Liber Amicorum
Antonio La Pergola

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Juristförlaget i Lund
Distribution: eddy.se

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This new adjusted, extended and re-redited edition of the
Liber Amicorum Antonio La Pergola (2008)
is published with permission of
Istituto Poligrafico e Zecca dello Stato S.p.A., Rome.

Address for orders:
eddy.se AB
Bokorder
Box 1310
S-621 24 Visby
+46 498 253900 (tel)
+46 498 249789 (fax)

Address to the publisher:
Juristförlaget i Lund
Box 207
S-221 00 Lund
+46 46 2221016 (tel)
+46 46 2221164 (fax)
www.juristforlaget.se

ISBN 978-91-544-0110-9
9 789154 401109

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Grafisk form: *Alf Dahlberg*/Pan Eidos
Layout: Hans-Heinrich Vogel
Photos: Sandro Weltin/Council of Europe
Tryck: Wallin &Dalholm Boktryckeri AB
Lund 2009
ISBN 978–91–544–0110–9

Foreword to the second edition

In October 2008, at the Scuola Grande San Giovanni Evangelista, seat of the Venice Commission, the Liber Amicorum Antonio La Pergola was presented to Ms Annarosa La Pergola and one of her daughters, and to the members Venice Commission. The book, prepared with the kind co-operation of the Istituto Poligrafico e Zecca dello Stato of which Antonio La Pergola had been the President, was the Commission's wholehearted homage to its visionary founder and President.

Mr Hans-Heinrich Vogel, then Swedish member of the Commission and responsible for the publications of the Stiftelsen Juristförlaget i Lund, proposed to prepare another edition of the Liber Amicorum, as a special Swedish tribute to Antonio La Pergola.

With gratitude and great satisfaction we welcome this second, enriched version.

The Hague, October 2009
Pieter van Dijk, member of the Venice Commission

Foreword

On the 18th of July 2007, after a long period of serious and bravely endured illness, Mr. Antonio La Pergola passed away. His death caused deep grief, not only in the circle of his family and friends, but also in professional circles in Europe and beyond; it meant a great loss for so many persons in different capacities and in different areas.

The Venice Commission lost its Founding Father and *"président éternel"*, its prestigious standard bearer and effective liaison. The members of the Venice Commission and of the staff lost a wise and experienced mentor and patron, an unfailing source of inspiration, and a caring and fatherly friend in many respects. In several ways Mr. La Pergola *was* the Venice Commission, and the Venice Commission was *his* Commission.

At its plenary session on the first of October 2007, the Venice Commission held a commemoration service in the presence of Mrs. Annarosa La Pergola, their three daughters Serena, Silvia and Emanuela, representatives of the Council of Europe and several distinguished guests. At the occasion of that solemn and moving gathering it was decided to distribute the commemorative speeches delivered in the Scuola Grande di San Giovanni Evangelista among the much larger group of persons who have known Mr. La Pergola and share dear memories of his person and qualities. In addition the Bureau invited the members of the Venice Commission and its staff, as well as former members and habitual guests of the Commission to contribute to these *"Mélanges La Pergola"*.

It is a cause of great satisfaction and gratitude that so many responded positively and quickly, and that their contributions are of such a quality and diversity that, together, they pay a dignified tribute to the memory of this universal person, eminent jurist, brilliant politician, inimitable president and warm-hearted friend.

The present publication is made possible thanks to the meticulous editorial assistance of Ms Simona Granata-Menghini, Ms Caroline Martin and Ms Helen Monks of the Secretariat of the Commission, and the very professional and efficient production of the *Mélanges* by Publisher Istituto Poligrafico e Zecca dello Stato.

It is the Venice Commission's wish that many, while reading and enjoying this publication, will remember Antonio La Pergola and pay tribute to this eminent person and to the high principles he stood for. He will always remain a source of inspiration for "his" Commission.

Strasbourg, The Hague, October 2008
Pieter van Dijk, member of the Venice Commission

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Annarosa La Pergola

Ringrazio vivamente la Commissione di Venezia per aver voluto organizzare questa cerimonia in ricordo del suo Presidente e vorrei cogliere quest'occasione per ringraziare ciascuno di voi per la partecipazione al lutto che ha colpito me e le mie figlie.

Ed ora consentitemi di proseguire in italiano, che è la lingua nella quale io e Antonio abbiamo dialogato ininterrottamente per quasi quarant'anni condividendo gli stessi ideali, le stesse battaglie, le stesse speranze. Antonio mi diceva sempre che io e lui siamo stati una sola persona, dall'inizio alla fine della nostra vita insieme: "Sei la mia costola" – mi diceva – "e nessuno me la leva!" – "*Adam's rib*" è anche il titolo di una poesiola che mi ha dedicato. Lo ho sempre considerato questo come un dono, un privilegio, la magia del matrimonio.

Antonio è uscito dalla vita, ma non dalla vita mia e delle mie figlie, e forse nemmeno da quella di molti di voi qui presenti oggi per ricordarlo come giurista, uomo e amico fraterno.

Antonio ha dedicato tutta la sua vita al lavoro nelle istituzioni, sia nel suo paese che in Europa, allo studio del diritto come fondamento della democrazia.

Dalle vostre numerose e bellissime lettere emerge l'unanime riconoscimento del valore del suo instancabile ed appassionato impegno per la costruzione dell'Europa del diritto. Le vostre lettere mi sono state di grande conforto perché esse testimoniano i frutti che la sua cultura, la sua intelligenza e la sua umanità hanno prodotto. Frutti – alcuni hanno detto – destinati a durare nel tempo.

Antonio ha dato molto alla Commissione di Venezia – voi dite – ma io aggiungo che ha ricevuto anche di più. La Commissione di Venezia riassume ed esprime tutti i valori, le idee in cui Antonio ha creduto, direi l'intero progetto della sua vita professionale. Questo suo progetto non avrebbe mai potuto realizzarsi senza tutti voi, i membri della Commissione, senza il Consiglio d'Europa, senza il suo Segretario Generale, senza Gianni Buquicchio ed il suo efficientissimo staff, senza il Ministero degli Affari Esteri e senza la Regione Veneto.

Questo sogno è stato un sogno anticipatore. Antonio ha immaginato la Commissione di Venezia prima che cadesse il muro di Berlino e l' Europa si allargasse ad est. Voleva creare una comune civiltà giuridica. "Le idee" – diceva Antonio – "camminano con le gambe degli uomini". E lui è stato uno di questi uomini.

Come tutti i sogni, anche il sogno della Commissione di Venezia di Antonio

aveva una vocazione universale. Antonio vedeva la Commissione di Venezia arrivare sino in America Latina, per la quale aveva già pronto il nome: CO-VENAL. La forza della sua fede nei valori del diritto era come il granello di senape che smuove le montagne. La forza di Antonio era la sua cultura, la sua intelligenza ma anche la sua profonda umanità. Gli americani quando vogliono fare un complimento a qualcuno che ci lascia la cui vita considerano esemplare dicono "*He was a man among men*" – un uomo tra gli uomini. Credo che questo di Antonio si possa dire.

Negli ultimi tempi, segnati dalla malattia, l'impegno con la Commissione di Venezia, il lavoro comune e l'amicizia fraterna con ciascuno di voi gli hanno dato la forza di combattere per continuare a dare il suo contributo.

Vorrei terminare ringraziando tutti voi per la collaborazione durata 17 anni, l'amicizia sincera, la stima e l'affetto che avete avuto per mio marito.

Antonio oggi è vivo come sempre nel cuore mio e delle mie tre figlie e sono certa che continuerà a vivere anche attraverso il lavoro, i progetti e gli ideali della Commissione di Venezia.

Annarosa La Pergola[1]

Je tiens à remercier vivement la Commission de Venise d'avoir organisé cette cérémonie en souvenir de son Président. Je voudrais également profiter de cette occasion pour remercier chacun d'entre vous d'avoir pris part au deuil qui nous a frappées, mes filles et moi.

Permettez-moi de poursuivre en italien, puisque c'est dans cette langue qu'Antonio et moi avons dialogué sans relâche pendant presque quarante ans, partageant les mêmes idéaux, les mêmes batailles, les mêmes espoirs. "Depuis le début, me disait toujours Antonio, toi et moi nous ne faisons qu'un. Tu es ma côte d'Adam, et rien ne pourra changer cela!"; "*Adam's rib*" est d'ailleurs le titre d'un petit poème qu'il m'a dédié. J'ai toujours considéré cela comme un don, un privilège, la magie du mariage.

Antonio a quitté ce monde, mais il fait toujours partie de la vie de mes filles et de la mienne, et peut-être aussi de celles de beaucoup d'entre vous qui êtes présents aujourd'hui pour évoquer le juriste, l'homme et l'ami fraternel qu'il a été.

Antonio a consacré toute sa vie au travail dans les institutions, dans son pays comme en Europe, à l'étude du droit comme fondement de la démocratie.

Des nombreuses lettres, très belles, que vous m'avez écrites, se dégage la reconnaissance unanime de la valeur de l'engagement inlassable et passionné de mon mari pour la construction de l'Europe du droit. Vos lettres m'ont été d'un grand réconfort car elles sont la preuve que sa culture, son intelligence et son humanité ont porté leurs fruits. Fruits qui, selon certains, résisteront au temps.

Antonio a beaucoup donné à la Commission de Venise, dites-vous, j'ajoute qu'il a reçu bien plus en retour. La Commission de Venise résume et exprime toutes les valeurs et les idées auxquelles Antonio a cru : tout le projet de sa vie professionnelle. Son projet n'aurait jamais pu se réaliser sans vous tous, membres de la Commission, sans le Conseil de l'Europe, sans son Secrétaire général, sans Gianni Buquicchio et son équipe extrêmement compétente, sans le ministère des Affaires étrangères et sans la région de Vénétie.

Ce rêve était un rêve visionnaire. Antonio a imaginé la Commission de Venise avant la chute du mur de Berlin et l'élargissement de l'Europe à l'est. Il voulait

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[1] Traduction non-officielle faite par Laura Tremoulet

créer une culture juridique commune. "Les idées, disait Antonio, marchent avec les jambes des hommes". Il a été l'un de ces hommes.

Comme tous les rêves, celui de la Commission de Venise d'Antonio avait aussi une vocation universelle. Antonio voyait la Commission de Venise arriver jusqu'en Amérique latine, pour laquelle le nom était déjà prêt: COVENAL. La force de sa foi dans les valeurs du droit était de celles qui font déplacer les montagnes. La force d'Antonio, c'était sa culture, son intelligence mais aussi sa profonde humanité. Lorsque les Américains veulent faire un compliment à quelqu'un qui vient de partir et dont la vie a été exemplaire, ils disent "*He was a man among men*" – un homme parmi les hommes. Je crois qu'on peut le dire d'Antonio.

Ces derniers temps, placés sous le signe de la maladie, son engagement dans la Commission de Venise, le travail commun et l'amitié fraternelle avec chacun d'entre vous lui ont donné la force de combattre pour continuer de donner.

Pour finir, je voudrais tous vous remercier pour cette collaboration longue de 17 ans, l'amitié sincère, l'estime et l'affection que vous aviez pour mon mari.

Antonio est aujourd'hui vivant dans mon coeur et dans celui de mes trois filles et je suis sûre qu'il continuera de vivre aussi à travers le travail, les projets et les idéaux de la Commission de Venise.

Jan Helgesen

Professor, University of Oslo, Norway

Thank you Madam Vice-President, for giving me the floor on this very special occasion.

Signora Annarosa La Pergola, Serena, Silvia and Emanuela, your excellencies, distinguished members of the Venice Commission, distinguished friends of the Venice Commission.

On the 18th of July 2007, the European Commission for Democracy through Law suffered a terrible loss: the President of the Commission, Mr Antonio La Pergola, passed away. Mr La Pergola was not only the founding father of the Commission; he was not only the President of the European Commission for Democracy through Law, since its first meeting; Antonio La Pergola was *the* Venice Commission. His person, his life will forever be linked to, and interwoven with, the life of the Venice Commission.

On that day, the 18th of July, not only did the Institution, the Venice Commission suffer, on that day, we, members and friends of the Venice Commission, lost a personal friend. We did not lose President La Pergola, we lost Antonio. We lost this warm person, this gentle face, these smiling eyes.

Antonio paid great attention to friendship. When reference was made, in the Commission, to a person, Antonio often added: «she/he is an old friend of mine».

Antonio extended his friendship to all newcomers from around the world. His "personal network" – to rely on a modern concept – was amazing. In spite of this, he received me, a young newcomer and stranger to the Venice Commission. He welcomed me into the family of the Venice Commission. From our first meeting, 17 years ago, in 1990, I have always felt I was very special to him. The truth is, however, that we were all very special to him.

Antonio combined a warm heart with a sharp intellect. Sadly, this is a very rare combination. Too many intellectuals see nothing but their own intellect. Because of this amalgamation of heart and mind, we did not merely accept, but rather we enjoyed him being more than our friend, we enjoyed him being our teacher. In the Venice Commission, Antonio was at his best when we he taught us his favourite subject, European Constitutionalism – past, present and future. We enjoyed these moments here in Venice, in this beautiful hall, when Antonio

gave life to theoretical, legal concepts like "federalism", "confederalism", "rule of law", and "democracy". To him, this was the challenge, to transform and to operationalise these metanorms, these principles, into practice, and into real life. We will forever recall one of Antonio's favourite sayings: "Because we must always remember, the proof of the pudding is in the eating".

Antonio was a true Italian, a person of culture and spirit. But Antonio was also a true European. To him, the borders of Europe were artificial boundaries which presented an opportunity for pan-European culture to blossom.

However, Antonio's visions were not bound by the shores or mountain ranges of Europe. Antonio was a true internationalist, or a globalist, in our modern vocabulary. In his dreams, he envisaged a world in which all states were governed exactly by Democracy and the Rule of Law.

Antonio La Pergola was a true Italian, a true European, and a true internationalist. Deep down, at the end of the day, Antonio La Pergola was a true idealist.

Dear Annarosa, Serena, Silvia and Emanuela, thank you for being so generous, thank you for allowing Antonio to spend so much of his time with us.

Dear colleagues in the Venice Commission, Antonio achieved a lot. Now he has left us. There is still much work to be done. Let us come back to Venice in December to continue ... Good work!

Ergun Özbudun

Professor, Department of Political Science
Bilkent University, Turkey

Madam President, dear Mrs La Pergola and their lovely daughters, dear friends and colleagues,

In a twisted sense, I feel privileged to have been asked to make this commemorative speech as one of the two oldest members of this Commission. At the same time, however, this is one of the saddest occasions of my life, since Professor La Pergola's loss was a great loss to all of us.

La Pergola's career was extraordinary in the sense that it combined so many honourable posts: Professor of constitutional law, President of the Italian Constitutional Court, Minister for European affairs in the Italian government, Member of the European Parliament, judge in the European Court of Justice, and, above all, the Presidency of the Venice Commission. Only one of these eminent posts is enough to make a career a truly distinguished one. But for us, and most probably for him as well, the Presidency of the Venice Commission was the most important of all. He was not only its President for seventeen years, but also its founding father, the man who put our Commission on the map.

Indeed, when the Venice Commission was inaugurated, there were some doubts about its functions. Some European governments, including my own, hesitated at the beginning to join the Commission. I personally had a hard time in persuading the Turkish Minister for European Affairs. Fortunately he agreed in the end that Turkey could become one of the founding members. Many European states joined the Commission at later dates.

However, such initial doubts were shattered within the first few months. The Venice Commission, under the able and inspiring leadership of Antonio La Pergola, has accomplished an extraordinarily successful task in assisting the new European democracies in writing their new democratic constitutions and in preparing other basic laws in accordance with European standards, briefly in building consolidated constitutional democracies. This is probably the most outstanding example of exporting democratic and constitutional known-how in the history of constitution-making.

Once this phase had more or less passed, there was again a cloud of doubt over the future of the Venice Commission. Had the Commission, having ac-

complished its main task, come to the end of its mission? The range of our activities today and our heavy workload demonstrate that such doubts were baseless. The Commission is as active as ever, and has forged an important place among the bodies of the Council of Europe, since the quest for democracy is a never-ending one.

Again under the imaginative leadership of La Pergola, the Venice Commission gradually extended its activities to countries beyond the borders of Europe. Today, many non-European countries are members of the Commission, and more are likely to join.

My own acquaintance with Antonio goes back to years before the inauguration of the Venice Commission. I first met him at the Conference of the European Constitutional Courts in Madrid, which he attended as the President of the Italian Court. At that time the Turkish Constitutional Court, having been expelled from the Conference following the military coup of 1980, was seeking re-entry to the Conference, and I warmly remember his strong support for the Turkish Court.

Today, Antonio La Pergola is no longer physically present among us. But I am confident that his spirit will continue to inspire us in our future activities and that the Venice Commission will resolutely follow the same routes which he so ably opened up.

Dear Mrs. La Pergola, their dear daughters, please accept my heartfelt condolences.

Thank you.

Renato Cianfarani

Ministry of Foreign Affairs, Italy

Mrs La Pergola, Excellencies, Ladies and Gentlemen.

I am deeply honoured to represent the Italian authorities on this occasion, having the opportunity to briefly mention what Professor Antonio La Pergola represented, and has been representing, for our country, for Europe and for the progress of the idea of justice.

Born in Sicily, Professor La Pergola fully honoured the intellectual and juridical tradition of his Land. He started his brilliant academic career in the most prestigious universities in Italy, then to move to Europe, North America, and South America. Several "honoris causa" degrees were awarded to Prof. La Pergola by eminent universities like those of Madrid, Lisbon, Bucharest and others.

In Italy, Professor La Pergola was not only a prominent figure in the academic field, but he also held top government and institutional positions.

Due to his personal interest and involvement in international legal issues, he has always played a major role in the European context, crucially contributing to the European integration process through the establishment of a common European law and protecting, as well as promoting, the spread of democracy.

His professional interests ranged from constitutional to international and to European Law; in this respect, his works and publications represent real milestones.

We should also be grateful to him for founding the Venice Commission and having been its soul for such a long time. The Commission is today recognized as the key body for fostering Democracy and the Rule of Law in Europe, and also all over the world.

Ladies and Gentlemen, Mrs La Pergola,

Let me pay homage to Professor La Pergola, a whole life spent for promoting and serving Justice.

Thank you for your attention.

Pieter van Dijk

Member of the Venice Commission

Chère Madame La Pergola, chère Mademoiselle Serena La Pergola,

C'est vraiment un grand honneur et un grand plaisir pour la Commission de Vénice de vous accueillir de nouveau parmi nous aujourd'hui. Le souvenir et les émotions de la dernière fois que nous nous sommes réunis ici, en octobre 2007, peu après que votre mari et père vous et nous avait quittés, sont encore très vifs et très présents. Une année s'est déjà écoulée depuis ce temps-là. Pendant ce temps, la Commission de Venise s'est remise au travail. Mais elle n'a pas oublié son fondateur et premier Président. La Commission a voulu lui rendre hommage avec un volume qui témoigne de l'affinité à la fois affective et de l'affinité intellectuelle qui liaient Antonio La Pergola aux membres de la Commission, ``a son Secrétaire-Général et aux membres du secrétariat.

Le Liber Amicorum Antonio La Pergola contient tout d'abord les paroles qui furent prononcées dans cette salle le 20 octobre 2007 lors de la réunion commémorative. Paroles qui révélaient non seulement un grand chagrin, mais aussi des bonnes mémoires et des sentiments de grande reconnaissance et qui nous exhortaient à regarder vers le futur.

Tout nouveau départ commence par un bilan. Et nous avons donc voulu faire un bilan des réalisations de la Commission de Venise sous le guide de son fondateur et premier Président et fondées en grande partie sur ses idéaux et principes. Nous avons commencé par reparcourir les étapes de la fondation de la Commission de Venise, qui était l'idéal et l'accomplissement d'Antonio. La deuxième section du volume contient l'histoire de la Commission à travers la vision et les réalisations d'Antonio, ainsi que ses deux premiers discours, qui révélaient déjà aussi bien sa vision que son style grandiose. Le premier statut de la Commission de Venise complète cette section «de documentation».

Suivent les mélanges: vingt-cinq articles, écrits exprès pour ce volume, en un temps record, si je puis dire, car nous avons voulu que le volume puisse être présenté un an après la cérémonie en honneur d'Antonio La Pergola, en octobre dernier.

Ces contributions sont tantôt personnelles, tantôt scientifiques, tantôt les deux à la fois.

Il ressort de ces contributions que la Commission a parcouru un long

chemin, elle s'est construite une excellente réputation grâce au sérieux et à la qualité de son travail ; elle a trouvé sa place au soleil, étant devenue l'une des institutions juridiques les plus respectées en Europe et au-delà.

Il en ressort également que la Commission n'a pas encore trouvé toutes les réponses, parce qu'elle n' a pas cessé de poser des questions, de s'interroger et de réfléchir. La Commission ne s'est jamais posée en détentrice des connaissances et des réponses, mais toujours comme interlocuteur.

C'est probablement ce que votre mari et votre père a transmis de plus précieux à sa Commission : la quête constante pour la démocratie à travers le libre échange d'idées.

Antonio La Pergola croyait en la démocratie, la Commission ne cessera pas de la poursuivre.

Chère Madame, Chère mademoiselle, je vous prie d'accepter ce volume comme signe de la reconnaissance, de l'affection et de l'estime que nous éprouvons tous pour Antonio et pour vous.

Je tiens à remercier l'Istituto Poligrafico e Zecca delle Stato, dont M La Pergola était le président.

M Murri, le Directeur de l'Istituto, est ici présent. L'Istituto s'est chargé de la publication, à ses frais, de ce volume.

Je remercie également toutes celles et tous ceux qui ont contribué a ce volume ou bien collaboré à sa préparation. Je présenterai un volume au Président de la Commission comme représentant de vous tous.

Je vous remercie.

The Founding of The Venice Commission

Gianni Buquicchio
Secrétaire de la Commission de Venise

Vingt ans avec Antonio La Pergola pour le développement de la démocratie

L'Homme

Le 18 juillet 2007 s'éteignait Antonio La Pergola, Président et fondateur de la Commission de Venise. Ce triste évènement mit fin à une aventure commune de vingt ans au service de la démocratie.

Pendant sa vie, Antonio La Pergola a assumé des fonctions importantes dans son pays et à l'étranger. Mais, avant tout, il était un homme de science. Professeur d'université à trente ans (il a été le plus jeune professeur d'université d'Italie), il a enseigné dans des universités italiennes prestigieuses, comme Padoue, Bologne et Rome, mais aussi à Dublin, Austin, Los Angeles, Sidney.

Il a beaucoup écrit en droit constitutionnel, international et communautaire et formé de nombreux disciples en Italie et à l'étranger.

Il a reçu le titre de « Docteur honoris causa » dans une bonne dizaine d'universités européennes et latino-américaines.

Antonio La Pergola a été un grand serviteur de l'Etat et de ses institutions : membre du Conseil supérieur de la Magistrature, membre et président de la Cour constitutionnelle, Ministre des Affaires européennes.

A sa disparition, le Président de la République italienne, M. Napolitano, a salué son engagement civique et sa grande contribution à la vie démocratique du pays.

Antonio La Pergola a servi aussi l'Europe, dans laquelle il croyait fermement : il a été membre du Parlement Européen, avocat général et juge à la Cour de Justice des Communautés, membre du Comité des Sages du Conseil de l'Europe.

Ces nombreuses activités n'ont pas empêché Antonio La Pergola d'avoir une vie familiale riche et heureuse avec son épouse Annarosa qui a été sa compagne inséparable pendant 40 ans et leurs trois filles, Serena, Silvia et Emanuela. L'une d'elles, quelques jours avant sa mort, lui avait demandé : « Papa, quelle est la chose la plus belle que tu as eue dans ta vie ? » – « Naître », avait-il répondu.

Antonio était né pour aimer, travailler, créer.

La vision

Antonio La Pergola avait commencé à penser à la création d'un forum international de constitutionnalistes pour le développement de la démocratie et de l'Etat de droit, en 1987, pendant la Perestroïka, mais bien avant l'écroulement du mur de Berlin. En 1988, alors qu'il était Ministre des Affaires européennes, il en avait fait part à Marcelino Oreja, Secrétaire Général du Conseil de l'Europe, lors d'une visite officielle de ce dernier en Italie. A son retour, Oreja – qui avait été conquis par l'idée de son vieil ami – m'avait demandé d'aller le rencontrer à Rome, afin d'étudier les modalités de mise en œuvre de son initiative. Ce fut ma première rencontre avec Antonio.

Nous discutâmes longuement de ses idées, conscients de la nécessité d'être prêts à aider les pays d'Europe centrale et orientale dès que le rideau de fer se serait levé. C'était une priorité. Mais à l'époque Antonio pensait aussi et déjà au-delà de l'Europe, à des pays non européens qui partagent l'héritage culturel de la démocratie européenne.

En mai 1988, La Pergola demanda au Représentant Permanent d'Italie auprès du Conseil de l'Europe de sonder le Comité des Ministres au sujet de la création d'un tel organisme au sein de l'Organisation. L'accueil fut très mitigé.

De concert avec Gianni de Michelis, vénitien, à l'époque Ministre des Affaires étrangères, ils décidèrent de convoquer à Venise une Conférence ministérielle sur « le développement de la démocratie par le droit ». L'organisation en fut confiée, pour l'Italie, à Claudio de Rose, son chef de Cabinet au Ministère des Affaires européennes, à Luigi Ferrari Bravo, président du Contentieux diplomatique aux Affaires étrangères et à Antonio Padoan, chef de Cabinet du Président de la Région de la Vénétie, et pour le Conseil de l'Europe, à Roberto Lamponi, Helen Monks et moi-même.

A la Conférence qui se tint les 31 mars et 1er avril 1989 à la Fondation Cini, sur l'île de San Giorgio à Venise, participèrent de nombreux ministres des Affaires étrangères et de la Justice des Etats membres du Conseil de l'Europe.

Les ministres adoptèrent une déclaration finale dans laquelle ils constatèrent que « la création d'une *Commission pour la Démocratie par le Droit* pourrait, dans ce moment particulier, apporter une contribution remarquable à l'examen des développements politiques dans les Etats non membres du Conseil de l'Europe, ainsi que dans des Etats non européens ».

A l'évidence, par l'expression (prudente) d' « Etats non membres du Conseil

de l'Europe » on pensait déjà à l'immense chantier constitutionnel qui se serait ouvert en Europe centrale et orientale. A noter aussi, qu'en suivant les idées de La Pergola sur l'extension géographique extra-européenne de la Commission, ils avaient omis le qualificatif d'« européenne ».

En constatant la coïncidence de cette initiative avec le 40ème anniversaire du Conseil de l'Europe, les Ministres invitèrent le Comité des Ministres du Conseil à examiner la proposition de création de la Commission à l'occasion de sa réunion solennelle du 5 mai 1989. Cependant, et encore une fois, le Comité des Ministres n'autorisa pas la création de la Commission, mais décida de lui accorder les auspices du Conseil de l'Europe.

C'était sans compter avec l'opiniâtreté de La Pergola qui, avec le soutien du gouvernement italien, convoqua une nouvelle conférence ministérielle pour la création de la Commission. A la Conférence, qui se tint à Venise les 19 et 20 janvier 1990 dans la Scuola Grande de San Giovanni Evangelista, participèrent environ 200 personnalités, provenant aussi d'Europe centrale et orientale[1], le mur de Berlin venait de s'écrouler.

La Conférence prit note de la création de la Commission, à laquelle adhérèrent 16 Etats membres du Conseil de l'Europe[2], et invita le Comité des Ministres du Conseil à étudier d'éventuels liens institutionnels entre l'Organisation et la Commission. A l'issue de la Conférence, lors de sa première réunion constitutive, Antonio La Pergola fut élu Président de la Commission. A cette occasion, il prononça un discours sur lequel nous avions beaucoup travaillé et qui contenait le fruit de nos réflexions et idées, telles qu'elles s'étaient enrichies et précisées depuis notre première rencontre.

J'invite tous ses amis à lire ce discours, car ils reverront Antonio avec son style élégant et éloquent et, en même temps, ils retrouveront sa vision qui conserve encore aujourd'hui toute son actualité[3].

La Commission se réunit ensuite le 16 février 1990 et les 16 et 17 mars de la même année, avant que le Comité des Ministres adopte la Résolution (90)6 relative à un « Accord partiel portant création de la Commission européenne pour la Démocratie par le Droit »[4]. La Commission se transforma donc en un

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1 Bulgarie, Tchécoslovaquie, Hongrie, Pologne, RDA, Roumanie, URSS et Yougoslavie.

2 Autriche, Belgique, Chypre, Danemark, Finlande, France, République Fédérale d'Allemagne, Grèce, Italie, Luxembourg, Malte, Portugal, Saint Marin, Espagne, Suisse, Turquie.

3 Reproduit dans cet ouvrage.

4 Le 10 mai 1990, lors de la 86e session du Comité des Ministres.

organe du Conseil de l'Europe composé de 18 Etats[5], avec un statut largement repris de celui adopté lors de la réunion constitutive du 20 janvier 1990[6].

Les réalisations

Fait exceptionnel dans les annales de la coopération internationale, Antonio La Pergola a présidé la Commission depuis sa création jusqu'à sa mort. Et ceci pour deux raisons : ses qualités humaines, scientifiques et politiques ont toujours été hautement appréciées par tous les membres de la Commission ; sa vision s'est révélée juste et à l'abri du temps. Non pas parce que la Commission n'a pas su se renouveler ou innover ou parce qu'elle n'a pas pu réaliser ses objectifs. Antonio La Pergola avait su identifier dans sa vision les éléments essentiels de la démocratie : les élections, la justice et le développement des institutions démocratiques. Ceux-ci sont encore aujourd'hui les piliers sur lesquels se fonde l'activité de la Commission. On les retrouve par ailleurs dans l'annexe à la note introductive à la première Conférence de Venise (31 mars – 1er avril 1989[7]) où on mentionne le droit électoral, les partis politiques, les secrets militaires et civils, la démocratie et la prévention du crime… ! Les bases du « patrimoine constitutionnel européen » que la Commission n'a cessé de développer depuis lors, étaient déjà posées.

Ce sont des domaines que la Commission a ensuite explorés et enrichis, parvenant parfois à en préciser les contours juridiques et à formuler des normes ou des lignes directrices.

Ainsi, au fil des années la Commission a contribué tout d'abord à la mise en place d'institutions démocratiques dans des nombreux pays européens ; elle a fourni une assistance hautement qualifiée et ciblée dans la préparation de constitutions se conformant aux normes européennes, mais également viables et respectueuses de la tradition juridique du pays concerné. La Commission a poursuivi sa mission en veillant à ce que ces institutions se développent de manière démocratique, par le biais de lois appropriées mais également de la co-opération internationale, notamment des cours constitutionnelles.

On retrouve en effet dans le rapport de la première réunion de la Commission (20.1.1990) une proposition du Président « visant à promouvoir la coopération

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[5] Aux 16 Etats fondateurs s'ajoutèrent l'Irlande et la Norvège.

[6] A noter dans la dénomination de la Commission l'apparition du qualificatif « européenne ». Le statut fut ensuite amendé en 2002, lors de la transformation de l'Accord partiel en Accord élargi (Résolution (2002)3 adoptée par le Comité des Ministres le 21.2.02).

[7] Reproduite dans cet ouvrage.

entre les cours constitutionnelles et d'autres organes investis de fonctions similaires notamment en vue de mettre des renseignements relatifs aux structures et au fonctionnement de telles juridictions à la disposition des pays européens ». Cela donna lieu à l'étude préparée par Helmut Steinberger sur les « modèles de justice constitutionnelle »[8] publiée dans la série de la Commission *« Science et Technique de la Démocratie », vol. n° 2 de 1992* et ensuite au *Bulletin de Jurisprudence constitutionnelle* (dont le premier numéro fut publié en 1993).

Dans le domaine de la justice constitutionnelle, les résultats ont été au-delà de toute attente. A une exception près, toutes les nouvelles démocraties européennes se sont dotées d'une cour constitutionnelle spécialisée et la seule exception (la Cour suprême d'Estonie) dispose d'une Chambre de contrôle constitutionnel.

Le *Bulletin de Jurisprudence constitutionnelle* et CODICES[9], sa version informatique, contiennent plus de cinq mille décisions, facilitant ainsi une fertilisation croisée dans le domaine de la justice constitutionnelle.

Très favorable aux coopérations régionales, la Commission a contribué à l'émergence de réseaux et associations de cours constitutionnelles dans les différents continents et entretient des relations suivies avec ceux-ci.

De concert avec la Cour constitutionnelle de l'Afrique du Sud, elle a pris l'initiative d'organiser la première Conférence mondiale sur la justice constitutionnelle qui se tiendra à Cape Town en janvier 2009. Voir cet évènement se réaliser aurait rendu heureux Antonio La Pergola, qui depuis longtemps préconisait la création d'un *« common room for constitutional judges »*.

Dans le domaine électoral, la Commission est un acteur incontournable. Organisme du Conseil de l'Europe responsable des questions électorales à l'exception de l'observation, elle est devenue l'organe de coordination en la matière au sein du Conseil de l'Europe en créant le Conseil des élections démocratiques. Cet organe tripartite réunit l'expertise juridique de la Commission et l'expertise politique de l'Assemblée parlementaire et du Congrès des pouvoirs locaux et régionaux du Conseil de l'Europe, et examine tous les documents en matière électorale que la Commission devra adopter. Il coopère étroitement avec le Bureau des institutions démocratiques et des droits de l'homme de l'OSCE (BIDDH).

Le Conseil des élections démocratiques a élaboré en particulier le Code de bonne conduite en matière électorale, qui est le texte de référence du Conseil de

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[8] Etude toujours d'actualité, traduit en arabe en mai 2008.

[9] http://www.venice.coe.int/site/main/CODICES_F.asp.

l'Europe dans ce domaine, ainsi que son pendant, le Code de bonne conduite en matière référendaire. Il rédige maintenant un Code de bonne conduite en matière de partis politiques.

La question des partis politiques est en effet inséparable de la matière électorale et a déjà fait l'objet de lignes directrices portant sur plusieurs questions essentielles, telles que l'interdiction et le financement des partis.

A cela s'ajoutent des activités de terrain, et en particulier l'assistance d'experts aux commissions électorales centrales en période électorale, organisée par exemple à l'occasion des élections présidentielles et parlementaires de 2008 en Géorgie, de même que des activités de formation des acteurs électoraux, et la base de données « vota » sur le droit électoral[10].

Aujourd'hui, vingt ans plus tard, la vision d'Antonio La Pergola garde toute son actualité et il serait fier de voir tous les accomplissements de sa Commission. Elle s'élargit à un rythme soutenu au-delà des frontières européennes[11], peut-être pas suffisamment vers l'Amérique latine, région qui lui tenait particulièrement à cœur, mais surtout vers la rive sud de la Méditerranée, ce qui pour lui – le Méditerranéen, né au centre de cette mer – était très important.

Antonio La Pergola a beaucoup fait et accompli dans sa vie, mais en l'ayant bien connu je crois pouvoir dire que la réalisation à laquelle il était le plus attaché était la Commission de Venise. Car, comme l'a dit son épouse Annarosa, « la Commission résume et exprime toutes les valeurs, les idées dans lesquelles Antonio a cru, le projet de sa vie professionnelle ».

[10] http://www.venice.coe.int/VOTA.

[11] Aux 47 Etats membres du Conseil de l'Europe se sont ajoutés : Kirghizstan, Chili, Corée, Maroc, Algérie, Israël et Tunisie.

Speech by Antonio La Pergola at the first Venice Conference

31 March–1 April 1989
Cini Foundation – Island of S. Giorgio

1. The Charter of the Council of Europe is fundamentally based on the respect of freedoms and the supremacy of law, on the heritage of legal traditions and political ideals common to the Member-States, bound together in the family of true democracies. Moreover, it is on this foundation that the activities reserved to the Council of Europe may be developed. It is not by chance that debate on this issue, opened on the occasion of the Fortieth Anniversary of its founding, has highlighted two main objectives of the Organisation: the promotion of human rights, and a permanent openness to problems of society, to be seen, now, in relation to the new events taking place in Europe with greater impulse to the economic integration contained in the European Single Act, and the objectives of the Single Market for 1992. These institutional aims are clearly laid down and, indeed, were recently underlined by the Netherlands Government, currently holding the Presidency of the Committee of Ministers.

Historical experience, and our present reality, warn us that full enjoyment of human rights is not guaranteed, nor are the pressing problems which arise in a civil society resolved, outside the context of a democracy governed by law. The present constitutional set-up of pluralist democracy develops evermore in a legal system of guarantees. The mechanisms laid down by normative texts and, above all, by fundamental charters, to entrench the values characteristic of such a democratic system or to favour their extension, have reached such a degree of effectiveness and have so penetrated the consciousness of all involved, that trust in the ruling force of law is now the cornerstone of our common political civilisation, to which we must refer in planning the future course of Council of Europe.

2. The Commission for Democracy through Law, the establishment of which is proposed here, is to be seen in the light of the points outlined above. This body fits in line with the goals of the Council of Europe and its consolidated policies, it answers the political and cultural demands widely adverted to by public opinion and society in general, it combines ideally and practically with the objectives expounded in the Single European Act, and related to the integrated *great space*, where free movement, not only of goods, services and capital but, above all, of people will be guaranteed. It joins also with other initiatives, already set in motion, to place the main tenets of pluralist democracy at the centre of the activities and interest of the Organisation, in the new role which we intend to assign to it. Suffice it to recall the "Strasbourg Conference on Democracy" where, alongside parliamentarians from the Member-States of the Council of Europe, those from other States of similar democratic inspiration participated as well.

The Commission, which could well be endowed with a permanent operational structure to maintain contacts with experts and research bodies, would have the task of:

a. Promoting and stimulating research providing scientific and comparative support to the prestigious legal cooperation activities of the Council of Europe, activities of the Council of Europe, activities which have had as their object the conclusion of numerous agreements in the area of public law. This initiative will give pre-eminence to debates and deeper reflection on guarantees, not only for fundamental rights, *especially those political*, and the participation of citizens in the functioning of the institutions of the State, but also, for the consolidation and effectiveness of democracy, the operation of freedoms, and the ordering of self-governing bodies, territorial or otherwise, which are characteristic of many forms of our contemporary constitutional experience. With full respect, of course, for the sovereignty of each State concerned, the research projects of the Commission could also concern the legal orders of non-member States, in which any of these problems are to be found, for example, as in reinforcing democracy and pluralism in areas such as Latin America and Eastern Europe.

From the Colombo report on the central position held by the Council of Europe, compared with other European regional bodies, has always been recognised and highlighted. The opening of dialogue has been promoted with other geo-political areas where the demands for democracy and the related need for *constitutional guarantees* have reached new dimensions and aroused widespread expectations in the people there.

b. Promoting studies and deeper reflection on the instruments and legal and institutional mechanisms available to transnational Communities, which serve to build systems of States on democratic bases. *Democracy through Law* is a value inseparable from *peace through law*, inseparable from the rejection of war and from the movement, now rooted in the system of international relations, towards the organising of peace and the *common enjoyment* of goods and services. Indeed, this movement may go further, even reaching integration – which already exists to a greater of lesser degree, be it on the normative, politico-economic or constitutional plane – of interests formerly reserved to the sphere of action of the individual State.

Therefore, in conformity with the institutional objectives of the Council of Europe, for the purposes examined here, the Commission should become a *reference point* when considering the guarantees furnished by the law, or when enquiring into the rules that govern the political phenomenon in democracy and trying to identify its inspiring philosophy. Such a debating forum and workshop for proposals and reflection offers a way to greater knowledge of the systems of individual countries, to an understanding of their legal cultures, as well as, where fitting, to a more profound evaluation of problems of common interest, and of their possible solution. More precisely, it is a question of making a new and useful contribution to the advancement of the *specific role* of the Council of Europe as "a natural setting for democratic integration, cooperation and peace between States", within an ambit suffused with the initiatives promoted by Strasbourg for this purpose.

In the Appendix attached, there is a list of suggested topics which could come within the Commission's sphere of activity.

3. The working basis for the Commission is to be directed to the achievement of the objectives outlined above.

a. Upon request of the Member-States of the Council of Europe, the Commission should elaborate reports endowed with great scientific authority, and propose outlines of *techno-legislative solutions* to specific questions. The same need for deep contemplation and study on the part of the Commission could be reflected and stimulated by the request for opinions coming from the *Committee of Ministers*, the *Parliamentary Assembly* and the *Secretary General*.

The compilation of important dossiers and opinion rendered by academics and experts may, clearly, be of enormous use, both for the Member-States, by reason of their position in the circle of political systems and civil societies in

which the importance of democratic structures, guaranteed by law, is constantly growing, as for that work of codification and legislative harmonisation that is entrusted to the competent organs of the Council of Europe.

b. Particular interest, in this context, should be focused on the institutions of constitutional justice, by now, in many legal systems, an essential component of the democratic system, which, on the one hand, must have a stable foundation and, on the other, must adapt to the new needs of our times. The case-law of the Constitutional Courts, or of analogous bodies at the top of the judicial order, is often far-reaching: it concerns issues which have arisen simultaneously in various countries, which reflect the underlying demands of society, cross national boundaries and concerned common principles and key rules of civil co-existence and of the democratic system itself. To underline the importance of these aspects of legal experience, the Commission should include, among its institutional tasks, the comparison of the achievements and developments in constitutional justice; the publication of a *case-book* or *year-book*, in various languages, in which the salient decisions would be collected and made know, on a wide scale, the promotion of periodic meetings and study initiatives, for example, by developing already-established programmes which provide *study grants or scholarships* for foreign researchers and assistants at the Constitutional Courts or other Supreme Magistrates. This type of initiative also serves to view the problems of the Constitutional and the actual functioning of the democratic system in an all-encompassing, up-to-date framework.

4. It is to be added that the way the Commission is to be instituted – and if it can eventually fit within the formula of the *partial agreement*, already used many times by the Council of Europe – can be worked out by the present Conference and then approved in a competent session of the Committee of Ministers. We are confident that this result can be achieved on this the Fortieth Anniversary of the Council of Europe.

Speech by Antonio La Pergola at the second Venice Conference

Scuola Grande di San Giovanni Evangelista
19–20 January 1990

My dears friends and colleagues, once again, the notion of "Democracy through Law" calls the attention of the Council of Europe. Back, last April, the First Venice Conference which dealt with this matter preceded the tumultuous sequence of events we saw unfold during 1989.

The year which has just ended is already engraved in history, with the unmistakable characteristics of a revolution for democracy which, once again, is played out on the scene of our continent. The powerful impression of present events thus overlies the words we heard in Venice less than a year ago, on constitutional reform and the path to political pluralism, uttered by the Hungarian observer, which, you will recall, we heard with intense interest and great emotion.

Here lies the primary and most urgent justification for this body, that it should be open, under the aegis of the Council of Europe, also to the countries of East Europe – dealing as it would with the issues of constitutional guarantees and such other difficulties that affect the development and consolidation of democracy. The present initiative has been put forward and sustained by the Italian government, in the firm conviction that it offers a new and effective way to put into practice the principles on which the Council of Europe is based and with which it is imbued.

Law is the ordering force of peace and of the bonds of co-operation which transform the peaceful coexistence of nations into an advanced and civilised communion of interests, in which it is *individuals above all,* even States, who are to take the fruits of common benefits and values.

This organising of peace may, of course, come about in various forms, but experience teaches us that it goes hand-in-hand with that role played by law in arranging the nation-State on the basis of democratic rule; and democratic

systems, as varied as one can imagine, according to the individual requirements and needs of each national grouping, may, for their part, be traced back to that environment where the State of law flourished.

The victories of constitutionalism all derive from this common source in the juridical heritage of law of the Europe which one can see today in Venice: of a Europe whole and complete, mother of our nations and of the other Europe's, of the systems and organisations into which we have divided.

It is the State of law which generates the clarifying and organising force which acts to reconcile the reason of authority with that for individual freedom, to prevent or resolve the conflict between other demands which must, too, be reconciled, and which presides over and governs that balance of powers. And it has always been the State of law which offers us the instrument of the Constitution, and teaches us the exacting art of "constitution-making". It is the task of the basic law to guarantee, not only individual rights, but the whole gamut of political relations, including the response to the call for freedom, together with the requirements for stability and efficacy which are essential to a well-ordered democracy. More recent democracies follow on this path, to come close to, in their concrete results, if not in their organisational and procedural solutions, to those which have stood the test of time. There is, however, a clear tendency towards diffusion, rather than concentration of power, pluralism between centres of authority and broad recognition, not only of individual freedoms, but also of the autonomy of territorial and social bodies.

Now, systems like those I have just outlined require guarantees which must be provided in a constitutional form. And there is a growing and nurtured demand for guarantees, which rises from society, itself, which is a demand, also, that democracy be ensured and that it be entrusted to the force of law.

Constitutional law has come to be seen as evolving on the field of juridical experience where guarantees are moulded, shaped and refined. This phenomenon was cultivated and enunciated clearly by certain jurists and legislators between the two World Wars. But we have seen it affirmed only after the uninterrupted period of peace and growth of democratic regimes we have enjoyed in the last half of this century.

One example suffices.

The idea of an impartial judicial body, called upon to watch over respect of the Constitution, has aroused reservations in the face of its first and far-sighted application in Austria, Czechoslovakia and the Spanish Republic. Today we know and can see that the institution of the Constitutional Court operates in accordance with a prudent, but enlightened "self-restraint",

and far from being in conflict with the essence of the democratic system, it corroborates and enriches it with new and salient characteristics. The trust of the citizen embraces the legal system where liberties and the exercise of powers are guaranteed and ensured in accordance with law. There is even, one can say, a truly active sense of "legality" which is transmitted – and a most welcome contagion it is, indeed – from one legal system to another and which passes beyond the sphere of internal competence of the State to that in which international law and organisations like the Council of Europe bestow the protection of individual rights. The "Europeanisation", if I may call it so, of *Bills of Rights* and Charters of fundamental human freedoms is the expression of a constitutionalism which is open, extensive and still emerging, which goes beyond the territorial confines of national legal orders where the State of law operates, but which is, beyond all doubt, permeated by the self-same values.

It is against this background and in this context that the establishment of a Commission for Democracy through Law is to be set. This body is to be seen as an instrument for *greater* knowledge and *further* promotion of our common living juridical heritage, as a vehicle, if you like, of a frank and current Europeanism. The main task of the Commission will be to scrutinise and formulate concrete proposals to resolve these matters of concern with which it is to be entrusted. Investigations and debates in this new centre for the Commission are to serve institutional engineering, proposals for reform and the drafting of texts or *blue-prints*, one could say, for their realisation.

The Commission will be able to deal with either specific questions or the broader issues which inevitably arise when one seeks to build a democracy from its foundations. In each case the Commission would ascertain and verify how institutions, procedures, guarantees and other mainstays of constitutional law may assuage the needs of the legal system in question and the underlying political, economic and social environment in which it is sought to incorporate and adopt them.

It is to this end that it is so necessary to bring together and elaborate on the proofs of experience, to enhance and deepen knowledge and comparisons of other constitutions and constitutional orders of major importance, particularly those in force in Europe, all of which will allow us to see the common bonds and key ideas in circulation among the systems of which our family is composed.

The Commission has a most useful, but independent, creative role to play, separate from that of any other political organ or other technical bodies of the

Council of Europe, and which, moreover, - a point which it is apposite to make here – is to be quite different from the activities simply of a research centre or study institute, because it will transcend the tasks which are particular to such bodies. Of course, it is envisaged nevertheless that such institutions, too, may, indeed, should be able to work with the Commission and so render its task all the easier to accomplish. And, I would like to highlight, of particular importance, as far as research on recent jurisprudence is concerned – if not more broadly – that co-operation on conferences and other study programmes or meetings, with our Constitutional Courts would be of the highest priority in this regard.

In short, then, this new body should be endowed with all the means that may be available so that it may become, as has been said right from the First Venice Conference, a *point of reference* for studies of the rules which govern democracy and of its inspiring philosophy, a *debating forum*, and a *workshop* or *laboratory* for law-making provisions bound to and entwined with the reality of the individual countries in question. Let us not forget that the issue of a living and active constitutionalism, matters which the Commission is to be called upon to concern itself with, is of direct and immediate concern to our history and identity as European countries.

To know, to understand, our past experiences means to retrace the paths opened up for us by law in order to overcome the difficulties and come through the crises which democracy meets in its path. We are able to call upon a heritage of wisdom which belongs to all our countries and which gives succour to each one of them. Research and further defining and elaboration of the guarantees which ensure the efficacy of power and the development of freedoms are thus imbued, even in their lesser detail, with the broad inspiration of the civilisation which we share. It is the process of political life, itself, which is thrown into sharp relief, in all its complexity, in the problems where the Commission would play a supporting role. Who could deny that *constitution-making* is the most difficult and exacting task of any legislator? One cannot look at the future political structure of our institutions without taking into account the "travails" already lived and indeed suffered, often, by all.

In every democratic constitution, there is a lesson from the past, an eloquent testimony to the experience common to other countries and to the Europe such as has been formed in each of our nations. Even for that part of Europe we today call "the Community" the thrilling hour of constitutional reform was struck when it was called upon to put its hand to a radical reappraisal and refounding of its democracy. Not a few of the democracies which have appeared

from the Second World War onwards are bound by a relationship of kinship, above all, in fact, *exactly*, because they bear witness, with equal steadfastness, to the utter and complete rejection of all dictatorship and the single-party state, not to mention war itself, stands for.

The season of constituent drafting, as we can call it, was, moreover, the happy and unrepeatable one in which critical spirit and constructive ability multiplied the demand for information and broadened the horizons of our political culture. The opening of our constitutional orders to the values with which we see our European institutions invested goes back to this period. Today East Europe is undergoing similar experiences which seem to be taking place under the portentous hand of a common destiny.

Let me then, if you will, put into words the wish that the dialogue set under way here may continue in a climate of close mutual understanding and practical solidarity.

Working together for democracy through law we exercise a freedom that perhaps ranks above any other in this historic moment when walls which once kept us apart now crumble before us: that is, the freedom of ideas, that they may circulate and confront one another, which is a freedom from solitude, from exile, a freedom with mutual support in promoting values which *are not*, and indeed *must not*, be separated one from the other, for they are the values which we hold to be the very birthright of each and every one of us.

Europe is rebuilding itself, knocking down, one after another, the barriers which, especially now, no longer have any reason to exist. We cannot, however, and must not limit ourselves to a free movement which is the free movement of goods, services and capital alone. "Europe-as-market" which we are currently building in the European Community, will not suffice. If such, and such alone, it is a barren Community. Rather, "Europe-as-Civilisation", Europe as our cultural heritage whose natural centre is to be found in the Council of Europe. As President Mitterrand has said, at Strasbourg lie the foundations for the possible conception and realisation of our forms of political unity which are gradually being realised, with strong roots in our cultural order, such as the common broadcasting space, co-operation in research and education, and with our legal institutions. So, too, with a Charter of Rights and the protection of freedoms.

This is a unity at root alone – and indeed it could not be otherwise – which will enrich other aggregating tendencies, leaving intact our individuality, our freedom and sovereignty, the richness of our differences of which Europe is so justly proud. And this unity will prevail in our encompassment of values,

at the centre of which is placed – today, as ever in crucial times of European history – the individual.

Democracy through law is a phenomenon which calls the interest of a Europe, not so much as a system of States, as, rather, let us say it clearly, a common home built fit for man.

Let us think of Europe as we would think of a single citizenship, which is the measure of a common heritage and which serves in assessing the essential problems of man – the relationship between the individual and power, political freedoms and social rights, the transition from single-party State to party-pluralism, developments of the revolution for democracy and after which must follow the development of the system then established, which grows and matures one step at a time, through patience and experience in the light of events past.

To participate in the Commission is, it goes without saying, the free choice of each and every country here present in this hall: it is not a body which may interfere in any way in national sovereignty, but the Italian delegation is firmly of the view that to set up this new body and permit the countries of East Europe to participate in its work would be a solid proof of our spirit of Europeanism, of our sense of community which we find awakened in us and the fulfilment of a wish has a noble cogency and a moral mandate.

Premier Venice Commission Statute

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Statut premier de la Commission de Venise

Resolution (90)6

On a Partial Agreement Establishing the European Commission for Democracy through Law

(adopted by the Committee of Ministers on 10 May 1990
at its 86th Session)

The representatives in the Committee of Ministers of Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, San Marino, Spain, Sweden, Switzerland and Turkey,

Having regard to the Resolution adopted by the Conference for the constitution of the Commission for Democracy through Law (Venice, 19–20 January 1990) which created the European Commission for Democracy through Law for a transitional period of two years;

Considering that the participants in the Conference invited the competent bodies of the Council of Europe to examine, in consultation with the Commission, proposals aimed at specifying and developing institutional links between the latter and the Council of Europe;

Welcoming the fact that a large number of member States has already expressed the intention to participate in the work of the Commission;

Considering that the Commission will constitute a fundamental instrument for the development of democracy in Europe;

Having regard to the decision of 23 April 1990 whereby the Committee of Ministers unanimously authorised the member States who so wish to pursue these objectives within the Council of Europe by means of a Partial Agreement;

Resolve to establish the European Commission for Democracy through Law, governed by the Statute appended hereto;

Agree to re-examine before 31 December 1992 the institutional links between the Commission and the Council of Europe in the light of the experience acquired, in particular with a view to strengthening them, if appropriate by the incorporation of the activities of the Commission into the intergovernmental programme of activities of the Council of Europe.

Appendix to Resoloution (90)6

Statute of the European Commission for Democracy through Law

Article 1

1. The European Commission for Democracy through Law shall be a consultative body which co-operates with the member States of the Council of Europe and with non-member States, in particular those of Central and Eastern Europe. Its own specific field of action shall be the guarantees offered by law in the service of democracy. It shall fulfil the following objectives:

– the knowledge of their legal systems, notably with a view to bringing these systems closer;

– the understanding of their legal culture;

– the examination of the problems raised by the working of democratic institutions and their reinforcement and development.

2. The Commission shall give priority to work concerning:

a. the constitutional, legislative and administrative principles and technique which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law;

b. the public rights and freedoms, notably those that involve the participation of citizens in the life of the institutions;

c. the contribution of local and regional self-government to the development of democracy.

Article 2

1. Without prejudice to the competence of the organs of the Council of Europe, the Commission may carry out research on its own initiative and, where required, may outline laws, recommendations and international agreements. Any proposal of the Commission can be discussed and adopted by the statutory organs of the Council of Europe.

2. The Commission shall supply opinions upon request submitted through the Committee of Ministers in its composition limited to the member States of the Partial Agreement (hereafter referred to as the Committee of Ministers) by the Parliamentary Assembly, by the Secretary General or by any member State of the Council of Europe.

3. Any non-member State as well as any intergovernmental organisation may benefit from the activities of the Commission by making a request to the Committee of Ministers with a view to obtaining its consent.

4. In the course of its work, the Commission shall co-operate with the International Institute for Democracy created under the auspices of the Strasbourg Conference on Parliamentary Democracy.

5. Furthermore, the Commission may establish links with documentation, study and research institutes and centres.

Article 3

1. The Commission shall be composed of independent experts who have achieved international fame through their experience in democratic institutions or by their contribution to the enhancement of law and political science.

2. The experts, members of the Commission, shall be appointed, one in respect of each country, by the member States of the Council of Europe members of the Partial Agreement. They shall hold office for a four year term and may be reappointed. The President of the Parliamentary Assembly and the President of the Giunta of the Region Veneto or their representatives may attend the work of the Commission.

3. The Committee of Ministers may unanimously decide to admit any European non-member State of the Council of Europe to participate in the work of the Commission. After consultations with the Commission, the State

concerned may appoint either an associate member or an observer to sit on the Commission.

4. Any other State may be invited under the same modalities to appoint an observer.

5. Any State which appointed a member or an associate member may appoint a substitute. The modalities by which substitutes may participate in the work of the Commission shall be determined in the Rules of Procedure of the Commission.

Article 4

1. The Commission shall elect from among its members a Bureau, composed of the President, three Vice-Presidents and four other members. The term of office of the President, the Vice-Presidents and the other members of the Bureau shall be two years; however, the term of office of one of the Vice-Presidents and two of the other members of the Bureau appointed in the first election, to be chosen by lot, shall expire at the end of one year. The President, the Vice-Presidents and the members of the Bureau may be re-elected.

2. The President shall preside over the work of the Commission and shall represent it externally. The Vice-Presidents shall replace the President whenever he is unable to take the Chair.

3. The Commission shall be convened in plenary session whenever necessary by the President, who shall decide the venue of the meeting. The Commission may also set up restricted chambers in order to deal with specific questions.

4. The Commission shall establish its procedures and working methods in the Rules of Procedure and shall decide on the publicity to give to its activities. The working languages of the Commission shall be English and French.

Article 5

1. Whenever it considers it necessary, the Commission may be assisted by consultants particularly competent in the law or the institutional practice of the country or countries concerned.

2. The Commission may also hold hearings or invite to participate in its

work, on a case by case basis, any qualified person or non-governmental organisation active in the fields of competence of the Commission and capable of helping the Commission in the fulfilment of its objectives.

Article 6

1. Expenditure relating to the implementation of the programme of activities and common secretariat expenditure shall be covered by a Partial Agreement budget funded by the member States of the Partial Agreement and governed by the same financial rules as foreseen for the other budgets of the Council of Europe.

2. In addition, the Commission may accept voluntary contributions, which shall be paid into a special account opened under the terms of Article 4.2 of the Financial Regulations of the Council of Europe. Other voluntary contributions can be earmarked for specific research.

3. The Region Veneto shall put a seat at the disposal of the Commission free of charge. Expenditure relating to the local secretariat and the operation of the seat of the Commission shall be borne by the Region Veneto and the Italian Government, under terms to be agreed between these authorities.

4. Travel and subsistence expenses of each member of the Commission shall be borne by the State which appointed him.

Article 7

Once a year, the Commission shall forward to the Committee of Ministers a report on its activities containing also an outline of its future activities.

Article 8

1. The Commission shall be assisted by the Secretariat General of the Council of Europe, which shall also provide a liaison with the staff seconded by the Italian authorities at the seat of the Commission.

2. The staff seconded by the Italian authorities at the seat of the Commission shall not belong to the staff of the Council of Europe.

3. The seat of the Commission shall be based in Venice.

Article 9

1. The Committee of Ministers may adopt amendments to this Statute by the majority foreseen at Article 20.d of the Statute of the Council of Europe, after consulting the Commission.

2. The Commission may propose amendments to this Statute to the Committee of Ministers, which shall decide by the above mentioned majority.

Résolution (90)6

Relative à un Accord partiel portant création de la Commission européenne pour la démocratie par le droit

(adoptée par le Comité des Ministres le 10 mai 1990 lors de sa 86e Session)

Les représentants au Comité des Ministres de l'Autriche, de la Belgique, de Chypre, du Danemark, de la Finlande, de la France, de la Grèce, de l'Irlande, de l'Italie, du Luxembourg, de Malte, de la Norvège, du Portugal, de Saint Marin, de l'Espagne, de la Suède, de la Suisse et de la Turquie,

Vu la Résolution adoptée par la Conférence pour la constitution de la Commission pour la démocratie par le droit (Venise, 19–20 janvier 1990), qui a créé la Commission européenne pour la démocratie par le droit pour une période transitoire de deux ans ;

Considérant que les participants à la Conférence ont invité les organes compétents du Conseil de l'Europe à étudier, en consultation avec la Commission, des propositions visant à préciser et développer des liens institutionnels entre celle-ci et le Conseil de l'Europe ;

Se félicitant qu'un grand nombre d'Etats membres aient déjà manifesté l'intention de participer aux travaux de la Commission ;

Considérant que la Commission constituera un instrument fondamental pour le développement de la démocratie en Europe ;

Vu la décision du 23 avril 1990 par laquelle le Comité des Ministres a autorisé à l'unanimité les Etats membres qui le souhaitent à poursuivre ces objectifs dans le cadre du Conseil de l'Europe grâce à un Accord Partiel ;

Décident d'instituer la Commission européenne pour la démocratie par le droit, qui sera régie par le Statut joint à la présente Résolution ;

Conviennent de réexaminer avant le 31 décembre 1992 les liens institutionnels entre la Commission et le Conseil de l'Europe à la lumière de l'expérience acquise, notamment en vue de les resserrer davantage, le cas échéant par l'incorporation des activités de la Commission dans le programme d'activités intergouvernemental du Conseil de l'Europe.

Annexe à la Résolution (90) 6

Statut de la Commission européenne pour la démocratie par le droit

Article 1er

1. La Commission européenne pour la démocratie par le droit est un organe consultatif qui coopère avec les Etats membres du Conseil de l'Europe ainsi que les Etats non membres, en particulier ceux de l'Europe centrale et orientale. Son champ d'action spécifique est celui des garanties offertes par le droit au service de la démocratie. Elle poursuit les objectifs suivants :

– la connaissance de leurs systèmes juridiques, notamment en vue du rapprochement de ces systèmes ;

– la compréhension de leur culture juridique ;

– l'examen des problèmes posés par le fonctionnement, le renforcement et le développement des institutions démocratiques.

2. La Commission donne priorité aux travaux relatifs :

a. aux principes et à la technique constitutionnels, législatifs et administratifs qui sont au service de l'efficacité des institutions démocratiques et de leur renforcement, ainsi qu'au principe de la primauté du droit ;

b. aux droits et libertés publics, notamment ceux qui concernent la participation des citoyens à la vie des institutions ;

c. à la contribution des collectivités locales et régionales au développement de la démocratie.

Article 2

1. Sans préjudice de la compétence des organes du Conseil de l'Europe, la Commission peut effectuer de sa propre initiative des recherches et élaborer, le cas échéant, des schémas de lois, de recommandations et d'accords internationaux. Toute proposition de la Commission peut être discutée et adoptée par les organes statutaires du Conseil de l'Europe.

2. La Commission formule des avis sur demande de l'Assemblée parlementaire, du Secrétaire Général ainsi que de tout Etat membre du Conseil de l'Europe, faite par l'entremise du Comité des Ministres dans sa composition restreinte aux Etats membres de l'Accord Partiel (ci-après : Comité des Ministres).

3. Tout Etat non membre ainsi que toute organisation inter-gouvernementale peuvent bénéficier de l'activité de la Commission en en faisant la demande au Comité des Ministres en vue d'obtenir l'accord de ce dernier.

4. Dans l'exécution de ses tâches, la Commission coopère avec l'Institut International de la Démocratie créé sous l'égide de la Conférence de Strasbourg sur la démocratie parlementaire.

5. La Commission peut en outre établir des liens avec des instituts et des centres de documentation, d'étude et de recherche.

Article 3

1. Font partie de la Commission des experts indépendants de renommée internationale en raison de leur expérience au sein des institutions démocratiques ou de leur contribution au développement du droit et des sciences politiques.

2. Les experts, membres de la Commission, sont désignés à raison d'un par pays, par les Etats membres du Conseil de l'Europe, membres de l'Accord Partiel. Ils restent en fonction pour une durée de 4 ans; leur mandat peut être renouvelé. Le Président de l'Assemblée parlementaire et le Président de la Giunta de la Région de la Vénétie ou leur représentant peuvent assister aux travaux de la Commission.

3. Le Comité des Ministres peut décider à l'unanimité d'admettre tout Etat européen non membre du Conseil de l'Europe à participer aux travaux de la Commission. Après concertation avec la Commission, l'Etat concerné peut désigner soit un membre associé, soit un observateur qui siégera dans la Commission.

4. Tout autre Etat peut être invité selon les mêmes modalités à désigner un observateur.

5. Chaque Etat qui a désigné un membre ou un membre associé peut désigner un suppléant. Les modalités de participation des suppléants aux travaux de la Commission sont définies dans le règlement intérieur de la Commission.

Article 4

1. La Commission élit, parmi ses membres, un Bureau constitué par le Président, trois Vice-Présidents et quatre autres membres. La durée du mandat du Président, des Vice-Présidents et des autres membres du Bureau est de 2 ans ; toutefois, le mandat d'un Vice-Président et de deux des autres membres du Bureau désignés lors de la première élection, choisis par tirage au sort, prendra fin après un an. Le Président, les Vice-Présidents et les autres membres du Bureau sont rééligibles.

2. Le Président dirige les travaux de la Commission et assure sa représentation extérieure. Les Vice-Présidents remplacent le Président en cas d'empêchement de ce dernier.

3. La Commission se réunit en réunion plénière, aussi souvent que nécessaire, sur convocation du Président qui fixe le lieu de la réunion. La Commission peut également créer des comités restreints pour traiter de questions spécifiques.

4. La Commission définit ses procédures et ses méthodes de travail dans son règlement intérieur et décide de la publicité à donner à ses activités. Les langues de travail de la Commission sont l'anglais et le français.

Article 5

1. La Commission peut se faire assister, lorsqu'elle l'estime nécessaire, par

des consultants particulièrement compétents dans le domaine du droit ou de la pratique institutionnelle du ou des pays concernés.

2. La Commission peut en outre procéder à des auditions ou inviter à participer à ses travaux, de manière ponctuelle, toute personne qualifée ou toute organisation non gouvernementale oeuvrant dans les domaines de la compétence de la Commission et susceptible d'aider la Commission dans la poursuite de ses objectifs.

Article 6

1. Les frais correspondant à la mise en oeuvre du programme d'activités et les frais communs de secrétariat font l'objet d'un budget d'Accord partiel qui sera financé par les Etats membres de l'Accord Partiel et soumis aux mêmes dispositions réglementaires que celles prévues pour les autres budgets de l'Organisation.

2. En outre, la Commission peut accepter des contributions volontaires qui sont versées sur un compte spécial ouvert aux sens de l'article 4.2 du Réglement financier du Conseil de l'Europe. D'autres contributions volontaires peuvent être destinées à des recherches spécifiques.

3. La Région de la Vénétie met gracieusement un siège à la disposition de la Commission. Les frais relatifs au secrétariat local et au fonctionnement du siège de la Commission sont assumés par la Région de la Vénétie et par le gouvernement italien, selon des modalités à déterminer entre lesdites autorités.

4. Les frais de voyage et de séjour de chacun des membres de la Commission sont à la charge du pays qui l'a désigné.

Article 7

Une fois par an, la Commission transmet au Comité des Ministres un rapport d'activité contenant aussi les grandes lignes de ses activités futures.

Article 8

1. La Commission est assistée par le Secrétariat Général du Conseil de

l'Europe, qui assure en outre la liaison avec le personnel détaché par les autorités italiennes auprès du siège de la Commission.

2. Le personnel détaché par les autorités italiennes auprès du siège ne fait pas partie du personnel du Conseil de l'Europe.

3. Le siège de la Commission est établi à Venise.

Article 9

1. Le Comité des Ministres peut adopter tout amendement au présent Statut à la majorité prévue à l'article 20.d du Statut du Conseil de l'Europe, après avoir recueilli l'avis de la Commission.

2. La Commission peut proposer tout amendement au présent Statut au Comité des Ministres, qui décidera à la majorité mentionnée ci-dessus.

Mélanges

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The "Law on Romanians living abroad": Comments and Assessment in Light of the Venice Commission's Standards on Kin-State Involvement in Minority Protection

Introductory remarks

The Law concerning the support for Romanians living abroad (hereinafter "the Law on Romanians"), Law no. 299/2007, was adopted by the Romanian Parliament on 13 November 2007, as a result of a parliamentary initiative.

The history of this piece of legislation is not simple.

As a result of the European debate prompted by the adoption of the Law on Hungarians living in neighbouring countries in June 2001 by the Hungarian Parliament, the Venice Commission issued in October 2001 its Report on the Preferential Treatment of National Minorities by their Kin-State.[2] It was the first time that a European body regulated, after a thorough assessment of international law and of the already existing practice of the European States, the rules and limits of the kin-State's involvement in protecting minority kin living in another country (the home-State).

The Venice Commission was soon followed by other international bodies

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[2] See, for the text of the Report of October 2001 (document CDL-INF (2001) 19), http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp.

which adopted similar positions: the High Commissioner of OSCE (the Declaration "Sovereignty, Responsibility and National Minorities" of 26 October 2001 and the Statement of 24 June 2003); the European Union (Non-Paper "Assessment of the Compatibility of the Revised Draft "Law on Hungarians living in neighbouring countries" with European standards and with Norms and Principles of International Law (Findings of the Council of Europe's Venice Commission) and with EU Law of December 2003"); and the Parliamentary Assembly of the Council of Europe (Resolution No. 1335/2003 on "Preferential Treatment of National Minorities by the Kin-State: the Case of the Hungarian Law on Hungarians living in Neighbouring Countries ("Magyars") of 19 June 2001, adopted by PACE on 25 June 2003).[3]

Relying on, as guidelines, these documents adopted at European level and the standards set forth by them, the Hungarian Parliament amended the Hungarian Law in June 2003, and two agreements were concluded between Romania and Hungary (in December 2001 and in September 2003) for the purpose of settling at bilateral level the issues of discrimination, extraterritoriality and the politico-juridical negative implications of the said piece of legislation.[4]

On the basis of the lessons learned from this European debate, which resulted in European standards on the rules and limits of kin-State involvement in minority protection, the Romanian authorities decided (after the issue of the Hungarian Law had been solved at bilateral level), to promote the adoption of a Romanian Act to regulate, in full conformity with the said standards, the support of Romania for its kin-minorities living abroad.

The first draft was elaborated upon in Spring 2004 and, after having been provisionally adopted in a first reading by the Romanian government, was sent for an opinion to the Venice Commission in May 2004. Also, it was sent to the High Commissioner on National Minorities of the OSCE, who considered that the draft was in line with the European standards on the matter.

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[3] See, for the general context of this debate and its results, Bogdan Aurescu (ed.), Kin-State Involvement in Minority Protection. Lessons Learned, edited by the International Law Section of the Romanian Association of International Law and International Relations (ADIRI) and the Venice Commission, RAMO, Bucharest, 2005; Adrian Năstase, Raluca M. Beşteliu, Bogdan Aurescu, Irina Donciu, Protecting Minorities in the Future Europe – Between Political Interest and International Law, RAMO, Bucharest, 2002. See, also, for the texts of these documents, Bogdan Aurescu, Bilateral Agreements as a Means of Solving Minority Issues: The Case of the Hungarian Status Law, article in European Yearbook of Minority Issues, Volume 3, 2003–2004, Martinus Nijhoff Publishers, pp. 509–530.

[4] See, for the texts of these agreements, Bogdan Aurescu, Bilateral Agreements as a Means of Solving Minority Issues: The Case of the Hungarian Status Law, article in European Yearbook of Minority Issues, Volume 3, 2003–2004, Martinus Nijhoff Publishers, p. 509–530.

The opinion of the Venice Commission (No. 299/2004) was adopted at its 59th Plenary Session (18–19 June 2004).[5] The Commission "welcome(d) that the Romanian authorities have drawn direct inspiration from its report on the "Preferential Treatment of National Minorities by their Kin-State" and that they further wish(ed) to receive the Commission's opinion on the draft law. The Commission consider(ed) indeed that this open and transparent attitude contributes towards showing the intention of Romania to implement this law in conformity with the requirements which have been identified by the international community, notably the Venice Commission and the OSCE High Commissioner on National Minorities."[6] In fact, it was the first such draft Law to be submitted for the consideration of the Venice Commission after the adoption of its 2001 Report. The Commission concluded that "the draft law is generally in conformity with European and international principles and standards, as referred to notably by the Venice Commission in its report on Preferential Treatment of National Minorities by their Kin-State"[7] and made suggestions for further improvement of the draft.

After modifying the draft in order to take on board the suggestions and comments of the June 2004 Opinion, the Romanian authorities sent the draft for consideration to the home-States which had Romanian minorities living on their territory (as well as to Republic of Moldova).[8] No negative reactions were received. The draft was also discussed with the representatives of Romanians abroad in August 2004. Then, the draft was adopted by the Romanian government and sent for approval to the Romanian Parliament in the autumn of 2004. Due to the change of government following the November 2004 general

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[5] See, for the text of this Opinion (document CDL-AD(2004)020rev), http://www.venice.coe.int/docs/2004/CDL-AD(2004)020rev-e.asp. The Rapporteurs of the Opinion were Giorgio Malinverni (member, Switzerland), Franz Matscher (member, Austria) and Pieter van Dijk (member, the Netherlands).

[6] Paragraph 5 of the Opinion of June 2004.

[7] Paragraph 26 of the Opinion of June 2004.

[8] In the Republic of Moldova there is no Romanian minority, as the majority of the citizens have Romanian ethnic identity. Nevertheless, the substance of the rules of the Report is applicable for the relations between Romania and the Romanians in Republic of Moldova. See, for an analysis of the relevance of the Venice Commission's Report of October 2001 in respect of Republic of Moldova, Bogdan Aurescu, Cultural Nation versus Civic Nation: Which Concept for the Future Europe? A Critical Analysis of Recommendation N° 1735/2006 of the Parliamentary Assembly of the Council of Europe on "The Concept of 'Nation' ", article in European Yearbook of Minority Issues, Volume 5 (2005–2006), Martinus Nijhoff Publishers, European Academy, Bolzano, pp. 147–159; see also Bogdan Aurescu, "The Concept of State National Policy" in the Republic of Moldova. The National Identity and the European Concept of Nation, article in Analele Universităţii din Bucureşti – Seria Drept (The Annals of the University of Bucharest – Law Series), 2007-I, pp. 135–151.

elections in Romania, the procedures for adoption of the Law were re-initiated by the new government in 2005, with minor changes of the draft regarding mainly the articles on the Department for Romanians living abroad, but the substance of the Law was not altered.

In parallel, the 2004 draft was promoted by a parliamentary initiative. This led to the adoption of Law no. 299 concerning the support for Romanians living abroad, on 13 November 2007. The text of the Law, as adopted by Parliament, is in fact the same as the 2004 draft. It will be analysed and assessed in the following section of this paper, in the light of the Venice Commission's Report of October 2001 and Opinion of June 2004.[9]

Presentation and assessment of the provisions of Law No. 299/2007 concerning the support for Romanians living abroad

The Law on Romanians is the first such Act adopted by taking into account the October 2001 Report of the Venice Commission and the lessons learned from the debate which took place between 2001 and 2003 on the Hungarian Law (described above). It is also the first national piece of legislation to mention, expressly in its text, the above Report of October 2001. Indeed, the second paragraph of the Preamble reads that "the guidelines stipulated by the European Commission for Democracy through Law (the Venice Commission) in the 'Report on the Preferential Treatment of National Minorities by their Kin-State' (Venice, 19–20 October 2001)" have been taken into account. The Opinion of June 2004 acknowledged that "this clearly appears from certain elements of the draft", which were kept in the adopted Law.[10]

The first Article sets forth the scope of the Law. It provides that the "Law sets forth:

a) The rights of persons of Romanian ethnic origin, and those of persons sharing a common Romanian cultural identity, residing outside Romanian

[9] An Emergency Ordinance of the Government of Romania (EOG N° 10/2008) was adopted on 20 February 2008 in order to amend certain provisions of the Law no. 299/2007 relating mainly to the competences and subordination of the Department of Romanians living abroad. According to the Romanian Constitution, the Emergency Ordinances have to be approved by the Parliament. As this procedure is currently under way, I will not refer, as a rule, in this paper, to the modifications of the Law introduced by the EOG no. 10/2008. However, certain references will be made in some footnotes.

[10] Paragraph 5 of the Opinion of June 2004.

borders (hereinafter called "Romanians living abroad"), aiming to preserve, promote and develop their cultural, ethnic, linguistic and religious identity.

b) The attributions of Romanian competent authorities."

It is clear from this text that the persons covered by the Law are persons belonging to Romanian minorities/communities abroad in their individual capacity – the Law does not target the minorities or communities as such. This corresponds to the constantly-held position of Romania that minority rights are individual and not collective rights. It is also clear that it covers persons from all over the world, and not only from the neighbouring countries, thus avoiding a certain type of discrimination which was a criticism of the Hungarian Law. The scope of the Law is not restricted to ethnic Romanians, thus avoiding a strict ethnic approach, which was also a weakness of the Hungarian Law, but it is extended to all those who consider themselves, freely, as sharing a common Romanian cultural identity, even if they are not ethnic Romanians. This larger scope of the Law was welcomed by representatives of certain communities of persons originating from Romania, who are not ethnic Romanians, but who want to keep the cultural links with the Romanian society (for instance, Germans or Jews who were Romanian citizens and live now in Germany or Israel). Last, but not least, the Law does not target the Romanian citizens working abroad temporarily.[11] Also, the text of this Article sets forth the purpose of the facilities granted – to preserve, promote and develop the cultural, ethnic, linguistic and religious identity of the persons under the scope of the Law – which is in the cultural field *lato sensu*, as prescribed by the Venice Commission Report of October 2001.

[11] The EOG N° 10/2008 modifies the scope of the Law by including "the Romanian emigrants who kept or not the Romanian citizenship, their descendants and the Romanian citizens having the domicile or residence abroad" who work outside the territory of Romania. The Law, in its original form, does not target the Romanian citizens abroad, even if article 4 (2) of the Law ("Any person pursuing his/her studies/teaching abroad in the Romanian language, can benefit, irrespective of his/her ethnic origin and with no discrimination whatsoever, at his/her request, of the rights mentioned in letters a)–d)."") allows them to take the benefit, if they want, of certain benefits of the Law. Nevertheless, the EOG provides that the Romanian citizens under the scope of this Law can exercise the rights granted under this Law "under the same conditions as all other Romanian citizens". In fact, as noted by the Venice Commission in paragraph. 7 of the Opinion of June 2004, "there is no need to extend [the Law's] reach to Romanian citizens, who, as such, derive rights from Romanian law in general in many respects."

As far as the structure of the Law is concerned, the suggestion of the Commission of paragraph 22 of the Opinion of June 2004 was taken into account, as such the current structure includes first the regulation of the rights of Romanians abroad and then the attributions of the Romanian authorities for implementing the Law.

Article 2 of the Law provides that it "shall be applied without prejudice to the principles of territorial sovereignty, good neighbourliness, reciprocity, *pacta sunt servanda*, respect of human rights and fundamental freedoms and non-discrimination." This provision is directly derived from the conclusions of the Venice Commission's Report of October 2001, as also noted in the 2004 Opinion on the draft Law.[12] It is the same for Article 3 of the Law, the text of which reads, in paragraph 1, that "(t)he implementation of the present Act shall proceed on the basis of the conclusion of agreements and programmes with the States where there are persons mentioned in Article 1 a) or of protocols of the bilateral Joint Commissions and respectively on the basis of reciprocity and in line with the provisions of the Framework-Convention on the Protection of National Minorities, of the Venice Commission's Report on the Preferential Treatment of National Minorities by their Kin-State, adopted on October 19, 2001 and with the recommendations of the OSCE High Commissioner on National Minorities, with a view to ensure protection of their cultural, ethnic, linguistic and religious identity." The 2004 Opinion welcomed this approach and stressed "in this respect the importance of consulting the relevant home-States."[13]

The second paragraph of Article 3 mentions that "periodically, the Government of Romania shall assess the state of implementation of the provisions of the agreements and programs in force concluded with the States mentioned in paragraph 1 and of the international and European standards and documents regarding the protection of persons belonging to national minorities to which the respective States are parties." This assessment is meant to be undertaken in two steps: the first step is the Romanian authorities' assessment, which is to be discussed, in a second phase, together with the home-States, especially in the framework of the Joint bilateral Commissions on minorities, if such bodies exist in relation with the home-State. This procedure is perfectly in line with the general rules of the law of treaties; the treaties provide for rights and obligations for their parties, which are entitled to permanently check the observance of these

[12] Paragraph 5 of the Opinion of June 2004.
[13] Paragraph 11 of the Opinion of June 2004.

instruments by the other party/parties. In cases of breach of the provisions, the interested party may always take measures, in accordance with the general law of treaties and with the specific provisions of the respective treaty, in order to ensure respect of the respective legal instrument.

Article 4 is the most important provision of the Law, providing for the facilities to be granted to the persons within the scope of the Law. Paragraph 1 reads as follows:

"Romanians living abroad shall enjoy the following rights:

a) The right to free access, in Romania, to public cultural institutions, historical monuments, sites belonging to the national patrimony;
b) The right to study in Romania at all levels and forms of education;
c) The right to apply for and be awarded, by contest, scholarships and related facilities in Romania, at all levels and forms of education with a view to consolidate the knowledge of Romanian language and the Romanian culture and scientific identity, under conditions similar to those provided for Romanian citizens;
d) The right to further training in Romania and to benefit from the related facilities available for the teaching staff;
e) The right to request for and obtain assistance of the Romanian authorities in order to receive textbooks, manuals, literature, publications and other printed materials or edited on electronic support in Romanian language;
f) The right to request for and obtain assistance of Romania for building or renovating worship buildings in the State of citizenship/ residence;
g) The right to request for and obtain assistance of Romania for building or renovating educational establishments teaching in the Romanian language in the State of citizenship/ residence;
h) The right to request for and obtain assistance of Romania for endorsing cultural, artistic and religious events of Romanians living abroad, for promoting the education in Romanian language, as well as for the functioning of cultural organizations of Romanians living abroad and for other activities related to their customs and traditions;
i) The right to participate to the Congress of Romanians Living Abroad to be organized pursuant to the provisions of art. 7;
j) The right to obtain free visas in order to participate to those activities, organized in Romania, aiming at preserving and developing their cultural, ethnic, linguistic and religious identity;
k) The right to request for and obtain assistance for editing publications and

producing audio-visual materials in Romanian, as well as for creating their own media institutions;

l) The right to be granted Romanian distinctions for promoting Romanian cultural, spiritual and scientific values;

m) Other rights provided for in international agreements and partnership programs."

This enumeration of rights shows clearly that these facilities are granted only with the aim to preserve, promote and develop the Romanian cultural, ethnic, linguistic and religious identity, as mentioned in Article 1 of the Law, which ensure the presence of the "objective and reasonable justification" required in order for these facilities not to amount to discrimination. This conclusion was already drawn by the Opinion of June 2004 (paragraph 17). The link to the Romanian language and culture is expressly provided, as required by the Opinion of June 2004, in paragraph 27, in order to justify the preferential treatment. The Commission also welcomed (in paragraph 18) the reasonability and proportionality of such preferential treatment, and noted that it is important that the second paragraph of Article 4 provides that "Any person pursuing his/her studies/teaching abroad in the Romanian language, can benefit, irrespective of his/her ethnic origin and with no discrimination whatsoever, at his/her request, of the rights mentioned in letters a), d)." Paragraph 3 further adds that " the assistance mentioned in paragraph 1 letters e), h) and k) shall be provided without any prejudice to the principle of non-discrimination and to the internal legislation of the State of citizenship/residence, which is in compliance with international and European standards." This last provision was included in order to respond to the suggestion of paragraph 21 of the Opinion of June 2004.

Article 5 establishes the conditions to be fulfilled by the persons within the scope of the Law in order to benefit from the facilities granted by the Romanian State. The first condition is "to freely declare, in accordance with the conditions set forth in the Framework Convention for the Protection of National Minorities, that they assume the Romanian cultural identity, no matter the name the respective minority is identified by in the State of citizenship/residence". This provision takes into account the fact that belonging to a certain national minority is a matter of personal free choice. It also takes into account the reality that certain home-States of Romanian minorities do not recognize that such minority falls under the umbrella term of Romanian

minority.[14] A second condition is "to possess appropriate knowledge of the Romanian language"; this provision was adapted in order to respond to a suggestion of the Venice Commission in its Opinion of 2004 (paragraph 24). The third condition is an optional one: "to prove his/her membership of a representative cultural organization of Romanians living abroad, provided that this membership exists".[15]

Article 5 also sets forth the requirement of a declaration of appurtenance to the Romanian cultural identity and the assessment of the requisite linguistic knowledge of Romanian (and, if necessary, the proof of membership to a representative cultural organization of Romanians living abroad) shall be made at the Romanian embassies or consulates in the State of citizenship/residence, with the assistance of the Department for Romanians Living Abroad. The Department for Romanians Living Abroad, after taking note of the fulfilment of the above-mentioned conditions, issues a document attesting that the applicant is entitled to the rights provided for by this Law.[16] This document is a simple sheet of paper stating that the person is entitled to benefit from the facilities mentioned in Article 4 letters a), i), j). According to Article 4 (4), these facilities may be granted only by presenting this document, together with a valid identity document issued by the authorities of the State of citizenship. These provisions respond to the conclusions of the Report of the Venice Commission of 2001, where it is stated that the administrative document issued by the kin-State may only certify the entitlement of its bearer to the benefits provided for under the applicable law, without mentioning the ethnic background of the holder, and should not be a substitute for an identity document issued by the home-State, in order to avoid establishing a political bond between the holder and the kin-State.

The same Article 5 provides that the data regarding the Romanians living abroad shall be kept by the Department for Romanians Living Abroad, in accordance with the legislation in force on the protection of personal data and that the expenses incurred as a result of the issuing and posting of the certificate to the applicant shall be covered from the budget of the Department for Romanians Living Abroad.

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[14] See, for instance, the case of Serbia, where a segment of the Romanian minority is called *"Vlachs"* or of Ukraine, where a segment of the Romanian minority is called "Moldovans".

[15] The EOG N° 10/2008 eliminates this optional condition.

[16] The EOG N°. 10/2008 replaces the document with a written statement of the person, which has a predetermined format, on which the Romanian authorities, in front of whom the statement is given and the "appropriate knowledge of Romanian language" is tested, are attesting that the person fulfils the conditions provided by article 5 (1) of the Law.

Article 6 of the Law sets forth the competences of the Department for Romanians Living Abroad.[17]

Articles 7 and 8 regulate the representative bodies of the Romanians abroad. Article 7 mentions that the Congress of Romanians Living Abroad shall be convened annually under the aegis of the Romanian Parliament, either in Romania or abroad, the consent of that foreign State is necessary if the Congress is convened abroad. This last condition was introduced in order to respond to a suggestion made by the Venice Commission in its Opinion of June 2004, in paragraph 23. The text also sets forth that the Congress of Romanians Living Abroad shall be convened by the joined permanent bureaus of the Chamber of Deputies and of the Senate in co-operation with the Department for Romanians Living Abroad, the expenses entailed by the organization of the Congress are provided for in the budget of the Chamber of Deputies. The Congress of Romanians Living Abroad shall, at its first reunion, elect its leadership and elaborate on its Rules of Procedure. According to Article 8, the Congress of Romanians Living Abroad shall elect the Council of Romanians Living Abroad as a permanent body. Its role is to provide information, analyses and proposals to the Romanian Parliament, the Department for Romanians Living Abroad and other competent governmental institutions with which it collaborates in order to promote legislative initiatives concerning the Romanians living abroad, as well as to accomplish and implement the programmes devised for the Romanian communities.

Articles 9 and 10 of the Law provide for the Day of Romanians abroad (November 30, the Day of Saint Andrew, the Apostle of Romanians) and for the establishment of a museum of Romanians Living Abroad. Article 11 contains certain provisions relative to the financing of the programmes for the Romanians living abroad.

Article 12 regulates the functioning of a Centre for Romanians living abroad, which has, as its purpose, the objective to support the exercise of the rights mentioned in Article 4 (1) letters (b) and (d) of the Law and to draw and coordinate training programs for learning of the specialized terminology of the teaching institutions by the individuals exercising the rights mentioned in Article 4 paragraph 1 (b), (c) and (d), and for promoting the Romanian cultural values.

[17] The EOG N° 10/2008 introduces detailed provisions on the competences and functions of the Department. If under the initial version of the Law the Department is under the direct coordination of the Prime Minister, under the EOG it is reintroduced within the structure of the Romanian MFA.

Paragraph 9 of this Article mentions that "the persons exercising the rights set forth in Article 4 (1) letters b), c), d) benefit from free of charge accommodation in student hostels during their studies in Romania, provided that they prove a lack of sufficient funds, according to the legally provided conditions for Romanian citizens." This provision was amended in order to correspond to the suggestion made by the Venice Commission in its Opinion of June 2004 in paragraphs 20 and 28 ("it is recommended to subordinate the grant of free accommodation and other facilities in favour of Romanians living abroad to the same low-income condition as applies in respect of ordinary Romanian students").

The last two Articles of the Law (13 and 14) regulate some aspects relating to the cooperation of the Department for Romanians Living Abroad with other Romanian institutions, as well as some transitory issues and final clauses (this Law replaces an older Act – Law No. 150/1998 concerning the support for the Romanian communities from all over the world).

Conclusions

Law no. 299/2007 concerning the support for Romanians living abroad, adopted by the Romanian Parliament on 13 November 2007, is a modern piece of legislation, the first such Act adopted in conformity with the standards set by the Venice Commission's Report of October 2001 on the Preferential Treatment of National Minorities by their Kin-State, as well as by taking into account the lessons learned from the European debate prompted by the adoption, in 2001, of the Hungarian Law on Hungarians living in neighbouring countries,.

Of course, its implementation will be the real test of its effectiveness, and consequently, of the rules and limits of kin-State activities in respect of its kin-minority as established by the various European bodies involved in this field and embodied in its text. It will certainly provide the basis for further legal analysis and evolutions in minority protection. I am sure that the Venice Commission will follow them closely.

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The European Union from the Perspective of the Contribution of Antonio La Pergola to the Doctrine of Federalism

This paper addresses the possible impact of the contribution of Antonio La Pergola to the doctrine of federalism, in particular, on the study of some aspects of the European Union, and will deal with two well-known studies which are situated at different stages of the scientific experience of La Pergola, and although concern different subjects, are clearly connected by the deep interest that our Friend showed for the institutions of the federalism and for the scientific study, and elaboration, of these institutions. On one hand, I would like to take into account his idea that the European Union is a modern type of Confederation,[1] and to rethink at the same time, on the other hand, his construction of the provision of the American Constitution (art. V) according to which the consent of the interested State is required if the rule that every member State of the Federation shall have two senators in the Senate, has to be amended.[2]

As is common knowledge, the European Union cannot be easily classified along the lines of the different traditional types of federal organizations. For instance, the European central authorities have the power of legislating with immediate effect which directly affects the personal position of the citizens of the member States without the necessity of an act of positive legislation of the member States themselves. This solution improves the cohesion of a Union which is not a Federation, but is – at the same time – something more of a Confederation. As a matter of fact, the old, traditional type of the Confederation did not confer the entrusting, to the central confederal authorities, the

[1] La Pergola, *"L'Unione Europea fra il mercato comune ed un moderno tipo di Confederazione. Osservazioni di un costituzionalista"*, in *Riv. trim. dir. proc. civ.*, 1993, 25.
[2] La Pergola, *"Residui "contrattualistici" e struttura federale nell'ordinamento degli Stati Uniti"*, Milano 1969, 274.

power of legislating with direct effect on the citizens of the member States. The conclusion of La Pergola is that the European Union is a modern type of Confederation: to appreciate this conclusion, it is sufficient to read those papers of the "Federalist" (15–22), where the previous experience of the Articles of Confederation is criticized because of their inability to provide unity and cohesion of the association of the American States, to the extent that the legislative intermediation of the governing bodies of the States was necessary to affect their citizens and to produce the effects, provided for by the confederal decisions, not only with regard to the waging of war.

The interpreter, taking into consideration the peculiarity of the abovementioned aspect of the European experience, could be tempted to suppose that the member States of the European Union accepted such a surrendering of their sovereignty that it can be easily compared to the transfer of the sovereign powers of the constitutive entities of a Federation to the central federal governing bodies. The Union should be classified as a first step towards the introduction of a European Federation which implies a large curtailment of the positions of the member States.

However, we know that the European Union is presently – as the *Bundesverfassunggericht* said in the famous *Maastricht Urteil* (October 12th, 1993) – *a Staatenverbund*, aimed at establishing close relations between the European peoples notwithstanding the fact that they are still organized in separate and independent States, and is not an individual State incorporating one European people. Therefore, even if the European Court of Justice interprets and uses the European Treaties as the Constitution of the Union, the member States are not ready to accept that those Treaties can be compared to a constitution and deserve, therefore, to be interpreted in the same way. Moreover, the project for the introduction of a constitution for the European Union required, to enable its revision or its amendment, the unanimous consent of all member States, notwithstanding that the constitutions of Federal States can usually be amended or revised by the vote of the (sometimes qualified) majority of the constituent entities of the Federation. This aspect of the Union is clearly explained by the idea of La Pergola that it is still a confederation. A typical example of this position of the member States of the European Union is the jurisprudence of the French *Conseil Constitutionnel*, which – at least in two different decisions (decision 2004/505 and decision 2007/560) – stated the principle that the adoption of a simplified revision procedure for the European Treaties requires a revision of the national Constitution even if the national Parliaments of the member States have expressly been entrusted with the power to oppose its application. The change from the system of unanimous

voting to the qualified majority voting is considered as a curtailment of the national sovereignty in so far as it implies that the acceptance by France of European decisions adopted even without its consent. The Constitutional Council does not say that the simplified procedure of revision of the treaties cannot be accepted by the French State it only states the principle that it requires a revision of the Constitution because the national sovereignty is at stake.

How can we coordinate this conclusion with the ability of European law, that is the law adopted by the European institutions, to produce direct effect on the personal positions of the citizens of the member States, which apparently implies the abandonment of the principle of the exclusive sovereignty of the States? The study of La Pergola about the federal structure of the United States helps find an answer to this question. According to his conclusion the rule that "no State, without its consent, shall be deprived of its equal suffrage in the Senate" does not conflict with the exigencies the federal cohesion and with the necessary limitations of the sovereignty of the member States. The rule only requires that the equality of the constituent entities be guaranteed in the Senate, at least as far as the Senate is an essential element of the federal government. But at the same time – La Pergola concludes – we are in the presence of a special guarantee of the participation of the member States in the amending process of the American Constitution. In this context, the equal suffrage of the States in the Senate is a peculiar feature of the exercise of the democratic powers of the people in the Federation.

At this stage it is convenient to go back to the *Maastricht Urteil*. In this decision, the German Constitutional Court dealt with an individual complaint which raised the issue of the connection between the surrendering of federal functions and powers to the European Union and the implementation of the democratic principles of the German Constitution, and specifically of its Article 38. The judges answered that, when sovereign rights are granted to international institutions, "the representative body elected by the people – the German Bundestag – and along with it the citizens entitled to vote, necessarily lose some influence on the processes of political will-formation and decision-making".[3] But this result has only been possible because the establishment of the European Union is based on an authorisation from the States which remain sovereign, "*die Herren der Verträge*". Therefore they have to control the integration process, "which is… primarily determined governmentally. If such

[3] For this quotation, I make reference to the English translation of the decision in *"Common Market Law Reports"*, 11 January 1994.

a community power is to rest on the political will-formation which is supplied by the people of each individual State, and is to that extent democratic, that presupposes that the power is exercised by a body made up of the representatives sent by the member-States' governments, which in their turn are subject to democratic control".

The democratic foundation of the member States' governments is the guarantee that the powers of the European institutions have also a democratic foundation. If the two levels of government were not connected, the surrendering of functions of the German Federation would not comply with the internal democratic principles and would conflict with the constitutional exigency that the exercise of those functions is subject to the democratic control of the German electors.

While in the jurisprudence of the French Constitutional Council we find the explicit recognition of the "*existence d'un ordre juridique communautaire intégré a l'ordre juridique interne et distinct de l'ordre juridique international*" (decision n. 2004/505 paragraph 11), the above-mentioned jurisprudence of the German Constitutional Tribunal does not only appear to accept the concept that there is a direct connection between the democratic foundation of the European legal order and the democratic legitimacy of the national governing bodies, but also elaborates this concept in view of defining the relations between the German citizens and the European governing bodies. The electoral rights of the German people are the starting point for the reasoning of the Tribunal of Karlsruhe in justifying the German accession to the European Union. As a matter of fact, the solution also proposed by the German judges can only be accepted only if the two legal orders are considered as integrated, and it appears to closely resemble that of the French Constitutional Council.

It could be argued that the position of the French judges is different in that they are specifically interested in connecting the solution of the case with the French constitutional rules enabling the ratification of international treaties. However, the final result is similar: the electoral rights of the French citizens are at stake as far as the national sovereignty, which is exercised through their representatives and by means of referendum (art. 3 French Constitution), must be preserved. It is true that the decision of the French Constitutional dealt with the Treaty establishing a Constitution for Europe, which has not entered into force, and therefore it is not a relevant precedent; the quoted statement however regards some provisions of that treaty which, according to the Council, did not require a revision of the French Constitution in so far as they did not change the nature of the European Union as it stood and presently stands. Therefore

the decision can be correctly quoted as far as it implies the acceptance of what is regarded as a permanent feature of the relationship between the French constitutional order and the European legal order.

Therefore, even if both constitutional tribunals are specifically interested in guaranteeing the continuity of the sovereignty of the States concerned, they take into due account the novelty of the structure of the European Union and construe the relationships between the two legal orders in the light of a mutual integration: the integrity of the European Union depends – on the one hand – on the support of the national legal orders while – on the other – the national legal orders can pretend to be recognised as effective and able to survive in the present globalised economy only through the support of the European Union. Moreover the adoption of European legislation has its legitimacy: only if the legitimacy of the European Union derives from the exercise of the democratic powers of vote of the citizens of the member States, the European Union is legitimate because it was supported by the democratic will of the people concerned and the European constitutional institutions, which have the legislative power to draw their legitimacy from not only from the direct election by the people of the European Parliament but also from the participation of the democratically responsible States' governing bodies in the European legislative decision-making processes. This peculiar legitimacy enables European legislation to produce effects which directly affect the legal position of the citizens of the member States. But it is evident that we can only establish the net of all these connections if we accept that the relevant legal orders are integrated: we can only say that the European governing bodies derive their legitimacy from the vote of the citizens of the member States because we consider that the exercise of the European legislative powers by those governing bodies is linked by a relation of close continuity with the democratic exercise of the powers of the European peoples. For instance, in the case of the "*passerelle*" clauses, only a revision of the French Constitution can allow the derogation of the internal democratic principles which is enabled by the adoption, by a qualified majority, of European decisions binding France even against her will.

It follows that both tribunals share the opinion that the European and national legal orders are part of the same system of government, whose implementation depends on the integration of those legal orders. The link supporting the integration is – at least for the German Constitutional Tribunal, but the position of the French judges is not radically different – the position of the citizens of the member States. There is an evident similarity with the position taken by Antonio La Pergola in his studies, which I mentioned in the previous pages.

At this point it could be interesting to look at the position of the the Italian Constitutional Court in the matter of the relation between the European legal order and the national legal order. It was finally stated in judgment n° 170/1984, written by Antonio La Pergola. This judgment recognizes that the direct internal effects and the primacy of European law, in the context of the Italian national legal order, require that the Italian judges be allowed to apply European law directly, even in the presence of a concurring and conflicting national law. As a matter of fact, in the Italian legal order, judges are not allowed to refuse the application of national legislation without a decision from the Constitutional Court declaring the invalidity (unconstitutionality) of the legislative provisions which the judges should apply. The solution adopted by the Court to solve the conflict between national law and European law is an exception to this general rule. The reasoning that La Pergola elaborated is interesting and very distinctive.

The European legal order and the national legal order are seen as different and separate legal orders which have different competences. The European legal law is expanding, its competences are enlarging: there is an expansion of European law which implies a contraction of the Italian legal order. The two systems of law are not integrated and remain separate, there is no overlap: the Constitutional Court has some difficulties in accepting a possible integration between the two systems because it does not accept the idea of dismissing its "competence of competence" role. The idea is that the application of European law by the Italian judges can be explained as a consequence of the recognition of the European legal system by the Italian legal order, which accepts the existence of a separate legal order and treats it in full respect of its distinct nature and legitimacy. In adopting this solution, Antonio La Pergola drew inspiration from the doctrine of legal pluralism of the Italian theorist of law *Santi Romano*: the relations between different legal orders are ruled by the mutual recognition of their existence: therefore one legal order does not have difficulty in allowing the application of the law of another legal order, which is treated as foreign law safeguarding its different origins and the different rules of recognition which justify its validity.[4]

According to the traditional doctrine, when the Italian national legal order refers to another legal order concerning the internal application of the latter's law, this foreign law is nationalised, that is, it becomes Italian law. However,

[4] ROMANO, *L'ordinamento giuridico*, Firenze 1951, 187–188.

according to this new concept , the foreign, that is European law, is applied not because it becomes Italian law, but being duly recognized as European law. The decision of the Constitutional Court thus rejects the old traditional approach and explains the application of European law (instead of Italian law) as the result of the substitution of European law for national law and, as a consequence, as the recognition of the European legal order by the Italian legal order which is ready to accept its existence, its legitimacy and its rule of validity, and to apply it as it stands.

If we compare the position of the Italian Constitutional Court with those of the German Constitutional Tribunal and of the French Constitutional Council, we find an interesting difference which would deserve a further elaboration, which would require time and space that is not presently at the disposal of the author of this contribution. While the French and German constitutional judges assert the establishment of the European Union in the light of the participation of the respective peoples in the relevant decision-making processes and, therefore, of the compliance with the principle of democracy, the Italian Judges are specifically attentive to the relations between different legal orders and treats, as secondary, the consideration of the decision-making processes, whose democratic nature is, at any rate, not denied. Notwithstanding that Antonio La Pergola was the judge rapporteur entrusted with the task of writing the decision, the reasoning of the Italian Constitutional Court does not follow the suggestions submitted by our Friend in his studies on the doctrine of federalism because it was not based on the consideration of the individual position of the Italian citizens within the context of relations with the European Union at the moment of its creation, and, therefore, it does not firstly deal with the democratic asset of the decision making processes which were, and are, adhered to in establishing of the European Union itself and along with the guarantee of the democratic electoral rights of the people in the relevant deliberations.

Can we say that Antonio La Pergola forgot his personal opinions in the matter, or should we think that the majority of the Court did not accept his point of view?

Perhaps there is a different answer. It could be that the method of reasoning adopted by the Italian Constitutional Court is independent of any value judgement on the democratic content of the Italian accession to the European Union because the Italian Constitution offers the possibility of a different construction. In all probability, it only depends on the particular nature of the constitutional provision in consideration. It is well known that according to Article 11 of the Italian Constitution, Italy "agrees, on the condition of equality

with other states, to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations". This provision was adopted bearing in mind the manner in which Italy sticks to the United Nations Organization, but it is also interpreted as authorizing the participation of Italy in the formation of the European Union. It is evident that the emphasis of the statement is specifically devoted to the relations between the Italian system of law and the legal order of the new international institutions, and it apparently directly provides for the limitation of Italian sovereignty without requiring specially qualified decision-making processes for the Italian manner of sticking to the relevant international institutions. Therefore, it is possible that the Court did not concern itself with assigning primary importance to the compliance with the outcomes from the deliberations with the democratic principles because it shared the opinion that the major relevant decision was made by the Constituent Assembly in framing the Constitution, and that the problem of the implementation of this decision is only of technical relevance and only requires a legally satisfying arrangement.

Following this line of thought, the Constitutional Court regarded the problem of the guarantee of the rights and freedom of citizens as relevant only as a follow-up after the accession of Italy to the European Union. That is, that problem is raised – in a way very similar to the Solange doctrine – only in so far as it concerns of the protection of the citizens against the decisions of the European institutions, while it is bypassed by the openness of the relevant constitutional provision as far as the creation of the European Union is at stake. This explanation is affirmed by the fact that the Italian authorities did not envisage the necessity of constitutional reforms at the moment of the ratification of the European Treaties notwithstanding that – step by step – these treaties have been enlarging the attributions of the European institutions and reducing the scope of the sovereignty of the Italian State.

Moreover the suggested explanation takes into due account the firm opinion of La Pergola about the correct approach of the participation of Italy in the process of integration of the European Union and the exigency of facilitating the relevant political decisions. It is a sign of the ability of our Friend to combine legal doctrine and political experience in dealing with the problems submitted to his attention.

Ledi Bianku
Judge, European Court of Human Rights

Democratic Participation in Constitutional Drafting

1. Introduction – defining the point of view

In Spring 2007 the Secretariat of the Venice Commission asked me to prepare a paper on this subject.

My first thought was the difficulty, from the perspective of the law in general as well as from the international law perspective in particular, to deal, from a strictly legal point of view, with the concept of democracy in general and the subject of this paper in particular. In a community of sovereign states based on a multiplicity of political systems, one can well imagine the degree of complexity involved in reaching an international agreement on the legal definition of democracy and its role in the political and constitutional choices of a country. Because of this, the evaluation of this difficult relationship between international law and domestic constitutional choices has somehow been avoided by lawyers, and especially by international lawyers, until recent years and the subject matter has been generally considered a domain of political and social sciences as well as of philosophy.[1] The evolution

[1] Steven Wheatley suggests this idea in an article "Democracy in International law: a European perspective", in International and Comparative Law Quarterly, vol. 51, January 2002, p. 225. See also Luc Heuschling, *"La structure de la légitimité démocratique en droit français: entre monisme et pluralisme, entre symbolique du sujet et ingénierie des pouvoirs"*, where writes about *"l'atonie des recherches sur le concept juridique de démocratie"*; RUDH, 2004, page 332,

of international law[2] and its legal doctrine[3] in connection with this relationship not only allows, but also demands, international lawyers to deal today with the subject. This is because the relationship between international law and the internal constitutional organisation and choices of states represents today a topic of increasing interest for international law divided into two points of view:

– *First*, to assess the impact to the community of democratic states in the process of democratisation of the international community, international relations and international law;
– *Second*, for evaluating the role and the impact of international law on the democratisation of the constitutional organisation of States and on the concept of constitutional law as such.

These two viewpoints might be considered as two sides of the same coin, which reciprocally and increasingly influence each other to such an extent that the doctrinal opinion is considering the emergence of international constitutional law, transna-

[2] As an example of the evolution of the international courts' jurisprudence compare mutatis mutandis the Permanent Court of International Justice judgement of 5 April 1933 in the case of Legal Status of Eastern Greenland where it held that: *"it might be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority. Another circumstance which must be taken into account..... is the extent to which sovereignty is also claimed by some other power"*.(p. 45–46) with the Advisory Opinion of the International Court of Justice in the case of Western Sahara, I.C.J. Reports 1975, p. 12 where the Court *by referring to the* General Assembly resolution 2625 (XXV), "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" ... reiterates the basic need to take account of the wishes of the people concerned: *"The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."* See also the declaration of Judge Nagendra Singh attached to the Opinion: *"Thus even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people - the very sine qua non of al1 decolonization."*.

[3] See, for an interesting analysis, Véronique Huet *"Vers l'émergence d'un principe de légitimité démocratique en droit international?"* in Revue trimestrielle des droits de l'homme, 67/2006, p. 547. See also Steven Wheatley, footnote 2 above.

tional constitutional law, or international constitutional order.[4] The EU phenomenon along with its constitutional characteristics has contributed considerably to the debate especially after the Maastricht Treaty ratification by referendum. As dealt with by many authors in recent years,[5] the interest in relationship largely increased during the preparations of the Constitutional Treaty of the European Union and was especially invigorated after the failure of French and Dutch referendums.

The question of democracy and legitimacy as a common political and legal/constitutional principle has been considered by prominent international socio-political theorists as a crucial but also a delicate and problematic point of debate. Jean-Jacques Rousseau in 1762 in "The Social Contract – or Principles of Political Right", wrote:

> "The people, being subject to the laws, ought to be their author: The conditions of the society ought to be regulated solely by those who come together to form it. But how are they to regulate them? Is it to be by common agreement, by a sudden inspiration? Has the body politic an organ to declare its will? Who can give it the foresight to formulate and announce its acts in advance? Or how is it to announce them in the hour of need? How can a blind multitude, which often does not know what it wills, because it rarely knows what is good for it, carry out for itself so great and difficult an enterprise as a system of legislation? Of itself the people wills always the good, but of itself it by no means always sees it. The general will is always in the right, but the judgment which guides it is not always enlightened.[6]"

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[4] Erika de Wet, Professor of International Constitutional Law in the University of Amsterdam suggests the latter concept. See for the elaboration of this idea "The international Constitutional Order", in International and Comparative Law Quarterly, vol. 55, Part 1, January 2006, pp. 51–76. See also among others Gráinne de Búrca and Oliver Gerstenberg *"The Denationalization of Constitutional Law"*, Harvard International Law Journal, Volume 47, Number 1, Winter 2006, pp 243–262, in *"Transnational Constitutionalism - International and European Perspectives"* Edited by Nicholas Tsagourias, Cambridge University Press 2007, see especially B. Fassbender *"The meaning of international constitutional law"* and W. Werner *"The never-ending closure: constitutionalism and international law"*, pages 307–368 Tourard, H., *"L'internationalisation des constitutions nationales"*, Paris, L.G.D.J., 2000.

[5] See, among others, for a comprehensive analysis the papers by various authors in Weiler and Eisgruber, eds., *"Altneuland: The EU Constitution in a Contextual Perspective"*, Jean Monnet Working Paper 5/04, Erik Oddvar Eriksen, John Erik Fossum and Agustin Menéndez (editors) *"Developing Constitution for Europe"*, London: Routledge, 2004, I.Pernice, F.Mayer, S.Wernicke, *"Renewing the European Social Contract: The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism"*, 12 KCLJ 61, (2001), *"Le Droit Europeen et les Constitutions Nationales"* by Georges Wivenes Luxemburg's Report at the XXth Congress of FIDE 2002 and the Conclusions to the congress prepared by Jacqueline Dutheil de la Rochere and Ingolf Pernice *"European Union Lan and National Constitutions"*, Jacques Ziller *"L'européanisation des droits constitutionnels à la lumière de la Constitution pour l'Europe"*, L'Harmattan 2003.

[6] Translation from Jean-Jacques Rousseau *"Du Contrat Social ou Principes du Droit Politique (1762)"*, Livre II. Chapitre VI - De La Loi.

Undoubtedly, this aspiration that encompasses many concerns has developed in theory and in practice since Rousseau times, but after more than 250 years the question remains pertinent. Especially if we consider that more than half of the world's Constitutions actually in force have been written or rewritten during the last 30 years and the question of democratic participation has often been considered, although not always used in practice. Increasingly international law and comparative constitutional law are being used to find solutions in the national constitutional context. This paper is limited to briefly analysing the elements of the concept of democratic participation in constitutional drafting. It tries to analyse how the entire concept is reasonable in theory (Chapter 2) and how feasible it is and what problems it faces in practice (Chapter 3).

2. The theoretical aspects of the concept of democratic participation in constitutional drafting

a. The Constitution and its drafting

Traditionally, legal and political doctrine has considered that constitutional drafting consists of the work of outstanding lawyers and political philosophers. Alexis de Tocqueville regarded the "*profession of law*" as an "*aristocratic element*" and lawyers as illustrators of habits of aristocracy.[7] If we take for granted this presumption we risk having a constitution prepared only by representatives of aristocrats and the expression *"we the people"* risks being too inadequate. On the other hand, having a constitution drafted by an unidentified, unprofessional and unorganised gathering of people jeopardises the very outcome of the constitutional act, which will reside at the foundations of the organisation and functioning of society.

Vivien Hart, Professor at Sussex University confirms a major change, which has occurred since Tocqueville times. According to Prof. Hart - *"Twenty-first century constitutionalism is redefining the long tradition of expert constitution making and bringing it into the sphere of democratic participation".*[8]

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[7] In *"De la démocratie en Amérique"* (première partie, Chapitre VIII) *"What Tempers the Tyranny of the Majority in the United States"*.

[8] Vivien Hart, *"Democratic Constitution Making"* - Special Report (N° 107) published by the United States Institute of Peace, July 2003. This thesis has been supported earlier from other scholars such as Thomas Franck in "The emerging right to Democratic Governance" 86 American Journal of International Law (1992) 46, James Crawford in the Inaugural lecture at Cambridge University, on March 5, 1993, etc.

Professor Hart suggests that the right for democratic participation in constitutional drafting derives even from international law.[9] From a ruling of the United Nations Committee on Human Rights in 1991[10], interpreting Article 21 of the Universal Declaration on Human Rights as well as Article 25 of the ICCPR, she concludes that there is a right to democratic participation in constitutional drafting. This ruling, followed by a General Comment of the UNCHR, reinforces the idea that the popular participation in public affairs, including here participation in the drafting of the constitution as the fundamental act regulating these affairs, might be considered not just as an endowment from the government to the people but also as a right to decide how to be governed by the latter.

At this moment it is important to make a distinction between the political and social campaigns for identifying the basic constitutional interests of the people and the technical aspects of transforming these interests into legal provisions. Both of them are vital for having the will of the people successfully drafted in a basic legal text. It is also crucial to make effective the combination of these two elements. Only by this combination it might be possible to prepare a technically good and functioning constitution on one side, and a basic act regulating the life of the people which embodies the legitimacy from the people, on the other side.

b. Democratic participation

The second question in relation to the drafting of a Constitution is related to the question of the participation of the people in the process which is accepted as the clearest legitimisation of the constitutional act.[11] According to some authors this process of constitutional drafting consists primarily of a so-called

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[9] See for a more restrictive analysis the Gregory H. Fox conclusion to *"The right to political participation in international law",* in *"Democratic Governance and International Law"* (2000), p. 89–90.

[10] Decision CCPR/C/43/D/205/1986, of 3 December 1991 in the case of Marshall v. Canada. See especially paragraph 5.4 of this Decision where the Committee suggest that *"It is for the legal and constitutional system of the State party to provide for the modalities of such participation [conduct of public affairs, directly or through freely chosen representatives – emphasis added]".*

[11] John Locke in the Second Treatise on Government (1690) affirms *"And thus that, which begins and actually constitutes any political society, is nothing but the consent of any number of freemen capable of a majority to unite and incorporate into such a society. And this is that, and that only, which did, or could give beginning to any lawful government in the world".* (Chapter VIII - Of the Beginning of Political Societies, Section 99).

"constitutional momentum".[12] This means that there should be a community which is aware of, and ready to be bound by, the same set of rules and accepts the need to behave in conformity with these rules. It is crucial that these communities have the same, or at least a basic, common understanding of the rules they would opt for as the ones which will regulate their society and the state institutions as well as the behaviour of each of the individuals belonging to the same society vis-à-vis the society, the state institutions, as well each other.[13]

This community, according not only to Locke and Rousseau but also to modern authors referring to them[14], is nothing less than a people engaged in a struggle to exercise its sovereignty. Most of the world's constitutions have the tendency to find the legal legitimacy of their formal existence as a basic source of law in the presumption of representing the people. In fact, most of the world's constitutions mention that "*we the people*" are deciding this constitution. Thus, the first question when considering the democratic participation as a process is the identification of the number of individuals and groups who would consider themselves as belonging to "*the demos*". This identification, accompanied by the identification of the background and the reasons that make several individuals or groups conscious of belonging to the same "*demos*", is crucial for considering the participation and the involvement on the process of drafting the constitution which will govern the society they belong to.

The identification of the demos not only creates the necessary social relations for obtaining the indispensable solidarity in creating the legal links to identify and consolidate this society. These legal links, from the constitution

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[12] Bruce Ackermann develops this concept to distinguish normal political processes of a society with its constitutional choices. In both its works *"We the People: Foundations" and "We the People: Transformations"*. Both published by Cambridge, MA: Harvard University Press respectively in 1993 and 1998. See also J. Tully, who explains that the *"Greek term for constitutional law, nomos, means both what is agreed to by the people and what is customary"* in *"Strange multiplicity: constitutionalism in an age of diversity"*, 1995, p. 60.

[13] Kant recognised the need for such a community in assessing *"Public Right is therefore a system of laws for a people, that is a multitude of men, or for a multitude of peoples, that, because they affect one another, need a rightful condition under a will uniting them, a constitution* (a constitutio)*, so that they may enjoy what is laid down as right. This condition of the individuals within a people in relation to one another is called a civil condition* (status civilis)*, and the whole of individuals in a rightful condition, in relation to its own members is called a state* (civitas)*"*. Immanuel Kant – "Metaphysics of Morals in Kant, Practical Philosophy", Cambridge: Cambridge University Press, (1996), 6:311.

[14] Richard D. Parker, Williams Professor of Law, Harvard Law School in *"The First Principle of Popular Sovereignty: Politics without End"*, 2001, suggests that *"First….what I see as the internal logic of popular sovereignty – a practical process of creating a 'people' ready, willing and able to exercise 'sovereignty'"*. See also Albert Weale's *"Contractarian Theory, Deliberative Democracy and General Agreement" in "Justice and Democracy: Essays for Brian Barry"* - Ed by K. Dowding, R. E. Goodin and C. Pateman, Cambridge University Press (2004) pp. 79–97.

down to the most routine legal acts offer the legal structure of a society and constitute one of the most evident elements of identification towards the rest of the world. At the end they are decisive in the eventual establishment of a democratic regime in a country.[15]

This two-way process, the demos establishing the constitution and the legal system, and the constitution and the legal system identifying the demos, is crucial for the purposes of constitutional and legal drafting. This process of constitutional and legal expression and identification of a society is probably the first element to be taken into account in the process of democratic participation in constitutional drafting.[16]

Should political leaders and constitutionalists simply be passive or should they lead this process? Should they wait for the sporadic unelaborated expression of the 'constitutional' ideas of the common people? Or should there instead be a process which both aims to and enables the identification of the constitutional grounds and constitutional perceptions of a 'people'? In my opinion, it is precisely in this expression and identification that the success of a constitutional process – the success of building up the constitutional agreement and legitimacy in a country and offering the constitutional stability and effectiveness – resides.

The current processes of constitutional drafting demand a definition and understanding of the term 'democratic participation'. To my understanding, the very concept of the "democratic participation" process comprises two questions, which should be carefully considered:

> *First*, whether the process, in order to be effective and meaningful, should include the whole society and reflect or address all of its interests and concerns;
>
> *Second*, by what means and with what techniques may the democratic process in constitutional drafting achieve the aim of being considered a "democratic process"? What is the accurate and factual meaning of a practical and effective participation of the *demos* in the process of the constitutional drafting?

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[15] Larry D. Kramer, argues that this participation in an organised political life transforms "the people" to "democracy". In *"The People Themselves: Popular Constitutionalism And Judicial Review"* Oxford University Press, 2004, pp. 190–191.

[16] See, among others, Franz C. Mayer and Jan Palmowski in *"European Identities and the EU – The Ties that Bind the Peoples of Europe"*, JCMS 2004 Volume 42. Number 3. pp. 573–98.

The answer to the first question cannot be framed only at the juncture during which the constitutional-drafting process is taking place. In order to have an effective participation of the people in the drafting of the constitution, the people should be organised in civil structures, which are able to formulate and express their ideas and interests. Experience shows that such organisation of the people could be in the form of institutions, political parties, trade unions, associations, professional bodies, NGOs, universities, etc. It would be, in fact, unrealistic to pretend that the involvement of an unorganised civil society affects the process of achieving a specific position for constitutional provisions' drafting or for any other social and institutional achievement at the local, national or even international level. Indeed, this basic organisation of the people is one of the most evident preconditions for forming an organised society and the constitutional momentum which we dealt with above.

This preliminary aspect of the basic organisation of society should be accompanied by, and combined with, an entire process of civic education. The effective participation of the people in the process of constitutional drafting cannot be achieved under conditions where there is a lack of basic knowledge and understanding of constitutional affairs and of constitution's purpose, objectives, and terms. In addressing this deficit, all structures of society should be involved in a process of information distribution, explanation, education in and formation of constitutional affairs.[17]

This civic education process should not be limited in time – but limited only within the period of the constitutional drafting. The process in itself could be achieved through two practical means: namely by increasing the public awareness in public affairs and constitutional choices and by winning over public opinion in relation to these affairs and choices.[18] The real purpose would be to have a democratic participation of all organised structures of the people in public affairs, including the drafting and the application of the constitution. If the participation consists only of producing a legal text, the very sense of the right to participate in public affairs would be seriously undermined. In effect, public participation in constitutional drafting should not be an exceptional moment

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[17] For a comprehensive analysis in this regard see Thomas Carothers *"Promoting the Rule of Law Abroad: In Search of Knowledge"*, Carnegie Endowment for International Peace, 2006.

[18] Jurgen Habermas asserts that *"…democratic procedure no longer draws its legitimizing force only, indeed not even predominantly, from political participation and the expression of political will, but rather from the general accessibility of a deliberative process whose structure grounds an expectation of rationally acceptable results."* in Jurgen Habermas "The Postnational Constellation" - Political Essays, Cambridge, Massachusetts: MIT Press. 2001, p. 110.

but rather a continuous and never-ending process of evolving the conscience of the people towards a greater understanding of the rules regulating their life. The participation of the public in constitutional drafting means creating a common understanding and commitment of the people on the basic ways of the organisation and functioning of society and its institutions.

To obtain real public participation in constitutional drafting and reforms, the International Association for Public Participation identifies 7 standards:[19]

- The public should have a say in decisions about actions that affect their lives.
- Public participation includes the promise that the public's contribution will influence the decision.
- The process communicates the interests, and meets the process needs, of all participants.
- The process seeks out and facilitates the involvement of people potentially affected by the proposed decision.
- The process involves participants in defining how they will participate--thus affecting how the process will be structured.
- The public participation process provides participants with the information they need to participate in a meaningful way.
- The public participation process communicates to participants how their input affected the decision.[20]

These standards are at the same time objectives to be achieved through adequate procedural and infrastructural choices. This is probably the most difficult task in the mission of effectively and concretely involving the people in

[19] See in http://www.iap2.org.

[20] See also Anne Elizabeth Stie in "Assessing Democratic Legitimacy from a Deliberative Perspective - An Analytical Framework for Evaluating the EU's Second Pillar Decision-Making System" (RECON Working Paper 2007/18), who suggests that "a deliberative-democratic decision making procedure must:

1. Include the viewpoints of affected and competent parties;
2. Take decisions in openness so that the relevant information and documents are accessible and the opportunity for public debate and scrutiny are possible;
3. Provide structures and procedures for neutralising and balancing asymmetrical power relations;
4. Facilitate deliberative meeting places;
5. Have decision-making capacity."

the constitutional drafting.[21] For the public at large it is usually very difficult to consider at once the different aspects of constitutional debate. Therefore it would be wise to have separate considerations and debates on specific subjects of constitutional affairs, preferably preceded by informative and explanatory actions. The input of the public is thus much more concrete to the drafters of the Constitution. In addition, the public itself would feel more conscious about its contribution to the constitutional drafting process. Direct expression of the will of the people, only through a referendum in voting for or against a constitutional text, remains a limited and inadequate instrument for assuring participation. This is particularly true in face of practical challenges of the constitutional drafting and implementation.

3. Democratic participation in constitutional drafting in practice

In general all politicians and legal experts consider the participation of the public as an element that reinforces first and foremost the democratic acceptance and the legitimacy of the constitutional text. It might also contribute to enhancing the quality of the text. Nevertheless there are specific problems, related to the drafting or later to the application or interpretation of the constitution that might restrain the impact of democratic participation in the constitutional drafting and might render the principle of democratic participation void of purpose and effective impact. Even more dangerously, the misunderstanding, the abuse and improper implementation of Rousseau's dream highlighted briefly above, might run contrary to its rationale and lead to very anti-democratic regimes. Below some of these problems are revealed which in my view deserve to be dealt with in this paper.

a. Constitution for all v. constitution for the majority[22]

The involvement of the people in drafting constitutional texts raises an important question related to the essence of the rule of law concept and even to

[21] The Albanian experience of regarding the 1998 Constitution, substantially supported by international expertise and especially the Venice Commission, has shown that proper institutionalisation of the process of the democratic participation is a key factor for its success. See for a more developed explanation of the Albanian case Scott Carlson p. Molly Inman, ABA/CEELI *"Forging a Democratic Constitution: Transparency and Participation in the 1998 Albanian Constitutional Process"*, UN Internet Forum on Conflict Prevention.

[22] See for an analysis in relation to the specific position of ethno-cultural minorities in a democracy Steven Wheatley "Deliberative Democracy and Minorities", EJIL (2003), Vol. 14, N° 3, pp.507–527.

the very concept of law as such. Public participation in constitutional drafting creates the impression that the act to be agreed and adopted has to necessarily represent the interests of all people. A priori, this goes in line with the principle of democracy, which at the end justifies the participation of the people in constitutional drafting. But on the other hand, this may jeopardise the very sense of participation if the text were adopted, as it has been always the case, only by a majority of voters. There are two concerns related to this issue.

Firstly, the constitution should, in principle reflect the basic conditions of the organisation of the entire society. As such, it should also take into account the interests of the minority, when such interests are in conformity with general principles of constitutional law and especially of human rights[23]. In order to get the constitution adopted the different actors leading the process might adopt solutions that do not necessarily represent the fundamental constitutional interests of all the people. If these interests are not taken duly into account the result might lead to a situation where a constitution represents only the rule of the majority and not the rule of the people in general, and a part of the population might see their interests totally excluded from the constitutional text.[24]

The effect of this situation brings us to the second concern. The position of society over specific constitutional topics may fluctuate with the lapse of time and even within relatively short periods of time. Thus, a choice supported by a minority during the relatively limited period of constitutional drafting might be supported by a majority of people in a society after a certain period. This might depend on various circumstances depending on the process of constitutional drafting as such, on the process of the participation of the people in such processes; on the interpretation and implementation of the constitution as such, as well as on the evolution of society. If this situation comes to pass then the question of the modification of the constitution might in turn very soon be under review.

In this regard, does the term participation also include the negative partici-

[23] See as an example in relation to this the ECtHR judgement in Young, James and Webster v. United Kingdom (13 August 1981), paragraph 63.

[24] In this regard, James Crawford correctly states: *"That the will of the people is to be the basis of the authority of government is as good a summary as any of the basic democratic idea. But the idea of democracy reflected in the International Covenant (of Civil and Political Rights – emphasis added), in the Universal Declaration and in other instruments is not a simple majoritarian one. It is a reflection of the idea that every person, whether member of a majority or a minority, has basic rights, including rights to participate in public life."* Inaugural lecture at Cambridge University, on March 5, 1993.

pation in the sense of the contestants and of the part of the public who voted against the proposed version of the text? Here there is a debate over the compatibility of the democratic processes and constitutional choices representing the long standing interest of a society and not the momentous will of leading forces in a society (see item *b* below). This debate, whatever the outcome, reinforces at the end of the analysis the need for a genuine, real, general and non-exclusive participation of the public in the constitutional drafting process. Giovanni Sartori even raises the question of the use of democratic systems by minority of restricted elites ruling over the majority of the population, but not in a leading position[25]. This might be the result of, among other reasons, political manipulation, financial and economic pressure, low level of awareness among the broad population of democratic governance principles, lack of a free and independent media and, probably most importantly, of well-established independent institutions based on the concept of separation of powers and the rule of law based on human rights and fundamental freedoms[26]. So far international law prefers to deal with this aspect by bypassing the internal procedural aspects of the majority rule through setting international standards and substantial guaranties for the individuals and the minorities in the text to be adopted.

b. Temporary participation?

Thomas Jefferson maintained that the participation of the people is more important in the courts than in the legislature as *"the execution of the laws is more important than the making of them"*.[27] Probably he feared that the principles embodied in the laws, including here the constitutions, could be weakened during their execution and interpretation process. In a State governed by the rule of law this interpretation and execution are achieved through institutions functioning on the basis of the constitution by interpreting and applying the entire legal system in conformity with the constitution. There lies the problem. Do these institutions interpret and apply the law in conformity with the expectations of the drafters, including people, at the time of drafting?

A successfully drafted text would be an act with clear, certain provisions which

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[25] In its "*The Theory of Democracy Revisited*", 1987 published by Chatham House, the question of "*Democratic Government by Leading Minorities*, *Responsiveness and Responsibility"* is dealt with.

[26] See for a very interesting standing on the relations between democracy and international human rights law, Paul Harvey *"Militant Democracy and the European Convention on Human Rights"*, E.L. Rev, 2004, 29 (3), pp. 407–420.

[27] *"The Writings of Thomas Jefferson"*, vol. VII, p.423 (14 July 1789) – Washington, 1907.

lead to legal effects and expectations already intended at the time of drafting or at the time of interpretation by common sense and by the community of professionals and the people as well.

There is need to consider a major issue of modern constitutional law in dealing with this issue – the constitutions as normative acts offer the procedural guarantees for the implementation and interpretation of their provisions. There are numerous constitutions in force providing for the possibility of the institutions, and even individuals, to challenge the way that the national constitutions are implemented or interpreted, or fighting for the respect of their constitutional human rights and fundamental freedoms. The more open these procedural guarantees are, the more the drafters of the constitution will offer a concrete possibility for an active continuous participation of the institutions and more importantly, the people, in the process of constitutional drafting through its implementation. This participation not only offers the possibility that the constitution is interpreted and implemented in conformity with the people's interests, but a possibility is also created for the constitution to be an instrument that develops alongside the development of society as well. In the end, constitutional procedural guarantees available to individuals and institutions during the constitution-implementation process would create a concrete possibility for the democratic participation in the *"constitutionalisation*" of the life of a nation and of a society.[28]

c. Constitutional drafting through courts' jurisprudence[29]

Jefferson's expression as stated above has a conceptual impact on the constitutions of many countries in the world. Whereas in USA the participation of the people in the courts is guaranteed by the concept of the jury, in Europe it is seen in the availability for the individual to have access to the courts in relation to their constitutional rights, in some countries this right is also recognised by the Constitutional Courts. There is a concrete possibility for involving individuals in constitutional interpretation and implementation. But this procedure, in

[28] See in this regard: *"Judicial review as a contribution to the development of European constitutionalism"* Lenaerts, Koen in Yearbook of European law, Vol. 22 (2003) Oxford University Press, 2004. pp. 1–43.

[29] For the concept in general Larry Kramer "We, the Court", Harvard Law Review, 2001. 115:4. In relation to ECHR and ECJ see respectively, among others, J.-P. Marguénaud *"Comment la jurisprudence de la CEDH contribue au progrès de la démocratie ?"* and P. Martens *"La CJCE peut-elle contribuer à faire avancer le processus démocratique au sein de l'Union européenne?"* in *"Justice et démocratie"* sous la direction de S. Gaboriau et H. Pauliat, PULIM, 2004.

some constitutions is perceived as a direct or indirect appeal procedure, opens up the opportunity of the interpretation of the Constitution before and by the courts.

The latter represents another concern relating to the democratic[30] participation in constitutional drafting. National and international practice shows that courts, especially constitutional but also, increasingly, international courts, through a proactive interpretation of their constitutional provisions, might be in effect transformed into constitutional drafters.[31] Through their jurisprudence the courts can amplify, reduce or even alter the meaning of constitutional provisions, depending on socio-political developments, institutional confrontations, and international legal development or even depending on their composition and background of their members. On several occasions, the courts have been the institutions which have interpreted and applied clearly and concretely the concept of constitutional democracy.[32]

Other questions, still of a constitutional nature, are of major importance in this framework, namely: the professionalism, the independence and the impartiality of the courts. This "unsecure" process might raise concerns regarding the democratic life of a constitution eventually borne democratically.[33] On the other hand, there are authors suggesting that if the courts control the eventual constitutional developments through jurisprudence this would offer

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[30] See in this regard *"Constitutionalizing adjudication under the European Convention on Human Rights"* Greer, Steven, Oxford journal of legal studies, Vol. 23, N° 3 (2003), p. 405–433, as well as *"Diritto comune delle libertà in Europa : profili costituzionali della Convenzione europea dei Diritti dell'Uomo"* Francesco Cocozza Ed. G. Giappichelli, 1994 Centro italiano per lo sviluppo della ricerca (CISR) ; N° 14.

[31] For the role of ECJ in this regard see also Miguel Maduro *"We, The Court: the European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of EC Treaty"* Oxford, Hart Publishing, 1998.

[32] See ECtHR judgments (among many others) in *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, (paragraphs 50–54), *Refah Partisi v. Turkey*, 13 February 2003, paragraphs 102–103, *Matthews v. UK*, 18 February 1999, paragraph 49, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, paragraphs 32, 43–45. In this last judgment the Court affirms: *"Not only is political democracy a fundamental feature of the European public order, but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that must claim to spring from a "democratic society"*. See for an interesting analysis Susan Marks, *"The European Convention on Human rights and its Democratic Society"* in BYIL 60 (1995), p. 209.

[33] See for an interesting analysis over a concrete case Bertrand Mathieu, *"Remarques sur un conflit de légitimité entre le juge et le législateur dans la détermination de l'intérêt général et la protection de la sécurité juridique. A propos de la décision de l'assemblée plénière de la Cour de cassation du 24 juin 2003"* , in: *Revue française de droit administratif*, n° 3, mai-juin 2003, Articles, pp. 470–476.

an indispensable guarantee and even would help to avoid threats dealt with in the above sub-sections *(a)* and *(b)*.[34]

d. Constitutional amendments

Constitutional amendments are of major importance when we talk about a democratic constitution. To ensure the greater flexibility of the constitutions and eventually to modify those depending on changing situations, constitution makers allow for amendments to be made by the parliament or assembly. If this process of amendment is not carefully regulated in the constitution and if it does not follow the same procedural guarantees for democratic participation as during the initial drafting of the constitutional text, the latter might face a risk which could undermine the entire democratisation of the process. The possibility for modification might result in a situation where it could be simply verified that *"we, political parties hereby modify what you, the people, have decided"*. At times, constitutional modifications are needed to achieve conformity with international commitments or to pave the way to comply with such obligations, or, to reflect jurisprudential interpretations of constitutional provisions.

It is important that all constitutional modification processes and amendments of specific provisions are accompanied by a similar public consultation regarding the necessity of the constitutional choice and the choice itself. But here again the public consultation should offer all the guarantees and facilities to enable a genuine and accurate public consultation and not comprise simply a political vote of the moment.

e. Civil society participation in legislative drafting

This process of democratic participation in constitutional making would be, in the end, limited and would probably have no practical effect if it is limited only to the drafting of the constitutional text. The role of the people and its organised structures and stakeholders should continue the process of implementing the constitution through the legislative process. Most often, the people consider that the manner, the quality and the effect of the implementation of a constitutional provision through legislation and court jurisprudence, is more important than the constitutional provision itself. Specific legislation, implementation of

[34] See in this regard Pierre Pescatore *"La légitimité du juge en régime démocratique"* (2000). See Ulrich R. Haltern *"High time for a check-up: Progressivism, Populism and Constitutional Review in Germany"*, Jean Monnet Working Paper 05/96. See also the references to Larry Kramer - footnotes 15 and 29 above.

constitutional provisions regulating for instance fundamental freedoms, social rights, role and independence of the judiciary, ombudsman and other institutions protecting human rights, budgetary issues, etc., are of major importance and should be discussed with civil society actors.

If the people and their organised structures are not continuously consulted, their intended participation in the constitutional drafting process would seem, to the people, like a forgotten dream which does not have any impact in their day-to-day life. As a consequence they would lose faith in participating in public life.

The legislative process in many countries, but also in international organisations, shows that the majority of legal acts adopted within their respective legal systems is procedurally consulted with civil society actors and does take into account their opinions. For this purpose, specific consultation procedures are provided to facilitate the participation of civil society. The wider the scope of this possibility, the better it reinforces the trust of the people in their institutions and in the awareness of the latter for observing the rule of law.

Following on from this, there is a factor which I consider is of fundamental importance – the role of legal doctrine, legal thought and legal analysis in a country. One of the difficulties of the process of adoption or not of a constitutional act by referendum is the question of "assent or dissent by ignorance, commodity or interests of the moment".[35] For avoiding this risk the long-term professional role of the legal doctrine in particular is indispensable. The professional elaboration and explanation of legal choices and legal positions makes the popular participation more effective, comprehensive and meaningful.

f. National constitutions' compatibility with international standards

Modern constitutional law considers as indispensable the two elements that form part of current constitutions. First, the separation of powers and the respect for the checks-and-balances principle. Second, the inclusion of a detailed catalogue of human rights and fundamental freedoms, with a normative and not just declaratory character and accompanied by appropriate procedural guarantees.

A large number of constitutions drafted, in particular after the fall of the communism in Europe and in other countries which leant towards moving away from democratic values after independence or political change or establish-

[35] A. John Simmons elaborates the elements of this consent. According to him consent must be given, first, intentionally and knowingly and, second, voluntarily. See *"Moral Principles and Political Obligations"*, 1981, p. 77, Princeton University Press.

ment of totalitarian regimes, tend to follow, respect, and sometime even copy, the catalogues of human rights contained in international law instruments.[36] Some constitutions give these catalogues with a priority status in the respective national legal order, whereas others grant them supremacy status. As a result of such provisions, a problem appears when evaluating democratic participation in constitutional drafting.

Who drafts these international norms which widely benefit from a constitutional status thanks to a formal or conceptual reference into the national constitutions? Are the people somehow involved in the preparation of these acts that influence the drafting and the interpretation of the domestic constitutions and laws? As is clear this is not the case, except in very specific cases,[37] one might conclude that in relation to human rights chapters the democratic participation in constitutional drafting is, indirectly but clearly, undermined. It becomes clear that sometimes it might be considered as much more important what a government negotiates with foreign governments than what it negotiates or concludes with its own voters. This might be even more problematic in the case of the European Union, where European Treaties and legislations modify not only the fundamental rights' concept but also the exercise of competencies and even the separation of powers,[38] especially in the case of EU membership. The membership to certain international organisations, mostly European ones, directly requires adhering to the democratic principle by the aspiring States.[39]

Different approaches between regional courts and constitutional courts in relation to human rights law are examples of this competition and difficulty in complying with the principle of constitution drafting with public partici-

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[36] For an analysis of the influence of the ECHR and its controlling mechanism in the new European democracies see, among others, Aeyal M. Gross *"Reinforcing the New Democracies: The European Convention on Human Rights and the Former Communist Countries – A Study of the Case Law"*, in EJIL, Vol. 7 (1996) N° 1, p. 89.

[37] Except of course the ratification by referendum of EU/EC Treaties and/or their modification in some countries of the European Union starting from Maastricht in 1992.

[38] In relation to this, Miguel Maduro affirms that "European integration does not challenge only the national constitutions … its challenges the constitutional law itself, indeed" in *"We, The Court: the European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of EC Treaty"* Oxford, Hart Publishing, 1998.

[39] See for instance the *considerandum* 3 of the Preamble and Chapters I p. II of the Statute of the Council of Europe. See also the Conclusions of the Presidency of the European Council in Copenhagen (21–22 June 1993) in relation to the co-called the First Copenhagen Criteria – p. 13 of the Conclusions. See also the third *considerandum* and Articles 6, 7 and 11 of the EU Treaty and well as Articles 177 and 309 of the EC Treaty – in EN Official Journal of the European Union C 321 E/1, 29.12.2006.

pation.[40] These constitutions might be well drafted with the participation of the public, but their drafting should comply and they should be understood in conformity with acts, which normally are not drafted with the participation of the public. Should the public participate in drafting fundamental international acts as well? Or are there any means to make sure that the ideas and interests of the people are directly reflected in the preparation of these acts? Is the ratification by the parliament or even by referenda sufficient to legitimise the participation of the people in the process of adopting these international norms?[41] From the substantive point of view international law clearly contributes to the democratisation of national constitutions but from the procedural point of view it might be argued that international law, produced by states, i.e. governments, and increasingly developed by international courts, influences the national constitutions which are eventually adopted directly by the people. The pertinence of such consideration is more real if we consider the remarkable increasing importance of these norms in the hierarchy of all national legal systems.[42]

4. Attempted conclusion

In view of theoretical inclinations and practical challenges to democratic participation in constitutional drafting, the conclusion seems to be a complex one. It stems from the need for people and state institutions to establish a communicative, consciously responsive and a continuous relationship among them is a crucial element for the functioning of the concept of democratic participation in constitutional drafting. To this end, they should find the appropriate ways to effectively make possible governing by the people. The other guarantees, at constitutional and international levels remain crucial, democratic participation in constitutional drafting being only one, although very important aspect of the entire concept of a democracy. My preference would be not simply for a

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[40] Examples of these differences might be the judgments of German Federal Court of Justice (19 December 1995) of the Federal Constitutional Court (15 December 1999) and of the European Court of Human Rights (24 June 2004) in relation to the case of Princess Caroline of Monaco focused in different understandings and interpretation of the concepts public figure par excellence.

[41] There are also much more extreme cases where National Constitutions have been adopted as part of international treaties and entered into power in accordance with rules of international law and not national constitutional law. See for the case of Bosnia and Herzegovina: Sienho Yee *"The New Constitution of Bosnia and Herzegovina"*, EJIL Vol. 7 (1996) N° 2, p. 176.

[42] Dominique Rousseau *"L'intégration de la Convention européenne des Droits de l'Homme au bloc de constitutionnalité, Conseil constitutionnel et Cour européenne des droits de l'homme : Droits et libertés en Europe : Actes du Colloque de Montpellier, 20–21 janvier 1989. – Paris"*: Editions STH, 1990, pp. 117–136.

constitutional act which simply follows the concept of democratic participation in a single moment – its approval – but for an act which creates the fundamental guarantees for a consistent, institutional, continuous and less emotional day-to-day participation in the public affairs of society.[43] To what extent democratic participation in the public and constitutional affairs is present, depends on the legal guarantees that the constitution offers in this regard.[44] As Habermas suggests *"In a democracy the correctness of decisions depends solely on the procedures"*.[45] It is in this respect, despite conceptual difficulties46 especially up to international law, to give some guidance influencing the entire concept of democratic participation in constitutional drafting in particular and to democracy in general. If international law succeeds for the moment to proclaim a right to democratic participation in public affairs and constitutional drafting, it has still much to do in defining the precise content of the concept and even more in finding the legal ways to transform it into a legal standard under international law. In this respect, international human rights law has been a front-runner.

As long as democracy and popular participation remain predominantly theoretical socio-political concepts, the elements which enable their functioning in practice – rule of law, separation of powers, individual human rights – are primarily legal concepts and they constitute the basic criteria under international law for assessing democratic states and effective participation in constitutional drafting and public affairs in a country[47]. If the democratic participation in

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[43] Alexis de Tocqueville proposes that "The existence of democracies is threatened by two principal dangers: namely, the complete subjection of the legislature to the will of the electoral body, and the concentration of all the other powers of the government in the legislative branch". Translation from "De la démocratie en Amérique" (première partie, Chapitre VIII, p. 162).

[44] This is probably because the conclusion has been drafted by a lawyer and not by a philosopher or political scientist. See for instance Pierre Pescatore who draws the difference between "le pragmatisme des juristes et le dogmatisme des philosophes", in "La Philosophie du Droit au tournant du millénaire", Luxembourg 2002, p. 5.

[45] Jurgen Habermas "Reply to Symposium Participants, Benjamin N. Cardozo School of Law", in Cardozo Law Review N° 17, issue 4, p. 1495. Norberto Bobbio as well clearly advocates for a procedural conception of democracy. See N. Bobbio, "Democrazia" in N. Bobbio, N. Matteuccci, G. Pasquino, "Il Dizionario di politica" Utet, Torino, 2004, as well as N. Bobbio "Il futuro della democrazia" Einaudi, Torino, 1984, p. 6".

[46] In the introductory remarks to the "La démocratie représentative devant un défi historique ?" Bruxelles, Bruylant, 2006, Prof. Slobosan Milacic suggests that "democracy remains still today, a political, systemic or civilising cause without having a legitimate alternative", p. 37.

[47] Susan Marks clearly puts forward that *"What makes governance democratic is that political authority is conferred through the mechanism of periodic competitive elections, backed up by civil rights (freedoms of expression, assembly and association, and so on) and a constitutional order dedicated to the rule of law."* In *"The Riddle of all Constitutions – International Law, Democracy and the Critique of Ideology"*, OUP 1999, p. 2.

constitutional drafting and elections is a guarantee, then the rule of law and separation of powers are the necessary guarantees of that guarantee. In the end, none of these concepts would have a long life in our societies alone, without reciprocally influencing and being influenced by each other.[48] The magnificent work of the Venice Commission under the leadership of Antonio La Pergola has magisterially assisted not only the drafting but also the approval procedures of most Constitutions in Council of Europe Member States. The Venice Commission continues to constitute an important doctrinal and case-by-case reference for the ongoing constitutional and legislative reforms in the Council of Europe areas of democracy, rule of law and human rights. It represents one of most interesting examples of how the international standards of constitutional democracy and human rights are drafted, explained, clarified and adopted by new but also old democracies.[49]

[48] To this extent Ralf Dahrendorf speech given to the European Court of Human Rights on 8 June 2000 at the ceremony of the presentation of Studies in honour of Rolv Ryssdal asserts "there can be a semblance of democracy without rule of law, and there can be a shell of the rule of law without democracy. Both are more desirable than their absence together. However, the constitution of liberty, or what I prefer to call the liberal order, requires both. It is only when democracy is firmly based on the rule of law that it commands trust and is protected against passing enthusiasms and disappointments. It is only when the rule of law is enveloped in democratic institutions and processes that it becomes a more than formal guarantee of the liberty of citizens." Cited by Michael O'Boyle "On reforming the Operations of the European Court of Human Rights", [2008] EHRLR, p. 3. See also the ECtHR judgements especially in Golder v. UK, 21 February 1975, paragraph 34, Klass and others v. Germany, 6 September 1978, paragraph 55 and their reference that "One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention…"

[49] See Jeffrey Jowell Q.C. *"The Venice Commission: disseminating democracy through law"* in Public Law 2001, pages 675–683. For the contribution of the Venice Commission in this topic especially see publications in the Collection of Science and Technique of Democracy, and especially *"Constitution-making as an instrument of democratic transition"* (N° 3), (1998), and *"Constitutional justice and democracy by referendum"*, (Strasbourg, 23–24 June 1995) (N° 14) (1998)

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Constitutional Review in The Netherlands

1. Introduction

Although the present author has been a member of the Venice Commission for more than eight years, and was welcomed and treated by President La Pergola in a most friendly, almost fatherly way, at times he felt a little embarrassed. As a rapporteur he often had to make critical remarks about the way in which the constitutionality of legislation was guaranteed in the Constitution and/or legal practice of the state under scrutiny, knowing that the system of constitutional review in his own country presents certain features which would most certainly also give rise to some criticism within the Venice Commission if submitted for its comments.

Article 120 of the Netherlands Constitution prohibits the courts from reviewing the constitutionality of Acts of Parliament and of treaties. This means that, up to now, no judicial constitutional review of legislation exists. The Netherlands shares this exceptional feature with Switzerland as the only two member States of the Council of Europe. It needs no saying that the Netherlands judiciary system also does not comprise a Constitutional Court.

This rather peculiar situation was one of the reasons why, in the beginning, the Netherlands Government decided not to adhere to the Partial Agreement establishing the Venice Commission, afraid as they were that this would put them under pressure to change their constitutional system on these points. It took the Government two years to change their mind.[2]

On the other hand, Article 94 of the Netherlands Constitution provides that

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[1] The opinions expressed are those of the author personally.

[2] P. van Dijk, *"De Europese Commissie voor Democratie door Recht (Venetië Commissie); Het stille geweten van de Raad van Europa"*, (The European Commission for Democracy through Law (Venice Commission); The silent conscience of the Council of Europe), *NJCM Bulletin* 2006, pp. 83–92 (84).

domestic law may not be applied if and in so far as it is not in conformity with treaties to which the Netherlands is a party, or with decisions of international organisations that are binding on the Netherlands. This means that a system of judicial review for conformity with international law exists which, in actual fact, resembles constitutional review very closely. This holds in particularly true in the case of provisions of international law that deal with human rights and are self-executing, since these are to a large extent identical to the fundamental rights' provisions of the Netherlands Constitution, if not in wording at least in scope of application. Indeed, as a consequence of Article 93 of the Netherlands Constitution as interpreted in legal practice, even provisions of the Constitution itself have to be interpreted and applied in conformity with self-executing provisions of treaties and decisions of international organisations, unless their scope of protection is broader.

One of the consequences of the fact that such system of review is determined by international law, is that the provisions of the Constitution, even those concerning fundamental rights, have up to now received much less attention in Dutch legal practice than treaty provisions concerning human rights, at least the self-executing ones. This holds good, in particular, for the courts[3] since the prohibition of constitutional review, laid down in Article 120, is directed to the courts only. But there is also a tendency for the legislature, and for the Council of State in its advisory function concerning draft legislation, to refer primarily and more emphatically to the European Convention on Human Rights and to the case-law of the Court in Strasbourg than to the Constitution and the domestic case-law based on it, if a fundamental right enshrined in both legal instruments is at issue. This is not surprising in view of the precedence that the European Convention takes over domestic law in the Netherlands, including the Constitution. Nevertheless, if this would become, or rather remain, the general practice, it could threaten to undermine not only the legal but also the already rather week political, social and cultural significance of the Netherlands Constitution as a hallmark of the Netherlands as a nation state, and as the ultimate bastion against attacks on democracy, human rights and the rule of law.[4]

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[3] Though it took the courts a long time to get familiar with this international dimension of their review function. See P. van Dijk, *"Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary; The Dutch Case"*, in M. Nowak a.o. (eds), *Fortschritt im Bewußtsein der Grund- und Menschenrechte* (Progress in the Spirit of Human Rights), *Festschrift für Felix Ermacora*, Engel, Kehl am Rhein etc. 1988, pp. 631–650.

[4] Cf. J-L Debré, President of the French *Conseil constitutionnel*, in his address to the Venice Commission at its October meeting in 2007: *"Dans l'ordre interne, la Constitution est la norme suprême et il n'est pas sain que le contrôle de conventionnalité celui qui est devenu le plus important"*.

2. Constitutional review by the judiciary and the legislature

The prohibition of constitutional review contained in Article 120 of the Constitution does not mean that the courts play no role at all in constitutional review in the Netherlands. The courts do review secondary legislation and administrative decisions, as well as other forms of administrative action, for their conformity with the Constitution, in particular its provisions concerning fundamental rights. In that framework, there is relevant case-law concerning constitutional review.

However, in the Netherlands, constitutional review is at present largely in the purview of the legislature in the form of *ex ante* review. Guideline 18 of the Guidelines on Legislation states that the legislature should investigate which higher rules set limits to the freedom to legislate the subject concerned. This implies also that the legislature has to pay attention, in the explanatory memorandum accompanying the Bill, to any of such limits and how these have been respected. After the Government – or one of more members of Parliament, as the case may be – has thus drafted the Bill and its explanatory memorandum, it is subsequently the responsibility of the Council of State as legislative adviser on draft legislation, to examine whether sufficient attention has been paid to, and sufficient account has been taken of, these higher rules, including the Constitution. Next, the minister(s) introducing the Bill has to respond to the opinion of the Council of State in a reasoned report to the Queen, before submitting the Bill to the Lower House.

These reports may reveal a difference of interpretation of one or more provisions of the Constitution between the Government and the Council of State. Ultimately, the constitutional issue will be decided by the legislature after deliberations in the two Houses of Parliament in the presence of the minister(s) who defend(s) the Bill. Once the Bill is adopted and promulgated as an Act of Parliament, it is binding on the courts, who may not examine the constitutional issue anymore. Nevertheless, that particular Act of Parliament may, at the same time and for identical reasons, still raise questions under the European Convention on Human Rights, which the courts will have to examine if any of the parties expressly or impliedly refers to such issues. The outcome of that examination may lead to an application by an alleged victim to the Court in Strasbourg. If the European Court of Human Rights decides that the law or its application is in breach of the European Convention on Human Rights, this may indicate that it is equally in breach of a comparable provision of the Constitution.

In the case of secondary legislation, on the contrary, the courts may in the specific case before them, depart from the legislature's standpoint and declare the legislation inapplicable for reasons of incompatibility with the Constitution. The courts – including the European Court of Human Rights – in making that decision may take into account the opinion given previously on the constitutional issue by the Council of State, but they are of course not obliged to do so. The advisory opinions of the Council of State are, also in that context, just that: advisory.

3. Is there a need for change?

The question may well be raised whether the state of affairs in the Netherlands, described so far, is a satisfactory one. On the one hand, the striking difference between the very progressive Netherlands system of review for conformity with international law and the total prohibition of judicial constitutional review of statutory legislation is difficult to explain and justify. On the other, the legislature (and the House of Representatives in particular) would seem to be less and less equipped to carry out constitutional review, or at least does not appear to give it any priority. It may sound very democratic to say that the legislature has the last word on the constitutionality of Acts of Parliament, but the point is whether that situation still does justice to the complexity of the matter and the shift in power between Government and Parliament, and to the rapidly changing public opinion, social trends and international relations, which may cast a different light on the constitutionality of an Act of Parliament. Moreover, there is the question of whether the hegemony of law in a state governed by the rule of law does not demand an independent and impartial review of the law for its conformity with higher law, including the Constitution.[5]

That does not mean, however, that there should be a complete shift from the legislature to the judiciary. Even – and perhaps, precisely – in the situation in which the legislature would no longer have the last word because the courts would have the power to review the constitutionality of statutory law, an *a priori* assessment of constitutionality in the drafting process remains highly

[5] Cf. R. Dahrendorf in a speech delivered in the European Court of Human Rights on the occasion of the presentation of the Studies in honour of Rolv Ryssdal, a former President of the Court, on 8 June 2000: "It is only when democracy is firmly based on the rule of law that it commands trust and is protected against passing enthusiasm and disappointments".

significant. The possibility that the court will set aside the law for reason of unconstitutionality might induce the legislature, again both Government and Parliament, as a preventive measure, to take their *ex ante* review more seriously, and to pay close(r) attention to the opinions of the Council of State on the issue. This may, and in my opinion should, also have a stimulating effect on the attention paid by the Council of State to constitutional issues.

If judicial constitutional review was introduced in the Netherlands,[6] it may well be questioned whether the provisions of the Constitution, in their current formulation, offer a suitable yardstick to the courts for their review and will lead to a sufficiently uniform interpretation. This holds true even for the provisions concerning fundamental rights. In general, these provisions could be said to have been formulated more as attributions of powers rather than as criteria for judicial review.[7] It may, therefore, well be that once constitutional review is introduced, the courts will still be inclined to fall back on the much more precise formulation in the European Convention on Human Rights and other treaties, and their authoritative interpretation by the European Court of Human Rights and other competent bodies. In performing their constitutional review, they will then give the provision(s) of the Constitution at issue an interpretation that is in line with the Strasbourg case-law or other international jurisprudence. This way, judicial constitutional review would have only limited added value in the Netherlands.

The legislature, and the Council of State as an advisory body, have a broader scrutinising task and, thanks to that, have less of a problem with the provisions of the Constitution in their current formulation. Indeed, in its advisory opinions the Council of State quite often focuses on the question of whether a Bill or, as the case may be, secondary draft legislation is compatible with the Constitution. These opinions may also be of some guidance to the courts in the course of constitutional review in the future, but in reality both the legislature and the judiciary will (continue to) draw largely from their main source: the case law of the European Court of Human Rights and other international jurisprudence.

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[6] A proposal by an MP to amend the Constitution to that effect is pending before Parliament at the moment.

[7] See F. Hey, R. de Lange & P.A.M. Mevis *"De transnationale dialoog tussen rechters: verschillende interpretaties van Europese en nationale grondrechten"* (The transnational dialogue between courts: different interpretations of European and national fundamental rights), *Nederlands Juristenblad* 33 (2005), paragraph 5.3 (electronic version).

4. Present practice: constitutional review by the legislature and the Council of State

From the *"legisprudence"* of the Council of State it may be concluded that there are often differences of opinion between the legislature (either the Government or Parliament, or both) and the Council of State regarding the constitutionality of a Bill or other draft regulation.

There are cases in which no constitutional issues are raised in the Council of State's advisory opinion, yet problems as to constitutionality then arise in the consecutive legislative process. That happened, for example, in the case of the Bill on same-sex marriages. In its advisory opinion the Council of State did not make any observation on this subject (which, of course, does not necessarily mean that constitutional issues were not raised during the stage of preparing the opinion). Yet the House of Representatives debated the constitutionality issue at great length, referring to Article 6 on freedom of religion, in connection with the beliefs of certain religious groups and possible objections on grounds of conscience from public registrars of marriages. The Government then as a counter objection pointed at the principle of equal treatment between couples of different and of the same sex embodied in Article 1 of the Constitution. There may be several reasons for such differences in approach. In general, the Council of State takes the position that it should not too lightly adopt the view that draft legislation is incompatible with the Constitution, assuming that in cases of an evident and serious incompatibility such a standpoint then carries much more authority. That is not necessarily the attitude parliamentarians are inclined to adopt. From debates in the House of Representatives one sometimes gets the impression that political groups or individual MPs who disagree with a Bill on other grounds, have a tendency to bring in the constitutional argument as heavy artillery.

In some other cases the Council of State does not expressly state that a Bill is unconstitutional, but that view may be inferred from the reservations expressed against the Bill and from certain conclusions drawn in the advisory opinion. This may be illustrated by the Council's advisory opinions on the Bill concerning the forced return of problematic youngsters to the Netherlands Antilles and Aruba. Given the political and emotional elements of the proposal which sharply divided supporters and opponents, the consideration not to emphasise the constitutional issue may have stemmed from a fear of a certain overkill. However, the observations on unequal treatment clearly implied that there was a problem with, at least, Article 1 of the Constitution concerning equal treatment.

Finally, there are cases in which the Council of State points at a conflict with the Constitution while the Government in its Explanatory Memorandum expresses a different opinion or no opinion at all. The Council of State will then advise the Government to amend the Bill or not to proceed with the Bill at all. Or, in the case of approval of a treaty, it recommends that the more stringent procedure be followed provided in Article 91, paragraph 3 of the Constitution for the approval of treaties which deviate from the Constitution. Thus, in connection with the proposal to enact a temporary law concerning emergency detention centres for drugs couriers the Council of State was of the opinion that the Bill did not offer sufficient guarantees that religious diets would be respected, and for that reason was not in conformity with Article 6 of the Constitution concerning freedom of religion. The Government did not deem it necessary to supplement the Bill on this point but the House of Representatives adopted an amendment to that effect. Although there is of course always the possibility that persons and institutions may differ in opinion on constitutional issues, differences in approach between the Council of State on the one hand and the Government and Parliament on the other would often seem to be a question of politics or expediency rather than of legal opinion. The Government may take the view that there is a need for the Bill, and knowing that its proposal will be supported by a majority in both Houses of Parliament, may not be inclined to allow constitutional issues to deflect it from its chosen path. The majority in Parliament may share the opinion of Government about the need for the proposed legislation or may feel bound by previously undertaken commitments when forming a coalition; they may also simply think that the issue is not important enough for bringing the Government into the limelight.

These latter cases are of course the ones in which the absence of a Constitutional Council with a final say in an *ex ante* review, or an *ex post* review, or judicial constitutional review in general, is most keenly felt. Indeed, if other than legal considerations determine the outcome of constitutional review, the primacy of the legislature may undermine the primacy of the Constitution. Once again, this is highly democratic but not in line with the philosophy of the rule of law.

5. Methods of interpretation applied by the legislature and the Council of State

Legislative practice does not reveal a clear view on the part of the legislature as to the place and role of the Constitution within our legal system and,

more broadly, within our society. The same holds true for the question of the desirability of regular adjustment, or at least – as an alternative – an evolutive interpretation of the Constitution; there are signals of a dynamic as well as of a conservationist approach. The opinions given by the Council of State are also not unequivocal on this point. This leads to the use of vastly differing methods of interpretation, which would seem not to be applied in any particular order of hierarchy.

In the case of the Constitution, because of its origin and its special status within the legal order of a democratic state governed by the rule of law, it would be logical to start from *a) the grammatical and historical method* and base one's interpretation on the text and the original intention. However, particularly in the case of fundamental rights, one should always be aware that most provisions concerning fundamental rights are not of an absolute character, but must be examined in the context of the other fundamental rights' provisions. This may ask for *b) the systematic method of interpretation*. Moreover, precisely because the Constitution cannot easily be amended but, on the other hand, its role within a rapidly evolving society should be to conserve values but not to fossilise them, there is in addition a need for interpretation methods that make it possible to respond to important changes in society without having to amend the Constitution at every turn; *c) the teleological and d) the dynamic method* that make the Constitution a living instrument. This ability to respond to important changes is all the more necessary when an urgent need for it is felt and waiting for amendments being made to the Constitution is deemed undesirable; *e) the anticipatory method*.

Especially in the case of provisions concerning fundamental rights, the importance of interpretation in line with the human-rights treaties has to be emphasised: *f) the treaty-conform interpretation*. However important the Constitution and a careful interpretation and application of its provisions are in drafting new legislation, it should always be kept in mind that this may not result in violating or restricting the standards as laid down in treaties and developed in international jurisprudence.[8] To prevent the courts from being forced at a later stage to conclude that a particular law, even if compatible with the Constitution (though this is not an issue on which the courts may comment at the moment), is incompatible with a treaty provision, the legislature must always

[8] See Committee of Ministers of the Council of Europe, Recommendation (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, 12 May 2004.

be aware of the fact that in examining any restrictions which the Constitution might impose on a Bill, the provision in question must be interpreted in line with the relevant treaty provisions. The same applies to the law of the European Union, which also takes precedence over national law and the Constitution. One might dispute whether the latter also holds true for the provisions of the Constitution relating to fundamental rights (the German and Italian Supreme Courts refuse to accept this *a priori* on grounds of principle – the 'Solange' case law) but that issue has lost most of its relevance since the Court of Justice of the European Communities incorporated the human rights provisions of the European treaties and the constitutional values of the member States as belonging to the general legal principles of Community law. Consequently, in interpreting and applying primary and secondary Community law, the Court of Justice will take account of these principles as well.

All the interpretation methods mentioned may lead both to a broad and to the narrowest possible interpretation of the guarantees laid down in the Constitution. Conversely, they may lead to a narrow, but also to the broadest possible interpretation of the scope for restricting the guarantees. Here too, the course of action followed by the legislature (Government and Parliament) is not always uniform and nor internally consistent. The approach adopted seems to be strongly influenced by the context, political or social desirability and other circumstances of the drafting process. In more brutal terms, interpretation appears to be governed by the desired result rather than the other way around. Apart from the fact that this is in general an unsatisfactory and, particularly in the case of important standards like those involved here, inappropriate state of affairs, it could give rise to serious problems if the courts acquire broader powers of constitutional review, since they might be less inclined to bow to expediency.

A degree of tension might then arise between the legislature, democratically empowered to decide what is in the public interest, and the courts, designated by the same legislature to assess the lawfulness of those decisions. The legitimacy implied in the guarantee of independence and impartiality of the judiciary functions alongside the legitimacy of elected representatives; this require a balanced approach which will do justice to the rule of law but does not lead to a situation of *gouvernement des juges*.

6. Conclusion

Fundamental rights are not always secure in the hands of the legislature. In preparing new legislation the Government will be inclined to be led primarily

by the problems at issue and the need to tackle them in the most efficient way while incurring the least possible costs and running the least possible political risk. As a result, it may in certain circumstances be inclined to manipulate the provisions on fundamental rights or to ignore them altogether.

In general the Council of State takes a protective attitude towards fundamental rights if they are evidently and seriously in danger, but its warnings are often ignored by Government, whose attitude is determined by the factors described above. The ultimate guarantee should therefore lie in Parliament. The House of Representatives, as a rule, shows no great interest in the legal quality of legislation as long as no political or social unrest threatens to emerge. What is left is the Senate, which in fact to a large extent performs the function of "*conseil constitutionnel*". In any debate on the usefulness or necessity of preserving this parliamentary institution in a bi-cameral system, one should therefore take into account that it constitutes an element in the legislative process for which there is no adequate alternative yet.

Perhaps, in the long run, one of the alternatives to be considered might be to entrust the Council of State with the function of a "*conseil constitutionnel*", but with this final remark the present author departs too far from his subject and will hastily put down his pen.

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Antonio La Pergola's Idiosyncratic Contribution to the Unique Success of the Venice Commission

The major forte of the European Commission for Democracy though Law (the Venice Commission), coinciding with the singular contribution to its mission by its first and long-time President Antonio La Pergola, has been due to correct historical timing and measured response to a situation that emerged, predominantly in Europe, towards the end of the ninth decade of the 20th century. For many it was sudden and for many others unexpected.

What happened at that historical juncture has been usually understood as the final collapse of a historical project, named either "communism" or "really existing socialism". It had been an attempt to implement the ideology of Marxism, in its Leninist-Stalinist version, in countries which at the end of the Second World War had come under the sphere of influence of the Soviet Union, a large country that had been working on the Socialist project since the end of the First World War. The name of the Soviet Union – the Union of Soviet Socialist Republics (USSR) had indicated from the very beginning that the state in question was not a nation-state but the nucleus of a universal project. This project was based on the idea of the dictatorship of the proletariat, which would lead to some kind of the end of history, the creation of a classless society. It was logical that constitutions in such states were essentially merely a window-dressing, a concession to "old-fashioned" ideas, where the real tenet was the unlimited power of the ruling party with its historical mission. In addition to the fact that such institutions were not really meant to be effectively brought to life, they could not depart from the ideology on which they rested. Accordingly, they did not *inter alia* recognise any separation of powers, which in fact meant that there was

a predominance of the executive branch, Parliament merely was of a decorative nature and there was an absence of an independent judiciary. The whole project being collectivist, based on the supremacy of the class over the individual, meant that guarantees of human rights had no place in the system.

However, to reduce the whole situation on the demise of communism would be simplistic. It should not be forgotten that many states of Central and Eastern Europe, with the possible exception of Czechoslovakia, had had, before communism was imposed on them, a poor democratic record. Quite frankly, some of them had fascist or quasi-fascist governments impressed, to be sure, by the example of some of the major European countries, such as Germany, Italy and Spain.

The sudden changes in many European states and some Asian in the European neighbourhood that occurred after 1989, confronted a larger number of nations with the need to quickly adapt to the new circumstances and to implement the ideas of modern democracy in a new constitutional set-up. These were the ideas which were a part of the efforts of many of their societal actors to change the political and social situation in such countries – it was a promise which had to be fulfilled in order to truly legitimise the new governments and to constitutionally anchor the achievements which had been the basis of the criticisms of the situation which had prevailed until the changes; changes which could be considered revolutionary.

This situation was in many respects historically unique. The colossal change in many countries, usually termed the transition from authoritarianism to democratic rule, had few historical precedents to follow and experiences to use. To complicate matters, the efforts to realise change in post communist countries could not benefit much from the experiences of those countries which had liberated themselves from dictatorship and authoritarianism by strictly political means. The whole "socialist" set-up had been based on abolition of private property and state ownership, which in some countries amounted to the state owning almost everything. New reforms meant therefore a complete overhaul of almost all the foundations upon which the state system had been based. The problems connected with the replacing of fascist governments in Europe and military juntas in Latin America provided some guidance and useful hints, but they did not offer full answers to the newly emerged questions.[1]

An interesting dilemma faced the new constitution-makers in countries

[1] Cf. V. Dimitrijević, *"The Insecurity of Human Rights after Communism"*, Oslo, Norwegian Institute of Human Rights, 1993.

which strived towards democracy. Normally, the constitution of a nation is a product of the experiences gathered in the process of its development and the result of political efforts reaching back deeply into the history of the relevant state. In such (shall we say "normal"?) situations the prevalent feeling is that nations have followed their own experiences and adapted their constitutions to the particular necessities of their societies. In the case of the states under consideration here, these experiences were non existent, obsolete or forgotten. The way out was to rely on the experiences and expertise of others, i.e. on the lessons learned by functioning democracies mostly in the period after the Second World War and expressed in written constitutions and constitutional practices shaped by strong international or trans-national influence. After all, human rights had not been an international concern before the adoption of the Universal Declaration of Human Rights in 1948 – until then human rights were an internal affair of sovereign states. Even the United Nations, which in its Charter listed human rights as their principle and goal, for almost quarter a century had refused to deal even with systematic and gross violations of human rights. Adapting something that looked like an international "ideology" was bound to meet with some resistance, especially among those who believed that they had suffered for decades from the imposition of ideological dogmas which had also been heralded as universally valid.

The feeling that some sort of international constitutionalism is contrary to the democratic tradition of a country is especially strong in the United States of America,[2] but in Europe it also raised the delicate issue of whether the demands on the new democracies were not discriminatory in relation to the "old" members of the Council of Europe, who mostly operated on the basis of their autochthonous constitutions, which very often remained verbally intact and were gradually adapted to new international currents by constitutional and political practice. In other words, was it not humiliating for the former socialist countries to pass a kind of an entrance examination to the club of civilised states where the latter, as old members, were not required to make necessary adaptations?

In such atmosphere the creation of the Venice Commission and the guidance offered to it by its first president La Pergola was a stroke of genius, fortunately without the accompanying fanfares, which in many cases have irritated people rather than won them a project. Members of the Commission are independent

[2] Cf. J. Rubenfeld, *"The Two World Orders. The Wilson Quarterly."* Vol. 27/ 4 (2003), p. 22 ff. Professor Rubenfeld served as the US Observer in the Venice Commission.

individuals who are however appointed and delegated by the governments of their countries; not only by the experienced "old members" of the Council of Europe, but also from newly accepted former socialist states, as well as those coming from countries awaiting admission to the Council and observers from non-European countries. A balance was thus struck between "pure" experts in constitutional law and other branches of law and those having access to political factors in their counties and being able to understand political realities. Furthermore, no duty was imposed on governments to report regularly to the Commission, say in the same manner as they have to do in relation to the United Nations treaty bodies for human rights. They were simply offered professional advice and competent comments in matters that they voluntarily submitted to the Commission. The advice given by the Commission was, unlike in cases of international tribunals, non-binding but relied on the authority and the prestige of the Commission.

This arrangement was commendable as it stood on paper but it had to be implemented with considerable tact and skill. This is where Antonio La Pergola entered the scene. His pervious experience and authority as lawyer, scholar, judge and politician imposed itself on the members of the Commission and the public and helped him to control the decision-making in a large body composed of powerful personalities so that the procedure which would normally be cumbersome and slow was streamlined and led to satisfactory results in a relatively short time. In view of the possible opposition from countries sensitive to international tutorship it was significant that advice was sought by their governments even in delicate matters where legal principles alone were not sufficient but principles of good governance also played a role, were accepted and used as impeccable arguments in parliamentary and other internal debates. From the moment that even the "old" members of Council of Europe, jealous of their constitutional and democratic traditions, started to turn to the Commission for guidance and advice all reservations regarding the usefulness of this body have disappeared. Antonio La Pergola and his collaborators carefully and gradually widened the scope of the activities of the Commission through the organisation of national and regional conferences, where important debates on the role that constitutions and legal instruments could play in the development of democracy took place and thus led to the creation of a sphere of rejuvenated democratic institutions in Europe and those parts of the world following the European example. It is to be hoped that the direction given to the Commission under La Pergola will continue and that this specific and ingenious institution will continue to play its important role.

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De l'élection comme événement à la démocratie comme structure. Réflexions sur la stabilité du droit électoral

Introduction

C'est en 1991, peu après la naissance de la Commission de Venise, que nous fûmes appelé a faire notre première contribution aux travaux de celle-ci, par la rédaction d'un document intitulé « Le droit électoral : principes généraux et niveaux normatifs ».[1]

Le président Antonio La Pergola, et le secrétaire de la Commission Gianni Buquicchio, avaient déjà décidé d'inclure le domaine électoral dans le champ d'action de celle-ci, comme aspect central de la démocratie.

A cette occasion, nous avions eu l'occasion d'aborder la question de la stabilité du droit électoral,[2] même si l'époque était plutôt au changement, voire aux bouleversements, qu'à la continuité et à la stabilité.

Entre temps, les structures constitutionnelles des nouvelles démocraties ont en général acquis leur stabilité. Par contre, le droit électoral est sujet à des changements continuels. La continuité du pouvoir des mêmes personnes, ou du moins du même parti, est souvent considérée à tort comme un gage plus important de stabilité que la continuité des règles du jeu. Or, un jeu ne fonctionne pas s'il a toujours les mêmes gagnants, mais s'il a toujours les mêmes règles.

C'est pourquoi, la question de la stabilité du droit électoral, relativement secondaire il y a dix-sept ans, est en train de devenir l'un des thèmes principaux de l'évaluation du droit électoral.

Dans cette contribution, nous allons d'abord présenter les principes dégagés

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[1] CDL(1992)001.
[2] CDL(1992)001, pp. 11–12.

par la Commission de Venise en la matière, avant de proposer des conclusions à en tirer pour l'avenir.

I. Les principes dégagés par la Commission de Venise

Le Code de bonne conduite en matière électorale[3] élaboré par le Conseil des élections démocratiques[4] et la Commission de Venise est le document de référence du Conseil de l'Europe dans le domaine des élections. Il a abordé la question de la stabilité du droit électoral comme suit :[5]

> « Les éléments fondamentaux du droit électoral, et en particulier le système électoral proprement dit, la composition des commissions électorales et le découpage des circonscriptions ne devraient pas pouvoir être modifiés moins d'un an avant une élection, ou devraient être traités au niveau constitutionnel ou à un niveau supérieur à celui de la loi ordinaire. »

Le système électoral proprement dit comprend les règles relatives à la transformation des voix en sièges, et les termes de « découpage des circonscriptions » doivent être compris largement, comme s'étendant aux règles relatives à la répartition des sièges entre les circonscriptions.[6]

Par ailleurs, la Commission de Venise a précisé que « toute réforme de la législation électorale destinée à être appliquée à une élection doit intervenir suffisamment tôt pour qu'elle lui soit réellement applicable ».[7]

La stabilité du droit électoral doit dès lors être comprise comme visant deux objectifs : à moyen terme avant les élections, une garantie contre les manipulations politiques et, à court terme, le bon déroulement du scrutin.

1. La stabilité comme garantie contre les manipulations politiques

Le rapport explicatif du Code de bonne conduite en matière électorale précise : « La stabilité du droit est un élément important de la crédibilité du processus électoral, qui est elle-même essentielle à la consolidation de la démocratie... En effet, si les règles changent souvent, l'électeur peut être désorienté et ne pas les comprendre, notamment si elles présentent un caractère complexe ; il peut surtout considérer, à tort ou à raison, que le droit électoral est un instrument

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[3] CDL-AD(2002)023rev.

[4] Un organe subordonné de la Commission de Venise, composé de membres de cette Commission, de l'Assemblée parlementaire et du Congrès des pouvoirs locaux et régionaux du Conseil de l'Europe.

[5] Point II.2.

[6] CDL-AD(2005)043, II.4.

[7] CDL-AD(2002)043, II.5.

que ceux qui exercent le pouvoir manipulent en leur faveur, et que le vote de l'électeur n'est dès lors pas l'élément qui décide du résultat du scrutin ».[8] En d'autres termes, pour que l'électeur ait confiance dans le processus, il faut absolument éviter qu'il soit amené à soupçonner des manipulations politiciennes.

La stabilité, telle que définie ainsi, concerne les éléments fondamentaux du droit électoral. Le Code de bonne conduite en matière électorale en retient donc trois: le système électoral proprement dit, la composition des commissions électorales et le découpage des circonscriptions, souvent perçus comme déterminants pour le résultat du scrutin. Cette liste n'est pas exhaustive et il se peut même que certains éléments apparaissent déterminants dans un Etat et pas dans un autre.

Un des moyens d'assurer la stabilité du droit électoral est de définir ces éléments dans un texte supérieur à la loi ordinaire (Constitution, loi organique). Un tel procédé n'est toutefois efficace que si les règles sur la révision de ces textes impliquent un consensus, ou du moins qu'ils ne peuvent être modifiés par la seule volonté de la majorité au pouvoir. Or, on a pu voir des révisions constitutionnelles opérées en un jour, ce qui va évidemment à l'encontre de l'objectif de stabilité.

Le meilleur moyen d'éviter les manipulations est toutefois de prévoir que les amendements ne seront pas applicables à la prochaine élection. Ils s'appliquent alors à une situation trop imprévisible; tenter une manipulation serait une opération spéculative. Pour qu'une telle règle soit efficace, elle doit être prévue dans la Constitution, et, évidemment, il doit exister un consensus pour ne pas l'abroger.[9] Le Code de bonne conduite en matière électorale, comme nous l'avons vu, ne va toutefois pas aussi loin, et réprouve les amendements intervenus dans l'année précédant l'élection. L'exception à ce délai prévue pour les règles supérieures à la loi ordinaire doit encore une fois se comprendre comme ne s'appliquant que si leur révision ne peut être effectuée par la seule volonté de la majorité parlementaire.

Cela dit, la stabilité du droit électoral n'est pas une fin en soi. Elle ne saurait en tout cas justifier le maintien d'une situation contraire aux standards internationaux, être un prétexte de l'immobilisme – notamment en matière de répartition des sièges entre les circonscriptions, ou le changement s'impose pour éviter des inégalités de représentation inadmissibles (géométrie électorale passive). En outre, certaines autorités pourraient être tentées d'attendre pour

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[8] CDL-AD(2002)023rev, paragraphe 63.

[9] Voir le rapport explicatif du Code de bonne conduite en matière électorale, CDL-AD(2002)023rev, paragraphe 66.

décréter que des améliorations nécessaires sont tardives… C'est pour cela que la Commission de Venise a précisé dans sa déclaration interprétative sur la stabilité du droit électoral :[10]

« II…

1. Le principe selon lequel les éléments fondamentaux du droit électoral ne devraient pas pouvoir être modifiés moins d'un an avant une élection ne prime pas les autres principes du code de bonne conduite en matière électorale.

2. Il ne peut dès lors être invoqué pour maintenir une situation contraire aux standards du patrimoine électoral européen ni faire obstacle à la mise en œuvre des recommandations des organisations internationales.

En outre, en ce qui concerne les circonscriptions électorales, le Code de bonne conduite en matière électorale a défini un certain nombre de principes, et notamment :

> « v. Afin d'assurer l'égalité de la force électorale, une nouvelle répartition des sièges doit avoir lieu au moins tous les dix ans et *de préférence hors des périodes électorales*.
>
> vi. En présence de circonscriptions plurinominales, la nouvelle répartition se fera de préférence sans redécoupage des circonscriptions, et les circonscriptions correspondront si possible à des entités administratives».[11]

Le maintien des mêmes circonscriptions, combiné avec une redistribution régulière des sièges sur la base de règles elles-mêmes stables, permet d'écarter toute manipulation en la matière. Tout redécoupage peut par contre conduire à des calculs politiciens, mais, lorsqu'il est effectué hors des périodes électorales, le risque est relativement limité, du moins s'il existe une certaine volatilité de l'électorat. En période électorale, le redécoupage risque davantage d'être intéressé, et le cas de figure le plus défavorable est la modification d'un système électoral entraînant un redécoupage peu avant le scrutin.

2. La stabilité comme garantie du bon déroulement du scrutin

Reste qu'à un certain moment du processus électoral, la modification des règles

[10] CDL-AD(2005)043.
[11] CDL-AD(2002)023rev, I.2.2. C'est nous qui soulignons.

est tout simplement inapplicable. A ce stade, elle ne doit plus être envisagée, même si elle vise en principe des améliorations. Comme déjà indiqué, la Commission de Venise a affirmé que « toute réforme de la législation électorale destinée à être appliquée à une élection doit intervenir suffisamment tôt pour qu'elle lui soit réellement applicable ».[12]

L'évaluation de l'applicabilité d'un amendement doit se faire au cas par cas. Il est par exemple clair qu'une diminution du nombre de signatures nécessaires pour enregistrer une liste est ineffective après le dépôt des listes; une extension du corps électoral l'est aussi après la clôture des listes électorales, si celles-ci ne peuvent plus être revues.

Un redécoupage des circonscriptions ne peut bien évidemment intervenir après le début du processus électoral, et notamment la préparation des listes de candidats de chaque circonscription.

Quant aux modifications du mode de scrutin, il ne faut pas oublier, en dehors de tout problème de manipulation, qu'elles influent sur le comportement des acteurs électoraux et ne sont donc guère concevables une fois le processus électoral commencé.

Une modification *in extremis* de la composition des commissions électorales, ou du moins de la Commission électorale centrale, risque aussi d'entraîner une grave désorganisation, car les commissions électorales doivent préparer le scrutin longtemps à l'avance. C'est pour cela que le Code de bonne conduite en matière électorale a prévu que la Commission électorale centrale, en tant que structure administrative chargée de maintenir la liaison avec les autorités locales et les commissions inférieures, par exemple pour ce qui concerne l'établissement et la mise à jour des listes électorales, doit être permanente.[13]

Les règles fondamentales ne sont cependant pas les seules qui ne doivent pas être modifiées au dernier moment. La révision tardive de règles techniques peut aussi influer négativement sur la tenue du scrutin. Rappelons encore une fois que les administrateurs d'élections doivent avoir les compétences nécessaires pour organiser le scrutin; or celles-ci ne s'acquièrent pas à la simple lecture de la loi la veille du vote. Pour assurer une véritable formation – et donc une gestion compétente du scrutin –, il faut disposer d'un manuel ou du moins d'instructions pratiques, dont la rédaction puis la diffusion ne sont pas possibles du jour au lendemain. Seules certaines améliorations de détail améliorant la qualité du scrutin (apposition d'encre sur les doigts, plus

[12] CDL-AD(2002)043, II.5.
[13] CDL-AD(2002)023rev, II.3.1.c et paragraphe 68.

grande transparence du dépouillement, par des publications sur papier ou sur internet) peuvent être envisagées dans les dernières semaines, en s'assurant que l'intendance suive.

Nous avons déjà vu, d'une part, que la stabilité des *règles générales* sur la composition des commissions électorales est un élément permettant de réduire les manipulations politiques,[14] et, d'autre part, que la Commission électorale doit être permanente pour assurer la continuité dans l'organisation des élections. Cependant, cela ne suffit pas, et une certaine stabilité *de la composition* personnelle de l'administration électorale est nécessaire à son efficacité. Non seulement les commissions électorales (inférieures) fonctionnant seulement en période électorale ne devraient pas voir leur composition modifiée pendant leur période d'activité, mais il est important que les membres de la Commission électorale centrale, et en particulier son président, exercent dans la mesure du possible la totalité de leur mandat ; une stabilité du personnel spécialisé, notamment des juristes préparant les décisions, est aussi plus que souhaitable, car, en cette matière comme dans d'autres, l'expérience a toute sa valeur. En préconisant de ne permettre la déchéance du mandat d'un membre d'une commission électorale que pour des motifs disciplinaires, la Commission de Venise vise en premier lieu à assurer l'indépendance de cet organe,[15] mais son fonctionnement harmonieux et la compétence de ses membres auraient tout autant à pâtir de la possibilité de révoquer un membre pour des raisons partisanes.

3. Les élections comme processus continu

Les élections ont longtemps été considérées comme un événement d'un jour (« *E-Day* »). Ces dernières années toutefois, la conscience s'est développée, au sein des organisations internationales en particulier, qu'elles s'inscrivent dans un processus continu. Il est d'ailleurs devenu banal de dire que la campagne électorale commence en fait le lendemain de l'élection, et les règles sur le financement des partis politiques se sont d'ailleurs adaptées à cette réalité en prévoyant toujours plus un financement continu plutôt qu'un financement des campagnes. En d'autres termes, si le moment des élections et, évidemment, du dépouillement sont essentiels, il ne faut négliger ni la période pré-électorale (formation des commissions électorales, inscription des candidats, campagne,

[14] Autre est la question de leur impartialité, fondée notamment sur leur équilibre partisan, et qui ne sera pas examinée en tant que telle ici CDL-AD(2002)023rev, II.3.1.
[15] CDL-AD(2002)023rev, par. 77; voir aussi CDL-AD(2006)018, paragraphe 43.

etc.), ni la période post-électorale (notamment le contentieux et la sanction des infractions).[16] Enfin, il faut prendre en considération le contexte de toute la période se situant entre deux élections, notamment dans le domaine de la liberté d'expression et de l'attitude des médias, ainsi que, plus largement, du fonctionnement des institutions. En effet, si Aristote disait qu'une hirondelle ne fait pas le printemps, il est tout aussi vrai qu'une élection libre et équitable ne fait pas la démocratie.

II. Des pistes de réflexion pour l'avenir : ou de l'affirmation de la prééminence du droit

Concrètement, nous avons vu que la stabilité du droit électoral vise à éviter deux écueils : les manipulations politiques et la désorganisation du scrutin. De manière plus conceptuelle, ces deux objectifs contribuent à la réalisation non seulement de la démocratie, mais aussi de l'un des deux autres piliers de l'action du Conseil de l'Europe : la prééminence du droit. En d'autres termes, l'affirmation de la prééminence du droit – et le principe de la sécurité juridique qui en découle – implique que la loi ne soit pas le fait souverain et passager du pouvoir en place, et qu'elle ne soit pas lettre morte, mais réellement appliquée.

Par ailleurs, la tendance à réviser régulièrement la législation est souvent signe d'immaturité de la démocratie. Certes, des adaptations du droit sont parfois souhaitables au vu d'une expérience négative d'application de règles par ailleurs conformes aux standards internationaux. Par contre, les amendements dus à la non-conformité aux standards internationaux ne devraient pas s'étendre dans le temps. Restent les cas où une manipulation peut être soupçonnée. Or, le soupçon est particulièrement facile en matière électorale, car il s'agit de fixer les règles du jeu – ce qui démontre d'ailleurs la nature constitutionnelle du droit électoral. Tant que les règles mêmes du jeu sont le centre de la discussion, la politique concrète, la recherche du bien commun, est occultée par des questions de nature préalable, ce qui ralentit l'évolution démocratique.

C'est pourquoi, face à des projets de révision du droit électoral intervenant trop souvent, la plus grande prudence s'impose et les organisations internationales devraient, à l'avenir plus qu'aujourd'hui, prendre en considération les implications de l'instabilité législative sur le principe de la prééminence du droit.

Ainsi, en présence d'une pratique électorale ne posant pas de problèmes sérieux

[16] Cf. CDL-AD(2006)018, paragraphe 194.

quant à sa conformité avec les standards internationaux, des amendements de la législation électorale ne devraient pas être encouragés.

Lorsque, par contre, les élections laissent plus ou moins à désirer, il convient d'identifier la source du problème : résulte-t-il de la législation ou de la pratique ? Ce n'est que lorsque cette question aura été tranchée qu'il sera possible de juger de l'opportunité d'une révision du droit.

Les problèmes liés à la législation électorale peuvent être de nature différente, et une étude comparative de la Commission de Venise a permis d'identifier ceux qui ont un caractère récurrent, dans le temps ou dans l'espace.[17] L'objet de la présente contribution n'est pas de les décrire à nouveau, mais de montrer comment distinguer les déficiences du processus selon qu'elles sont de nature législative, partiellement de nature législative ou relevant de la pratique avant tout.

Les différentes catégories de problèmes peuvent être classées comme suit.

– *Les problèmes de nature purement législative*. L'exemple typique d'un problème de nature purement législative concerne les restrictions au droit de vote, comme par exemple la privation de liberté des prisonniers en attente de jugement, qui est contraire à la présomption d'innocence. Il en va de même de la privation systématique du droit de vote des prisonniers qui ont purgé leur peine[18] et des faillis.[19] Ces règles doivent être abrogées.

– Un des domaines où la qualité des normes juridiques est particulièrement importante est celui des recours. En particulier, un recours doit toujours être possible devant un tribunal, du moins en dernière instance ; la procédure doit être simple et dénuée de formalisme ; les dispositions en matière de recours, et notamment de compétences et de responsabilités des diverses instances, doivent être clairement réglées par la loi, afin d'éviter tout conflit de compétences positif ou négatif ; ni les requérants, ni les autorités ne doivent pouvoir choisir l'instance de recours ; l'instance de recours doit pouvoir annuler le scrutin si une irrégularité a pu influencer le résultat ; les délais de recours et les délais pour prendre une décision sur recours doivent être courts.[20] Reste que la mauvaise qualité du contentieux électoral est souvent davantage due à

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[17] CDL-AD(2006)018, Rapport sur le droit électoral et l'administration des élections en Europe – sur la base d'une contribution de M. Michael Krennerich.

[18] Cour européenne des droits de l'homme, Hirst (2) c. Royaume-Uni, 6 octobre 2005, no 74025/01.

[19] Voir par exemple Cour européenne des droits de l'homme , Albanese c. Italie, 23 mars 2006, n° 77924/01. Pour d'autres exemples de privation excessive des droits politiques, voir CDL-AD(2006)018, paragraphe 78 ss.

[20] CDL-AD(2002)023rev, II.3.3; sur les problèmes rencontrés, voir aussi CDL-AD(2006)018, paragraphe 166 ss.

la crainte des tribunaux ou d'autres organes de prendre une décision ayant de sérieuses implications politiques qu'aux lacunes de la législation. Il appartient donc d'identifier la source du problème (législatif ou non) pour déterminer les moyens de le résoudre.

Les problèmes de nature législative, mais dont la pratique peut réduire la portée. Ces problèmes résultent de la loi, mais celle-ci n'impose pas formellement une violation des standards européens. Il en va ainsi de la possibilité accordée par la loi au chef d'un parti de demander aux autres candidats de lui remettre leur lettre de démission signée, ou simplement de la possibilité de démettre de leur mandat les élus qui quittent leur parti.[21] S'il se peut que la pratique soit moins restrictive que ce que permet la loi, le risque est trop grand que les règles contraires aux standards européens soient appliquées. Il convient également de les abroger.

A l'inverse, certains *problèmes qui ne sont pas à première vue d'essence législative peuvent être corrigés par un amendement législatif*. Cela vaut en particulier de la tenue des listes électorales. Certaines précisions de nature technique dans la législation peuvent faciliter la tenue d'un registre électoral fiable, même si le fonctionnement correct de l'administration en est la condition essentielle. On peut aussi penser au défaut de transparence du processus, en particulier du dépouillement et de la proclamation des résultats, et aussi à la lenteur du processus de décompte. Si la loi n'exclut pas une pratique améliorant la situation, il vaut mieux toutefois la réviser dès lors qu'un problème est constaté, pour imposer davantage de transparence (par exemple concernant l'affichage des résultats dans les bureaux de vote ou sur internet) et des délais précis.[22]

– *Les problèmes résultant de l'application, en pratique, de règles apparemment anodines*. Certaines règles, dans un certain pays ou une certaine situation, sont parfaitement innocentes, et vont même dans le sens de plus de liberté et de démocratie, mais conduisent à des abus dans d'autres cas. De tels problèmes peuvent se présenter dans plusieurs domaines ; nous donnerons ici quelques exemples.

– Les modalités de vote doivent être citées en premier lieu. On pensera par exemple au vote par correspondance, mais aussi à la réception de bulletins de vote à domicile, qui, dans certaines situations, renforce le secret du vote, tandis qu'elle le réduit dans d'autres. La procédure dans les bureaux de vote eux-mêmes peut aussi être en cause.

[21] Cf. CDL-AD(2006)018, paragraphe 190.
[22] Cf. CDL-AD(2006)018, paragraphe 160 ss.

- Le système électoral peut aussi être en cause. Certains systèmes électoraux mixtes, qui fonctionnent ailleurs sans encombre, ont conduit à des manipulations lorsque consigne a été donnée aux électeurs de voter pour des partis différents dans la partie proportionnelle et dans la partie majoritaire de l'élection – ce qui a conduit à des disproportions contraires au but de la loi. L'admission du vote de préférence et du panachage peuvent conduire à des violations du secret du vote alors qu'ailleurs elles sont à juste titre considérées comme un élément important de la liberté de vote.
- Il en va de même de normes concernant les restrictions aux droits fondamentaux tels que la liberté d'expression ou de réunion, plus précisément de normes sur la diffamation ou l'incitation à la haine. Si leur existence même est légitime, elles sont souvent appliquées de manière à restreindre excessivement la liberté du débat politique ou de manière sélective.
  Dans ce domaine, l'action préventive est utile, mais n'est pas la panacée tant l'imagination des amateurs de contournement de la loi est grande. En d'autres termes, il convient de réfléchir aux conséquences négatives possibles d'une législation avant son adoption. Lorsqu'une assistance internationale est demandée en amont, au stade de l'élaboration de la loi, l'attention des autorités de l'Etat concerné doit déjà être attirée sur le risque de telles dérives. Une fois le texte adopté par contre, sa modification n'apparaît souhaitable que si des abus sont constatés ou hautement probables. A ce stade, il faut encore se demander si la révision législative est propre à mettre fin aux abus. En cas de réapparition de problèmes semblables après une révision législative, il convient ainsi de réfléchir sur l'efficacité possible de nouveaux amendements. Le problème se situe en effet alors davantage dans la volonté de contourner la loi. On se trouve alors dans une situation semblable à celle décrite au paragraphe ci-dessous (violation de la loi) et une révision législative doit être envisagée avec prudence.

– *Les problèmes résultant de la violation de la loi*. Ils peuvent être voulus par leurs auteurs – en particulier en cas de fraude électorale –, ou résulter du défaut de compétences ou d'intérêt des acteurs électoraux. Dans ce cas, il se peut que des amendements législatifs conduisent à une amélioration, mais il faut éviter plusieurs écueils qui conduiraient au contraire à aggraver la situation et à porter encore plus atteinte au principe de la prééminence du droit. Les règles nouvelles doivent d'abord être effectivement applicables et appliquées. Cela implique notamment qu'elles ne soient pas révisées au dernier moment, quand les administrateurs d'élections ne seront plus en mesure de les mettre en

œuvre. Toutefois, cela ne suffit pas. Les règles ne doivent pas atteindre un tel degré de complication que leur inapplication tende à confiner à la certitude… et finalement à des élections moins fiables qu'avec des règles apparemment incomplètes.

Plus grave encore, la révision législative peut être un moyen de détourner l'attention des vrais problèmes. On ne révise pas une loi au seul motif qu'elle est violée ! Une révision législative peut être un remède à la violation de la loi si celle-ci est inapplicable ou difficilement applicable; se focaliser sur les textes dans d'autres cas risque par contre d'être pour le moins infructueux, voire de conduire à un écart inadmissible entre les textes et la pratique, mettant en cause la prééminence du droit.

– *Les violations les plus fréquentes des principes du patrimoine électoral européen* touchent à l'égalité des chances et à la libre formation de la volonté de l'électeur, qui lui est étroitement liée.[23] Elles concernent en particulier l'impartialité des médias et le financement des partis politiques et des campagnes électorales, ainsi que l'abus des ressources publiques en faveur d'un candidat ou d'un parti.[24] Ces domaines sont exemplatifs de l'imbrication de problèmes législatifs et pratiques. En ce qui concerne le financement par exemple, il faut que la législation contienne des dispositions claires et complètes.[25] Cependant, encore faut-elle qu'elle soit mise en œuvre, ce qui implique notamment l'absence de complexité excessive et l'existence d'un organe capable d'assurer sa mise en œuvre effective. Quant à l'utilisation d'infrastructures publiques lors des campagnes, elle ne résulte que rarement de la loi, mais si elle n'en implique en général pas une violation caractérisée. Essayer de détailler chaque cas d'abus dans la loi serait vain, mieux vaut définir des principes généraux et développer une observation permettant d'identifier leurs violations et un contentieux conduisant à les rectifier. Une attitude semblable devrait être adoptée dans le domaine de l'impartialité des médias, où les organisations internationales ont développé des instruments d'analyse reconnus.[26]

Une situation analogue se présente en matière d'observation des élections. La loi doit permettre l'observation la plus large possible, en ce qui concerne aussi bien les observateurs nationaux que les observateurs internationaux, tant

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[23] CDL-AD(2002)023rev, I.2.3 et I.3.2;.
[24] CDL-AD(2006)018, paragraphe 194.
[25] CDL-AD(2006)018, paragraphe 99.
[26] Voir CDL-AD(2005)032, *Guidelines on Media Analysis during Election Observation Mission prepared in co-operation between the OSCE's Office for Democratic Institutions and Human Rights, the Council of Europe's Venice Commission and Directorate General of Human Rights, and the European Commission.*

il est vrai que l'observation des élections contribue sensiblement à assurer leur transparence.[27] Cela dit, les entraves à l'action des observateurs peuvent aussi résulter d'une interprétation biaisée de la loi (en particulier de normes interdisant de troubler le processus électoral) voire d'une violation pure et simple de celle-ci.

En bref, *face à des lacunes du processus électoral, il convient d'identifier soigneusement si elles résultent de la loi ou ont une autre cause, et, sur la base de cette analyse, il est possible de trouver le remède, de déterminer si une révision législative est souhaitable, utile, inutile voire contre-productive*. Comme l'a dit la Commission de Venise, « toute réforme électorale supplémentaire devrait se garder d'ajouter des dispositions de plus en plus détaillées au droit électoral. Certaines carences législatives doivent certes être comblées mais, d'une manière générale, il importe avant tout de revoir l'ensemble de la législation électorale en vue de clarifier et de simplifier les dispositions complexes, ainsi que de supprimer les incohérences et les répétitions superflues ».[28]

La coopération internationale ne doit alors pas se focaliser sur le domaine législatif mais contribuer plutôt à résoudre les difficultés pratiques de mise en œuvre. La formation des administrateurs d'élections et des autres acteurs électoraux (juges chargés du contentieux, observateurs, juristes, représentants de partis politiques) joue un rôle important. En premier lieu, elle vise à ce que les personnes chargées de l'application de la loi aient les connaissances nécessaires pour l'appliquer correctement. En deuxième lieu, si cela ne suffit pas et que des irrégularités sont néanmoins commises, des observateurs bien formés seront mieux à même de les dénoncer à bon escient, et un contentieux de qualité sera également facilité, contribuant à l'élimination des irrégularités. C'est ainsi que la Commission de Venise, en plus de son activité traditionnelle d'expertise législative et de définition des standards internationaux, est active depuis plusieurs années dans l'assistance aux Commissions électorales centrales et dans la formation des acteurs électoraux.

Conclusion

L'activité du Conseil de l'Europe, et en particulier de la Commission de Venise, s'est beaucoup développée suite aux bouleversements intervenus dans la partie orientale du continent. C'est alors que le regretté Président La Pergola a lancé

[27] CDL-AD(2002)023rev, II.3.2; CDL-AD(2006)018, paragraphe 122 ss.
[28] CDL-AD(2006)018, paragraphe 195.

le concept d'« ingénierie constitutionnelle ». L'assistance constitutionnelle, et encore plus électorale, s'est développée dans une situation d'urgence, et l'urgence concernait en premier lieu la rédaction des textes. Il s'agissait de (re) construire. Puis est venue la phase de la consolidation. De la rédaction l'on est passé à l'application, de l'ingénierie constitutionnelle à la définition, puis à la mise en œuvre du patrimoine constitutionnel – et électoral – européen. C'est alors que la question de la stabilité du droit, comme garantie de sa prééminence, est devenue vraiment actuelle.

En matière électorale notamment, si certains textes législatifs mériteraient certes des améliorations, les problèmes qui subsistent relèvent davantage de la pratique. S'agissant des règles du jeu, la stabilité est d'autant plus nécessaire pour garantir une véritable sécurité. Cependant, les amendements législatifs restent encore fréquents et interviennent souvent à une distance beaucoup trop brève de l'élection.

Sans négliger par principe l'amélioration des textes législatifs, nous suggérons dès lors d'identifier la source des imperfections du processus électoral avant de chercher à y porter remède. Si celle-ci est purement ou partiellement législative, une révision du droit s'impose ou est pour le moins souhaitable. Par contre, si la pratique est avant tout en cause, il faut se demander si un amendement législatif est vraiment la solution, surtout si le temps restant jusqu'au vote est limité. Sinon, l'on risque d'accentuer l'instabilité – l'insécurité – juridique, ou de faire de la révision législative le paravent d'une pratique condamnable qui, elle, se pérennise. La prééminence du droit n'en sort pas gagnante.

La mise en œuvre du patrimoine électoral européen ne peut ainsi s'effectuer ni par la seule rédaction du droit ni par la seule action des organes chargés de l'appliquer. Aussi bien le texte que son application doivent respecter les principes fondamentaux du droit électoral.

Plus généralement, la démocratie ne peut être évaluée sur la seule base du jour de l'élection, ni même du processus pré- voir post-électoral. La démocratie est un processus permanent dans lequel l'élection proprement tient une place centrale, mais non unique. L'évaluation d'un texte doit donc s'inscrire dans son contexte, tout comme les solutions à apporter aux dysfonctionnements éventuels.

Luis López Guerra
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Some Thoughts on Constitutional Engineering

1. In Memoriam Antonio La Pergola

I first had the opportunity of meeting Antonio La Pergola in the now distant spring of 1977 at a conference held at the University of Salamanca on the legal regulation of political parties,[1] in the early days of Spain's transition to democracy. This first conference in which Spanish constitutionalists[2] could freely participate was sponsored by the German Friedrich Ebert Foundation, and one of its high points was the intervention of renowned international constitutionalists such as Hans Peter Schneider from Germany, Jorge Carpizo from Mexico, Jorge Reinaldo Vanossi from Argentina and, certainly, Antonio La Pergola from Italy. Don Antonio was already well known in Spain through translations of several of his works on constitutional and international law. But at this meeting (and on many subsequent occasions) he had the opportunity to personally and directly exercise considerable influence on Spanish legal theory and, in consequence, on the transition to democracy itself, a process in which his opinions were present in both academic and political circles. The intellectual presence of Don Antonio in Spain and his publications there have been carefully documented by his former student at the University of Bologna and present professor of constitutional law at the Universidad of Salamanca, Jose Luis Cascajo.[3] Both his presence and publications demonstrated to the

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[1] The papers presented at the conference were published by Professor Pedro DE VEGA (ed.) in Teoría y práctica de los partidos políticos, Madrid, Cuadernos para el Dialogo, 1977.

[2] For obvious reasons, at that time "constitutional law" did not exist in Spain an academic discipline. The expressions used were "political law" or "theory of the State".

[3] J.L. CASCAJO CASTRO, " A modo de epílogo: la obra del profesor Antonio La Pergola en el ámbito de la doctrina de lengua española" in A. LA PERGOLA, Los nuevos senderos del federalismo, Madrid, Centro de Estudio Constitucionales, 1994.

Spanish legal community at least two dimensions of his relevant personality. First, his expertise in comparative law and his profound knowledge of the legal systems of Europe, the United States and Latin America was immediately apparent. But also and closely related, his intellectual generosity was constantly reflected in his willingness to advise and collaborate as an academic authority, in processes of legal and constitutional reform. In Spain's transition to democracy his contributions and influence on the Spanish constitutional debate were obvious in two areas: the territorial organization and structure of the State,[4] and the establishment of a system of constitutional justice.[5] In both aspects, his knowledge of comparative law (particularly of U.S. law, and certainly Italian law, which was quite influential in the Spanish transition) provided valuable contributions to academic debates during the drafting of Spain's new constitution,[6] as well as its subsequent implementation.[7]

Professor La Pergola's qualities as an expert in comparative law and as an advisor in processes of constitutional reform, which were so valuable during the Spanish transition to democracy, took on a European dimension in his work for the Venice Commission, which he founded and presided, and which played a key role in the transition to democracy in many of the countries of Central and Eastern Europe. As is well known, after 1989 one of the fundamental tasks facing those countries was to adapt their legal systems to the constitutional standards or models of the democratic countries of Europe, to establish political systems that respect the basic principles of freedom and dignity of the individual and, in addition, to enable those countries to join the process of European integration, sharing basic values, principles and institutions. The work of the Venice Commission and its president played a decisive role in the incorporation of the countries of Central and Eastern Europe into the Council of Europe,

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[4] For example, his participation in the Symposium on the territorial organization of the State held at the University of La Laguna in 1977 and reproduced in his article "Federalismo y regionalismo: el caso italiano" in G. TRUJILLO (Ed.) Federalismo y Regionalismo, Madrid, 1979.

[5] In that regard see his article "La jurisdicción constitucional en Italia" in A. LOPEZ PINA (ed.) División de poderes e interpretación. Hacia una teoría de la praxis constitucional, Madrid, Tecnos, 1987, pp. 46–49.

[6] Examples include Professor La Pergola's contributions during the Workshop on the Draft of the Spanish Constitution held at the University of Bologna in 1978. See J.L. CASCAJO, op. cit., p.356.

[7] The interest shown by Spanish constitutionalists in Professor La Pergola's work is evident in J.F. LOPEZ AGUILAR, "Constitución y Federalismo Europeo. Conversación con el profesor Antonio La Pergola" in Anuario de Derecho Constitucional y Parlamentario, 14 (2002) pp. 7–46.

their ratification of the European Convention on Human Rights, and the subsequent accession of many of them to the European Union.[8]

2. Transition to democracy and "Constitutional Consulting"

The creation of the Venice Commission was a response from a European perspective to a need that has likewise arisen in other contexts. In effect, the successive waves of transitions to democracy in the last few decades (in the 1970s in Southern Europe, in the 1980s in Latin America and in the 1990s in Central and Eastern Europe) have given rise to a phenomenon that we might describe as the globalization of constitutional law, which has been characterized by a (more or less voluntary) demand for external or international consulting services on the part of many of these countries in transition when designing new institutions and preparing declarations of rights.[9] On occasions such demands have been the result of a genuine desire to understand the constitutional theory and practice of other countries when planning internal reforms. On other occasions their origins spring from the necessity of acquiring recognition or an international "seal of quality" for the implemented reforms, in order to join the "respectable" international community of democratic countries and, as a consequence, gain admission to prestigious organizations such as the Council of Europe or the European Union.

Thus, together with many universities, institutions, foundations and governmental and international agencies, the Venice Commission is one (and possibly the most prestigious) of the institutions that have provided advice and consulting services in the creation of the necessary legal structures to facilitate the transformation of authoritarian regimes into constitutional ones. And this has been the case not only in the area of constitutional law, but also with respect to their criminal, civil or administrative justice systems. The progressive extension of constitutional

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[8] For a viewpoint with respect to the relevance of the Venice Commission see J. JOWELL, "The Venice Commission: disseminating democracy through law", Public Law (Winter 2001), pp. 675–683. And more recently, P. VAN DIJK, "The Venice Commission on Certain Aspects of the Application of the European Convention on Human Rights *naturae personae*" in BRECTENMOSER, S., et. al., (eds.) Human Rights, Democracy and the Rule of Law. Liber Amicorum Luzius Wildhaber, Zurich, Dike, 2007, pp. 183–202, especially pp. 183–188. In Spanish, S. SALINAS ALCEGA, La Comisión para la democracia a través del Derecho (Venice Commission), Zaragoza, Real Instituto de Estudios Europeos, 1999.

[9] See P. HÄBERLE's observations in "Dokumentation von Verfassungsntwürfen und Verfassungen ehemals sozialisticher Staaten in (Süd) Osteuropa und Asien" in 43 Jahrbuch des Öffentliches Rechts der Gegenwart (1995) 106, in which he also refers to the Venice Commission.

democracy into areas once dominated by authoritarian regimes very probably means that this type of support work and collaboration will continue. In other respects it should be underscored that constitutional consulting has proved useful (or at least has been required) not only in processes of transition to democracy, but also in the reform or transformation of well-established constitutional regimes.

3. Establishing standards of democracy

These waves of "democratization" and corresponding processes of constitutional "standardization" have not only given rise to private, governmental and international legal consulting firms or agencies, but have also prompted an examination (or reexamination) of a series of questions that not only concern specific countries that are or have been in transition, but more generally, the very concept as to what constitutes the minimum requisites of a constitutional regime. If we initially limit our assessment to the context of Europe, the democratic processes occurring during the second half of the 20th century raise at least two questions:

1. What are the basic standards to be met in order for a country to join the "club of the democracies" or, simply stated, to achieve what has been termed "European public order"?
2. What techniques or specific formulas are the most appropriate in each country for achieving those basic standards?

These questions obviously refer to two very different tasks: on the one hand to establish the objectives to be reached, and on the other, to define and design the policies through which they can be achieved.

With regard to the former, that is, defining the final objectives to be achieved, when can a regime be deemed democratic and to sufficiently guarantee respect for human rights? Paraphrasing the famous expression of a justice of the U.S. Supreme Court (referring to other matters) "I can't define democracy, but I know it when I see it." But a bit more precision is needed to establish the minimum rules required for membership in the European "club of democracies", or even at a worldwide level.

In reality, and at first glance, it wouldn't seem difficult to determine the basic standards that a regime must meet to reflect the demands of modern constitutionalism, by simply making reference to the common European legal order's universally-accepted texts. The most classic expression of the foundations of constitutionalism may be the famous Article 16 of the Declaration of the Rights of Man and of the Citizen: "Any society in which the guarantee of rights is

not assured, nor the separation of powers defined, has no constitution at all". Chronologically closer in time, as basic elements for justice and peace in the world, the Preamble to the European Convention of November 4, 1950 refers to, for example, "effective political democracy" and a "common understanding and observance of human rights". The combination of (indispensable) democratic institutions and the guarantee of human rights (together with an element that is inseparable from both, the rule of law) is easily drawn, and has thus been recognized in academic writing, legal proclamations and case law as the common defining factor of any constitutional model.

As for a specific definition of the human rights commonly recognized as an inalienable standard, once again a specific point of reference can be found in the European Convention of 1950, and in the case law of the European Court of Human Rights. These provide a basis for defining a series of rights that must be recognized and effectively exercised as a minimum requisite for admitting a country into the "club of democracies". In effect, formally since 1993 the ratification of the Convention of 1950 and its protocols and submission to the jurisdiction of the Court at Strasbourg have become inevitable requisites for admission to the Council of Europe.

4. Alternatives in Constitution drafting

It seems reasonable to assert that the principal points of reference for verifying the degree of democracy of a given regime are the legal norms by which it is governed, and especially constitutional norms. But this certainly only provides an initial means of assessment, since the letter of the law (and particularly of constitutional laws) may have only limited application in practice. Over a half century ago Karl Loewenstein offered his famous classification of constitutions into three categories: normative, nominal and semantic.[10] An examination of the letter of the law does not suffice to assess the level of effective democracy of a given regime. It is likewise necessary to determine how its institutions function in practice.

Nevertheless, in any transition to democracy one of the initial tasks (and the one most likely to attract public attention) is the drafting of the legal or constitutional texts that establish new institutions and bills of rights. The enactment of a new constitution is seen as a significant and symbolic event, as well as

[10] K. LOEWENSTEIN, Political Power and the Governmental Process, Chicago, University of Chicago Press, 1957.

representing a "new beginning" founded on firm and equitable principles. It is true that in many cases this may give rise to a certain degree of "constitutional illusion" and high expectations, with the subsequent disappointment with respect to what a constitution can actually contribute to peaceful coexistence and prosperity within society. But in those cases in which there is not merely a reform of preexisting institutions, but rather the *ex novo* creation of a democratic regime, the practical and symbolic importance of the enactment of a new constitutional text is evident.

In contrast to what may occur during processes of constitutional reform within established democratic systems, in those cases in which there is a radical regime change to establish a democratic system for the first time or to reintroduce one after a long period of authoritarian rule, the constitutional assembly and its advisors may find themselves in a constitutional vacuum and, thus, may have a broad scope of action. Sometimes prior constitutional traditions fill the vacuum left by an authoritarian regime, through the adoption of laws or institutions from previous periods. As an example, the reintroduction of democracy in Austria was achieved by reenacting the former Constitution of 1920. However, in the majority of cases former constitutional traditions are either nonexistent, did not have sufficient impact, or may not provide useful models, since their faulty design may have actually given rise to the crisis that ended the former democratic regime. In such cases it is necessary to practically "start from scratch."

On such occasions the constitutional assembly and its advisers can choose among several courses of action. In theory, one of them might be termed the "option of optimums." In view of the objectives to be achieved in order to set up a "standardized" democratic regime, it would be possible to seek the institutions and techniques most ideally suited for that task from the ideological perspective of the constitutional assembly. If this course is chosen, the constitutional assembly and its advisors undertake the largely abstract task of drafting an ideal constitution that reflects their values and preferences. In such (theoretical) cases, constitutional assemblies would enjoy the broadest possible scope of action.

But even in (hypothetical) situations in which this freedom exists, the formulas for organizing political institutions capable of achieving a reasonable level of democratic credibility **are** ultimately limited. After all, comparative experience in "constitution building" provides a list of alternatives or models in which it is difficult to introduce new formulas or variations. This is not to say that constitutional assemblies do not create new techniques that are added to the range of already-existing constitutional formulas. An example of this

type of "creation" or invention can be found in the establishment of concentrated constitutional jurisdictions inspired by Hans Kelsen in the Austrian Constitution of 1920,[11] or the Conseil Superieur de la Magistrature created in the French Constitution of 1946 and improved with greater success in the Italian Constitution of 1948, or the procedure of *habeas data* introduced in the Brazilian Constitution of 1988.[12]

Nevertheless, in the great majority of constitution-drafting processes the available alternatives are very restricted. With respect to the head of state, the choice lies between a monarchy and a republic. As for territorial organization, the choice is among centralized models (such as France), federal systems (such as the United States or the Federal Republic of Germany) or regional models (such as in Italy or Spain). Concerning the balance of powers, the possibilities include presidential, parliamentary or, as an intermediate solution, mixed systems (such as in France). And finally, (although there are many more examples), with respect to the electoral system the available formulas are limited to something ranging between the majority system versus a proportional system.

5. Constitutional borrowing

In reality, when designing more or less radical reforms of political institutions to achieve a transition toward democracy and to create an "internationally approved" system, it is difficult not to seek inspiration in other well-tested examples. As a consequence, constitutional reform has often been an exercise in "constitutional borrowing", adopting models from other countries, especially in regimes without their own constitutional traditions.[13] Although the Spanish Constitution adopted several institutions inherited from previous eras in Spanish constitutional history, it is also a good example of constitutional borrowing. It provides for institutions that follow models from Germany (such as the design of the Constitutional Court or the *Konstruktive Misstrauenvotum*); Sweden (the Ombudsman, in its Spanish version known as the *Defensor del Pueblo*); Italy (the general formula for regional autonomy, which in turn took

[11] See P. CRUZ VILLALON, La formación del sistema europeo de control de constitucionalidad, Madrid, CEPC, 1987.

[12] An example followed in the constitutions of Paraguay (1992), Perú (1993), Argentina (1994) and Ecuador (1996).

[13] The International Journal of Constitutional Law, vol. I, no. 2, 2003, was devoted entirely to constitutional borrowing. For a critical perspective with regard to Central and Eastern Europe see in that issue W. OSIATYNSKI's article "Paradoxes of constitutional borrowing", pp. 244–288.

its inspiration from the Constitution of the Second Spanish Republic of 1931); France (organic laws, with some very Spanish features added); or Mexico (the *recurso de amparo*, at least if only in name).[14]

When designing a constitutional regime it is logical to consider formulas that have achieved satisfactory results in other countries. This explains the frequent presence in new constitutions of institutions tested in other contexts, such as the constitutional court, judiciary council, ombudsman, or the different generations of rights, and it is not infrequent to speak of "constitutional families." Nevertheless, "constitutional borrowing" can pose numerous problems, as has been evident on many occasions. The "model" institutions that have proved most useful in the constitutional history of most countries are often not the result of "intellectual planning", but of years of experience and of trial and error. Those institutions reflect solutions that took into account not only the specific problems and conditions of society and politics at a given time, but also well-rooted cultural traditions. For that reason, "transplanting" a new model in different contexts with different problems and traditions may give rise to situations that are both unpredictable and dysfunctional.

In that regard, an example to consider might be judiciary councils, institutions which, as a phenomenon of constitutional borrowing, have extended to numerous countries, especially after being adopted in the French Constitution of 1946 and the Italian Constitution of 1948. From a European perspective the justification for this type of institution resides in a desire to free the judiciary from possible influences from the executive branch, entrusting the council with decisions concerning the appointment, promotion, inspection and discipline of judges. The creation of judiciary councils in Europe has, in practice, reduced the powers of the executive in matters concerning the organization of the court system.

This European model has been adopted in several Latin American countries (notably Colombia, Peru and Argentina), where the context is very different. In Latin American constitutions the power to appoint, promote, inspect and discipline judges has traditionally been vested not in the executive, but rather in the highest instance of the judiciary, that is, the Supreme Court. The Supreme Court was (and in many countries continues to be) conceived both as the highest court and as the body in charge of the administration of the judiciary. As

[14] See Santiago VARELA, "La Constitución española en el marco del Derecho constitucional comparado" in T.R. FERNANDEZ (ed.) Lecturas sobre la Constitución española, Madrid, UNED, 1978, vol. I., pp. 13–36.

a consequence, introducing judiciary councils and vesting them with powers to administer the court system has not decreased the powers of the executive, but rather those of the Supreme Court. Moreover, in these Latin American countries members of judiciary councils are appointed by parliamentary committees, universities and, in some countries, by institutions of civil society, therefore creating new means for exercising political influence on judges that were previously nonexistent.[15]

Thus, and as an example of cultural dissemination or constitutional borrowing, judiciary councils can be introduced as an apparently more efficient means for ensuring the independence of the judiciary. But when transplanted from the context in which judiciary councils were created to a radically different one, the effects may not be the same, or they may even yield results opposite to those intended

6. Constitutional engineering

It is certainly understandable that well-established models may be readily adopted in new constitutional systems, not only by political leaders who wish to imitate models with proven success, but also by the advisors and experts who collaborate in the constitution-drafting process. And these advisors and experts will most likely tend to introduce in other contexts the institutions with which they are most familiar, that is**,** institutions from their own countries. It is not difficult to suppose that U.S. experts tend to recommend the presidential system, while European experts prefer parliamentary systems, and the French choose semi-presidential ones. However, experience derived from many cases in which international consultants have contributed to constitution-drafting processes has shown that the mere imitation of models from other contexts is not particularly successful. For that reason, rather than "constitutional borrowing", there is a more appropriate alternative that consists in applying a different approach. Instead of seeking prestigious models to be imposed on a given legal system, what is often termed "constitutional engineering" seeks to define the country's real political conditions and problems, and to choose the legal tools that can most readily be adapted to those conditions and to resolving those problems. The idea is to add a political perspective to the legal task of building a constitutional system, admitting

[15] I had the opportunity to write on these matters in the chapter "Modelos de gobierno de los jueces" in my book El poder judicial en el Estado constitucional, Lima, Palestra, 2001, pp. 125–156

from the onset that the letter of the law alone may not suffice to implement stable democratic policies.

On the one hand, this approach takes a realistic position, considering legal institutions not as an end in themselves, but as instruments for achieving an adequate level of peaceful coexistence. On the other hand, and from the perspective of an advisor or expert, when proposing or analyzing institutional reforms in other contexts, they must resist the temptation to consider their own institutions as "natural" or best, simply because they are the most familiar.

The constitutional engineering perspective was made popular by Giovanni Sartori,[16] although the term has been used frequently in the academic literature of Italian constitutionalists.[17] In reality, the idea underlying constitutional engineering has been present for a long time in studies concerning policy and constitutions: in view of the conditions of a given community, what are the best legal techniques for achieving the specific objectives of that community? In contrast to the previously-mentioned "option of optimums" that seeks ideally-perfect formulas, constitutional engineering chooses what is reasonably possible.

Since constitutional engineering seeks to achieve stable and effective political systems, it is a particularly appropriate approach for designing the organizational structures and institutions in a democracy. A common characteristic of this approach is to consider socio-political circumstances as conditioning factors for the effective working of any legal system, especially (and this is perhaps the common feature among examples of this approach) the presence of political parties. To a large extent constitutional engineering can be considered as the development and continuation of the famous studies of Maurice Duverger concerning the relationship of electoral laws and political party systems.[18] Duverger used a type of analysis that not only focused on the formal study of laws (the characteristics of electoral laws), but also their consequences in political relationships. Subsequent studies have either revised, confirmed or contradicted Duverger's theories. But his methodology of determining the political effects of legal norms in a particular socio-political context is extremely useful when choosing between possible alternatives for designing a constitution.

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[16] Possibly the best-known work in the field is G. SARTORI, Ingegnieria Costituzionale Comparata, Milano, Il Mulino, (1st ed.), 1995. For an overview see G. SARTORI, "La constitutional engineering y sus límites". Teoría y Realidad Constitucional 3(1999) pp. 79–

[17] See, for example, P. LUCAS VERDU, "Una reciente aportación de la doctrina italiana a la teoría de la Constitución: la "constitutional engineering", Revista del Departamento de Derecho Político de la UNED, no. 4, Fall, 1979, pp. 27–38.

[18] M. DUVERGER, Les partis politiques. Paris, Colin, (1st ed.) 1951.

The "natural" scope for constitutional engineering is undoubtedly electoral law, as a means of influencing the political party system and, directly or indirectly, the political system as a whole. But this is not the only scope of action for this methodology. Constitutional engineering has often been applied when designing relationships between the executive and legislative branches of government with respect to the choice between presidential or parliamentary systems, or mixed models. An initial example of constitutional engineering in this area might be the introduction in the German Basic Law of the "constructive vote of no confidence", designed by Professor Nawiasky, as a formula for ensuring governmental stability, which as indicated previously was adopted in the Spanish Constitution (and in the great majority of the Statutes of Spain's Autonomous Communities). More recently, constitutional engineering has been applied in constitutional reforms in Latin America, in the design of the relations between the executive and eegislative powers, along the lines proposed by Juan Linz,[19] in addition to Sartori's, concerning the advantages and disadvantages of presidential and parliamentary systems, as well as mixed models. In that regard, an eloquent application of constitutional engineering (to the extent that it represents a deviation from the traditional models and ideals in Latin American republics) is the introduction of semi-parliamentary formulas in the constitutions of Argentina and Peru, with a "Cabinet Head" (Argentina) and a Prime Minister (Peru) being responsible to parliament, while maintaining the President of the Republic as Head of State and the Government.

7. Constitutional engineering and human rights

Is there any scope of action for constitutional engineering in the legal regulation of human rights? It might initially appear that there is not. Human rights, as fundamental rights and public liberties recognized in constitutions are the basic values of a democratic system and not ad hoc formulas designed for reasons of political expediency. The enshrinement of these rights, not only in constitutions but also in numerous international texts, as well as the creation of international organizations to guarantee the exercise of those rights removes them from the scope of being merely instrumental. Many constitutional texts define what

[19] J. LINZ and A. VALENZUELA, eds. The Failure of Presidencial Democracy (2 vols.) I. Comparative Perspectivas. II. The Case of Latin America. Baltimore and London, JHU Press, 1994.

is termed the "essential content"[20] of fundamental rights, which cannot be amended or abridged to serve other interests, no matter how important they may be. Certain case law has taken the matter further, in some cases referring to the "absolute content"[21] of specific fundamental rights, in the sense that they should remain entirely immune from the actions of both law-makers and those called upon to apply the law.

The basic institutions of constitutional regimes provide constitution drafters and law-makers with a wide margin of discretion when introducing organizational models, without any detriment to the democratic nature of the system. In that regard, although fundamental rights are certainly susceptible to limitations and restrictions, these will always subject to strict conditions carefully set forth in constitutions, domestic and international case law, and the common "constitutional culture". Thus, it would appear that in the area of fundamental rights constitutional engineering has little to offer in the task of finding ad hoc solutions to different situations and problems. And, in fact, as indicated previously,the primary focus of legal opinion and practice in constitutional engineering has not been on bills of rights, but rather on the "organic" clauses in constitutions that regulate matters such as elections and the organization of the branches of government and the relationships among them.

Nevertheless, a deeper analysis reveals that it is not difficult to find aspects of the regulation of fundamental rights in constitutional and legal texts in which constitutional engineering can play a significant role in designing formulas to adapt legal and constitutional regulation to the needs, conditions and specific objectives of a given country. Due to the pressure of national and international public opinion, the definition and content of basic fundamental rights are beyond the reach of constitution drafters and lawmakers. But this is not the case with regard to other matters directly related to human rights, which allow for a multitude of formulas. An example can be found in the technical mechanisms for guaranteeing fundamental rights, that is, for ensuring the effective application of the lists of rights contained in the declaratory part of constitutions.

Guaranteeing a right is a fundamental part of that right. As it has been said, guarantees put "teeth" in rights. Without a means for guaranteeing rights, their inclusion in constitutions is merely a declaration of good intentions. And if the

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[20] Article 53.1 of the Spanish Constitution, following the model of Article 20 of the German Constituion (*Grundgesetz*) of 1949.

[21] Spanish Constitutional Court Judgment 91/2000, *Paviglianitti Case*.

minimum catalogue of rights for constitutional regimes and their content have been largely defined and "globalized" in our common constitutional culture and, more effectively, in international case law, the same cannot be said of the system for guaranteeing those rights and specific forms of protection that vary notably, and which certainly have much room for innovation and improvement. In this area there is certainly a minimum common denominator in constitutional regimes that provides for the judicial guarantee of rights, administered by independent courts. But such guarantees are susceptible to improvements to increase their effectiveness, adapted to the individual circumstances of each country. And here, once again, neither attempts to find ideal abstract formulas nor the mere imitation or constitutional borrowing of models developed in other contexts provide the best solutions.

There is still insufficient academic literature analyzing comparative systems for guaranteeing the effective application of fundamental rights, in contrast to the ample research available, for example, on the consequences of choosing a given electoral system, or concerning the relationships between the executive and the legislature**,** or the advantages or disadvantages of different systems of territorial organization. And, nevertheless, problems in the area of human rights guarantees are considerable and are progressively becoming more evident with the extension to new areas of constitutional regimes that seek to ensure the rule of law, or as even the oldest and most deeply-rooted constitutional regimes seek to reinforce the protection they already provide for personal rights.

As an example, many legal systems have adopted a specific appeal for protecting individual fundamental rights, separate from the rest of the remedies available in their courts. Examples of this technique for guaranteeing rights through a specific procedure include the Spanish *amparo* (both judicial and constitutional), the German *Verfassungsbeschwerde*, or the Colombian *tutela*. These appeals vary with respect to the rights they protect (according to more or less extensive lists), the steps and procedures they entail, and the consequences and effects of the judgments rendered. And experience has shown that the introduction of this technique in its diverse variants may yield both functional as well as dysfunctional consequences, especially with respect to the effective protection of rights and the relationships among the different branches of government. An example of dysfunctional consequences would be the abusive use of such appeal procedures and the subsequent collapse of the competent courts under a backlog of unresolved cases. Another example may be found in the tensions that may arise between specialized constitutional courts and the higher courts in the ordinary court system, as was the case in the famous

"war of the courts" in Italy[22] and similar events in other countries. Thus, in processes of constitutional reform in different contexts, it is legitimate to question whether the conditions in a specific country at a given moment warrant instituting a special judicial procedure for defending human rights. And when the answer is affirmative, the specific rights to be protected and the courts to be entrusted with their protection must likewise be determined. These are all questions for constitutional engineering in which comparative law literature may prove quite useful.

Another example of the application of constitutional engineering in the area of the declaration of rights concerns the guarantee of "second generation" social and economic rights. As is well known, in constitution drafting processes when deciding the degree of recognition and constitutional guarantee for these rights, two positions are deemed worthy of special consideration. On the one hand, there is the universal aspiration that the political community will ensure the essential minimum conditions of welfare and security. On the other hand, it is understood that to do so will require resources that may not be readily available. Thus, the problem resides in introducing guarantee mechanisms to ensure the satisfaction of those social rights when sufficient resources are available, while establishing sufficient safeguards to prevent them from becoming a burden that the political community cannot bear, when resources are unavailable or must be used for more urgent purposes. The constitutional systems created in the last half century have addressed this matter in many different ways. An example may be found in the Spanish model (influenced by the Constitution of India, among others) that recognizes various categories of rights, each having different level of guarantees. Thus, there are fundamental rights, constitutional rights, and those derived from "economic and social principles" that give rise to rights when they are subsequently defined in legislation. This is only one of the possible formulas that constitution drafters may apply, and it is undoubtedly susceptible to improvement. Constitutional engineering problems of this nature would also benefit from increased attention on the part of legal scholars.

There are many other examples of possible applications of constitutional engineering in the area of fundamental rights. But, in conclusion, perhaps a matter mentioned above should likewise be addressed. As indicated, there is a consensus in at least one aspect concerning the protection and guarantee of

[22] For an interesting analysis of the "war of the courts" in Italy from a Spanish perspective see Rosario SERRA CRISTOBAL, La guerra de las Cortes: la revisión de la jurisprudencia del Tribunal Supremo a través del recurso de amparo, Madrid, Tecnos, 1999.

fundamental rights: that protection must ultimately be ensured by independent courts. But this gives rise to difficulties of an eminently practical nature. How can the independence of these courts be ensured vis-à-vis other public and private powers? Once again, the administration of the judiciary requires formulas that guarantee, on the one hand, that judges are not subjected to unwanted pressure, and on the other hand and simultaneously, that the courts function efficiently as a public service provided by responsible civil servants, all of which require a given level of supervision and control. Among the increasing number of studies concerning judicial reform from a comparative perspective (and that reflect experiences or make proposals with respect to "constitutional engineering"), many deal with the administration of the judiciary, whether such powers be vested in a Supreme Court, Ministry of Justice, Judicial Council, or mixed models,[23] and are an indication that in this area there is certainly a need to seek new formulas. Here it has also been affirmed that the mere adoption of solutions tested in other contexts, such as the judiciary council model, is not necessarily a good idea, whether in the context of Latin America (referred to above), or in Europe.[24]

[23] For an analysis and summary of these works, see P. DESHAZO and J.E. VARGAS, Judicial Reform in Latin America, Washington, CSIS, 2006.

[24] See, for example, K. MALLESON, "Creating a Judicial Appointments Commission: Which Model Works Best?" Public Law (Spring 2004) pp. 102–121.

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Le contrôle parlementaire de l'Union Européenne

Le spectre de la légitimité démocratique a toujours hanté la construction européenne, mais tant que celle-ci a conservé un contenu essentiellement économique, il n'attirait qu'épisodiquement l'attention. Dans le domaine économique en effet, les questions de principe avaient été tranchées dès l'origine par les traités eux-mêmes ; il s'agissait de mettre ceux-ci en œuvre, en dégageant des compromis et en ménageant des transitions. Et c'est pourquoi, malgré l'autorité que lui conférait son élection au suffrage direct à partir de 1979, le Parlement européen a eu initialement de la peine à trouver sa place dans le fonctionnement de l'Union, ne réussissant vraiment à s'imposer que dans le domaine budgétaire.

Le traité de Maastricht a constitué un tournant, en faisant pénétrer la construction européenne dans les domaines régaliens : non seulement il réalisait une union monétaire entrer les États membres, mais il instituait une Union dont les deuxième et troisième « piliers » développaient la dimension politique, puisque leurs objectifs étaient une affirmation de l'Europe en matière de politique étrangère, de sécurité, de défense, et la construction d'un espace intérieur de liberté, de sécurité et de justice. La construction européenne abordait ainsi des domaines où elle avait besoin d'une légitimité démocratique suffisante pour que son action soit perçue comme justifiée, et le thème d'un « déficit démocratique » de l'Union se trouvait plus que jamais au premier plan.

La réponse à ce déficit a été cherchée, au fil des traités, dans un développement des pouvoirs du Parlement européen.

Le traité de Maastricht contenait déjà, à cet égard, des avancées importantes. Il rendait nécessaire l'accord du Parlement pour de nombreuses décisions : accords internationaux les plus importants, règles concernant le droit de séjour et de circulation des citoyens de l'Union, règles de base concernant les fonds structurels et le fonds de cohésion, statuts du système européen de banques centrales, procédure uniforme pour les élections européennes. En outre, il met-

tait en place, pour certains domaines, la procédure de codécision dans laquelle un texte ne peut être adopté par le Conseil, même statuant à l'unanimité, dès lors que le Parlement s'y oppose. Enfin, les pouvoirs de contrôle de l'Assemblée étaient sensiblement élargis : la Commission, désormais renouvelée après chaque élection européenne, devait recevoir l'investiture du Parlement, et celui-ci avait désormais le droit de constituer des commissions d'enquête.

Le traité d'Amsterdam a poursuivi cette évolution : la procédure de codécision a été modifiée pour aboutir à une égalité complète entre le Parlement et le Conseil ; surtout, elle a été étendue à de nombreux domaines, devenant la procédure de droit commun lorsque le Conseil statue à la majorité qualifiée (les exceptions les plus significatives étant la politique agricole et la politique commerciale). Le contrôle politique du Parlement sur la Commission a été renforcé par un mécanisme de double investiture (le Parlement investit d'abord le président de la Commission, puis la Commission en tant que collège, après audition de chacun des membres désignés). Enfin, le Parlement a reçu un instrument important d'influence en matière de politique étrangère et de sécurité commune, puisque les dépenses de cette politique ont été mises à la charge du budget communautaire sauf décision contraire du Conseil statuant à l'unanimité.

Le traité de Nice a prolongé ce mouvement, en étendant la procédure de codécision aux nouvelles matières où le Conseil était désormais appelé à statuer à la majorité qualifiée. Par ailleurs, ce texte a accru les pouvoirs du Parlement en ce qui concerne la saisine de la Cour de Justice : alors qu'auparavant il pouvait seulement saisir celle-ci pour sauvegarder ses propres prérogatives ou faire constater la « carence » d'une autre institution à mettre en œuvre une disposition des traités, il a reçu – au même titre qu'un État membre – la possibilité de former des recours contre les actes du Conseil, de la Commission ou de la Banque centrale européenne (BCE), que ce soit pour incompétence, violation des formes substantielles, violation du traité instituant la Communauté européenne, ou détournement de pouvoir.

Le Parlement européen dispose ainsi, aujourd'hui, de pouvoirs étendus.

La procédure budgétaire lui donne le « dernier mot » sur les « dépenses non obligatoires » (c'est-à-dire pour l'essentiel les dépenses autres que les dépenses agricoles) qui constituent la majorité des dépenses de l'Union.

En matière législative, la procédure de codécision s'applique à presque tous les domaines où le Conseil statue à la majorité qualifiée, ce qui est désormais le cas général (au demeurant, l'accord du Parlement européen – soit par l'exigence d'un « avis conforme », soit par l'application de la procédure de codécision – est également requis pour certaines décisions prises par le Conseil à l'unanimité).

Les pouvoirs de contrôle du Parlement sont également très larges : investiture de la Commission, droit de la renverser (alors que le Parlement ne peut être dissout), droit de créer des commissions d'enquête ...

Ces pouvoirs sont d'autant significatifs que le Parlement les exerce de manière autonome, n'étant lié ni par les contraintes d'une discipline majoritaire, ni par les mécanismes du « parlementarisme rationalisé ». Ils apparaissent, *mutatis mutandis,* plus importants que ceux dont dispose le Parlement national au sein d'un État membre, où le poids de l'Exécutif est généralement bien plus grand.

L'ascension du Parlement au sein des institutions européennes n'a cependant pas produit tous les effets escomptés. Paradoxalement, la participation aux élections européennes n'a cessé de décliner, passant en vingt-cinq ans de 63 % à moins de 46 % (encore faut-il tenir compte, pour apprécier ce résultat moyen, du fait que le vote est obligatoire dans certains États membres). Contre toute attente, l'augmentation des pouvoirs du Parlement s'est ainsi accompagnée d'un désintérêt croissant pour son élection.

De même, le sentiment d'un « déficit démocratique » de la construction européenne n'a pas disparu, et semble avoir été une des raisons des référendums négatifs en France et aux Pays-Bas en 2005.

Il est vrai que le parlementarisme européen répond assez mal à certains des « canons » de la démocratie représentative. Celle-ci suppose tout d'abord l'existence et l'expression d'une opinion publique vis-à-vis de laquelle les gouvernants sont amenés à se situer. Or, même si des mouvements d'opinion en Europe dépassent les frontières nationales, on ne peut parler aujourd'hui d'« opinion publique européenne » ou d'« espace public européen ». Bien au contraire, les élections européennes donnent lieu à autant de débats qu'il y a d'États membres, et c'est d'ailleurs surtout en termes de succès ou de désaveu du gouvernement national qu'elles sont interprétées sur le plan politique. Autrement dit, le cadre de référence commun qui donnerait sens aux élections européennes ne s'est pas véritablement formé.

Surtout, la formation de la légitimité démocratique est étroitement liée à la notion de responsabilité. Comme l'a souligné Bernard Manin dans ses *Principes du gouvernement représentatif*, c'est en définitive le mécanisme de la sanction électorale qui fonde la légitimité démocratique. Dans une démocratie, le responsable politique sait qu'il peut être sanctionné à l'élection suivante, et il est de ce fait conduit à anticiper le jugement qui sera porté sur lui par les électeurs. Il peut prendre des risques, lancer des mesures difficiles au début de son mandat en estimant que, lors de l'élection suivante, on lui sera finalement reconnaissant de les avoir prises ; mais, dans tous les cas, il lui faut se préoccuper d'avoir, le

moment venu, l'adhésion du plus grand nombre. Finalement, ce qui rend un gouvernement démocratique légitime, ce qui fonde le devoir d'obéissance à son égard, c'est la possibilité de sanctionner et le changer.

Or, il est difficile de faire jouer un mécanisme de responsabilité démocratique à l'échelon européen. Non seulement le cadre de référence commun n'est pas suffisamment constitué, mais le fonctionnement de l'Union ne se prête guère à une alternance des majorités. La composition de la Commission repose sur les propositions faites par des gouvernements nationaux de différentes orientations politiques. Le Conseil des ministres ne fonctionne pas – et ne pourrait fonctionner – selon un clivage stable entre une majorité et une opposition ; quant au Conseil européen, il décide par consensus. Le Parlement européen lui-même – élu au scrutin proportionnel et donc relativement émietté – fonctionne en grande partie par accord entre les deux plus grands groupes, le PPE et le PSE. On voit mal comment une sanction électorale à l'échelon européen pourrait pleinement jouer dans ces conditions.

Certes, en l'absence d'une légitimité démocratique mieux affirmée, l'Union peut continuer à reposer en partie sur une légitimité fonctionnelle, c'est-à-dire sur son efficacité, sa capacité à résoudre des problèmes dont l'existence a été reconnue par tous. Il n'en reste pas moins nécessaire de chercher à consolider ses liens avec les citoyens, car l'affirmation politique de l'Europe reste, en tout état de cause, inséparable de l'approfondissement de sa vie démocratique.

Bien loin d'ignorer cette exigence, le traité de Lisbonne – après le traité constitutionnel – s'efforce d'y répondre. Il poursuit le mouvement vers une « parlementarisation » bien plus grande de la construction européenne, mais d'une manière novatrice, non seulement en renforçant encore les pouvoirs du Parlement européen, mais en attribuant un rôle spécifique aux parlements nationaux.

Le rôle législatif du Parlement européen est sensiblement accru par la généralisation (sous réserve d'exceptions en nombre très limité) de la procédure de codécision qui va désormais s'appliquer également en matière de justice et d'affaires intérieures, de politique commerciale commune, de législation agricole…

Ses pouvoirs budgétaires augmentent également en raison de la suppression de la notion de « dépenses obligatoires », alors que cette part du budget, comprenant essentiellement les dépenses agricoles, ne peut pratiquement pas aujourd'hui être amendée par le Parlement. Le Conseil et le Parlement sont placés sur un pied d'égalité dans la procédure budgétaire ; toutefois, si un accord est intervenu au sein du comité de conciliation entre les représentants du Parlement et ceux

du Conseil, mais que ce dernier rejette cet accord, le Parlement peut statuer définitivement en reprenant tout ou partie des amendements qu'il avait adoptés en première lecture.

À côté de ces changements, qui se situent dans la logique des précédents traités, le traité de Lisbonne contient des dispositions plus novatrices en ce sens qu'elles accordent un rôle aux parlements nationaux dans le fonctionnement même de l'Union.

Le premier aspect de ce rôle est de veiller au respect du principe de subsidiarité. Le mécanisme retenu comprend trois aspects :

– dans un délai de huit semaines à compter de la transmission d'un projet d'acte législatif, toute chambre d'un parlement national peut adresser aux institutions de l'Union un « avis motivé » exposant les raisons pour lesquelles elle estime que ce texte ne respecte pas le principe de subsidiarité. Les institutions de l'Union « tiennent compte » des avis motivés qui leur sont adressés. Lorsqu'un tiers des parlements nationaux ont adressé un avis motivé, le projet doit être réexaminé (pour les textes relatifs à la coopération policière et à la coopération judiciaire en matière pénale, ce seuil est abaissé à un quart). Pour l'application de cette règle, chaque parlement national dispose de deux voix ; dans un système bicaméral, chaque chambre dispose d'une voix ;

– si un projet d'acte législatif est contesté à la majorité simple des voix attribuées aux parlements nationaux et si la Commission décide de le maintenir, le Conseil et le parlement doivent se prononcer sur la compatibilité de ce projet avec le principe de subsidiarité ; si le Conseil (à la majorité de 55 % de ses membres) ou le Parlement (à la majorité simple) donne une réponse négative, le projet est écarté ;

– après l'adoption d'un texte, la Cour de justice peut être saisie par un État membre d'un recours pour violation du principe de subsidiarité émanant d'un parlement national ou d'une chambre de celui-ci. Le recours est toujours formellement présenté par le gouvernement d'un État membre, mais le protocole ouvre la possibilité qu'il soit simplement « transmis » par ce gouvernement, l'auteur véritable du recours étant le parlement national ou une chambre de celui-ci.

Par ailleurs, les parlements nationaux sont associés à la mise en œuvre des « clauses passerelles » qui permettent le passage de l'unanimité à la majorité qualifiée pour une décision du Conseil, ou le passage d'une procédure autre que la codécision entre le Parlement européen et le Conseil à la procédure de codécision. La décision de mettre en œuvre une « clause passerelle » est prise par le Conseil européen à l'unanimité. Elle doit être approuvée par le Parlement

européen. Toutefois, chaque Parlement national dispose, avant que la décision ne soit prise, d'un droit d'opposition. Dès lors que le Conseil européen a manifesté l'intention de recourir à une « clause passerelle », cette initiative est transmise aux parlements nationaux. Cette transmission ouvre un délai de six mois durant lequel tout parlement national peut s'opposer à la mise en œuvre de la « clause passerelle ». Si, à l'expiration de ce délai, aucun parlement national n'a notifié son opposition, le Conseil européen peut statuer.

Enfin, certaines dispositions du traité associent les parlements nationaux à la constitution de l'espace de liberté, de sécurité et de justice. Elles prévoient que *« les parlements nationaux sont informés de la teneur et des résultats »* de l'évaluation de la mise en œuvre, par le autorités des États membres, des politiques de l'Union en matière d'espace de liberté, de sécurité et de justice et qu'ils *« sont tenus informés des travaux »* du comité permanent chargé de favoriser la coordination entre les autorités des États membres en matière de sécurité intérieure. Surtout, le nouveau traité précise que les parlements nationaux sont associés *« à l'évaluation des activités d'Eurojust »* et au *« contrôle des activités d'Europol »*. En outre, les parlements nationaux ont un droit d'opposition (analogue à celui prévu pour les « clauses-passerelles ») lorsque le Conseil détermine la liste des aspects du droit de la famille ayant une incidence transfrontalière.

Cette nouvelle implication des parlements nationaux pourrait contribuer par plusieurs aspects à renforcer la légitimité de l'Union. Tout d'abord, parce qu'un meilleur contrôle du respect du principe de subsidiarité, en incitant à recentrer l'action de l'Union vers les domaines où elle est particulièrement nécessaire, ne peut que renforcer l'acceptabilité de cette action. Ensuite, parce qu'impliquer davantage les parlements nationaux revient à instituer un relais, un fil conducteur, entre les citoyens et l'Union. Enfin, parce qu'étant plus directement associés aux activités de l'Union, les parlements nationaux pourront d'autant moins se dérober à leurs responsabilités en matière de contrôle de la politique européenne menée par leurs gouvernements.

Plus généralement, la double parlementarisation opérée par le traité de Lisbonne paraît dans l'esprit de la construction européenne comme « fédération d'États-Nations », selon la formule de Jacques Delors, car une fédération de ce type – visant un exercice en commun des souverainetés plus que l'avènement d'une souveraineté nouvelle remplaçant celle des États membres – ne peut ni reposer sur une méthode décision unique, ni sur une seule forme de légitimité : elle doit associer, conjuguer toutes les légitimités en présence.

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La dimension collective des droits de l'homme et les conséquences de son occultation par l'individualisation. L'exemple de la réconstruction en Bosnie-Herzégovine

La première intervention de l'ONU dans une région en crise a eu lieu à la fin de 1995 lorsque, en accord avec le Conseil de sécurité de l'ONU, quelque 60 000 soldats ont été stationnés en Bosnie-Herzégovine. Les négociations de paix menées dans la ville américaine de Dayton (Ohio) ont abouti à un accord, qui a été signé à Paris en décembre 1995. La pacification militaire s'est déroulée avec succès et les armes se sont bientôt tues. En revanche, le processus de reconstruction qui en est suivi a suscité des résistances qui perdurent aujourd'hui. Rétrospectivement, il apparaît que la situation politique instaurée par l'accord de paix de Dayton n'était pas totalement propice à la pacification et à la construction du pays. Les remarques critiques qui suivent se limitent au domaine des droits de l'homme au sens le plus étendu.[1] Si la Bosnie n'est pas parvenue à développer une culture des droits de l'homme digne de ce nom dans les premières années qui ont suivi la guerre, il y a à cela des raisons structurelles tenant essentiellement à trois éléments de départ figurant dans l'accord de paix de Dayton.

En premier lieu, le nouvel Etat de Bosnie-Herzégovine a été dessiné en suivant les frontières entre les groupes ethniques qui s'étaient affrontés pendant la guerre. La genèse de l'accord de paix explique que les nouvelles frontières internes suivent plus ou moins les lignes de démarcation militaires, les anciens

[1] L'auteur a exercé la fonction de médiatrice pour les droits de l'homme en Bosnie-Herzégovine de 1996 à 2000 à Sarajevo. Sa charge de médiatrice était instituée par l'annexe 6 de l'accord de paix de Dayton.

chefs de guerre ayant participé aux négociations de Dayton. Mais, de surcroît, une ethnicisation systématique a été pratiquée jusque dans les moindres détails des structures fédéralistes, alors qu'elle ne répondait pas à une nécessité, et a pris une ampleur inégalée pendant des siècles dans l'histoire de la Bosnie.[2] Le deuxième élément est la création d'une multiplicité d'institutions chargées d'examiner les recours individuels relatifs aux droits de l'homme et dont les compétences se chevauchent partiellement. A Dayton, les parties voulaient avant tout mettre en place un grand nombre d'instances et de possibilités de recours, accordant moins d'importance à la cohérence de l'ordre juridique.[3] Pour leur donner une base légale, il a été décidé que l'ensemble des conventions internationales relatives aux droits de l'homme seraient directement applicables et on les a intégrées dans le droit national.[4] Certes, on ne peut pas construire un Etat sans créer d'instances de recours. Mais dans le cas de la Bosnie, la pléthore de voies de droit associée à d'autres facteurs a eu des conséquences critiquables. Le troisième et dernier élément tient à la valeur même de l'accord de paix. Il contenait notamment la Constitution élaborée à Dayton, qui avait été en quelque sorte plaquée sur le nouvel Etat. Or, l'accord de paix était considéré par la communauté internationale – et encore plus par la population bosnienne – comme intangible : il était inconcevable de remettre son contenu en question. Cet élément n'aurait eu qu'une importance mineure s'il n'avait eu un impact sur les droits de l'homme dans son interaction avec les deux autres éléments précités.

Historiquement, la Bosnie possède une tradition séculaire de coexistence interethnique. Elle remonte au royaume ottoman et a traversé le règne des Habsbourg avant de s'effondrer au XX^{ème} siècle. Des milices d'obédience croate et serbe se sont affrontées pendant la seconde guerre mondiale. La

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[2] Par exemple, il était prévu que la présidence tricéphale de l'Etat serait partagée entre les trois groupes ethniques (Serbes bosniens, Croates bosniens et Bosniaques, c'est-à-dire. Bosniens musulmans). La restriction du droit de vote passif que constitue cette réglementation fait l'objet d'un recours pendant devant la Cour européenne des droits de l'homme (« *Roms* et *Communautés juives* contre *Bosnie-Herzégovine* », selon communication de la Cour européenne des droits de l'homme du 5.02.2008).

[3] La Commission de Venise du Conseil de l'Europe, sollicitée pour clarifier la situation, a constaté « que le mécanisme de protection des droits de l'homme prévu dans l'ordre juridique de Bosnie et Herzégovine [présentait] un degré de complexité inhabituel ». Document CDL-INF(96)9, http://www.venice.coe.int/docs/1996/CDL-INF(1996)009-f.asp (consulté le 31.01.2008).

[4] Les conséquences de cette construction juridique ont été problématiques. Ainsi, elle pose la question de l'applicabilité directe de normes de droit international public qui sont reconnues dans le monde entier comme n'étant pas justiciables. Au surplus, avant la ratification de la CEDH par la Bosnie le 12 juillet 2002, il était impossible de présenter à la Cour européenne des requêtes contre les autorités bosniennes pour des violations de la Convention alors que celle-ci, en vertu de l'accord de paix de Dayton, était directement applicable en droit national depuis le 14 décembre 1995.

Yougoslavie, Etat pluriethnique, avait réussi à canaliser les animosités entre les ethnies. Lors de son démantèlement, ses dirigeants, privés de leurs anciens appuis communistes, ont recherché une nouvelle base de pouvoir dans l'ethnonationalisme, réveillant les conflits le long des lignes de démarcation ethniques. C'est là l'origine de la guerre de Bosnie dans les années nonante. Mais même les actes barbares commis pendant ce conflit ne sont pas parvenus à effacer totalement la tradition de coexistence pacifique entre les ethnies. L'identité de la population bosnienne est restée marquée par le souvenir de la Yougoslavie multiethnique – ou par des vestiges d'une tradition remontant aux temps encore plus anciens des empires pluriethniques. Il ne s'agissait pas d'un sentiment *civique*, l'expérience de la démocratie manquant pour cela, mais bien en quelque sorte d'un sentiment *étatique*, de la conscience que la coexistence pacifique entre les différentes ethnies ne pourrait être assurée que dans le cadre d'une entité ayant le caractère d'un État et administrée comme elle l'avait toujours été.

Individualisation de la responsabilité des droits de l'homme

Plutôt que de s'appuyer sur cette tradition, l'accord de Dayton a fermé la porte à tout effort étatique visant à établir une coexistence interethnique. Il n'a pas non plus donné à l'individu la possibilité d'agir sur le plan civique pour obtenir que l'on améliore les chances de la coexistence entre les ethnies. Au contraire, force lui a été de constater que l'organisation de l'Etat comportait de nombreuses structures soigneusement calquées sur les lignes de démarcation ethniques et qu'il n'était pas question de remettre en cause ces présupposés. Par ailleurs, les individus disposaient en théorie de tous les droits et garanties qui auraient dû leur permettre d'échapper au carcan de cette structure de base ethnicisante puisqu'ils pouvaient revenir s'installer là où ils habitaient antérieurement : l'accord de Dayton garantissait à toutes les personnes déplacées le droit de réintégrer leur logement. Mais dans la pratique, ce retour pouvait être une entreprise dangereuse si le lieu de domicile avait entre-temps été investi par des membres d'un autre groupe ethnique, opposés au retour des anciens habitants. L'ethnicisation des structures étatiques inscrit comme un principe intangible dans l'accord de Dayton a contribué à renforcer ces réactions de rejet.

On attendait donc des habitants de la Bosnie qu'ils accomplissent au niveau individuel, en réintégrant leur ancien domicile, ce à quoi l'accord de Dayton lui-même faisait obstacle au niveau collectif de l'Etat. Les personnes

qui souhaitaient favoriser la coexistence interethnique ont été renvoyées à la lutte pour leurs droits individuels. C'est ainsi que la responsabilité de la coexistence interethnique a été *in fine* reportée sur les individus. Et la responsabilité du respect des droits de l'homme a fini par être entraînée dans ce sillage. Les multiples instances de recours en matière de droits de l'homme ont été saisies principalement pour des questions de propriété ou de jouissance de logements. Ainsi, dans la perception de l'opinion publique, le retour des personnes déplacées est devenu essentiellement une question de droits de l'homme.

Il n'y a pas que les individus qui ont été dépassés par cette configuration issue de l'accord de Dayton. La culture des droits de l'homme dans son ensemble en a elle aussi souffert : chaque échec essuyé lors d'une tentative de retour est apparu, principalement, voire exclusivement, comme une violation des droits de l'homme. Cette mise en scène d'une multitude de violations, qui crée un sentiment d'inflation, est propre à affaiblir la culture des droits de l'homme d'une société. L'individualisation de la responsabilité de la mise en œuvre des droits de l'homme a entraîné en quelque sorte une « désétatisation » de ces droits. Celle-ci a abouti à une négation de la responsabilité qui incombe à chacun, en tant que citoyen ou citoyenne, de participer au débat public pour obtenir que l'Etat garantisse les droits de l'homme de tous ceux et celles qui habitent sur son territoire. Au lieu de cela, le processus de reconstruction en Bosnie s'est développé par le canal de procédures individuelles demandant la restitution de la propriété de terres. Une des raisons pour lesquelles les trois éléments de départ figurant dans l'accord de Dayton dont nous avons parlé plus haut ont porté atteinte à la culture des droits de l'homme dans son ensemble tient au fait que cette méthode de reconstruction a très largement été pratiquée au nom des droits de l'homme.

Rétrospectivement, on peut dire que ce phénomène, qui s'est produit pour la première fois en Bosnie, a été observé à plusieurs reprises par la suite. Ainsi, ce qui s'est passé en Bosnie n'a été que le point de départ d'une évolution qui s'est répandue à travers et au-delà des Balkans pour gagner d'autres régions en crise où des interventions militaires ont eu lieu par la suite : le Kosovo, l'Afghanistan et finalement l'Irak. Le problème que pose cette évolution tient en quelques mots : la tentative de mettre en place une structure d'organisation s'appuyant sur des groupes ethniques ou religieux empêche *in fine* qu'un État se développe. Ainsi conçue, la reconstruction repose non pas sur l'identité civique de chaque citoyen et citoyenne, mais sur l'identité communautaire

de groupes définis par leur ethnie ou leur religion.[5] Dans le domaine des droits de l'homme, la Bosnie reste l'exemple qui illustre le mieux ce mode de reconstruction. D'une part, le pays a pu être pacifié par des moyens militaires, contrairement aux autres régions en crise, ce qui permet de porter une appréciation sur la culture des droits de l'homme indépendamment du succès militaire. Dans les régions en crise qui se sont retrouvées sous les feux de l'actualité par la suite, le problème des droits de l'homme a souvent été éclipsé par les difficultés à instaurer la paix militairement. D'autre part, l'investissement dans le respect des droits de l'homme a été beaucoup plus important en Bosnie que partout ailleurs.

Le cas de la Bosnie est également exemplaire en ceci qu'il illustre l'incompatibilité des droits de l'homme avec une conception de l'ordre public reposant sur le communautarisme. Pendant les années d'après-guerre, les victimes en Bosnie ont souvent fait valoir que leurs droits de l'homme avaient été violés particulièrement en raison de leur appartenance ethnique. Les personnes déplacées invoquaient une violation de leurs droits de l'homme en tant que « Croates bosniens », « Serbes bosniens » ou « Bosniaques » (Bosniens de confession musulmane). Cette argumentation était souvent liée à l'idée – implicite ou exposée explicitement – que les membres d'une ethnie à laquelle appartenaient des individus ayant commis ces violations avaient par là même perdu le droit de faire valoir leurs propres droits de l'homme : les actes commis pèseraient trop lourd pour que leurs auteurs puissent invoquer des droits de l'homme. De telles erreurs d'interprétation ont conduit à une implosion de la culture des droits de l'homme.

On ne peut parer à des erreurs d'interprétation de cette nature que par une conception des droits de l'homme dont la construction fondamentale renonce à toute référence communautariste pour se fonder exclusivement

[5] La situation en Irak, qui est analogue, est décrite ainsi par Amartya Sen : « La participation de différents groupes de population (chiites, sunnites, kurdes) a donné l'impression d'être largement dominée par leurs représentants et porte-parole sans que la population elle-même ne puisse véritablement prendre part à une réflexion et une action citoyenne […]. Puisque la politique menée par les Etats-Unis repose sur une conception de l'Irak comme simple collectivité de communautés religieuses et non collectivité de citoyens, les négociations ont avant tout été conditionnées par les décisions et les déclarations des chefs des différentes communautés religieuses. Il était certainement beaucoup plus facile d'agir ainsi, étant donné les tensions qui existaient déjà dans le pays et les nouvelles tensions créées par l'occupation elle-même. Mais le chemin le plus facile à court terme n'est pas toujours le plus sûr moyen de bâtir l'avenir d'un pays, surtout lorsque les enjeux sont aussi importants, et que la nation a besoin d'être une conglomération de citoyens plutôt qu'une collectivité d'ethnies religieuses. » (traduction) Amartya Sen, Identité et violence : l'illusion du destin, éd. Odile Jacob, 2007, pp. 116 et 246.

sur la naissance de l'individu en tant qu'être humain, sans tenir compte de quelque autre caractéristique que ce soit. Cela n'exclut pas que des références communautaristes puissent jouer un rôle lorsque des violations des droits de l'homme sont commises en raison de l'appartenance à une communauté. Dans ce cas, il faut que l'appréciation de la violation comporte une analyse de son aspect communautariste. Il en va de même pour les questions de discrimination, qui sont toujours liées à l'appartenance à un groupe. Or, ce sont précisément les cas de violation des droits de l'homme et de discrimination qui permettent de montrer que tout individu a des droits indépendants de son appartenance à un groupe ou à une communauté. Cette conception des droits de l'homme met en valeur à la fois leur attribution individuelle et leur portée universelle.

Droits individuels et responsabilité collective: Les droits de l'homme et la souveraineté populaire

Une individualisation de la responsabilité des droits de l'homme, telle qu'elle s'est produite de manière exemplaire en Bosnie, occulte en grande partie la dimension collective de ces droits, qui se retrouvent réduits à leur dimension individuelle alors que la responsabilité de l'individu pour les droits de l'homme est essentiellement de nature collective. L'explication historique de ce phénomène réside dans le lien indissoluble qui unit les droits de l'homme et la souveraineté populaire depuis la Révolution française. Les Lumières attribuent à l'être humain deux rôles distincts, mais interdépendants : d'une part, le rôle de membre du législateur souverain ; d'autre part, le rôle d'assujetti aux lois. C'est seulement dans la mesure où le citoyen peut participer à l'élaboration des lois qu'il peut ensuite s'y soumettre, même s'il a été mis en minorité lors du processus de formation de l'opinion qui a présidé à l'élaboration de la loi .[6] Ce double rôle est particulièrement évident dans le domaine des droits de l'homme. D'une part, le droit de prendre part à la politique est un droit humain. Mais d'autre part, le fait de prendre part à la politique confère le droit d'interpréter et de développer les droits de l'homme : il faut en particulier que la définition des restrictions apportées à ces droits ait une assise démocratique, c'est-à-dire repose

[6] Günther propose une réflexion de fond sur ce sujet : *„Welchen Personenbegriff braucht die Diskurstheorie des Rechts? Überlegungen zum internen Zusammenhang zwischen deliberativer Person, Staatsbürger und Rechtsperson"*, in Brunkhorst/Niesen (éd.), *„Das Recht der Republik"*, 1999, pp. 83–104.

sur la souveraineté populaire.[7] Au sens où les concevait la Révolution française, les droits de l'homme et la souveraineté populaire sont interdépendants.[8]

Malgré les grandes révolutions, une conception prérévolutionnaire a cependant perduré, selon laquelle ce sont les gouvernants qui garantissent les libertés aux sujets de droit. C'était le cas dans les Etats qui n'avaient pas connu de véritable révolution, mais où des groupes de pouvoir sociaux avaient convaincu les monarques d'abandonner une partie de leurs prérogatives.[9] Lorsque les droits de l'homme sont conçus comme étant consentis aux ayants droit, ils perdent leur interrelation avec la souveraineté populaire. Ils sont en quelque sorte coupés de la souveraineté populaire car le souverain est la personne ou l'instance qui les a consentis. Si l'on y regarde bien, ces deux conceptions des droits de l'homme ont toujours cohabité, selon le stade de développement historique d'un État ou d'une région.[10]

Que les droits de l'homme soient conçus dans leur interrelation d'origine avec la souveraineté populaire ou sans référence à cette interrelation n'est pas sans portée. Dans le second cas, la personne assujettie aux lois n'est pas tenue de s'accorder de droits en qualité de membre du peuple souverain, pas plus qu'elle n'est invitée, toujours en qualité de membre du peuple souverain, à participer à la définition des droits consentis par l'instance étrangère au peuple souverain. Il suffit que l'individu se préoccupe des droits de l'homme qu'il revendique et invoque en justice individuellement et dans des cas d'espèce. Il n'y a pas de dimension collective. Dans la conception d'origine des droits de l'homme, par contre, chacun peut se préoccuper des droits autres que ses droits individuels dans des cas d'espèce. L'individu doit d'abord revendiquer ces droits et les définir, au cours d'un processus permanent et dans le cadre d'un dialogue public avec les autres individus investis de la souveraineté populaire. Il prend ainsi conscience des limites que doivent avoir ses droits, qui s'arrêtent là où commencent les mêmes droits des autres individus. Cette définition concrète des droits de l'homme dépasse la perspective de l'attribution de droits au niveau individuel

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[7] Maus, *„Menschenrechte als Ermächtigungsnorm internationaler Politik, oder : der zerstörte Zusammenhang von Menschenrechten und Demokratie"*, in Brunkhorst/Köhler/Lutz-Bachmann (Ed.), *„Recht auf Menschenrechte"*, 1999, p. 287.

[8] Pour un récapitulatif des objections à cette position, lire : Menke/Pollmann, *„Philosophie der Menschenrechte zur Einführung"*, 2007, p. 170 ss.

[9] Grimm, *„Deutsche Verfassungsgeschichte 1776 – 1866"*, 1988, p. 12.

[10] Möllers, *„Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung. Begriffe der Verfassung in Europa"*, in von Bogdandy (éd.), *„Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge"*, 2003, p. 15.

uniquement.[11] Mais surtout, ce processus conduit nécessairement à la prise de conscience que la garantie des droits de l'homme n'est pas uniquement dictée par la somme de tous les intérêts individuels, mais qu'elle s'intègre de surcroît dans la garantie du bien commun, qui est davantage que la somme algébrique des intérêts individuels de tous les ayants droit. Cette garantie du bien commun peut s'exprimer notamment dans les limites fixées aux droits individuels.

Les droits de l'homme ne peuvent être durables que s'ils émancipent l'être humain à deux titres : au titre d'acteur de la souveraineté populaire, qui revendique ces droits collectivement d'abord et prend régulièrement part à leur définition ; au titre de sujet de droit, qui revendique ces droits individuellement dans des cas d'espèce. On voit donc que les propositions occasionnelles d'assortir les catalogues des droits de l'homme d'un catalogue de devoirs font fausse route. En effet, cette conception prive les ayants droit de la possibilité de prendre part à l'interaction entre tous les individus qui exercent leurs droits. La personne qui se demande dans quelle mesure d'autres peuvent invoquer les mêmes droits de l'homme ne remplit pas là un devoir, mais elle exerce un droit, le droit du Souverain de définir collectivement les droits de l'homme. Le discours sur les devoirs liés aux droits de l'homme tente d'intégrer les droits de l'homme des autres êtres de l'homme tout en occultant la dimension collective de ces droits.[12] Dans le domaine des droits de l'homme, l'individu a un seul devoir : celui de s'engager dans la mesure de ses possibilités pour que règne un ordre public au sens d'une *res publica*, auquel puisse être confié le devoir de protéger les droits de l'homme afin que tous les individus bénéficient d'une protection égale.[13]

Disjoindre les droits de l'homme de la souveraineté populaire dans une étape de transition

Bien que les droits de l'homme aient toujours été conçus sur le plan normatif comme étant universels, ils ont été mis en pratique à leurs débuts sous la forme de droits civiques. Dans la Déclaration des droits de l'homme et du citoyen proclamée en France en 1789, les deux concepts se recouvraient. Cette particularité ne figure toutefois que dans la déclaration française, et pas dans les autres

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[11] Nagl-Docekal, *„Autonomie zwischen Selbstbestimmung und Selbstgesetzgebung, oder Warum es sich lohnen könnte, dem Verhältnis von Moral und Recht bei Kant nachzugehen"*, in Pauer-Studer/Nagl-Docekal (éd.), Freiheit, Gleichheit und Autonomie, 2003, p. 313.

[12] *„Menschenrechte verpflichten nicht das einzelne moralische Subjekt sondern „das kollektive politische Subjekt"*, Menke/Pollmann (op. cit. en note de bas de page 8) p. 33.

[13] Tugendhat, *„Vorlesungen über Ethik"*, 1993, p. 349 s.

catalogues des libertés individuelles de l'époque.[14] Elle traduit la conviction que les citoyens ne sont autres que des êtres humains qui, dans un espace social déterminé, sont convenus ensemble, en tant qu'individus libres et égaux, de donner à la société une forme juridique dans laquelle ils deviennent le législateur souverain.[15] Cependant, comme la mise en œuvre de la souveraineté populaire a eu lieu dans les différents Etats à des moments différents, en fonction du processus de construction de chacun, les droits de l'homme qui y sont liés ont également été mis en pratique sous la forme de droits civiques dans les autres Etats nationaux que la France. Il était encore beaucoup trop tôt pour procéder à une positivation universelle des droits de l'homme. Inversement, on peut dire que le ravalement au niveau de l'Etat national de ces droits conçus pour être universels était le prix à payer pour garantir l'interrelation entre les droits de l'homme et la souveraineté populaire. Sur le plan normatif et en théorie, la prétention à l'universalité restait intacte tandis que, dans la pratique, les droits civiques devenaient des droits particuliers associés à l'Etat national.[16]

Un mouvement inverse d'universalisation a commencé à s'étendre à la pratique après 1945. Mais, cette fois encore, il y a eu un prix à payer pour cette élévation de la protection des droits de l'homme au niveau international, un prix inverse à celui consenti 150 ans auparavant. L'interrelation d'origine entre les droits de l'homme et la souveraineté populaire a été largement abandonnée au niveau international. Les nouveaux instruments de protection des droits de l'homme prévus par le droit international ont été adoptés par les gouvernements dans l'enceinte des organisations internationales puis signés et ratifiés, suivant une procédure d'approbation qui ne laissait plus aux parlements nationaux aucune possibilité d'influer sur les définitions.[17] L'interprétation et le développement des droits de l'homme régis par des conventions internationales ont été confiés à des instances judiciaires et à des comités. Les procédures afférentes ont été développées avec un maximum d'efficacité par les organes de la Convention européenne des droits de l'homme (CEDH) et, aujourd'hui, par la Cour européenne des droits de l'homme.

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[14] Brunkhorst, Solidarität. *„Von der Bürgerfreundschaft zur Globalen Rechtsgenossenschaft"*, 2002, p. 92.
[15] Brunkhorst (op. cit. en note de bas de page 14), p. 93.
[16] Wellmer, *„Menschenrechte und Demokratie" in Gosepath/Lohmann, „Philosophie der Menschenrechte"*, 1998, p. 266.
[17] L'Assemblée parlementaire du Conseil de l'Europe, composée de délégations des parlements nationaux, constitue une exception : elle a exercé une influence non négligeable sur l'organisation de la protection des droits de l'homme dans ce qui était alors l'Europe de l'Ouest. Van Dijk/van Hoof/van Rijn/Zwaak, *"Theory and Practice of The European Convention on Human Rights"*, 2006, p. 3 s.

Pour le sujet qui nous intéresse ici, il y a une différence majeure selon que les droits de l'homme sont développés par le constituant ou le législateur, d'une part, ou par la justice, d'autre part. Dans le premier cas, il s'agit d'un acte politique, qui se rattache à la dimension collective de la conception des droits de l'homme, alors que, dans le deuxième cas, il s'agit d'une procédure judiciaire concernant un cas d'espèce, qui se rattache donc à la dimension individuelle. Cette différence donne matière à discussion surtout au niveau de l'Etat national. Dans de nombreux Etats, en effet, le législateur est confronté à la cour constitutionnelle, selon des modalités variables en fonction de la répartition des compétences propre à chaque pays[18]. Or, cette situation nationale n'est pas comparable avec la situation internationale puisqu'il n'existe pas, au niveau international, de constituant ou de législateur au sens traditionnel du terme.

L'occultation de la dimension collective : un paradoxe international

Au fond, il est paradoxal que les droits de l'homme doivent être disjoints de leur interrelation d'origine avec la souveraineté du peuple pour pouvoir être imposés aux États nationaux et soumis à un contrôle par le biais des mécanismes de recours individuel au plan international. Il nous faudra vivre encore très longtemps avec ce paradoxe car la protection des droits de l'homme par les tribunaux et autres organes internationaux est indispensable et, surtout, doit être développée sur le plan mondial. Mais pour que les droits de l'homme aient une réalité durable malgré ce paradoxe, il est indispensable de parler de la contradiction qui a conduit à ce paradoxe, en ayant bien conscience que la disjonction entre les droits de l'homme et la souveraineté populaire peut n'être qu'une étape transitoire.

Le paradoxe de la situation ressort surtout du fait que la dimension collective de la conception des droits de l'homme est occultée ou – en d'autres termes – éclipsée par la dimension individuelle. Depuis la Révolution française et jusqu'au XX^{ème} siècle, il était clair que les ayants droit – pour autant qu'ils prennent pour référence la Révolution française et non pas une conception prérévolutionnaire

[18] Au sujet de l'Allemagne, lire l'avis critique de Maus (op. cit. en note de bas de page 7). Au sujet de la Grande-Bretagne, lire l'avis critique de Bellamy, Political Constitutionalism : *A Republican Defence of the Constitutionality of Democracy*, 2007. Dès 1991, Mary Ann Glendon, professeur à Harvard, avait relevé un problème analogue aux Etats-Unis, découlant de la tradition locale selon laquelle des prétentions juridiques sont déduites des revendications politiques. Glendon, Rights Talk. *"The Impoverishment of Political Discourse1991"*.

des droits de l'homme – devaient déterminer eux-mêmes en quoi consistaient leurs droits[19]. Par la suite, en revanche, l'acte d'auto administration politique fondateur des droits de l'homme a été remplacé par l'affirmation d'une vision morale préexistante.[20] Il s'ensuit que les deux rôles de l'individu, celui d'acteur de la souveraineté populaire et celui de sujet de droit coïncident ou plutôt que le premier disparaît derrière le second. L'acte politique de définition, d'interprétation et de développement des droits de l'homme est remplacé par l'acte juridique que constitue la décision du tribunal.

Ainsi, l'acte collectif d'auto administration est remplacé par l'acte individuel d'invocation de droits en justice dans des cas d'espèce. La conception des droits de l'homme est réduite à sa dimension individuelle, ce qui peut conduire à une conception individualiste de ces droits. Marcel Gauchet relève qu'à l'heure actuelle la confiance dans les droits de l'homme repose sur des fondements exclusivement individualistes, ce qui est contraire au sens originel de ces droits.[21] Si l'être humain n'est plus confronté à la collectivité publique qu'en tant qu'un individu isolé et ne peut plus que lui présenter des revendications, cela crée une pratique d'accusation et de plainte qui menace de détruire toute forme de vie commune et, ainsi, remet finalement en question les droits mêmes qu'elle invoque.[22] Si cette évolution devait s'intensifier, les instances judiciaires risquent elles aussi de ne plus pouvoir se soustraire à cette vision de plus en plus individualiste des droits de l'homme.

Les droits de l'homme doivent être constitués par un acte politique posé par les ayants droit eux-mêmes. Cette première étape est suivie d'une deuxième, à savoir l'interprétation et le développement des droits de l'homme pour les adapter à l'évolution de la société. Si la dimension politique collective est éliminée de cette deuxième étape et que celle-ci est confiée exclusivement à des instances judiciaires, l'opinion publique a l'impression que la deuxième étape peut remplacer la première. C'est probablement cette hypothèse qui a présidé

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[19] Selon Tugendhat, dans la mesure où nous nous soumettons à la morale du respect universel, ce sont nous, les êtres humains, qui, accordons à tous les êtres humains les droits découlant de cette morale (op. cit. en note de bas de page 13), p. 345 s.

[20] Menke/Pollmann (op. cit. en note de base de page 8), p. 169.

[21] « *La déclaration des droits de l'homme* vise à l'origine les droits d'un sujet rationnel, d'un être abstrait qui n'est pas envisagé sous l'angle de sa singularité, au contraire. (...) En oubliant peut-être que ce qui constituait la dignité de l'homme était de s'élever au dessus des particularités de chacun et de penser pour l'humanité en général. Mais on n'a plus foi dans « le peuple » ou même dans la souveraineté partagée entre les citoyens et le gouvernement. On a foi dans le droit qui protège et départage les individualités. » Gauchet, L'individu privatisé, http://gauchet.blogspot.com/2007/12/lindividu-privatis.html (consulté le 20.2.2008).

[22] Menke/Pollmann (op. cit. en note de base de page 8), p. 97.

à la conception de la reconstruction en Bosnie. Or, l'expérience dans ce pays montre que cette hypothèse est sans issue. L'interprétation et le développement judiciaires ne peuvent pas remplacer l'acte politique initial qui constitue les droits de l'homme. Bien sûr, il n'est pas exclu que le peuple souverain se réfère à des violations massives des droits de l'homme vécues par d'autres mais qu'il n'a pas subies lui-même. Cela peut arriver en particulier si un pays prend pour référence l'expérience d'une large communauté d'Etats et adopte des normes élaborées et contrôlées par d'autres. Cette référence peut offrir une base solide, mais elle doit être reprise dans un acte politique constitutif et adaptée à la situation concrète. En outre, comme les normes internationales constituent des exigences minimales, l'acte politique constitutif doit déterminer dans quelle mesure il convient de dépasser ce seuil. Si l'acte collectif constitutif des droits de l'homme ne peut pas être remplacé par les actes postérieurs d'interprétation et de développement judiciaires, l'inverse est également vrai: la constitution initiale des droits de l'homme par un acte politique ne peut pas remplacer les actes postérieurs d'interprétation et de développement de ces droits à travers les revendications des ayants droit. C'est vrai en tout cas au niveau national. La question au niveau transnational ou supranational ainsi que la nécessité d'une autocritique permanente des droits de l'homme sont abordées dans le chapitre qui clôt le présent article.

Il est important d'apporter ici une nuance concernant les deux rôles de l'individu, celui d'acteur de la souveraineté populaire et celui de sujet de droit. Dans le premier rôle, qui est collectif et politique, les droits de l'homme sont revendiqués et définis collectivement tandis que dans le second rôle, qui est individuel et juridique, les droits de l'homme sont mis en œuvre ou appliqués dans des cas d'espèce. Parallèlement à la dépolitisation que nous avons décrite de la fonction « définition et développement des droits de l'homme », on observe à l'échelle mondiale une politisation de la fonction « application des droits de l'homme ». Il n'y a qu'en Europe, où les mécanismes de protection sont bien développés, que la mise en œuvre et l'application des droits de l'homme ont un caractère largement juridique. La transformation de la Commission des droits de l'Homme de l'ONU en Comité des droits de l'Homme, les espoirs placés dans cette transformation et leur déception partielle ont montré où et pourquoi la mise en œuvre politique des droits de l'homme se heurte à des limites. Le présent article porte un regard critique sur l'occultation de la dimension collective de la conception des droits de l'homme et sur la dépolitisation. Mais cette critique ne se limite pas à la question de la définition et du développement de ces droits. En ce qui concerne leur mise en œuvre et leur

application aux cas d'espèce, c'est plutôt la politisation qu'il faudrait critiquer, raison pour laquelle il convient d'étendre la protection juridique des droits de l'homme par des tribunaux internationaux ou d'autres instances. Mais cette dernière problématique dépasse le cadre du présent article, qui est consacré à la définition et au développement des droits de l'homme.

Faire converger la souveraineté populaire avec les droits de l'homme

Si l'individualisation favorisée par la situation paradoxale décrite plus haut prend des proportions telles que la dimension collective ne peut plus subsister dans la conception des droits de l'homme, c'est toute la culture des droits de l'homme qui est mise en danger. Il est donc important d'analyser dès maintenant les possibilités qui s'offrent à long terme pour surmonter cette situation paradoxale. Il ne saurait être question bien sûr de ravaler les droits de l'homme au niveau national des droits civiques, où ils se sont développés à l'origine en lien avec la souveraineté populaire dans l'Etat national. Ce serait là un retour en arrière malheureux dans l'histoire des droits de l'homme. La perspective est inverse : il faut élever la souveraineté populaire au niveau supranational, là où la protection des droits de l'homme s'est déjà étendue. Il faudrait alors si possible parler de souveraineté *des peuples.*[23] Ce transfert de la souveraineté des peuples peut parfaitement se limiter, dans un premier temps, à la définition des droits de l'homme.[24] Le discours des peuples souverains devra-t-il, à plus long terme, s'étendre à d'autres domaines que le contenu et le développement des droits de l'homme, évolution que l'on résume parfois sous le vocable de « constitutionnalisation » ? La question reste ouverte aujourd'hui, tout au moins en ce qui concerne l'échelon mondial. Si l'on considère la « constitutionnalisation » au sens strict, c'est-à-dire comme la création d'une entité étatique totalement développée, analogue à l'Etat national mais à un niveau supérieur, la prudence est de mise : la question de savoir s'il est souhaitable voire faisable d'avoir un « Etat mondial » ou un « gouvernement mondial » est controversée, à juste titre.

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[23] Une publication anglaise proposait récemment la notion de « *demoi*-cracy », Besson, *" Deliberative Demo-cracy in the European Union. Towards the Deterritorialisation of Democracy"*, in Besson/Marti, *"Deliberative Democracy and its Discontents,"* 2006, pp.181–214.

[24] Les droits de l'homme peuvent jouer un rôle précurseur dans cette évolution car leur domaine est celui qui a mis le plus nettement en évidence la concurrence entre les différents niveaux aux yeux de l'opinion publique mondiale. Günther, *„Rechtspluralismus und universaler Code der Legalität : Globalisierung als rechtstheoretisches Problem"*, in Wingert/Günther (éd.), *„Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit. Festschrift für Jürgen Habermas"*, 2001, p. 548.

On peut considérer la convergence de la souveraineté populaire avec les droits de l'homme sous deux aspects : l'aspect institutionnel, dont nous avons commencé à parler, et l'aspect du contenu. Pour aborder l'aspect institutionnel au niveau mondial, il faut penser à très long terme. Des structures et des régimes de portée mondiale sont en cours de « juridisation ».[25] Sur le thème de la « gouvernance mondiale », on discute du principe d'une administration supérieure aux États nationaux qui serait assurée par des acteurs issus des milieux étatiques, du monde de l'économie et de la société civile. Mais cette juridisation n'a pas de légitimité parlementaire.[26] Elle est le produit d'activités normatives publiques et parapubliques et peut même résulter de processus de négociation menés par des acteurs privés, comme c'est le cas par exemple des codes de bonne conduite de l'économie privée. Cette procédure est critiquée pour son manque de démocratie et nombreuses sont les propositions avancées pour combler ce manque. Le but est d'institutionnaliser sur le plan juridique une autonomie législative qui s'appliquerait aux procédures de juridisation mondiales et qui reposerait sur le modèle ayant conduit à l'avènement de l'Etat national démocratique.[27]

Sur le plan du contenu, par contre, on peut cerner plus précisément ce qu'implique le retour à l'ancien paradigme de la Révolution française. Si l'interrelation entre les droits de l'homme et la souveraineté des peuples est prise en compte à sa juste valeur, ces droits ne peuvent ni être offerts, ni être imposés à un peuple, mais les êtres humains concernés doivent se les attribuer. Or, cela n'est pas possible individuellement, mais seulement collectivement, c'est-à-dire en revendiquant la souveraineté populaire dans un espace social déterminé. Ce processus ne doit pas nécessairement se faire au titre de la « souveraineté populaire » si le discours sur les droits de l'homme dans l'espace social concerné se déroule sans exclusions.[28] Dans cette vision, la politique des droits de l'homme se distingue sur bien des points de ce que l'on observe aujourd'hui. Et bien qu'il

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[25] On trouve cette notion chez Zangl/Zürn, *„Verrechtlichung – Baustein für globale Governance"*, 2004, p. 12 ss.

[26] Nanz/Steffek, *„Zivilgesellschaftliche Partizipation und die Demokratisierung internationalen Regierens"*, in Niesen/Herborth (éd.), *„Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik"*, 2007, p. 88.

[27] C'est dans ce sens que Klaus Günther décrit l'Etat national moderne comme une étape transitoire dans l'histoire du monde sur la voie de l'institutionnalisation, sous une forme juridique, d'une pratique d'autodétermination démocratique. Il ajoute que le découplage entre le code juridique et son institutionnalisation sous la forme d'un Etat national démocratique doté d'une constitution ne signifie cependant pas qu'il faille abandonner l'idée d'une autonomie législative à caractère démocratique. Günther (op. cit. en note de bas de page 24), p. 561.

[28] Menke/Pollmann (op. cit. en note de bas de page 8), p. 92 s.

s'agisse d'un retour à un paradigme ancien, cette vision pointe dans une direction qui pourrait conduire la politique des droits de l'homme à des transformations équivalant à un changement de paradigme. Il n'est pas exclu qu'en s'interrogeant sur des activités entreprises aujourd'hui au titre des « droits de l'homme », on ne soit pas obligé de leur trouver une autre justification ou même que certaines activités apparaissent comme tout bonnement injustifiables.

Pour prendre un exemple d'actualité, l'une des conséquences qu'il faudrait tirer à court terme de cette vision est que les interventions militaires dans des États tiers (pour autant que des décisions d'intervention soient prises, ce qui est controversé pour d'autres raisons) ne soient plus jamais justifiées par la protection des droits de l'homme. Cela n'exclut pas de les légitimer par la prévention de crimes de guerre ou de crimes contre l'humanité, et c'est bien cela que les partisans de ces interventions ont à l'esprit lorsqu'ils invoquent la protection des droits de l'homme. Mais ils amalgament deux notions, une notion de droit public et une notion de droit pénal. Et cette confusion porte à conséquence. Le droit pénal international n'est lié qu'indirectement à la protection des droits de l'homme en droit international public. De la même manière qu'au niveau national la protection des biens juridiques par le droit pénal ne constitue qu'un ultime recours, le droit pénal international ne peut être invoqué qu'en dernier recours dans l'ordre juridique instauré par le droit international public pour protéger les droits de l'homme. La protection des droits de l'homme par le droit international public a pour but, au sens le plus large, de protéger le bien juridique que constitue la dignité humaine par des normes et des procédures multiples de nature non pénale. Lorsque l'on confond la protection des droits de l'homme en droit international public et le droit pénal international, cela signifie, rapporté au niveau national, que l'on réduit l'ordre juridique au droit pénal et, donc, que l'on nie la protection de ces mêmes biens juridiques par le droit non pénal, alors que celui-ci a une portée beaucoup plus fondamentale que le droit pénal.

Plutôt que de s'arrêter sur des activités dont la justification devrait être remise en question, il est plus intéressant de déterminer les domaines auxquels ce changement de paradigme donnerait un surcroît de visibilité. Un aspect de fond particulièrement important concerne les relations intérieures et extérieures d'un Etat, d'une communauté d'Etats ou d'un espace social quel qu'il soit. Le changement de paradigme – qui est en fait un retour à l'ancien paradigme – réunit à nouveau les deux rôles de l'individu, celui d'acteur de la souveraineté populaire, qui participe régulièrement à la définition collective des droits de l'homme, et celui de sujet des lois, qui revendique ces droits individuellement

dans des cas d'espèce. S'il y a un équilibre entre les deux rôles, cela contribue à ce que le sujet des lois reste conscient que les droits de l'homme n'existent que s'ils sont les mêmes pour tous. Même si son rôle consiste à revendiquer individuellement des droits dans des cas d'espèce, il garde à l'esprit une parcelle de sa responsabilité citoyenne. Ce constat s'applique en premier lieu aux relations intérieures dans un espace social déterminé. Mais en outre, cela instaure une interdépendance entre les relations extérieures et les relations intérieures dans le domaine des droits de l'homme. Dans les relations extérieures, la question des droits de l'homme est généralement abordée lorsque l'on invite un Etat tiers à les respecter. Conséquence du changement de paradigme, ces invitations ne sont crédibles que si la culture des droits de l'homme est développée avec la même crédibilité sur le plan intérieur.

L'opinion publique peut prendre conscience des droits de l'homme de deux manières : en prenant part au discours public sur la définition et le développement de ces droits ou bien – et c'est la moins bonne des deux solutions – lorsque des abus sont commis. Si ni l'un ni l'autre n'arrive, les droits de l'homme tombent dans l'oubli et des violations massives peuvent se préparer. La meilleure prévention pour éviter les abus est donc de parler en permanence des droits de l'homme, cela pas seulement dans les relations extérieures – c'est-à-dire en rappelant les autres à l'ordre –, mais aussi sur le plan intérieur.

Perspectives

Le retour au paradigme de la Révolution française concerne un plus large éventail de thèmes qu'il n'y paraît au premier abord. En voici quelques uns. Si le discours sur les droits de l'homme est mené de la manière décrite plus haut, cela rend inopérant le reproche d'« impérialisme occidental » exprimé ça et là non sans raison. Dès lors qu'il appartient aux peuples de revendiquer et de définir eux-mêmes les droits de l'homme, on ne peut plus continuer à les leur accorder ou à les leur imposer. Mais alors, il faut que les Etats ou groupes d'États qui jouissent d'une longue tradition de mise en oeuvre des droits de l'homme fassent eux-mêmes ce que l'on attend ou espère de ces peuples : ils doivent soumettre leur conception des droits de l'homme à une autocritique permanente.[29] A long terme, cela permettra que la démarche de rappel à l'ordre des autres, tellement appréciée de nos jours, soit supplantée par une attitude

[29] Menke/Pollmann (op. cit. en note de bas de page 8), p. 85.

dans laquelle les États ou groupes d'Etats prennent les devants en pratiquant, sur le plan intérieur, un discours sur les droits de l'homme ayant un caractère exemplaire. Cette seconde méthode est bien plus efficace que la première, comme l'illustre d'ailleurs avec éclat l'histoire des droits de l'homme : la tentative de Napoléon de faire le bonheur de l'Europe toute entière en lui imposant les acquis de la Révolution française a porté durablement atteinte à ces acquis, et en particulier aux droits de l'homme, retardant de plusieurs décennies la diffusion de ces idées. Les droits de l'homme et la souveraineté populaire ont réellement pris racine en Europe grâce au fait que certains Etats ont suivi l'exemple de succès déjà obtenus, poussant plus loin dans la même voie.

Sur le plan des relations intérieures, l'Union européenne a un rôle particulier à jouer. Et là, l'aspect du contenu rejoint l'aspect institutionnel dans la convergence de la souveraineté populaire avec les droits de l'homme. L'Union européenne s'est dotée d'une Charte des droits fondamentaux, mais sa démarche n'est pas comparable, pour ce qui concerne la convergence précitée, avec la création des instruments internationaux relatifs aux droits de l'homme dans l'enceinte du Conseil de l'Europe et de l'ONU. L'une des différences réside dans le fait que les droits fondamentaux des citoyens et des citoyennes de l'UE trouvent leurs racines en grande partie dans l'activité de la Cour européenne des droits de l'Homme, laquelle a tenté de compenser le déficit de participation politique en assumant une fonction de « joker », manifeste surtout aux débuts de la CECA mais encore visible dans la CEE.[30] Les tribunaux nationaux ont également contribué à cette évolution, sans toutefois jouer le rôle de joker car ils sont toujours dans un rapport de tension avec le législateur et le constituant. Aujourd'hui, la situation dans l'UE est critiquée à juste titre pour sa juridisation, qui substitue la jurisprudence en matière de droits de l'homme à la politique démocratique.[31] Une autre différence réside dans le transfert partiel de la souveraineté étatique des Etats membres vers l'UE, qui peut avoir pour conséquence que les Etats membres ne sont plus libres de définir les politiques qu'ils souhaitent employer pour accomplir leur devoir de protection des droits de l'homme.[32] L'UE étant considérée dans le monde entier comme le champ d'expérimentation par excellence du transfert

[30] Tohidipur, *„Europäische Gerichtsbarkeit im Institutionensystem der EU. Zu Genese und Zustand justizieller Konstitutionalisierung"*, 2007, p. 78.

[31] Brunkhorst, *„Zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung. Europas zweite Chance"*, in Niesen/Herborth (op. cit. en note de bas de page 26), p. 334.

[32] Cette évolution devrait avoir des conséquences sensibles plutôt dans le domaine des droits sociaux que dans celui des libertés traditionnelles.

de la souveraineté nationale à un niveau supérieur, elle ne pourra pas rester longtemps fermée à un transfert de la souveraineté des peuples dans le domaine des droits de l'homme. Peut-être le malaise diffus que l'on observe ça et là envers l'UE dans les Etats membres est-il dû au pressentiment qu'une évolution importante est imminente dans ce domaine, mais qu'elle n'est pas encore suffisamment articulée[33]. En tout état de cause, la convergence de la souveraineté populaire avec les droits de l'homme constitue un défi particulier pour l'UE.[34]

Le nouveau paradigme, ou plutôt le paradigme restauré, pourrait aider à répondre à quelques questions dans le débat sur le relativisme culturel. On reproche aux droits de l'homme provenant de certaines cultures leur excès d'individualisme, arguant qu'ils risquent de contribuer à défaire des structures de solidarité nécessaires sur le plan social. Or, ce reproche n'est pas dirigé contre le phénomène décrit ici comme l'occultation de la dimension collective des droits de l'homme par leur dimension individualiste. Pourtant, il existe des points communs entre les deux phénomènes. Même dans sa conception européenne, la culture des droits de l'homme, pour autant qu'elle n'occulte pas la dimension collective de ces droits, n'a pas pour but d'ériger l'individu en figure solitaire, sans lien aucun avec son environnement social. Historiquement, la forme actuellement en vigueur en Europe d'intégration civique et collective est une évolution à partir de formes antérieures d'intégration dans des structures de groupe, grandes familles, communautés, corporations, associations ethniques, religieuses ou autres.[35] Ces groupes ont progressivement abandonné leur revendication de médiation exclusive et laissé leurs membres accéder directement et individuellement à la participation civique collective, ce qui a permis à long terme aux individus exclus de ces groupes déterminants d'accéder eux aussi à cette participation.[36] Il appartient aux cultures qui expriment ces réserves de trouver la voie qui les conduira vers un discours sur les droits de l'homme

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[33] Brunkhorst (op. cit. en note de bas de page 31), p. 322 ss.

[34] Buckel, *„Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts"*, 2007, p. 273 ss et p. 295 ss.

[35] Les débuts de cette évolution remontent à l'établissement des villes au Moyen Age, à la constitution d'une association formée de tous les citoyens en tant qu'individus et surmontant les barrières du sang, de la parenté et du rite. Cf. Dilcher, *„Mittelalterliche Stadtkommune, Städtebünde und Staatsbildung. Ein Vergleich Oberitalien – Deutschland"*, in Lück/Schildt (éd.), „Recht – Idee – Geschichte, Beiträge zur Rechts- und Ideengeschichte für Rolf Lieberwirth anlässlich seines 80. Geburtstages", 2000, p. 455.

[36] Ce processus, qui n'est pas achevé, se développe aujourd'hui sur une ligne de séparation entre ressortissants nationaux et ressortissants étrangers ou entre personnes originaires d'Etats membres et personnes originaires d'Etats non membres de l'UE.

libre de toute exclusion.[37] Il n'est pas exclu que d'autres cultures conservent certaines structures de solidarité traditionnelles s'ils arrivent à leur donner une forme plus intégrative.

C'est là que se recoupent le champ du relativisme culturel des droits de l'homme et le champ du processus fautif de reconstruction mis en évidence au sujet de différentes régions en crise au début du présent article. Les structures de solidarité défendues par d'autres cultures, d'une part, et les structures créées par le processus fautif de reconstruction, d'autre part, sont apparentées sur le fond dans la mesure où aucunes ne garantissent un accès à la décision concernant l'instauration de l'ordre public qui soit indépendant des communautés et égal pour tous les individus. Les premières cultures assurent l'ordre public et l'intégration solidaire à travers des structures communautaristes car elles souhaitent se réserver la possibilité d'utiliser l'exclusion du groupe comme instrument d'instauration de l'ordre. Les acteurs du processus fautif de reconstruction recourent aux structures communautaristes car ils ont négligé l'absolue nécessité de la conscience civique collective, oubliant que la nation doit être conçue comme une conglomération de citoyens et non pas comme une collectivité d'ethnies religieuses.[38] C'est ainsi que les droits de l'homme ont été réduits à une approche individualiste, comme l'illustre bien l'exemple de la Bosnie-Herzégovine. Cela n'a été possible que parce que l'on est parti d'une conception prérévolutionnaire des droits de l'homme, comme exposé au début du présent article. C'est précisément là que s'articule le changement de paradigme présenté.

En Europe aussi, certains débats reprennent des concepts tirés du relativisme culturel des droits de l'homme. Ainsi, lorsque d'aucuns parlent de « responsabilité personnelle », il ne faut comprendre rien d'autre que le retour à une intégration solidaire et à la prise en charge des risques sociaux par les structures familiales ou communautaires. Pour les individus concernés, cela entraîne une perte de liberté de qualité identique à celle qui est critiquée dans d'autres

[37] Les différentes réactions qui ont accueilli l'entrée en vigueur de la Charte arabe des droits de l'Homme montrent l'ambivalence des acteurs occidentaux face à la définition des droits de l'homme par d'autres cultures, ambivalence légitime en partie seulement. Pour une appréciation de la Haut Commissaire des Nations Unies au droits de l'Homme : http://www.unog.ch/unog/website/news_media.nsf/ ; httpNewsByYear_en)/385A138D2DCAA53FC12573DA00563DEB?OpenDocument et http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/CA8AD9742DC02606C12573E00057C3C0?OpenDocument> (beide angerufen am 17.2.2008).

[38] Sen (op. cit. en note de bas de page 4), p. 246.

cultures, parfois par les mêmes acteurs.[39] Ce rejet de la responsabilité affaiblit la conscience civique collective dans son ensemble alors qu'elle est la seule à même de garantir la cohésion sociale.[40] Le changement de paradigme qui s'annonce est d'autant plus important.

Si la culture des droits de l'homme réunit à nouveau les deux rôles de l'individu, l'opinion publique prendra conscience que le rôle de participation de tous les ayants droit au discours collectif sur le contenu des droits de l'homme est tout aussi important le rôle de revendication individuelle de ces droits dans des cas d'espèce. Cela rendra impensable toute tentative visant à instaurer un ordre public et une intégration solidaire bâtis sur l'appartenance à un groupe ou à une communauté de nature religieuse, ethnique ou autre. L'affaiblissement de la dimension civique et collective que pareille tentative entraînerait immanquablement ne se produira pas, ce qui revêt une importance à ne pas sous-estimer pour la cohésion sociale. Et il devient en particulier impensable que la dimension civique et collective des droits de l'homme soit occultée aussi complètement que ce qui s'est produit dans les régions en crise évoquées.

[39] L'ampleur de cette perte de liberté n'est pas comparable, mais cela ne doit pas induire en erreur quant à l'identité qualitative des deux phénomènes.

[40] Indépendamment du fait que la notion de « patriotisme » a pris un tour douteux en raison de différents événements intervenus ces dernières années, on pourrait ranger cette prise de conscience au sens le plus large dans la catégorie du « patriotisme constitutionnel ».

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La question de la nature juridictionnelle de la Cour constitutionnelle Lituanienne

1. «Tout comme le parlement incarne le gouvernement représentatif, la Cour constitutionnelle est la pierre angulaire de cet édifice qu'est la démocratie».[1]

2. Les arrêts de la Cour constitutionnelle corrigent le travail du législateur, du Président de la République et du Gouvernement. La mission de la protection judiciaire de la constitution est déléguée à la Cour constitutionnelle.

La préparation des nouvelles constitutions dans les pays de l'Europe centrale et orientale a éveillé de même des discussions sur l'établissement du contrôle constitutionnel. Le plus souvent les auteurs des textes constitutionnels ont choisi le modèle de la Cour constitutionnelle parmi de nombreuses formes connues du contrôle constitutionnel. Selon Louis Favoreu « une Cour constitutionnelle est une juridiction créée pour connaître spécialement et exclusivement du contentieux constitutionnel, située hors de l'appareil juridictionnel ordinaire et indépendante de celui-ci comme des pouvoirs publics ».[2]

L'établissement de la Cour constitutionnelle en Lituanie a été prévu dans le texte de la Constitution de 1992. La Cour constitutionnelle de la République de Lituanie a commencé ses activités en septembre 1993. La Cour constitution-

[1] La Pergola A., « Allocution d'ouverture *in* Le rôle de la Cour constitutionnelle dans la consolidation de l'Etat de droit » (actes de séminaire UniDem), Strasbourg : Les éditions du Conseil de l'Europe, 1994, p. 15.

[2] Favoreu L. *« Les Cours constitutionnelles »*, 3 édition, Paris : Presses universitaires de France, 1996, p.3.

nelle s'est prononcée sur la conformité à la Constitution d'un grand nombre de dispositions légales et réglementaires. La Cour a plusieurs fois délimité les pouvoirs du Seimas, du Président de la République, du Gouvernement. La protection de l'indépendance du pouvoir judiciaire fut l'objet de plusieurs décisions. Dans sa jurisprudence la Cour a protégé toujours la sphère des droits et libertés constitutionnels. La Cour a rendu des décisions sur la constitutionnalité des lois concernant la restitution des biens, des mesures de lustration. Elle a examiné la constitutionalité de la réglementation sur la citoyenneté, sur la réparation de dommage infligé par l'activité illégale du ministère public et les tribunaux, et sur la limitation des droits de propriété en territoires protégés et forestiers, etc.

La Cour constitutionnelle est seule interprète officiel de la Constitution, « c'est elle, qui confère dans sa jurisprudence, aux dispositions de la Constitution leur signification définitive... ».[3] Dans sa jurisprudence la Cour constitutionnelle lituanienne a dévoilé la signification des principes de l'Etat de droit, de séparation des pouvoirs, d'égalité, etc. Les doctrines du contrôle de l'omission législative, de la confiance légitime, de la responsabilité des gouvernants ont été formulées dans la jurisprudence constitutionnelle. Le rôle de la Cour comme le garant de la stabilité de la vie politique et sociale, comme l'arbitre, qui juge des conflits politiques, qui protège le processus démocratique doit être souligné.

Quelle est la nature de cette nouvelle institution ? On se demande si c'est une juridiction ou une institution politico-juridique ? Deux positions peuvent être distinguées parmi les auteurs qui accentuent la nature juridictionnelle de la cour constitutionnellle. Les uns considèrent la Cour constitutionnelle comme juridiction *sui generis*, placée dans l'organisation étatique face aux autres pouvoirs « classiques » (le pouvoir législatif, le pouvoir exécutif et le pouvoir judiciaire), les autres affirment que cette cour appartient au pouvoir judiciaire.[4]

La Lituanie n'est pas une exception. Certains auteurs en Lituanie ont posé la question de la nature et de la place de la Cour constitutionnelle dans le système des organes du pouvoir de l'Etat.

Jusqu'au 6 juin 2006 les réponses étaient différentes. Maintenant la concep-

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[3] Kūris E. *« L'incidence des décisions de la Cour européenne des droits de l'homme sur le système juridique interne du point de vue de la Cour constitutionnelle de Lituanie »*, Dialogues entre juges, Strasbourg: Conseil de l'Europe, 2006, p. 28.

[4] Alen A., Melchior M. *« Les relations entre les Cours constitutionnelles et les autres juridictions nationales, y compris l'interférence en cette matière, de l'action des juridictions européennes »*. Rapport général : *Les relations entre les Cours constitutionnelles et les autres juridictions nationales, y compris l'interférence en cette matière, de l'action des juridictions européennes.* Rapports, vol. I ; Brugge : Vanden Broele, 2005, p. 23.

tion du statut de la Cour constitutionnelle comme juridiction est affirmé par la doctrine constitutionnelle officielle formulée par la Cour constitutionnelle. Dans son arrêt du 6 juin 2006, la Cour a constaté que la Cour constitutionnelle est définie dans la Constitution comme la juridiction indépendante qui exerce le contrôle juridictionnel constitutionnel.[5] Cette juridiction fait partie du pouvoir judiciaire. On devait mentionner de même que la Cour constitutionnelle a confirmé a plusieurs reprises qu'elle est une juridiction distincte et indépendante, qui exerce la fonction de la justice constitutionnelle et garantit la suprématie de la Constitution dans le système juridique de Lituanie.

Dans cet article sera analysée la doctrine constitutionnelle officielle formulée dans l'arrêt du 6 juin 2006 de la Cour constitutionelle de la République de Lituanie selon laquelle la Cour constitutionnelle a été définit comme une juridiction indépendante qui exerce le contrôle juridictionnel constitutionnel et qui fait partie du pouvoir judiciaire.

3. « Les Etats post-communistes se sont dotés d'une cour constitutionnelle dont le mode de fonctionnement, la désignation des membres et l'étendue des compétences est d'inspiration tout à la fois française, américaine et allemande ».[6] Les diverses sources d'inspirations demandent l'explication doctrinale de la nature de chacune de ces institutions.

Ce fut le groupe des parlementaires lituaniens qui a posé la question de la nature de la Cour constitutionnelle. Les observateurs du processus politique ont souligné que la demande du groupe de parlementaires à l'origine de l'arrêt ici commenté masquait une attaque contre la Cour constitutionnelle lituanienne et la justice constitutionnelle en général, considérée comme limitant le champ de manœuvre des hommes et des institutions politiques. Plusieurs grandes affaires, examinées par la Cour constitutionnelle à cette époque, ont montré l'importance de cette institution en tant que garant de l'ordre constitutionnel et de la démocratie constitutionnelle en Lituanie (affaires sur l'indépendance du pouvoir judiciaire, sur le service public, sur le statut des membres du Seimas, sur les élections municipales, sur la restitution de la propriété, sur les actes du Président de la

[5] L'arrêt de la Cour constitutionnelle de la République de Lituanie du 6 juin 2006. Journal officiel Valstybės žinios, 2006, n° 65-2400.

[6] Gicquel J., *Droit constitutionnel et institutions politiques*, 19e édition, Paris : Montchrestien, 2003, p. 355.

République, etc.). De même, certains parlementaires voyaient un danger dans le fait que, selon la jurisprudence constitutionnelle, la Cour constitutionnelle était considérée comme l'interprète officiel et suprême de la Constitution. Les politiques ont commencé à découvrir le vrai rôle de la justice constitutionnelle et certains d'entre eux se sont alors demandés comment diminuer le rôle de la Cour constitutionnelle, comment freiner son activisme judiciaire.

Un des moyens de lutter contre cette toute puissance imaginaire de la Cour constitutionnelle a été le recours d'un groupe des parlementaires contestant la nature juridictionnelle de la Cour ; recours fondé sur la supposition que la Cour constitutionnelle n'était pas une institution du pouvoir d'Etat. Peut être attendait-il la conclusion suivante : si la Cour n'est pas une institution du pouvoir d'Etat, il ne faut pas respecter sa jurisprudence.

Le paradoxe de cette affaire réside dans le fait que c'est la Cour constitutionnelle elle-même qui devait donner une réponse à cette interrogation. On l'attendait au tournant : resterait-elle, dans cette affaire, dans le cadre du raisonnement juridique ? Quels motifs domineront dans sa décision ? L'examen de cette affaire a montré la fermeté de la Cour constitutionnelle en tant que gardienne de la suprématie constitutionnelle dans le système juridique, qui apprécie toutes les questions examinées seulement sous l'angle du droit. Il convient de mentionner que, dans la littérature spécialisée, certains auteurs avaient déjà posés, en Lituanie, la question de la nature juridictionnelle de la Cour constitutionnelle. L'affaire examinée a donné à la Cour constitutionnelle la possibilité de formuler sa conception de la Cour constitutionnelle en tant que juridiction autonome et indépendante.

La Cour constitutionnelle conclut que la supposition avancée par le demandeur selon laquelle la Cour constitutionnelle ne serait pas une juridiction et n'exercerait pas le pouvoir d'Etat est en contradiction avec la notion de pouvoir d'Etat et avec les pouvoirs de la Cour constitutionnelle tels qu'ils sont fixés par la Constitution. La Cour a constaté que le titre « La Cour constitutionnelle – une institution juridictionnelle » figurant à l'article 1 et l'article 1, alinéa 3, de la loi sur la Cour constitutionnelle de la République de Lituanie ne sont pas contraire à l'article 5, alinéas 1 et 2, et article 111, alinéa 1, de la Constitution.

4. D'abord il faut noter que le doute selon lequel la Cour constitutionnelle n'est pas une juridiction et n'exerce pas le pouvoir d'Etat est fondé sur l'article 5, alinéa 1 et 2 (le pouvoir de l'Etat est exercé en Lituanie par le Seimas, le Président de la République et le Gouvernement, ainsi que par les tribunaux ; l'étendue des pouvoirs est limitée

> par la Constitution), et sur l'article 111, alinéa 1 (les tribunaux de la République de Lituanie sont la Cour suprême, la Cour d'appel, les tribunaux régionaux et les tribunaux de district), de la Constitution. Le demandeur (le groupe des parlementaires) remarquait que la Cour constitutionnelle ne figure pas dans cette liste et dans le chapitre IX (qui est consacré aux tribunaux) mais qu'un autre chapitre de la Constitution (chapitre VIII) lui est consacré. Une telle interprétation reposait sur une interprétation littérale du texte constitutionnel.

« Dans l'exercice des missions qui lui sont confiées la Cour constitutionnelle prend toujours la Constitution comme base d'examen ».[7] Dans l'arrêt du 6 juin 2006, la Cour constitutionnelle a rappelé ce qu'elle avait déjà constaté à maintes reprises, à savoir qu'il est impossible d'interpréter la Constitution (et le droit) de façon seulement littérale, en appliquant la méthode dite linguistique (verbale). En cas d'application de ladite méthode linguistique (verbale), la signification absolue, le contenu du système de la réglementation juridique constitutionnelle est même rétréci : certaines valeurs établies, protégées et défendues par la Constitution seraient ignorées. Une telle interprétation peut violer les objectifs, établis par la nation dans la Constitution adoptée par le référendum. La Cour constitutionnelle a souligné qu'en interprétant la Constitution, doivent être appliquées les diverses méthodes d'interprétation du droit : systémique, référence aux principes généraux du droit, logique, téléologique, prise en compte des intentions de législateur, des précédents, historique, comparative, etc.

On peut rappeler que la Cour constitutionnelle a constaté maintes fois dans sa jurisprudence que toutes les dispositions de la Constitution sont liés entre elles et constituent un système intégral et harmonieux, qu'il y a un équilibre entre les valeurs établies dans la constitution, qu'il n'est pas possible interpréter la Constitution de sorte que le contenu de quelconque disposition de la Constitution sera déformé ou nié, car ceci déformerait l'essence de la réglementation constitutionnelle et modifierait l'équilibre entre les valeurs constitutionnelles (arrêts de la Cour constitutionnelle du 24 septembre 1998, du 23 octobre 2002, du 25 novembre 2002, du 4 mars 2003, du 4 juillet 2003, du 30 septembre 2003, du 3 décembre 2003 et du 15 avril 2004).

Les dispositions constitutionnelles mentionnées par le demandeur ont par

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[7] Jarašiūnas E., *La Cour constitutionnelle de la République de Lituanie et la protection des fondements constitutionnels de l'institut des élections démocratiques, Jurisprudencija*, 2007, n° 4 (94), p. 8.

conséquent été interprétées dans l'arrêt de la Cour constitutionnelle en adoptant cette conception de l'interprétation constitutionnelle.

5. Il faut souligner que la force de la Cour constitutionnelle réside dans le monopole conféré à la Cour constitutionnelle en manière d'interprétation officielle de la Constitution. « On conteste d'abord la latitude d'interpretation du juge constitutionnel qui ne rencontrerait pas de bornes clairement définies ».[8]

La Cour constitutionnelle a constaté que selon la Constitution, c'est la Cour constitutionnelle qui est l'interprète officiel de la Constitution (arrêts du 30 mai 2003, du 29 octobre 2003, du 13 mai 2004, du 1 juillet 2004 et du 13 décembre 2004). Le rôle d'interprète officiel du texte constitutionnel de la Cour constitutionnelle dérive de la Constitution elle-même.

Il est impossible de contrôler la constitutionnalité des lois et des autres actes juridiques sans normes de référence. La Constitution est la norme fondamentale de référence pour la Cour constitutionnelle. La Cour explique la signification des dispositions constitutionnelles. Le vrai sens des normes et principes constitutionnels est dévoilés par la jurisprudence constitutionnelle. Les catégories et les exigences constitutionnelles formulées dans les décisions de la Cour constitutionnelle deviennent la mesure principale pour apprécier la constitutionnalité des actes contrôlés.

La formation de la doctrine constitutionnelle officielle n'est pas un acte unique, mais un processus progressif et cohérent. Le processus du développement de la jurisprudence constitutionnelle est graduel ; la doctrine constitutionnelle officielle n'est pas formée d'un coup toute entière mais cas par cas, la Cour constitutionnelle constamment complète cette doctrine par les fragments nouveaux.

Dans l'arrêt du 6 juin 2006 la Cour a rappelé que la Cour constitutionnelle a la compétence exceptionnelle d'interpréter la Constitution de façon officielle et de présenter, dans sa jurisprudence, la conception officielle des diverses dispositions du Constitution (elle forme la doctrine constitutionnelle officielle), compétences qui résultent de la Constitution.

L'interprétation des dispositions constitutionnelles présentée dans la juris-

[8] Chagnollaud D., *Droit constitutionnel contemporain*, tome 1, *Théorie générale. Les régimes étrangers*, 5 édition, Paris : Dalloz, 2006, p. 91.

prudence constitutionnelle s'impose aux institutions (les autorités) dotées de pouvoirs dans la création et l'application du droit. La jurisprudence constitutionnelle s'impose de même aux tribunaux. Par l'interprétation constitutionnelle la Cour constitutionnelle exerce certaine fonction « préventive ».[9]

6. « En Lituanie, le pouvoir de l'Etat est exercé par le Seimas, le Président de la République et le Gouvernement, et les tribunaux.

L'étendue des pouvoirs est limitée par la Constitution. » (Article 5, alinéa 1 et 2 de la Constitution).

La Cour a commencé son raisonnement juridique en notant que, selon la Constitution, le pouvoir de l'Etat en Lituanie est organisé et mis en œuvre sur la base du principe de la séparation des pouvoirs.

Il a été constaté maintes fois par la jurisprudence constitutionnelle antérieure que ce principe constitutionnel signifie que les pouvoirs législatif, exécutif et judiciaire sont séparés et suffisamment indépendants ; qu'il doit y avoir un équilibre entre eux ; que chaque institution du pouvoir dispose d'une compétence correspondant au but qui lui est assigné et dont le contenu concret dépend du pouvoir de l'Etat à laquelle cette institution appartient et de la place de cette institution parmi les autres institutions du pouvoir de l'Etat aussi bien que des relations entre ses compétences et celles des autres institutions ; qu'après que les pouvoirs d'une institution donnée du pouvoir de l'Etat aient été directement établis par la Constitution, aucune autre institution du pouvoir de l'Etat ne peut prendre ces pouvoirs ; que ces pouvoirs ne peuvent être modifiés ou limités par une loi.

Ce sont des tribunaux qui exercent le pouvoir judiciaire. Leur fonction est l'administration de la justice. La jurisprudence constitutionnelle met l'accent sur l'indépendance des juges et des tribunaux qui est l'un des principes essentiels de l'Etat démocratique de droit. Les tribunaux sont considérés comme des institutions de la protection des droits et des libertés de l'homme.

La Cour constitutionnelle note que l'autonomie et l'indépendance du pouvoir judiciaire par rapport aux autres branches du pouvoir d'État est déterminée par le fait qu'il est formé différemment des autres branches du pouvoir d'Etat, c'est-à-dire selon une base professionnelle (et non selon une base politique).

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[9] Kūris E., *On the Constitutional Courts, Constitutional Law and Constitutional Democracy: a View from Vilnius ; The Constitutional Court in the Democratic State, Sofia: Constitutional Court of the Republic of Bulgaria*, 2006, p. 38.

7. Les tribunaux constituent une catégorie des institutions du pouvoir de l'Etat prévues par la Constitution. Le but et la compétence constitutionnelle des tribunaux sont l'exercice de la justice.

La Cour constitutionnelle souligne que les tribunaux qui, selon la Constitution, exercent le pouvoir judiciaire, appartiennent non pas à un, mais à deux ou plus (en fonction de lois conformes à la Constitution) systèmes de tribunaux.

En vertu de la Constitution et des lois actuellement en vigueur en Lituanie, il y a trois systèmes de tribunaux :

a) La Cour constitutionnelle de la République de Lituanie ;
b) Le système des tribunaux de droit commun, composé de la Cour suprême de Lituanie, de la Cour d'appel de la Lituanie, des tribunaux régionaux et des tribunaux de district ;
c) Les tribunaux spécialisés qui peuvent être établis par les lois en vertu de l'article 111, alinéa 2, de la Constitution pour l'examen des affaires concernant l'administration, le travail, la famille et autres. En Lituanie le système des tribunaux administratifs a été introduit en 1999.

La Cour constitutionnelle exerce le contrôle juridictionnel constitutionnel, les tribunaux de droit commun administrent la justice dans les affaires civiles et pénales, les tribunaux administratifs examinent les affaires liées aux actes administratifs et aux différends survenus dans le domaine de l'administration publique.

Le système des tribunaux de droit commun fonctionne sur trois instances (la première instance, l'appel et la cassation). Le tribunal de district est la juridiction de première instance pour les affaires civiles, pénales et administratives attachées à sa juridiction. De même il examine les affaires liées à l'exécution des décisions ou des jugements et les affaires liées à l'hypothèque. Le tribunal régional est la juridiction de première instance pour les affaires civiles et pénales attachées à sa juridiction et examine les appels contre les décisions, jugements et arrêts des tribunaux de district. La Cour d'appel examine les appels contre les décisions, jugements et arrêts des tribunaux régionaux et exerce d'autres fonctions prévues par les lois. Selon l'article 23 de la loi sur les tribunaux la Cour suprême est la seule instance qui peut examiner un appel contre les décisions, les jugements ou les arrêts d'un tribunal qui est déjà entrée en vigueur. C'est la Cour suprême qui est une seule cour de cassation et elle forme la pratique unique pour les tribunaux de droit commun.

Actuellement le système des tribunaux administratifs se compose du

Tribunal administratif suprême de Lituanie et des tribunaux administratifs régionaux.

8. La Cour a rappelé sa jurisprudence antérieure[10] (arrêts du 28 mars 2006 et du 9 mai 2006) selon laquelle la Cour constitutionnelle est définie comme l'institution de la justice constitutionnelle qui exerce le contrôle juridictionnel constitutionnel.

La Cour constitutionnelle a constaté maintes fois dans ses arrêts que, lorsque, en fonction de sa compétence, elle se prononce sur la conformité des actes juridiques (certaines de leurs dispositions) à la Constitution, de même que lorsqu'elle exerce ses autres pouvoirs constitutionnels, elle remplit la fonction de justice constitutionnelle en tant que juridiction autonome et indépendante et garantit la suprématie de la Constitution dans le système juridique et la constitutionnalité de la législation[11] (arrêts du 12 juillet 2001, du 29 novembre 2001, du 13 décembre 2004 et du 28 mars 2006).

Les pouvoirs de la Cour constitutionnelle, en tant que partie du système judiciaire, sont établis par la Constitution.

La Cour constitutionnelle examine et adopte les décisions relatives à la conformité des lois de la République de Lituanie et des actes du *Seimas* à la Constitution de la République de Lituanie. La Cour constitutionnelle statue également sur la conformité à la Constitution et aux lois des actes juridiques du Président de la République et des actes juridiques du Gouvernement.

La Cour constitutionnelle donne un avis sur la question de savoir :

a) s'il y a eu violation des lois électorales pendant les élections du Président de la République ou des membres du *Seimas* ;
b) si l'état de santé du Président de la République de Lituanie lui permet de continuer à exercer ses fonctions ;
c) si les accords internationaux conclus par la République de Lituanie sont conformes à la Constitution ;

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[10] L'arrêt de la Cour constitutionnelle de la République de Lituanie du 28 mars 2006, Journal officiel Valstybės žinios, 2006, n° 36-1292 ; l'arrêt de la Cour constitutionnelle de la République de Lituanie du 9 mai 2006, Journal officiel Valstybės žinios, 2006, n° 51-1894.

[11] L'arrêt de la Cour constitutionnelle de la République de Lituanie du 12 juillet 2001, Journal officiel Valstybės žinios, 2001, n° 62-2276 ; l'arrêt de la Cour constitutionnelle de la République de Lituanie du 29 novembre 2001, Journal officiel Valstybės žinios, 2001, n° 102-3636 ; l'arrêt de la Cour constitutionnelle de la République de Lituanie du 13 decembre 2004, Journal officiel Valstybės žinios, 2004, n° 181-6708 ; l'arrêt de la Cour constitutionnelle de la République de Lituanie du 28 mars, Journal officiel Valstybės žinios, 2006, n° 36-1292.

d) si des actes concrets des membres du *Seimas* et des autorités de l'Etat, contre lesquels a été engagée une procédure d'accusation, sont conformes à la Constitution.

Selon l'article 107 de la Constitution, une loi (ou certaines de ses dispositions) de la République de Lituanie ou tout autre acte (ou certaines de ses dispositions) du *Seimas*, un acte du Président de la République de Lituanie ou un acte (ou certaines de ses dispositions) du Gouvernement, ne peuvent être appliqués qu'à partir du jour où a été publiée officiellement la décision de la Cour constitutionnelle affirmant que l'acte en question (ou les dispositions concernées) est contraire à la Constitution. Les décisions de la Cour constitutionnelle sur les questions relevant de sa compétence sont définitives et ne peuvent faire l'objet d'aucun recours.

La Cour constitutionnelle a noté que l'appellation « Cour constitutionnelle » figure dans la Constitution. Par conséquent, une institution du pouvoir de l'Etat, appelé « Cour » par la Constitution, « ne peut être considérée autrement que comme une cour, c'est-à-dire une institution juridictionnelle » [4].

La Cour constitutionnelle dans l'affaire examinée a analysé la question des deux chapitres distincts (« La Cour constitutionnelle » et « Les tribunaux ») figurant dans le texte constitutionnel. Elle considère que l'existence de deux chapitres distincts ne signifie pas que la Cour constitutionnelle n'est pas une juridiction et qu'elle est distincte du pouvoir judiciaire.

Selon la Cour constitutionnelle, l'existence d'un chapitre distinct consacré à la Cour sert à souligner son statut spécifique, non seulement au sein du système judiciaire, mais aussi par rapport à toutes les autres institutions de l'Etat qui exercent le pouvoir d'État. Ce chapitre distinct sert également à mettre en évidence les spécificités du rôle et de la compétence de la Cour constitutionnelle.[12] Les dispositions constitutionnelles qu'il contient définissent les règles de constitution de la Cour, le statut des juges constitutionnels, les modalités de sa saisine, les conséquences juridiques des actes qu'elle prend.

On doit constater également « qu'il y a des liens significatifs entre les tribunaux de droit commun, les tribunaux spécialisés, établis selon l'article 111, alinéa 2, de la Constitution et la Cour constitutionnelle, qui est institution de la justice constitutionnelle : par exemple, chaque tribunal de droit commun et tout tribunal spécialisé (le juge), en tant que demandeur, ont le droit de

[12] Ruškytė R., *kai kurie svarbiausi Lietuvos respublikos konstitucinio teismo 2005* m. liepos 1 d.- 2006 m. spalio 1 d. *priimtų nutarimų aspekta, Konstitucinė jurisprudencija*, 2006, n° 4, p. 373.

saisir la Cour constitutionnelle (article 106, alinéas 1, 2 et 3, et article 110, alinéa 2, dans les cas prévus ».[13]

Tous les tribunaux de droit commun (la Cour suprême de Lituanie, la Cour d'appel de Lituanie, les tribunaux régionaux et les tribunaux de district) et les tribunaux spécialisés (le Tribunal administratif suprême de Lituanie et les tribunaux administratifs régionaux) sont obligés, en vertu de l'article 107 de la Constitution, de respecter les décisions de la Cour constitutionnelle sur les questions relevant de sa compétence et qui sont définitives et ne peuvent être l'objet d'aucun recours.

Tous les tribunaux de droit commun et les tribunaux spécialisés sont obligés de respecter la doctrine constitutionnelle officielle formée par la jurisprudence de la Cour constitutionnelle, etc.. Toutefois, tous les systèmes juridictionnels (la Cour constitutionnelle, qui exerce le contrôle juridictionnel constitutionnel, les tribunaux de droit commun et les tribunaux spécialisés, instaurés selon l'article 111, alinéa 2, de la Constitution) sont séparés de point de vue de leur organisation et de leur administration.

« Le statut constitutionnel des juges reflète la nature juridictionnelle de la Cour constitutionnelle ».[14] Un ordre spécial de la nomination des juges, le serment des juges, l'inviolabilité de la personne du juge, les restrictions à l'exercice d'un emploi ou une autre activité, la fin des fonctions d'un juge revêtent les traits caractéristiques du pouvoir judiciaire. On peut noter que dans l'exercice de ses fonctions la Cour constitutionnelle suit des règles procédurales qui dans leur essence et contenu sont semblables aux règles procédurales des autres juridictions. Dans l'analyse des principes de la procédure judiciaire constitutionnelle on distingue plusieurs principes: l'indépendance et légalité des activités, la publicité, la collégialité, l'oralité de la procédure, etc.[15]

9. La Cour constitutionnelle exerce-t-elle le pouvoir de l'Etat ? C'était l'une des questions posées par le demandeur dans l'affaire examinée. Peut-être cette question semble bizarre ? On peut supposer que le demandeur aspirait dans le cas d'une réponse négative à avoir des

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[13] L'arrêt de la Cour constitutionnelle de la République de Lituanie du 6 juin 2006, Journal officiel Valstybės žinios, 2006, n° 65-2400.

[14] Žilys J., *Lietuvos Respublikos Konstitucinis Teismas konstitucinėje sistemoje, Lietuvos konstitucinė teisė : raida, institucijos, teisių apsauga, savivalda*, Vilnius: Mykolo Romerio universitetas, 2006, p. 264.

[15] Jarašiūnas E., Kūris E., Lapinskas K., Normantas A., Sinkevičius V., Stačiokas S., *Constitutional Justice in Lithuania, Vilnius: The Constitutional Court of the Republic of Lithuania*, 2003, p. 133–134.

possibilités d'affirmer que les dispositifs des arrêts de la Cour ne sont pas obligatoires. En effet, la question posée dissimulait une certaine perfidie contre la Cour et la justice constitutionnelle.

Dans l'arrêt du 6 juin 2006, la Cour a constaté qu'aux termes de la Constitution, elle a le pouvoir de constater l'inconstitutionnalité des actes juridiques des autres institutions du pouvoir de l'Etat (le Seimas, le Président de la République, le Gouvernement) lorsqu'ils sont contraires à des actes juridiques d'une plus grande force et, au premier chef, à la Constitution, et d'annihiler la force juridique de ces actes et de les éliminer du système juridique.

La Cour constitutionnelle, par ailleurs, a le pouvoir constitutionnel d'interpréter officiellement la Constitution et d'arrêter une conception officielle des diverses dispositions de la Constitution qui oblige toutes les institutions de création et d'application du droit (parmi lesquelles le Seimas).

Selon la Cour, cela montre évidemment que la Cour constitutionnelle ne peut être qu'une institution exerçant le pouvoir de l'Etat. Dans son arrêt, la Cour a remarqué que la supposition faite par le demandeur que la Cour constitutionnelle n'est pas une juridiction et n'exerce pas le pouvoir de l'Etat est tout à fait irrationnelle. Elle ne se concorde pas avec la conception constitutionnelle des pouvoirs de l'Etat, de même qu'elle nie la *raison d'être* de la demande du requérant dans cette affaire de justice constitutionnelle, puisque, comme l'avance le demandeur, si la Cour constitutionnelle n'était pas une juridiction et n'exerçait pas le pouvoir de l'Etat, il ne serait pas compréhensible que le demandeur lui demande notamment d'examiner la constitutionnalité d'un acte juridique, adopté par le Seimas, qui est l'une des institutions qui exerce le pouvoir de l'Etat (le pouvoir législatif).

L'article 107 de la Constitution prévoit qu'une loi (ou certaines de ses dispositions) de la République de Lituanie ou tout autre acte (ou certaines de ses dispositions) du Seimas, un acte du Président de la République de Lituanie ou un acte (ou certaines de ses dispositions) du Gouvernement, ne peuvent être mis en application à partir du jour où a été publiée officiellement la décision de la Cour constitutionnelle que l'acte en question (ou les dispositions concernées) est contraire à la Constitution.

Il doit être mentionné que les décisions de la Cour constitutionnelle sur les questions relevant de sa compétence sont définitives et ne peuvent faire l'objet d'aucun recours. En se fondant sur l'avis de la Cour constitutionnelle, le Seimas statue définitivement sur les questions énoncées dans l'article 105 alinéa 3 de la Constitution.

Les actes de la Cour constitutionnelle s'imposent à tous les organes, sociétés, entreprises et institutions publics ainsi qu'aux citoyens et aux fonctionnaires.

10. En guise de conclusions nous pouvons noter que la Cour constitutionnelle lituanienne a constaté dans sa jurisprudence :

a) que la supposition, faite par le demandeur, selon laquelle la Cour constitutionnelle n'est pas une juridiction et n'exerce pas un pouvoir de l'Etat ne coïncide pas avec la conception des pouvoirs, des compétences de la Cour constitutionnelle, qui sont établies par la Constitution. ;
b) que la Cour constitutionnelle lituanienne est une juridiction indépendante qui exerce la fonction de la justice constitutionnelle et garantit la suprématie de la Constitution dans le système juridique de Lituanie ;
c) que la Cour constitutionnelle lituanienne fait partie du pouvoir judiciaire et qu'il y a trois systèmes de tribunaux en Lituanie :
    1) la Cour constitutionnelle qui exerce le contrôle juridictionnel constitutionnel ;
    2) le système des tribunaux de droit commun ;
    3) un système des tribunaux administratifs.

Dans cet arrêt la Cour constitutionnelle a rappelé que les compétences exceptionnelles de la Cour constitutionnelle d'interpréter la Constitution officiellement et de donner, au travers de sa jurisprudence, une vision officielle des dispositions de la Constitution, c'est-à-dire d'élaborer une doctrine constitutionnelle officielle, résultent de la Constitution elle-même.

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Is Administrative Justice a Fundamental Right?

Antonio La Pergola's exceptional contributions are admired not only for the variety of activities in which he excelled (scholar, politician, judge, international mediator and many more), but also for his vision, particularly in foreseeing the collapse of the Soviet Union and the need for the kind of assistance that his Venice Commission provides.

I have been privileged to be the United Kingdom's member of the Venice Commission since 2000. With that privilege came another: meeting and getting to know Antonio. I soon learned of another of his virtues: kindness and generosity to all his colleagues, and sharing of his wisdom. We used to talk about our common experience of being students at Harvard Law School, where he got to know the famous constitutional lawyer, Professor Paul Freund.

Antonio was a true comparatist. He could speak with authority about both the letter and spirit of different constitutional systems. He was one of the few who understood that, although my country does not have a written constitution, it is nevertheless imbued with constitutional principles, the central of which is respect for the rule of law and fundamental freedoms.

One of the topics on which we used to speak was the notion of administrative justice, and whether that should be considered a fundamental human right. My view is that it should qualify as such a right and the rest of this paper will be devoted to that issue.

The democratic necessity of administrative justice

One of the issues in which the Venice Commission is centrally engaged is the extent to which the principles of democracy are universal. Comparative lawyers rightly remind us that the law of any one country can only be understood in the light of the history, traditions and culture of that country. That is of course true in respect of most private law, but does cultural relativism permit different

standards of democracy in different countries? Or is there a basic core of freedoms and liberties which are essential requisites of any constitutional democracy? Are some democratic features disposable under certain conditions?

There was a time when we permitted the appellation "democracy" for countries governed by parties alone, or for a government which, although freely elected decided, with popular support, to suppress its opposition. Nowadays we are more certain that a country that denies at least a basic catalogue of human rights does not merit a democratic designation.

[As an aside, we might ask whether a country that writes into its constitution just about every freedom and liberty ever imagined qualifies as a democracy if it fails to implement some or most of them. There is indeed a danger in constitutions that embrace aspirations that are practically unrealizable.]

South Africa in the early 1990s provides an example of a country searching for a perfect constitution. After the end of *apartheid* it was free to choose any model. Many were offered, but in the end it chose to adopt its own model, drawing on the best of a number of different constitutions and international human rights instruments. One of its original rights was that of "administrative justice" which some of the prominent draftsmen of the South African constitution had, just a year or two earlier, included in the new constitution of neighbouring Namibia.

Article 18 of the Namibian Constitution states that:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal".

The current South African Constitution is more extensive, providing that:

" Section 33

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must –
    (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsection (1) and (2); and
(c) promote an efficient administration[1]."

In the early 1990's, when the South African constitution was so painstakingly negotiated, administrative justice was not an obvious candidate for inclusion.[2] Opposition was initially voiced against a bill of rights at all, and to administrative justice as a right in particular – opposition from those who finally saw the chance of coming to power, yet harboured legitimate concerns about the possibility of being constrained by the countervailing power of unelected (and then unrepresentative) judges. Other opponents of the constitutionalisation of administrative justice, while not necessarily quarrelling with the intent of administrative law, preferred its development on a case-by-case elaboration of the common law (as in England, where the principles of administrative law have never formally been codified). In the end however, in recognition of the fact that the apartheid regime was characterised not only by racial discrimination but also by bureaucratic oppression, it was accepted that administrative justice should be entrenched as a foundational value in the new South Africa. Traces of the tensions during the drafting process of section 33 remain only in the cautionary note in subsection 3(c) which draws attention to the necessity of "efficiency" as a quality of administrative justice.

To what extent is administrative justice a universal democratic requirement, and to what extent are the standards and of administrative justice universal?

Inspired by South Africa's example, the concept of administrative justice as a constitutional right is being actively considered by the new democracies, such as countries of the former Soviet Union. Not all of them have accepted South Africa's decision to codify its administrative law principles (now under the terms of the *Promotion of Administrative Justice Act 2002*). Even the new Charter of Rights of the European Union has adopted a modified version of South Africa's section 33. Under Chapter V of that Charter, which provides for "citizen's rights", Article 41 confers a "right to good administration", which is phrased as follows:

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[1] Under section 24 of the 1994 Interim South African Constitution administrative justice was defined as the right to administrative action which is "lawful", "procedurally fair", and "justifiable in relation to the reasons given for it". Reasons for decisions were also required.

[2] See the account in L. de Plessis and H.Corder, Understanding South Africa's Transitional Bill of Rights (1994).

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. The right includes:
   - The right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
   - The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
   - The obligations of the administration to give reasons for its decisions.

Does the right to administrative justice include substantive or merely procedural protections?

The incorporation of a right to good administration in the European Charter (whatever the present uncertain status of the Charter) is a signal example of the progressive and incremental articulation of administrative justice as a democratic necessity. However, the rights that it protects are largely procedural (the right to a hearing, access to information and reasons for a decision). They do not go as far as the South African constitution in incorporating the right to a 'reasonable' decision. However, the Charter is set in the context of the European Court of Justice's recognition of "fundamental principles" by which to assess substantive interference with Treaty obligations by the standards of equality, legal certainty and proportionality. In addition, the ECJ applies the rights under the European Convention of Human Rights, some of which protect substantive rights, such as Article 5 (the right to the liberty and security of the person) and Article 14 (equality).

In addition, in the United Kingdom, as elsewhere, the rule of law as a constitutional principle provides the justification for much of administrative justice.[3] Some see the rule of law as embodying formal qualities in law (such as clarity, prospectivity, stability, openness and access to an impartial judiciary).[4] Others

[3] See Jeffrey Jowell, "The Rule of Law and its Underlying Values" in J. Jowell and D. Oliver, *The Changing Constitution*, (6th ed. 2007).

[4] J. Raz, "The Rule of Law and its Virtue' (1977) 93 L.Q.R. 195; *The Authority of Law* (1979). P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework"[1997] Public Law 467. Compare J.Waldron, "Is the Rule of Law and Essentially Contested Concept?'(2002) Law and Philosophy 137.

criticise that view as a "rule-book conception" of the Rule of Law and prefer the "rights conception", under which legal rules contain inherent moral content.[5] Insofar as the rule of law is a principle guiding the way power is deployed by government in a democracy (rather then a general theory of law, or of "good" law), it highlights a number of values inherent in administrative justice. These include: *legality* (which requires all decisions and acts of public officials to be legally authorised); *certainty* (which allows affected persons to know what they are required to do – or not do – in advance of any sanction for breach of a rule); *consistency* (which requires even-handed application of standards, and like cases can then be treated alike); *access to justice* (which forbids measures which prevent or preclude judicial review) and *due process* (requiring a fair hearing by an unbiased tribunal). Many of these values are substantive, including even that of due process[6] which, in the course of providing full and fair consideration of the issues and evidence plays an instrumental role in promoting substantively just decisions.

Whatever the content of its constituent parts, administrative justice is integral to constitutional democracy because it requires individuals to be treated lawfully and with due regard to the proper merits of their cause. Failure to provide that treatment diminishes a person's sense of individual worth. In a democracy properly so-called everyone has the right to equal respect, and it is this respect and dignity which administrative injustice denies. The claim of administrative justice for our attention is based therefore on the assumption that in a properly democratic society no public official should close his ears to legitimate claims or abuse the authority with which he has been entrusted. Antonio La Pergola felt passionately that that was so, and he was surely right.

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[5] R. Dworkin, A Matter of Principle (1985), chap.1, p.11 ff.

[6] For a full account of the variety of justifications of procedural protections see D. J. Galligan, Due Process and Fair Procedures (1996).

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The Decisions of the Constitutional Court of the Republic of Macedonia and their Legal Consequences

Introduction

The constitutional judiciary in the narrow sense of the term is competent for judicial supervision of the constitutionality and legality of regulations. However, in the wider sense, the constitutional judiciary decides on other matters that are of fundamental constitutional and legal significance.[1]

The supervision of constitutionality is organised from outside or inside the judiciary,[2] and this centralised system, rather than the decentralised version, seems to have been adopted by most European countries. In opting for fundamental constitutional supervision of the rule of law, the constitutional writers were saying that the Republic of Macedonia fully accepted the centralised system of constitutional court control.[3]

In this paper, we shall use the example of the Constitutional Court of the Republic of Macedonia to outline the decision-making process implemented by this Constitutional Court, drawing on the principle of legality. We shall also

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[1] In the case of the Republic of Macedonia, for instance, pursuant to Article 110 of the Constitution of the Republic of Macedonia, the Constitutional Court also decides on the protection of freedoms and rights of the individual and citizen relating to the freedom of beliefs, conscience, thought and public expression of thought, political association and activity and the prohibition of discrimination against citizens on grounds of sex, race, religious, national, social and political affiliation, and decides on conflicts of competences, on the responsibility and liability of the President of the Republic, on the programmes and statutes of political parties and associations of citizens, etc.

[2] We have two different basic systems: the out-of-court system (in which the constitutionality of legislation is verified by a legislative or specially created body usually made up of members of legislative and judicial bodies), and the court system (in which constitutionality and legality are supervised by ordinary courts or by the Constitutional Court).

[3] In some countries, led by Portugal, constitutional supervision was placed in a mixed system involving elements of both a decentralised and a centralised system.

specifically address the legal consequences of the decisions taken by the Constitutional Court of the Republic of Macedonia, thus also tackling a problem with which most constitutional courts in Europe are confronted, namely the means of enforcing their decisions.

1. The Constitutional Court of the Republic of Macedonia

The Constitutional Court of the Republic of Macedonia was established under the 1963 Constitution, although the first Constitutional Court did not commence operations until 15 February 1964.

The new 1991 Constitution of the Republic of Macedonia reinforced the role of the Constitutional Court. The Constitution stipulates the jurisdiction of and procedure before the Constitutional Court, as well as the status of constitutional judges (Articles 108–113). The working method and procedure before the Constitutional Court of the Republic of Macedonia are further specified in the Rules of Procedure of the Constitutional Court. The fact that working methods and procedures before the Constitutional Court are clearly and specifically defined in the Constitution of the Republic of Macedonia and in the Constitutional Court's Rules of Procedure is particularly important in securing full implementation of the principle of legality in the Constitutional Court's work. For these reasons, each set of proceedings and each decision taken by the Constitutional Court is based on clear implementation of the principle of legality.

In many countries the organisation, working method and procedure before the Constitutional Court are governed by a special law on the organisation and working methods of the Constitutional Court. Macedonia's decision to regulate these issues under the Constitutional Court's Rules of Procedures enables this Court to remain independent from the three powers in the state in organising its work and procedures as it wishes. Recently, however, more thought has been given to adopting a special Law in order to ensure enforcement of the decisions reached by the Constitutional Court.

1.1. Position and composition of the Constitutional Court

The Constitutional Court is the supreme judicial body responsible for the protection of constitutionality and legality, as well as human rights and the fundamental freedoms. The Court is autonomous and independent from the other state bodies, and is responsible not only for ensuring the rule of law as a fundamental constitutional value but also for promoting clear respect for the principle of the legal safety of the individual and the citizen.

The Constitutional Court is made up of nine judges. Under Amendment XV, the Assembly is responsible for electing judges to the Constitutional Court. The Assembly elects six judges to the Constitutional Court under a majority vote of the total number of deputies. The Assembly elects three judges under a majority vote of the total number of deputies, in this case requiring majority votes of the total number of deputies belonging to the minority communities of the Republic of Macedonia. The term of office of the judges is nine years non-renewable.

The constitutional judges' independence is reinforced by their right to immunity, which is a matter for the Constitutional Court itself to decide. Another cornerstone of the judges' independence and impartiality in decision-making is the constitutional provision that the duties of a constitutional judge are incompatible with the holding of another public office or profession, or membership of a political party.

Furthermore, the transparency of the Constitutional Court's work guarantees freedom of information for the citizens and compliance with the principle of legality. The Constitutional Court's transparency is manifested in its public sessions, and is also reflected in the public presentation of the annual report on the Court's work, regular press conferences and the fact that all resolutions and decisions are accessible on the Court's website [4].

1.2. The jurisdiction of the Constitutional Court of the Republic of Macedonia

The jurisdiction of the Constitutional Court breaks down into six sections. The Constitutional Court:

a. decides on the mutual agreement of existing laws and statutes, assessing their constitutionality and legality, that is to say the compliance of:
– legislation with the Constitution;
– other statues and collective agreements with the Constitution and legislation;[5]
– protects the freedoms and rights of the individual and the citizen, namely

[4] All the decisions and resolutions of the Constitutional Court of the Republic of Macedonia from 1991 to the present day are available on the Constitutional Court website, http/:www.usud.gov.mk.

[5] In this section of the Court's jurisdiction, unlike the Constitutional Court of the Republic of Macedonia, the Constitutional Court of the Republic of Slovenia also has a preventive competence, ie it gives opinions on international treaties currently being ratified (like the Constitutional Council in France).

the freedom of belief, conscience, opinion and public expression of opinion, political association and activities and ban on discrimination against citizens on grounds of sex, race, religion, and nationality, social and political affiliation;

b. decides on disputes as to jurisdiction between the legislature, the executive and the judiciary;
c. decides on the responsibility and liability of the President of the Republic[6];
d. decides on the constitutionality of the programmes and statutes of political parties and associations of citizens;
e. decides on other issues as defined by the Constitution.

2. Conduct of proceedings before the Constitutional Court and the Court's decision-making procedure

2.1. Conduct of proceedings before the Constitutional Court of the Republic of Macedonia

Working methods and the conduct of proceedings before the Constitutional Court of the Republic of Macedonia are governed by the Court's Rules of Procedure. The Constitutional Court applies the legislation governing its jurisdiction ratione materiae to matters that are not governed by the Rules of Procedure of the Constitutional Court. Some sections of the Constitutional Court's jurisdiction necessitate a different approach to proceedings, including:

a. proceedings to assess the constitutionality and legality of laws, statutes and other general regulations and decisions;
b. proceedings for the protection of freedoms and rights under Article 110 indent 3 of the Constitution of the Republic of Macedonia;
c. proceedings to lift immunity, establish responsibility or liability and ascertain the presence of the conditions for terminating the term of office of the President of the Republic;
d. proceedings to settle disputes as to jurisdiction; and
e. special proceedings.

For the purposes of this paper we have opted to begin by considering proceedings to assess the constitutionality and legality of laws, statutes and other

[6] Unlike the Constitutional Court of the Republic of Macedonia, the Constitutional Court of the Republic of Slovenia decides on the responsibility and liability of the President of the Republic, but also on the responsibility and liability of the prime minister and other ministers.

general regulations and decisions, as this type of proceedings provides an optimum illustration of the implementation of the principle of legality under the Constitutional Court's decision-making procedure.

2.1.1. Commencement of the preliminary proceedings and the proceedings proper for assessing the constitutionality and legality of laws, statutes and other general regulations and decisions on the basis of the legality principle

Proceedings geared to assessing the constitutionality of legislation and the constitutionality and legality of a statute or another general regulation or decision are initiated by resolution of the Constitutional Court on receipt of a written initiative.[7]

In the Republic of Macedonia the full implementation of the principle of actio popularis means that anyone can submit an initiative for commencement of proceedings to appraise the constitutionality of a law and the constitutionality and legality of a statute or another general regulation or decision. The Constitutional Court itself may also bring proceedings proprio motu to appraise the constitutionality of a law or the constitutionality and legality of a statute or another general regulation or decision. Furthermore, when appraising the constitutionality of such measures, the Constitutional Court may also assess the constitutionality and legality of the provisions in the statute or another general regulation or decision that are not challenged by the initiative.

In the course of the preliminary proceedings, during the examination of the initiatives requesting an assessment of constitutionality and/or legality, a Constitutional Court judge must gather all the requisite data and notifications needed for the purposes of a proper and fair decision on the request for initiation of a procedure, with the assistance of the State Counsellor mandated to deal with the case.

The judge and the State Counsellor must perform these preliminary procedural acts within ten days at the latest (where the initiative invokes the protection of freedoms and rights defined in the Constitution, this time-limit is three days) from the date of receipt of the request. In the course of the preliminary proceedings the officials responsible may summon any party to the procedure

[7] The initiative for commencing proceedings to assess the constitutionality of a law or the constitutionality and legality of a statute or another general regulation or decision comprises the following: a memorandum on the law, statute, general regulation or decision being contested, or specific provisions thereof, the grounds of the challenge, the Constitutional provisions concerned, the law that is infringed by the statute or piece of legislation, and the name and address of the person submitting the initiative.

and other persons concerned for a consultative interview, asking them to produce the necessary information and explanations. Although the Rules of Procedure of the Constitutional Court stipulate that the initiative must be submitted to the body having adopted the disputed measure only if need be, in actual practice the Constitutional Court regularly refers the initiatives to the body having adopted the disputed act so that it can state its opinion or provide information on any changes which may have occurred in the meantime. In accordance with Article 21 of the Constitutional Court's Rules of Procedure, everyone is obliged to provide data to the Constitutional Court and to inform it of matters important to the conduct of proceedings.

Where the Court finds, in the course of proceedings, that several persons have tabled separate initiatives requesting assessment of the constitutionality and/or legality of the same provisions of the same law, statute or general regulation or decision, all these initiatives are combined with the one submitted first, a single set of proceedings is conducted for all of them and the court takes one decision only. When several separate initiatives are submitted for the assessment of the constitutionality, and/or legality of the same law, statute or general regulation or decision, any requests submitted later may be combined with the one received first, a single set of proceedings may be conducted for all of them and one decision only given.

When the parties to proceedings and their representatives and proxies address the Court, they are entitled, in the presence of a specially appointed member of the Constitutional Court staff, to peruse the documents relating to the subject of the proceedings. The staff member in question must provide the parties to proceedings and other relevant persons with information on the subject as it emerges from the records.

The parties to proceedings and the other relevant persons are not allowed access to any report, draft decision or resolution or other conclusions which are under preparation for a decision by the Court, apart from reports for public hearings, preparatory sessions or sessions which they have been invited to attend.

Following the conclusion of the preliminary proceedings, and within a maximum of three months from the date of receipt of the request, a report must be submitted to a Court session or else the Court must be otherwise informed of progress in the proceedings. Where the request for assessment of the constitutionality and legality of a statute or another general regulation or decision invokes the protection of freedoms and rights set out in the Constitution, the time-limit for submitting a report for a Court session is 30 days. The Rules

of Procedure of the Constitutional Court clearly state which facts must be set out in the report for the session, viz the date of submission and nature of the request, what preparatory measures were taken, which disputed legal and factual issues occurred in the course of proceedings, a review of Constitutional Court practice and, as a general rule, an opinion and proposal regarding the mode of decision-making on the request made.

2.1.2. Decision-making in proceedings for the assessment of the constitutionality and legality of laws, statutes and other general regulations and decisions on the basis of the principle of legality

The sessions of the Constitutional Court of the Republic of Macedonia are public. The President of the Court informs the judges in writing of the date and time of the session at which the reports proposed are to be considered. This notification is sent to the judges at least seven days before the date of the session. The President may decide to hold the session at shorter notice only in exceptional cases, when specific matters must be dealt with urgently. The reports on the draft decisions or resolutions and, if necessary, other matters are appended to the notification of the date of the session.

Constitutional Court sessions begin with a discussion of the agenda.

A reporting judge is assigned for each item, except for matters assigned to a judge involved in the preliminary proceedings. Each item of the agenda is debated about concerning the disputed and factual issues and is decided on. Where a discussion on a separate issue leads the Court to conclude that there are grounds for changing a position already adopted or where the case requires further study, the Court postpones the decision-making process in order to reconsider the previous position, possibly including further investigations, and issues instructions accordingly.

Resolutions or decisions are taken on a majority vote of the total number of judges in the Constitutional Court, unless otherwise determined by the Constitution or the Rules of Procedure of the Constitutional Court. A Constitutional Court judge who is unable to attend the session may present a written opinion on the issue.

The President and judges may not abstain from voting. Judges who vote against the decision or who believe that it should be based on different legal grounds is entitled to formulate a separate opinion and submit it in writing. The separate opinion is published in the Court Bulletin and the Official Gazette of the Republic of Macedonia. The separate opinion may be a dissenting or a concurring opinion. The aim of the separate opinion is to clarify the argu-

ments which the judge presented during the debate and the decision-making procedures on specific matters.

The Constitutional Court may, during the whole course of proceedings before the final decision, pass a resolution suspending the execution of individual acts or decisions taken on the basis of a law, statute or other general regulation or decision whose constitutionality or legality it is assessing, where its execution was liable to have lasting consequences. In such cases, the Constitutional Court is required to conclude the proceedings as quickly as possible.

In accordance with Rule 28 of the Rules of Procedure of the Constitutional Court, the Court may decide to reject the initiative only if:

a. it lacks jurisdiction to decide on the request;
b. it has already decided on the same question and there are no grounds for reaching a different decision; and
c. there are other legal impediments to deciding on the initiative.

Sometimes, in dealing with initiatives, in order to clarify the factual and legal situation at various stages in the proceedings, the Constitutional Court may decide to hold a preparatory session. The aim of the preparatory session is to give the court a clearer picture of the legal points at issue and elucidate certain facts. Parties to proceedings, expert bodies and organisations, specialists and legal experts selected by the Court are summoned for the preparatory session. Along with the summons to attend the preparatory session the persons in question are provided with a report for the preparatory session containing the statements set out in the initiative for initiating proceedings to assess the constitutionality of a law or the constitutionality and/or legality of a statute or general regulation or decision, the relevant legal conditions, the contested legal issues and the legal opinions expressed in the previous set of proceedings. In the debate at the preparatory session the judges may put questions and state views and comments regarding the disputed legal and factual issues and on other matters of importance for the Court's decision. After the completion of the proceedings on the issue for which the preparatory session was organised, a copy of the decision or resolution with which the Constitutional Court terminated the proceedings for assessing the constitutionality and legality is also delivered to all parties involved in the preparatory session.

The Court may decide to hold a public hearing on certain cases of particular importance in the construction of the legal opinion. The Court therefore holds a session to decide which specialist bodies and organisations and legal experts should be summoned to the hearing, in addition to the other participants in proceedings. The public media are also informed of this public hearing.

Unlike the preparatory session, the public hearing may take place after commencement proceedings for assessing the constitutionality of a law or the constitutionality and/or legality of a statute or another general regulation or decision.

The public hearing is held in the Constitutional Court itself. The Court may decide to hold the hearing at another venue inside or outside the Court premises. The public hearing may be held subject to attendance by at least five judges of the Constitutional Court. The Constitutional Court must decide whether the evidence adduced in the preliminary procedure is also to be adduced at the hearing. If, in the course of proceedings, new evidence is produced that was not mentioned during the preliminary proceedings, this evidence must also be adduced at the hearing. If, in the course of the public hearing, the person submitting the initiative instigating proceedings decides to waive it, the Constitutional Court may continue with the public hearing if the issue is of broader constitutional/legal significance. If the Constitutional Court, at the public hearing, decides to assess the constitutionality and legality of provisions deriving from a general statute or decision whose constitutionality and/or legality is not challenged in the initiative, that is to say, which is not covered by the resolution to commence proceedings, the Constitutional Court, at the request of the parties to proceedings, shall delay the public hearing and set a time limit for the adopter of the act to provide an answer.

Where the Constitutional Court considers that the hearing on the matter is completed, the President of the Court must conclude the public hearing and inform the participants to proceedings on the mode of announcement of the decision. If the Constitutional Court decides on constitutionality and/or legality of a legal provision immediately after the public hearing, the President of the Court must announce the decision to the parties to the proceedings, setting out the fundamental grounds therefore.

In the course of proceedings the Constitutional Court may only decide to halt proceedings if:

a. in the course of the proceedings the law, statute or other general regulation or decision has lapsed, leaving no grounds for assessing its constitutionality and/or legality for the period during which it was in effect;
b. in the course of the proceedings the request for assessment of constitutionality and/or legality is withdrawn, whereby the Constitutional Court notes no grounds for conducting proceedings proprio motu;
c. it is ascertained that proceedings were instigated on the basis of an incorrect assessment of the facts of the case;

d. following the establishment of the facts of the case and the relevant legal situation, the grounds for challenging the constitutionality and legality lapse, during the public hearing or the subsequent proceedings.

If, after the held public hearing held by the Constitutional Court, the latter concludes that the point at issue has been sufficiently clarified, it must initiate the decision-making process by means of consultation and voting. Consultation and voting take place in camera. The judges to the Constitutional Court who have not attended the public hearing session can also take part in the consultation and voting procedure. During consultation the Constitutional Court may decide to postpone the decision or to hold another hearing. Before taking any decision on the merits of the case, if necessary, Constitutional Court judges can vote on separate issues relevant to the final decision. Separate minutes are drafted on the consultation and voting procedure. Separate written opinions are appended to the minutes. The minutes of the consultation and voting procedure is kept in a sealed envelope, which may be opened only by formal decision of the Court.

3. Legal consequences of Constitutional Court decisions

The decisions of the Constitutional Court in relation to the assessment of the constitutionality and/or legality of regulations and other provisions are binding on all parties (*erga omnes*). The same applies to specific decisions taken on ad hoc verification of the constitutionality of regulations.

In proceedings to assess constitutionality and/or legality the Constitutional Court adopts decisions, resolutions and conclusions.

The Constitutional Court takes decisions on the merits of the following types of case:

a. annulling or repealing a law or statute, a programme and/or the statutes of a political party or another general regulation or decision;
b. protecting the freedoms and rights set out in Article 110 paragraph 3 of the Constitution;
c. deciding on a dispute as to jurisdiction;
d. lifting immunity and ascertaining the responsibility and the preconditions for terminating the office of President of the Republic of Macedonia;
e. addressing the immunity and the preconditions for discharging a judge of the Constitutional Court of the Republic of Macedonia;
f. establishing the unconstitutionality of a law or the unconstitutionality and/or illegality of a statute or any other general regulation or decision while

the latter was in force, even though it has lapsed during the proceedings, provided the conditions for their annulment have been met.

The Constitutional Court must adopt resolutions in the following cases:

a. commencement of proceedings to assess the constitutionality of a law and the constitutionality and/or legality of a statute or any another general regulation or decision;
b. termination of proceedings;
c. rejection of initiatives, proposals and requests;
d. halting the execution of individual decisions or measures adopted on the basis of a law, statute or any other general regulation or decision whose constitutionality and/or legality it is currently assessing; and
e. in other cases where it is not deciding on the merits of the case.

The Constitutional Court reaches conclusions on action taken in the course of the proceedings.

When the Constitutional Court decides whether to annul or repeal the law, statute or general regulation or decision in question, it shall take account of all the circumstances of importance for protecting the constitutionality and legality, and in particular the seriousness of the violation and its nature and importance for implementation of the freedoms and rights of citizens or for relations established on the basis of these acts, the certainty of the law and other preconditions for the decision-making process.

The text of the decision or resolution is defined at the Constitutional Court session and is prepared by a drafting committee. The text of the decision or resolution as defined at the session must, as a general rule, be prepared by the drafting committee within 7 days. Where the drafting committee discovers incorrectly established factual or legal circumstances or contradictions in the text of the decision or resolution, it shall inform the Court thereof at its next session. The final text of the decision or resolution is signed by the President of the Constitutional Court and the reporting judge. A copy of the decision or resolution is communicated to the parties to the proceedings. Constitutional Court decisions are published in the Official Gazette of the Republic of Macedonia. The Constitutional Court may decide also to publish a separate resolution in the Official Gazette of the Republic of Macedonia. The final text of the decision or resolution is communicated to all parties to the proceedings and sent for publication within 3 days from the date of the President's signature.

Decisions by the Constitutional Court of the Republic of Macedonia to repeal or annul a law, statute or other general regulation or decision take legal

effect from the date of their publication in the Official Gazette of the Republic of Macedonia.

Effective individual measures adopted on the basis of a law, statute or other general regulation or decision that has been repealed by of the decision Court may not be enforced, and if enforcement has commenced it must be halted.

Any person whose right has been violated by a final or effective decision adopted on the basis of a law, statute or other general regulation or decision that has been annulled by decision of the Constitutional Court is entitled to request the competent body to annul that individual measure, within 6 months from the date of publication of the decisions of the Constitutional Court in the Official Gazette of the Republic of Macedonia.

If the consequences of the implementation of the law, statute or general regulation or decision that has been annulled by decision of the Constitutional Court cannot be eradicated by amending the individual decision in question, the Court may rule that the consequences be eliminated by restoring the *status quo ante*, providing damages or some other form of compensation. The enforcement of effective individual measures adopted on the basis of a law, statute or other general regulation or decision that has been annulled by decision of the Constitutional Court, must not be enforced, and if enforcement has commenced it must be halted.

Under a decision of the Constitutional Court on the freedoms and rights under Article 110 paragraph 3 of the Constitution, the Constitutional Court must set out the mode of elimination of the consequences of implementing the individual measure or decision having violated those rights and freedoms.

Conclusions

The Constitutional Court, as the independent and unbiased guardian of constitutionality and legality in every State, has a specific role to play in ensuring respect for the fundamental value of the rule of law. Accordingly, Constitutional Court judges, as experienced professionals and distinguished lawyers, must be particularly careful to comply with the principle of legality. Every single set of proceedings conducted by the Court must observe the methodology set out in the Constitution of the Republic of Macedonia and in the Rules of Procedure of the Constitutional Court.

Constitutional court decisions are also a source of legal doctrine, forming an integral part of the legal order, and must therefore invariably be definitive, general, constant and just. They have *erga omnes* force and consequently must

comprise general rules of conduct for everybody, without exception. The contents of the Court's decisions must be deemed to comply with the justice principle, together with equity, and their constant nature must provide citizens with confidence in the certainty of the law. The Constitutional Court does not "chop and change" its positions on the same issues.

The principle of legality guarantees the certainty of the law as a guarantee on protection of every individual's rights. We therefore also maintain that procedural guarantees are as important for the law-based State as the legal standard themselves. Rights can be implemented when persons whose rights have been violated are provided with legal remedies for their protection.

Consequently, we believe that open, transparent operations on the part of the Constitutional Court are extremely important in ensuring full compliance with the decisions of the Constitutional Court. The fact that sessions are public and the decisions and resolutions are published is important for the work of the Constitutional Court. The availability of information helps form a legal culture among the general public. A citizen who knows his/her rights and duties is able to value and respect the national legal system.

Giorgio Malinverni
Juge à la Cour Européenne des Droits de l'Homme

Extradition, expulsion et assurances diplomatiques

Comme la plupart des contributeurs au présent ouvrage, j'ai eu la chance et le privilège de connaître cet homme exceptionnel que fut Antonio La Pergola durant les seize années pendant lesquelles j'ai siégé à la Commission de Venise, commission dont ce visionnaire fut le père fondateur et qu'il présida par la suite avec l'intelligence et l'enthousiasme qui le caractérisaient.

Éminent juriste, Antonio La Pergola a consacré toute sa vie au droit public, en sa qualité de professeur d'abord, de juge ensuite. Le respect de l'État de droit, des valeurs démocratiques et des droits de l'homme était pour lui une préoccupation constante.

C'est en témoignage de profond respect, mais aussi de l'amitié qui nous a liés, que cette brève étude sur une problématique actuelle du droit international des droits de l'homme lui est consacrée.

1. Les États face à des obligations contradictoires

Lorsqu'ils sont requis d'extrader une personne, les États sont confrontés à des obligations qui peuvent paraître, de prime abord, contradictoires. D'une part, ils ont l'obligation de respecter un traité international, bilatéral ou multilatéral, d'extradition. A cette première obligation est venu s'ajouter récemment le devoir qu'ils ont de lutter efficacement contre le terrorisme, et donc de renforcer la coopération internationale dans ce domaine.[1] Or, l'extradition de terroristes présumés constitue incontestablement un moyen de lutter efficacement contre le terrorisme.

D'autre part, les États ont également l'obligation, qui découle, elle aussi, de traités internationaux, de préserver en toute circonstance certaines valeurs

[1] Cour eur. DH, arrêt Chahal c. Royaume-Uni, 22414/93, 15 novembre 1996, § 79 ; arrêt Chamaïev et autres c. Géorgie et Russie, 36378/02, 12 avril 2005, § 335.

fondamentales, comme celles qui sont par exemple consacrées aux articles 2 et 3 CEDH.

2. La conciliation de ces obligations

La question qui se pose bien souvent aux États est donc celle de savoir comment ils peuvent concilier ces obligations apparemment contradictoires. L'on peut à cet égard distinguer, parmi les États requérants, trois groupes d'États.

Le premier comprend ceux qui sont généralement reconnus comme des États de droit, démocratiques et respectueux des droits de l'homme. Ici, l'extradition ou l'expulsion peut s'effectuer sans qu'aucune condition ne soit posée.

Un deuxième groupe d'États regroupe ceux dans lesquels il existe des motifs sérieux de penser que la personne extradée pourrait être maltraitée, mais où ce risque peut être réduit à zéro moyennant l'obtention de garanties diplomatiques. Pour ces États, le risque que la personne extradée soit maltraitée est donc purement théorique. L'expulsion vers ces États devrait donc être possible, faute de quoi l'on réduirait de manière excessive le droit des États d'extrader ou d'expulser des personnes et la coopération internationale en matière pénale serait par trop entravée.

Le troisième groupe d'États est constitué de ceux vers lesquels une expulsion ou une extradition ne devrait en aucun cas être ordonnée, même si leurs gouvernements fournissent des assurances diplomatiques. Il s'agit là d'États pour lesquels les assurances diplomatiques ne peuvent pas réduire à un niveau suffisant le risque de violation des droits de l'homme.

Se pose alors la question de savoir dans quels cas l'on a à faire à la deuxième ou à la troisième hypothèse évoquée ci-dessus. Plusieurs critères peuvent être pris en compte à cet effet.

Un premier critère est constitué par la situation des droits de l'homme et leur respect dans l'État requérant. Dans l'affaire Chahal c. Royaume-Uni, du 15 novembre 1996[2], les autorités britanniques avaient été requises par l'Inde d'extrader un séparatiste sikh. Quand bien même les autorités indiennes avaient fourni des assurances diplomatiques, la Cour considéra qu'elles ne suffisaient pas à éliminer les risques de mauvais traitements du requérant. La Cour basa son raisonnement principalement sur le fait qu'au Pendjab les séparatistes sikhs avaient été victimes de violations graves des droits de l'homme, et que le

[2] Voir note 1 ci-dessus.

Gouvernement fédéral indien n'était pas en mesure de contrôler suffisamment la situation dans cet État pour prévenir de telles violations.

Un deuxième critère est le risque que court personnellement la personne qui doit être extradée.

Enfin, un dernier critère est fourni par la précision des assurances diplomatiques données par l'État requérant. Dans l'affaire Saadi c. Italie, du 28 février 2008[3], en réponse à la demande d'assurances diplomatiques présentées par le gouvernement italien, la Tunisie avait répondu qu'elle était disposée à accepter le transfert vers son territoire de détenus tunisiens à l'étranger, et ce dans le strict respect de la législation nationale en vigueur, et sous la seule garantie des lois tunisiennes pertinentes.

Dans une note verbale successive, la Tunisie avait rappelé aux autorités italiennes que les lois tunisiennes en vigueur garantissaient et protégeaient les droits des détenus et leur assuraient des procès justes et équitables. Elle ajouta que la Tunisie avait délibérément adhéré aux traités et conventions internationaux pertinents. Ces assurances furent cependant jugées insuffisantes par la Cour.

3. Les critiques formulées à l'endroit des assurances diplomatiques

Les principales critiques formulées à l'encontre des assurances diplomatiques consistent à dire que celles-ci, et l'éventuel « monitoring » diplomatique qui s'ensuit, n'offrent pas des garanties suffisantes contre la torture et les mauvais traitements. Ces critiques sont formulées principalement par les ONG[4], mais également par le Haut Commissariat des Nations Unies aux Droits de l'Homme, par une partie de la doctrine et même par certains gouvernements.[5]

Une autre critique faite aux assurances diplomatiques consiste à dire que l'État qui accepte d'extrader une personne obtient de l'État requérant une exception à une pratique généralisée de la torture dans cet État, mais dans un seul cas, à savoir celui de la personne extradée. L'État qui extrade la personne requise accepte ainsi implicitement que d'autres détenus ne soient pas bien traités. En d'autres termes, moyennant l'obtention des assurances diplomatiques, l'État requis obtiendrait « une île de légalité entouré d'un océan d'abus ».

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[3] Cour eur. DH, arrêt Saadi c. Italie (GC), 37201/06, 28 février 2008, § 148.

[4] Voir, par exemple, Human Rights Watch « Empty promises » : Diplomatic Assurances, No Safeguard Against Torture, avril 2004, p. 4.

[5] Voir, par exemple, la réponse de Mme Micheline Calmy-Rey à Human Rights Watch, du 4 avril 2007.

Les adversaires des assurances diplomatiques avancent également que les exemples de non respect de ces assurances seraient nombreux. Ainsi, Human Rights Watch donne l'exemple de sept détenus russes emprisonnés à Guantanamo, qui avaient été remis par les États-Unis aux autorités russes, lesquelles les auraient maltraités.[6] Pour plusieurs ONG, il ne servirait dès lors à rien de réglementer plus avant le régime des assurances diplomatiques. Il faudrait tout simplement les rejeter (« reject rather than regulate »).[7]

Enfin, une autre critique importante a trait à la nature juridique non contraignante des assurances diplomatiques. Il serait difficile d'admettre qu'un État qui ne respecte pas des règles de droit impératif, comme l'interdiction de la torture, puisse se conformer à des arrangements entre États qui ne sont pas véritablement contraignants, mais constituent plutôt des engagements moraux, et qui reposent davantage sur la bonne foi que sur des règles de droit international.[8]

Il est d'ailleurs permis de se poser à cet égard la question de savoir si, s'agissant des assurances diplomatiques, il convient de faire une distinction entre les cas d'extradition et les cas d'expulsion. Dans la première hypothèse, en effet, les garanties diplomatiques seraient un instrument efficace de protection des droits de l'homme, car l'État requérant aurait un intérêt évident à respecter les assurances qu'il a données, faute de quoi il mettrait en péril la collaboration judiciaire future avec l'État requis. Un tel intérêt à respecter les engagements qu'il a assumés n'existerait en revanche pas dans les cas d'expulsion.

4. La jurisprudence de la Cour de Strasbourg

Nous avons déjà eu l'occasion de nous référer à quelques exemples tirés de la jurisprudence de la Cour en matière d'assurances diplomatiques. D'une manière

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[6] Human Rights Watch : The Stamp of Guantanamo, the Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States, mars 2007.

[7] Amnesty International, Human Rights Watch, et International Commission of Jurists, Reject rather than Regulate, Call on Council of Europe Member States not to Establish Minimum Standards for the Use of Diplomatic Assurances in Transfers to Risk of Torture and Other Ill Treatment, 2 décembre 2005, p. 2.

[8] Address by Louise Harbour, UN High Commissioner for Human Rights, at Chatham House and the British Institute of International and Comparative Law, du 16 février 2006. Voir également Martina Caroni, Menschenrechtliche Wegweisungsverbote: neuere Praxis, in: Jahrbuch für Migrationsrecht 2006–2007, Berne 2007, p. 59 ss, et Peter Popp, Grundzüge der Internationalen Rechtshilfe in Strafsachen, Basel 2001, p. 255.

générale, on peut dire que la Cour prend en compte les assurances diplomatiques pour déterminer si l'État requis viole les articles 2 ou 3 CEDH.[9]

La jurisprudence de la Cour n'offre que quelques exemples où les assurances diplomatiques n'ont pas été prises en considération. Dans l'affaire Chahal, déjà mentionnée[10], la Cour a affirmé qu'en cas d'expulsion l'article 3 CEDH serait violé en dépit des garanties données par l'Inde. Dans l'affaire Saadi c. Italie, la Cour a jugé que les garanties données par la Tunisie étaient insuffisantes. Le § 148 de ce dernier arrêt résume fort bien la position de la Cour sur cette question. La Cour y a en effet affirmé :

« A titre surabondant, il convient de rappeler que même si, contrairement à ce qui s'est produit en l'espèce, les autorités tunisiennes avaient donné les assurances diplomatiques sollicitées par l'Italie, cela n'aurait pas dispensé la Cour d'examiner si de telles assurances fournissaient, dans leur application effective, une garantie suffisante quant à la protection du requérant contre le risque de traitements interdits par la Convention (Chahal précité, § 105). Le poids à accorder aux assurances émanant de l'État de destination dépend en effet, dans chaque cas, des circonstances prévalant à l'époque considérée ».[11]

Un autre motif autorisant la Cour à ne pas prendre en considération les assurances diplomatiques est constitué par l'impossibilité de vérifier que celles-ci seront effectivement respectées. Ainsi, dans l'arrêt Ryabikin c. Russie du 19 juin 2008 la Cour a affirmé :

"The Court notes that the Government invoked assurances from the Prosecutor General of Turkmenistan to the effect that the applicant would not be subjected to ill-treatment there. However, no copy of that letter has been submitted to the Court. In any event, even accepting that such assurances were given, the Court notes that the reports cited above noted that the authorities of Turkmenistan systematically refused access by international observers to the country, and in particular to places of detention. In such circumstances the Court is bound to question the value of the assurances that the applicant would not be subjected to torture, given that there appears to be no objective means of monitoring their fulfilment. The Court also recalls its previous practice whereby it has found that diplomatic assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable

[9] Voir, par exemple, Cour eur. DH, arrêt Olaechea c. Espagne, 24668/03, du 10 août 2006 ; arrêt Mamatkulov et Askarov c. la Turquie (GC), 46827/99, du 4 février 2005.
[10] Voir note 1 ci-dessus.
[11] Voir note 2 ci-dessus, § 148 .

sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see Saadi, cited above, §§ 147–148)." [12]

5. Conclusion

Puisque, contrairement à ce que préconisent certaines ONG, il n'est guère envisageable pour le moment de rejeter les garanties diplomatiques, se pose la question de savoir comment leur régime pourrait être amélioré.

Le gouvernement requis devrait toujours demander des assurances aussi précises que possible. Les points suivants devraient en tout cas y figurer :

- les conditions de détention ne doivent pas être inhumaines ou dégradantes ;
- l'intégrité physique et psychique de la personne extradée ou expulsée doit être préservée ;
- la santé du détenu doit être assurée de manière convenable ; en particulier, il doit pouvoir avoir accès aux médicaments dont il a besoin ;
- un représentant de l'ambassade de l'État requis doit être autorisé à rendre visite à la personne extradée, sans surveillance aucune, et sans avertissement préalable ;
- la personne extradée doit pouvoir à tout moment s'adresser à la représentation diplomatique de l'État requis ;
- les autorités de l'État requérant doivent s'engager à indiquer à l'ambassade de l'État requis le lieu où se trouve le détenu et à l'informer de tout changement de lieu de détention ;
- la représentation diplomatique de l'État requis doit toujours connaître le lieu où se trouve la personne extradée ;
- la personne extradée doit à tout moment pouvoir s'entretenir avec l'avocat de son choix, ou avec l'avocat désigné d'office ;
- la personne doit pouvoir recevoir les visites de sa famille.

[12] Cour eur. DH, arrêt Ryabikin c. Russie, 8320/04, 19 juin 2008, § 119.

Franz Matscher
Professeur émérite, Université de Salzbourg, Autriche

Souvenirs personnels d'un éminent juriste

J'ai fait la connaissance de Antonio La Pergola lors d'un colloque que le regretté Giuseppe Sperduti avait organisé à l'Université La Sapienza de Rome les 29–31 octobre 1984. Le titre du colloque était « *La concezione del diritto e dello stato nell`era di rivendicazione della dignita della persona uman* ». Les langues de travail du colloque avaient été l'italien, le français et l'anglais. Antonio La Pergola avait fait son rapport sur « *Aspetti costituzionali della garanzia del diritto internazionale* » en espagnol, ce qui m'avait étonné. À l'époque, il utilisait peu le français ; néanmoins, à l'anglais que, d`ailleurs, il connaissait parfaitement, il semble avoir préféré l'espagnol, certainement en raison de ses long séjours en Amérique Latine. Pourtant je n'avais pas compris, pourquoi il n'avait pas parlé en italien. Moi, j'avais parlé en italien sur « *La protezione attraverso La Corte Europea del Diritti del 'uomo* ». Comme rapporteurs il y avait également Juan Antonio Carillo, Felix Ermacora, Manfred Lachs, Theo van Boven, Antonio Cassese, H. Gross Espiell.

Je connaissais déjà les publications de Antonio La Pergola sur le fédéralisme, les relations entre le droit international et le droit interne, l'état de droit et la théorie générale de l'état[1], et nous en avons discuté longuement. À l'occasion de cette Conférence, j'ai pu constater avec étonnement la familiarité de Antonio La Pergola avec la doctrine autrichienne du droit public de la première moitié du siècle passé : Hans Kelsen, Adolf Merkl, Alfred Verdross et Josef Kunz, les représentants les plus en vogue de la célèbre « École de Vienne de la théorie du droit » (*Wiener Rechtstheoretische Schule*).[2]

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[1] Costituzione e adattamento del diritto interno e internazionale, Milan, 1962; Sistema federale e Compact Clause, Milan 1962; Residui contrattualistici e struttura federale nell´ordinamento degli Stati Uniti, Milan 1969; Poder exterior y estado de derecho, Salamanca,1987; Sguardo sul federalismo e i suoi dintorni, Diritto e Società, 1992, pp 492–517; Los nuevos senderos des federalismo, Madrid 1994.

[2] La transformación del derecho internacional en derecho interno y la teória di Hans Kelsen, Revista espagnola de derecho internacional 1962.

Plusieurs années se sont écoulées jusqu'à notre prochaine rencontre. Celle-ci eu lieu à l'occasion de la création de la « Commission européenne pour la démocratie par le droit » appelée communément « La Commission de Venise » ; l'entreprise sans doute la plus intéressante et la plus durable parmi les multiples activités juridiques, scientifiques et politiques de Antonio La Pergola. En effet, il fut président de la Commission en 1990 et réélu plusieurs fois. Il a exercé cette fonction jusqu'à son décès le 18 juillet 2007.

Antonio La Pergola avait auparavant, songé, en commun avec son ami, le prof. Wolfgang Zeidler, membre de la Cour Constitutionnelle allemande, à la création d'un centre de droit constitutionnel comparé à Bologne. En effet c'était à l'université de cette ville, le berceau de la culture juridique européenne, que Antonio La Pergola avait obtenu en 1959 son agrégation (*libera docenza*) en droit public et où il avait enseigné comme professeur associé jusqu'en 1962, puis au *John Hopkins Center* jusqu'en 1975.

La réalisation du projet original avait dû être différée suite à la nomination de Antonio La Pergola à la présidence de la Cour Constitutionnelle italienne en 1986 et ensuite au poste de ministre des affaires européennes dans les gouvernements Goria et De Mita (1997–1989) et, d'autre part, en raison de la nomination du prof. Zeidler au poste de président de la Cour Fédérale allemande en 1983. Ultérieurement Zeidler avait trouvé la mort dans une excursion en montagne près de Merano (Tyrol du Sud) le 31 décembre 1987.

Quelques années plus tard, Antonio La Pergola, toujours plein d'idées, créa La Commission de Venise avec l'appui du gouvernement italien, lequel avait depuis la fin de la première Guerre mondiale des intérêts particuliers dans le Sud-est européen. La ville de Venise, qui, elle aussi depuis des siècles avait entretenu des liens commerciaux et culturels avec la zone adriatique, fut considérée comme la mieux placée pour accueillir un tel projet ; d'autant plus que le ministre des affaires étrangères de l'époque, Gianni De Michelis, un ami politique et personnel de Antonio La Pergola avait d'ailleurs aspiré au poste de maire de cette ville.

À l'origine, le but de la Commission consistait à assister les nouvelles démocraties de l'est et du sud-est de l'Europe dans l'établissement de leurs ordres juridiques et ce en conformité avec les principes de l'Etat de droit. Mais très vite la sphère de la Commission s'est élargie pour s'étendre également aux autres pays européens et à certains états extra européens. A cet égard, Antonio La Pergola visait en premier lieu les états en Amérique Latine avec lesquels il eu toujours des relations particulières.

C'est à l'occasion de la session inaugurale de la Commission, le 19 jan-

vier 1990, au Danieli à Venise, que j'ai retrouvé Antonio La Pergola. Par la suite, durant toutes les années qui suivirent, nous avons repris nos discussions sur les matières qui ont constitué nos centres d'intérêts juridiques privilégiés pour nous deux.

L'état de droit, les relations entre le droit international et le droit interne ont été dès le début – et sont toujours – au centre des activités de la Commission, qui a élaboré des études et des avis importants sur ces sujets. À cela il faut ajouter le fédéralisme, la protection de Droits de l'homme, la protection des minorités et la justice constitutionnelle.[3]

À cet égard, les questions de procédure ont été chères à Antonio La Pergola, étant donné son expérience de membre et de président de la Cour constitutionnelle italienne (1978 – 1989) mais également comme théoricien de la procédure de cette cour.[4] Là aussi, nos intérêts scientifiques en la matière avaient rencontré des points d'intérêt commun.

Après avoir assumé la fonction d'avocat général et de juge de la Cour des Communautés au Luxembourg (1994–1999) Antonio La Pergola a publié plusieurs oeuvres sur le droit européen.[5] Bien sûr, cela a représenté également un intérêt certain pour moi, mais il ne constituait pas le noyau de nos discussions.

Je me souviens qu'en août 1996, nous avions organisé une rencontre à Merano, ma ville natale, où tous deux passions une partie de nos vacances d'été. Pour Antonio La Pergola, revoir Merano c'était une redécouverte des lieux de sa jeunesse, car il y avait été régulièrement avec ses parents. Il m'avait prié de l'emmener sur le plateau de Avelengo à 1400 m, où, jeune homme, il avait été plusieurs fois avec son père. Nous nous sommes promenés pendant des heures dans les bois en discutant de Kelsen et de l'École de Vienne, de la théorie de l'Etat. Tout d'un coup, Antonio La Pergola se tourne vers moi en me demandant : « Franz, est-ce qu'il y a encore des sapins dans la région ? » J'ai dû lui répondre: « Antonio, regardes vers le haut, depuis des heures nous marchons sous des sapins ». « Tu as raison » m'a-t-il dit, « je n'y ai pas fait attention ». C'est un exemple typique de la distraction, qui a caractérisé Antonio La Pergola. Il a

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[3] Voir les Rapports annuels de la Commission de Venise.

[4] Un volume contenant plusieurs articles de Antonio La Pergola sur la justice constitutionelle devrait etre publié par l´ Université de Salamanca.

[5] Italy and European Integration : a Lawyer´s Perspective, Indiana Int. Comp.Law, Rev., 1994 pp. 259–275; Constitución e integración europea, la contribución de la jurisprudencia constitucional, Cuadernos de derecho publico, 1999, p 13 ss; L´Unione europea tra il mercato comune ed un moderno tipo di confederazione: osservazioni di un costituzionalista, Riv.Trim.dir.pro.civ.,1993, pp. 1–26.

toujours vécu dans ses idées et ses pensées, sans trop se soucier des détails, pour lui peu importants, du monde qui l'entourait.

Il se racontait à propos d'Antonio La Pergola que, quelque soit le lieu où il se trouvait, il téléphonait tous les matins à son épouse, lorsqu'elle ne l'avait pas accompagné dans ses déplacements, en lui demandant: « Annarosa, que dois-je faire aujourd'hui? ». En effet, c'était elle qui organisait son agenda. Pourtant, je me suis demandé parfois, si Antonio La Pergola n'avait pas un peu « cultivé » ses distractions et qu'il était en réalité bien moins étranger au monde de ce qu'il laissait croire à son entourage.

En tous cas, il est indéniable qu'il avait besoin d'Annarosa pour organiser sa vie privée. En effet, durant les années, où il a travaillé à la Cour de Luxembourg, alors qu'il louait un appartement, lorsque Annarosa n'était pas avec lui, il préférait loger dans un hôtel pour ne pas devoir s'occuper des besoins de la vie quotidienne. De la même manière, comme il a dû s'appuyer, en tant que Président de la Commission de Venise, sur ses collaborateurs – en premier lieu Gianni Buquicchio, Simona Granata-Menghini, Christos Giacomopoulos, Thomas Markert, Pierre Garrone, Schnutz Dürr – pour traduire en pratique ses idées.

Comme je l'ai évoqué précédemment Antonio La Pergola aimait partager et faire revivre son passé. Je me souviens qu'en 2005, lors d'une session de la Commission à Venise, il avait invité quelques uns de ses amis – j'ai eu le privilège d'être l'un d'eux – à l'accompagner à Padou, la ville où il avait obtenu en 1962 sa première chaire de droit public, afin de participer à un colloque qu'il avait organisé à l'université sur des sujets de droit constitutionnel et de fédéralisme.

Antonio La Pergola a été une personnalité exceptionnelle, toujours riche en idées et avec des visions qui dépassaient le cadre des circonstances concrètes. Il fut un constitutionnaliste et fédéraliste éminent Avant tout il a été un homme d'une extrême bonté et un ami fidèle. C'est dans ce sens qu'il restera toujours présent dans ma mémoire.

Ugo Mifsud Bonnici
President Emeritus, Malta

Law's Contribution to Better Governance in our Future

I. Aristotle (384–322 B.C), described by Dante Alighieri as "the master of those who know"[1] concludes his Ethics (the so called Nicomachean Ethics) with a paragraph which some have seen as an apt introduction to his Politics. He writes: *Now our predecessors have left the subject of legislation to us unexamined; it is perhaps best, therefore, that we should ourselves study it, and in general study the question of the constitution, in order to complete to the best of our ability our philosophy of human nature. First, then, if anything has been said well in detail by earlier thinkers, let us try to review it; then in the light of the constitutions we have collected let us study what sorts of influence preserve and destroy states, and what sorts preserve or destroy the particular kinds of constitution, and to what causes it is due that some are well and others ill administered. When these have been studied we shall perhaps be more likely to see with a comprehensive view, which constitution is best, and how each must be ordered, and what laws and customs it must use, if it is to be at its best.*

It is interesting, though not unusual for Aristotle, despite his empiric reliance on analysis and deduction, that he should, intuitively, relate law-making not only, and obviously, to constitutions, but also to the philosophy of human nature and to the end result in practice.[2] Indeed, even if law-making is, for him, part of the "practical" art of politics, there is much more to it than that.

II. The constitution of a state is best defined by the answer to the question: who legislates and who regulates therein? The assignment of this power

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[1] *"maestro di color che sanno"* Inferno Canto IV verse 131.

[2] The same problem was revisited so many centuries later by Kant in his *Anthropology from a pragmatic point of view* where the question of liberty for the human being in the world (his ethical inner-self and in "legal" society) is seen as *"freihandelndes Wesen"* [management of his being].

of legislation and regulation is the essence of any constitution. The Master of philosophers saw sovereignty or supremacy to be attributed to laws "well framed" [Book III Chapter 11]. A conditional declaration of the Rule of Law: Laws, to aspire to supremacy must be well framed, which raises further other questions. What would be the governing principles which would make laws worthy of being considered as sovereign? Which organ of the state should establish their conformity to the "principles"? He also makes a very pertinent observation in Book 10 of the Ethics: *In the arts and sciences, one learns from the experts. The experts in this field are the politicians; for legislation is a branch of the political science. Should the legislator learn his art from the politicians? These rarely think about principles.* Aristotle realised very early on in our civilisation's history this tension between practice and principle. Then he proceeds according to his usual method, to examine different types of constitutions, but does not only merely refer back to the traditions of the various Greek states which had adopted them, but also "critically" reflects on their historical performance, and then again on their response to the nature of man. In modern times representative parliamentary democracy has appointed the politicians (the "experts") as sole legislators.

It may seem unnecessary that one should bother to return to Aristotle, when so much water has passed beneath the legal, the philosophical and the political bridges of Europe and indeed the world, since his time. It is worth quoting him, however, as indicative of the essentially indissoluble link between sovereignty, legislation, a constitution, and the basic needs of human nature in society, which needs do not exclude the ethical imperatives.

A. Laws have to justify their very existence

Law, any kind of law, begins as a bind, as a harness, as a limitation of choice and movement, and it is not evident immediately to all that it is the foundation of the liberty of an individual in society. *Legum servi sumus ut liberi esse possimus* Cicero might have coined the phrase as a rhetorical ploy in the defence of his client in *Pro Cluentio Habito.* He may have been aiming merely at the "liberation" of the accused at that trial. As sometimes happens, what is expressed in contingent eloquence turns out to be a nugget of permanent wisdom. In fact Law conjugates with Liberty as a means to an end. Law conjugates also with Order as cause and effect; with Justice as its guide and aspiration. Law is a harmonisation of rights and liberties, possibly even the rights and liberties which do not have their origin in human law, and which could even be in conflict

with the rights and freedoms of others. There is always a practical necessity of law; there is also an ethical necessity.

Law together with an inherent negative aspect of constraint has a positive justification of its necessity for assuring rights and freedoms; in that whilst limiting the choice of some, it creates a free space for the choice of others. How far is that limitation really necessary and for what purpose, we now frequently see described as the principle of proportionality and the justification of the aims sought. We also, today, witness a tendency to avoid law, if possible. Less law is seen as laudable. On the other hand, law is also seen as providing clarification, putting order instead of chaos, so that law responds to a human need for certainty and stability. Does Order require an outside prop of reason, or is it its own justification? Is the implementation of Justice sufficient or is it to be left for achievement by other, non-legal means? Has Law a self-sufficiency? Is it an end in itself as a good, or is it merely a necessary evil, to which one turns as a last resort?[3] Proportionality would be an aspect of justice: it is the "just" amount of law that is justified. The justification of the aims is a much more complex philosophical and practical, as well as moral, exercise.

It seems therefore aberrant that Law is seen as a necessary evil: it is necessary and laudable, a good: it is a settlement. It expresses a positive collective will. It produces order and guarantees peace and the enjoyment of rights. There is no virtue in reticent, in fact improvident, legislation. Whilst the collective will should not restrain the individual will unnecessarily, legal *lacunæ* create uncertainty and are harmful. Europe is indeed fortunate in that it can fall on Roman Law as an ultimate source of common law, by default, when positive laws have not been foresighted and provident enough. Having recourse, however, to that bountiful but ancient source is not always satisfactory.

The evil lies in the excessive limitation of freedom of action; the worst evil lies in legalism, in making a fetish of the law and in interpreting it without humanity.

Laws have to receive the consent of those bound by them

In a democracy most decidedly, but also to a large extent even in any other type of regime, laws which are not observed by the general majority of a population, will not be successful. *Consuetudo abrogatoria* is the extreme result

[3] Even an old poet's tale of a golden age saw it as without the need of law as in Ovid's *Metamorphosen I verses* 89, 90:
Aurea prima sata est aetas, quae, vindice nullo,
Sponte sua, sine lege, fidem, rectumque colebat.

of general non-observance, but when a substantial part of a population is in disagreement with a law, even if there is no complete breakdown of its efficacy, the implementation will be unsatisfactory. Otherwise unnecessary use of force might have to be employed. In fact a law that does not convince the general mass of a people, even if "well framed", is very imperfect law. To be convincing requires more than being enacted by the proper authorities and according to the accepted, constitutional, rites. It has to be, first of all, understood and susceptible of understanding. It has to be seen as just and necessary, according to principles which are not purely and simply "legal" principles, and which are embraced by the people who are governed by that law.

Popular consent to a law is not achieved by the vote of a legitimate majority in a parliament alone. Representative Government means that the electorate delegates the rule-making power to their freely chosen deputies in the legislative organ, but this does not ensure automatic consent by the electorate. When one considers human law-making, one cannot avoid the dichotomy between the objective criteria of justice, proportionality, necessity on one hand and that of the "subjective" criterion of its acceptance by the people. The bridging of these two can only be the result of explanation, dialogue and persuasion. A very political task indeed. Whilst proportionality and necessity can be argued relatively easily, there is a very difficult task to convince people about justice without a commonly shared, not simply legal, concept of what is just.

Legisprudence cannot avoid the problem of justice. Laws do not only respond to the public good, the interest of the common wealth, convenience or necessity. The excellence of drafting, the coherence and consistency of a code or set of laws, do not suffice. Unjust laws, laws which trample upon or do not subscribe to fundamental human rights, will encounter great obstacles. The Rule of Law cannot be known for unjust law. It is also denied to law which runs counter to men's conscience. The laws of Nazi Germany were not part of the Rule of Law, and enjoyed only the brute force of implementation from a tyranny. At Nuremberg obedience to some of these laws was deemed, very rightly, a crime.

Laws must be legible and comprehensible, but precisely so

If law-making is to retain its link to democracy and a democratic way of thinking and acting, laws which are enacted in virtue of the delegation of peoples' sovereignty to a legislative organ, as such one should not allow a hiatus of incomprehension to be created between laws and the people governed by them.

It would of course be manifestly unjust to have individual citizens bound by laws that they cannot understand, but which, within the current and long time assumption, they are required and presumed to know. It has been contended that to render laws more comprehensible one should go back to basics and use terms without relying on the accumulated legal history which has resulted in a specialized language with complex concepts and fixed interpretations. One cannot however drain modern law of its traditions. Legibility does not impose this impoverishment. The plainest laws still require a background of legal science and a legal profession of lawyers and judges. The experiments (at one time in the earlier Chinese Communist experience) of doing away with formal legal processes and formal legal training, have been disastrous. "People's" Courts are the least democratic.

On the other hand, the offshoot of a democratic revolution led by lawyers, the Constitution of the United States, as well as the Code Civil, drafted by five eminent lawyers at the instance of a revolutionary Assembly, are remarkable in that they use words in the context of their literal (dictionary) meanings, and extending this to the legal technical terms, which are defined and limited for the purpose of further clarity. The concept of a human being as a constituent citizen of a state can be traced back to these two revolutions.[4]

Drafting laws as if only lawyers and higher civil servants are destined to read and understand them, whilst the general run of citizens, though bound by them, should better defer to the mediation of the professionals, is no longer, if it ever was, acceptable. There has been a move away from the convoluted formulations even in Common Law countries, but the results in terms of clarity and comprehensibility have not been satisfactory. It is paradoxical that in an age where high percentages of citizens achieve higher and tertiary education, laws are still being drafted on the implied premise that laws had better be left to the initiated to decipher properly. Modern Democracy is built on the premise that every citizen has a right to know about the government of his country with only very exceptional allowances for confidentiality or secrecy. No excuse can be accepted for obscurity in the law.

The aid of other human science disciplines such as sociolinguistics can be enlisted to help drafters and legislators fashion laws which are more legible and comprehensible. The comprehensibility tests are made to answer four different criteria: the simple semantic test [what a word means]; the interpretative

[4] See Maslan, Susan 1963, *"The Dream of the Feeling Citizen: Law and Emotion"* in Corneille and Montesquieu Substance – Issue 109 (Volume 35, Number 1), 2006, pp. 69–84.

test [what a word can be made to mean]; the receptive test [what a particular group to whom it is addressed will make of it]; and the functional test [what the selected word will perform, as words are also factors of change]. In the case of a legal text, the use of known technical terms fixed in content by tradition and constant practice, is an indispensable tool for the attainment of a stable and universal but also precise understanding of a word with a particular connotation. Indeed in this period of time which sees the confluence of legal traditions and the imperative use of linguistic translation of legal texts, the fixation of content of legal terms is unavoidable and should be promoted. It will lead to more clarity and less confusion. In my own country, the use of a Latin term such as *hæres,* in brackets, helped to define precisely what was meant by the words "successors in title" in an imported British Succession Duty Tax law. In such Unions as the present European Union a harmonisation of legal terms is warranted, and one should not shun the common legal traditions and their common legal terminology, where it still exists and has not diversified beyond comprehension. The Union has, without too great an exertion, managed to make such terms of the politico-philosophical language, such as "subsidiarity", popular and commonly understood, it would not seem impossible to achieve the same results with legal terms which have been used in practice for a number of centuries. In conclusion a balance can be struck between conservation and refinement of the precision of the legal terms and the clear enunciation of principle, authorisation, limitation and prohibition, in legal texts which could be understood by the majority of citizens. Scholars of linguistics have suggested that "avoiding linguistic formulations that make the comprehension more difficult (in the field of propositional semantics or syntax)" is the best, for some the only way, of improving the comprehension of legal texts. For some "the introduction of cognitive elements in the text in order to broaden its base of knowledge (in the field of lexical semantics)" might sometime bring about additional difficulties. It is to my mind a risk worth taking in the interest of precision and stability, even if it might entail more expenditure of energy in comprehension.

B. Legalism and bigotry

Legalism has the same relationship with Law as bigotry with Religion. Legalism sees Law as transcending its proper end of service to man. Legalism has brought some considerable disrepute to Law. The Law is an ass when those entrusted with its formulation, its interpretation or its execution, lose the flex-

ibility of reason, the urgency of human needs and plain good sense. Legalism defeats the conjunction of law with Justice. Legalism turns law into a tyranny of mediocre minds.

We can all be bigots. Even atheists can be bigots. In fact most believers from Thomas the Apostle to Teresa of Calcutta, seem to be more beset with doubts, whilst some non-believers assert negative certainty without any inhibition. We can all be legalistic, at some moment or other. Theoretical jurists seem to be more flexible in the interpretation of law than judges and lawyers in a hurry, or those laymen who have picked up some law from vulgarising manuals. One admires judges and other operators in the field of law who have maintained their reasoned faith in the Law after years of practice. Every single application of the law to a particular case is stressful and there is a temptation to shortcut by automatic legalistic reaction. The best judges, as the best lawyers, seem to be those that have not worn off their conscientious attitude in rising to the challenge of the occasion when the instance presents itself.

Legalism has free rein within systems with too abject a deference to "case-law" and precedent. Fairness lies in the differentiations and intellectual discrimination of the circumstances varying from case to case. The hardening of the arteries of just decision occurs after repeatedly succumbing to the addiction of superficial copy and easy repetition. The system of "equity" running in parallel and refining the "hardness" of the Common Law had to be invented by wise and learned chancellors.

Legalism is not to be equated with strict interpretation. Paradoxically, it may seem at times, that the strictest interpretation of the letter of a statute might lead to a more sensible application.[5] The application of the principles of *hermeneutica legalis* means delving into the *ubertate sensus* of the text of a statute or of reported case-law. It requires not simply a philological and historical investigation but

[5] A case in point might be that of the decision given by the German Federal Constitutional Court on the 29th July 2004 (Third Chamber of the First Panel) [1 BvR 737/00] Identification : GER-2004-2-008. A loose interpretation of the concept of business in the Legal Advice Act led to the imposition of a regulatory fine on a retired Judge who had been giving free advice and assistance as well as acting as the counsel of choice in proceedings before a local Court (*Amtsgericht*). The Federal Constitutional Court found that should the concept be given the strict interpretation within the context of the aims of the statute (giving popper legal aid to people who could otherwise not be able to pay for it) no infraction could be seen. See page 276 of the Venice Commission's Bulletin on Constitutional Case-Law 2004 Edition 2.

also the employment of a philosophical method.[6] The tension between the politician's *techne* and the philosophical [call it "human rights" or natural law principles] underpinning of law, is resolved under the best constitutions, by deferring to the Courts the supremacy of interpretation.

We associate legalism with application and interpretation, but there can be rigidity and inbuilt formalism in the legislative document itself. When subjecting the "political" exercise of legislating to the Courts' review according to legisprudential[7] "scientific" criteria, we are, rightly, putting in doubt the omniscience of the state legislating organs, though not of course their Constitutional mandate or democratic legitimacy. The lesson of the counterproductive effect of Draconian Laws, should have been learnt long ago. Today one can see reviewed and criticised not only rigidity in harsh legislative measures, but also inflexible administrative laws[8]. Laws are being judged by their declared or undeclared aims and the methods employed to implement them.

Even in Anglo-Saxon Commonwealth countries long tongue-tied by the Dicey dogma of the omnipotent legislative supremacy of Parliament, Courts have found indirect ways and means of trying to make laws revert to reason and what would now be called legisprudential wisdom, whilst still retaining the traditional theory. In Australia very clearly but also elsewhere, a new Constitutionalism is rearing its head and claiming a reviewing role for the Courts concerning legislation, a role which is not restricted to inquiring into the *vires* and the formalities, but also extend to investing the content. In effect the legislating politicians are no longer the ultimate "experts".

We have seen a number of judges giving testimony of their "internal" work-

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[6] See the observations of Hans-Georg Gadamer in his Truth and Method [*Wahrheit und Methode*] concerning specifically legal hermeneutics, some of which cannot be completely accepted. He sees legal hermeneutics as preoccupied wholly with the practical solution of a particular case, and contrasts this with the historian's hermeneutics striving to arrive at an objective and definitive "truth". Legal Hermeneutics is not that subject to the vagaries of casuistic. See also *"Emilio Betti's Teoria Generale della interpretazione"* and its contrast with Gadamer's views, influenced no doubt by his long apprenticeship to Heidegger. In his *"Law as Practical Reason"* M.J.Detmold sees legal reasoning as purely and solely practical, in that it should result in action being taken or not taken.

[7] Legisprudence is a newly (from the eighties onwards especially by Julius Cohen and Luc J. Wintgens) coined term aimed at making a distinction between the science in decision and theory (jurisprudence) and the science in legislating. Gaetano Fil angieri (1752–88) had of course named his work *"La Scienza della Legislazione"*. Jeremy Bentham (1748–1832) had published in French in 1802 his *"Traités de législation civile et pénale"*, 1802 which was translated in 1864 into English as Theory of Legislation.

[8] See the decision given by the Supreme Court of Justice of the Nation of Argentina (Identification :ARG-2004-3-003) in *"Milone vs Associart. S.A. Asiguradoes de riesgos de trabajo"*, where the imposition of a way of paying compensation for injuries was criticised, though not considered unconstitutional. Reported in Bulletin on Constitutional Case-Law Edition 2004-3.

ings of intelligence and will. United States Supreme Court Judge Benjamin Cardozo wrote very frankly of the judicial process, and of the influence of a judge's personal philosophy of life and philosophy of law on the performance of the judicial task at hand.[9] Giving judgment is an anguished ethical act for the conscientious member of the bench and all the ethical convictions one has, will be brought to bear on a decision. A judge will of course be conscious, all the time, that the ethical burden is shared with the legislator. Seeking to discover the legislator's proper sense is also an ethical imperative. So is that of keeping constantly in mind the *jus cogens* of natural law.[10]

C. Constitutions necessary for a democracy

Aristotle again [Book V Chapter 9] writes that, in a democracy, *it ought not to be regarded as a denial of liberty to live according to a constitution but rather as self-preservation.* A constitution is seen as guaranteeing a member of a community. Indeed the opposite of the rule of law is the exercise of arbitrary power. Arbitrary power in the hands of a majority [or a "ruling class"] is no less arbitrary than that exercised by a dictator or an oligarchy. The supremacy of a constitution is the best illustration of the ethical value of the rule of Law. The constitutional laws regulating a state serve as blueprint for its continued existence. Again however the Master [in Book II Chapter 9] makes the observation that a constitution has a good prospect of maintaining itself if all sections of a community agree to it and want it to go on. This would seem to be obvious wisdom, but it has been sometimes forgotten by transient majorities. A constitution is an essential tool for the maintenance of balance within a community, but it can only serve as guarantee when enjoying an *earned* wide consensus. The supremacy of a contested constitution is a weak restraint on illegality in public affairs. An accepted constitution, even when not written, achieves more automatic compliance.

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[9] See *"The Nature of the Judicial Process"* (New Haven 1921) and *"The Growth of the Law"* (New Haven 1924).

[10] Without entering into the running Political Science debate between *behaviouralist* elaborations which test hypothesis through the classification of known and measurable data, at times resulting in conclusions not necessarily in agreement with the direct experience of judges, however much that may be fallible, and the *New Institutionalist* views, which are less susceptible to objective estimation, one can perhaps allow special relevance to the testimony of "good" judges. One can also decipher the not strictly legal thinking of judges through their pronouncements in decisions and thereabouts. The corollary, in practice, would follow, that in the appointment of and assignment of duties to judges, it is wise, and proper, to consider not only qualities which are strictly bound to mastery of legal science but also the judge's ethical and philosophical convictions. Also as a matter of the best way to prepare and train lawyers, one cannot miss the importance of a proper introduction to philosophical analysis.

In the context of the debate concerning a Constitution for the European Union, it is apposite to remember that a Constitution is relevant not only to delimit the limitations already imposed by treaties, but also as guarantor over and above the interplay of national and sectoral interests. It is also an important means of diminishing the legal deficit as much as the supposed democratic deficit. Paradoxically, though the European Union is seen by many as overburdened by a super abundance of regulation, some of which is too detailed and perhaps intrusive, there is still lacking some unity of fundamental legal principles, whilst basic ethical principles are in the process of doubt and dispute. The *mores* point toward a mood which would "abrogate" [by transgressive *consuetude abrogatoria*] parts of the hitherto accepted common ethic. What would happen if the "supreme experts" in the European Court of Human Rights would no longer, in their majority, fall back on the natural law foundation of human rights? In essence one of the guarantees of a written constitution is that the politicians with the concurrence of their peoples can provide a relatively decipherable limit to the philosophical meanderings of judges. On the other hand that temporary majorities can be restrained from tampering with human rights by judges with a human rights philosophy, seems to be an essential component of modern civilised democracies.

Constitutions, it has been affirmed, strengthen a national identity.[11] In fact Constitutions have the function of acting as an amalgam beyond the purely "national" identity. Constitutions and constitutional Treaties and Conventions do in fact change the content of the legislation and the case-law of a country or a group of countries bound by the Treaties or Conventions

D. Law and democracy

The trust in the Law's positive charge may come under the stress of scepticism for lawyers, judges and for politicians, because of the experience of the way it is used and manipulated in everyday practice. Jurists in universities may conserve more faith within their relative detachment from everyday human failings. Jurists without necessarily confining the term to those in academia have made a great contribution to the proper balance in a state between the rule of law, the rule of human rights, and crude majority rule. In nation building, and in the conglomeration of states, the legal theorists have made great,

[11] See *"Writing a national identity"* Vivien Hart and Shannon C. Stimson (editors) Manchester University Press 1993.

not always universally acknowledged, contributions. The great Roman Law scholars revived the concept of the transcending nature of law as a curb on the executive powers of monarchies or nascent republics, when the restraint of religious morality was loosened.

It is obvious that laws alone do not make a democracy. Perfectly written and balanced constitutions do not produce a perfect democracy. Much has been written, and remains to be written about the indispensable component of the spread of education.[12] Education produces and is produced by, a democracy. The culture of law is not only an ingredient of a functioning democracy; it is also, as with the case of education, pre-formative. Must the culture of law be totally home-grown? Is the culture of law as we know it a specifically western by product of a particular civilisation? We must not repeat the essentially sophistic (and alas western based) stance which sought to describe the concept of human rights as a product of this side of the world. The universality of human rights is not only an obligatory premise of civilised living in any continent, but has in actual fact been invoked universally as such even though it is a human construct without an aboriginal objective existence. The universality of the culture of law has obviously received more elaboration in certain countries or within particular academic *milieux*, but it essentially ties to the universality of the concept of man and of the human race.

Knowledge of the law, long assumed axiomatically, for all citizens, but woefully very poor even in most advanced countries, seems to continue to be a great deficiency in modern democracies. How can a citizen participate in the governance of his country, when he is ignorant of its laws or substantially legally illiterate? If "participation"[13] is of the essence in democracies, inability to participate by substantial proportions of the citizenry would mean that the participation and the democratic specific density, would be low, in fact more virtual than real. It is important to have a considerable, hopefully preponderant, number of citizens, voting at elections, but this surely is not enough. Participation without proper knowledge can at times be even worse.

Knowledge of the general principles of one's own Constitution should not be out of the intellectual baggage of knowledge any citizen should possess. Modernity, with its technology, has not invaded very deeply the camp of the dissemination of knowledge of the laws. Whilst most legislation in

[12] See, first of all, John Dewey's, *"Democracy and Education (1916)"* Macmillan.
[13] See Volker Gerhardt, *„Partizipation das prinzip der Politik"* C.H. Beck München 2007. Eloquently expressed.

Europe is now available consolidated on line, in many instances, including some of the legislation issuing out of the organs of the Union, the version available has to be updated by pursuing the later amendments, without having an updated version; an intricate exercise for the common citizen. Some states, including the one to which I belong, consolidate amendments and change accordingly the internet version of their laws. Again in certain countries the state is too shy with the issue of versions of the laws in minority languages.

E. The international nature of part of the body of law

The pendulum swings from a purely "national" denomination of law to an international *jus comune*. Once upon a time, not very long ago, all law was national: the nation state, after the manner of the arrangement brought about by the peace of Westphalia not only arrogated to itself the monopoly of legislation within its territory, but jealously admitted international law only as its own, "national" international law. Supremacy and sovereignty could not admit any ethical or legal intrusion. It was not so a few centuries earlier. In the Middle Ages, the law was higher than the state, even if transgression, by kings and minor rulers was rampant. Such laws as were made for particular places, in contradistinction to the *jus comune,* were timidly designated as "municipal" law.

We are today in quite a different situation. Though national sovereignty is still the mean, every state has become exposed to the ethical pressures from non state forces within, from international forces externally. When states abandon the right to inflict the death penalty, mostly reacting to international "moral" opinion, they are in fact accepting that they no longer have the *jus vitæ necisque* over their citizens. The right to life, the first fundamental human right, would have triumphed over the rights of the nation state. Even the power to legislate in some areas is moving out of state monopoly. In the European Union the states have formally surrendered part of their monopoly of exclusive legislative privilege. It is not only a matter of statute law enactment. It is also a matter of "what should be legislated upon", the ethics of legislation.

Modern life with its immediate communications has indeed created a world community of standards and expectations. Globalisation is not confined to commercial exchange. In certain areas more than in others, and through the terrible experiences of so many wars, from the two World Wars of the twentieth century, to the post-colonial and post-communist wars of ethnic cleansing, the world has come to realise how vital for the peace of

the world would be the spread of the culture of human rights, the rule of law and democratic rules of governance. Laws in these areas, as well as, now more markedly than ever, in the area of the protection of the environment and the repression of internationally organised crime, are now deemed of international import, urging fixing standards, the urgent character of which does not stop at borders.

This has brought about the need of "experts" in the Aristotelian sense, referred to. University professors, constitutional lawyers, retired judges, some retired legislators men and women who have held positions political office in their country, scholars in the human sciences and in most environmental, fields natural scientists, are expectedly seen as experts whose advice should be sought in establishing the standards. Minerva returns. And the impact of reason and knowledge on legislation has international sources, at least in the Council of Europe's Commission of Democracy through Law meeting in the *Scuola Grande San Giovanni Evangelista* in Venice. Antonio La Pergola's invention, orphaned of its creator in its seventeenth year should however continue to provide good service as it has given proof of its utility. When a book with the intriguing title: Council of Europe Law-Towards a pan-European Legal Area, was published in 2005,[14] one could feel that although this area is still in formation, the constituent elements were now visible.

One lauds the efforts of Unidroit (International Institute for the Unification of Private Law) and Unicitral (United Nations Commission on International Trade Law), to try to provide uniform texts and Conventions, but the political will and driving force on the part of Governments world-wide, is not so evident, although there is patently a need in most areas for the unification of law. The plans for the formulation of the common European Civil Code or Common Frame of Reference – are moving along at too slow a pace.

Most of the contribution of the "experts" in many countries is supplied informally at the request of the political legislators or holders of executive or administrative power. Formalising the recourse to this not essentially democratically legitimised opinion, is definitely still premature at this stage of our political history. It is not always wise to formalise a process which should continue to be fresh and unburdened with pedantry.

We have however arrived at the concept of imposing on all major projects which would affect the physical and social environment an "environmental

[14] Florence Benoît-Rohmer, Heinrich Klebes were the authors, Council of Europe Publication ISBN 978-92-871-5594-8.

impact assessment" before an executive administrative decision to approve it is arrived at. It is not unlikely that at some future date, what has become a discretionary but expected *modus operandi,* before new legislation is introduced, will acquire more of an obligatory character. Whilst *post facto* review of legislation by Constitutional Courts will become universal, the French practice of having the *Conseil d'Etat* examine the constitutionality of the proposed law in draft form, even before its presentation to the legislature, may be copied more extensively.

And yet, Democracies at times are suspicious of intellectual elites. "Eggheads" are during certain historical periods and in some places very unpopular. The imposition of intellectual prowess has to be tempered by explanation, argumentation and persuasion. The modern citizen is less prone to defer to others, even if more expert. Minerva has to smile and then, speak.

F. The no longer tolerable inefficiency of many Courts of Law

To many citizens in the European democratic space, the fact that the Courts and their procedures seem so impervious to modernity and efficiency is no longer comprehensible or acceptable. Criminal Law procedures in Common Law countries appear to be much more expeditious, just and democratic. The laws of evidence as adopted in these countries together with trial by jury seem to have been largely more successful than the continental rules, even though the substantive criminal law in those European countries which know their legal derivation from the Code Napoleon, is so evidently more coherent and more juridically [plus humanly] sustainable. Yet some continental countries, notably and regrettably Italy, continue to be chastised for the excessive length of their criminal process. There is no threat of rejection by the system if this Anglo-Saxon "*invention*" is transplanted into the continental body of law. This has been done in my own country and has a history of a hundred and sixty years of success and popular acceptance.

Though the length of procedures in criminal trials is more harmful to basic human rights, the length of procedures in civil and administrative courts, as well as their inefficiency in the management of time and resources, is no longer tolerable by the standards established in other areas of public service. Some of the incongruities in substantive law in Common Law countries cry aloud for cross pollination from the mainstream of European civil law.

Whilst a jury system adds considerably to decisiveness in a system of law; one doubts whether retaining the bind of precedent in common law countries and

the pretence of presenting it as a model way of ensuring stability and certainty, could not reasonably stand for a long time in a world which emphasises the importance of developing the critical faculty.

Law as crystallization

It is sometimes said that Law is a conservative tool of an achieved state of value structures but it has also been used for the purpose of the introduction of change. Law is an indispensable tool in the fixing of standards, whether those received as a heritage or those achieved by consensus. Much as Law is to be distinguished from ethics or morality: an Enlightenment re-affirmation of an earlier discovery, conforming to just laws, as much as applying just laws is in itself a moral act. Standardisation of minimum requirements in the act of legislation is also a moralizing tool. More so in the case of the constitutional laws of democracy. It would be a perversion of the notion of liberty if one were to consider norm formation in the structures of democracy as an intolerable imposition. Here as in most other areas of living in a community, the common heritage of values is no obstacle to the achievement of more a refined consensus. This is of the utmost importance within the single state, but is increasingly coming to the fore as an imperative on the world stage. The universal character of human rights as a common ethico-legal heritage, is not to be seen as the unsurpassable zenith, but as an indispensable starting point for the achievement of a ethico-legal arrangement of the relations between states. The present international order is not merely a result of war and *postbellum* accommodation; it has in it the seed of a more rationalised standardisation (in fact the English world standardisation is rendered in French as *rationalisation*). When we speak of the achievement of consensus we are in fact using reason for that purpose. Imposed consensus is a contradiction in terms. There are of course limits to the synchronization of standards to practices which are the result of very different histories and traditions. Philosophy, and its offshoots in legal and political philosophy have less geography, than law and politics in practice. Though Law, in contradistinction to ethics and morality, adds sanction and enforcement to its norms, this does not mean that Law relies solely on imposition. Its authority especially in the area of constitutional law lies also in its appeal to an accepted consensus. In Public International Law though the lack of peaceful enforcement tools exposes a weakness, a generality of conformity has also shown an undoubted source of strength in international opinion and in the reference to principles.

In conclusion

Law is and would seem to be destined to continue to be an indispensable tool for ensuring the respect for liberty and the other human rights belonging to every individual in a community. As it is prescriptive it can be useful in building better societal structures. It must however reform itself, its very enunciation, its formulation, the way it proves its conformity to justice, its efficiency and the way it responds to human needs. Europe has a long-standing familiarity with law and its effects. Sometimes one has the feeling that this closeness to the law is restricted to jurists and some politicians.[15]

Reform in Europe can spearhead reforms and modernisation in other parts of the globe. In many areas of human governance, more harmonisation of the law is now expected and urgent. Harmonisation entails a continued commitment to the perfecting of the Constitutions and the laws, as well as to making them better known. More commitment by the European Union to the formulation of its constitutional documents would seem to be warranted.

[15] Unfortunately as a reviewer in Le Monde (23rd February 2008) put it: *"Le monde des juristes a généralement mauvaise presse"*, in the case of politicians it is sometimes even worse.

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The Constitutional Doctrine of Separation of Powers and the Rule of Law

The term "Rule of Law" implies two fundamental principles:

a) that nobody is above the Law, and
b) that everybody is equal before the Law.

It also implies that the State is governed by the Law.

It is the Law that defines the rights and obligations of the State and its officials, and it is the Law that defines the rights and obligations of all persons present in a country, both nationals and aliens.

But there can be no rule of law without an independent and impartial judiciary, and there can be no Democracy without rule of Law.

Therefore an independent judiciary is one of the cornerstones of Democracy, and Democracy is the system of a Government based on the will of the majority.

The existence of the three separate powers of the State was recognised by the ancient Greek Philosopher Aristotle in his "*Politica*" (politics) two thousand five hundred years ago, and in modern times the doctrine of Separation of Powers was developed by the French Political Philosopher Montesqieu in his "*Esprit des Lois*" (Spirit of Laws).

Independence of the Judiciary primarily means that judges are not accountable to anyone but only to the Law and their conscience. It means that judges alone are responsible for the administration of justice in their country. The Head of State as well as the Executive and Legislative powers have no right to interfere with the administration of justice. This implies that both judges and prosecutors are independent and they perform their duties of initiating proceedings and administering justice, respectively, without fear of prejudice or hope of advantage and without any extraneous consideration, but only on the basis of the merits of each case.

The State and its citizens, the highest officials and the simple people, are deemed to be in exactly the same position in the eyes of an independent judge, in the eyes of the law.

In mature democracies the Executive and Legislative powers are not afraid of judicial independence, instead they welcome it. They welcome it as a necessary check to their power and as an important balance in the democratic distribution of power.

In countries where the democratic institutions are now being built, an independent judiciary is something that should necessarily be established, as soon as possible.

We all know that absolute power corrupts absolutely, therefore an independent, impartial and of course honest judiciary is extremely vital to the proper functioning of democracy in a state governed by the rule of Law.

Judges should, of course, never become a state within a state. They should gain democratic legitimacy through the appointment of the Highest Judiciary by the appropriate elected organs of the state.

But independence of the judiciary dictates that judges are appointed and promoted on merit, based on objective criteria and not on political or other considerations. It means that they have security of tenure and may only be dismissed on specific grounds and as provided for by the Law. It means that their salaries are guaranteed and decent, so that they are not subject to any kind of pressure and not prone to corruption. Independence of the judiciary requires immunity for judges for everything they do, in good faith, in the performance of their duties. It also requires that judges have the right place in the hierarchy of their country, not as civil servants or employees of any government department, but as members of an independent power of the State just as Government Ministers and elected Members of Parliament are.

Independence of the judiciary is above all a question of education and culture for judges. It implies judicial courage. Only judges with courage and determination to administer justice impartially and independently can be judges in a democratic society governed by the rule of law. Only such judges can be the trustees and guarantors of the democratic freedoms of the people, and only on such judges can the people rely, with confidence, for the protection of their rights, and for the respect for Law and Justice.

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Setting Limits and Setting Limits aside. The Constitutional Framework of Presidential Power in Post-Communist Countries

I. Introduction

Constitutionalism is the art of creating legal rules for the domestication of power. Power has to be controlled and limited in order to reach a fair balance between the interests of the individual and the interests of the State, between the interests of majorities and minorities, between the interests of those ruling and those being ruled. There are no eternal solutions valid over the centuries. But after a long period of trial and error in Europe some basic principles have emerged that are universally accepted. The most prominent among them are democracy, human rights and the rule of law.

Antonio La Pergola has dedicated his life to those values. As the founding father of the Venice Commission, the Commission for Democracy through Law, he has established a framework for discussion of common solutions to common problems in modern constitutionalism.

When the Commission was founded the most important challenge was the systemic change of the legal systems in the former communist countries. After a period of peaceful revolutions completely new and innovative approaches to constitutional law were needed. Legal experts from an ever growing number of countries followed Antonio La Pergola's call and came to Venice in order to reflect on basic questions of constitutional law.

Since then almost two decades have passed. So the time may have come to review and compare the legal solutions elaborated and to critically assess their impact on the redistribution, control and limitation of power in the countries that have undergone profound change.[1]

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[1] For an interesting intermediate assessment cf. Levent Gönenc, Prospects for Constitutionalism in Post-Communist Countries, Leiden 1998.

What is surprising – despite common goals and common ideas[2] – the legal systems of the Central and Eastern European as well as the Central Asian countries of the former socialist block have developed very differently.[3] Not all are under the ambit of the Venice Commission, not all are in the geographical area of Europe. But the Venice Commission's influence does not only reach out to the inner circle of the European countries including even Byelorussia as an associate member State, but also to Asian countries such as Kyrgyzstan, which is a full member, as well as to observer States such as Kazakhstan. In all those countries present-day constitutional developments can thus be measured against the European constitutional values promoted by Antonio La Pergola. They can be compared with countries outside the reach of the Venice Commission such as Uzbekistan and Turkmenistan.

The basic question is if after the "third wave" of democratization in the late twentieth century[4] this process has been stopped or even turned around by a counter-wave bringing about a return to authoritarian ruling. This is suggested by a recent study of the *Bertelsmann-Stiftung* pointing out that democracy has gained ground at the outset, but that many countries have only "defective" democracies.[5]

During the constitution-making process in the early 1990s there was a general compromise to limit power, although the models chosen were very different; they range from parliamentary democracies over mixed and semi-presidential systems to systems with a strong presidential power.[6] But whatever

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[2] All the newly elaborated constitutions adhere to the basic values of democracy, human rights and the rule of law.

[3] It might already be difficult to justify the notion "postcommunist countries" as a common framework for analysis. According to Jacques Rupnik"…ten years after the collapse of the Soviet empire, one thing is clear: the word 'postcommunism' has lost its relevance. The fact that Hungary and Albania, or the Czech Republic and Belarus, or Poland and Kazakhstan shared a communist past explains very little about the paths that they have taken since." (Jacques Rupnik, The Postcommunist Divide, in Journal of Democracy 19 (1), p. 57).

[4] Samuel Huntington, *"The Third Wave: Democratization in the Late Twentith Century"*, University of Oklahoma Press, Norman 1991; Huntington refers in his studies to democratisation processes in Southern Europe and Latin America.

[5] Cf. Bertelsmann Stiftung, Bertelsmann Transformation Index 2008. Politische Gestaltung im internationalen Vergleich, Gütersloh 2007; www.bertelsmann-transformation-index.de.

[6] Cf. Wolfgang Ismayr, *„Die politischen Systeme Osteuropas im Vergleich"*, in: Wolfgang Ismayr (ed.), *„Die politischen Systeme Osteuropas"*, Opladen 2002, p. 9 et seq., Georg Brunner, *„Präsident, Regierung und Parlament. Machtverteilung zwischen Exekutive und Legislative, in Otto Luchterhandt, Neue Regierungssyteme in Osteuropa und der GUS. Probleme der Ausbildung stabiler Machtstrukturen"*, 2nd Edition Berlin 2002, pp. 67–123; Ellen Bos, Antje Helmerich, *„Osteuropäische Staatspräsidenten zwischen Diktatur und Demokratie: eine vergleichende Bilanz"*, in Ellen Bos, Antje Helmerich (ed.), *„Zwischen Diktatur und Demokratie. Staatspräsidenten als Kapitäne des Systemwechsels in Osteuropa"*, Münster 2006, pp. 251–278.

limits and rules were defined in the newly elaborated constitutions, they were established in order to be taken seriously. Nevertheless, many limits have been lifted since; many clear constitutional rules have been undermined by contrary practice.

The present article analyses the erosion of power limits set in the beginning of the democratisation process in former communist countries. It focuses on temporary restrictions to presidential power as they are seen to be one of the most effective barriers to an unlimited prolongation of personal power. The elimination or reinterpretation of such clauses can be an indicator for a transition from democracy to authoritarian ruling.

II. Historical background for setting limits to presidential power in the reform constitutions in post-communist countries

Constitution-making in the new democracies can be understood as a response to negative historical experiences.[7] One of the major problems was the abuse of power by the communist party and – what was even worse – by the party leaders.[8] There was no clear separation between State, society and political party. The party had a firm grip both on the society and on the State. Thus the power of the party leaders was unlimited both in scope and in time. The communist dictators managed to cling to power for a very long period of time, usually up to their death. Within more than seventy years the Soviet Union has seen only six transfers of power – from Lenin to Stalin, from Stalin to Khrushchev, from Khrushchev to Brezhnev, from Brezhnev to Andropov, from Andropov to Chernenko, from Chernenko to Gorbachev. In other socialist states the party leaders remained at the top of the State for many decades as well, e.g. Ceauşescu for 22 years or Tito for 35 years. Although there were periodic elections the position of those staying in power could never really be challenged by the voters. Whenever there was a hand-over of power, it was characterised by lack of transparency and battles behind the scenes. In the late 1980s when

[7] This is not to deny the strong external influence on constitution-making in post-communist countries; cf. Jan Zielonka, *"Conclusions: Foreign Made Democracy"*, in Jan Zielonka, Alex Pravda, *"Democratic Consolidation in Eastern Europe"*. Volume 2. *"International and Transnational Factors"*, Oxford 2001, p. 511 et seq.

[8] This was implicitly acknowledged by the decision of the Russian Constitutional Court on the legitimacy of the order of the President to suspend and then prohibit the Communist Party as well as on the constitutionality of the party itself; cf. the decision of the Russian Constitutional Court of 30 November 1992 (*Vestnik Konstitucionnogo Suda* RF 1993, no. 4–5, p. 37 et seq.).

the communist regimes were overthrown by the people, the protest against autocracy was, at the same time, a protest against gerontocracy.

Therefore one of the most important challenges was to define new and effective rules not only for the limitation of authoritarian power in general, but also for the temporal restriction of personal power. In the beginning of the new era this task had to be solved under revolutionary conditions. The long-term communist leaders had to be forced to step aside and to make way for new democratically elected leaders. The main aim in this period was to manage a smooth transition and to avoid bloodshed – the Polish example with the famous Round Table shows how difficult it was to find a half-democratic compromise for a hand-over of power. The Communist political and military leader Wojciech Jaruzelski who had served as Prime Minister from 1981 to 1985 and as head of the Polish Council of State from 1985 to 1989 was elected President in 1989, but resigned in 1990. Similarly, the first generation of presidents in the other Central and Eastern European States were often considered as "transitory solutions" before generally accepted and durable rules for the legitimate transfer and limitation of power could be laid down.[9]

Generally, the definition of a new model of power-sharing was in most of the countries extremely controversial and hindered, as evidence in Ukraine, where the adoption of a new constitution took many years. In Russia the struggle over the division of powers between the legislative and the executive branch of power even led to an outbreak of violence in 1993.

III. Subsequent changes to the reform constitutions in the late 1990s and the beginning of the 21st century

In some countries the constitutional compromise initially found remained untouched up to the present time. In others it was challenged soon. We can witness many fundamental changes of the new constitutions within a relatively short period of time.[10]

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[9] P. Mladenow in Bulgaria (1990), A. Rüütel in Estonia (1990–1992), A. Gorbunovs in Latvia (1991–1993), V. Landsbergis in Lithuania (1990–1992), A. Mutalibow in Azerbaijan (1991–1992) and R. Nabijew in Tadjikistan (1991–1992) served as short-term transitory presidents. On the contrary, in Hungary Árpád Göncz was the first interim President between 3 May 1990 up to 8 August 1990, but he was re-elected afterwards. A. Rüütel was after his first presidency again elected President in 2001.

[10] Many constitutional changes in the Central European countries were due to the accession to the European Union and thus to the partial transfer of sovereignty to a supranational organisation; they are not relevant in the context of the present study; cf. Angelika Nußberger, *„Die Zweite Wende: Zur Verfassungsentwicklung in den Ländern Mittel und Osteuropas im Zuge der EU-Erweiterung, Die Öffentliche Verwaltung 2005"*, 357–367.

One of the first countries to completely change the constitution or even to adopt a new one was Kazakhstan in 1995[11] and Belarus in 1996,[12] in Kyrgyzstan the constitution was revised three times, in 1996[13], 1998[14] and in 2003;[15] the discontent with the new constitution led to an upheaval against President Akajev in 2004 and subsequently to the adoption of two new constitutions in 2006.[16] As both were declared unconstitutional by the Constitutional Court in 2007,[17] the sixth Kyrgyz constitution was adopted in 2007.[18] In Georgia and Ukraine the fundamental changes of the constitutions in 2004 were also triggered by revolutionary movements, by the so-called "Rose-revolution" in Georgia[19] and the "Orange Revolution" in Ukraine.[20] The revision of the constitution in Macedonia was not directly linked to the model of power-sharing between the executive and the legislative branch of government; it was a response to an uprising of the Albanian minority and was enshrined in the Ohrid-Treaty of 13 August 2001.[21] In Slovakia the changes to the constitutions in 1999 were necessary because of the political stalemate in Parliament that was unable to elect a new President in 1998; the election of the President by Parliament was replaced by a popular vote. [22] In Croatia the Constitution was changed after the end of the "*era Tuđman*". The balance of power was shifted in favour of the Parliament. [23] Constitutional changes also occurred in Uzbekistan.[24]

In some cases the constitution was not explicitly revised, but nevertheless the originally designed system of power-sharing was changed or even reversed. This can be observed in the Russian Federation where rulings of the Constitutional

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[11] Revision of the Constitution adopted on 30 August 1995.
[12] Revision of the Constitution adopted on 24 November 1996.
[13] Revision of the Constitution adopted on 18 February 1996.
[14] Revision of the Constitution adopted on 21 October 1998.
[15] Revision of the Constitution adopted on 18 February 2003; cf. Judith Beyer, Rhetoric of 'Transformation': The Case of the Kyrgyz Constitutional Reform, in Andrea Berg, Anna Kreikemeyer (eds.), Realities of Transformation. Democratisation Policies in Central Asia Revisited, Baden-Baden 2006, p. 43 et seq.
[16] New versions of the Constitution adopted by Parliament on 9 November 2007 and on 30 December 2007.
[17] Decision of the Constitutional Court of Kyrgyzstan of 14 September 2007.
[18] Revision of the Constitution adopted on 21 October 2007.
[19] Revision of the Constitution adopted on 6 February 2004.
[20] Revision of the Constitution adopted on 8 December 2004, entered into force in January 2006.
[21] Revision of the Constitution on the basis of the Ohrid-Treaty of 13 August 2001.
[22] Revision of the Constitution by constitutional law on 14 January 1999.
[23] Revision of the Constitution on 9 November 2000 and 23 April 2001.
[24] Constitutional amendment by referendum on 27 February 2002.

Court,[25] fundamental legal acts such as the laws on changes of the electoral system,[26] and the interpretation of the constitutional rules by the political players[27] have contributed to a noticeable shift in the constitutionally proclaimed model of power-sharing.[28]

The survey of reforms of the constitutional setting shows that despite fierce political controversies the models of parliamentary democracy in the Central European reform countries have less frequently undergone sustainable changes than the semi-presidential and presidential systems in Eastern European and Central Asian countries.

IV. Erosion of the systems of checks and balances

As experience has shown within the first decades after the constitutional reforms in the post-communist countries power limits based on the principle of checks-and-balances can be easily overcome by re-interpretation and manipulation within the political process. On the contrary, limitations blocking personal power have to be explicitly eliminated in order to allow for a change. Whereas in the first case, the democratic façade can be upheld, in the latter case the gap between democratic values and reality is difficult to hide.

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[25] Cf. especially the decision of the Constitutional Court confirming the constitutionality of the abolition of direct elections of regional leaders; decision of the Constitutional Court (21 December 2005), *„Vestnik Konstitucionnogo Suda RF 2006"*, N° 1, p. 49 et seq., the decision of the Constitutional Court confirming the constitutionality of the repeated proposal of the same candidate for the post of the Prime Minister by the President; decision of the Constitutional Court (11 December 1998), Sobranie Zakonodatelstva RF 1998, No. 52, Pos. 6447.

[26] Cf. the law on the abolition of direct elections of regional leaders: Federal Law N° 159-FL 'On Changes in the Federal Law "On General Principles of Organizing the Legislative (Representative) and Executive Branches of State Power of the Russian Federation's Member States" and the Federal Law "On Basic Guarantees of Civilians of the Russian Federation for Elective Rights and the Right for Participation in Referendum", of 11 December 2004 (SZ RF 2004 N° 50, pos. 4950); cf. the changes to the legislation on elections: the law on the elections of deputies of the Duma of 2002 was replaced by a new law in 2005 (SZ RF 2005 N° 21, pos. 1919); the same happened to the law on the elections of the President of 2000 that was replaced by a new law in 2003 (SZ RF 2003 No. 2, pos. 171). Both laws underwent subsequently manifold further revisions; cf. Angelika Nußberger, Dmitry Marenkov, *„Wahlgesetz als Steuerungsmechanismus: Zu den neuen rechtlichen Grundlagen der Duma-Wahlen im Dezember 2007"*, in Heiko Pleines, Hans-Henning Schröder, „Die russischen Wahlen" 2007/2008, Bremen 2007, p. 25 et seq.

[27] Margareta Mommsen, Angelika Nussberger, *„Das System Putin. Gelenkte Demokratie und politische Justiz"*, Munich, 2nd Edition 2007, p. 32 et seq.

[28] See Roemer Lemaître, *"The Rollback of Democracy in Russia after Beslan"*, Review of Central and East European Law 31 (2006), p. 369 et seq., Hans Oversloot, Reordering the State (without Changing the Constitution): *„Russia under Putin's Rule"*, 2000–2008, Review of Central and East European Law 32 (2007), p. 41 et seq.

A few examples might show the relativity of traditional constraints on presidential power based on the separation of powers doctrine.

Whereas the U.S. Constitution plainly states that "[t]he executive power shall be vested in a President of the United States of America",[29] this model was not followed in the new constitutions in the post-communist countries. Power is not conferred to the President on the basis of a general clause. Rather the competences are clearly enumerated in the form of a – limited – catalogue.

But restrictive catalogues can be and are opened up with references to broad constitutional definitions of the role of the President. Those definitions vary widely. In Estonia the President is simply characterised as "Head of State" (paragraph 77 Constitution of Estonia). In Armenia, on the contrary, he is described as "the guarantor of the independence, territorial integrity and security of' the Republic" and "shall uphold the Constitution, and ensure the normal functioning of the legislative, executive and judicial authorities" (Article 49 Constitution of Armenia). The Russian Constitutional Court has taken the relevant provision in the Russian Constitution defining the role of the President as "guarantor of the Constitution of the Russian Federation, of the rights and freedoms of man and citizen" (Article 80 Constitution of Russia) as starting-point for the justification of ultra vires activities not foreseen in the catalogue of the Presidential prerogatives.[30]

Presidents derive their power from elections. They are elected either directly by the people or by Parliament; in post-communist countries the latter option was chosen only exceptionally.[31] But even elections at periodic intervals are no guarantee for an effective control of power. During communist times voter turnouts used to reach almost 100 per cent. The same is true for some elections in post-communist regimes.[32] Time and again election results were said to be rigged.[33] Studies of the Venice Commission in this field show how easily rules on electoral systems in general as well as on details such as election commissions, thresholds, and the admission of political parties can predetermine the

[29] Article II paragraph 1 of the US Constitution.

[30] Decision of the Russian Constitutional Court (31 July 1995) on the constitutionality of the presidential orders and decrees justifying the invasion in Chechnya; *„Vestnik Konstitucionnogo Suda RF 1995"*, N° 5, p. 3 et seq.

[31] Poland, Hungary, Albania, Estonia, Latvia, and Czech Republic.

[32] Approval rates in presidential elections in Central Asia turned always out to be over 90%.

[33] There were famous cases of rigged elections in Ukraine in 2004, in Kyrghyztan in 2005 and in Georgia in 2003. In all those cases the manipulations were a pretext for revolutionary upheavals. But many other elections were challenged by international observers as well as by the opposition because of a lack of fairness.

outcome of elections in an unfair way.[34] Relevant international conventions in this field such as the Convention on the standards of democratic elections, electoral rights and freedoms in the member States of the Commonwealth of Independent States adopted by seven CIS countries in 2002,[35] have not yet proved to be an effective remedy in practice.[36]

Presidents form part of the executive branch of power. Nevertheless, they may interfere in legislation. The most important tool in the hands of the President in this respect is the power to veto laws adopted by Parliament.[37] But, as a rule, the veto can be overruled by a – differently defined – majority vote of the Parliament.[38] Decrees and orders are hierarchically below parliamentary laws and have to be in conformity with the laws and with the Constitution. Despite these regulations the scope of the presidential power to issue decrees and orders does not seem to be clear; the dividing line between executive legislation and parliamentary legislation is often blurred.[39] One of the most extreme examples was the legislative activity of the former President of Turkmenistan, Njazov. Many of his decrees such as the ban on video games or on ballet and opera directly infringed human rights.

Generally, such restrictions are only effective so long as the political process is based on fair play and the legal rules are taken seriously. But, as experience shows, problems arise as soon as manipulations occur. Consent of other political players can be achieved by bribery, menaces and blackmailing, the functioning of institutions can be undermined; public opinion can be biased by media which is not entirely free. All those manipulations do not necessitate constitutional changes; the façade of a democratic regime can remain untouched. Therefore the most important factor for the functioning of "checks and balances" is a solid,

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[34] For a summary of problems arising in practice see CDL-AD(2006)018, Report on Electoral Law and Electoral Administration in Europe – Synthesis study on recurrent challenges and problematic issues, adopted by the Council for Democratic Elections at its 17th meeting (Venice, 8–9 June 2006) and the Venice Commission at its 67th plenary session (Venice, 9–10 June 2006).

[35] Armenia, Georgia, Kyrgyzstan, Moldova, Russia, Tadjikistan, Ukraine.

[36] This is true although the Venice Commission had held that the essential features of the European electoral heritage had been introduced into the text of the Convention; cf. Comments of the Venice Commission, Opinion CDL-AD(2007)007 on the Convention on the standards of democratic elections, electoral rights and freedoms in the member States of the Commonwealth of Independent States adopted by the Commission at its 70th plenary session (Venice, 16–17 March 2007).

[37] This right is granted to all Presidents in post-communist constitutions with the exception of Slovenia and Croatia.

[38] Simple majority (Estonia, Lithuania, Moldova, Hungary, Romania); absolute majority (Albania, Bulgaria, Makedonia, Lithuania, Czech Republic, Slowakia), qualified majority (Poland).

[39] Cf. e.g. for Russia Christian Schaich, *„Exekutive Normsetzung in der Russischen Föderation"*, Berlin 2004.

well-developed democratic constitutional culture.[40] If a constitutional setting does not correspond to attitudes, opinions, values, emotions, information and skills in a given system, it is doomed to fail.

Among all constraints on presidential power probably the most effective ones are regulations prohibiting re-election after two terms. If an individual is barred from being at the top of the executive power in a country for more than a certain amount of time, personal change is necessary. And personal change, as a rule, breaks up frozen structures and enables a new start. Moreover, such restrictions are clear and unequivocal, do not leave any margin of interpretation, and can be based on psychological evidence as it is well established that those who stay in power for a longer period of time easily loose contact with reality. Although presidential term-limits cannot prevent authoritarian ruling as such,[41] they are, if taken seriously, a factor of discontinuity. And discontinuity might help to correct wrong developments.

Temporal restrictions to power are not a *conditio sine qua non* for democracies, though. They may be seen as counterproductive to stability and continuity. If a candidate for presidential elections is excluded on the basis of a term-limit although he/she might get the majority of votes, the term-limit openly contradicts the will of the people. As a matter of fact, the people are protected against their will. But experience shows that this might be necessary, if it is the only way of limiting the detrimental effects of manipulations of public opinion. As Vernor Bogdanor puts it: "Codified constitutions are, after all, valued as a means to the end of limiting governmental power; and, in a democracy, limiting also the power of the people to whom government is responsible."[42]

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[40] "Constitutional culture" is understood here as a component of political culture characterised by essential qualities such as attitudes, opinions, values, emotions, information and skills; cf. Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, in Mirosław Wyrzykowski, Constitutional Cultures, Warsaw 2000, p. 57.

[41] Croatia might serve as an example: Tudman was President only for nine years (1990–1999), but managed to transform the democratic system into an authoritarian system; the same is true for Kucma in Ukraine (1994–2005); cf. Antje Helmerich, *„Kroatien unter Franjo Tudman. Plebiszitärer Autoritarismus hinter demokratischer Fassade"*, in Ellen Bos, Antje Helmerich (ed.), *„Zwischen Diktatur und Demokratie. Staatspräsidenten als Kapitäne des Systemwechsels in Osteuropa"*, Berlin 2006, p. 223 et seq; Ellen Bos, Leonid Kutschma: *„Spieler" mit demokratischen Institutionen*, in Ellen Bos, Antje Helmerich (ed.), *„Zwischen Diktatur und Demokratie. Staatspräsidenten als Kapitäne des Systemwechsels in Osteuropa"*, Berlin 2006, p. 79 et seq.

[42] Vernor Bogdanor, Introduction, in Vernor Bogdanor (ed.), *„Constitutions in Democratic Politics"*, Aldershot 1988, p. 3.

V. Temporal restrictions to presidential power

1. Temporal restrictions to presidential power as part of the American constitutional tradition

The tradition of limiting service as President to two terms has existed in the United States since the beginning of the American constitutional system. George Washington did not seek re-election. Thomas Jefferson supported the convention of a two-term limit as well. Thus he stated in 1807 that "if some termination to the services of the chief Magistrate be not fixed by the Constitution, or supplied by practice, his office, nominally four years, will in fact become for life".[43] Although there was no firm constitutional provision barring presidents from being elected more than twice, the restriction was observed by all American Presidents[44] with the exception of Franklin Roosevelt who won his fourth term in 1944, but died soon afterwards. In order to safeguard the unwritten rule against further violations in 1951 the following clause was inserted into the American Constitution with the 22nd Amendment in 1951: "No person shall be elected to the office of the President more than twice ...".

This limitation plays an important role in the constitutional system of the U.S. Although the powers of the President are far-reaching and the systems of checks-and-balances may be considered as rather weak, the constant change of persons does not allow for a degeneracy of the system. Therefore the acceptance of the combination of strong power and strict time-limit may be conceived as a characteristic feature of the American constitutional culture.

2. Temporal restrictions to presidential power as part of the European constitutional tradition

a. Monarchies in Western Europe

Presidential systems such as the American system and parliamentary systems such as the British system differ in many important points. To a certain extent the differences can be explained by historical reasons. Thus the construction of the constitutional system of the United States was inspired by the philosophy of the Enlightenment. The power system could be built up from the scratch without having due regard to long-standing traditions or roles traditionally

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[43] Thomas Jefferson, *"Reply to the Legislature of Vermont"*, 1807".

[44] Ulysses S. Grant sought a third term in 1880 after serving from 1869 to 1877, but narrowly lost his party's nomination. Theodore Roosevelt, who served from 1901 to 1909 sought to be elected in 1912 non-consecutively for a second time, but lost to Woodrow Wilson.

assigned to certain groups of persons. [45] On the contrary, in parliamentary systems the transfer of power from the monarch to Parliament was a slow process from the 17th to the 20th century. The monarch remained at the top of the executive, but gradually lost political power. A barrier against an abuse of power was not deemed to be necessary, as the factual political power had been reduced to mere representative functions.[46] Concerning the hand-over of power, the only regulation necessary is the transfer of the functions of Head of State in case of death or abdication. The real power lies in the hands of the prime minister. But – contrary to the American model – his or her term of office is not limited in time. This is probably due to the assumption that the position of the prime minister is weak as he/she is dependent on Parliament and can be controlled by the opposition. Prime ministers can be easily ousted on the basis of a vote of no confidence, whereas Presidents can be impeached only in case of high treason or other grave crimes. Individuals could therefore dominate the political scene for a long period of time, such as Margaret Thatcher, who was Prime minister for eleven years.

b. Parliamentary and semi-presidential democracies in Western Europe

Contrary to monarchies, in parliamentary democracies with elected presidents the presidential term is limited.[47] This is surprising as the position of presidents in parliamentary democracies can hardly be misused for a usurpation of power. The German constitutional system might serve as an example. The President is considered as the highest representative of the State, but has almost no political influence. Even the power to veto unconstitutional laws is not spelled out clearly in the constitution and is highly controversial among constitutional lawyers. Every order or directive requires for its validity the countersignature of the Chancellor or the competent Minister.[48] It is the Chancellor who determines, and is responsible for, the general guidelines of policy.[49]

In contrast to the regulation for presidents, the term of the politically responsible prime ministers is not limited. Therefore some prime ministers or

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[45] Walter Haller, Alfred Kötz, *„Allgemeines Staatsrecht"*, 3rd Edition Basel et al. 2004, p. 194 et seq.
[46] Queen Elizabeth has been in office since 1952, for more than half a century.
[47] Cf. e.g. Article 60 paragraph 5 Constitution of Austria (election for six years, one consecutive re-election possible), Art. 85 Constitution of Italy (election for one term of seven years), Art. 123, 128 Constitution of Portugal (election for five years, no re-election for a consecutive third term), Art. 54 of the German Grundgesetz (election for five years, one consecutive re-election possible).
[48] Cf. Article 58 of the *German Grundgesetz*.
[49] Cf. Article 65 of the *German Grundgesetz*.

chancellors have managed to cling to power for quite a long time. The era of Konrad Adenauer lasted for 14 years, the era of Helmut Kohl for 16 years.

In semi-presidential systems, such as the French system, the situation is different.[50] In the original version of the French Constitution of 1958 the President was elected for a term of seven years and could be re-elected once. This was changed in 2002. Now the term of office is only five years, but re-election is not restricted.[51]

c. Parliamentary and semi-presidential democracies in Central Europe

The systems in Central Europe correspond to those in Western Europe. The power of the President is limited by clear-cut timeframes and the exclusion of a re-election after the second term.[52] Interestingly, here too, the executive temporal limits only apply to the position of the President, not to the position of the Prime minister.

Historical experience in almost two decades of constitutional practice in the countries of Central Europe shows that those limitations were respected. Most of the newly elected presidents were intellectuals, writers, dissidents or opposition leaders such as Vaclav Havel, Árpád Göncz and Lech Wałęsa.[53] They were considered as symbols of the beginning of a new era and the creation of a new national identity after a period of oppression. Nevertheless, in the transitional period between the end of the old era and the determination of the new constitutional setting, the role presidents should play was highly controversial. The newly elected presidents did not manage to keep from political fighting, especially during the first term of their presidency. Some of them like Árpády Göncz and Lech Wałęsa often fell back on their right to veto parliamentary laws. Others repeatedly used their right to initiate legal projects.[54] Moreover, the antagonism between President and Prime minister was a characteristic

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[50] Maurcie Duverger, *A new political system: semi-presidentialism, in EJPR 1980*, 8, p. 165–187.

[51] Cf. Article 6 Constitution of France.

[52] Cf. e.g. term of five years with one re-election in Albania (Article 88 Constitution of Albania), Bulgaria (Article 93, 95 Constitution of Bulgaria), Estonia (paragraph 80 Constitution of Estonia), Poland (Article 127 Constitution of Poland), Hungary (paragraph 29/A of the Constitution of Hungary), and Romania (Article 81 Constitution of Romania); term of four years with only one re-election in Russia (Article 81 Constitution of Russia), Latvia (Article 35, 39 Constitution of Latvia), and Moldova (Article 78, 80 Constitution of Moldova).

[53] Cf. August Pradetto, Carola Weckmüller, *„Die neue Präsidentengeneration im Postkommunismus"*, in Otto Luchterhandt (ed.), *„Neue Regierungssysteme in Osteuropa und der GUS. Probleme der Ausbildung stabiler Machtstrukturen"*, p. 205 et seq.

[54] An example would be Lithuania where the President iniatiated 19 legislative projects in 1998 and 1999.

feature of the political culture, e.g. in the Czech Republic and in Slovakia. In Hungary the Constitutional Court was called upon to clarify the respective competences.[55]

The "reform presidents" stayed in office for one or two terms; re-election was not an option. The presidential term-limit was observed, but it was not a decisive factor in power politics.

3. Inefficiency of temporal restrictions to presidential power in semi-presidential and presidential systems in Eastern Europe and Central Asia

The presidential and semi-presidential systems that were formed in Eastern Europe and Central Asia are very different in this respect. On the one hand, changes or eliminations of presidential term-limits have opened the road to new forms of authoritarian systems. On the other hand, the forced handover of power has triggered revolutions against the ruling elite. Peaceful transfers of power after the constitutionally set period of time were rare exceptions.

a. Elimination of restrictions

i. Kazakhstan

The most blatant way of disregarding democratic rules of the game is to simply abolish the relevant temporal limitations enshrined in the constitution. This was done in Kazakhstan.[56] Kazakhstan had been one of the first countries to imitate Gorbachev's decision to introduce the position of a President in 1990. Nazarbaev who had been the first secretary of the communist party in Kazakhstan since 1989 was elected President in 1991.

According to the first Constitution of Kazakhstan adopted in 1993 the President was elected by the people for a period of five years and could be re-elected once; the age-limit for the President was set at the age of 65 years.[57] A new Constitution was adopted by referendum in 1995 without changing this clause. Only in 1998, shortly before the end of the first term of President

[55] Cf. e.g. the important Decision of the Hungarian Constitutional Court of 26 September 1991 (48/1991 (IX.26) AB); reprinted in English in László Sólyom, Georg Brunner, *"Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court, University of Michigan 2000"*, p. 159 et seq.
[56] See on the developments, in Kazachstan Otto Luchterhandt, *„Präsidentialismus in den GUS-Staaten"*, in Otto Luchterhandt (ed.), *„Neue Regierungssysteme in Osteuropa und der GUS. Probleme der Ausbildung stabiler Machtstrukturen"*, 2nd Edition Berlin 2002, p. 279 et seq.
[57] Article 41, paragraph 1, of the Constitution.

Nazarbaev,[58] the relevant clause was revised.[59] The term of office was extended to seven years; the restriction to two terms as well as the age limit were eliminated without compensating this extension of the presidential power.[60] Together with the reform, the date of the elections was changed and pre-dated by two years; the 50 percent minimum participation threshold for presidential elections established in 1995 was removed. The Constitution was once more changed in 2007, shortening the presidential term again to five years and excluding re-eligibility of the President after two terms in a row. Interestingly, this clause will only be applied starting from 2012.

ii. Belarus

In Belarus the constitutional clause limiting presidential power to two terms of five years contained in the first version of the Constitution of 1994 (Article 97, paragraph 1 of the Constitution of Belarus) was not abolished when the Constitution was fundamentally revised in 1996; it was restated in Article 81 paragraph 1 of the Constitution. But according to a transitory provision (Article 144) the President could retain his powers. His term of office was assessed from the day on which the new Constitution entered into force. That meant that President Lukashuk's first term of office that would have run out in 1999, was extended to 2001. The Venice Commission interpreted the 1996 revision of the Constitution in general "to fall short of the democratic minimum standards of the European constitutional heritage".[61] Despite this criticism and the refusal to accept the legitimacy of the referendum both by the United States and the European Union, in Belarus the amended Constitution was seen as the legal basis for the continuation of Lukashenko's presidency. In 2004 a second referendum on whether to eliminate presidential term-limits was held. It was personalised and explicitly referred to the candidacy of Lukashenko in the up-coming presi-

[58] The term was counted starting from the adoption of the new Constitution, not from the beginning of his presidency.

[59] Adoption of the new version of the Constitution by law on 7 October 1998.

[60] The wording of the new provision is: "The President of the Republic shall be elected by universal, equal and direct suffrage under a secret ballot for a seven-years term in accordance with the constitutional law by the citizens of the Republic who have come of age." (Article 41 paragraph 1).

[61] Opinion of the Venice Commission CDL-INF(1996)008e on the amendments and addenda to the Constitution of Belarus, adopted by the Venice Commission at its 29th Plenary Session (Venice, 15–16 November 1996).

dential elections.[62] According to official results 79.42% of the voters approved this proposal of the President. Thus the Constitution was amended on the basis of Article 140 of the Constitution allowing for amendments or supplements to the Constitution via referendum. According to the Venice Commission the constitutional change shows "an approach to the functioning of the state in direct contradiction with European democratic standards".[63] What is criticized most is the introduction of an "obviously illegal personal element into the referendum question."[64] Therefore the 2004 referendum is seen to "aggravate the democratic deficit in a country already characterised by excessive powers of the President without adequate checks and balances".[65]

These examples show how susceptible referenda are to misuse. They are "miles away from that kind of conceptual structure of public discourse which lifts the referendum out of manipulative ratification into the higher sphere of deliberative politics called for by Jürgen Habermas ...".[66]

b. Circumvention of restrictions

i. Turkmenistan

The changes in Turkmenistan went even further towards an unlimited personal ruling of former communist leader Njazov, although the wording of the Constitution was not explicitly changed. The constitutional limitation of two terms of five years set in 1992[67] was extended to 2002 in 1994 on the basis of a referendum.[68] In 1999 a constitutional law fixed the right of Njazov to stay president for life. Njazov died in 2006 after sixteen years in power. By that time

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[62] See the question submitted to the voters: "Do you allow the first President of the Republic of Belarus Alexander Grigoryevich Lukashenko to participate in the presidential election as a candidate for the post of the President of the Republic of Belarus and do you accept Part 1 of Article 81 of the Constitution of the Republic of Belarus in the wording that follows: "The President shall be elected directly by the people of the Republic of Belarus for a term of five years by universal, free, equal, direct and secret ballot."?"

[63] Opinion of the Venice Commission (CDL-AD(2004)029) on the referendum of 17 October 2004 in Belarus, adopted by the Venice Commission at its 60th Plenary Session (Venice, 8–9 October 2004).

[64] Idem.

[65] Idem.

[66] Wolfgang Merkel, *"Institutions and Democratic Consolidation in East Central Europe"*, Working Paper 86, Madrid: *"Instituto Juan March de Estudios e Investigationes 1996"*; the work Merkel refers to is Jürgen Habermas, *"Faktizität und Geltung"*, Frankfurt 1992, p. 367 et seq.

[67] Cf. Article 55: "Every citizen of Turkmenistan aged older than 40 years and living in Turkmenistan can become President. One and the same person cannot be President for more than two terms."

[68] Cf. the Article 54 of the Constitution of Turkmenistan: "The President of Turkmenistan is elected directly by the people of Turkmenistan for a term of five years and takes office right after he is sworn in at a sitting of the Halk Maslahaty."

the regime had developed into one of the worst totalitarian and repressive dictatorships in the world characterised by an all-persuasive cult of personality.[69]

ii. Uzbekistan

In Uzbekistan the pattern of power politics irrespective of constitutional limitations is very similar to the models developed in the other Central Asian countries, although the Constitution was not explicitly changed. The original text of the 1992 Constitution limits the President's term of office to two times five years.[70] Former communist leader Islom Karimov won the first elections in 1991, i.e. before the adoption of the Constitution. Through a widely criticized referendum in 1995 his term was extended until 2000. When he was elected President in 2000, this was interpreted to be his first official term on the basis of the 1992 Constitution. In February 2002 the length of the presidential term was extended from five to seven years; the date of the elections was consequently changed. If Karimov stays in power up to the end of his official "second" term in the year 2014, he will have managed to cling to power for 23 years without explicitly changing the restrictive provision in the Constitution.[71]

iii. Tajikistan

Tajikistan is another example of the non-respect of a clear constitutional rule. In 2003, 56 changes were introduced into the Constitution. Instead of one seven-year term two were made possible. President Rachmonov is seen to have started his first term under the new constitution only in 2006. Therefore he is accorded the right to stay in power up to 2020.

All these examples show that despite the constitutional provisions limiting personal power of the President practice was never guided by rules. Rather, they were arbitrarily set aside.

c. Personal continuity despite personal change

i. Rebuilding of dynasties

The situation seems to be different in Azerbaijan. The presidency of Heidar

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[69] Cf. Otto Luchterhandt, Präsidentialismus in den GUS-Staaten, in Otto Luchterhandt (ed.), *„Neue Regierungssysteme in Osteuropa und der GUS. Probleme der Ausbildung stabiler Machtstrukturen"*, 2nd Edition Berlin 2002, p. 260 et seq.

[70] Article 60 Constitution of Uzbekistan.

[71] See on the developments in Uzbekistan Otto Luchterhandt, *„Präsidentialismus in den GUS-Staaten"*, in Otto Luchterhandt (ed.), *„Neue Regierungssysteme in Osteuropa und der GUS. Probleme der Ausbildung stabiler Machtstrukturen"*, 2nd Edition Berlin 2002, p. 268 et seq.

Alijew ended after two terms of five years.[72] But in Azerbaijan power was passed from the father to the son. The elections were said to be falsified, the hand-over of power was perceived as nothing but a change within a dynasty.[73] The critical assessment of the situation in Azerbaijan is illustrated by various resolutions of the Parliamentary Assembly of the Council of Europe as well as the European Parliament concerning political prisoners in Azerbaijan[74] and the suppression of the opposition.[75]

ii. The Russian model

In Russia the "problem 2008" was one of the most vividly discussed topics during Putin's second term of Presidency.[76] The Russian Constitution explicitly limits the power of the President to two terms of four years and thus provides one of the most restrictive systems.[77] As Putin had constantly denied the intention to change the Constitution, but nevertheless clearly stated his desire to substantially influence Russian politics, analysts and observers kept wondering how this problem might be solved. President Putin accepted to be the central candidate of the party "United Russia" in the 2007 parliamentary elections, but laid down his mandate in the Duma immediately after the elections. On 10 December 2007 he declared his support for Dmitry Medwedjew in the presidential elections coming up in 2008. Within hours the chosen candidate confessed that, if elected President, he would nominate Putin as Prime Minister. As predicted, Dmitry Medwedew was elected President on 3 March 2008 with a majority of more than 70 % of the voters.

This scenario shows that even if the political actors stick to the constitutional rules, personal change and discontinuity can be avoided. It will be interesting to see how the new co-operation model will function.

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[72] The legal basis was Article 101 of the Constitution of Azerbaijan.

[73] Cf. Martina Helmerich, *„Vom Familienclan zur Erbdynastie – Der Sonderweg Aserbaidschans"*, in Ellen Bos, Antje Helmerich (ed.), *„Zwischen Diktatur und Demokratie. Staatspräsidenten als Kapitäne des Systemwechsels in Osteuropa"*, Berlin 2006, p. 135 et seq., Aledperowa, Irada, Syn za otca. *„Ustanovlenie presidentskoj dinastii v Azerbaidžane sprovosdalos' massovymi besporjadkami"*, in Vremja novostej, 17 October 2003; Ismailsade, Faris, Generational Change occurs amid political infighting within Azerbaijan's ruling party, in Eurasia insight 16 August 2004.

[74] Resolution 1359 (2004)1, Political prisoners in Azerbaijan.

[75] Resolution of the European Parliament adopted on 21 June 2005.

[76] Cf. Margereta Mommsen, Angelika Nußberger, *„Das System Putin. Gelenkte Demokratie"*, München 2007, p. 75 et seq.

[77] Article 81, paragraph 3 of the Constitution of the Russian Federation.

d. Hand-over of power under revolutionary conditions

The hand-over of power from one long-term ruling President to a new President seems to be connected with great risks. In Ukraine, in Georgia, and in Kyrgyzstan it led to revolutionary upheavals.

i. Ukraine

In Ukraine Leonid Kutschma, a former communist leader, was elected President of Ukraine in 1994. The election was still based on the old Ukrainian Constitution dating back to the communist era although it had been amended numerous times. In 1999 Kutschma was re-elected under the new Constitution adopted in 1996. Despite the explicit wording forbidding "one and the same person to be the President of Ukraine for more than two consecutive terms" (Article 103 Constitution of Ukraine), there were several attempts to overcome this barrier. Kuchma's initiative to extend his term of office up to 2006 within the frame-work of a large scale constitutional reform was without any success.[78] But on the basis of an initiative from deputies of the Ukrainian Parliament to interpret the relevant article of the Ukrainian Constitution the Ukrainian Constitutional Court decided in December 2003 that Kuchma could run for President a third time. It argued that Kutshma's first election had not yet been governed by the 1996 Constitution, so that the first time of his presidency did not have to be taken into account in the relevant calculation. [79]

These attempts show on the one hand that rules were taken seriously and not just set aside. But on the other hand it became clear that the ruling elite did not accept the limitation of power and tried to find ways around. Nevertheless, Kutschma decided to step down from office in 2004, but to actively support Viktor Yanukovych as successor. The obvious manipulation of the election contributed to the so-called "Orange Revolution" in Ukraine[80] that subsequently triggered important changes of the constitutional system.[81] It can

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[78] Cf. the Comments of the Venice Commission, Opinion on three draft laws proposing amendments to the Constitution of Ukraine adopted on 12/13.12.2003 by the Commission at its 57th Plenary Session (Venice, 12–13 December 2003).

[79] Decision of the Ukrainian Constitutional Court of 25 December 2003.

[80] Cf. Taras Kuzio, From Kuchma to Yushchenko. Ukraine's 2004 Presidential Elections and the Orange Revolution, in Problems of Post-Communism, 52 (2), pp. 29–44.

[81] Law N° 2222-IV amending the Constitution, 8 December 2004; cf. the Comments of the Venice Commission Opinion on the amendments to the constitution of Ukraine adopted on 8.12.2004 by the Commission at its 63rd plenary session (Venice, 10–11 June 2005). The conclusions of the Commission are rather critical: "In general, the constitutional amendments, as adopted, do not yet fully allow the aim of the constitutional reform of establishing a balanced and functional system of government to be attained."

be said that the time limit of the presidential term was one of the decisive legal factors contributing to the hand-over of power. Without such a limitation it is likely that Leonid Kuchma would have stayed in office; authoritarian tendencies might have deepened.[82]

The long-term effects of the "Orange Revolution" are controversial. The Parliamentary Assembly of the Council of Europe stressed Ukraine's way back to democracy and recognised "the achievements of the orange revolution that have allowed key democratic freedoms to take root in Ukraine: the country now enjoys freedom of speech and of the media, freedom of assembly, freedom of political competition and parliamentary opposition, and a vibrant civil society".[83] Critics complain of the instability of the system. The Parliamentary Assembly of the Council of Europe is still hesitating to comment on the progress in Ukraine after the "Orange Revolution". In its report "Honouring of obligations and commitments by Ukraine" of 2006 it states that "it is still somewhat too early to make a final evaluation of the new leadership's ability to stick to the fundamental principles underpinning the Council of Europe."[84]

ii. Georgia

In Georgia the Rose Revolution took place shortly before the expiry of the presidential term[85] of Shevardnadze who had also been accused of misusing his power and building up a corrupt and autocratic system. When the election results turned out to be manipulated massive anti-governmental demonstrations started in the streets of Tbilisi. The opposition protest finally forced the President to announce his resignation. In the 2004 presidential elections Mikail Saakashvili was elected President. Subsequently, the Constitution was changed. Although some powers were shifted to the Parliament, an overall assessment shows that the position of the President was strengthened.[86] The limit to the presidential term of office remained untouched. The Venice

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[82] Cf. Ellen Bos, Leonid Kutschma: *„Spieler mit demokratischen Institutionen"*, in Ellen Bos, Antje Helmerich (ed.), *„Zwischen Diktatur und Demokratie. Staatspräsidenten als Kapitäne des Systemwechsels in Osteuropa"*, Berlin 2006, p. 79 et seq.

[83] Resolution of the Parliamentary Assembly 1549 (2007)April 19, 2007, paragraph 3.

[84] Parliamentary Assembly of the Council of Europe, Recommendation 1722 (2005).

[85] According to the Constitution of Georgia the President is elected for a term of five years; one consecutive election is possible (Article 70).

[86] Margarete Wiest, *„Georgien – demokratischer Neuanfang unter Mikail Saakaschwili?"* in Ellen Bos, Antje Helmerich (ed.), *„Zwischen Diktatur und Demokratie. Staatspräsidenten als Kapitäne des Systemwechsels in Osteuropa"*, Berlin 2006, p. 149 et seq.

Commission welcomed the overall aim of the amendments, but saw them as not fully coherent.[87]

The decision of Parliament to adopt amendments to the constitution and to hold joint parliamentary and presidential elections in the period of September to December 2008[88] once more triggered a rigorous reaction by the people. The term of Parliament would have been extended beyond the period for which he had been elected, whereas the presidential term would have been shortened. The fact that such a unilateral decision extending the power of a democratically elected body was not accepted shows the sensibility to constitutional principles. As a reaction to the public protest presidential elections were held in January 2008.

iii. Kazakhstan

The third country where a hand-over of power was forced by a revolutionary movement is Kazakhstan. The 1993 Kyrgyz Constitution was amended three times during the Presidency of Askar Akayev, in 1996, 1998 and 2003. Akayev had been elected President by Parliament in 1991, before the entry into force of the new Constitution. Therefore the Constitutional Court decided in 1998 that Akayev was not blocked from running for another term in 2000. But the so-called Tulip Revolution after the parliamentary elections in March 2005 forced President Akayev's resignation in April 2005. The new President Kurmanbek Bakiyev promised the adoption of a new constitution, a project that was vividly discussed with experts of the Venice Commission. [89] But controversies about the governmental system and the distribution of power between President, Parliament and Prime Minister delayed the process. Once more it was a popular movement that forced action – in great hurry a new version of the Constitution providing for a mainly parliamentary system of government was adopted by Parliament in November 2006.[90] Although it contained many inconsistencies

[87] Comments of the Venice Commission, Opinion CDL-AD(2004)008 on the draft amendments to the Constitution of Georgia adopted by the Commission at its 58th Plenary Session (Venice, 12–13 March 2004).

[88] Cf. the Opinion of the Venice Commission, Opinion CDL-AD(2006)040 on the draft constitutional law of Georgia on amendments to the Constitution of Georgia adopted by the Commission at its 69th Plenary Session (Venice, 15–16 December 2006).

[89] Cf. the Interim Opinion of the Venice Commission on Constitutional Reform in the Kyrgyz Republic (CDL-AD(2005)022), adopted by the Commission at its 64th plenary session (Venice, 21–22 October 2005); see also the Preliminary Comments on Three Drafts for a revised Constitution of the Kyrgyz Republic (CDL(2006)066).

[90] Constitution, adopted by the Kyrgyz Parliament on 8 November 2007, signed by the President on 9 November 2007.

the general tendency to reduce the scope of presidential powers was welcomed by the Venice Commission. But as the main political players did not seem to be satisfied with the compromise already achieved in December of the same year a new version of the constitution strengthening presidential powers was adopted.[91] The constitutionality of the procedure chosen for the adoption of both new versions of the Constitution was contested by some members of Parliament. On 14 September 2007 the Constitutional Court decided that the procedure for the adoption of both new versions of the Constitution had been unconstitutional, as the Constitutional Court had not been asked to give an expert opinion. Therefore it annulled both versions of the Constitution. This decision was contested by the Jogorku Kenesh, which claimed that the Court had clearly exceeded its powers. The Venice Commission saw the Constitutional Court's decision to declare the full text of an acting Constitution as unconstitutional as "highly unusual, if not unprecedented" and stressed the consequences, as all the actions based on the former constitutions would be without legal basis.[92] On 19 September 2007 President Bakiev issued a decree submitting a new version of the Constitution as well as a draft Electoral Code for adoption by referendum. The referendum took place on 21 October 2007; the sixth Constitution strengthening the role of the President was adopted on this basis. The assessment of this new version by the Venice Commission is very critical: "The main thrust of the new version of the Constitution is to establish by all possible legal means the indisputable supremacy of the President with respect to all other state powers. This corresponds to an authoritarian tradition which Kyrgyzstan has tried to overcome. While the Constitution proclaims the principle of the separation of powers, the President clearly dominates and appears both as the main player and the arbiter of the political system."[93]

In the context of the present study it is interesting to note that once more the only effective check on presidential powers is a clause providing that the President may be re-elected only once (Article 43.2 Constitution of Kazakhstan). But, contrary to one of the draft Constitutions elaborated in 2005, this paragraph

[91] Constitution, adopted by the Kyrgyz Parliament on December 30, 2007, signed by the President on 15 January 2007.

[92] Venice Commission, Opinion on the constitutional situation in the Kyrgyz Republic (CDL-AD (2007)045), adopted by the Commission at its 73rd Plenary Session (Venice, 14–15 December 2007).

[93] Venice Commission, Opinion on the constitutional situation in the Kyrgyz Republic (CDL-AD (2007)045), adopted by the Commission at its 73rd Plenary Session (Venice, 14–15 December 2007).

no longer contains the provision that amendments to the Constitution may not be the basis for prolonging the President's term of office. This can be seen as an indicator that Kyrgyzstan – after a short democratic interplay – has caught up with the authoritarian tradition of setting aside limitations to presidential power in Central Asia.

VI. Conclusions

The different developments in the post-communist countries in Central and Eastern Europe as well as in Central Asia can only be explained with a view to different constitutional cultures and constitutional traditions.

Whereas restrictions to presidential power were accepted in the United States for centuries without being fixed, they were set aside and disregarded in Central Asian countries although they had been explicitly enshrined in all the constitutions elaborated after the end of communism. Law in theory and in reality do not coincide; what matters are traditions. The necessity to restrict personal power is based on a broad consensus in the United States, while in the newly independent Central Asian countries autocratic traditions prevail.[94]

In Eastern Europe as well as in the Caucasian countries the situation is more complex. Although provisions restricting the re-election of the same person for President for more than two terms were only exceptionally – in Byelorussia – arbitrarily changed, they do not really seem to be accepted as eternally fixed rules of the game, but are outweighed against values such as stability, unity of power and continuity. This leads on the one hand to attempts to eliminate or change restrictive rules and on the other hand to clashes between civil society and government. The Eastern European and Caucasian countries are not only geographically situated between Europe and Asia, but their political culture also oscillates between the different poles. The Russian model of a predetermined and well controlled role reversal between President and Prime Minster is especially interesting in this context. It does not violate the constitutional rules, but is contrary to the spirit underlying the Constitution.

In Central Europe clauses restricting the presidential term of office have more of a decorative than of a substantial value as presidential power in par-

[94] Cf. on different traditions and State structures in Central Asia Paul Georg Geiss, *"State and Regime Change in Central Asia"* in Andrea Berg, Anna Kreikemeyer (eds.), *"Realities of Transformation. Democratisation Policies in Central Asia Revisited"*, Baden-Baden 2005, p. 23 et seq.

liamentary democracies as well as in the comparatively weak semi-presidential systems is per se limited.

Thus the wave of democratisation has not been transformed into a big river, but rather resembles a thin trickle. Although constitutional provisions are almost identical and are based on the same ideals, their implementation in the countries of Central and Eastern Europe on the one hand and in the countries of Central Asia on the other hand leads to completely different results. Historical experience in democracy as well as geographic proximity to Western Europe seems to be crucial determinants for the success in democratisation.[95] Furthermore the realisation of democratic rules of the game strongly depends on the relevant political players. In systems where former communist leaders dominate the political scene the idea of "change" was never an option seriously pursued (Kazakhstan, Uzbekistan, Turkmenistan, and Tajikistan). The legacy of an uncontrolled but well organised hierarchical regime could not be cast aside. Whenever a differently educated elite managed to revolt against former communist leaders (e.g. in Georgia and Ukraine), it led to instability and political battle. On the contrary, in those countries where the transformation has started from below and power was passed smoothly to new elites, the idea of restriction of power was more easily accepted.

Constitutional practice corresponds to long-term traditions. Whereas legal rules can be changed on the surface, this does not necessarily affect deeper layers of constitutional culture.[96] Therefore in some of the post-communist countries the expectations of a rapid transition to democracy have been thwarted by the tenacity of deeply rooted autocratic traditions. Historical continuity has proven to be stronger than new ideas, even if the new ideas have been fixed in the Constitution. Yet, even in those countries where the application of democratic rules has failed, the "rhetoric of democracy" is maintained as the main source of legitimacy for those in power.[97]

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[95] Grzegorz Ekiert, *"Patterns of Postcommunist Transformation in Central and Eastern Europe"*, in Grzegorz Ekiert, Stephen E. Hanson (eds.), *"Capitalism and Democracy in Central and Eastern Europe. Assessing the Legacy of Communist Rule"*, Cambridge 2006, p. 89 et seq., Jeffrey S. Kopstein, David A. Reilly, Postcommunist Spaces: A Political Geography Approach to Explaining Postcommunist Outcomes, in Gregorsz Ekiert, Stephen E. Hanson (eds.), op. cit., p. 120 et seq.

[96] Cf. Kaarlo Tuori, EC Law: *"An Independent Legal Order or a Post-Modern Jach-in-the-Box?"* in Dealing with Integration, vol. 2, *„Skrifter fran Juridiska Fakulteten I Uppsala 65"*, Iustus Förlag, 225–248, at 233 et seq., analysing law and its changes on three levels: the surface level of law, the legal culture and the deep structure of law.

[97] Cf. Andrea Berg, Anna Kreikemeyer, Introduction: Democratization Policies in Central Asia Revisited, in Andrea Berg, Anna Kreikemeyer (eds.), Realities of Transformation. Democratization Policies in Central Asia Revisited, Baden-Baden 2005, p. 10.

The transitory process that started in the late 1980s, early 1990s seems to have come to an end in the post-communist countries; the new constitutional systems are more or less consolidated. But the task of the Venice Commission to achieve "democracy through law" has to continue. The open and critical dialogue on democracy in Europe and beyond, initiated by Antonio La Pergola, therefore remains as promising and challenging as it has been in the early 1990s.

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Antonio La Pergola et l'Albanie

J'ai connu Antonio La Pergola au cours de sa première visite en Albanie, vers la fin du printemps 1991. Le Parlement albanais, issu des premières élections pluralistes, après la chute du système totalitaire, avait terminé la discussion sur le projet d'une nouvelle Constitution, rédigé au cours de l'année 1990 et revu par la commission compétente après l'instauration du système politique pluraliste en décembre 1990. Le Parlement n'avait pas approuvé tout le projet mais seulement les chapitres concernant les dispositions générales, le Parlement, le Président de la République et le Gouvernement. Les autres parties concernant le système judiciaire, la justice constitutionnelle et les pouvoirs locaux devaient être rédigées *ex-novo* et approuvées ultérieurement après avoir obtenu l'expérience nécessaire et une certaine consolidation du nouveau système démocratique.

La Pergola, invité à donner une contribution sur la base de sa haute qualification et de sa vaste expérience, était aussi intéressé à avoir une information sur les chapitres de la Constitution qui n'avaient pas été approuvés. Je fus chargé par le Ministre de la Justice de recevoir le professeur La Pergola. Pendant deux heures j'ai exposé le contenu des chapitres de la Constitution qui n'avaient pas été approuvés et j'ai répondu à maintes questions posées par lui. Je me souviens que La Pergola manifesta un intérêt particulier pour le fait que dans le projet il était prévu la création d'un Conseil Constitutionnel ayant les compétences d'une Cour Constitutionnelle, dont les décisions seraient seulement des recommandations pour l'Assemblée, laquelle pourrait les refuser par les voix des deux tiers de ses membres. À défaut d'une réponse de la part de l'Assemblée dans un délai de deux mois, les recommandations seraient considérées comme approuvées par elle. La Pergola me posa la question si une telle idée avait été empruntée à une proposition présentée par le renommé juriste italien, Piero Calamandrei, au cours des travaux pour l'élaboration de la Constitution italienne. Je répondis que nous n'avions pas eu connaissance de ces opinions de Calamandrei. Deux semaines après son départ de Tirana, j'ai reçu l'intervention écrite par Calamandrei, envoyée par La Pergola.

J'ai rencontré de nouveau La Pergola à Tirana, en 1993, lorsque le Parlement albanais se préparait à discuter un projet de nouvelles lois constitutionnelles concernant le système judiciaire et la justice constitutionnelle. Je lui ai demandé s'il pensait qu'il était opportun de revenir à l'idée d'un Conseil Constitutionnel ou s'il serait mieux de créer une Cour Constitutionnelle avec un pouvoir délibératif. Après une petite pause de réflexion, il me répond : « *Je pense qu'il serait mieux de créer une Cour Constitutionnelle, parce que le Parlement albanais a un nombre très limité de juristes qualifiés et cette carence, dans une certaine mesure, peut être compensée par une Cour Constitutionnelle munie de larges compétences* ». Cette suggestion de La Pergola, transmise par moi aux membres de la Commission Parlementaire, fut prise en considération.

La troisième rencontre avec La Pergola a eu lieu en juillet 1998 à Rome, où le professeur, accompagné du secrétaire de la Commission de Venise, Gianni Buquicchio et quelques membres (Je me souviens de Batliner, Russell, Maliverni, Lopez Guerra) devait discuter avec des parlementaires albanais membres de la commission pour l'élaboration de la Constitution et quelques juristes sur les problèmes encore irrésolus, parmi lesquels la structure du Parlement : monocamérale ou bicamérale. J'étais invité à cette réunion en tant que nouveau membre de la Commission de Venise, depuis la fin de juin 1998. La majorité des Albanais participant à cette discussion penchaient pour un Parlement bicaméral, dans lequel la deuxième chambre serait un Sénat avec des prérogatives législatives limitées, composé de membres désignés par les conseils des préfectures. Une autre variante était la création d'un Conseil, faisant partie de l'Assemblée et qui serait composé de 25 députés élus par l'Assemblée lors la première session de la législature. L'Assemblée, sous requête du Conseil des Ministres et dans des cas d'urgence, pouvait déléguer au Conseil des compétences législatives.

L'opposition nette de La Pergola et ses arguments convaincants eurent pour résultats le rejet de l'idée du bicaméralisme, comme tout à fait inadéquat pour un petit pays comme l'Albanie.

Je voudrais souligner que la contribution de la Commission de Venise et particulièrement de son président Antonio La Pergola fut un facteur très important pendant tout le processus d'élaboration de la Constitution albanaise.

En outre, la Commission de Venise, sous la direction de La Pergola, a réservé une attention particulière aux maints problèmes de l'Albanie, en examinant des questions importantes telles que l'incompatibilité de la peine capitale avec la Constitution de l'Albanie, l'immunité parlementaire, la restitution des propriétés confisquées ou nationalisées pendant le régime communiste, etc. Durant

la discussion de ces problèmes, les remarques et les suggestions du président de la Commission ont eu toujours un grand poids.

En général, il faut dire que les conclusions de La Pergola à la fin de la discussion de chaque problème dans les séances plénières de la Commission exprimaient sa vaste culture, sa connaissance approfondie des aspects juridiques de chaque problème, la force de son argumentation et, en même temps, sa fermeté basée sur le respect des principes comme sa souplesse diplomatique.

Pour son apport éminent dans le processus de la création et de la consolidation de l'Etat de droit en Albanie, Antonio La Pergola a été élu membre étranger de l'Académie des Sciences de l'Albanie.

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Judicial Activism v. Judicial Restraint and Collisions with the Political Elites in Turkey

Judicial activism and judicial restraint have been key concepts in almost all countries with a system of constitutional review. The political nature of many problems that come before constitutional courts make collisions between parliaments and courts almost inevitable. In the United States the Supreme Court Justice Frankfurter's opinions are often quoted in support of judicial restraint. Thus he said:

"This legislation is the result of an exercise by Congress of the legislative power vested in it by the Constitution, and of the exercise by the President of his constitutional power in approving a bill and thereby making it 'a law'. To sustain it is to respect the actions of the two branches of our government directly responsible to the will of the people and empowered under the Constitution to determine the wisdom of legislation. The awesome power of this court to invalidate such legislation, because in practice it is bounded only by our own prudence in discerning the limits of the court's constitutional function, must be exercised with the utmost restraint".[1]

On another occasion he said that involving the judiciary in the politics of the people was "hostile to a democratic system" and added that "courts ought not to enter this political thicket".[2] Indeed, the history of the US Supreme Court has witnessed periods of both judicial activism and judicial restraint. It has also been observed that excessive activism on the part of the constitutional courts may lead to reaction by the political elites which result in restricting the courts' jurisdiction or to threats of such action.[3]

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[1] Tim Koopmans, *"Courts and Political Institutions: A Comparative View"* (Cambridge University Pres, 2003), pp.51–52.
[2] *Ibid.*, p.52.
[3] On the collision between President Roosevelt and the Supreme Court, see *ibid.*, pp 59–60.

The Turkish Constitution of 1982, even more so than its predecessor, is highly susceptible to judicial activism. The first three unamendable articles describing the basic characteristics of the Turkish state contain such broad and hard to define concepts as social peace, national solidarity, justice, Atatürk nationalism, respect for human rights, the rule of law, democratic, secular, and social state, the indivisable integrity of the Turkish state with its territory and nation. The long Preamble, which is an integral part of the Constitution under article 176, contains even broader and vaguer terms such as "Turkish national interests", "the historical and moral values of Turkishness" and Atatürk's "reforms and principles". Evidently, such broad concepts give the Constitutional Court a large leeway for judicial activism.

The Turkish Court's activism was apparent during the 1961 Constitution period, the best examples of which were its rulings on the constitutionality of a number of consitutional amendments. The Constitution of 1961 had no explicit provision concerning the judicial review of constitutional amendments. Theoretically speaking, such review is possible only if one adopts the existence of supra-positive constitutional norms or of a hierarchy of norms within the constitution itself. In the Turkish constitutional system no such hierarchy was established and it was commonly agreed that all constitutional norms had equal legal value. Only, Article 9 of the 1961 Constitution had stipulated that Article 1 on the republican form of government was unamendable and that no proposal could be made in order to amend it. The Constitutional Court in a 1970 ruling invalidated a constitutional amendment arguing that the unamendable republican form of government should be construed to include the characteristics of the Republic enumerated in Article 2, namely a national, democratic, secular, social state, based on human rights and the rule of law. Thus, the court argued that an amendment incompatible with any one of these characteristics would be against Article 9 which bans amendments altering the republican form of government.[4] Evidently, this interpretation gives the Constitutional Court the competence to invalidate almost any constitutional amendment, since it is hard to conceive any constitutional amendment that does not touch upon one of these characteristics.

The legislative assembly reacted to this ruling by a constitutional amendment adopted in 1971 which restricted the review powers of the Court over constitutional amendments to a procedural review, namely to a review of whether the procedural requirements for such amendments were complied with. However,

[4] Constitutional Court decision, E. 1970/1, K 1970/31, 16 June 1970, *AMKD* (Reports of the Constitutional Court), N° 8, p.323.

the Court again struck down four constitutional amendments in 1975, 1976 and 1977. This time the Court's argument was that the unamendability clause concerning the republican form of government was not only a substantive, but also a procedural norm. Therefore, any amendment that is incompatible with the characteristics of the Republic enumerated in Article 2 would be procedurally unconstitutional and null and void.[5]

The political elites reacted to these rulings once more in the Constitution of 1982. Article 148 of the Constitution limits the procedural review of the Court to ascertain whether the quorums for the amendment proposal and its adoption are complied with and whether the ban on the use of the urgent procedure in the Assembly debates on the amendment bill is violated or not. Furthermore, Article 149 stipulated that the court could invalidate a constitutional amendment only by a two-thirds majority of its members. The 2001 constitutional amendment reduced this qualified majority to three-fifths. Thus, it appears that the controversy over the judicial review of constitutional amendments has ended with the victory of the political elites. Since the adoption of the 1982 Constitution the court has not invalidated any constitutional amendment, and in the two cases referred to it, it decided that the alleged procedural irregularity was not among the ones covered by Article 148.[6]

Another controversy between the Court and the political elites concerns the constitutional provision on the prohibition of political parties. Article 69 of the 1982 Constitution provided that parties can be prohibited by the Constitutional Court if (a) their constitutions and programs are found to be in violation of the constitutional bans enumerated in Article 68, or (b) if a political party becomes a "focus" of anti-constitutional activities referred to in Article 68.[7] On the other hand, Article 103 of the Law on Political Parties (amended in 1986 by the Law No. 3270) stipulated that a party can be considered to have become a "focus" of anti-constitutional activities only on two conditions: (a) such acts must have

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[5] Constitutional Court decisions, E. 1973/19, K. 1975/87, 15 April 1975, *AMKD*, N°13, pp. 430–31; E.1976/38, K. 1976/46, 12 October 1976, *AMKD*, N° 14, pp. 252–86; E. 1976/43, K. 1977/4, 27 January 1977, *AMKD*, N° 15, pp. 106–31; E. 1977/82, K. 1977/117, 27 September 1977, *AMKD*, N°15, pp. 444–64.

[6] Constitutional Court decisions, E. 1987/9, K. 1987/15, 18 June 1987, *Resmi Gazete* (Official Gazete), 4 September 1987, N° 19564, pp. 22–26; E. 2007/72, K. 2007/68, 5 July 2007, Resmi Gazete, 7 August 2007, N° 26606.

[7] Paragraph 4 of Article 68 states that "The statutes, programs and activities of political parties shall not be against the independence of the State, its indivisible integrity with its territory and nation, human rights, principles of equality and the rule of law, national sovereignty, principles of democratic and secular Republic; they shall not aim at the defense or establishment of class or group dictatorship or any kind of dictatorship; they shall not incite to commit crimes."

been committed "intensively" by members of the party as defined by Article 101 of the Law on Political Parties, and (b) such acts must be approved, explicitly or implicitly, by the national congress, on the central executive committee, or the parliamentary group, or the executive committee of the parliamentary group of the party concerned. Article 101 of the Law referred to by Article 103 had stipulated that in order for the prohibition process to start, the perpetrators of such acts must have been convicted by courts, the Chief Public Prosecutor must have requested their expulsion from the party, and the party must have failed to comply with this request within thirty days. However, the Constitutional Court invalidated in a 1998 verdict the paragraph 2 of Article 103 on highly dubious constitutional grounds.[8] With the invalidation of this paraghraph the prohibition of political parties was made much easier, and the Court made itself practically the sole arbiter in ascertaining whether a political party has become the focus of anti-constitutional activities. Having thus solved this preliminary question, the Court proceeded to ban the Welfare Party (RP).

Following this ruling, the National Assembly amended Articles 101 and 103 of the Law on Political Parties by the Law numbered 4445 and dated 12 August 1999 defining the concept "focus" in the following way: "A political party is deemed to have become a focus of such activities if the activities referred to in paragraph 1 are committed intensively by party members and such situation is approved explicitly or implicitly by the national congress, or the central executive or decision-making bodies, or the parliamentary group in the Turkish Grand National Assembly, or the executive committee of the parliamentary group of the party concerned, or if such acts are committed directly and resolutely by the said organs". No doubt, the aim of the amendment was to limit the margin of appreciation of the Constitutional Court in party prohibition cases.

The court, in turn, invalidated this amended provision in connection with the case against the Virtue Party (FP) which was the successor to the RP. The Court argued that to hinder or to make it excessively difficult to prohibit parties that are involved in anti-constitutional activities is "incompatible with the essence of a democratic system". In the Court's opinion, the amendment makes it almost impossible to ascertain whether a political

[8] Constitutional Court decision, E. 1997/1, K. 1998/1, 16 January 1998, *AMKD*, N° 34, p. 1018. For an analysis of this decision, see Merih Öden, *Türk Anayasa Hukukunda Siyasi Partilerin Anayasaya Aykırı Eylemleri Nedeniyle Kapatılmaları* (The prohibition of political parties on account of their anti-constitutional activities in Turkish constitutional law) (Ankara: Yetkin Yayınları, 2003), pp. 63–74.

party has become the focus of anti-constitutional activities.[9] This ruling is another example of the "militant democracy" mentality firmly adopted by the Constitutional Court.

The political elites reacted to this situation by the constitutionl amendment of 2001. The amended Article 69 incorporated the annulled provision of the Law on Political Parties almost in verbatim. The new provision reads as follows: "A political party shall be considered to have become a focus of said acts, if such acts are committed intensively by party members and if this situation is explicitly or implicitly approved by the general congress, or leader, or the central decision-making or the executive bodies, or the parliamentary group in the Turkish Grand National Assembly, or the executive committee of the parliamentary group of the party concerned, or if such acts are directly and resolutely committed by the said party organs". Thus, the tug-of-war between the Court and the legislature ended with the victory of the latter and the Court's margin of appreciation in party prohibition cases was considerably narrowed down.

A similar problem arose under the Constitution of 1961 as regards the procedural review over ordinary legislation. The constitution had not explicitly specified procedural review, but it was commonly accepted that the Court's competence included both substantive and procedural review of constitutionality. During this period, the Court annulled many laws on procedural grounds without, however, developing solid and convincing criteria for procedural review. Thus the Court annulled many laws on the grounds of minor procedural irregularities.[10] This activist attitude led to a change in the rules in the Constitution of 1982. Now, procedural review is limited to ascertaining whether the required majority is obtained in the final vote on the bill.

One of the most serious collisions between the Court and the legislature was witnessed in the spring and summer of 2007 over the election of the President of the Republic. Under the 1982 Constitution, the president is elected by the Grand National Assembly, and a maximum number of four parliamentary rounds are foreseen for the election. The decisional quorum is two-thirds of the full membership of the Assembly on the first two rounds, and the absolute majority of the full membership on the third and fourth rounds, a minimum of 367 and 267 votes respectively. The Constitution specified no special quorum

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[9] Constitutional Court decision, E. 2000/86, K. 2000/50, 12 December 2000, *AMKD*, N° 36, vol.2, pp. 900–902; for an analysis of this ruling, see Öden, *op.cit.*, pp. 79–84.

[10] Ergun Özbudun, *Türk Anayasa Hukuku* (Turkish Constitutional Law) (Ankara: Yetkin Yayınları, 2004), pp. 389–93.

for the meeting of the assembly concerning presidential elections, in which case the general rule in Article 96 should apply, i.e., the quorum should be one-third of the full-membership (184 votes). The parliamentary arithmetic then gave the majority Justice and Development Party (JDP) the power to elect its own candidate in the third or fourth rounds, but not in the first two rounds. Thus, there seemed to be no constitutional obstacle to the election of a JDP candidate.

At this point, however, the major opposition party, the Republican People's Party (RPP)and some jurists put forward an argument that the two-thirds majority was not only the decisional quorum, but also the necessary quorum for the opening of the session. After the first round on which the two-thirds quorum was not obtained because of the boycotting of the opposition deputies, the RPP carried the case to the Constitutional Court, and the Court in an extremely controversial ruling rendered on 1 May 2007, endorsed the claim of unconstitutionality.[11] The ruling put an end to the election process, and the ensuing deadlock obliged the Parliament to call new parliamentary elections as required by the Constitution. However, before the elections scheduled for 22 July, The JDP deputies proposed a constitutional amendment package that involved changes in five articles and the addition of two provisional articles. The proposal involved the shortening of the legislative period from five to four years, the popular election of the President of the Republic for a maximum two five-year terms, and an amendment to Article to Article 96 according to which the meeting quorum for the assembly shall be the one-third of its full membership for all business including elections. The amendment package was designed with a view to preventing the reoccurrence of the parliamentary deadlock in the election of the President. The amendment was carried to the Constitutional Court by the outgoing President Ahmet Necdet Sezer and the RPP deputies. But this time the Court rejected the claim of unconstitutionality on 5 July 2007.[12] Meanwhile President Sezer had already submitted the amendment to referendum as he was entitled to under Article 175 of the Constitution, and on October 21, the amendment was adopted with a 68.95% majority with a turnout rate of 67.51%.[13] Thus, another major collision between the Court and Parliament ended with a victory of the latter.

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[11] Constitutional Court decision, E. 2007/45, K. 2007/54, 1 May 2007, *Resmi Gazete*, 27 June 2007, N° 26565.

[12] Constitutional Court decision, E. 2007/72, K. 2007/68, 5 July 2007, *Resmi Gazete*, 7 August 2007, N° 26606.

[13] Yüksek Seçim Kurulu (Supreme Board of Elections), decision N° 873, October 2007, http://www.ysk.gov.tr/ysk/docs/genelge/2007/200-873.htm.

There are many other areas of judicial activism which, however, has not led to an adverse reaction by political elites and, consequently, to constitutional amendment. One concerns the power of the Court to issue stay orders for legislation under review. Neither the 1961 nor the 1982 Constitutions gave the court such a power explicitly or implicitly, and until 1993 the Court refused to issue stay orders. However, in 1993 it changed its earlier rulings arguing that such power is inherent in the judicial process in cases where the implementation of the law would lead to irreparable damages.[14] Since then the court has stuck to its new ruling and issued 52 stay orders (out of a total number of 92 requests) between 1993 and March 2005.[15]

A similar controversy concerns the Council of Ministers' power to issue law-amending ordinances (decree-laws), introduced into the Turkish constitutional system by the constitutional amendments of 1971 and maintained, even strengthened, by the Constitution of 1982 (Art.91). Such power was extensively used by the Özal government in the 1980's until the Constitutional Court severely limited its use by its highly controversial decisions at the end of the decade. The court argued that law-amending ordinances can be issued only in important, urgent, and necessary cases and for a reasonably short period.[16] According to the Court's reasoning, the issuing of an ordinance beyond these limits would constitute a delegation of the legislative power forbidden by Article 7 of the Constitution. These rulings have been severely criticized on the grounds that the additional conditions imposed by Court, such as importance, necessity, urgency, and short duration, have no place in the Constitution. Thus, in a sense, the Court has acted as the constituent power, exceeding its constitutional competence.[17]

The Court also severely limited the scope of the law-amending ordinances issued in times of war, martial law, and the state of emergency. The 1982 Constitution excluded such ordinances from the review of the Constitutional Court (Art.148). Nevertheless, the Court in its two rulings rendered in 1991 saw itself competent to review whether such ordinances were indeed "required by the

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[14] Constitutional Court decision, E. 1993/33, K. 1993/40–42, 21 October 1993, *AMKD*, N° 29, vol. 1, pp. 574–81.

[15] Kemal Başlar, "Anayasa Yargısında Yeniden Yapılanma" (Reorganization in Constitutional Jurisdiction), *"Demokrasi Platformu"*, vol. 1, N° 2 (Spring 2005), p.94.

[16] Constitutional Court decisions, E. 1989/4, K.1989/23, 16 May 1989, *AMKD*, N° 25, p. 245; E. 1988/64, K. 1990/2, 1 February 1990, *AMKD*, N° 26, pp. 63–64, 68, 73; E. 1988/62, K. 1990/3, 6 February 1990, *AMKD*, N° 26, p. 115.

[17] Özbudun, *op.cit.*, p.236; Kemal Gözler, *"Türk Anayasa Hukuku"* (Turkish Constitutional Law) (Bursa: Ekin Kitabevi, 2000), pp. 692–704.

state of emergency." The Court reasoned that the state of emergency is limited by time and location. Therefore, an ordinance containing provisions applicable outside the emergency zone or beyond its duration is not an emergency ordinance required by the state of emergency, and hence subject to the review of the Court. Likewise, the Court reasons, any amendment to ordinary laws brought about by the ordinance is unconstitutional, since permanent changes in laws are incompatible with the temporary nature of the state of emergency.[18] These rulings can be praised as they enabled the Court to exercise review in an area where fundamental rights are not sufficiently protected. On the other hand, it may be argued that the Court practically abolished the restriction on its review powers in cases of emergency, since to ascertain whether an ordinance is indeed required by the state of emergency is tantamount to review its constitutionality. Furthermore, if an emergency ordinance cannot change existing laws, one may wonder what is the practical significance of such an ordinance.[19]

A particularly telling example of the collisions between the Court and legislature concerns the headscarf issue. The liberal-conservative majority party in Parliament (the Motherland Party) passed a law in 1988 permitting female university students to cover their hair and the neck on account of their religious beliefs. The Constitutional Court invalidated the law arguing that in a secular state, laws cannot be based upon religious injunctions.[20] Thereupon, the Parliament passed another law stating that dressing is free at universities so long as they are not against the existing laws. The Court did not invalidate this law, but interpreted it "in conformity with the Constitution" referring to its earlier decision and stating that the new law did not permit the wearing of religious garments.[21]

The political elites belatedly reacted to the Court's headscarf rulings by adopting a constitutional amendment on 9 February 2008 involving Articles 10 and 42 of the Constitution. The paragraph added to Article 42 stipulates that "no one shall be deprived of his/her right to a higher education for any reason whatsoever unless explicitly stated by law. The scope and limits of this

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[18] Constitutional Court decisions, E. 1991/6, K. 1991/20, 3 July 1991, *AMKD*, N° 27, vol. 1, pp. 375–421; E. 1990/25, K. 1991/1, 10 January 1991, *AMKD*, N° 27, vol. 1, pp. 100–107.

[19] For a critical analysis of these rulings, see Gözler, op.cit., pp. 775–89.

[20] Constitutional Court decision, E. 1989/1, K. 1989/12, 7 March 1989, *AMKD*, N° 25, pp. 148–152.

[21] Constitutional Court decision, E. 1990/36, K. 1991/8, 9 April 1991, *AMKD*, N° 27, vol. 1, pp. 300–301; for a critical analysis of these rulings, see Mustafa Erdoğan, *Anayasa ve Özgürlük* (Constitution and Liberty) (Ankara: Yetkin Yayınları, 2000), pp. 188–197.

right shall be regulated by law." The amendment adopted by a record high number of deputies (411 out of a total number 550) intends to nullity the effect of the Constitutional Court's rulings alluded to above. However, the major opposition party, the Republican People's Party, declared its intention to challenge the amendment before the Constitutional Court. Therefore, the end of the battle is not yet in sight.

It may be concluded that the Court, while overly cautious and conservative in human rights cases, has demonstrated a marked pro-state activism in cases that involve the fundamental values of the Turkish state, namely a unitary and secular nation-state. The broad interpretation given to these principles by the Constitutional Court and other parts of the official elites has led many observers to argue that the 1982 Constitution has an "official ideology" strongly supported and guarded by such elities.[22] It has been argued in the same vein that the Court's attitude, particularly in the party prohibition cases, represents an "ideology-based" paradigm in contrast to a "rights-based" paradigm.[23] It has been pointed out above that certain broad and vague terms in the 1982 Constitution, particularly in its Preamble, allow the Court to exercise a wide margin of appreciation in its review of constitutionality. However, much more than the text of the Constitution, the pervading philosophy of the Kemalist Republic and the powerful socialization processes associated with it are responsible for the state elites' tendency to act as the "guardians of the state" rather than the guardians of civil and political rights.[24]

The two pillars of the founding ideology of the Kemalist Republic are the unitary nation-state and the principle of secularism. The Turkish Constitutional Court has been particularly sensitive to particularistic ethnic claims which it considers incompatible with the unitary nation-state. Similarly, the Court has given an exceedingly rigid interpretation to secularism. Thus, in the headscarf decision alluded to above, the Court reasoned that "in the secular state which is purified from religious rules, based on reason and science, and leaves religious beliefs to the conscience of the individuals, the legal order cannot be based on

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[22] See, for example, Fazıl Hüsnü Erdem, *"Türkiye'de 'İdeolojik Devlet' Gölgesinde Yargı ve Bağımsızlığı Sorunu"* (The Problem of the Judiciary and its Independence in the Shadow of the 'Ideological State' in Turkey), *Demokrasi Platformu*, vol. 1, N°2 (Spring 2005), pp. 51–69.

[23] Zühtü Arslan, *"Conflicting Paradigms: Political Rights in the Turkish Constitutional Court", Critique: Critical Middle Eastern Studies*, vol. 11, N° 1 (Spring 2002), pp. 9–25.

[24] Ergun Özbudun, *"State Elites and Democratic Political Culture in Turkey"*, in Larry Diamond, ed., *"Political Culture and Democracy in Developing Countries"* (Boulder and London: Lynne Rienner Publishers, 1994), pp. 189–210.

religious injunctions ... In the conduct of the state affairs all regulations must be based on the rules of the law ... Laws cannot be based on religion. If statutes do not deduce their principles from life and law, but from religion, the principle of the rule of law will be violated". The Court further argued that the meaning of the secularism "cannot be limited to the separation of religion and affairs of the state. It is a milieu of civilization, freedom and modernity, whose dimensions are larger and whose scope is broader. It is Turkey's modernization philosophy, its method of living humanly. It is the ideal of the humanity The supreme and effective powers in the state are reason and science, not religious rules and injunctions. Religion is an act of faith between God and human being, taking its place within his conscience".[25] Thus, according to the Court, the ultimate aim of secularism seems to be to privatize and individualize religion and to ban or limit its visibility in the public space, a concept radically different from the notion of secularism prevalent in most Western democracies.

Thus the future role of the Constitutional Court seems to be intimately tied to the resolution of a fundamental conflict between two notions of democracy in Turkey, namely a limited democracy under the guidance of an official ideology and the tutelage of official elites, or a truly liberal democracy where the state is an ideologically neutral actor. In the former case, the Court is likely to continue to act as the guardian of the state, inevitably leading to frequent frictions with the elected political elites. In the latter, it will pursue a "rights-based" approach and broaden the scope of fundamental rights and freedoms.

A more positive note is suggested by the fact that despite such collisions with elected authorities, the need for and the legitimacy of the Court has never been seriously challenged. This is remarkable for a country where the supremacy of the Grand National Assembly has long been a fundamental rule of the Republic, at least until the adoption of the Constitution of 1961. Since then the Constitutional Court has been accepted as a very important element of the democratic system, and is likely to remain so in the foreseeable future. However, if the Court's excessively activist attitude continues, the extent of its powers and the method of electing its judges may well become major political issues. No liberal democracy can remain indifferent in the long run to efforts to transform it into a "juristocracy".

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[25] Constitutional Court decision, E. 1989/1, K. 1989/12, 7 March 1989, *AMKD*, N° 25, pp. 147–152.

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Consensus and Discretion: Evolution or Erosion of Human Rights Protection?

I. Introduction

The European Court of Human Rights exercises judicial control over the State Parties to the Convention. The decisions of the Court under Article 46 are binding on the States. The European Convention on Human Rights and its Protocols are agreements under public international law; their observance and the protection of fundamental rights are primarily the tasks of the domestic legal mechanisms and the national judicial system.[1] This is reflected in its so-called "subsidiary" character (although the use of this notion might not be quite appropriate): the European Court of Human Rights exercises its jurisdiction of review only after the exhaustion of domestic remedies. The effectiveness of the Court is dependant on the willingness of the Contracting States to follow its case-law, and it takes into consideration the differing political, social, cultural, legal traditions of the States. The Convention governs a multiplicity of nation-states (not less than 47 for the moment). No doubt, the entire legal framework of the Europe-wide protection of human rights – to quote Macdonald, former judge of the European Court of Human Rights – "rests on the fragile foundations of the consent of the Contracting Parties."[2]

Not only does the text of the Convention rest upon on the consent of the Contracting States but the principles and standards applied by the Strasbourg

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[1] F. Matscher, *"Methods of interpretation of the Convention"*, in Macdonald, Matscher, Petzold (eds.), *The European system for the protection of human rights.* Martinus Nijhoff Publishers, Dordrecht, 1993. p. 76.

[2] R. St. J. Macdonald, *"The margin of appreciation"*, in Macdonald, Matscher, Petzold (eds.) *The European system for the protection of human rights.* Martinus Nijhoff Publishers, Dordrecht, 1993. p. 123.

Court also rely on a judge-made doctrine: that of the consensus doctrine. The doctrine means that in cases of consensus among the States less discretion is left for the States; or, contrarily, the less the consensus, the more margin of appreciation is left for the States.

II. Consensus v. national discretion

Margin of appreciation used to be referred to as power of appreciation, discretion, and latitude.[3] The fields of latitude allowed for the States under the margin of appreciation doctrine can be classified into two main groups, depending on their justifications.[4]

Firstly, differing local circumstances may justify it. The Court first elaborated in detail on the doctrine of margin of appreciation in *Ireland v. United Kingdom*. The main argument was that "national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it."[5] National security, childcare, town and country planning cases belong to this heading.

Secondly, the lack of European consensus, especially in matters of morals, questions related to sex, and blasphemy enlarge the sphere of action of the States. The landmark *Handyside* case pointed out that "it is not possible to find in the domestic law of the various Contracting States a uniform European concept of morals."[6] Similarly, in *Müller and others v. Switzerland*: "the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject."[7]

It became a consistently used doctrine in the jurisprudence of the Strasbourg

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[3] Herbert Petzold, *"The Convention and the principle of subsidiarity"* in Macdonald, Matscher, Petzold (eds.) *"The European system for the protection of human rights"*. Martinus Nijhoff Publishers, Dordrecht, 1993. p. 55.

[4] According to the classification of Latsis, the two categories of margin of appreciation mentioned in this paragraph belong to the "structural concept of margin of appreciation". Under the structural concept, state authorities enjoy a margin of appreciation, in that the Strasbourg Court will not scrutinize their decision. G. Letsas, *"A theory of interpretation of the European Convention of Human Rights"*. Oxford University Press, Oxford, 2007. p. 90. The Court also uses the concept of margin of appreciation in a substantive sense when decides on the legitimacy of interference with individual freedoms as a matter of political morality. *ibid*. p. 84.

[5] *Ireland v. United Kingdom*, Application no. 5310/71, judgment of 18 January, 1978, paragraph 207.

[6] *Handyside v. United Kingdom*, Application no. 5493/72, judgment of 7 December 1976, paragraph 48.

[7] *Müller and others v. Switzerland*, Application no. 10737/84, judgment of 24 May 1988, paragraph 35.

Court that the Convention leaves a power of appreciation to the Contracting States.

The doctrine has a territorial and a temporal scope; both are well illustrated by the reasoning of the *Dudgeon* case.

Under the "territorial" scope the Court allows space for the margin of appreciation because of the territorial relativity of public morals.

In *Dudgeon* the Government drew attention to the profound differences of attitude and public opinion between Northern Ireland and Great Britain in relation to questions of morality. Northern Irish society was said to be more conservative and to place greater emphasis on religious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct. The Court acknowledged that such differences do exist to a certain extent and are a relevant factor. The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland. "Where there are disparate cultural communities residing within the same State, it may well be that different requirement, both moral and social, will face the governing authorities."[8]

In relation to the "temporal" scope of the doctrine, the Court recognized the significance of the legislative evolution within the States, which coincided with the changing attitudes of the States towards questions of morals. In the *Marckx* judgment the Court observed that it "cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments."[9] In *Dudgeon* the Court remarked that it "cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States". [10]

The margin of appreciation is complementary to the consensus: this is proven by the fact that their boundaries move together: the extent of the margin of appreciation fluctuates from a 'slight' and 'certain' to a 'wide' margin. Complementarily, the range of the consensus might shift to the extent of a 'broad' one.[11]

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[8] *Dudgeon v. United Kingdom*, Application no. 7525/76, judgment of 22 October 1981, paragraph 60.
[9] Marckx v. Belgium, Application no. 6833/74, 13 June 1979, paragraph 41.
[10] Dudgeon v. United Kingdom, Application no. 7525/76, judgment of 22 October 1981, paragraph 60.
[11] *Wagner and J.M.W.L. v. Luxembourg*, Application no. 76240/01, judgment of 28 June 2007, paragraph 129. In the original French text: *« La Cour observe qu'en la matière la situation se trouve à un stade avancé d'harmonisation en Europe. En effet, une étude de la législation des Etats membres révèle que l'adoption par les célibataires est permise sans limitation dans la majorité des quarante-six pays. »*

III. Consensus – at what price?

The recognition of the territorial and temporal scope of the margin of appreciation – and accordingly of the consensus doctrine – illustrates that the Convention and the Court's jurisprudence are based on a relativist approach. I agree that the conceptualization of human rights cannot be independent from cultural traditions and is determined by the given historical context. Even the concept of man is changing in time. As formulated by the Hungarian Constitutional Court in its *Abortion decision*: "Given the plurality of equally prevalent moral views in society we cannot even discuss a generally accepted moral concept of man".[12]

The internationalization of human rights as expressed in international documents, and in the Convention itself, is a result of compromises and a certain extent of consent. The important and indispensable mission fulfilled by the European Court of Human Rights over the past nearly five decades has been the supervision of domestic legal systems, even judicial decisions, and the effective enforcement of human rights. In order to keep a balance between the European supervision of domestic human rights' violations, and respect for State sovereignty, the Strasbourg Court has developed the consensus doctrine.

A methodical consideration occurs: how can the Court find out whether the consensus exists or not, and to what extent? The autonomous interpretation by the European Court of Human Rights means that the concepts of the Convention are to be regarded as parts of a self-governing legal system that must be interpreted independently from the legal systems of the State Parties.[13] Consensus should not necessarily mean the consent of all the parties affected. In the context of the Convention it means rather 'common ground' or 'common denominator'.

Growth of uniform international standards including in the area of human rights is evidence of a clear trend in present-day legal development. Commentators warn of the ambivalent effect of the "globalizing trends towards transnational normativity"[14] on distinct legal traditions. Supposing a consensus among States on certain issues presumes the understanding of

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[12] Hungarian Constitutional Court decision 64/1991. Reproduced in English in László Sólyom and Georg Brunner, *"Constitutional Judiciary in a New Democracy"*. University of Michigan Press, Ann Arbor, 2000. p. 186.

[13] Christoph Grabenwarter, *"Europäische Menschenrechtskonvention"*, 2008. (3. Auflage) p. 38.

[14] Horatia Muir Watt, *"Globalization and Comparative Law", The Oxford handbook of comparative law.* Oxford University Press, Oxford, 2006. p. 586.

different legal cultures, including conceptual languages and legal grammars. The European Court of Human Rights makes possible the encounter and exchange among different legal cultures, elevating them to a high normative level based on legal convergence.[15] Continuous interaction has been expounded between the Strasbourg Court and the national legal systems and domestic tribunals.

Being familiar with the pros and cons of the discussion on the consensus and margin of appreciation doctrines, and being aware of the related arguments,[16] I would like to point to two perils of the interlinked doctrines.

Peril no. 1: minimalism. International law and international judicial organs based on the consent of the Contracting States determine the minimal level of human rights' protection. This is also seen in the case of the European Court of Human Rights. The lack of a European consensus and the consequent discretion or margin of appreciation doctrine open the way for the minimal-level approach. However, even well-established democracies failed several times to comply with these so-called "minimal level standards." The problem to be discussed here is how a "minimal standard" Strasbourg jurisprudence influences the national courts, including the constitutional courts.

Peril no. 2: relativism. The question that rests beyond the balancing between European standards and domestic peculiarities is whether the protection of human rights may vary from country to country as public morals vary? How far do cultural relativism, and the altering nature of what we call contemporary values prevail?

The Court revealed in the *Rasmussen* judgment its flexibility to the use of the doctrine: "The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States."[17] Although the standards

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[15] Vivian Grosswald Curran, *"Comparative Law and Language", The Oxford handbook of comparative law.* Oxford University Press, Oxford, 2006. p. 701.

[16] R. St. J. Macdonald, *"The margin of appreciation"*, in Macdonald, Matscher, Petzold (eds.) *The European system for the protection of human rights.* Martinus Nijhoff Publishers, Dordrecht, 1993. 83–124; H. C. Yourow, The margin of appreciation doctrine in the dynamics of European human rights jurisprudence. Martus Nijhoff, Dordrecht, 1996; Paul Mahoney, *Marvellous richness or invidious cultural relativism?* HRLJ 19 (1998) pp.1–6; Onder Bakircioglu, *The application of the margin of appreciation doctrine in freedom of expression and public morality cases.* German Law Journal 8 (2007) N° 7.

[17] *Rasmussen v. Denmark*, 28. 11. 1984, Series A 87, paragraph 40. For the discussion of the context of the concept, see Jeroen Schokkenbroek, *The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation,* Human Rights Law Journal 19 (1998) p. 21.

used by the courts necessarily vary when decisions are taken on the ground of the differing circumstances, the excessive flexibility of those standards undermines the credibility of judicial decisions. This might be the case as seen in the interplay of consensus and discretion, both common criteria, and the margin of appreciation are flexible and varying, respectively.

IV. The unintentional effects of the decisions of the European Court of Human Rights: the lessons of the Rekvényi case

There is an obvious interaction between national and international protection of human rights. Even if international courts do not supervise national courts, their jurisprudence serves as a source of inspiration for national judges. On the other hand, the high level of protection by the States ("common constitutional heritage") sets an elevated international standard. To formulate it in other words: the consensus among States on the protection of human rights guarantees a high standard while the lack of consensus opens up a greater area for discretion or, in the language used by the European Court of Human Rights, for the margin of appreciation.

The margin doctrine balances between the uniform application of the Convention and the domestic application of human rights. In other words: the European supervision is combined with the national margin of appreciation.[18] When the Court respects the power of appreciation of the States, it exercises judicial self-restraint as it does not use, to the full extent, its powers of supervision or review.

Thus the influence of a human rights international court is basically inspirational for the national courts. This is exemplified by the impact of the European Court of Human Rights on the then newly founded Hungarian Constitutional Court.

The Convention influenced the constitutional review and the interpretation of the Constitution in Hungary. The Constitutional Court referred to the Convention even before its ratification by Hungary. "In the first, formative period of constitutional jurisdiction in Hungary, however, referring to a given provision of the Convention was much more a demonstration of considering and searching for 'European standards', it was aimed more at linking up Hungarian

[18] Marc-André Eissen, *"The Principle of proportionality in the case-law of the European Court of Human Rights"*, in Macdonald, Matscher, Petzold (eds.) *The European system for the protection of human rights*. Martinus Nijhoff Publishers, Dordrecht, 1993. p. 127.

legal thinking to 'European norms' than to use this international instrument in its proper role in the course of constitutional review."[19]

For the contrary effect of permissive Court decisions one can refer to cases such as *Rekvényi v. Hungary*.[20] In the Rekvényi judgment the Court "showed understanding for the transitional period of consolidation of democracy"[21] – as President Wildhaber expresses it when reviewing the judgment. Unfortunately, the case had not an evolving but rather an erosive effect on the jurisdiction of the Hungarian Constitutional Court. Over the following years, the Constitutional Court, referring to the judgment of the European Court of Human Rights in a number of consecutive decisions, definitely relaxed the domestic constitutional standards.

This went against the original philosophy of the Hungarian Constitutional Court regarding a transition that firmly stated: the unique historical circumstances of the transition and the given historical situation can be taken into consideration. "However, the basic guarantees of the rule of law cannot be set aside by reference to historical situations… A State under rule of law cannot be created by undermining the rule of law."[22]

The Hungarian Constitutional Court, diverging from its earlier interpretation in 2000, based the limitation of the freedom of expression[23] and the freedom of assembly on the Rekvényi case.[24] "The Court judged the social causes necessitating the restriction by taking into account the particular features of Hungarian history in the case *Rekvényi v. Hungary*."[25]

In its earlier decisions the Constitutional Court had consistently assessed the historical circumstances (most often the change in the political regime taken as a fact) by acknowledging that such circumstances may necessitate some restriction on fundamental rights, but it has never accepted any derogation from the requirements of constitutionality on the basis of the mere fact that

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[19] László Sólyom, *"The interaction between the case-law of the European Court of Human Rights and the protection of freedom of speech in Hungary"*. In *Studies in memory of Rolv Ryssdal*. Heymann, Köln, 2000. p. 1317f.

[20] *Rekvényi v. Hungary*, Application no. 25390/94, judgment of 20 May 1999.

[21] Speech given by Mr Luzius Wildhaber on the occasion of the opening of the judicial year, 20 January 2006, p. 20.

[22] Hungarian Constitutional Court decision 11/1992. Reproduced in English in László Sólyom and Georg Brunner, *"Constitutional Judiciary in a New Democracy. University of Michigan Press"*, Ann Arbor, 2000, p. 221.

[23] Hungarian Constitutional Court decisions 13/2000. and 14/2000. (the latter extensively citing the judgment in the *Rekvényi* case)

[24] Hungarian Constitutional Court decision 55/2001.

[25] Hungarian Constitutional Court decision 13/2000.

the political regime has been changed. Legislation justified by the change in the political regime as well as the restrictions contained in such laws had to remain within the limits of the Constitution in force. The Constitutional Court decision continued with the examination of the European Court of Human Rights. "Regard being had to the margin of appreciation left to the national authorities in this area, the Court finds that, especially against this historical background, the relevant measures taken in Hungary in order to protect the police force from the direct influence of party politics can be seen as answering a 'pressing social need' in a democratic society."[26]

Thus the decision of the European Court of Human Rights – unintentionally – had an impact that lowered the standards that the Constitutional Court had previously used.

In the Case of *Bukta and others v. Hungary*, the Strasbourg Court rightly found "that the dispersal of the applicants' peaceful assembly cannot be regarded as having been necessary in a democratic society in order to achieve the aims pursued."[27] Paradoxically, the Court by this judgment reviewed the decision of the Budapest Regional Court that referred to the case-law of the Strasbourg Court and to a decision of the Constitutional Court that cited the *Rekvényi* judgment.

V. Conclusions

I would suggest a caveat, a warning in relation to the use of international standards: while respect for national or other communities' distinct legal traditions by a European court should be considered an appreciable judicial self-restraint, reducing the domestic level of protection by domestic courts with the excuse of lower minimal standards based on common grounds is not acceptable.

Another danger of the two-sided consensus concept can be mentioned. It is doubtful whether consent means unanimity or a practice accepted by a large majority of the States. As mentioned earlier, in the context of the Convention it means rather the 'common ground' or the 'common denominator'. Even if the application of the Convention does not require the acceptance of the universal character of the human rights protected therein, certain 'hard core'

[26] Hungarian Constitutional Court decision 14/2000. The cited part of the *Rekvényi* case is paragraph 48.

[27] *Bukta and others v. Hungary*, Application N° 25691/04, judgment of 17 July 2007, paragraph 38.

human rights should be defended even against the majority or the consent – similarly to the unalterable basic rights (*unabdingbarer Grundrechtsstandard*) in Germany. As rightly said by US Supreme Court justice, Judge Jackson: "The very purpose of a Bill of Right was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's rights to life, liberty, and property, to free speech, a free press, freedom of worship and assembly may not be submitted to vote; they depend on the outcome of no elections."[28]

Freedom of expression (even in commercial speech) was also an overriding value for the nine judges in the minority in a ten-to-nine split decision brought by the European Court of Human Rights in the case *Markt intern*: "We find the reasoning set out therein with regard to the 'margin of appreciation' of States a cause for serious concern. As is shown by the result to which it leads in this case, it has the effect in practice of considerably restricting the freedom of expression in commercial matters."[29]

In some cases the Court did not consider as decisive the lack of a European consensus. In the case of *Hirst v. the United Kingdom*, the Court observed that "As regards the existence or not of any consensus among Contracting States, the Court would note that […] even if no common European approach to the problem can be discerned, this cannot of itself be determinative of the issue."[30]

The German Constitutional Court offered a viable solution to the relationship of international and domestic standards in its *Solange II*,[31] *Maastricht*,[32] and *Görgülü*[33] cases. As the Court formulated in the latter judgment concerning the relationship between the Convention and the Basic Law: "The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of

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[28] *West Virginia State Board of Education v. Barnette,* 319 US (1943) 624, 638.

[29] Joint dissenting opinion of Judges Gölcüklü, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo and Valticos in *markt intern Verlag GmbH and Klaus Beermann v. Germany*, Application N° 10572/83, judgment of 20 November 1989 criticising the margin of appreciation doctrine as referred to by the majority in paragraph 33 and 37.

[30] *Hirst v. The United Kingdom* (No. 2), Application no. 74025/01, judgment of 6 October 2005, paragraph 81.

[31] BVerfGE 73, 339 (1986).

[32] BVerfGE 89, 155 (1993).

[33] BVerfGE 111, 307 (2004).

the Basic Law, provided that this does not lead to restriction or reduction of the protection of the individual's fundamental rights under the Basic Law – something which the Convention does not intend."[34]

Transnational rule of law[35] should leave no discretion in the "hard core" human rights cases, and shall require caution be taken in other cases to avoid the tyranny of the majority and to protect even those communities that are the most vulnerable – the minorities within the States.[36]

[34] BVerfGE 111, 307 (2004), HRLJ 25 (2004) p.103.
[35] Wolf Heydebrand, *"From globalisation of law to la wunder globalisation"*, in David Neelken and Johannes Fest (eds.) *Adapting legal cultures*. Hart Publishing, Oxford and Portland, 2001. p. 118.
[36] Eval Benvenisti, *"Margin of appreciation, consensus, and universal standards"*. 31 NYU Journal of International Law and Politics (1999) 851.

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Professor La Pergola's "Constructive Fantasy"

Over the last two decades of his life, Antonio La Pergola became a prominent figure in the European legal environment. Previously, he had held high-level positions in institutions in his country. But, first and foremost, he distinguished himself as a constitutional law scholar, in his diverse professional roles he showed no less dedication than in the academy.

In the national scholarly landscape, he was known for natural, innate skills as well as for the unique experience of legal doctrines and practices he had acquired elsewhere. At the very beginning of his career, in 1954, he had been at Harvard, where he found an extraordinary melting-pot of scholars, including those Europeans who had remained in the U.S. after the end of the war, and those who had escaped of totalitarian regimes. La Pergola had then the opportunity to attend the courses of leading, albeit very different, scholars such as Paul Freund, Carl Friedrich and Hans Kelsen, whose thinking he himself would confront and analyse for all his life. But he also received their appreciation. In 1988, when I introduced myself to Prof. Freund as La Pergola's pupil, his old teacher looked into the distance, as if thinking to himself nostalgically, and said: "He has a constructive fantasy".

This sentence depicts the core of La Pergola's figure as jurist. While dealing with decisive questions concerning the structuring of legal orders, such as sources of law or the evolution of federal and regional states, he combined creativity with an inclination towards constructive solutions. He plunged into the deepest levels of legal orders in order to search for a correct statement of the issue at stake, and then advanced his proposals, which were at the same time original and compatible with the principles of such orders. To this end, he could rely on a vast array of tools experimented with in the *common law* not less than in the *civil law* system. In spite of the fact that, forty years ago, those systems were far more distant than they are now, La Pergola was well acquainted with both, and this helped him to avoid bias when approaching any legal issue. He knew all the piano's keys, and how to choose the right ones for each occasion.

These features appear clearly in *Costituzione e adattamento dell'ordinamento interno al diritto internazionale* (1961). The essay is devoted to the implementation of international law in national legal orders, whose comprehension was then conditioned by a deep theoretical dispute. While the monist theory advocated by Kelsen and his followers asserted the primacy of the international over the national order, the dualist theory, typical of continental Europe's legal tradition since Triepel, claimed that states maintained their own sovereignty vis-à-vis international law. La Pergola demonstrates that implementation of international law is a concrete legal phenomenon, which needs to be dealt with irrespective of such dispute.

A parallel approach, apart from the obvious differences, might be found in the Constitutional Court's opinion, written by La Pergola, of decision n. 170 of 1984, which marked a watershed in the jurisprudence concerning the relationship between Community law and national law. Even in that case he had to take account of two opposite views, namely the concept of the absolute primacy of Community law over national law held by the European Court of Justice, leading to the conclusion that national judges were bound to enforce in any case the former, and the dualistic vision of the previous jurisprudence of the Constitutional Court, according to which judges had to submit before the Court any question of compatibility of national legislation with Community law. The 1984 decision afforded a third solution, due to a balanced as well as innovative approach which still drives forward the jurisprudence on the topic.

From the perspective of the Court, interpretation of Article 11 of the Italian Constitution (stating that the Republic agrees to "limitations of sovereignty" whereas necessary for a legal order ensuring peace and justice between nations, and promotes and favours international organizations furthering such ends) lay at the core of the issue. The Court interpreted for the first time the words "limitations of sovereignty" in terms of a Republic's self-restraint with respect to the organizations, the European Community included, furthering the ends which Article 11 referred to. From this it followed that the two legal orders were "autonomous one from each other, albeit co-ordinated". The conclusion was that ordinary judges were bound to enforce Community law to the extent that it was self-executing, irrespective of national legislation concerning the same object. However, they should submit the question before the Court, whenever they believe Community law might encroach upon the fundamental principles of the Italian Constitution.

This solution corresponded to the Luxembourg Court's insistence on a direct

enforcement of Community law in national legal orders, without achieving, however, its vision of an absolute primacy of the former over the latter. To the extent that it interpreted Article 11 in terms of a Republic's self-restraint, the Constitutional Court held the view that the national legal order was not hierarchically subordinated to the European Community, maintaining the power of final supervision over EC legislation violating supreme constitutional principles. Therefore, the Court revealed the intention of furthering European integration without surrendering to the ECJ's pretentions.

But La Pergola was also fully aware of the historical contingency of legal constructions. It is not surprising that, after the Maastricht Treaty, he promptly admitted that Article 11 could not sufficiently meet the new challenges of European integration, suggesting a corresponding amendment (*L'Unione Europea fra il mercato comune ed un moderno tipo di Confederazione. Osservazioni di un costituzionalista*, in *Rivista trimestrale di diritto e procedura civile*, 1993, 25).

In his thinking, structure and history are mutually connected in the legal systems' developments. This is revealed even more clearly in his approach to federalism. Among his contributions on the topic, reference will be made here to *Residui "contrattualistici" e struttura federale nell'ordinamento degli Stati Uniti* (1969), which focused on the question of whether, and of to what extent, the conventional origins of the U.S. have conditioned the structure of the federation as drafted in Philadelphia, namely the technical devices which the Founding Fathers adopted in distributing powers and competences among the federation and member states (p. 23).

To this end, La Pergola firstly rejects the opposing views which might be proposed against such research. In his view, the continental doctrine which, from Jellinek onwards, deemed irrelevant on legal grounds the historical backgrounds of different States, puts aside too early the processes leading to federations (p. 14). On the other hand, the results of Friedrich's emphasis on the "federalizing process" appears to him rather fruitless, leading to a mere substitution of the notion of State with that of political community (p. 22).

After having demonstrated the legitimacy of his research on methodological grounds, La Pergola concentrates on Calhoun's theory of consent, which relied heavily on the fact that the federation was born from treaties among sovereign states, as enshrined in the Articles of Confederation, with the objective of asserting that the amendment procedure provided in the U.S. Constitution was governed by the unanimity principle. Such theory was far from being a relic of the past. It still survived in Kunz's consideration of federal states in terms of "international law by analogy". La Pergola replies that the unanimity principle

should not be implicitly inferred from Article V, establishing *inter alia* that no State, without its consent, shall be deprived of its equal suffrage in the Senate. In his view, within the historical background of American federalism, the amendment procedure appears rather "a simplified solution" with respect to the unanimity principle, governing the decision-making process of the central authorities of the Confederation (p. 249).

This conclusion, in turn, is decisive for enlightening the ultimate meaning of a rigid constitution in a federal state. While in the unitary state the only function of a rigid constitution is to limit the legislative power, in the federal context it also limits the member states sovereignty, granting at the same time their competences *vis-à-vis* the federation (p. 208).

Such thesis is now widely accepted among scholars. But, forty years ago, the perspectives of public lawyers did not usually surmount national borders, and only exceptionally would devote serious attention to foreign countries experiences. La Pergola's studies on the relationships between legal orders and on their respective internal structures paved the way to comparative constitutionalism and, more importantly, to the awareness that comparison integrates our studies rather than being a mere curiosity. It is not surprising that, then, that some Italian scholars did not look at the recent rise of "multivel constitutionalism" as if it was an absolute novelty, being capable to discern its features of real discontinuity with the past. This happened because they were already at ease with a legal articulation of public power far more complex than that resulting from the traditional *Allgemeine Staatslehre*.

In this respect, La Pergola's contribution to the development of constitutional science needs to be understood in light of the background of the crisis affecting the state-centred tradition which had characterized public law in continental Europe until the Second World War. The Constitutions which then entered into force marked indeed a turning point in the history of constitutionalism. But, rather than changing immediately and automatically the legal landscape, they announced changes which needed to be both implemented and interpreted. La Pergola belonged to the generation of judges, scholars and politicians that was called upon to deal with the constitutional issues posed at this respect. And his contribution appears unique in the vast field concerning the relationship of the national legal order with international and Community law, including the effects of international and Community obligations on the distribution of functions among the central state and regions. It was not only a question of technical expertise. What was needed was also an understanding of when the opening of the national to other legal orders would be deemed mature, and what

conditions were required for such an opening. To this end, La Pergola could rely on a fine political ability, in conjunction with initiative and prudence.

He told me once that one should keep oneself far from an ideological approach to politics, without being indifferent to it. His writings confirm such attitude, revealing precise political ideals. His intellectual training had occurred during the Fifties, and was therefore influenced by the generation of political and legal thinkers brought up after the First World War in Europe and in the U.S. It is not surprising that La Pergola's references include "social engineers" of the New Deal epoch such as Felix Frankfurter, and the leader of the Labour party Harold Laski (*Un momento del federalismo americano: entra in scena il "New Deal"*, in *Scritti on. Mortati*, I, Milano, 1977, 663 ss.). In relation to continental Europe's concerns, he was certainly inspired by the great losers of the Thirties who had looked too far forward, Hans Kelsen particularly, whose model of constitutional justice was adopted in many countries with the return to democracy (*Prefazione* a H.Kelsen, *La giustizia costituzionale*, Milano, 1981). On the same vein, references can be found to Boris Mirkine-Guetzévitch's emphasis on the "*droit constitutionnel international*" and to the members of the 1931 Spanish Constituent Assembly (*Regionalismo, federalismo e potere estero dello Stato. Il caso italiano ed il diritto comparato*, *Relazione al Convegno Internazionale su Federalismo, regionalismo ed autonomie differenziate*, *Palermo-Taormina, 24–28 settembre 1985*, Palermo, 1991, 345 ss.).

I remember my first meeting with him at the Constitutional Court, thirty years ago. He delivered his thoughts sitting behind a big desk, full of cigars and books which came from some of the most diverse countries of the world. It was a monologue, not only because of my young age, but also because it was his way of teaching, and of transmitting an infinite passion for research. His attention was indeed centred on the essay I was preparing under his guide. But he did not limit his focus to it alone. He would abruptly jump to other issues, following connections which were rather mysterious for me. When I became acquainted with them, I realized how precious they were for acquiring a certain methodology in constitutional law studies. But I also realized my Professor's generosity in disseminating hints and suggestions, namely a further aspect of his deep humanity.

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Ambassador of Poland to the Holy See

The Role of the Constitution in the Creation of a Law-Governed State

The last decade of the 20th century has been an exceptional period for constitutional law. It was a time in which a great number of European states found themselves in a dynamic process of creating new constitutions. The period was unique in that most of those states found themselves plunged into that process without a preparatory stage to precede such an effort[1].

In most cases, the period in which new constitutions were drawn up had not been preceded by profound theoretical debates on political models and solutions. The rapid pace at which social and political changes were taking place at the early stages of the transformation required constitutional 'action', compared to which intellectual discussion was secondary. It was effectively limited to a kind of commentary on the constitutional measures being taken and the solutions being chosen. Poland was probably the only exception, since theoretical work on the future constitution had been conducted prior to the changes that took place in 1989.

The profundity of the changes taking place in Poland after the elections of June 1989 and in other countries after the fall of the Berlin wall required constitutional-law studies and analyses from a completely new and different perspective. This no longer involved a modified or improved form of socialism but a different political system based on totally different premises. The challenge at hand was to determine what exactly those should be. The new situation raised a number of questions. The taboos that limited discussion in the previous period had disappeared. Every query was permitted and legitimate. There were no forbidden questions, just as there were no longer any ready, pre-planned "solely correct replies". There were the generally outlined goals that individual states wanted to achieve as a result of

[1] This was one of the main reasons why the Venice Commission was established: to help the new countries in the constitution-making process.

constitutional changes. Those goals were similar or even identical in individual states. It is they that determined the changes in constitutions.

Those goals comprised the following:

1. All those states wanted in various ways to break with the past of their authoritarian, centrally ruled states, both in the political and the social spheres.

2. All those states wanted to adjust to so-called European standards, encompassing both the area of human rights as well as the democratic organisation of the state. Without a doubt, the demands and proposed solutions expressed at that time were formulated in an exceptionally general, almost slogan-like manner. They were often presented in the form of a slogan or battle cry meant to symbolise a certain democratic tendency. In a social atmosphere marked by the pursuit or, rather, expectation of something new, slogans were needed to rally public support and acceptance for what was being done. That acceptance, as time would show, was rather short-lived, probably because of the generality of the outlined goals. In the initial phase of transformation, however, that was sufficient.

The new situation, however, created not only chances but also the danger of committing errors. In the most general terms, the situation might be compared to the constitutional atmosphere that prevailed when the American constitution was being drawn up. As one American writer put it. 'Americans sometimes speak of there having been a "constitutional moment" – the era that produced the federal Constitution and Bill of Rights. Reinforced by such metaphors as Catherine Drinker Bowen's "Miracle at Philadelphia", this notion of the constitutional moment obscures the fact that the founding period of American constitutionalism was one of trial and error. The state constitutions drafted in 1776 were often quite flawed documents, and the Article of Confederation (1781) soon proved inadequate to the purposes of the emerging nation. By the same token, the countries of Central and Eastern Europe seem to have embarked on a process of trial and error in the making of new constitutions.'[2]

The new constitutions arose from the rubble of the shattered constitutional monolith of the previous period. The constitutions of the previous system had been created according to a similar pattern. Often even the chapter breakdown was nearly identical. That situation resulted from the fact that all constitutional law and constitutional structures had been subordinated to the model of a centralised state, based on the principle of uniform power which in reality

[2] A.E. Dick Howard, Constitutional Reform, in. Transition to Democracy in Poland, ed. by Richard F. Staar, New York 1993, p. 107.

meant the leading role of the party. The principle of unity of power in its doctrinal and constitutional construction was originally intended to show the dominance of parliament as the highest expression of the Nation's will -- in reality it meant the dominance by party structures. The principle of unity of power was reduced to the concept of the overriding role of the communist party within the system of state organs. Constitutions drawn up on the basis of that principle were essentially divorced from the cultural roots and the political traditions of individual states. All of them were modelled on the Soviet constitution of 1936. Their characteristic feature was a rift between the form of the constitution, its articulation, its expression as a written document and the tradition from which that constitution grew. It was not surprising then that one of the questions asked at the threshold of work on a new constitution was its reference to tradition.

The history of constitutionalism is nothing more than man's quest for a limit on the absolute power of its bearers and an attempt to create a spiritually, morally and ethically justified authority instead of subservience to the exiting power's absolutism, as Loewenstein wrote.

In the most concise manner possible, those words encapsulate the very essence of a constitution as well as answering the basic question as to why we need a constitution and what role it plays in a democratic state.

Whilst considering that idea, it should be added that a constitution is needed to set the limits of a state's activities, that it might not place itself above its citizenry, but should also give people assurances of their existence as citizens who enjoy rights and benefit from protected liberties.

A constitution signifies a way of organising the life of the community known as the state. A constitution fulfils an integrating function, because it fuses the totality of legal regulations into a uniform system. A constitution should also perform a stabilising function by fostering the legal system's independence of surpassing political changes. It should endow rules of the game with a sense of certainty and stability.

The basic question therefore is whether a constitution truly constitutes a fundamental legal act or whether it is simply treated as an incidental political document. In order for constitutional norms to effectively limit power, an awareness must exist in society and amongst the political elite regarding the fact that the constitution truly is a legal act which clearly organises public life. It is important therefore to foster a belief that the constitution is not only an instrument used in various political situations for the convenience of various political groups. The constitution cannot be a political bargaining chip in the

hands of the ruling elite, but must display elements of permanence. A constitution's permanence may not be based solely on arithmetical considerations stemming from the relationship between the numerical strength of the ruling and opposition parties in parliament. But, as J. Zakrzewska has written, even the best constitution cannot prevent abuses of the law, social conflicts or crises caused by the unbridled ambitions of politicians. Nevertheless, a constitution is meant to create such legal norms that would defuse such conflicts and tension and make the abuse of power more difficult as well protecting the citizen and ensuring a democratic order.[3]

It is no coincidence that one of the traits of a constitution is its rigidity, i.e. that it can be changed only by means of more exceptional measures than is the case with ordinary legislation. This goes beyond purely formal requirements and should be rooted in the public's belief in of the constitution as a legal act that is rarely and not too easily changed. Only when such a perception of the constitution becomes prevalent in the minds of the political elite and throughout society can it be stated that its provisions are functioning restrictively and guaranteeing the behaviour set forth therein.

In the so-called new democracies, which emerged following the disintegration of the Soviet Union after 1989, a quest was undertaken to find solutions that would make the constitution a true authority. Such quests have often taken many years to achieve. By way of example, Poland did not enact its constitution until 1997. Earlier, it had introduced various changes to its old constitution of 1952 and in 1992 had adopted a 'small constitution', a legal act of a purely interim nature, intended to remain in force only until a full, proper constitution could be promulgated.

Agreement plays a key role in the creation of every constitution. That goes beyond agreement amongst ruling parties or even within parliament. Of paramount importance is reaching an agreement with society which should rally round the values protected by the constitution.

In that context, the first question that should be raised is around which constitutional solutions should society be rallied for it to acknowledge the constitution as its own, thereby ensuring the constitution's greater permanence?

Institutional solutions should stem from a given nation's political tradition and political culture. But here some further questions arise: "to what extent can and should a democratic constitution accommodate a society's history, culture

[3] J. Zakrzewska, Spór o konstytucję (Dispute over the Constitution), Warsaw 1993, p. 190.

and apparent peculiarities? What features of history, culture and current circumstances are relevant to constitutional design and how precisely, in specific workings and provisions, can we accommodate these things?'[4] At the same time one must be aware of the fact that every constitution is also an act expressing specific political options backed by the parliamentary majority. But, in order to enact a constitution between different political forces, a compromise must be achieved. That cannot be a compromise of a purely instrumental nature, however. It should not undermine the basic objective for which a constitution is created. And it should be asked whether it will be legible and clear to society?

The quest for a compromise and an attempt to balance different political anxieties while constitution-building efforts are under way may go astray. And it may lead to the creation of a legal act that raises numerous legislative misgivings. Such was the fate of Poland's 'small constitution' of 1992. The view was even expressed that its contents and the way in which it was adopted reflected the elite's critical attitude towards the substance and enactment process of the law. That accusation was unsubstantiated and untrue. The truly dominant factor in that constitution's enactment process was the plethora of diverse anxieties of different parties over giving too much power to the president, to parliament or to the government and prime minister. As a result, efforts were made to caveat everything with provisos and create a complicated system of checks and balances. But instead of achieving a balance of power, it paved to way to circumventing constitutional provisions.

Many doubts were expressed concerning the detailed powers of the President as regards the appointment of three Cabinet ministries: Foreign Affairs, National Defence and Internal Affairs. The Constitution was very laconic on this subject. Article 61 regulated only that the motion to appoint Ministers of Foreign Affairs, National Defence and Internal Affairs is presented by the Prime Minister after consulting the President.

It is against this background of mutual relations between the two principal actors that the dispute took place over the shape of the systemic model. Each party sought to apply different tools to reflect a different understanding of the model of the state system. The President, chosen in a general election, claimed the need for stronger powers. Consequently, he interpreted many prerogatives inscribed into the Small Constitution in light of the presidential, rather than

[4] Peter C. Ordeshook, Are Western Constitutions Relevant to Anything Other than the Countries They Serve?, draft paper prepared for the workshop on 'Constitutions in Transition', Berlin, June 28 and July 2, p. 2.

parliamentary, system. Real tension between the written Constitution and the actual state of affairs was then bound to emerge. Through his action, the President no doubt wanted to pressurise the Constitutional Commission and to influence the shape of the future model of state system towards a presidential system. Each constitutional ambiguity was tapped by him as an occasion for broader interpretation of the Constitutional powers of the President. The above-mentioned Article 61, concerning three Cabinet ministers, is one such example. Its widely-drafted provisions led the Presidential chancellery to create an interpretation that there are so-called presidential portfolios, involving a special role for the President in ministerial appointments. In practice, such a particular fashion of interpretation of the provision about consulting the President was that, in reality, it was actually the President who proposed the ministerial candidates. The interpretation differences led to a long deadlock in the appointment of the Minister of National Defence, when after the resignation of a former minister the President did not agree on any candidate proposed by the Prime Minister. In effect, the latter yielded and consented to the Presidential candidate. A similar situation developed in the case of the Minister of Foreign Affairs.

Significantly, after President Wales's electoral defeat in 1995, all those ministers tendered their resignations. Through consistent broadening of the interpretations by the Presidential chancellery, an attempt was made to treat these ministers as a quasi-secretaries under the Presidential system, which meant that they considered themselves more related, and responsible, to the President than to the Cabinet of which they were members. Here was a clear clash, as seen in an attempt to force a custom characteristic of the Presidential system against a Constitution which provided for the Parliamentary system, even if tilted towards a Presidential one.

The constitution of a democratic state is not an act which the authorities grant citizens. Instead, it can be seen a kind of agreement concluded by citizens themselves. Consequently, it is citizens who define rights, obligations and mutual benefits, as well as who determine the scope of the burden they are willing to shoulder for the common good. The best example reinforcing that lone of thought has been the 'problems' connected with what has been referred to as the European constitution. Attempts to grant it to the European community have failed. Citizens had their own idea on the subject and expressed it in general referenda in France and the Netherlands (2005). More recently, the Irish followed suit by rejecting a treaty not officially called a 'constitution', but undoubtedly displaying constitutional attributes nonetheless.

A constitution must be real. In order to constitute the basis of a democratic order it cannot be based on empty declarations. Long ago, F. Lassale wrote on such subject. [5] In the mid-19th century he wrote that 'written constitutions possess value and durability only when they exactly express the real balance of forces existing in society. When a written constitution does not correspond to the real constitution conflicts erupt [...] In the long run, in such a conflict a written constitution that is nothing more than an ordinary scrap of paper must unconditionally submit to a real constitution.' I believe all those involved in constitutional endeavours over the past decade can corroborate those words. Excessive promises contained in a constitution ultimately undermine the authority of the state and of law in general.

For a constitution to constitute the basis of a democratic order therefore, whilst constructing a catalogue of human rights (specially in the area of social and economic rights), forms of subjective law must be avoided wherever the enforcement of subjective law is not possible. That applies to the entire realm of social rights. Of particular danger is the protection of certain values in the form of subjective law, when it is unjustified. In general, that undermines faith in the value of the constitution as a legal act. Such an approach transforms a constitution into an ideological programme which effectively amounts to wishful thinking.

The guarantee of the freedom and dignity of Mankind is a value emphasised by all of Europe's new constitutions. The purpose of that freedom is to respect man's dignity and become an indispensable factor of every person's economic and cultural development, hence also of the entire community known as the state.

One of the principal values of the constitution is the creation of the framework of a strong state, i.e. one that gives the citizen certainty and security, as well as a state in which the authorities' scope of power is restricted. It must provide its citizens with opportunities of various activity within numerous communities outside strictly state structures in accordance with the principle of subsidiarity. A thus organised state should be synonymous with a free society creating opportunities for every individual human being.

The principle of subsidiarity, which is gaining in importance, constitutes the foundation of the contemporary construction and organisation of public life. It dates from the encyclical of Leon XIII 'Rerum Novarum'. It has be-

[5] F. Lassale: O istocie konstytucji (On the Essence of a Constitution), Warsaw 1960.

come one of the basic principles according to which united Europe is being organised. It was also the new constitutional principle of most countries emerging after the collapse of the Berlin Wall. And it has been proved itself in the practice of democracy and self-government in societies educated in democratic practice.

That principle is clearly mentioned in Article 14 of the European Charter of Local Autonomy, adopted by the Council of Europe. It states that 'the exercise of public authority must in general rest upon the authorities closest to the citizen. Entrusting tasks to other authorities must correspond to the scope and nature of those tasks and comply with the requirements of effectiveness and economy.'

The principle of subsidiarity also undoubtedly means that certain activities are as if by nature the prerogatives of individuals and local communities. That is not to say that the central authorities are to grant certain rights to local communities when those authorities deem it proper and that those authorities are to determine the criteria thereof.

At one historical stage, the state usurped the natural competence of individuals and local communities. The democratic organisation of society means nothing more than restoring that natural division of prerogatives: the local community should deal with that which is closer to it and what transcends its capacity should be transferred to a structure of higher rank. That manner of state organisation had to be learnt by the new democracies which for some 50 years had borne the burden of a strongly centralised system. In the course of discussions on preparing concrete institutional solutions, one may still observe vestiges of that centralised mind-frame.

The way a constitution defines the mutual relations between state authorities, central authorities and local communities is of key significance to the construction of a democratic order. That is why constitutional provisions pertaining to self-government are so important.

Of great importance is the social dimension of self-government. Public passivity often presents an obstacle to the construction of real democracy. A lack of interest in public affairs effectively impedes the actual functioning of democratic mechanisms. Civic society therefore becomes but an empty term.

From the viewpoint of a democratic society, of extreme significance is the question of the intermediate links that bridge the state and the individual. That is why the levels of territorial self-government which the constitution defines are so important.

The constitution therefore is not only a legal act incorporating clearly po-

litical elements. It is also an act that should reflect a certain axiology. After all, the constitution contains clear moral and social references. It sets forth a social order defined by ethical norms and the organisation of the community's life in a manner that prevents despotism and authoritarianism. It ensures the exercise of general public affairs, guarantees individual freedom and constitutes a framework for social-integration processes.

One of the more important matters pertaining to the constitution as an element of the democratic order entails relating its written text to natural law. A discussion of the significance of natural law for the law-making process is a sign of the times of transformation, of the transition away from authoritarian systems in which the rights of individuals and entire nations were violated. Such references are exceptionally important because the constitution-adoption process is taking place in states whose constitutions were full of democratic rhetoric but whose reality marked a flagrant departure from it. A constitution therefore needs to be more firmly anchored in values.

Such a need could be observed during the constitutional processes of the new democracies. This has included a need to invoke higher values, to seek transcendental references and by the same token to clearly refer to ethical norms. Ethical norms as a moral frame of reference for human behaviour are perceived as certain guarantees of the ethical conduct on the part of entire collectives, nations and states. In that situation one can more vividly observe a reversion to natural law. A carrier of precisely those desired values is being sought in natural law. Natural law becomes the frame of reference of a just order. Hence the need to refer directly to natural law as a just law and, in the event of a clear clash of norms, to reject positive law.[6]

The difficulties in constructing a certain value system, which may be referred to as natural law, in a pluralistic society should not prevent attempts to seek such references.

A constitution should spawn a sense of constitutionalism in society, a sense that it truly is a fundamental document and not simply an incidental political declaration. Hence, both the manner in which it is adopted and the way it is deployed must create in society the conviction that by its very nature the constitution is a stable act, not subject to easy change under the influence of changing political climates. Only when such a perception of the constitution takes root and proliferates in the consciousness of the political elite and all of

[6] Cf. more extensively: H. Suchocka: References to God and Christian values in European constitutions in: Religion in public space – perspectives of dialogue, edited by J. Bagrowicz, Toruń 2007.

society can it be stated that its provisions are functioning restrictively. Only then can it become a guarantor of the individual rights, and of the conduct of state organs set forth in its text and truly become the foundation of the state's democratic order.

Otherwise what may occur is a situation whereby, as one of the authors of Poland's constitutional debate put it, *politics devours the constitution*.

Cyril Svoboda
Member of Parliament, Czech Republic

Memories of Antonio La Pergola

There are not many people in Europe who possess far-reaching vision. A lack of such individuals weakens the European continent's ability to be a respectable force from a global point-of-view. Europe has its roots: Christian-Jewish religion, classical thought, enlightenment and the Roman legal tradition. These roots exist, even though European political representatives refused to articulate them in the preamble of the original European Constitutional Treaty and did not even discuss them during preparation of the Lisbon Treaty.

Antonio Mario La Pergola was a man with vision. He was an extraordinary individual. Even before the fall of the Iron Curtain, he had thought over how to contribute to European-wide development, how to influence this development on its path to democratisation. At a time, when politicians focused merely on the present time and did not understand the actual, long-term movement taking hold in Eastern Europe, Professor La Pergola brought forward and advocated a visionary project: Democratisation through Law. Democratisation without legal order and without respect for the law is crippling to democracy. He approached his project from the tradition of Roman law, confirming its existence as a European, cultural root. Law and democracy belong together. We experienced firsthand in the Czech Republic after 1989 the type of unfortunate consequences that a radical transformation brings, without the necessary cultivation of a legal environment carried out in response to it. Change in the political system, competition between political parties, free elections, the transformation of justice, privatisation and other societal changes all require a democratic legal framework and certain rules. The idea that the freedom of one individual ends, where another individual's freedom begins is not valid. The way that honour and respect for the law is regulated at the very beginning of a transformation creates the atmosphere that will dominate the country's political environment in the long-term. Democracy must have its order. Even the state must respect certain rights while carrying

out steps towards transformation; the legislative branch should accept norms in accordance with European standards; the executive should respect the body of laws of its own country and the judicial branch should provide real protection against the violation of rights and liberties.

Antonio Mario La Pergola was aware that merely declaring a political intent to respect international agreements and other legally binding instruments from the Council of Europe is not sufficient. It is necessary to set up a mirror for each member state to help each one see the level to which its legal order has transformed; how this political intent is actually being implemented; how not only the form, but also the substance and purpose of law are being respected and what is meant by a democratic, legal environment. The Council of Europe decided to implement this approach: accept the membership of another state first, even if it is not in complete compliance with the principles and standards of the European, democratic environment and only afterwards contribute to its cultivation, so that both the state's written and applied law approached European, democratic traditions.

The Venice Commission itself became the effective and cultivated instrument for achieving this goal. Antonio Mario La Pergola as an individual with extensive education and authority instilled a sense of refinement in the Commission's work and an emphasis on erudition. He never resorted to arrogance. He was even patient in placing requirements and insisted on evaluating submitted questions solely on the basis of law, even though he was rejected by many and criticised – he, as well as the Venice Commission – several times for politicising his position. Such criticisms were made by those, who knew very well that the legal order of their countries did not comply with the European legal order and who were not, for various reasons, willing to enter into compliance with the European standard. If we observe what type of political representatives have criticised and rejected the work of the Venice Commission under the direction of Professor La Pergola, we must recognise that the Commission did, and continues to do, good work.

The participation of the Commission in the democratisation of Europe is truly extraordinary. La Pergola's contribution to this success is substantial. I am glad that I not only became acquainted with Professor La Pergola, but that I was also able, in some small way, to contribute to the collective work of the Venice Commission.

Herdís Thorgeirsdóttir
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"Something is Rotten"... Reporting on Corruption

The Council of Europe was created out of the ashes of the Second World War and based on the values of democracy, human rights and the rule of law. The common heritage of the ten signatory states was individual freedom, political liberty and the rule of law.[1] *Today with 47 member states and 800 million people the need to develop democracy, protect and extend human rights, advocate and encourage the rule of law is no less relevant than it was in the beginning. These fundamental values were often mentioned by the President of the Venice Commission, the late Antonio La Pergola, and given extra weight by the enthusiasm of his voice and Italian hand gestures. Listening to someone using his legal expertise and wit to elaborate on the concept of human dignity and European constitutionalism makes facts like oppression of fundamental rights, torture or even killing of people seem distant. But he reminded everyone, conscientious as those who have lived long enough, that abuses of power and position are continuous threats in our world which need to be fought. He knew as did Thomas Jefferson before him that the price of freedom is eternal vigilance. This contribution will focus on one way to translate La Pergola's vision into reality and that is to concentrate on the role of the media in turbulent times to strengthen the democratic process. Corruption now occupies a central place as an issue of public concern on the political agenda in Europe, is.*[2] *Corruption is viewed as a grave threat to the objectives of democracy, human rights and rule of law and the media is seen as having an instrumental role in fighting it. Yet,*

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[1] Treaty of London, 5 May 1949 establishing the Council of Europe, signed by Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.
[2] http://www.transparency.org/publications/gcr.

the media itself is not immune from corruption and is in a position to use and control information to combat – or conceal – corruption.

Corruption in times of state decay and privatization

In the aftermath of World War II the compromise reached by the ten signatory states of the European Convention was the protection of fundamental civil liberties mostly – rather than economic and social rights. The dominant view was that by granting individuals basic civil and political rights and prohibiting illegitimate public interference would pave the way for social justice. Hands-off policy by the state was seen as guaranteeing the individual freedoms. Legal codification of rights has little meaning if they are not wholly enforceable. In the more than half a century since the adoption of the European Convention on Human Rights the member states have gone through various structural political changes as well as economic and social transformations. During the first few decades of the Convention's dynamic existence the struggle for individual rights was directed against the almighty state. In the age of globalization the traditional focus on political power vested in public institutions only no longer applies. In the post communist era after the 1990s the states in many of the older member states of the Council of Europe were "privatized". Stephen Holmes defines this evolution internationally as meaning that "when the state, the only available social institution that can systematically defend the interests of the weak, is "privatized" – when it becomes wholly, rather than merely partially, a tool of the strong – liberal state/society relations cannot emerge."[3]

The press apart from public broadcasting has its roots in private enterprise. Apart from public broadcasting the press is widely owned and run by private parties. Yet, press freedom or more accurately the free flow of information was from the inception of regional and international human rights instruments seen as a touchstone freedom for all other rights – and the media was entrusted with the guardian role of democracy – the public watchdog in European Convention jurisprudence.

The performance of the media as the public watchdog is, however, increasingly called into question in the process of globalization and ownership concentration leading to the growth of multinational, including European media and communications groups. This situation, as noted by the Council of Europe Committee of Ministers in a declaration in January 2007, is fundamentally changing the media landscape where 'media concentration can place a single or a few media owners or

[3] S. Holmes, 'Constitutionalism, Democracy and State Decay' in *Deliberative Democracy & Human Rights*, ed. By H. Hongju Koh and Ronald C. Slye, 1999 Yale University Press, p. 120.

groups in a position of considerable power to separately or jointly set the agenda of public debate and significantly influence or shape public opinion, and thus also exert influence on the government and other state bodies and agencies,' (as worded in a declaration from the Committee of Ministers in January 2007).[4]

A growing body of social science literature has highlighted the so-called state-corporate nexus.[5] The blurred distinction between public and private authorities renders the notion of state protection of human rights less meaningful as rights' protection depends on state capacities[6] and states are losing out in competition with private power. This is what Holmes calls "state decay". It is safe to assume "something is rotten" in a state where the roots of oppression or abuse are not visible. The famous words from Hamlet warn of an impending evil. Horatio's less famous reply to the legendary line from Marcellus that *something is rotten in the state of Denmark* is: *"heaven will direct it"*. We may trust that God will ultimately control that rotten something. The metamorphosis of such a heavenly guidance is the faith in the legal codification of human rights; a believe that there is a public watchdog that will guard our democracy; courts that serve an independent role free from political pressure and elected representatives who will serve the public interest.

The preamble of the United Nations Convention against Corruption, states that corruption is a transnational phenomenon that affects all societies and economies. The preamble to the Council of Europe Criminal Law Convention on Corruption[7] emphasizes that corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society. The press according to the European standards developed in Convention jurisprudence is the guardian of democracy where journalists must act as the public watchdog shedding light on any misdeed or conduct that is of public interest. On the World Press Freedom Day in 2006 the President of the International Federation of Journalists (IFJ) called on all journalists to join the battle against corruption, while addressing a UNESCO conference in Sri Lanka. "Corruption threatens

[4] To take an example from Iceland, the two major media companies are owned by two distinct conglamorates, which each is a major shareholder of a bank and other financial enterprises. At present, when Iceland is hit by the global impact of the crisis on the financial markets, high inflation and serious recession it is hard not to be sceptical of the information flow from the media owned by those who have serious interests at stake.

[5] G. Anderson, *Constitutinal Rights after Globalization*, 2005 Hart Publishing, p. 26.

[6] See S. Holmes, supra, p. 120.

[7] ETS no. 173, Strasbourg 27. I, 1999.

free and effective societies. It discredits the key institutions of democracy, including the media itself".

We may be faced with the age-old question: *Quis custodiet ipsos custodies?* Who will guard the guardians? This saying ponders the insoluble question of where ultimate power should reside. The way in which modern democracies attempt to solve this problem is in the separation of powers. The idea is to never give ultimate power to any one group; the executive, legislative, or judicial; have the interests of each compete and conflict. Each group will then find it in its best interest to impede the functioning of the rest and this will keep ultimate power in constant competition and out of any one group's hands. This is also why the press has been termed the Fourth Estate. "It is not a figure of speech, or a witty saying; it is a literal fact, – very momentous to us in these times" wrote Thomas Carlyle in 1841.[8] This is why journalists still seem to take their "watchdog" role extremely seriously as evident from the words of the President of the IFJ in at the below quoted speech:

> "'We have a responsibility, both as individuals and as a collective, to battle corruption within the media. And we have a responsibility to combat the corruption that flows from commercialism and corporations that use their media interests to advance their corporate interests. Investigative journalism is fundamental in combating corruption. Without it, inefficiency, waste, crime and secrecy thrive… But investigating corruption is a risky business. It is a tribute to the integrity of our craft that, despite the risk, journalists continue to investigate and fight corruption, struggling to expose corrupt politicians and governments."

The danger facing journalists in Europe takes many forms. Precarious employment conditions, deterioration of bargaining rights, government prosecution of investigative reporters and confidential sources, and abandonment of public service journalism values are making the lives and livelihoods of journalists extremely uncertain.[9] In some parts there has been continued abuse of power with regard to taxation, regulations and police powers in order to intimidate opposition media.[10]

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[8] Thomas Carlyle, "The Hero as Man of Letters. Johnson, Rousseau, Burns", Lecture V, May 19, 1840, from *On Heroes and Hero Worship, the Victorian Web*, accessed November 18, 2006.

[9] According to a report of the European Federation of Journalists (http://www.ifj.org/pdfs/JournalistsKilled2007finalweb.pdf)

[10] PACE Resolution 1346 (2003).

The responsibility of the press

Convention jurisprudence answers the question of what the vital role of the public watchdog is under Article 10 - in ought-propositions at times. In one of the first freedom of expression cases that came before it in the mid 1970s, the Court emphasized the need to pay utmost attention to the principles characterizing a democratic society. "Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10–2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that "pluralism", "tolerance" and broadmindedness without which there is no democratic society".[11]

In its landmark decision of the *Sunday Times* judgment in 1979 the European Court did not uphold a court order, prohibiting the newspaper in question to publish an article on the plight of women who, having taken a thalidomide-based medicine while pregnant and gave birth to children with severe deformities.[12] The newspaper had already published one article on the thalidomide-scandal when the courts ordered an injunction on the publication of a following article on the ground that it might influence negotiations on the level of damages due. The European Court of Human Rights took an affirmative stance towards the democratic role of the press and its significance for the public. It referred to the need for a journalism: "provocative" debate that would agitate either the state or any sector of society, which required the co-operation of an "enlightened public", and it made it incumbent on the media to shoulder the responsibility of informing people of all matters of public interest, not only by providing information but also by imparting ideas. The Court stated that:

> "Whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and idea… of public interest. Not only do the media have the task of imparting such information and ideas: the public also has the right to receive them."[13]

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[11] *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, paragraph 49.
[12] *Sunday Times v. the United Kingdom*, 26 April 1979, Series A no. 30.
[13] *Sunday Times v. the United Kingdom*, ibid. paragraph 65.

The right to receive, an independent right, has in the Court's interpretation come to mean that the press is under an obligation to see to it that the public is 'properly informed'.[14] Protecting this right is thus no less *protecting a process* than preventing insulated violations (rendering it difficult to attain) such as protecting the right to fair trial and presumption of innocence**.** Increasingly the Council of Europe organs on the basis of Article 10 jurisprudence have set forth more demanding paradigms to fulfil the expectations of the role of the media in democracy, recognizing that this freedom originates *inter alia* within the media itself and that if it is not guaranteed *within* the press, the public's right to receive is not effective.[15]

Systematic legal harassment and a distorted view of journalism

Journalism, political in nature, is entitled to the greatest level of protection in Convention jurisprudence. There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debates on questions of public interest[16]. As the Court stated in the *Lingens* case: "...The limit of acceptable criticism is wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues."[17]

Journalists are widely intimidated. One need only look at the homepage of the IFJ or the European Federation of Journalists (EFJ), the regional group of the International Federation of Journalists to get a glimpse of the situation which is sometimes 'but a Prologue to a Farce or a tragedy or perhaps both' to quote James Madison. Recently the EFJ protested against the adoption by the Romanian Senate of a draft law obliging radio and television stations to transmit positive and negative news "in an equal proportion."[18]

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[14] *Ibid*.

[15] Council of Europe, Committee of Ministers Recommendation (99) 15 on *Measures Concerning Media Coverage of Election Campaigns* (Adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Ministers' Deputies).

[16] *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, paragraph 61, ECHR 1999-IV.

[17] *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, paragraph 42).

[18] http://europe.ifj.org/en/articles/efj-condemns-romanian-draft-law-calling-for-good-bad-news-equality. Accessed June 27, 2008

Similarly a Civil Code of Ukraine that came into force 2004 established that "negative information disseminated about a person shall be considered false". "Negative information" is to be understood as any form of criticism or description of a person in a negative light.[19]

Provisions as the above are not only a violation of the right to freedom of expression. The latter "turns reality on its head to the extent that something that is true but negative will be considered false. It cannot possibly be justified as necessary, since it is often a matter of great public interest to disseminate negative facts, as well as opinions, about people. The exposure of corruption, for example, may well require both."[20]

When government entities use criminal libel cases or civil suits based on alleged damage to a 'person's honour and integrity' to influence or intimidate the press[21] it deters journalists from contributing to a public discussion of issues affecting the life of the community. The European Court Human Rights has taken into consideration the "chilling effect" that the fear of sanctions may have on journalists.[22] A high amount of "defamation:damages (in defamation proceeding)" in a libel case may be disproportionate to the legitimate aim of protecting someone's "reputation and the state in question" hence in breach of Article 10 occurs in not preventing such severe restrictions hampering free expression.[23]

In the most famous freedom of speech cases in the United States in the 20th century, the *New York Times* v. *Sullivan* (1964), the amount of libel damages "defamation: damages (in defamation proceedings)" was seen as being as much endangering the public interest in "uninhibited, robust and wide open" debate as it chilled journalism by fear of libel "defamation:damage" awards.[24] The *Sullivan* decision introduced a new application of the First Amendment requiring hence forth public officials to show that the news medium published the offending words with "actual malice" – knowledge of falsity, or reckless

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[19] See Report by Article 19 on Ukraine, *Ukrainian Media Group v. Ukraine*, judgment 29. March, 2005.
[20] See Report by Article 19 ibid.
[21] Report of the United States Department of State on the Media Situation in Ukraine. *Ukrainian Media Group v. Ukraine*, judgment 29 March, 2005.
[22] *Jersild v. Denmark*, 23 September 1994, Series A no. 298.
[23] *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Series A no. 316, paragraph 55 (GBP 1.5 million).
[24] *New York Times v. Sullivan*, 376 US 254, (1964).

disregard for falsity.[25] The United States Supreme Court reversed an "Alabama" court ruling requiring the "*New York Times*" to pay USD 500,000 to Sullivan, an "Alabama" police commissioner, because it published certain fairly minor errors in an advertisement from a civil rights organization. From then on the Constitution itself, through the First Amendment, provided the shield for a vigorous political debate in the press.

Killing of journalists

Violence against journalists and media workers who report in the public interest on issues that involve members of public, local authorities, or powerful business elites is as common as it is unacceptable – and is unfortunately not confined to remote areas of tyrannical governments. The current media environment in South East Europe has been tarnished by a recent string of attacks on journalists and other press freedom violations, according to the South East Europe Media Organization, reported in the *European Commission Enlargement Newsletter* in June 2008.[26] In many cases, these journalists were involved in reporting on organized crime and corruption and on war crimes. Over the last decade more than 1,100 journalists and media staff have been killed in the line of duty. The murder of Anna Politkovskaya, an internationally renowned Kremlin critic who regularly exposed human rights abuses by Russian forces in Chechnya brought international attention to the danger that journalists face in Russia. She was one of four media workers killed in Russia in 2006. Around 255 journalists and media staff have been killed in Russia since 1993.[27]

The murder of Gongadze a political journalist who was actively involved, both nationally and internationally, in raising awareness about the lack of

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[25] *Cf.* D. L. Teeter, D. R. Le Duc and B. Loving, *Law of Mass Communications: Freedom and Control of Print and Broadcast Media*, Ninth Edition, 1998 Foundation Press, New York, p. 207. Since then, the Sullivan doctrine has been much debated as some consider it to grant too much autonomy to the press and as not necessarily in the public interest.

[26] http://ec.europa.eu/enlargement/press_corner/newsletter/index_en.htm#a10. Accessed on 28 June 2008.

[27] The International Federation of Journalists (IFJ) welcomed news in June 2008 that three men had been charged in the killing of Anna Politkovskaya but said that those who ordered the killing must also face charges. http://www.ifj.org/en/articles/politkovskaya-ifj-welcomes-charges-but-asks-who-ordered-the-killing, accessed on 28 June 2008.

freedom of speech in Ukraine evoked world attention.[28] He reported on, for example, corruption among high-level state officials. Gongadze was kidnapped by four policemen in 2000 and his beheaded body was found later in the woods outside of Kiev. His widow lodged a complaint with the European Court of Human Rights in September 2000. The Court in its judgment in 2005 found that there had been a violation of Article 2 concerning the authorities' failure to protect the life of the applicant's husband. The Court considered that, during the investigation, until December 2004, the State authorities were more preoccupied with proving the lack of involvement of high-level state officials in the case than in discovering the truth about the circumstances of the disappearance and death of the applicant's husband. The Court therefore concluded that there had been a violation of Article 2 concerning the failure to conduct an effective investigation into the case. The Court also found that the attitude of the investigation authorities to the applicant and her family clearly caused her serious suffering which amounted to degrading treatment, in violation of Article 3. Furthermore, the absence of any outcome concerning the main criminal proceedings also prevented the applicant from receiving compensation, since in practice a civil claim for compensation would not be examined prior to a final determination of the facts in pending criminal proceedings. There had therefore also been a violation of Article 13.

In response to the cases of serious attacks and killings of journalists in Turkey, a broad positive obligation requiring governmental bodies to resort to measures to protect journalists and the media they work with from unlawful violence has been developed and applied by a unanimous Chamber of the full-time Court in *Özgur Gundem* v. *Turkey* where the Court confirmed that there are positive obligations that member states have to undertake effective investigations as well as to take steps to protect life under Article 2.[29]

Self-censorship in the corporate town

The "chilling effect" on journalism of "libel law" is an acknowledged fact. The "chilling effect" of market politics conceals critical "opposition within the media" before it even shows up. The issue of media-ownership concentration

[28] The Parliamentary Assembly condemned in 2003 "the very high incidence of violence against journalists (the most prominent among them being the killings of Georgiy Gongadze in 2000 and Ihor Alexandrov in 2001), and the low number of such crimes which have been solved. Parliamentary Assembly Resolution 1346 (2003): honouring of obligations and commitments by Ukraine.

[29] *Özgur Gündem v. Turkey*, 16 March 2000, RJD 2000-III, paragraph 42.

has been on the agenda due to the rapid transformation of the global media landscape and the introduction of new information technologies.[30] The impact of concentrated ownership is that journalists do not write about the issues and people that they consider to be restricted or off limits or write about them only in ways that they consider as safe. Fearing for their jobs journalists steer clear of criticism of influential parties including their own superiors or advertisers. The intertwined interest of many media magnets and political elites impedes open criticism or revelations of corrupt conduct. The ownership concentration of the media also affects the political opposition as their only access to the public is through the media. Against such "self-censorship", neither journalists nor the public, have an apparent remedy.[31] There are no prison sentences or criminal sanctions needed where the culture of self-censorship is prevailing.

The Committee of Ministers in a declaration in 2007 stated: "Noting that it emerges from Article 10 of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights that, as ultimate guarantors of pluralism, states should take positive measures to safeguard and promote a pluralist media landscape to serve democratic society."[32]

In tackling the question of regulation of the broadcasting environment in 1993, the Court stressed the fundamental role of the public watchdog and the corollary right of the public, saying that 'such an undertaking cannot be successfully accomplished unless grounded in the principle of "pluralism", of which the State is the ultimate guarantor'.[33]

A more recent case raised the important question of the State's positive obligations in a modern society where many traditionally state-owned services like post, transport, energy, health and community services and others have been or could be privatized.[34] In this case, *Appleby and Others* v. *the United Kingdom*,

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[30] Cf., European Commission Merger Regulation No. 139/2004, control of concentration between undertakings. The control of media concentration rests primarily with the members states; the right to issue national laws on the control of media ownership as is expressly recognized by Art. 21(3) of the ECMR.

[31] 'This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed'. "Dr. Goebbels" quoted in G. H. Fox and G. Nolte, "Intolerant Democracies", Vol. 36 *Harvard International Law Journal*, No. 1, Winter 1995, p. 1. (Originally quoted from Karl Dietrich Bracher et al. eds., 1983 Nationalsozialistische Diktatur 16, 1983).

[32] Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration (Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies).

[33] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Series A no. 276, paragraph 36 and 38.

[34] As pointed out by Judge Maruste in a dissenting opinion in *Appleby and Others v. the United Kingdom*, judgment 6 May, 2003.

private individuals were prevented from accessing the town centre by so-called Gallerias built on public land and transformed by public authorities into private ownership. They were prevented from communicating political information and ideas and claimed that their freedom of expression and freedom of assembly rights had been violated.[35]

The Court found that while freedom of expression was an important right, it was not unlimited. The property rights of the owner of the shopping centre also had to be taken into consideration. The Court did not find a violation of the freedom of expression or freedom of assembly rights of the applicants maintaining that they had not been effectively prevented from communicating their views to their fellow citizens. The Court did not find that the Government had failed to comply with any positive obligation to protect the applicants' freedom of expression. The Court was not convinced that there should be automatic rights of entry to private property (or even all state-owned property), but "if a bar on access to property were to result in the lack of any effective exercise of freedom of expression, the Court would not rule out the possibility that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. A *corporate town* where the entire municipality is controlled by a private body might be an example (citing *Marsh v. Alabama*)."[36]

Judge Maruste in a dissenting opinion questioned whether, in such a situation as the above, private owners' property rights should prevail over other rights or whether the state still had some responsibility to secure the proper balance between private and public interests? [37] "…The old traditional rule that the private owner has an unfettered right to eject people from his land and premises without giving any justification and without any test of reasonableness being applied is no longer fully adapted to contemporary conditions and society. Consequently, the State failed to discharge its positive obligations under Articles 10 and 11."[38]

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[35] *Appleby and Others v. the United Kingdom*, judgment 6 May, 2003.
[36] *Appleby and Others v. the United Kingdom*, judgment 6 May, 2003, paragraph 47. Emphasis added.
[37] As pointed out by Judge Maruste in his dissenting opinion in *Appleby and Others*.
[38] Dissenting opinion Judge Maruste in *Appelby and Others v. the United Kingdom*, supra.

The challenge ahead

The Court, in the above case, has submitted that in determining whether or not a positive obligation exists in securing fundamental rights that "regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities."[39] The above submission by the Court is in fact the dilemma that each and every member state of the Council of Europe is faced with to a different extent; either from the perspective of scarce resources or political will or both.

This short overview of the media situation from Europe's East to West shows that corruption affects the media landscape and the media from within to the detriment of democracy, human rights and the rule of law. Individual journalists who tried to act as the public watchdog by revealing corruption in high places have paid with their lives. We must not forget though that they also made a difference. We who live must help to put things right in our (rotten) states. It is comforting to recall at the present time the words of Horatio who was Hamlet's most trusted friend: *"Heaven will direct it."*[40]

[39] *Özgur Gündem v. Turkey*, 16 March 2000, RJD 2000-III, paragraph 42. Citations omitted.
[40] Horatio described himself as an ancient Roman not a Dane.

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The Many Faces of the Constitution

1. Legal and political constitution [1]

The constitution occupies in many respects a special position within modern law. It is through the constitution that modern law defines its space as that of the nation state. Constitution and the modern nation state belong together; constitution in its modern sense, as the law of the laws of society, is one of the main contributions of the American and the French Revolutions, which in legal and political regard paved the way into the modern era. The constitution has manifested not only the position typical of modern law – the nation state as its privileged space – but also the dialectic between stability and changeability which is one of its main temporal qualities. The constitution is supposed to bring stability into the legal (and the political) system; this accounts for the specific procedure for constitutional amendments, with qualified majorities, the acceptance by two parliamentary and/or the referendum. The constitution not only possesses at the surface-level legal order, a higher status than other norms; it is also supposed to be its most enduring element. On the other hand, the constitution also reaffirms legally the principle of the changeability of the legal order.

So though "constitution" and such related concepts as "fundamental law" (*loi fondamentale*) have a long and interesting pre-history, in its present legal sense

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[1] References:
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Weiler, Joseph: The Constitution of Europe. Cambridge: Cambridge University Press, 1999.

the constitution is linked to modern law and the modern state. We cannot speak of the constitution in its present meaning before noting that all political power holders are considered to be legally bound by it; this includes the ruler, the monarch, who is transformed into to a state organ among others. What is needed is the completion of the process for which Quentin Skinner (1989) has coined the apt expression "the double abstraction of the state". The history of the modern constitution begins only in the 18th century; the American and the French Revolution were the crucial events for the breakthrough of this central innovation of modern law and politics. The history of Nordic, especially Swedish (and Finnish) constitutionalism has sometimes been extended to cover the Form of Government of 1634, at times even the articles on the King in the late medieval Laws of the Realm, issued in the 14th and 15th century. But the Form of Government of 1634 was originally adopted only for the regency during Queen Christina's minority; it was not regarded as binding on a major monarch. And when the later monarchs, in sovereign pledges that they made when starting their reign, confirmed the Form of Government and swore to comply with it. This was considered a voluntary concession, based on their sovereign power. It was only in the 18th century that the Form of Government came to be seen as binding on a major monarch irrespective of his or her sovereign pledge.

Niklas Luhmann (1993, p. 470 ff.), among others, has drawn our attention to the constitution's peculiar position in a modern, differentiated society. The constitution belongs to two of modern society's sub-systems: both to the legal and the political system. In addition, the constitution fulfils the important function of linking these two sub-systems together: it channels the influences of the legal into the political system and of the political into the legal system. In Luhmann's terms, the constitution establishes a structural coupling between the two sub-systems.

Let us first examine the functions of the legal constitution, that is, the constitution as part of the legal system. Modern law is positive law; under the conditions of "mature" modern law, legal validity is accorded only to positive law, i.e. to law resulting from conscious human action, primarily from explicit decisions by the law-maker and the judges. In addition to its positivity, modern law is also reflexive: it regulates its own production, determines which human actions can have legal normative consequences. It was here that Hans Kelsen, perhaps the greatest theorist of positive law, saw the function of the constitution: the constitution regulates the introduction of new legal norms, defines the structure of the legal *Stufenbau* and formulates the validity criteria of positive

law. Kelsen's attached his material concept of constitution to this very task: according to him, a constitution in the material sense of the term refers to "a positive norm or positive norms which regulate the creation of general legal norms" (Kelsen 1970, p. 228). This central function of the constitution can also be put in H. L. Hart's terms: the constitution defines the rule of recognition of the legal order.

Thus, through its provisions on the use of legislative power, the constitution creates the very possibility of modern law's positivity, and lays down the intra-legal validity criteria of positive law. In addition to this Kelsenian function, the constitution performs another central task, necessitated by the law's positivization. Every type of law must solve the problem of its limits: the law is a coercive order, and not all coercion in the name of law is justifiable. Under the conditions of modern, positive law, the traditional way of posing and solving the problem of the law's limits in terms of natural law is no longer available. Particularly through its provisions on fundamental rights and constitutional review, the constitution of a modern democratic *Rechtsstaat* appears to provide to the problem of the law's limits, a solution which respects modern law's positivity.

In the political system, the constitution fulfils both an organisational and a legitimising function. The organisational part of a constitution defines the basic institutional structure of political power: the main state organs, their competence and their mutual relationships. The constitution gives this organisation the stability necessary for its effective and frictionless functioning. This is an important accomplishment in itself, regardless of the specific organizational choices of the constitution.

In a democratic *Rechtsstaat*, the constitution's organising function cannot be separated from its other crucial task, namely its legitimising function. The constitution channels the legitimacy of the law into the political system. We can argue that a minimum condition for the legitimacy of the exercise of political power consists of its compliance with the constitution: unconstitutional exercise of power cannot be regarded as legitimate.

2. Constitution, constitutional culture and constitutional practices

At least since Kelsen, constitutional theory has made a distinction between a formal and a material constitution. In this distinction, a constitution in the formal sense refers to a written legal document called the Constitution, whereas a constitution in the material sense consists of norms fulfilling certain specific

functions in the legal system, whatever these functions, according the theorist in question, may be.

In my *Critical Legal Positivism* (2002), I have argued that the law can be approached both as a normative legal order and as specific legal practices producing and re-producing this legal order, such as law-making, adjudication and legal scholarship. A constitution too can be examined both as a symbolic-normative phenomenon and as constitutional practices upholding the constitution in its normative sense. The concepts of both material and formal constitution both refer to the symbolic-normative dimension.

The law as a legal order is not exhausted by the surface of explicit, discursively formulated legal material, such as individual statutes and other regulations, together with court decisions. A "mature" legal order also includes various "sub-surface" layers, which both constitute the possibility for, and impose restrictions on, what can appear on the law's surface in the shape of, say, new legal regulations and court decisions or legal dogmatic standpoints by legal scholars. I have termed the law's sub-surface layers "the legal culture" and "the deep structure of the law". The law's surface is connected to the sub-surface layers through reciprocal relations, such as relations of sedimentation, constitution and limitation. These relations are channelled by the same legal practices which are responsible for the production and reproduction of the law as a legal order, that is, primarily, law-making, adjudication and legal science.

Modern law is the result of processes of differentiation. These include the emergence of a professional legal culture of legal elites which has distanced itself from the general legal culture. It is specifically the elite culture of legal professionals which can – and should – be regarded as a constituent part of the law. A central element of the elite legal culture consists of what is often called legal doctrine: legal theories, concepts and principles, as well as patterns of argumentation, that is, specific ways of dealing with the legal theories, concepts and principles. In legal practices, the legal culture operates mainly as tacit (practical) knowledge of the legal actors; it provides the *Vorverständnis* through which lawyers approach their practical legal tasks and which, in fact, makes legal practices possible in the first place. Only in hard cases do judges, for example, openly thematize, say, the criminal law principle of *nulla poena sine lege* or the contract law principle of *pacta sunt servanda*.

Like other fields of law, constitutional law is not only about discursively formulated surface-level material; it is not only about the explicit constitutional norms to which the customary concepts of material and formal constitution

refer. Constitutional law also includes various sub-surface levels. It is also about constitutional culture: constitutional theories, concepts and principles, and ways of dealing with these, i.e., patterns of constitutional argumentation. Constitutional culture plays both a constitutive, or enabling, and a restricting role with respect to constitutional practices. In relation to the *Vorverständnis* of constitutional lawyers, the constitutional culture provides for the very possibility of constitutional practices, such as the interpretation and application of the constitution. By the same token, its theories, concepts and principles impose restrictions on which interpretations and applications can be adopted in these practices.

How does the legal culture arise and change? Here my answer is: through legal practices. One of the relations connecting the law's surface with the sub-surface levels, and realized through legal practices, is the relation of sedimentation. The elements of the legal culture have their origin in the law's surface, in the lawmaker's, the judges' and the legal scholars' doctrinal innovations. Subsequent legal practices determine which of the innovations survive and sediment into the legal culture, and are transformed into the cultural *Vorverständnis* of legal actors. This also holds true for the development of constitutional culture: constitutional culture also evolves through constitutional practices, practices which include constitutional scholarship. Unfortunately – or maybe fortunately! – not all of the innovations of legal scholars survive to be included in the legal culture. Only in retrospection can we tell which of the recent suggestions of constitutional theorists will pass the test of subsequent constitutional practices.

So far, so good. My translation of the insights of general legal theory into the discourse of constitutional theory seems to have succeeded. But it isn't this simple. I have ignored the complications which arise from the constitution's peculiar dual demesne, its simultaneously legal and political character. Constitutional culture can – and should – be examined not only in legal but also in political terms. The actors of the political system – Members of Parliament, Government Ministers, politicians from the opposition – are in their activities guided by a specific political culture through which they tackle their practical political tasks. This political culture includes constitutional ingredients, elements of constitutional culture. The legal culture of constitutional lawyers and the political culture of political actors of course interact, but they can also show significant divergences. The borders can be fluid but they do exist; a politician does not usually approach constitutional issues in the same way as a justice of a constitutional court or a scholar of constitutional law. Thus, what for a constitutional lawyer appears as an end in itself – for instance basic-rights

safeguards – is often judged by politicians in instrumental terms, as a means for, or an impediment to, the attainment of their policy goals.

Until now my discussion has focused on the constitutional culture of legal and political elites. However, especially in the examination of the constitution's political functions, an analysis of merely the elite culture does not suffice. There is clearly one function that is dependent on the existence or at least the subsequent formation of a supportive general constitutional culture: the constitution's legitimising function. If there does not exist a receptive general constitutional culture, the constitution cannot contribute to the legitimacy of the polity. In this general constitutional culture, the borderline between its two dimensions is removed: no clear distinction between legal and political aspects can be made.

The constitutional culture of legal and political elites is formed through constitutional practices. Correspondingly, crucial for the formation of a general constitutional culture are constitutional practices or citizenship practices in which citizenship rights are exercised and the underlying principles affirmed. This process is the formative process of a civic *demos*. It does not, of course, develop in a cultural vacuum but is promoted or inhibited by surrounding cultural factors. Thus, at the level of the nation-state civic and nationalistic cultural elements may interact in a rather paradoxical way: nationalism may at first contribute to the rise of civic legal and political culture, but, subsequently, a robust civic culture can free itself of supportive nationalistic ingredients and also weaken nationalism's general cultural impact.

The two levels of the constitution, that is, constitution as a phenomenon at the law's surface and constitution as an element of the legal and political culture, are clearly inter-dependent. Explicit constitutional provisions and the praxis of their application affect the evolution of the legal and political culture; here too we can refer to a process of sedimentation, beginning from the surface level and contributing to the formation and stabilisation of a legal and political culture which underpins and promotes the realisation of the written constitution. At present, we can observe such a process in the so-called new democracies of Central and Eastern Europe, the new member States of the Council of Europe. These countries have adopted constitutions based on the principles of a democratic *Rechtsstaat*, but the process through which these principles sediment to the legal and political culture, supportive of the realisation of constitutional provisions, is in many of these countries still incomplete.

An analogous process can also be seen in the history of my own country.

Finland gained its independence in 1917, experienced a brief but bloody civil war in 1918 and enacted in 1919 its first constitution, by and large based on the principles of a democratic *Rechtsstaat*. The constitution had a fairly modern chapter on fundamental rights and acknowledged the principle of separation of powers while at the same time affirming the supremacy of the Parliament, although it also conferred significant powers on the President. The emergence and stabilisation of the legal culture of a democratic *Rechtsstaat*, however, was a long process. During the two first decades of independence, the civil war and its aftermath were still fresh in the memory of the nation and parliamentary democracy was regarded with suspicion at both the left and the right wing of the political spectrum; an analogy with the situation in the Weimar republic is not far-fetched. In Finland, though, the constitutional crisis in 1930, when a right-wing coup was a realistic possibility, ended with the victory of parliamentary democracy. But focusing on the constitutional provisions on fundamental rights, it can be claimed that it lasted until the latter half of the 20th century before these were taken seriously. Until the 1960s the main significance of fundamental rights were seen in the determination of the procedure in which Government Bills were to be approved in the Parliament. Only gradually were they understood as norms even binding the executive and the judiciary.

3. Transnational Constitution?

The constitution in its present sense arose with the modern nation state, and up to now, my discussion has focussed on the nation-state constitution. But in our late modern age we are witnessing a transnationalisation of law which affects even the constitution. And, in fact, an analysis of the functions of the constitution, like the one discussed above, is in no way necessarily tied to its nation-state origins but can be transferred to the examination of transnational politico-legal entities, such as the EU. Let us use our analysis as a basis for a tentative answer to the question of whether the EU already has a constitution in the material sense.

From the legal point of view we are quite obviously entitled to speak of an already existing constitution. The founding treaties include provisions on the introduction of new EU-norms and on their application. The development of the basic rights' dimension and the reliance on basic rights principles in the praxis of the Luxembourg court are evidence of the restricting function of an EU constitution. We can also argue that that the structural coupling

enabling the reciprocal influences between the EU as a legal and as a political system is already functioning. The EU norms that define the use of legislative power and determine its limits certainly fall short of the clarity of an ideal Kelsenian constitution. This does not, however, invalidate the principal claim of an already-existing material constitution of the EU.

In relation to the political dimension, the Treaties clearly perform the task of organizing the use of political power and, at the same, time, defining its limits. In this dimension, we can, however, also point to an obvious omission, which the abortive constitutional project was aimed at curing. The existing constitutional norms (in the substantive sense) do not fulfil the legitimising function that a constitution is expected to accomplish. In Joseph Weiler's (1999, p. 298) words, the EU has a constitution without constitutionalism, and in Miguel Poiares Maduro's (2003, p. 80) terms, a constitutional body without a soul. In my own terms, the Weiler's and Maduro's theses can be expressed as follows: the EU already possesses a surface-level constitution but still lacks an adequate constitutional culture.

The fate of the Constitutional Treaty attests to a wide discrepancy between the legal and political culture of the European elites and that of the general public. The elites may be justified – and, indeed, may be even forced – to speak about constitution in the European context. However, the constitutional vocabulary finds much resistance among the general public. In their constitutional enthusiasm, the elites easily think that constitutional rhetoric will contribute to the general legitimacy of the EU, in the same way as they are used to thinking that a constitution contributes to the legitimacy of the political and legal system of a nation-state; but that seems to be a misjudgement. The general public often enough feels that the constitutionalisation of Europe more as a threat than a promise. Why?

Constitutional scholarship has spent much energy in the effort to detach the concept of constitution from its nation-state template, to demonstrate the viability of a more general concept which would also allow for the use of constitutional language in a trans-national context. However, in the general legal and political culture, a constitution appears to remain inseparably linked to the nation-state. Thus, the constitutionalization of the EU was commonly seen as leading to the EU's acquiring state-like attributes. And this is not what the general public, which still invests its main political allegiance in the nation-state, is willing to accept. At the cultural level, a constitution can be analysed as a condensed symbol, as a symbolic framework of reference (see Walker 2003, p. 33–34). But it doesn't only refer to human rights,

democracy and the rule of law; at least in the general culture, it also refers to the nation state[2].

The fate of the Constitutional Treaty, especially in light of the results of the referendums in France and the Netherlands, has clearly proved that there was no constitutional momentum in Europe, at least not among the general public, the citizenry of Europe. If there was a constitutional momentum, it was confined to the European legal and political elites.

What then, about, the lively scholarly constitutional discussion within Europe? Has it also been a futile enterprise? I am inclined to answer in the negative. The recent debates on transnational constitutional theory have produced or revitalized a plethora of constitutional concepts and analytical distinctions; through this upsurge of interest, constitutional theory has really taken a leap forward. The benefits fall not only on the elaboration of transnational constitutionalism but also on constitutional theory in its traditional nation state focus. And not only that, but also one of the most significant results of the debates will be – so I venture to predict – the achievement of a heightened awareness of the interaction between the national and transnational even in constitutional issues.

Constitutional debates in the context of the EU may also give reason to expand our constitutional vocabulary. In the EU, much attention has been given, not only to the political and the legal or juridical, but also to the economic constitution. Thus, we may make a distinction between, not only two, but three aspects of the constitution and three corresponding concepts, all of which are relevant in the analysis of the EU: the economic, the juridical and the political constitution. The *economic constitution* focuses on the relationship between the legal and the economical, the law and the market; the *juridical constitution* on the reflexive self-regulation of the legal order; and the *political constitution* on the relation between the legal and the political system. All these concepts are legal in so far as they are related concepts and the law constitutes one of the related poles; what

[2] There are of course many reasons for the rejection of the constitutional project by the general public and the failure of the referendums in France and the Netherlands, some of them perhaps connected more to domestic politics than the development of the EU. I do not claim that the links which in the general constitutional culture are seen between constitution and state were the only, or even in empirical respect the main, factor; I only claim that it played a non-negligible role. Here we should also be wary of making sweeping generalizations: there certainly are differences in the respective political and legal culture in different member states with respect to the links between constitution and state. Thus in federal states, the idea of multi-level constitutionalism is perhaps easier to accept than in unitary states.

varies is the other pole to which the law is related: economy; the law itself; the political system.

In the context of the EU, the three aspects of the constitution have not developed parallel to each other but, rather, successively. "Economic constitution" (*Wirtschaftsverfassung*) was a key concept especially for the German ordo-liberals, who played an important role in the early 1950s and 1960s debates on European integration; the reference was mainly to the four market freedoms and the competition rules of the EC Treaty, that is, to the legal frame of the EC as a market-place. *Wirtschaftsverfassung* was an explicitly non-political concept: the EC was considered a legal and economic entity, which derived its very legitimacy from its non-political character. According to the ordo-liberal theorists, the EC should content itself with the framework regulation of the common market and refrain from redistributory and market-interfering measures. As the constitution in the sense of *Wirtschaftsverfassung* defined the EC in non-political terms, there was no need to build up the EC's political aspect or to develop the concept of constitution in a political dimension.

So constitutional vocabulary was first employed to account for the EC's economic constitution. Next came the discourse on what I have called the juridical constitution: the constitution as the self-reflexive level of the legal order. This discourse was initiated by the great constitutional decisions of the ECJ in the 1960s: the decisions established the doctrines of supremacy and direct effect, and claimed for EC law the position of an independent legal order. In this discourse, the Treaties came to be seen as representing the constitutional level of the EC legal order. If the discourse on the economic constitution was mainly conducted as a scholarly discussion, the discourse on the juridical constitution was launched by the Court, and the scholars only joined it at a later phase.

The Treaty of Maastricht confirmed the extension of the EU's activities beyond the framework regulation of the single market and the execution of the four market freedoms. By the same token, it became evident that the non-political view of the EU (EC), embraced by the ordo-liberals and the first wave of the constitutional discourse, could no longer be convincingly upheld. In addition to the broader definition of the objectives of European integration, the Treaty of Maastricht introduced the concept of European citizenship; this also provided fuel for the examination of the EU as a polity and for the debates on the EU's political constitution. At this stage, a new group of participants joined the constitutional discourse; if the first phase, that of the *Wirtschaftsverfassung*, was dominated by the scholars and the second phase, that of the juridical constitu-

tion, by the ECJ, in the third phase the politicians can be deemed have held a predominant position.

So we should understand "constitution" as a relational concept. But maybe we should take a further step and not content ourselves with an analysis of the relations between law and economy or law and politics or the law's reflexive self-relation. Maybe we should extend our discussion to the interrelations between the economic, political and juridical constitution, and the corresponding concepts. Thus, the complicated relations between basic rights and the four market freedoms can be seen as involving a tension between two aspects of the EU's constitution. We should also remain open to the possibility that the three concepts that I have referred to will not exhaust the multi-dimensionality of the EU's constitution; that in the future we can speak of a, say, social constitution, too. Finally, the recent theorizing about constitutional pluralism or multi-level constitutionalism has also provided us with fresh conceptual tools for tackling one further dimension of constitutional interaction, namely the reciprocal impacts of national and trans-national constitutionalism.

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Regulation of Political Parties – Guidelines, Codes and Opinions

Regulation of political parties has been on the agenda of the Venice Commission many times. There are almost countless opinions which often briefly and sometimes very thoroughly touch upon matters concerning political parties. Such remarks and comments on regulation of political parties can be found not only in opinions on laws dealing with political parties in general and their financing in particular,[1] but also in opinions on constitutional legislation, on election laws and the right to free elections, on legislation concerning freedom of assembly and association, freedom of expression and the right to a fair trial, etc.

The essence of these opinions has been distilled into a set of codes, guidelines and other documents which have been adopted by the Commission for future guidance, e.g.

- Guidelines on prohibition and dissolution of political parties and analogous measures adopted by the Venice Commission at its 41st Plenary Session (Venice, 10–11 December, 1999)[2];
- Guidelines and Report on the Financing of Political Parties adopted by the Venice Commission at its 46th Plenary Meeting (Venice, 9–10 March 2001)[3];

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[1] Cf. for example the Venice Commission's opinions on legislation on political parties in Armenia (CDL-AD(2003)005), Azerbaijan (CDL-AD(2004)025), Moldova (CDL-AD(2002)028 and CDL-AD(2003)008), Ukraine (CDL-AD(2002)017), and Bulgaria (CDL-AD(2008)034), and the Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey adopeted by the Venice Commission at its 78th Plenary Session (Venice, 13–14 March 2009). – These and all other Commission documents referred to below are available through the Internet site of the Venice Commission at www.coe.int.

[2] Document CDL-INF(2000)001, Opinion 63/1998.

[3] Document CDL-INF(2001)008, Opinion 82/1998.

- Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12–13 March 2004)[4];
- Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources adopted by the Venice Commission at its 66th Plenary Session (Venice, 17–18 March 2006)[5];
- Report on the Participation of Political Parties in Elections adopted by the Venice Commission at its 67th Plenary Session (Venice, 9–10 June 2006)[6];
- Code of Good Practice in Electoral Matters; Guidelines and Explanatory Report adopted by the Venice Commission at its 52nd Session (Venice, 18–19 October 2002)[7];
- Code of Good Practice in the Field of Political Parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12–13 December 2008) and Explanatory Report adopted by the Venice Commission at its 78th Plenary Session (Venice, 13–14 March 2009)[8].

Taken as a whole, the substance of these documents establishes standards which – when adhered to – can achieve good law making and good law application in this field of regulation.

The position of these standards within the hierarchy of legal sources is not easy to define. Perhaps they can be classified as soft-law with "moral" authority not too far from the authority of recommendations of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe[9] – in line with the model tax conventions on income and on capital of the Organisation for Economic Co-operation and Development[10] or the various documents of the World Customs Organization on customs valuation, on origin, on the Harmonized Commodity Description and Coding Systems, etc.,[11] which also are developed by expert bodies.

In 2003 the Grand Chamber of the European Court of Human Rights delivered judgment in the case of Refah Partisi (The Welfare Party) and others

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[4] Document CDL-AD(2004)007rev, Opinion 247/2003.
[5] Document CDL-AD(2006)014, Opinion 366/2006.
[6] Document CDL-AD(2006)025, Opinion 329/2004.
[7] Document CDL-AD(2002)023rev, Opinion 190/2002.
[8] Document CDL-AD(2009)021, Opinion 414/2006.
[9] Cf. Florence Benoît-Rohmer, Heinrich Klebes: Council of Europe law. Towards a pan-European legal area. Strasbourg 2005, ISBN 978-92-871-5594-8, p. 108–110.
[10] Cf. http://www.oecd.org/document/37/0,3343,en_2649_33747_1913957_1_1_1_37427,00.html.
[11] Cf. http://www.wcoomd.org/home_wco_topics.htm.

v. Turkey,[12] the latest in a number of Turkish cases concerning prohibition of political parties. Refah Partisi had been dissolved pursuing a decision of the Constitutional Court of Turkey, and the main question in the case before the European Court was whether the dissolution violated the freedom of assembly and association as protected by Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The answer to this question was negative for the applicants:

"…[F]ollowing a rigorous review to verify that there were convincing and compelling reasons justifying Refah's dissolution and the temporary forfeiture of certain political rights imposed on the other applicants, the Court considers that those interferences met a "pressing social need" and were "proportionate to the aims pursued". It follows that Refah's dissolution may be regarded as "necessary in a democratic society" within the meaning of Article 11 § 2."

And the Court concluded:

"Accordingly, there has been no violation of Article 11 of the Convention."

The Venice Commission had dealt with matters of prohibition and dissolution of political parties several times in the 1990ies and it had published its guidelines on prohibition and dissolution of political parties in early 2000. But the Court did not refer to the views of the Commission, which initially caused some disappointment. Later however – with good reason – the view prevailed that the silence of the Court could not reasonably be interpreted as negative: The Court on the one hand and the Venice Commission on the other have to achieve different aims. The Court has to provide protection against violations of the European Convention, it has to clarify the borderline between acceptable restriction and unacceptable violation, and it therefore has to identify the minimum which always is protected – the *minimum standard*. The Commission, however, has to provide advice how to achieve a *good standard*, which is much more than the bare minimum, and the Commission accordingly has to identify this specific standard. For the Commission it would not be satisfying that legislation based on its advice narrowly passes the Convention test and that a verdict of violation thus is avoided; its advice must be way above the minimum level.

To give advice, and perhaps to criticise, in the field of constitutional law is delicate business; to get it wrong where and when political parties – which are

[12] Judgment of 23 February 2003, applications 41340/98, 41342/98, 41343/98 and 41344/98. The text is available at http://www.echr.coe.int; cf. also the notice at http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=698813&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

an essential part of every democratic system – are involved would be really bad. Any advice has to consider that constitutional law to a very large extent is a result of political experience, of trial and error of the past, and this past can be a very distant one. Every constitutional jurisdiction has its own particular history and therefore its own set of political experiences. Add to this that constitutional law not always is law on the books and that the sphere of constitutional law is so close to politics that interaction is a fact of everyday life. Finally, interaction of this kind can differ hugely between constitutional systems even when these all beyond doubt are democratic systems.

All this is well known. And it has to be remembered when advice is asked for or given in matters of constitutional law. There is no "one fits all"-solution for problems of constitutional law emerging from different jurisdictions which at first glance seem to be the same or at least very similar. This has to be taken into account when it comes to apply any of the guidelines or codes of the Venice Commission concerning the law of political parties. They allow ample margin for that. Two examples, party regulations in Germany and in Sweden, both beyond doubt well established democracies, will illustrate this.

Sweden has few written rules on political parties. The Swedish Constitution, the Instrument of Government of 1974, provides in Chapter 3 Articles 7 and 8 a few basic rules on distribution of parliamentary seats in general elections and it states that "party" is understood to mean any association or group of voters which runs for election under a particular designation.[13] This regulation and the definition which is part of it are deliberately kept brief. The *travaux préparatoires* show the reason: There has been long standing reluctance to accept any kind of regulation of political parties. This reluctance is based on the assumption that political activities primarily are a matter for political parties and that freedom of expression and information is fundamental for their work; there must be no interference – neither by legislation nor else – with this freedom.[14] One consequence of this reluctance has been that legislation on non-profit associations, *ideella*

[13] An English translation is available at the website of the Swedish parliament at http://www.riksdagen.se/templates/R_Page____6307.aspx and printed in: Constitutions of Europe. Texts collected by the Council of Europe Venice Commission. Vol. II. Leiden, Boston 2004, ISBN 978-90-04-13931-2, p. 1711–1802. For a commentary to the Constitution see: Erik Holmberg, Nils Stjernquist, Magnus Isberg, Marianne Eliason, Göran Regner: Grundlagarna. Regeringsformen, successionsordningen, riksdagsordningen. 2nd ed. Stockholm 2006, ISBN 978-91-39-10816-0.

[14] Report of the Constitutional Committee of the Swedish parliament (Konstitutionsutskottets betänkande) 1973:26 p. 17.

föreningar, never has been enacted in Sweden. These associations – sports and stamp collectors clubs as well as political parties and trade unions – are recognised as legal persons if properly founded by their members, which is done entirely in private. Registration or confirmation of the founding act, of by-laws, or of a representative etc. by a public authority is neither required nor possible.[15]

There is, however, an exception to this rule of reluctance to enact legislation concerning non-profit associations in general and political parties in particular: In 1969 legislation was enacted for the first time, which permitted public financing of political parties by *municipalities.*[16] In 1972 this legislation was followed up by legislation on public financing of political parties on the *national level.*[17] Another exception to the rule is enacted in legislation on procedures to be observed by political parties before general elections. For participation in an election it is required to register the name of the party and the candidates presented by the party.[18]

Germany, too, has basic provisions on political parties enacted in the Constitution, the *Grundgesetz* of 1949.[19] Article 21 provides that political parties shall participate in the formation of the political will of the people and that they may be freely established. Their internal organisation must conform to democratic principles, and they must publicly account for their assets and for the sources and use of their funds. Further, Article 21 provides that parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the

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[15] Cf. Krister Moberg in Michael Bogdan (ed.): Swedish Law in the New Millennium, Stockholm 2000, ISBN 91-39-00628-X, p. 377.

[16] Act on financial support of political parties by municipalities (1969 no 596). One reason for this legislation was that the Supreme Administrative Court in several cases had ruled that local communities could not legally support political parties financially; e.g. Regeringsrättens årsbok 1966 ref. 27, in which case the Court ruled that a municipality could not assume the cost for printing ballots (which political parties had to pay for). In 1992 the Act of 1969 was replaced by provisions in Chapter 2 Paragraphs 9 and 10 §§ of the Municipalities Act (1991 no 900). In this Act there are also provisions concerning the distribution of seats in local assemblies pursuant to local elections.

[17] Act on State Support for Political Parties (1972 no 625). In 2002 an attempt was started to modernise the Act of 1972. A draft was published in 2004, but work on the project was discontinued; Statens offentliga utredningar 2004:22 Allmänhetens insyn i partiers och valkandidaters intäkter. Betänkande av Utredningen om offentlighet för partiers och valkandidaters intäkter.

[18] Election Act (2005 no 837) with comprehensive provisions on general elections including registration of party names and candidates and how to order and to pay for the printing of ballots.

[19] An English translation is available in: Constitutions of Europe. Texts collected by the Council of Europe Venice Commission. Vol. I. Leiden, Boston 2004, ISBN 978-90-04-13930-5, p. 760–822. – The constitutional aspects of the German law on political parties are presented in extenso by Philip Kunig, Parteien in: Handbuch des Staatsrechts der Bundesrepublik Deutschland (editors Josef Isensee, Paul Kirchhof), Band III, Demokratie – Bundesorgane. 3rd ed. Heidelberg 2005, ISBN 3-8114-3302-4, § 40.

free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional, and that the Federal Constitutional Court shall rule on the question of unconstitutionality. Finally, Article 21 provides that details shall be regulated by federal laws. This last part of the provision is the base of the comprehensive *Parteiengesetz,* the Political Parties Act, which was enacted in 1967[20] – as many as 18 years after the adoption of the Constitution and only since the Federal Constitutional Court in 1966 had ruled that parliamentary budget decisions on financing of political parties by public means were unconstitutional, if not supported by a federal law according to Article 21.[21] This Act defines the term (political) "party" (as distinguished from "political association"), and with this definition as point of departure the Act provides rules concerning, *inter alia,* the internal organisation of parties, the presentation of candidates by parties, public financing of parties, their accounting and auditing of their accounts, further rules about sanctions if accounts are found not to be in order, and finally rules about the execution of decisions to prohibit parties. A third source of regulation is legislation on non-profit associations as codified in Paragraphs 21–79 of the German Civil Law Code.

Registration of political parties is a delicate matter for both Germany and Sweden. Both states went through times of political insecurity for political parties in the 19th and 20th century and therefore still avoid requirements for political parties to register. Neither Germany nor Sweden require outright registration in order to get status of legal person or of political party, but both provide for similar proceedings to get recognition as political party. *Sweden's* Election Act requires registration of the name of a party as prerequisite for participation in elections, and an application to be registered for participation in a parliamentary election has to be supported by at least 1500 citizens with the right to vote in the election. *Germany's* Political Parties Act requires the parties – i.e. those (and only those) political associations which meet the requirements laid down in the "party"-definition – to file certain documentation with the *Bundeswahlleiter,* the public authority in charge of federal elections. The documents to be filed must contain proof of the founding of the party, further the by-laws and the programme of the party and finally information about their leading functionaries. Filed documentation has to be updated every year and the public has

[20] Gesetz über politische Parteien (Parteiengesetz) vom 24.7.1967. – A commentary to this Act has been published by Jörn Ipsen (ed.): Parteiengesetz. München 2008, ISBN 978-3-406-57531-0.
[21] Entscheidungen des Bundesverfassungsgerichts vol. 20 p. 56.

access to the whole collection of documents. Documentation which is filed electronically – the filing method which nowadays is used by all major parties – is available for download on the Internet; copies of documentation filed on paper can be obtained free of charge by mail.[22]

Old fashioned registration requirements modelled on old police state templates have played an important part in many of the above mentioned opinions of the Venice Commission on draft legislation on political parties and have regularly been criticised. The Venice Commission guidelines on prohibition and dissolution of political parties point out that registration requirements not *per se* amount to a violation of rights protected under Articles 11 and 10 of the European Convention but the guidelines underline also that any restriction must be in conformity with principles of legality and proportionality.[23] There is probably no risk that the proportionality principle could be violated in Swedish proceedings for registration of party names. Nor is there an indication that the German filing requirements are applied in any un-proportional ways. However, the wording of the German Political Parties Act, and especially its definition of "party" is very elaborate and strict; it is manifest that the definition mirrors constitutional ideas of the past and that the whole Act was drafted more than 40 years ago. If applied literally it is not entirely impossible that the results could of the old fashioned kind.

Financing of political parties is regulated in both Sweden and Germany.

The very detailed and comprehensive *German rules* have been tested many times in the German Constitutional Court[24] and even in both criminal and administrative courts – the latter caused by the scandals around concealed private payments to political parties usually referred to as Flick-affair in the 1980ies and the Chancellor Kohl-affair in 1999.[25] Under the Political Parties Act the political parties have to publish extensive information on their finances. Much of it is nowadays available on the Internet through the Internet sites of

[22] Cf. Paragraph 6.3 of the Political Parties Act and the Internet site of the Bundeswahlleiter at http://www.bundeswahlleiter.de/de/parteien/parteigruendung.html (information about the filing of documentation concerning the founding of a party) and http://www.bundeswahlleiter.de/de/parteien/parteien_downloads.html (links to documentation).

[23] Document CDL-INF(2000)001, part III Explanatory Report, para. 6.

[24] Cf. the latest of many decisions of the Constitutional Court in Entscheidungen des Bundesverfassungsgerichts vol. 111 p. 382 and the presentation of the development of the jurisprudence of the Court in: Ipsen, Parteiengesetz (footnote 20) Vor § 18 ff. Rdnr. 1–39 (Thorsten Koch).

[25] Eckart Conze: Die Suche nach Sicherheit. Eine Geschichte der Bundesrepublik Deutschland von 1949 bis in die Gegenwart. München 2009, ISBN 978-3-886880-919-6, p. 591–594 (Flick) and 794–796 (Kohl).

the parties. Wrong, misleading or incomplete information is sanctioned in Paragraphs 31a–31d of the Political Parties Act, and sanctions are enforced by the Presidency of the German *Bundestag*.[26]

The *Swedish rules* are fragmentary. Public financing is covered, but not private financing. The 1972 Act on State Support for Political Parties provides that any party which applies for public funds has to file the annual report for the latest financial year which has to be based on the audited accounts of the party, and that the audit has to be conducted by a certified auditor according to good accounting practice.[27] There is no other legislation on accounting of political parties and on auditing of their accounts. Nor is it mandatory for political parties to *publish* economic information. But all major political parties publish such information, which also is available on their Internet sites. However, this published information is neither fully standardised nor composed according to templates which are common for all political parties. Whether the reference to good accounting practice, *god revisionssed,* is a satisfying yardstick for audits of political parties is an unanswered question. The existing regulations boil down to the rule that financial information is given voluntarily. Control – if any – is a matter for the media.

Are these solutions in Germany and Sweden in compliance with the Venice Commission guidelines on financing of political parties of 2001? These guidelines underline he importance of financial transparency. It is pointed out in paragraph 5 concerning *public* financing that

"[t]he financing of political parties through public funds should be on condition that the accounts of political parties shall be subject to control by specific public organs (for example by a Court of Audit). States shall promote a policy of financial transparency of political parties that benefit from public financing."

and concerning *private* financing in paragraph 7:

"The transparency of private financing of each party should be guaranteed. In achieving this aim, each party should make public each year the annual accounts of the previous year, which should incorporate a list of all donations other than membership fees. All donations exceeding an amount fixed by the legislator must be recorded and made public."

The German solution complies fully with these recommendations but the Swedish obviously does so only partly.

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[26] Cf. the Internet pages on Parteienfinanzierung by the Bundestag which can be reached through http://www.bundestag.de/bundestag/aufgaben/weitereaufgaben/parteienfinanzierung/index.html.

[27] Paragraph 14 of the Act on State Support for Political Parties (1972 no 625).

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Rule of Law and Legal Awareness: Russia in the Contemporary World. Challenges and Perspectives

Some scientists have suggested that a definition of the "rule of law" is not important. Rather, what is important is the meaning in context. But, there are moments when it becomes necessary to specify what a certain name or term means. Confucius said that there are times of quietude and conformation, but also there are so-called times of "rectification and correction of names".

Understanding of the rule of law principles differs when viewed through Anglo-Saxon legal traditions as compared to the continental legal tradition, to which Russia also belongs. The mentality and spirit of these legal systems are different.

The Russian legal system, borne out of transformations in the 19th Century under the reforms of Emperor Alexander II, is based primarily upon the German jurisprudence. It was from here that we borrowed a concept of "*Rechtsstaat*", which literally translates as "law-governed state". The English equivalent is "rule of law". For the time being, let us use the term "rule of law" as a concept meaning the predominance (or supremacy) of legal standards in the life of a civil society and state.

This principle underlies a new world order and constitutional systems of modern democracies. Through the rule of law principle the world is becoming one common super-civilization or the civilization of civilizations, irrespective of other differences. The alternative to this principle is lawlessness and social chaos. Therefore, this principle was taken as foundation for the present Constitution of the Russian Federation, and its implementation is the top priority of our country at this time.

The morality of law

Steps such as the adoption of liberal laws, legislative acknowledgement of common principles and norms of international law, and the creation of corresponding state and public institutions are insufficient for the real rule of law. It is also important that statutes express the essence of law as mankind understands it at each particular stage of its development. The great philosopher Spinosa once said that law was the mathematics of freedom.

Law cannot be simply what is dictated by political authority or issued by the state. In the 20th Century there have been two examples of legal tragedies which developed in parallel. One was totalitarian Soviet communism, and the other German Nazism. In the USSR, owing to efforts of the Stalinist regime theoretician Vyshinsky, the law was identified with statutory law, and law was identified with the will (or rather dictatorship) of the proletariat. Through such logic, whatever was prescribed by the state in the form of statutory law was lawful.

Hitler followed yet a different ideological pathway, absolutely antagonistic to communist ideology, but the result was the same. In Nazi Germany, the law was an expression of the will of the German nation, and the will of the German nation was incorporated in the Fuhrer. Hence, the law existed only as a body of statutory laws.

Both systems killed millions of people, because for both the law was given and contained within the statutes.

1. Protecting human rights

Finding the proper balance between the European Convention and the Russian Constitution is a reflection of the more general problem of balance between two major trends: towards globalization and towards national sovereignty. On the one hand, Russia gradually becomes a part of integrated European legal territory, implementing in its legal system many European legal principles, including the principle of availability of judicial protection for human rights and freedoms, both at a national and a supranational level. On the other hand, national sovereignty always assumes the existence of national legal and judicial systems as a primary instruments of justice, with the admission of a supranational system of protection of human rights and freedoms as an additional, subsidiary tool. Meanwhile, it is important that both systems work harmoniously; if either is disregarded, the mechanism for protection of human rights and freedoms will suffer.

Article 15 (Part 4) of the Constitution of the Russian Federation along with the Federal Law #54-FZ of March 30, 1998, "On ratification of the Convention for Protection of Human Rights and Basic Freedoms" (and Protocols thereto), creates a legal basis for direct application of both provisions of the Convention, and legal propositions of the European Court of Human Rights (European Court). The European Court provides interpretation of the norms contained in the Convention, as relevant from time to time. Based on its interpretation of the Convention, the European Court develops uniform, pan-European standards for protection of human rights and freedoms, mandatory for all member states of the Convention. Even though the catalogue of the rights guaranteed by the Convention, is consistent in text with the list stipulated by the Russian Constitution (in which the nomenclature is even more comprehensive, due to the addition of social rights), the content of the rights guaranteed by the Convention in some cases appears much broader in light of their practical interpretation by the European Court. The primary goal of Court reform (discussed recently in connection, amongst other things, with the ratification of Protocol 14 to the Convention) is to increase the role of the European Court as a supranational court, de facto the Supreme European Court of Justice for protection of human rights and freedoms in all European states.

As of early 2007, the number of complaints, lodged against the Russian Federation and pending consideration by the European Court amounts to approximately 22% of the total number of referable applications (in absolute figures – approximately 20,000); the annual increase in complaints lodged to the European Court against the Russian Federation in 2006 was 38%. These figures, in many respects, manifest a credibility gap that exists between Russian citizens and the domestic judiciary. The exponentially increasing number of Russian applications to the European Court cannot be entirely attributed to the fact that more and more of our citizens "discover" the Convention; but this rather happens because the domestic judiciary establishments (especially trial courts of general jurisdiction) ineffectively protect citizens against violation of their rights.

The primary task of our state in response to complaints against Russia processed by the European Court should be both the modification of domestic legislation (this needs to be done without waiting for repeated acknowledgements by the European Court of other similar violations), and the assurance of domestic efficient instruments of legal protection, even though often these two directions are closely inter-related. Despite the fact that a growing number

of applications testifies to the accessibility of the European Court to Russian citizens, an overwhelming majority of complaints still are declined. This is due to non-observance of application requirements, as well as under-utilization of possibilities provided by domestic legal protection instruments. As a matter of fact, citizens address themselves to the European Court when there still exists an opportunity to defend their interests in-country, but they prefer to go directly to Strasbourg. Why? I suppose the reason lies in the lack of public confidence in domestic judicial and law enforcement systems. Therefore, the state, represented both by the highest agencies of power, and specific courts and law enforcement establishments, has to provide – within the limits of reforming and streamlining the entire system – for an ability of every complaining individual to first bring the domestic system to its conclusion, and only then apply to the European Court. If this ever happens, I guess the flow of complaints should be reduced quite significantly.

Many violations recognized by the European Court, as well as a great many complaints submitted to Strasbourg, could be avoided if Russian trial courts are more attentive and instrumental in using the Convention and the European Court practice in their activity. Certainly, the problem of perfection of domestic legal protection mechanisms cannot be exclusively Russian. It exists in all member states of the Convention, especially in the so-called «new wave» participants.

The policy of the European Court, as well as that of other bodies of the European Council, is to stimulate each member state to resolve any in-system problems as revealed by the European Court, at a domestic level and eliminate from the future Court docket any repeated cases with similar violations committed with regard to other individuals. Therefore, the task of Russia – as the country holding the first place in terms of the number of submitted complaints – is to pay the closest attention to perfection of its domestic legislation and national judiciary in order to transfer the main burden of human rights protection onto the national legal structures and reduce the flow of complaints sent to Strasbourg. We should not forget that at the moment of Russia's entry into the European Council both domestic and international experts evaluated our legal system as non-compliant to EC standards. Since that time, Russian legislation has undergone a quite lengthy and relatively liberal transformation. But does the adoption of a mostly faultless law mean its equally faultless practical implementation?

Since the Convention is a integral component of national legal systems of its member states, any legal protection methods accessible at a national level

should be efficient and known to the citizens of each specific country. These methods form a « first line of defence » for protection of the rule of law and basic human rights and freedoms. The first task of every national judiciary is to protect human rights by using all domestically available mechanisms, while ensuring strict observance of the Convention provisions. Our common task is to render these mechanisms really efficient from the standpoint of civil rights protection.

2. Social and political rights

For centuries mankind has been trying to find ways of achieving justice. At each stage of historical development these ways have had their own specific features. We live in a world that is becoming globalised; this fact has its pros and cons. The latter, quite unfortunately, prevail. The report on «Justice and Development» for 2006, prepared by the World Bank (International Bank for Reconstruction and Development), shows that the most fundamental cause for existence of poverty lies in the absence of power combined with the absence of investment possibilities. Absence of incomes, absence of access to services, absence of assets – all these forms of public misery are combined with the absence of a "voting voice", the absence of power and that of status. Steps taken by the State could expand the investment potential of those whose possibilities are limited, by making investments into their human capital, into the infrastructure they use, and also into assurance of fairness and safety in the markets where such people negotiate. And if the State fails to take such steps, this should mean it has other priorities in mind.

The current policy, failing to promote elimination of economically inefficient kinds of injustice, is – expressly or by impliedly – the result of political choice. Such political mistakes, generated by injustice and securing eternal rule thereof, are antagonistic to prosperity. The people deprived of possibilities are incapable of making any contribution to their own country's development. Their potential and talents are wasted, while other state assets such as funds, soil, subsoil and other resources become under-used. Disparity in the control over resources, says the Report of the World Bank, promotes unequal representation of power, which manifests itself in a poor quality of institutions of government: nobody ever spurs on official bodies to increase accountability.

The constitutional principle of a social state assumes creation of equal possibilities for all members of the society, while the state carries out social policy recognising the right of each member of the society to such a standard

of living (including food, clothes, housing, medical and social services), which is essential for sustenance of health and the well-being of such person and his immediate family, both when he works and also in the event of his unemployment, illness, physical disability, or old age. In this way, constitutional law as a fundamental control of social relations gets a more pronounced social dimension.

The Russian Constitution codifies the legal foundation for social protection, including the creation of conditions for ensuring a dignified life and free development of each individual, labour safety and health protection, state support for the family, motherhood and childhood welfare, priority of international social standards, etc. The basic tendencies defined in the social sphere include the cancellation of excessive state support; meeting the minimum social requirements of citizens, based on the financial assets available at citizens' disposal; target-oriented social aid; etc. However, it is clear that proclaiming such noble goals is one thing, and making them a reality is quite another. Today almost 25% of Russian citizens live below the poverty line, and most of them are not unemployed. Struggle against poverty and social injustice is one of the most important tasks for both the State and society.

Even though formally the Constitution of the Russian Federation proclaims Russia as social state, the policy of which is directed at the creation of conditions providing for a dignified life and free development of each individual, it is hardly a secret that such state of affairs in our country is but a constitutional ideal. Many researchers appraise the current status of Russia as a formally social state to conform to the early 20's of the last century. Among the reasons for such "underdevelopment" of social mechanisms, are vestiges of the Soviet political and social system, contradiction of economic, social and other goals of the state policy, and also the fact that today's Russia belongs in the group of developing countries by major macroeconomic indicators.

Legal institutions can both defend the political rights of citizens and limit the power of the ruling elite. They can provide equal economic possibilities by protecting property rights of all citizens and providing for the absence of discrimination in market relations. But, at the same time, such problems as errors in the legislation and poorly calculated social consequences of specific laws which are at odds with actual social and economic conditions and public opinion and cultural traditions can have quite the opposite, negative effect on social justice for the society and its development. It is such discrepancies that first come to light during the performance of constitutional justice.

The most comprehensive list of social rights is provided in Part 1 of the Euro-

pean Social Charter of May 3, 1996 (not ratified by the Russian Federation).

The Constitution of the Russian Federation, when defining the legal status of individual, followed the General Declaration of Human Rights and the International Pact of 1966 to proclaim such rights as:

- a right to social security,
- a right to employment,
- a right to equitable labour conditions,
- a right to protection of labour rights by all ways provided by the law, including the right to strike,
- a right to association in trade unions and for free trade-union activity,
- a right to education,
- a right to healthcare,
- a right to clean and safe environment,
- a right to housing.

This above list of basic social rights – on the strength of Articles 17 (Part 1) and 55 (Part 1) of the Constitution of the Russian Federation – cannot be considered complete and does not prevent constitutional protection of other conventional social and human rights and freedoms.

In modern jurisprudence and judiciary practice there exists a growing tendency to consider the social rights consolidated by the Constitution not only as basic reference points for the legislator, but also as fundamental inherent rights equal by importance to the constitutional civil and political rights. The constitutional social rights – along with the civil and political rights – by their nature pertain to fundamental human rights, indefeasible and belonging to everyone from birth. Based on the principles of equity and social solidarity, such rights are consolidated by the Constitution as those directly effective and therefore subject to judicial protection. As such, they become binding for both legislative and executive powers, creating reference points for the state social policy, as well as for the creation and development of corresponding branches of the legislation.

One of the basic problems, still awaiting solution in the course of current social security reform, is the establishment of social security payments which will meet at least the minimum living requirements. A survey performed by the All-Russia Centre for Living Standards shows that the purchasing capacity of the average old-age benefit, received by more than 29 million Russians, barely exceeds the subsistence minimum; while the average disability benefits, received by 4.2 million people in the Russian Federation, as well as the survivor's and social benefits are well below this threshold. The official

minimum wage in Russia is below the average subsistence minimum; the average-wage-to-the-average-subsistence-minimum ratio in Russia also lags far behind standards adopted in the countries with well-developed market economies.

In some cases, measures of social support perform a guaranteeing function, i.e. they are directed at the assurance of constitutional laws. The constitutional duty of the State in guaranteeing the right for pre-school education in conjunction with the Constitutional provisions on the state support for motherhood and childhood welfare makes it necessary for the State to render financial aid to families with pre-school children. Such support, as the Constitutional Court has noted, may be provided in various ways, including by setting a limit on the pay required from parents for the stay of their children at pre-school day-care centres. The specified measure of social support represents one of the forms for nation-wide guaranteed public availability of education and care at pre-school institutions.

This situation draws sharp criticism from experts, sparks wide public discontent, and growth of social unrest. In recent scientific publications the existing social security system is quite often described as being inconsistent with the social equity principle, insufficient for provision of a dignified life and free development of each individual, and thereby diverging with the constitutionally protected social values and aims. There is a real danger of upsetting the balance between the constitutionally protected social values, of rupture between the social and economic priorities, between the rights of citizens and public interests.

Until recently the Constitutional Court showed some restraint in this area. It repeatedly stated that the Constitution, while stipulating the individual right of every citizen to social security, refers the solution of problems related to the legal grounds of awarding guaranteed social payments, methods of their calculation, rules of indexation, definition and classification of such payments, etc. to the legislators (the rulings of CC of April 4, 2006 - #90-O, of July 18, 2006 - #297, of November 2, 2006 - #563-O, of November 16, 2006 - #510, of November 16, 2006 - #511, etc.). The legislator is given the possibility to eliminate any shortcomings and defects existing in the new regulation, which, unfortunately, are becoming more and more obvious.

Imperfection of the social security and social protection legislation manifests itself also in a number of vague and inconsistent provisions, which tend to be ambiguously interpreted in the practice of law enforcement. Quite often it leads to arbitrary application of such provisions and, consequently, to infringement

of the social rights of citizens. Such infringements may be further eliminated by means of revealing the constitutional-legal meaning of the rules of law defining the order and conditions of realization of the right to social security, and on this basis – by updating of the law enforcement practice.

There exists a variety of problems related to the delimitation of benefits of compensatory nature from other benefits, and also to the separation of lasting legal relations from the common system of legal relations related to social support. We have witnessed infringements of the equality principle taking place in the process of provision of social support to the inhabitants of various regions of Russia, and also there were cases of wrongful refusal by various constituent entities of the Russian Federation and municipal formations in granting social support to various legally eligible categories of citizens.

The Federal legislator, having delegated partial authority in the area of social protection area to the level of constituent entities of the Russian Federation and municipal formations, yet failed to define with sufficient accuracy the scope of this authority, also failed to provide proper principles of the new legal regulation and the minimum standards guaranteed to all citizens of Russia irrespective of their domicile. Any efficient financial mechanism, providing for the state-wide realization of uniform social policy and redistribution of budgetary funds at all levels in order to preserve the already obtained level of social protection, was not put in place either.

In general, the legislation intended to control one of the major fields of activity of the social state, appeared to be deplorably inconsistent, vague and incomplete. The Constitutional Court of the Russian Federation, when ruling on the cases checking the constitutionality of laws and other statutory acts – by the use of its inherent authority – corrects any defects of the effective social legislation, thereby assuring the constitutional protection of basic social and human rights and freedoms.

Real assurance of social human and civil rights compliant both to the Constitution and to the well-established standards of life, commensurate with a modern socially and ethically targeted economy, is a necessary precondition not only for political stability of any society, but also for its successful development towards humanism, democracy and progress.

Certainly, to succeed in the challenging task of building a model of the social state based on the Constitution and assuring high standards of life for its citizens may seem quite difficult, but those who dare to walk shall finally reach!

Public Legal Awareness

Does the rule of law exist? Who saw it and who can describe it? Here we should again return to great thinkers of the past. One of them theoretically proved that there was an unknown planet in the Solar system. But nobody could view that planet, so other astronomers said "the facts speak differently: we look in our telescopes and there is no such planet", to which the discoverer replied, "the worse for these facts of yours". So his discovery was first written off as "crazy chair-borne sophistication". And then the planet was finally viewed. The same situation exists with the Rule of Law.

The task consists of bringing the rule of law and an understanding of its necessity to the general public, and of the country-wide introduction of its principles; otherwise all, even the greatest, undertakings will come to nothing. A good example of this is the great liberal reforms of Emperor Alexander II, which ended in the rise of anarchy and this reformer's terrorist assassination. But the terror continued and finally Russia was caught in bloodshed of revolution. I shall not judge the revolution itself – there were good and bad sides to it – but we now speak about the rule-of-law principle. I will always repeat: we must not try to destroy the parliament. When the parliament was disbanded and stormed in this country in 1993, not everybody abroad understood it. Yes, the then-existing Constitution was imperfect, even bad, but it shouldn't have been so debased in the eyes of the mass public in favour of tactical victory.

Thank God, that the conflict was extinguished and not only by the use of tanks, for otherwise a far bloodier tragedy could have ensued. I am not going to castigate political leaders of that time, especially the deceased ones. But we should preserve continuity and consider that in Russia the «soil» is barely suitable for the cultivation of "a fragile flower" like the rule of law; we should always remember that even "a slightest cold spell blown by revolutionary winds" can kill this fragile flower. That is why I believe our main goal today lies not only in creating good laws; this stage has already effectively happened. The legislation system has been created and now it produces laws, sometimes bad and sometimes very bad. I have repeatedly criticized this system, based on our experience at the Constitutional Court. For example, the tax legislation, where there are many conflicts and where normative standards can change up to several times within the same tax period. This is a shame from the viewpoint of stability of the legal system. But still we do have an adequate legislative system in place. Now it is important to transform the legal awareness both of professional lawyers and of the general public.

Russia is a typical land of extremes: there is an island of legal life and then there is a huge continent of those living outside of the law. There are salaries in "grey envelopes"; unfair distribution of profits; desire to settle conflicts by unlawful methods. In Russia, there still exists the danger of transformation of law into lawlessness, and of lawlessness into a worse kind of social existence, into obliteration of law or social chaos, since the majority of the population still lives in poverty. From the viewpoint of social security and living standards, Russia cannot be called a safe country. This social problem keeps at bay the ultimate victory of the rule of law, and, hence, and the triumph of democracy in Russia. Poverty-stricken people do not need democracy not because they do not want to live in a democracy but because they are unable to see the value of democracy in their life.

From this viewpoint, the people are still the protagonist and decisive factor. If most of them did not want to live by the law, the country would have already reverted to former times by counter-revolution or the like. This does not happen; but the opposite does not happen either. In my opinion, we have not yet safeguarded a steady or mature democracy. I would not say that our reforms are completed. They exist in the form of legislation for judicial reform and economic reform, etc. The rule of law still has to become a real driver of liberal reforms; but such an irreversible turn has not yet taken place. Why? Because of the negative factors that exist in Russia.

In Russia, the role of the authorities in relation to the rule of law is a paradox. On the one hand, democratic standards are badly needed. But, on the other hand, if we adopted democratic standards as they exist, for example, in Belgium, Germany, or even in the United States unchanged onto Russian soil, this would be wrong and subject to imminent failure. In Russia, the ruler always had priority over society, and all reforms have been due solely to the efforts of the authorities while society remained impassive. This absence of proper transformation of public legal awareness was the prime reason for failure of all the previous reforms. In my opinion, it still serves as the stumbling block to the success of reforms, on the one hand; and, on the other hand, it is the main factor leading to accretion of power in the hands of the ruling elite.

A dangerous tendency exists: the reformers require more and more power to bring their reforms to a successful ending. But how are we to sail through the dangerous strait between these Scylla and Charybdis so that our reformers do not get too carried away and turn themselves into a mechanism that works not for society's interests but for its own? This is one of the main challenges

that Russia faces, but meeting this challenge will be impossible without the transformation of public legal awareness. Such transformation would be impossible in a Russia isolated from the rest of the civilized world. We have to belong to the global community, and we are already there.

There are many things uniting us with other countries. Based on the rule-of-law principles can we cope not only with specific challenges for each country, including Russia, but also with global challenges dictated by our time – terrorism or international crime, the danger of ecological disaster, or poverty. Only by connecting the efforts of Russia, of its legal community, of its professional elite with those of the international legal community, including the United States of America, Western Europe, and the Far East is it possible to attain reasonable horizons, behind which even brighter horizons beckon.

Paraphrasing the well-known line from Bulgakov's novel "Dog's Heart", we may say that the rule of law resides not in the statutes, but in the minds. By saying "minds", we mean not only those of legislators and representatives of other branches of state power, but those of the whole nation, that is mass public legal awareness. Legislative consolidation of any liberal and democratic principles and provisions, or creation of corresponding institutes per se does not mean successful implantation of all these into the very core of social life and public consciousness. Quite similarly, creating a parliament does not at all mean creating a parliamentary system.

In the Oxford Law Dictionary the term Rule of Law (when attributed to the UK constitution) embodies three concepts: the absolute predominance of regular law, so that the government has no arbitrary authority over the citizen; the equal subjection of all (including officials) to the ordinary law administered by the ordinary courts; and the fact that the citizen's personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations.

The due process of law should become the very essence, the keystone, the driver both in the state and social life. Without such transformation, without their implantation into mass public legal awareness, any legislatively consolidated principles and norms, including constitutional ones, are nothing but mere scraps of paper.

Implementation of the rule of law in Russia is difficult at all levels of state and social life because its introduction in Russia takes place under very specific conditions. Historically, Western Europe was the birthplace of democratic foundations of a state system. When the resulting model, however, was applied under different cultural, social and economic conditions, it was frequently

incompatible with the mentality of nations shaped by other cultural, religious or communal traditions. Unlike European countries, Russia simply does not have enough time for an evolutionary, unhurried development and adaptation to the local milieu – cultural, religious and social – of the principles and norms of behaviour, such as individual legal behaviour, which developed in Western Europe over centuries. Due to religious and other cultural and social specifics, European public legal awareness tends to be rather individualistic, whereas the Russian social milieu has been almost exclusively shaped by the collective and communal consciousness of the local population. Any independent cultural environment will inevitably resist the introduction of non-native legal institutions into national legal systems. This process is universal, and it affects even successful organizations such as the European Union. Such resistance to introduced ("implanted") norms and institutions onto historical, cultural and religious specifics of the receiving state, lead to deformed public opinion about the borrowed institutions, to modification of their content, and quite frequently to defamation of their character in the eyes of population; and, as consequence, to general public rejection of inherently positive phenomena.

Unlike in the Western culture, the law is not a determinative social control factor in the legal systems where the moral priority still belongs to religion, traditions and customs, which is especially true for countries of the so-called "Eastern mentality". For instance, one of the basic postulates of the Western concept of democracy, asserting the priority of individual human rights and freedoms, is not equally supported by many Asian states. To a certain degree, the same may be said about Russia, where traditionally high state involvement in the economy and the majority of other areas of social life throughout practically the entire history of the Russian statehood entailed wide public immunity to the majority of traditional West European legal institutions.

In the modern world we see certain factors which inhibit the process of universalizing human rights and application of uniform standards across the entire world. The universal human rights' catalogue (axiomatic for Western mentality and incorporating the best of political and legal landmarks of European thought) is difficult to understand for nations belonging to different traditional cultures, even if such human rights provisions were included in their national constitutions and regional international agreements. "Axiomatic truths" of human rights have not been realised and understood in pre-revolutionary Russia or in the Soviet Union, where human rights were always sardonically referred to as "the so-called human rights." Today's Russia, with all its seeming

proximity to Western civilisation, is still undergoing a very slow and difficult process of understanding human rights. Many human rights' violations, caused by corruption, rampant organised crime, social and economic sufferings of a considerable part of the population, are already a product of the new Russia.

The task is to shape correct legal awareness among the population as a basis for the assimilation of a democratic heritage, so that democratic legal ideas and values can finally become a real priority in the country's development. The fact that Russia is a truly Eurasian country with a multi-ethnic population, belonging to several different traditional cultures complicates the formation of common public legal awareness, since it cannot rest upon uniform cultural, religious and traditional values. Under such conditions, formation of the true rule-of-law state goes only too slowly and painfully, as the human rights' culture, as an element of the social milieu, requires much time to grow and mature.

The role of the Constitutional Court under these conditions is one of a gardener cultivating constitutional principles on the national-specific soil. Rule of Law includes several essential elements:

– The first element is the ability of legal norms, standards and principles to govern people in their daily activities. People should be able to understand law and match their behaviour to the effective rule of law.
– The second element is the stability of statutory law. Statutory law should be reasonably stable to allow for proper planning and coordination of actions over a certain period of time.
– The third element is efficiency and dynamism. Law must direct the activities of the entire population, or at least a majority thereof. In other words, people should be directed by the law, abide by it and be capable of further development.
– The fourth element is the supremacy of statutory law; the regime of due process of law. In the so-called «continental» legal systems, to which Russia belongs, this principle (the regime of due process of constitutional law) plays an especially important role.
– The fifth element is the supremacy of legitimate authority. State officials of all levels (including judges) shall, as well as ordinary citizens, be governed by the law.
– The sixth element is the functioning of impartial justice in institutions. The courts should put the law into practice and carry out legal proceedings on the basis of justice.

Rule of law as a guiding goal

The Rule-of-Law principle is our guiding star, telling us in which direction to go, even though we might never reach the ideal. I think the ideal exists only in the hands of our Creator. But this must not mean we should not pursue this ideal. We, the seamen, who have embarked on a ship, called the human civilisation, in order to come through all the storms and find the desired destination, should be always guided by the rule-of-law principle as our Stella Polaris.

ANTONIO LA PERGOLA

(Catania 1931 – Roma 2007)

Academic Career and Distinctions

Dottore in giurisprudenza (University of Catania, 1952), libero docente in public law (University of Bologna, 1959). He held a LLM from Harvard Law School (1955), honorary degrees from several foreign Universities: Madrid (Complutense and Carlos III), Lisbon, Bucarest, Universidad de Buenos Aires), honorary professorships (University of Salamanca in Spain, Universidad de Belgrano, Universidad de La Plata, Universidad Nacional del Litoral, Santa Fe in Argentina, Externado de Bogotá in Colombia).

He was Professor of Constitutional Law at the Universities of Padua, Bologna and Rome. Visiting Professor at Johns Hopkins University and its Graduate Schools of Advanced International Studies in Washington and Bologna; University College, Dublin; The Law School of the University of Texas at Austin; the Law School of the University of California, Los Angeles (UCLA); The Law Faculty of the University of Puerto Rico.

Special Guest Lecturer in Canada and Australia. Senior Research Scholar at Harvard (1963), Oxford (Christ Church College) (1987) and Heidelberg (Max Planck Institut of International and Comparative Law) (1990).

He was also Editor of Academic Journals, past President of the Italian Society of Constitutional Lawyers, and a member of foreign academies, including the Académia de Ciencias Sociales in Cordoba (Argentina), the European Academy, Cambridge (U.K.), the International Academy for the Study of Comparative Law, Washington, DC.

Writings

Some of his major monographs deal with the relationship between the domestic law of Italy and international law (Costituzione e adattamento del diritto interno e internazionale, Milan, 1962) with the American federal system (Sistema federale e Compact Clause, Milan, 1962; Residui contrattualistici e struttura federale nell'ordinamento degli Stati Uniti, Milan, 1969), and with the rule

of law and the conduct of foreign affairs, (Poder exterior y estado de derecho, Salamanca, 1987).

Other books concern the theory and practice of federal and regionalised states (Los nuevos senderos del federalismo, Madrid, 1994; Sguardo sul federalismo e i suoi dintorni, Diritto e Società, 1992, pp. 492–517).

His work on the relationship between domestic law and international law has appeared in a revised Spanish edition in Mexico, Constitución del Estado y Normas Internacionales, 1985 edited by UNAM (Universidad Nacional Autónoma de Mexico). This later edition of the book takes into account the case-law of the Italian Constitutional Court and other comparable judicial bodies in the European countries with reference to the supremacy and direct effect of Community law in the member States: here special emphasis is laid on the transfer of sovereign powers to the Community and the resulting limitations on national sovereignty, as construed by the Constitutional Courts of Italy and Germany.

The place of Community law within the Italian constitutional system forms the object of more recent writings, such as Italy and European Integration: a Lawyer's Perspective, Indiana Int. Comp. Law Rev., IV, 1994, pp. 259–275; Constitución e integración europea: la contribución de la jurisprudencia constitucional, in Cuadernos de derecho público, n. 6, enero-abril, 1999, spc. p 13 ss.; Quale Europa-Artikel per l'Italia?, Scritti in onore di G.F. Mancini, Milan, 1998, vol. II, pp. 537–555; L'Unione europea tra il mercato comune ed un moderno tipo di confederazione: osservazioni di un costituzionalista, Riv. trim. dir. proc. civ., 1993, pp. 1–26.

His contributions to public international law date back to papers he wrote while a graduate student at Harvard Law School (Studies on Public Law, Milan 1959) as well as to an essay published in Revista española de derecho internacional, 1962 (La transformación del derecho internacional en derecho interno y la teoría de Hans Kelsen), devoted to the difference between Kelsenian monism and dualism, as understood and practised in Italy, and to the efforts made by both Schools to reconcile their opposite views.

His thought on the subject has been developed in a number of subsequent publications: thus, for instance, in an article written with Patrick Del Duca: (Community Law, International Law and the Italian Constitution, in American Journal of International Law, 1985, vol. 79, pp. 598 ss.).

Another book of his is being published by the University of Salamanca and collects several writings on constitutional democracy and judicial review of legislation in a comparative perspective.

Public service

Judge (since 1999) and previously Advocate General (1994–1999) of the Court of Justice of the European Communities. Before joining the European Court, he had served in Italy as chairman of several committees on legal problems appointed by the Head of State or the Government. He had sat on the High Council of the Judiciary (1976–1978) and later, first as Judge then as President, on the Constitutional Court (1978–1989). He was also a past Minister for European Affairs in the Italian Government (1987–1989), and past Member of the European Parliament (1989–1994), where he chaired the Commissions on Research and Development, and on Culture.

Mediator in South Africa together with Dr. H. Kissinger, Lord Carrington and other personalities, in view of the new constitutional system following the fall of apartheid. He has also served on high ranking international advisory committees such as the team of Wise People headed by former Portuguese President Mario Soares, to which the Council of Europe had entrusted the task of suggesting how its role could be updated on a continental scale.

President of the European Commission for Democracy through Law (Venice Commission) since its establishment in 1990.