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CONSTITUTION MAKING AS AN INSTRUMENT OF DEMOCRATIC TRANSITION

Proceedings of the UniDem Conference organised in Istanbul on 8-10 October 1992 in co-operation with the Government of the Republic of Turkey and the Turkish Democracy Foundation

TABLE OF CONTENTS

OPENING SESSION

Chaired by Professor Üstün ERGÜDER, President of Bogaziçi University, Istanbul

a. Opening speeches by :

- Mr Erdal INÖNÜ, Deputy Prime Minister of Turkey
- Professor Antonio LA PERGOLA, President of the European Commission for Democracy through law
- Mr Bülent AKARCALI, M.P., President of the Turkish Democracy Foundation

b. **"Tour de table"** of delegations from the Commonwealth of Independent States on the constitutional situation in their countries

I

Mr Erdal Inönü, Deputy Prime Minister of Turkey addressed the Conference as follows :

"Mr Chairman, Mr President of the European Commission for Democracy through Law, distinguished guests from the Commonwealth of Independent States, distinguished rapporteurs and members of the Venice Commission, Ladies and Gentlemen

Let me first express how happy I am to welcome you all here for this Conference on behalf of the Turkish Government. The Turkish Government considers this Conference an extremely important step on the way towards increased co-operation between the countries of the Commonwealth of Independent States, on the one hand, and the Council of Europe

and its member States, including our own on the other. It is rare for international Conferences to be organised as rapidly as this one and I think that the fact that, despite the very short notice, we have here so many distinguished members of parliaments and so many distinguished scholars, both from the CIS and as rapporteurs or members of the European Commission for Democracy through Law, amply proves that this is the right Conference at the right moment.
When the President of the European Commission for Democracy through Law first launched the idea of the UniDem Programme, as a project destined to complete the existing co-operation programmes and to cover the so far neglected field of the Universities, the Turkish authorities immediately endorsed this idea and together with the Turkish member of the European Commission for Democracy through Law, Prof. Ergun Özbudun, Vice-President of the Turkish Democracy Foundation, we agreed on the proposal to hold a seminar on constitution-making for the CIS States here in Turkey. The European Commission for Democracy through Law welcomed our proposal and started immediate preparation of this Conference, with our support and the Turkish Democracy Foundation's essential support.

Mr President,

Why did we think of holding this Conference at this very moment?

Mr Cetin, Turkey's Minister for Foreign Affairs, is currently the Chairman of the Committee of Ministers of the Council of Europe and the Turkish authorities consider it very important that this Chairmanship should bring positive results both for the Organisation itself and for the non-member States with which it co-operates or is about to establish good co-operation. The Chairman of the Committee of Ministers therefore undertook in July, together with the Secretary General, Mrs Lalumière, an official journey through several member countries of the Commonwealth of Independent States to ascertain the wishes and needs of these States and establish whether co-operation with the Council of Europe is desired. In all these States the area of constitutional law was mentioned as one of the most important areas for possible co-operation with the Council of Europe.

The Turkish Chair then took the initiative to convene a special Ministerial meeting of the Committee of Ministers here in Istanbul and during that meeting the Committee of Ministers held an exchange of views with the Ministers for Foreign Affairs from the Commonwealth of Independent States and Georgia. Following this exchange of views it was agreed to step up co-operation between the Council of Europe and the CIS. This shows that today's Conference is not an isolated event but in line both with the general policy of the Council of Europe and the aims of the present Turkish Chairmanship of the Committee of Ministers.

It also seems logical that this Conference again takes place in Istanbul, not only because it is one of the most pleasant and historic cities in the world, but also because this city is a bridge between continents, between Europe and Asia. For a Conference destined for people from countries which have been marked either by orthodox christian civilisation or by islamic civilisation, there can be no better venue than this city which inside its walls has some of the most glorious monuments both of Byzantine and of Islamic culture.

Mr President,

Constitution -making, the subject matter of this Conference, is extremely topical today. There is nothing more fundamental for a newly independent State or a State which leaves behind a period of dictatorship or one party rule than the adoption of the new constitution. The Constitution reflects the fundamental choices made for the future of the country and the model of society to which the country aspires. When the members of the CIS now turn to Europe in seeking advice for their constitutions, this clearly reflects their interest for the western model of a free and democratic society. You know that I come from a country which, in the early 19th century and in particular at the end of the First World War, was faced with a similar choice between a European and an Asian model of society. During that time many Turkish intellectuals and statesmen endeavoured to orient Turkey towards the Western world. Thanks to Kemal Atatürk, the founder of our Republic, Turkey finalised this process by undergoing a rapid transformation along the directions of the European model and therefore she is now an integral part of the Western world. Like our friends from the CIS today, my country at that time had a very close look at Western models and we even imported whole statutes into our legal orders. We know therefore the importance of the choice of the appropriate legal norms for the development of a State. Of course it is up to each country to make its own choices, in full freedom and independence. But I think it is only wise, and your presence, distinguished guests from the Commonwealth of Independent States confirms this, to get as much advice and information as possible before making such fundamental choices.

Mr President, distinguished guests, I am convinced that this Conference, organised within the framework of the European Commission for Democracy through Law, is in fact the best way for our friends from the Commonwealth of Independent States to become acquainted with Western constitutional thinking. The European Commission for Democracy through Law is a consultative body, composed of independent experts of high standing. The advice given by the distinguished members of this Commission is based on its experience in dealing with the constitutions of many Eastern European countries and it is completely independent. The fact that the Commission has secured three rapporteurs of international reputation for this conference clearly shows the high prestige it has among Western constitutional law specialists. Thanks to the rapporteurs and the members of the Commission and not least thanks to your extremely high qualifications, distinguished guests from the Commonwealth of Independent States, we have assembled here a wealth of constitutional experience which should enable us to establish a fruitful dialogue. This dialogue will be a scientific dialogue but it will also be a practical dialogue and I hope that the conclusions every one of you will draw from this meeting will help you shoulder the heavy responsibilities you have in your own countries and reach solutions in the best interests of your peoples.

Let me express once again the very best wishes of the Turkish Government for the success of this Conference and thank you for your kind attention."

II

Mr Antonio La Pergola, President of the European Commission for Democracy through Law, made the following statement :

1. This is an ideal beginning for UniDem, the mobile campus which the European Commission for Democracy through Law - the Venice Commission - has designed to promote a great debate on the revival of freedom in our time. It will be followed by similar

seminars in Poland and Russia. UniDem has begun and we can chart its course. Let me thank warmly our Turkish hosts and my distinguished colleague Professor Özbudun for the generous help they are giving us to get our programme off the ground. Our initiative can now rely on the driving force of the Council of Europe to which the Venice Commission is proud to belong. UniDem is committed to spreading the spirit of constitutionalism in the world of culture. This is the task ahead of us and we have an apt occasion to highlight its importance. We are at an historical cross-roads between East and West and our gathering is being honoured by the presence of prominent scholars and men of government, whose knowledge and experience were needed to bring into focus the whole cultural area of interest to this conference. We are addressing a broad range of issues arising in unison in all the countries where dictatorship, like the infamous Berlin wall, has broken down. A new generation of charters will change the pattern of Europe and enrich our common history. Each new democracy is a workshop for constitution-making. A creative season of politics is flourishing which we can throughout Europe live with a sense of fresh solidarity. This is the point. It has been a central concern of all times how to frame the constitution and to organise relationships between man and his government. Today, I believe, it is also one in which we feel we are ever more clearly involved regardless of our national origin or outlook. After the epoch making events of 1989, the ordering of democracy in the nation-state is set in a context where the view of the constitution makers, if it is sustained by enlightened public opinion, will be lengthened by a new reach into the scheme of things outside the domestic scene. Our continent is beginning to take shape as one unbroken space of the same political civilization. This is still, to be sure, no more than a tendency. But it is a tendency which the logic of history is carrying forward. Consider, for example, the growth, in role and membership, of the Council of Europe. The values of which our organisation in Strasbourg is the depositary -political pluralism and the rule of law - are taking root in countries where they had no previous foothold. Our Venice Commission is a vantage point to see this process advance in Central and Eastern Europe, and UniDem has been planned as a vehicle to pour the results of our activity into the mainstream of cultural debate. We have through our privileged experience gathered food for thought and reflection. Let me explain the Commission's work by way of introduction to the present conference.

2. The Venice Commission was established in 1989. It was motivated by a premonition of great changes in the offing. The timing was right. Democracy and human rights would no longer be the exclusive preserve of the West. History was lending us a unique occasion to create within the Council of Europe a new instrumentality for the pursuit of shared goals. The Commission was thus put in place with three objectives in mind.

2.1. First it was to be an expert body to debate issues of constitutional reform not only inside the Council of Europe, but also for the benefit of those Central and Eastern European States which would require assistance to move into the family of democratic nations. These new democracies must of course feel free to turn to their western sister nations for advice in constitution making. Theirs is a sovereign choice. But it was and remains the duty of the Council of Europe - one that has a noble cogency of a moral mandate - to offer them such help in the establishment of democratic institutions as is afforded by the collective wisdom of its members. The achievements on record speak for themselves. The Commission has been open from the start to countries of Eastern and Central Europe and these have all

rallied to our body, which practically includes all members of the Council of Europe. This flexible arrangement has proved useful. Whether members, after their admission to the Council of Europe, or associates, our sister nations that have recently joined the circle of democracies work side by side with original members on a footing of equality. Our Commission, composed of independent experts, each of them appointed by a national government, has turned into a fruitful and rewarding exercise in European togetherness. It has offered its services to all the countries concerned in drafting constitutional charters or in other problems arising from their transition from dictatorship to democracy. As the constituent process unfolds in several countries at the same time, our meeting place is a probing ground for comparison and the pooling and sharing of experience. The United States, Canada and the Holy See have been admitted as observers, and the grouping of States linked to the work of the Commission has thus come to approximate the composition of the CSCE. Our old continent continues to occupy centre-stage, the wings have unfolded to encompass Atlantic democracies connected to us by bonds of kinship. In the same vein we can nourish the hope that along with Russia, which is already in our midst, other members of the Commonwealth of independent States may join us, if and when they so wish, as welcome additions to our endeavour. Democracy through law is an overarching system of values which individual nations have every good reason to share even if they are parts of a confederation or any other broader political community.

2.2. The second objective of the Commission was to provide a centre for the specialised in-depth knowledge of constitutional law as practised by the member states. Democracy as a living set of rules is shaped not only by the basic charters and statute books but by the judicial work which mediates between large principles and particular problems, between the high tension charge of philosophy and the reduced voltage of serviceable current. These are the words of Paul Freund, an unforgettable student of the Supreme Court of the United States. The idea of judicial review has materialised this side of the Ocean in the shape of the Constitutional Court, now a staple feature in the new constitutions of Europe no less than in the older ones. A parallel growth has occurred in the importance of international Courts. All this testifies to an increasing confidence in law as the reliable source of the guarantees that ensure the stability of the political system, the proper balance between conflicting claims such as those of individual freedom versus authority, or local interest versus centralisation, whatever the level of the powers involved. The conviction has spread throughout Europe that a good constitutional court is the foundation stone of a sound democracy. Constitutional justice is of vital interest to our work and the Commission has addressed this by a general report and a special plan for a documentation centre which will provide the newly established courts with an easily available selection of case law based on rulings from comparable judicial bodies of longer standing.

2.3. The third objective of the Commission is to foster a wider knowledge of Western constitutional law and political culture. Here the experience acquired by the Commission as an advisory body during the formative stages of the new constitutions can be put to further use. After the constitution is made, there comes the formidable task of its implementation. Democracy may arise with the thunderbolt of radical change but it can only grow in a gradual process which calls for settled constitutional habits and a developed cultural climate. The ruling class must be capable of facing this challenge. Our Commission is for its part

concerned with all efforts that help democracy develop in the countries it has assisted. We are called upon to look beyond the initial phase of their transition from dictatorship to political pluralism and perhaps the free market. The UniDem initiative must therefore also be seen in this light. Its purpose is to promote a mature legal culture and a well trained political class through hub-seminars and conferences of which this one in Istanbul may well be regarded as the first example or model. The programme brings together high-profile political figures, current holders of public office, and prestigious scholars in a forum which will concern the science and technique of democracy. This, then, is the significance we can attach to our present meeting. Our Zeitgeist is the freedom of circulation that generates the circulation of freedom. The free flow of ideas is no less important than the circulation of goods or capitals, and UniDem could be one more way, one more joint decisive effort, to make our democratic experience circulate in keeping, as it were, with the Commission's central task.

3. How can our work as an expert body find its place in the sphere of political culture? From its standpoint as a laboratory of institutional changes, the Commission can discern issues that reflect human needs across national boundaries. That is why we are creating task forces and working groups on federalism, regionalism, constitutional justice and, last but in no conceivable way least, the protection of minorities, for which the Commission has drawn up a draft Convention. Now, all of these problems, and more, fall within the universe of constitution-making, which this debate will scan and place in the proper perspective. Constitution-making is an instrument of transition from the old dark time to a new and brighter one. This is the thrust of our debate and it is grounded on experience. I would not think of intruding on the time reserved for the speakers and panellists from whom we have, no doubt, much to learn. I can only draw a thumb-nail sketch of certain issues that reflect the Commission's work.

3.1. As is well known, a new constitution is required when a nation makes a clear break with the past and a fresh start. There is no clearer case of this generally acknowledged need than that of the countries which are arriving at the western type of government and economy from the socialist state as it once existed everywhere behind the so-called iron curtain. It is equally clear that the new constitutions should be written and endowed with the rank of a supreme law so as to prevail over inconsistent ordinary enactments of the legislature. The days of the flexible or unwritten constitutions seem to have sunk into the depths of English tradition, as they have hardly ever been revived in other countries. The lengthy and often complicated amending process and the rise of Constitutional Courts as the guardians of basic charters all stem from this preoccupation with the stability of democratic systems and of the values they enshrine.

3.2. The stability of democracy means, amongst other things, the stability of the executive, without which whatever form of government chosen would sooner or later land on the quicksands of crisis and inefficiency. This is one of the intricate knots in the working of constitutional government that needs to be untied. If we rely on the empirical data at our disposal, the best possible answer seems to lie in the balanced view that a viable democratic system must steer a middle course between the extreme form of parliamentary government known as the gouvernement d'assemblée and iron-clad presidentialism.

3.3. But it would be wrong to assume that all problems can be solved by constitutional fiat. Inevitably, there is room for later adjustment and evolution of the rules laid down as supreme law. Even technically, constitutions are not seldom conceived as simple guide-lines of political life. At any rate, there are limits to the field which the constitution-maker can plough and till with his own hands. The essential content of a constitution is twofold, a frame of government and a bill of rights. However, both these chapters of a basic text will as a rule consist of broad principles, which have to be interpreted and implemented by the law-makers or the law-applying organs. Transition from dictatorship to pluralism is thus entrusted to measures which in the majority of cases are not directly laid down in the constitution, but in laws which the constitution authorises, either expressly or by the implied principle that all lingering traces of the past regime must be erased. Legislation in the form of ordinary or organic laws has been required to initiate a free market where previously there was the hard and fast rule of state capitalism and planned economy. The same thing can be said of the mise en oeuvre of political parties and of free elections. A more controversial issue may be raised by purging laws concerning the old ruling class; sanctions of this kind are justified by the urge to clean and change the country but they must respect human rights in order not to allow an indiscriminate punishment hardly conducive to social pacification.

3.4. There is another side to human rights. Their protection can be afforded by international conventions as well as by the national constitution: ethnic minorities, too, come within the potential purview of this double source of guarantees. The problem here is to see how in this case treaty and constitution should complement each other. A forward looking constitution-maker will improve on internationally agreed standards and never detract from their provisions. And this is true of new social rights no less than of time-honoured freedoms.

3.5. This line of reasoning leads to my last point. The place of the nation-state under international law has always been taken into account in constitution-making. Within the international community at large there is, however, a motley crowd of communities formed by sovereign states that answers the rising need for interdependence in all manner of fields. Let us cast a glance at the Europe of today. It is enveloped in a web of military alliances that are in search of a new role, confederations in the making and other regional structures. It is, you might say, a huge jig-saw puzzle, the odd shapes of which are made by sovereign nations - or unmade, for that matter. Now states join or leave international organisations by acceding to the treaty that has established them or by denouncing it. A constitution maker may bring all such cases within the discipline laid down in general for the exercise of the treaty-making power. But there are supernational bodies that encroach more or less extensively on national sovereignty. The acquisition of membership of organisations of this kind should be covered by appropriate constitutional provisions, in view of its repercussions on the internal legal order of the state. If the community of which the state is a member is genuinely federal, then the problem arises whether the national constitution should embody a convenient solution for the exercise of the right of secession. Federalism is knocking on our doors, whether within or above the nation-state. It is the technique we employ to submit sovereignty to law and organise one and many communities in a peaceful and civilised

political context. This is one of the goals of constitution-making for which, in East and West alike, we must steel ourselves. Let us face it. In ultimate analysis, the technique of democracy is the wise and skilful articulation of collective and individual freedoms: freedom from dictatorship, from want, from war - and civil war is the worst of all possible conflicts - freedom from isolation: democracy is the right and reason for each and all of us to live and grow together.

III

Mr Bülent AKARCALI, M.P., President of the Turkish Democracy Foundation, welcomed the participants on behalf of the Foundation. The Conference had been prepared in close co-operation between the Turkish Ministry for Foreign Affairs, the European Commission for Democracy through Law and the Turkish Democracy Foundation. He wished to thank in particular the President of the Commission, Mr La Pergola, and Professor Özbudun, the Vice-President of the Turkish Democracy Foundation and member of the Commission on behalf of Turkey, for their personal efforts in preparing this Conference. He was also indebted to the National Endowment for Democracy for its, in particular financial, support.

A wave of democratisation had swept over the world, starting in 1974 in Portugal with the carnation revolution, spreading to Southern Europe, Latin America and parts of Asia, then to Eastern Europe and now to the former Soviet Union. This had given a global dimension to democracy and never had there been so many democratic countries as today.

The drawing up of the constitution was the most important step on the way to establishing a democratic system and setting up democratic institutions. It was necessary that all parts of the population had access to the process of drawing up the constitution and that this process was not restricted to a small group of experts. Even in Turkey there were now problems stemming from the fact that the Constitution had been drawn up by a small group of experts and did not fully reflect the will, aspirations and feelings of the population as a whole.

When drawing up a constitution, one was faced by a number of essential choices like the one between a presidential and a parliamentary system. It had however to be borne in mind that these choices depended on the economic and social structures of a country and on its traditions. Every country was a case apart and there was no abstract model which could be transferred without changes from one state to the other. Each country had to make its own choices but it was very important that these choices were good choices and led to stable democratic institutions.

The European Commission for Democracy through Law had been set up in 1990 as a Partial Agreement of the Council of Europe. Even if full membership was restricted to member States of the Council of Europe, it was open to participation by other countries and willing to co-operate with them. This applied in particular to Eastern Europe where the Commission had played an important role in assisting these countries in drafting their constitutions and now to the countries within the area of the former Soviet Union.

He himself was a member of the Parliamentary Assembly of the Council of Europe and therefore he was pleased to say that this approach of the Commission was parallel to the approach adopted by the Council of Europe as a whole. The Parliamentary Assembly of the Council of Europe considered the countries present as potential future member States of the Council of Europe or as potential future associate members.

There was a lively discussion on the future relations between the Council of Europe and the members of the Commonwealth of Independent States and the Parliamentary Assembly of the Council of Europe had decided in favour of having as close links as possible with these

States. He himself was pleased to co-operate with President La Pergola and the Commission for this purpose.

The Conference should serve to make it possible to obtain as much information as possible on the draft constitutions prepared in the countries of the CIS and to give as much information as possible on the constitutional systems practised in the West to the participants from the Commonwealth of Independent States. This information should then enable the responsible people in their countries and the organs of the Council of Europe, the Parliamentary Assembly and Committee of Ministers, to prepare for a better common future.

1. Ukraine

The Representative of Ukraine said that the starting point for the constitutional process in Ukraine had been the declaration on the sovereignty of Ukraine, adopted on 16 July 1990 by the Supreme Soviet of Ukraine. A Committee had then prepared an outline of a future Constitution which had been approved by the Supreme Soviet on 19 July 1991. On this basis a draft Constitution had been prepared. Having been finalised in July 1992, it was approved by the Supreme Soviet as a basis for further national discussion. Now the draft should be discussed at a national level until 1 November 1992.

The draft had been examined at international scientific seminars in Prague and in Kiev, at the all-Ukrainian forum in Kiev and at a congress of law makers also in Kiev. There had

been various reactions, ranging from considering the authors of the draft as traitors to socialism to regarding the draft as being based on the old communist ideals.

The following were the main problems :

- the area of human rights, where Western experts advised against including positive rights (economic, social, ecological and cultural rights) within a catalogue of human rights, - these rights were difficult to implement for the courts and their inclusion could therefore threaten the credibility of the system - whilst others thought that it would be a step back to abandon such rights;

- the problem of property; the draft foresaw public or private ownership, whilst others wanted to provide also for co-operative and kolkhoz ownership;

- whether to foresee a presidential, a parliamentary or a mixed system; whereas many people accused the drafters of having elaborated a law favouring a presidential type of government, it could be seen from many parts of the draft that in fact there were elements of a mixed system;

- whether to foresee a unitary Republic as provided in the draft Constitution or a federal Republic, as advocated by political forces in particular from the Crimea, the region of Lvov and the Donbass;

- whether to foresee two chambers for Parliament or a single chamber.

There were also other problems like the State symbols, whether to refer in the Preamble to the people of Ukraine or the Ukrainian people, the protection of minorities and the transitional arrangements.

2. Turkmenistan

The Representative of Turkmenistan reported that Turkmenistan had adopted its constitution already in May 1992 since that was one of the first priorities after having obtained independence on 27 December 1991. The Constitution had been discussed nationally and internationally and numerous remarks had been received. Turkmenistan had tried to take into account as many of these remarks as possible and in particular be guided by international legal texts like the UN Charter and the Helsinki Final Declaration.

In Turkmenistan there were no national or economic conflict situations and therefore the Constitution had been discussed in a calm manner. It took into account the interests of all strata of the population including the minorities.

On the basis of the Constitution a number of laws had already been adopted. He had brought an English text of the Constitution and would welcome any comments, in particular from the European Commission for Democracy through Law. Democracy was an on-going

process which was never and nowhere completed and therefore additional remarks were always welcome.

3. Tadzhikistan

The Representative of Tadzhikistan said that the situation in his country was very complicated. The objective was to have a secular state with democratic institutions and based on the rule of law. The constitution still in force did not reflect the important changes which had taken place.

A draft of a new Constitution has already been published and foresaw the following main principles :

- the protection of human rights in accordance with international law;
- the separation of powers;
- economic freedom and transition towards a market economy;
- the territorial inviolability of Tadzhikistan;
- federal structures with the autonomous Pamir region and three other administrative districts;
- the right to local self-government.

The Constitution should be submitted to a referendum but hitherto the deterioration of the political situation had not allowed to proceed in the appropriate manner.

4. Russia

The Representative of Russia said that the first draft of a new Russian constitution had already been prepared in August 1990. Since then work had been continuous with three drafts being published in no less than 17 million copies. This procedure should make the population familiar with the document so that it no longer considered the new Constitution as revolutionary. In fact, attitudes towards the new constitution were changing. While in December 1990 the item draft constitution had been removed from the agenda of the Congress of People's Deputies due to an ideological discussion, it had been approved in principle at the 6th Congress of People's Deputies in March 1992 and would now get a first reading at the 7th Congress of People's Deputies scheduled for December 1992. A referendum on the basic principles of the Constitution should follow in order to allow for a second reading in Autumn 1993.

Russia was in no hurry to adopt a new Constitution. It was more important that the new constitution reflected the evolutionary process in society and be in conformity with social reality. Parts of a future constitution had already been adopted piecemeal, like statutes on

the President and on the Constitutional Court and a declaration on the rights and obligations of citizens. The old law was gradually replaced by new provisions.

The main problem was not the form of government, whether presidential or parliamentarian or mixed. There one had found the formula of the sufficient President and powerful parliament, providing for a mixed system. This was based on the historic experience which showed the need to avoid an all-powerful bureaucracy as it might be associated with a purely presidential system. The main issue however was the problem of federalism. The spreading of the process of disintegration from the old Soviet Union to the new Russian Federation should be prevented and to that effect the model of asymmetric federation had been proposed. Its three main components were the Constitution, the Treaty of Federation and bilateral treaties between territories and the Federation. The Treaty of Federation constituted a framework within which the competences were distributed between the different units. Within this framework some responsibilities could be delegated upwards or downwards by bilateral agreement.

There was no discussion in Russia whether to put Russian people or people of Russia into the Constitution since it had been clear from the beginning that the people of the Russian Federation was multi-national. The new tribalism and the ethnic approach to constitution making, distinguishing between a root nation and other citizens, were considered as dangerous and rejected.

In Article 10 of the draft Constitution it was pointed out that the Russian Federation has the right to join a Union with other States and transfer to bodies of the Union the exercise of some of its powers. The tendency of people to keep real ties that had developed throughout centuries was not considered as shameful or imperialist. Today indeed one could see the results of establishing new boundaries and customs posts and of the violation of the rights of 25 million Russian population beyond the Russian boundaries. If people, perhaps not for all nations but only from one or two, therefore decided to create a closer union, the Russian Constitution provided for this. Russia welcomed the process of closer co-operation between various institutions of the Commonwealth of Independent States and was convinced of the need to have a CIS Charter. This Charter would not be a constitution violating the constitutions of member States, but a document respecting reality, containing mutual guarantees of the rights and obligations of human beings, establishing a single information and a single customs space and foreseeing such common institutions as an inter-parliamentary assembly, a council of Heads of State and government, a court of human rights and an economic court.

He invited the CIS representatives present to draw the attention of their parliaments to the need for such a Charter.

5. Kyrgyzstan

The Representative of Kyrgyzstan said that the draft Constitution had been approved by the constitutional committee of the parliament and it would get a first reading by the Supreme Soviet in December. The draft was based on guidelines for a new Constitution, which had

been previously adopted by the Supreme Soviet. It had been established by a restricted drafting group under the authority of the President of the Republic, Mr Akayev. There had been three other drafts, two from the party for a free Kyrgyzstan and one from a Vice-President of parliament, but the constitutional committee had decided to adopt the presidential draft while taking into consideration elements of the others.

The draft had tried to take into account world experience and the Group had studied the American, Turkish, Italian, French, German and Japanese constitutions in great depth. The American Constitution had been the most attractive model, not only because it was now in force for two hundred years but also because of its clear separation of powers.

But the draft Constitution was also inspired, for example, by Article 63 of the Italian Constitution on property. Until now Kyrgyzstan had only had socialist ownership and now it had to move towards private property. This was not only an economic problem but also required that the population was prepared for this. There were hesitations in the population concerning private ownership of land and therefore in Article 4 of the present draft a co-existence between private and public ownership was foreseen like in Italy.

The Turkish Constitution was important for Kyrgyzstan because of its very European nature. The draft also drew on the French Constitution concerning the co-existence between the powers of the President and the Legislature.

Because of the important Russian minority, the problem of the official language had been important. In Article 5 of the draft Constitution it was provided that the official language was the Kirgiz language, but that the Republic is obliged to care for preservation and equal development of all the languages which are used by the population of the Republic and to create conditions for learning them. The transition towards Kirgiz as the official language would have to be gradual and for a long time one would have to use equally Russian and Kirgiz.

With respect to a constitutional court, the draft opted in favour of the American Supreme Court model providing for a constitutional chamber of the Supreme Court. At a lower level the pre-revolutionary model of honourable old men's courts was reintroduced. This was regarded by some people as a step backwards.

With respect to parliament, the American model was also followed. There would be a parliament of professional Deputies with one-third of them elected every two years. This would avoid the problem of all members of parliament having to learn their job at the same time.

The main democratic principles were the basis of the draft Constitution, in particular human rights and fundamental freedoms. Fifty-two UN texts on human rights had been taken into account as well as human rights instruments of other institutions.

6. Kazakhstan

The Representative of Kazakhstan said that, like the other members of the Commonwealth of Independent States, Kazakhstan preferred the drawing up of a new Constitution to amending the old one. The new Constitution should reflect a humanistic approach and take into account world experience. The introduction of the free market economy had already transformed Kazakhstan's society and it required the introduction of a new legal system. In addition to adopting a new Constitution, changes in legislation were required.

The new Constitution should be based on the division of powers between executive and legislature. The old legislation and jurisdiction had been based on the autocratic system and now this had to be changed and the rights and freedoms of the citizens had to be defined.

In Kazakhstan there were many ethnic groups. It had to be ensured that these ethnic communities were not adversely affected by the new situation and that the new Constitution would allow for the building of a new common nation. The rights and freedoms of people were natural freedoms which had to be equal for everybody, regardless of religion or belonging to an ethnic group. International law protected human rights and fundamental freedoms and these internationally protected freedoms had inspired the Kazakh people to adopt the system of market economy. Kazakhstan no longer had a monopolistic economy but it was part of the world community and wanted to be more fully integrated into the international economic and trade system.

The draft constitution had three main elements : the citizen, the society and the state. It had been widely discussed since June, not only at parliamentary level but also by the whole population.

7. Azerbaijan

The Representative of Azerbaijan said that the constitutional process in Azerbaijan had started under difficult circumstances. A commission for the elaboration of a new constitution had been set up in March 1991, but political instability had prevented it from working. Only since the election of a new President in June 1992 had tensions decreased and now a group of voluntary experts had been set up to draft a new Constitution. This group was later granted an official status by joint act of the President of the Republic and the President of Parliament.

The draft Constitution was inspired by Azerbaijan's declaration of independence which had been approved by referendum in October 1991.

One of the main aims was the protection of human rights. Protection of human rights should not remain at a purely formal level but there had to be effective legal guarantees. In addition to the draft constitution implementing legislation for the protection of human rights was therefore foreseen.

The draft constitution foresaw two types of ownership, individual ownership and state ownership. Property should be inviolable and new draft legislation as a means towards guaranteeing ownership was being worked on.

The draft in its present form provided for a presidential system with a strong executive. More recently, the drafting group had wondered whether a parliamentary system would not be preferable. At least there was a need to introduce checks and balances, for instance a possibility for parliament to call a referendum and a strong judiciary, something which had been completely lacking in the past.

The drafting group had completed two sections, the section on the rights and obligations of individuals and on the organisation of powers in the Republic. The other parts of the draft constitution were still being discussed in the group.

8. Armenia

The Representative of Armenia said that Armenia had started work on drafting a new democratic constitution. The main principles of a democratic Constitution were however already reflected in legislation of the Supreme Soviet of Armenia. A law on the Supreme Soviet and a law defining presidential powers had already been adopted and these laws would later be reflected in the text of the Constitution.
At the moment the main problem was judicial reform. The present legal system was no longer adapted to the structure of society and to the new democratic principles. Armenia had to move towards as democratic a situation as possible. In this respect Armenia was leaning towards the French type of system. Another problem now under consideration was the local authorities. Until now Armenia had retained the old structures but these were now clearly inadequate.

Armenia was moving towards the consecration of human rights and a law establishing a multi-party structure had been adopted. It was already implemented: there were now 28 independent political parties in Armenia.

FIRST WORKING SESSION

Chaired by Professor Jan HELGESEN, Oslo University, member of the European Commission for Democracy through Law for Norway

Democratic transition and constitutional choices

a. Report by Professor Miguel HERRERO DE MINON, Madrid, Member of the Spanish Parliament

b. Summary of the discussion

The subject of this report is the constitutional machinery for transitions from authoritarian systems to a democratic and national State.

This is not the occasion to speak about the weight of legal rules in political processes. Even admitting that they may be superstructures of a basic social and economic reality, their relevance can be taken for granted.

The main issues dealt with in this paper are the significance of the Constitution in society (I), its roots in the social and political consensus (II), the patterns of transition in comparative politics (III) and some practical problems in drafting the Constitution (IV).

The dissolution of Empires into Nations, and the transitions towards democracy in Southern Europe during the seventies, with special emphasis on the Spanish case - due to my having been one of the drafters of the present Constitution -, should be our main references of comparative politics.

I.

James Bryce in his classic masterpiece on constitutionalism "Rigid and flexible constitutions", already said over a century ago that "New States ... that start an independent existence have felt the need to fix their lines of behaviour in a solemn instrument, consecrated as fundamental and placed over all ordinary laws". And history certainly shows that the emergence of new modern States has been at the origin of a fertile constitutional harvest. The independence of the United States, the emancipation of Latin America, the independence of the Balkan States in the middle of the nineteenth century and the self-assertion of Asian, African and Caribbean nations, are different waves of this constitutional tide.

What explains, then, such generalisation of a written constitution as the most important component of the modern State? Its two main functions : rationalisation of the political process and political integration.

In the first place, a written Constitution arises from juridical rationalisation. As the driving force of modern legal science, rationalisation tries to organise social relations deductively, starting from certain principles. The 19th Century fight for codification in Europe lies in the introduction of this criterion in the organisation of private legal relations and a constitution plays the same role in the field of public law. Codification and constitutionalism are, thus, the parallel expression of an identical historical and political process: the rationalisation of social relations and their subordination, together with subsequent forms of power, to certain general principles. The result is a high degree of predictability which makes possible a high standard of social mobility.

Constitutionalism appears then as the typical instrument of modern politics, which expresses concisely the drive to an egalitarian, dynamic, democratic, scientistic and economically developed society.

However, historical experience shows that the process of political modernisation of which the constitution is, at the same time, instrument and expression, can only take place within the framework of a National State, the integration of which is the second main function of the constitution.

In fact, the constitution not only rationalises, but its rationalisation of the political existence of a historical community can only be completed through its political integration.

Correct understanding of this concept requires a brief explanation. The State exists and evolves in a continuous vital process by which its plural elements - individuals, collectivities, segments, social classes - are reconducted to unity. Such a "combination of all forces and ideas of unification" was called integration by an outstanding German scholar, Rudolf Smend, and he identified it with the "plebiscite de tous les jours" that, according to Ernest Renan, constitutes the Nation. Thus, the most integrated of all States is the one which appears as the "skin" of a national body.

From this point of view, a Constitution is the legal arrangement of the vital dynamics of a State. In other words, its integration process. That is the reason why a living Constitution requires, initially, an affirmation of the political community as such - the constituent act - which must remain under constant renewal.

This is why the Constitution, besides organising channels of functional integration - i.e. electoral systems - and establishing factors of material integration - i.e. social values -, remains a material element of integration in itself, allowing for the evolution of a series of loyalties and affections which contribute to the will of living together. That is why, historically, all successful constitutional processes were born from a passionate desire of the people, not only to have a Constitution, but to be constituted. Examples include France (1789) and Spain (1978).

The main political and legal options of constituents will determine the choice in the functional, material and even personal elements of integration. But the Constitution should be in itself capable of inspiring a popular feeling of support as the symbol of national statehood and social identity. Such is the case of the American Constitution, and similar approaches are found in most latitudes. To feel means "to be involved". And a living Constitution must be felt as one's own, in the same way as a skin, and not a prothesis, is felt.

In order to fulfil this integrating function, a Constitution must attend to the very existence of the community it must integrate. Should any constitution avoid such specifications of time, space, national characteristics and affections and remain abstract, it would probably be unable to achieve the technical organisation of a very concrete political process, and it would certainly fail in its integration function. For instance, no electoral system can be established that does not attend to the size and structure of society; neither monocameralism nor bicameralism are good or bad in themselves, only more or less adequate to the needs of each country; parliamentarism or presidentialism have different consequences in different latitudes; monarchy or republic may serve or not, depending on the situation, the purpose of expressing national identity. But essentially and beyond all specific organisational

functions, a Constitution contributes or fails to contribute to national integration when it expresses or not its collective life and builds up those loyalties which are at the roots of such a community.

To summarise the above, constitutionalism is a consequence both of the rationalisation of political existence or, in other words, its modernisation, and the simultaneous conscience of being a different country. Modern constitutionalism is a function of national self-assertion of the State in front of imperial domination or antidemocratic autocracy.

II.

The main basis for a pacific political transition to democracy and a stable Constitution is the consensus of all social and political forces, that is, of the substantial majority of the social body, not only of an arithmetical majority.

The questions faced by new democracies are so critical that they have become State problems. That is why a number of political matters, which in stable democracies would be open to confrontation and discussion, can only be solved, in new democracies, through social and political consensus.

Certainly consensus requires certain factors which cannot be explained or reduced through constitutional nor, generally speaking, legal rules. Such is the case of social homogeneity, economic development, a society's own political experience. When there is no will of being together, consensus is unimaginable and without it there can be no political integration.

This paper only outlines constitutional instances which encourage greater degrees of consensus. Thus, a federal constitution should be avoided as much as possible as Sir Ivor Jennings, one of the most prolific constitution drafters of our time, said. From Burma to Lebanon, forms of communal State have been a complete failure but, at the same time, it should be noted that a forced unity of State that suppresses all minorities is not only contrary to the international laws that rule civilised coexistence, but it provokes reactions against its own pretended goals.

In relation to possible forms of responsible government, the main options are parliamentarism or presidentialism.

Parliamentarism is, as everyone knows, a system whereby the government is politically responsible to the House; it must have the confidence of the majority of the legislative assembly. It is designated as a result of such a majority and should resign when it loses this confidence. The government is, then, the Executive Committee of the majority of the House.

Parliamentarism requires a permanent dialogue of such a government with the House or Houses from which it arises; as well as with the opposition that is also represented in the chamber; and between the ruling majority and the minorities, as Professor Vedel underlined many years ago.

Parliamentarism is a form of government where dialogue and consensus take precedence over other formulas and where the necessity to choose imposes the need to decide instead of discussing the option.

On the other hand, because of dialogue, parliamentarism helps to soften the tendency towards power personalisation in a world where communications and image are becoming more and more important.

Presidentialism, as opposed to parliamentarism, has failed everywhere outside its country of origin, the United States of America. This form of government causes a breach in the political body and, by concentrating power in one individual instead of a chamber, strengthens all tendencies towards power personalisation. The reinforced and radical presidentialism of politically under-developed countries arises from this formula.

Contrary to the general belief, it is the very radicalism of presidentialism which makes it suitable for very mature and articulate societies.

On the other hand, parliamentarism is useful in softening conflicts, favouring consensus and collegiate decisions, and encouraging the formation of political parties within an institutional frame.

Complex societies, such as current modern industrial societies or even plural societies in the process of development, will find their proper expression in parliamentarism rather than in presidentialism.

Undoubtedly, whereas presidentialism means the power of majority, (even if second rounds may easily turn majority into majoritarian minorities), parliamentarism is, with rare exceptions, a regime of relative majorities and subsequent coalitions. But while it is difficult if not impossible to centre coalitions around one individual, they are feasible between teams. That is the reason why coalition governments are frequent in parliamentary regimes and rare in presidentialism. Coalition is, by definition, the technique of compromise and moderation as opposed to radicalism.

This thesis is endorsed by the Spanish transition to democracy. The necessary consensus to attain a pacific transition followed by a successful implementation of the new system, was only possible because everybody had to compromise when forming a sovereign and pluralistic Congress. Should the parliamentary "middle-of-the-road government", which at the same time is a "broad road government", be replaced by the need to choose a presidential candidate whose stability and capacity would not require the parliamentary compromise, such commitment would have been impossible.

All post-communist new democracies of Central Europe have followed the parliamentary formula. The structure of communist constitutions, the political traditions of the countries involved and the example of Western Europe are at the source of this choice. Coalition

governments have thus taken place everywhere, specifically in Poland, Hungary, and Czechoslovakia.

Parliamentarism has been called "a government without the people" by its enemies. This is no occasion to enter into long disquisitions on how a country is articulated in representative democracy. It suffices to indicate that a moderate consensual and efficient government, as that represented by parliamentarism, is probably what people expect from their government.

Furthermore, it is possible to superimpose a Head of State to the parliamentary regime, in those cases where the dignity it embodies represents both the unity of the political body and the continuity of the State. Should this possibility exist, a Head of State is very convenient for transition and for constitutional stability (for example, the Spanish Crown and the President of the Republic in Poland and Portugal). If not, State leadership beyond the parliamentary government may prove dysfunctional.

III.

The challenges which confront States that emerge from the former Soviet Union are certainly unprecedented in history. There have been national processes of emancipation and transitions from authoritarian regimes to democracy, but except in other similar post-communist countries no other cases of transitions from a socialist economy to a market economy have taken place; not even transitions from a totalitarian to a democratic system without prior destruction of the State through war (debellatio of the Third Reich); nor, even less, the coincidence of all these processes of political, national and economic transition.

That is why new States cannot exactly follow a previous outline, although they could, when opting for their own transitional way, profit from the experience of those who have faced, in different circumstances, other transitions of minor complexity.

To this effect it is convenient to discern between three transitional processes :

A. From Empire to Nation
B. from authoritarianism to democracy, and
C. from a controlled economy - not a planified one - to a market economy.

A. Processes of national emancipation in relation to the constitution, have taken place according to the following guidelines :

a. Evolution of imperial legality towards forms of granted independence, according to different models: within the British Empire colonial constitutions were the basis for further developments; the USA granted independence unilaterally while laying down principles of a future constitution; by France the question of self-determination was submitted to a referendum.

b. Breach of imperial legality through a revolutionary secession movement. E.g. American emancipation; dissolution of Austria-Hungary.

c. Acknowledgement of independence through the agreed dissolution of imperial structure.

Is the constitution an instrument or the goal of transition, that is, should a duality of constitutions be foreseen - one constitution which enables the process of drafting the constitution, and one constitution which is born from the drafting process - or only one constitution?

From a logical point of view, the dual solution seems to impose itself. One thing is a provisional constitution for democracy, serving as frame for the constitutional drafters, and a different thing the constitution which finally emerges. Recent experiences point in this direction and thus, regulations frequently dictated at least formally by the administrative power granting independence (i.e. India Independence Act, 1947), serve as a framework for the constituent process giving birth to an autochthonous constitution (i.e. The Constitution of India, 1950).

The drafting of an autochthonous constitution is the most adequate way of expressing both national self-assertion and affections that give place to political integration.

However, the practical consequences of dual constitutions have not always proved to be beneficial and frequently the resulting autochthonous constitution is a reaction against the transitional one, thus eliminating values which have been hard to obtain, i.e. guarantees for minorities. Also, the constituent period has often served to increase social and political tension and the duality of constitutional instruments has impaired the above-mentioned constitutional feeling.

European experience in political transitions is quite diverse. The length of the constitutional process proved fatal for Portugal and fruitful for Spain. In several Central and Eastern European countries, the aspects of national identity recovery were implemented through slight changes in their old constitutions, whereby the advantage of stability was unbalanced by the feeling of precariousness born from projects of constitutional revision.

The Spanish case, a most successful transition from authoritarianism to democracy, required that the old laws remained in force for a long time, with slight amendments to allow for the constituent period. However, since there was no breach with the previous formal law, the transition took place within the same frame of State. This formula can therefore be valid only in those cases where national identity remains untouched and causes no major conflicts, where the previous constitution may serve as a provisional instrument of government (for instance, federated constitutions after the disappearance of the federation, as opposed to constitutions of more or less autonomous local corporations), and where a basic democratisation takes place (e.g. through the direct election of a representative assembly).

B. Processes of political transition, have constitutionally taken place through :

a. Revolutionary breach with previous legality. For example, Portugal in 1975.

b. Radical amendment of authoritarian laws until total substitution by democratic legality, as in Spain 1976-78.

c. Mixed formulas whereby institutions coinciding with the authoritarian regime have served as protective strata against a revolutionary rupture. For instance, Italy 1944-47.

Comparative experience endorses the least violent of solutions, notwithstanding a constitutional renewal as radical as necessary. The Spanish and Turkish cases are the best examples of this theory and counterproofs could easily be shown.

Therefore, if possible, old constitutions should be maintained as much as possible as channels for transition, together with those institutions that generate support and may thus guarantee the permanence of the State. At the same time, any amendments necessary to the new democratic freedom may be introduced through relatively rapid and clear-cut reforms.

C. Transitional processes towards a free market economy are more dependent on political options and legal measures than on constitutional norms. Moreover, market economy as opposed to planned economy, does not require its constitutionalisation, although it is frequently recognised as a social value, later specified in laws, court decisions and administrative norms. However, certain issues such as the privatisation of land or enterprises, private law, business and commercial law, new labour rules, financial institutions, etc., certainly require thorough analysis and legal revision. On the whole, because of the complexity of such matters, it is advised not to copy models which can only be useful in extremely developed societies. At any rate it is not necessary to include in the constitution each possible case.

General experience, except for Germany, shows that economic clauses - economic constitutional law - prove more inconvenient than advantageous when included in a constitution. They tend to introduce in the drafting process controversial debates over matters of principle which become more difficult to approach and solve than the specific aspects of practice. On the other hand, constituents may react to their previous experience and try to compensate the injustice of the previous situation by radical decisions, as in Portugal in 1975. Finally, the evolution of the economy, both national and international, often destroys whatever sense there was in the economic options used by the constituent, e.g. Spain, 1978.

Consequently, it is advisable to eliminate from a constitution all hindrances to economic liberalisation - such as socialising clauses - and wisely refrain from mentioning economy.

IV

If transition towards pluralism and democracy in an independent State should be legally orchestrated through constitutional processes and instruments, the main questions that may arise are as follows :

Firstly, Who should elaborate the Constitution? In the new countries born from the dissolution of the Soviet Union it can only be an autochthonous instance, as opposed to other imperial sunset experiences. There are two possible models: the Constituent Assembly or a Committee of Experts whose work is later submitted to a popular referendum. The first was used in Italy in 1948, and the second in France in 1958. Spain used a mixed formula in 1978, whereby a number of experts were chosen among the members of the Constituent Assembly and the resulting text, after discussion and approval by the Assembly, was submitted to a referendum.

The advantage of the Spanish choice was that it allowed for a wide political and social consensus on relatively good technical formulas. However, due to the difficulty in obtaining a high number of experts within all constituent assemblies, to the tendency of such assemblies to erode the work of experts through political criteria, and to the lengthiness of the process, this experience is not an easy one to repeat.

Through the Committee of Experts, a constitutional text may be prepared with no loss of time and satisfying good technical criteria and its submission to a referendum gives it democratic legitimacy. Naturally, the campaign should be well prepared and based on agreement by all political parties, or else public consensus could not be obtained. At the same time, with this approach there is always the danger of excluding certain political and social forces and ruining the integration function of the constitution.

On the other hand, the elaboration of a constitution by a Constituent Assembly is an adequate means of bringing about a consensus of all political forces which can be later consecrated in a referendum, but it implies three sorts of danger :

1. to secure an unrealistic consensus at the expense of technical precision (apocryphal commitments) or even political correctness (demagogic inflation);

2. to create a breach among the political forces (Spain 1931 or Portugal 1975); or

3. to lead to a solution later rejected by the country in a referendum (France 1946).

Consequently, the most advisable system seems to be initially the appointment of a Committee of Experts, all of whom enjoy the trust of the wide majority of political forces, to elaborate a constitutional text. The experts should be able, if necessary, to consult foreign advisers. This should be followed by a global debate of the resulting text in the Constituent Assembly. It should, however, be noted that any detailed amendment of the text could have unforeseeable consequences and totally ruin the usefulness of the Committee. Next, the text, once approved, should be submitted to a public referendum on the occasion of which the affirmative vote should be backed by all political parties.

Secondly the question arises whether the text of the Constitution should be original or derivative, using formulas already employed and tried out in other constitutional models.

There is clearly no absolutely original text, since foreign doctrinal and legal influence may be found in the most prestigious and successful constitutions. Therefore, constituents of the new States may seek profitable inspiration in foreign models and request information on their practical functioning.

On the other hand, as stated above, a living Constitution must be felt as one's own, absorbing all identifying marks of the community to the point of becoming part of its specific identity. So it is also advisable to avoid a literal copy of foreign models and avoid taking up texts that may be extraneous to national tradition.

Finally, it must not be forgotten that constitutional homogeneity of a number of States could become a factor of solidarity among them. Thereby, when aiming at fostering such solidarity, both among these States or towards a nearby country with which there exist certain bonds - historical, cultural, linguistic - it would be convenient to choose a common model and ensure the parallelism of the various constitutions, avoiding servile imitations.

The third concern is about the contents of the constitution. The easiest answer to this question is that the constitution should be as short as possible, including those values and rules on which everybody agrees, in other words, avoiding any polemic issues. However, this is not always possible nor convenient, when attending to the concreteness of its double function of rationalisation and integration.

Rationalisation requires the constitution to define who rules and the limits of such rule. That is, to establish those procedures through which the authority is elected, controlled and, eventually, replaced; traditionally, this would form the organic part of the constitution. The control of power requires limiting the discretion of the rulers, either by foreseeing the untouchability of certain areas of reality such as the classical rights of freedom, or by pointing out certain tasks to be performed by the authority, such as social rights. This of course differs from the mere enunciation of wishful goals to be attained by the authority, as is the case for what is called, in several constitutions, guiding principles of political action. This is for the dogmatic part of the constitution.

The organic section of the constitution (which regulates the organisation and the responsibility and reciprocal relations of public authorities) may either establish such regulations in broad outlines, referring to other norms or simple practice for its development, or list in a most detailed fashion all parts of constitutional practice. Previous experience advises following the first option and shunning all claims to rationalising constitutional practice as much as possible, for the outcome would be as illusory as pretending to substitute politics with procedural law.

The most stable and effective constitutions, because of their simplicity, have always been easy to understand and to apply and, at the same time, have allowed enough room for evolution through conventions.

The dogmatic section, essential in all constitutions, apart from listing rights and liberties, bears a symbolic and pedagogic meaning, of particular relevance when establishing a democratic, free and plural regime instead of the previous authoritarian system. However, since the dogmatic section essentially handles concepts which express values, it is extraordinarily prone to rhetoric and consequently to discussion, so that it may become rather costly to elaborate, as evidenced by different constitutional processes. In many instances it has produced an excess of statements of impossibility to implement and the main effect has been the discredit of the whole constitution. Such is the case when consecrating social rights, which may be appropriate for very rich countries but totally undesirable in underdeveloped societies. For example, welfare state services, which are normal in Scandinavia would be out of place in other regions.

Consequently, it is advisable to include a brief dogmatic section consisting of a minimum bill of rights. Its purpose would be perfectly fulfilled by using an existing model of proved efficiency, such as the European Convention on Human Rights.

Integration, the second function of a constitution, may be accomplished in three ways. In the first place, by listing a series of values that are considered characteristic by the community. Such values would then become a powerful instrument for material integration. This would be one of the main functions of the dogmatic section and, similarly, of the initial statements of the constitution. However, it is particularly important to include only values which are shared by the great majority of the community and not those which may introduce disagreement and eventual disintegration of the social body. To this effect, a remarkable sobriety is required from the constituents.

On the other hand, a constitution can also favour the recovery or assertion of national identity through the establishment of institutions that are identified as belonging to the Nation. This has been, in Spain, the case of the Crown or of certain autonomous institutions of the Senate in Poland and of the Head of State in many countries of Central and Western Europe as opposed to the orthodox forms of communist constitutionalism.

Finally, it is recommended to include in the constitution the material symbols accepted by the community as part of the national identity such as the language, flag, coat of arms, names etc., whenever these are almost universally shared and never the ensigns of a party, however important.

Because of all the above, a constitution will not only establish the instruments of political integration, but will become in itself an element of this integration, as far as the social body or, at least, its ruling "elite" has the political will of :

1. going ahead on the path of integration and modernisation. That is, it wants to become a nation or to recover its national identity.

2. living under the rule of law.

Without the belief in law as an instrument of human sociability - as opposed to the plain power of men or even to the effective power of outstanding men - and the conscious option in favour of the national path to modernity, constitutionalism is irrelevant and impossible. This also applies to political modernisation.

1. The problems specific to the transition process

First of all the question was raised whether a country in transition from dictatorship to democracy should really start by drafting a new constitution. The implementation of a democratic constitution required that the institutions of the State were up to the task, in particular the judiciary had to be able to implement its provisions. If one started by drafting a new constitution, based on imported texts, one risked having a beautiful text which did not reflect reality in the country. Moreover, a constitution had to be based on a consensus in society but this consensus had first to be established.

A certain degree of stability therefore seemed required before the adoption of the constitution was feasible and it might be better to start with ad hoc amendments to legal texts in force under the old regime and by implementing a reform of the judiciary. A democratic constitution would follow as a further step.

On the other hand it was argued that the constitution-making process could also be an important contribution to the whole process of democratic transition. It was necessary to have a broad and free discussion on what kind of new system one wished to have. The adoption of a new constitution was the appropriate occasion for such a discussion. In

addition, only the constitution could give legitimacy to the whole political process and the new constitution could be the symbol of the break with the past.

Several participants underlined that the former communist countries were in a unique situation. The members of the Commonwealth of Independent States were faced with three transition processes at the same time : from a kind of imperial rule to national independence; from dictatorship to democracy and from a planned economy to a market economy. In such situations politics tended to prevail over law and it was difficult to counter attempts to put political expediency before the rule of law.

In this context, it seemed important to distinguish between the establishment of constitutional legitimacy and the political process. If the constitution did not try to solve all problems, it was easier afterwards to have concrete problems decided in the political process without constitutional legality being challenged.

In particular one should not try to impose an ephemeral political consensus, arising out of a rejection of the ancien régime, within the framework of a new constitution. One had to try to establish a lasting consensus going beyond the political philosophy of the presently dominant political forces while at the same time clearly expressing the transition to a democratic system.

It was controversial whether Marxist heritage could still be useful for the former communist countries even though their former governments had distorted Marxist philosophies. On the one hand it was argued that it was dangerous to import models from outside instead of trying to take up the still valuable elements in one's own society and that many things in Marxism, for example its insistence on economic reality as a basis of the political and legal process, were still valid.

On the other hand, the role of Marxism was seen as a dialectic one in the sense of the old system being the antithesis of the new system. It was always important to learn from past mistakes. Marxism as it had been practised in the East (to be distinguished from the social values advocated by socialists in the West) was totally discredited and had no longer any meaning for these societies. This should however not lead to a dogmatic rejection of everything social. There was definitely a role for the state in some areas like health care.

2. How much detail should be put into the constitutions?

In principle there was general agreement with the rapporteur's argument in favour of a short constitution. There were certain things which had to be put into any constitution, like the main principles of organising a State, including a choice between a presidential or a parliamentary system, between a unitary or a federal system, and human rights. Beyond that there were other areas where basic principles had to be laid down if one wanted stability. Countries in transition to a market economy needed for example guarantees for private property in their constitution. If one wished to change society, there was a need for a longer constitution than if one wished to maintain an existing situation. There was also a danger that too short or too vague a constitution would leave too much room for political

manipulation. A concise constitution therefore required a strong constitutional court as a control organ.

As a general principle it seemed however preferable to concentrate in the constitution on procedural and organisational matters and to leave substantive decisions to the political process. The constitution should be regarded as the framework for the political process like the civil code was the framework for the activities of individuals and private bodies. This approach made the constitution flexible enough to adapt to changes in the political consensus and permitted avoidance of the need to change the constitution too often. This applied in particular to the field of the economy. If one tried to solve all questions by law, there was a high risk of being impractical.

The need for flexibility and for making a later revision of the constitution not too difficult was in principle also accepted. It was however also pointed out that in the present situation in the CIS one had to provide for safeguards against a possible move back to the old system.

It was also pointed out that besides the constitution itself there was a whole range of other statutes which were part of constitutional law. These statutes were easier to change than the constitution and therefore provided more flexibility. Nevertheless one should not try to put too much into them. Good Ministers were more important than a good law on the Council of Ministers.

3. Human rights and social rights

There was general agreement on the need to guarantee the protection of human rights in the constitution. The participants in the discussion coming from the West advised against including a catalogue of social rights in the constitution. Social rights were difficult to implement and their introduction into the constitution could therefore threaten the credibility of the system. Social rights put constitutional courts in a difficult position: if the constitution guaranteed everybody an adequate wage, what could the constitutional court do if somebody received too low a salary? Could it order the employer to pay more regardless of economic considerations and where should the money come from in such a case? Social rights could have a tendency to protect vested interests and might in the present situation in the former communist countries be used to uphold the privileged position of the old nomenclatura.

Therefore it seemed preferable to have social values only as aims to be achieved and as a programme of action for the State and to restrict human rights to the traditional freedoms with the European Convention on Human Rights as a possible model.

Participants from the Commonwealth of Independent States pointed out that the population was attached to social rights it had previously enjoyed, like the right to work and to an old-age without misery. Abandoning these rights would be regarded as unacceptable by the people. There seemed to be a worldwide trend towards a welfare state and the former communist countries were faced with the risk of extremely unsocial structures. There were

precedents of the Russian Constitutional Court protecting social rights, like for example a decision forbidding mass redundancies.

4. Federalism and minorities

It was pointed out that it was important in particular for multi-ethnic societies to take as the basis of relations between individuals and the state the loyalty of all citizens to the state and not the belonging to a specific nation or people. In Spain, for example, it was possible to be at the same time a good Spanish citizen and a Catalan. In other countries like Yugoslavia it had however proved impossible to obtain this degree of tolerance.

If one wished to have a stable federal state in a multi-ethnic context, it was important to start the process of constitution-making at the level of the federation and not to have the federated entities fully established before their competences had been defined.

SECOND WORKING SESSION

Chaired by Professor Giorgio MALINVERNI, Geneva University, member of the European Commission for Democracy through Law for Switzerland

Fundamental legal options

a. Report by Professor Georges VEDEL, Honorary Dean of the Faculty of Law and Economics of Paris. Former member of the French Constitutional Council

b. Summary of the discussion

FUNDAMENTAL LEGAL OPTIONS

1. Two preliminary remarks must be made before giving this report.

The first is that this report must be set within the context of the Conference, where it is preceded by a report and discussion on "the transition to democracy and constitutional choices". It will not, therefore, discuss the period of transition of whatever duration that prepares for the final establishment of democratic institutions. Similarly, it can be assumed

that the main types of constitutions will have been presented in the first report. Some additional remarks will doubtless be necessary, however.

Furthermore, the third report and the discussion which follows it will be devoted to "political and social consequences". It can be assumed that the inter-relation and reciprocity of laws and the political system will be discussed on this occasion. Political systems are never defined by the law - far from it. Numerous historical, social, economic and cultural factors come into play in practical politics and in the political system born of it and often define its character. This observation does not refer to cases where the Constitution and the laws are simply façades hiding a dictatorial or despotic régime. It seeks, rather, to underline the fact that apparently similar and fairly applied rules of law can result in very different systems under the influence of extra-legal factors. To take a classic example, the basic rules of the parliamentary system are common to Great Britain, Germany, Italy and France, yet these countries have very different political systems, all of them democratic. It is very difficult to distinguish between the aspects of a political system which can be imputed to the law and those which are the result of other influences, principally because there is a confusion of causes and effects, of actions and reactions. The choice of an electoral system, for example, is the result of numerous historical or cultural influences. But the electoral system in its turn affects the factual data, particularly the party system which then itself reacts on electoral laws, etc.

Assuming these problems, familiar to anyone who studies political systems, will be dealt with in the third report, only the legal options will be discussed here. In other words, the present report will approach the problem from the point of view of law and not, except in passing, from that of political science.

2. The second preliminary remark concerns the fact that some laws cannot be regarded as options, simply because they are inseparable from democracy; only their particular application can be a matter of option. To take an example, freedom of thought, expression and communication is one of the basic principles of democracy. The options which exist on this subject obviously do not involve a choice between this freedom and its more or less direct negation. But this does not mean that the Constitution or the legislature cannot and must not adapt this freedom so as to prevent its abuse, notably in order to protect its citizens from defamation, or public order from appeals to violence.

What is essential for a democratic State, what is not a matter of choice, can be summed up in the following principles:

- the existence of, and the respect for, a Constitution;

- genuine free universal suffrage;

- the non mixing of powers;

- the recognition and guarantee of rights and freedoms of individuals and minorities;

- the Rule of Law.

It is only within the framework and respect of these principles that one can speak of fundamental options which, as we will see, are numerous.

SECTION 1 - THE CONSTITUTION

3. The Constitution is the legal foundation of the State. It lays down how power is acquired, exercised and lost: it establishes the structure and functioning of the organs of State; it defines and guarantees rights and freedoms. The Constitution prevails over any other norm.

To ensure its character as foundation of the State, it can only be changed or modified by a special procedure more difficult and more solemn than that required for the change or modification of other laws. There is only one democratic country where, theoretically, the Constitution could be changed or modified in the same way as any other law: Great Britain. But this situation can be explained by specific historical factors which do not exist elsewhere and, in fact, the British Constitution, to a great extent based on conventions, is more stable than that of many other countries.

What are the basic options concerning the Constitution itself?

A. WHAT SHOULD THE CONSTITUTION CONTAIN?

4. There is a tendency to frame long and very detailed Constitutions when there is a fundamental change in the political system. This tendency should be resisted for several reasons:

- The mass of citizens can understand a Constitution if it is not too long or too complicated.

- If the Constitution is too long and too complicated, a complicated system of revision is required (Cf. below No.5) for reforms of detail.

- Experience shows that a political system cannot be entirely encapsulated in a document: its reality depends to a great extent on its practical application. Practice must of course be prevented from perverting the Constitution but a certain leeway must be left for the experience gained over the years.

The Constitution must therefore include:

- the proclamation of basic rights and freedoms, without going into excessive detail: for example, on the question of freedom of communication, the prohibition of censorship; in the law of property, the possibility of expropriation in the public interest but accompanied by equitable compensation, etc.

- the principles on which the organisation, powers and functioning of the organs of state are to be based, and the basic procedures concerning them (for example, those concerning the responsibility of the executive, the passing of laws, the executive's power to issue regulations within the framework of the Constitution and laws, etc.).

- the character of the State (federal or unitary). This point will be discussed below (No.10).

B. REVISION OF THE CONSTITUTION

5. The revision of the Constitution refers to the means by which the Constitution can be modified or, exceptionally, changed altogether. There is an almost infinite number of options.

Before enumerating them, a warning must be given, parallel to that given above concerning long and complicated Constitutions. The revision of the Constitution, the "fundamental pact", should be made much more difficult than the passing of an ordinary law, but the difficulty should not be excessive. Experience proves two things:

- The first is that the authors of a Constitution tend to believe that they have produced an almost perfect document which should be protected against their successors.

- The second is that, if revision is too difficult, necessary changes cannot be effected in a legally correct manner and their legal impossibility can cause, if not justify, a coup d'état or a revolution.

When implementing the various solutions outlined below, procedures must be adopted which do not make desirable modifications unreasonably difficult to realise.

6. The initiative for revision can be quite wide, since it is simply a question of making a proposal: it may be enjoyed concurrently by the executive and members of Parliament (this generic term will be used to refer to legislative assemblies). The right may also be accorded to the people by way of petition of a sufficient proportion of the electorate (10, 15 or 20%, for example). But this "popular initiative" presupposes that the revision will be the subject of a referendum (Cf. below No. 16).

There are many ways of passing the revision, two or more of which can be combined, thus giving rise to an almost infinite number of permutations.

We will not discuss the possibility of placing the revision of the Constitution in the hands of a Constituent Assembly elected specially for the purpose. This system is appropriate where an entirely new Constitution is being framed following the collapse of a political system. But although history provides examples (none of them very successful), it is not appropriate for the revision, even the profound revision of a Constitution, if only because it provokes the hostility of the elected Assemblies which must give way to the Constituent Assembly.

The two major options, which engender a third, are the following:

a) The revision of the Constitution can be entrusted to the Assembly or Assemblies which exercise legislative power, but to be passed the revision must gain wider consent than is necessary for ordinary laws. For example: a larger majority; necessity of agreement by both chambers, etc.

b) The revision can be decided by a popular vote (referendum) on a Bill prepared by the Government, a legislative Assembly or on the initiative of a sufficient percentage of the electorate.

c) There can also be a choice between the two procedures whereby the revision could be passed either by the Assembly or Assemblies or by the people.

The choice among these three modes of revision (which offer a great number of possible permutations) depends on the attitude to the principle of the referendum (cf. No.16 below).

But unless there is hostility to the principle of the referendum, the third system, which offers a choice between revision by the Assembly or Assemblies and revision by referendum, would seem the most flexible. It makes it possible to submit to referendum the more important revisions on matters of principle accessible to the mass of the population, while reserving for Parliament revisions concerning practical or technical questions which the elected representatives have the experience to deal with more appropriately.

In addition - and this can be very important - the range of possible solutions is still wider in the case of the federal State (below, No. 10) in which the constituent States must usually be involved in one way or another in procedures for the revision of the federal Constitution.

C. THE PROBLEM OF CONTROL OF CONSTITUTIONALITY

7. Laws and legal acts in general must be in accordance with the Constitution, by definition the supreme law, superior to any other law or legal act. To ensure this principle is respected, there must be a public body that can annul or freeze laws or acts that are contrary to the Constitution. This is easy for all regulations and instruments other than the law: the courts will annul or render ineffective a government or administrative regulation or a private act, for example, which disregards the Constitution.

The difficulty begins when it comes to controlling the constitutionality of laws passed by the elected Parliament, firstly, because Parliament represents the nation and the control of constitutionality appears to be contrary to the principle of the sovereignty of the people. Furthermore, the annulment of a law always has political repercussions and how can a body be found that is impartial and objective and will decide on purely legal grounds with no political bias?

The first difficulty can be overcome by reasoning as follows: it is the Constitution, the supreme law, which defines the powers of the various organs of State. It confers the power to make law on the members of Parliament, but only on condition that they respect the Constitution. If they do not respect it, they can no longer claim to represent the people as they represent them only under the terms of the Constitution.

As to the second difficulty, the choice of a competent, impartial, independent body, it can be suitably resolved in various ways, as we will see.

8. On the question of control of constitutionality, as on many others discussed in this report, many options are open, options which give rise to further options. These can be combined exponentially and would require a book to enumerate fully.

We will limit ourselves to the major options.

The first option is between entrusting control of constitutionality to a Court of general jurisdiction, not specialised in the control of constitutionality, or to a specialised Constitutional Court. The United States is the oldest and most illustrious example of the former: the Supreme Court which pronounces on the constitutionality of state and federal laws is simply the highest Court in the country having a general jurisdiction to hear appeals against the judgments and decisions of the Courts in all areas of the law (civil, criminal, commercial, etc.). Although the American system is to be found in some other countries, almost all European Constitutions resort to the system of the specialised Constitutional Court, under various names.

The second option, which is related to the first, is that between control by incidental plea and control by action. Control by plea means that in the course of a trial a person to whom a law is being applied asserts that this law cannot be enforced because it is contrary to the Constitution. The court must then examine this "plea of unconstitutionality" and, if it considers it justified, refuse to enforce the unconstitutional law. Given the importance of questions of constitutionality, the case usually goes on appeal to the highest court (the Supreme Court in the United States). But in systems with a Constitutional Court a suit can generally be brought to that Court independently of any particular case, so that it can decide whether or not the law is constitutional. There are two variants to this system: the control of constitutionality can be exercised a priori, that is after the law has been passed but before promulgation has rendered it enforceable, or a posteriori after the law has been promulgated.

The third option is related to the first two: who can initiate the control of constitutionality? If control is by plea, any citizen can in any trial in which he is involved ask the judges to refuse to enforce an unconstitutional law. In control by action, matters can be referred to the Constitutional Court only by certain authorities or bodies: for example, the Head of State, the Government, the Presidents of the Assemblies, a certain number of members of Parliament, the federated States or the local authorities, etc.

The general tendency in Europe is to avoid the American system in its entirety, while trying to retain its advantages.

We have seen that it is the system of Constitutional Courts that has prevailed. Laws can be referred to them only by certain more or less numerous authorities or bodies. The advantage of the system is that it makes it possible to know if a law is constitutional in advance, before any trial has taken place. But if during a trial a party puts in a "serious and pertinent" plea of unconstitutionality, the court will refer the matter to the Constitutional Court which will then decide. Thus even if a law has not been referred to the Constitutional Court when it was passed or promulgated, it can nevertheless be subjected to a control of constitutionality on the simple request of a citizen involved in a case.

As to the recruitment, composition and status of the members of the supreme Court, everyone agrees on the necessity of assuring the independence of these judges, notably by their being irremovable during the full time of their office. They are always recruited differently from other judges (civil, criminal, administrative, etc.). Their appointment can be the responsibility, in varying proportions, of the Head of State, Parliament, the Presidents of the Assemblies, the highest-ranking judges. No system is perfect. It is essential to remember one is choosing men who have a crushing responsibility in that their decisions are subject to no appeal and are binding on every organ of State: Head of State, Parliament, Government, the Courts.

9. The role of a Constitutional Court has many aspects. Three essential points must be emphasised.

- Firstly, the Court ensures the lawful functioning of the organs of State and, if necessary, interprets the Constitution in order to settle conflicts between them (executive and legislative, federal Government and the States or local authorities).

- Secondly, it can be responsible for matters other than controlling constitutionality but which concern the functioning of the institutions: monitoring elections and referenda, for example.

- Thirdly, but most importantly, controlling the constitutionality of laws involves the annulment or freezing not only of laws passed according to a procedure which contravenes the Constitution, but also and more importantly laws which disregard the rights and freedoms guaranteed by the Constitution.

This third point also explains the general development in Europe of Constitutional Courts which are regarded as indispensable to the functioning of democratic institutions and as the "guardians of fundamental rights", which constitute the essence of democracy.

D. FEDERALISM AND DECENTRALISATION

10. A full discussion of the choice that every Constitution must make between a unitary and a federal State is beyond the scope of this paper. The choice is determined by political, historical, economic and cultural factors whose number and variety defy even simple enumeration.

We will confine ourselves to a few remarks:

- There are abstruse controversies among constitutional lawyers concerning the notions of federal State and unitary State. Their practical importance is probably limited.

- There are many ways of defining and structuring the federal State and the unitary State. Roughly speaking, it should be remembered that the one is opposed to the other on one or other of the following points:

- In a unitary State, there is only one legislative authority; in a federal State, the local Parliaments enjoy a degree of legislative power.

- In the unitary State, legislative, executive and judicial powers are indivisible. In the federal State, these powers are divided between the organs of the federal State and those of the member States. Generally, however, international relations, defence, the currency and the basic running of the economy are the preserve of the federal Government.

- In the unitary State, the "Kompetenz-Kompetenz", that is the authority to frame the Constitution, belongs only to the State; in the federal State, the member States enjoy such a power, within the terms of the federal Constitution, and there thus exist "federated Constitutions".

- In the unitary State, there may only be one Assembly representing all the citizens. In the federal State, there are usually two Assemblies: one representing the citizens, the other representing the federated States in a way that is not proportional to their populations.

It goes without saying that all aspects of the institutions are affected by the choice between unitary State and federal State. This has already been mentioned in connection with controlling constitutionality, but it is true also of the composition of Parliament, legislative procedure, the organisation of the administration, the administration of justice, etc.

In the organisation of the federal State, particular attention must be paid to:

- the clear definition of federal jurisdiction and States' jurisdiction;

- the respect of rights, freedoms and democratic principles at every level;

- the resolution of conflicts between the federal State and the federated States or between federated States, principally by appeal to the Constitutional Court.

11. Without ignoring the profound difference between the federal and the unitary State, it must be remembered that :

- federalism is subject to great variations, as a comparison between the United States, Switzerland and Germany would demonstrate;

- the unitary State can "decentralise" to a greater or lesser extent without delegating to local authorities any constituent, legislative or judicial power, but allowing them to form corporations with their own interests and property and administer their locality autonomously through elected bodies;

- particularly in Europe, institutions of self-government sui generis have developed which do not altogether fit into the classic framework of either the unitary or the federal State, as is for example the case in Italy, Spain and Belgium.

12. Finally, it should be noted that in multi-ethnic States which include different nationalities, various types of federation, decentralisation and self-government have been instituted to deal with this situation. But one should not lose sight of the fact that the "organic" solution to ethnic multiplicity would not be sufficient if the Constitution did not ensure the respect of minority rights - this aspect is related to fundamental rights and freedoms.

On this point too the effective guarantee of democratic principles is dependent on the controlling of constitutionality and the existence of a genuine Rule of Law (cf. below, No.40).

SECTION II - FREE AND AUTHENTIC UNIVERSAL SUFFRAGE

A. THE PRINCIPLE OF UNIVERSAL SUFFRAGE

13. It is universally accepted that universal suffrage is fundamental to democracy. It can be defined as a system in which there is no exclusion on grounds of sex, education, economic situation, belief or race. The only acceptable exclusions are those based on mental capacity (minors, the mentally ill) or unworthiness (convicts). On this point no "option" is possible.

The same is true of equality: "one man, one vote". Many years ago Belgium had a system of "plural" suffrage which gave extra votes to people with diplomas or savings or who were the head of a family. This historical situation is sometimes referred to, but never with any success.

Freedom of voting is self-evident. It depends firstly on a secret ballot and the incrimination of economic or psychological pressure on the voter. A whole series of measures (which are not enshrined in the Constitution which should be limited to general principles) must by their specificity ensure the authenticity of the vote.

Pluralism is the guarantee of the authenticity of universal suffrage. It is manifested in the exercise of various freedoms: freedom of communication (press, radio, television),

individual freedom, etc. But it particularly implies the freedom to form and run political parties.

B. THE FREEDOM TO FORM, ORGANISE AND RUN POLITICAL PARTIES

14. The single party or its variants (front of principal party and satellite parties) is the very negation of democracy.

Pluralism of parties is, on the other hand, one of the conditions of democracy. It must be guaranteed by the Constitution.

Legal regulation of parties must be minimal.

It should be restricted to ensuring:

- that a party does not pursue the objective of overturning the constitutional order by violence or plot;

- that it is democratically organised;

- that the sources of its funds be known (transparency). Any dispute concerning the conformity of the formation or life of the party to these principles must be decided by a judge who is completely independent politically or, preferably, by a Constitutional Court.

C. THE FUNCTION OF SUFFRAGE:REPRESENTATION AND DIRECT EXPRESSION

15. Here, we favour a genuine option which is not absolutely restrictive and allows different responses in different situations.

Theoretically, suffrage can satisfy two objectives:

- either to elicit a decision from the citizens themselves;

- or to elect representatives who will decide in the name of the citizens.

In a modern country with more than a few hundred citizens, it is obvious that most decisions concerning the State, its policies, its activities, etc. must be taken by representatives, if only by virtue of the division of labour. But should there also be a place for the direct expression of the peoples' will, for the referendum, in other words?

This question opens two options, one of principle, the other practical.

16. The question of principle is classic: is democracy better served by representatives, as MONTESQUIEU maintained in France, or by direct vote of the citizens, as ROUSSEAU maintained?

Democratic logic favours ROUSSEAU's thesis:

- If the people are sovereign, why believe them incapable of deciding for themselves?

- Elected representatives may have a personal will opposed to that of their electorate: recent examples in western Europe have shown that the answer given by the people directly consulted differed from that of their representatives.

- The referendum frees the people from the supervision of parties.

Conversely, it can be noted:

- that many political questions are beyond the real understanding of "the man in the street";

- that the real purpose of the referendum is distorted because the mass of citizens regard it as a vote for or against the party in power;

- that a too frequent use of referenda discourages the electorate who can no longer be bothered to vote.

It is difficult to come down on one side or the other, the conditions not necessarily being the same in different countries.

It must, however, be observed that democratic logic tends to prevail. The example of Great Britain, the home of the sovereign Parliament, is apposite here: for about twenty years now referenda have been held there.

The referendum cannot, therefore, be excluded altogether. But two remarks are necessary:

- Firstly, the frequency with which the referendum is used should depend on the specific national situation, the degree of development of democratic institutions, the existence of a pluralistic, competent media network - press, radio and television.

- The citizens' legitimate desire to have a more direct influence on political decisions can be satisfied in another way by the election of a Head of State by direct universal suffrage.

17. If we now turn to the procedural aspects of the referendum, we will find the same plurality, intertwining and combination of solutions we have already encountered in relation to other problems. A brief review:

- A referendum can be held on revision of the Constitution, legislative questions or both.

- It can either be compulsory in certain cases, or optional and, in this case, the initiative can lie with any or all of the following: the executive, the legislature or a percentage of the citizens.

- It may or may not be combined with parliamentary involvement.

- It can take the form of approval (the proposal is adopted if it obtains a majority of votes) or a veto (to prevent the application of a law passed by the Parliament).

D. THE PROBLEMS OF REPRESENTATION

18. Whatever the place given to direct expression by the citizens, in a modern State democracy can at best be only "semi-direct" given that many decisions, particularly legislative, must be taken by elected representatives.

There are two essential problems concerning political representation.

The first is the nature of the mandate given to the elected representatives and, as a corollary, their status.

The second is the electoral system, particularly the type of ballot.

19. According to the dominant conception in democratic countries, deputies, or more generally, members of Parliament, are not the "agents" of the voters, linked to them by an "imperative mandate" which obliges them to vote only in the way the voters wish, on pain of dismissal.

On the contrary, the effect of election is simply to confer on them the legal power to legislate. When doing so, they represent not the citizens who elected them, but the nation as a whole. They must decide independently in the general interest and according to their own conscience. They cannot be dismissed.

In fact, without going so far as to acknowledge the "imperative mandate", the legal theory has been tempered by the involvement of political parties in two ways.

Firstly, the parties usually present "programmes" to the voters which include a promise of implementation.

Secondly, the parties subject representatives to more or less strict discipline, particularly to ensure the unity of voting of deputies of the same party.

It is nonetheless true that parties which fail to fulfil their promises risk no sanction other than the voters turning away from them at the next election and the deputies can be dismissed neither by their electorate nor by their party.

The status of the representatives, which must be expressly stated in the Constitution, it being an essential point, must include:

- "immunities" protecting the representative from any impediment to his freedom of expression or his voting: he must risk no civil, administrative or criminal penalty for anything he says or writes in his capacity as member of Parliament; if he commits an offence "as a private individual", he can be charged or arrested only with the authorisation of the Assembly to which he belongs;

- a material situation, a "salary", that allows him to work full-time in Parliament.

This is the minimum necessary to ensure the representative's independence which is one of the essential foundations of representative institutions.

19b. The problem of the electoral system and especially the type of ballot is immense.

A brief look at some fairly constant facts:

The voting age is tending to be lowered: 18 for many countries; sometimes it is slightly higher.

There must be fair and equal access to the media during election campaigns. Their financing must be free of any intrusion by private interests (State financing of parties and candidates). To ensure that there are no irregularities, elections must be subject to judicial control (usually by the Constitutional Court).

All corresponding arrangements and many others concerning elections must be extremely detailed to be effective. It follows that the Constitution can only lay down principles and that the detail must be decided by the ordinary legislature.

20. The choice of the type of ballot is very important for the functioning of representative institutions. It poses theoretical problems particularly that of the "fidelity" of electoral results to the will of the electorate, and practical problems notably that of knowing whether there will be a working majority in the Assembly or Assemblies able to establish a political programme and support the action of the executive.

As far as the type of ballot is concerned, it is a choice which cannot be made in abstracto because account must be taken of traditions, bodies of opinion and the party system, on the one hand, and of the more or less foreseeable effects one type of ballot or another will produce on the working of the institutions, particularly on the relation between legislature and executive and on the party system, on the other. This evaluation cannot be made in general or theoretical terms but only in relation to a particular country at a particular time.

Some idea of the "options", or rather the multiple permutations, open to those wishing to determine what would be the "right" type of ballot can be given, however.

21. It is tempting to give an outline in which there would be broadly two general types of ballot: election on a majority basis and proportional representation. But this would be imprecise for several reasons: firstly because majority election can be on one or two ballots and, despite appearances, this is not a case of a simple variant, but rather of two profoundly different electoral systems; secondly, because there are several types of proportional representation; finally, because there is a tendency to combine majority and proportional systems.

Therefore a more complex plan will be adopted than that which simply opposes majority election and proportional representation.

22. The first-past-the-post system is not practised only in Great Britain (also in the United states, notably), but it is in Great Britain that its nature and effects are most manifest.

The principle is simple: the country is divided into constituencies (as equal as possible in terms of population, but with considerable variations). Each constituency elects one Member of Parliament; the candidate who obtains the most votes is elected, even if the combined vote for his opponents is higher.

In correlation with this type of ballot - although it is impossible to determine on all points what is cause and what effect - one observes the following:

- The two-party-system: two parties and two parties only hold the attention of the electorate; other parties exist but their representation in Parliament is very limited and much lower than the proportion of votes they have obtained;

- The majority party is over-represented: it obtains a proportion of seats superior to the number of votes; party discipline ensures stability of government;

- The opposition, formed essentially of the "second party", has a double role: checking and opposing the Government; preparing an "alternative" to it at the next election;

- Except very rarely, the Government's political accountability to Parliament is replaced in practice by the accountability of the majority party to the electorate;

- Some authors have described the political system of Great Britain as "government by one party, monitored by the opposition and subject to arbitration by the electorate". (This is, of course, an oversimplification.)

This type of ballot is not mentioned simply to avoid the accusation of omission. It exists in correlation with democratic institutions of high quality, but it must be remembered that it is linked to specific historical and sociological factors. As we said above, it is impossible to

unravel what is cause and what effect in the structure of the British political system and there is nothing to suggest that it would produce analogous (hypothetical) effects if introduced in another country. It could, on the contrary, favour the multiplication of parties and candidates, at least in the first elections, and result in a distorted representation of the electorate and also very fragmented Assemblies with a scattering of tendencies incapable of forming majorities.

23. The two-ballot majority system is not to be found only in France, but will be illustrated by that country as it has been the dominant type of ballot there for more than a century.

The principle is simple: to be elected at the first round, a candidate must obtain an absolute majority of the votes cast, that is more than half. For the seats not filled at the first round, there is a second ballot a week later when they are attributed by a relative majority, that is to the candidate who obtains the most votes, even if his opponents together poll more votes than he does. The constituency may have several seats (plurinominal ballot) but the system is simpler if each constituency has only one seat.

In fact the usual pattern is as follows: at the first round, each party takes its chance and puts up a candidate; at the second round, alliances are formed between parties; the "allies" of the second round organise the withdrawal of their candidates in some constituencies in return for withdrawal to their advantage in others. In this way, there is usually a "right-left" duel at the second round. According to a classic expression: at the first round the voter chooses; at the second, he eliminates.

Of course, there can be many variations on different points: to be elected at the first round, it may be necessary to obtain not only an absolute majority of the votes cast but a certain proportion of those registered to vote; access to the second round might be limited to the candidates who have obtained a minimum percentage of votes, etc.

24. The principle of proportional representation is simple: each party must obtain a proportion of the seats in the Parliament equal to the proportion of votes it has obtained in the country.

The procedures are extremely varied. Only the problems they must take into account will be described:

- The larger the constituencies, the better the system works arithmetically, but the larger they are, the more tenuous the links between voters and representatives. This contradiction can be mitigated by having smaller constituencies, each electing only a few members (even one) and adding up the votes cast nationally which are not represented locally and giving each party extra seats thus assuring complete proportional representation (this is more or less the German system).

- By giving every party, however small, a chance, there is a risk of a fragmentation of votes and seats unfavourable to the coherence of parliamentary life; the

establishment of a "threshold" of votes (5%, for example) without which a party has no right to any seats can help to avoid the worst effects of this.

- In order for the parliamentary representatives to escape the hold of the parties which are in control in that they accept candidates or not onto their list and assign an order of preference, voters can be asked to choose from the party list the candidates who will be given the seats attributed to the party (preferential vote).

The ingeniousness of the designers of electoral systems is boundless and pages could be written giving a more detailed description of the various systems of proportional representation.

25. This ingeniousness is even more obvious and more embarrassing when it comes to examining the systems combining majority and proportional ballots or in which the combination of procedures is more complex. It is in a way unjust not to analyse electoral systems like those of Ireland and Greece, but a great deal of space would be needed to do so. Furthermore, it is possible that too complicated a system runs the risk of not being understood by the mass of voters, at least initially.

26. The problem of the criteria to apply when choosing an electoral system is at once banal and, at least in the abstract, almost insoluble. Theoretically, proportional representation, which is "fair" but leads to a fragmentation of electorate and parties, unfavourable to the stability of institutions and governments, can be opposed to the majority system, which is "unfair" but nonetheless facilitating the formation of parties and parliamentary majorities.

In reality, it is difficult to formulate even tentative "laws" as they are too often disproved in practice. In France, during part of the Third Republic and all of the Fourth, the majority system did not prevent the multiplication of political formations or government instability. Proportional representation in Germany since the last war has not produced a proliferation of parties nor compromised the stability of governments.

All one can say is that the choice of an electoral system must be based on three types of consideration:

- the existing political and social structures and their probable development (this includes the problem of multi-nationality States);

- the type of system adopted in terms of the relation between executive and legislature: a parliamentary system has a far greater need for a stable and coherent parliamentary majority than a presidential system (below, No.33);

- the interaction of laws concerning the electoral system and the structural effects that the system involves in practice.

27. If one can only mention the options open without recommending a choice, one can, at least, draw a conclusion from the above discussion:

There is a great temptation to include in the Constitution the rules or at least the principles of the electoral system. The usefulness of doing so has for long been a matter of debate in established democracies. But for those countries which have a shorter democratic tradition, it would be imprudent to give the choice of electoral system a constitutional value, even in principle. Indeed, because of the unforeseeability of the cyclical and structural results of one system or another in a particular country at a particular time, it is essential to keep open the possibility of rapidly correcting "perverse" and therefore unexpected effects of the existing system. For this reason, it is wise to leave the electoral system to the ordinary legislature, at least for a reasonable experimental period.

SECTION III - THE NON-MIXING OF POWERS

A. DEMOCRACY AGAINST TOTALITARIANISM

28. In a sense, democracy is the system in which, in the absence of unanimity, collective decisions fall to the majority.

But as many authors have observed, this function of the majority implies a consensus on the coexistence of the majority and the minority. Those in the minority in a democracy disagree with the majority, except on one point: that all must continue to live together, with the risk for one camp, and the chance for the other, that the minority will become the majority.

In addition, the minority, as a group or as individuals, have "reserves" defined principally by human rights.

Democracy is therefore at once a system in which the majority decides and an "anti-totalitarianism", opposed to the totality of the rules applicable to social life being monopolised by the same man or group of men.

In the context of the revolutions of the XVII or XVIII centuries (Great Britain, the United States, France), marked by the dominance of the monarch, this struggle against totalitarianism focused on a struggle for the sharing of political decision-making between the executive, legislative and judicial branches, according to the precepts (not absolutely in agreement) of LOCKE, MONTESQUIEU and the Fathers of the American Constitution.

But if the separation of powers is an essential aspect of democratic constitutional theory, it must not be forgotten that it is simply one factor in this rejection of totalitarianism.

Firstly, because political reality has sometimes given the legal formulations of the separation of powers an unexpected content. Although, in theory, in Great Britain the Government and the House of Commons have distinct powers and the means of influencing each other (political accountability of the Government, right of dissolution) are balanced, it has been argued that in fact the majority party, because of the sovereignty of the majority in the

Commons and party discipline, controls both the legislature and the executive. But it is here that such powerful anti-totalitarian factors come into play that no one has ever suggested that Great Britain was a totalitarian, dictatorial or simply authoritarian State. These factors are: the prerogatives of the Opposition; political pluralism; rights and freedoms, particularly of expression; local self-government; the independence of the judiciary. Similarly, in the United States, which is legally very attached to a strict separation of powers, presidential power is limited not only by the prerogatives of Congress but also by the federal structure.

Furthermore, totalitarianism does not consist only in the concentration of all political power (directly or indirectly) in the same hands (man or party), but also in the fact that the political authorities claim to control all aspects of the individual's life: his upbringing, his intellectual training, his beliefs, his work, his leisure, his private life, etc.

The struggle against totalitarianism therefore implies another series of "separations": separation of State and private life; separation of State and religion or beliefs in the broadest sense; separation of State and work.

Should one speak of a separation of State and economy? Democracy allows great variation in the relation between the political authorities and the economy: history proves that the democratic State can be more or less active in economic and social matters as a comparison between the United States and Sweden or Norway, for example, would show.

But on this point democracy is squeezed between two limitations which boil down to a rejection of the concentration of political and economic power. First of all, the economy must not be in the hands of the State. The right to private ownership of most of the means of production and the acceptance of market forces are not only recipes for better economic management, but also a basic guarantee of the freedom of the citizen who would otherwise be dependent on the whim of those in power. Conversely, economic power ("the power of money") must not be allowed to control political power nor paralyse its efforts to oppose the abuse of mergers, make social laws, struggle against too great inequalities, and prevent the domestication of culture and consumption by money and profit.

The respect of these two limitations depends to a great extent on legal rules, particularly on the Constitution. It is indispensable to formulate such rules : for example, to define the principle and limits of private property, the principle and limits of State involvement in economic and social questions; possibly the principles of taxation, etc. But to find a balance that respects both the rights of the State and those of individuals as producers or consumers, appropriate administrative structures are needed, mediation (the role of the unions), an economic culture.

B. THE POLITICAL PRINCIPLE OF THE SEPARATION OF POWERS

29. Thus, the principle of the separation of powers understood in its classic political sense is only one manifestation of democracy's repugnance for totalitarianism; but it is an essential part of democratic organisation.

Putting to one side the erudite and obscure glosses on the various meanings the term has been given by writers or Constitutions of various countries, the "vulgate" is roughly as follows.

The State has three functions which can be broadly characterised as:

- a normative function tending to establish general, compulsory rules;

- a governmental function including, within the framework of these general rules, domestic administration, international relations, the maintenance of internal and external security;

- a judicial function consisting in the resolution of public and private disputes and the repression of offences by application of the law.

The separation of powers seeks to prevent the same man, the same social group or the same party exercising, either in theory or in fact, more than one of these functions.

The dictatorship of one man or one party is thus the counter-model of the separation of powers.

On the other hand, the different "powers" cannot be isolated from each other.

Firstly, neither the executive nor the judiciary may act unlawfully (or in contravention of the Constitution); because each branch must take into account the prerogatives of the other.

Secondly, the political action of the State forms a whole and Assemblies and Government cannot, without harm, pursue different political goals.

These precepts imply both the separation and the collaboration of powers and can be realised in many different ways.

C. THEORETICAL CLASSIFICATION OF POLITICAL SYSTEMS ACCORDING TO THE SEPARATION OF POWERS

30. The theoreticians of constitutional law have long proposed a classification of political systems according to the separation of powers.

They begin by repudiating systems in which there is a mixing of powers and identify two varieties:

- the personal dictatorship in which one man is at the head of the executive and there is no Assembly or the members of the Assembly or Assemblies have been reduced to the state of docile servants and in which the electorate is subjugated by propaganda, the grip of totalitarianism or terror;

- the "Convention" system (from the name of the French Convention of 1792) or "Assembly System" in which the Assembly regards the executive as being totally subordinate to the Assembly's orders thus reserving all decision-making to itself.

30b. On the other hand, constitutional lawyers agree that the principle of the separation of powers is respected in two types of system: systems of "rigid" separation of powers and systems of "flexible separation" or "collaboration" of powers.

The presidential system, of which the United States provides the principal illustration, is given as the main example of "rigid separation". The executive (the President) and the legislature (Congress) are both elected (directly, in this case) by the people. Each has a clearly defined sphere of competence: Congress has no role in the appointment of the executive, and can overthrow neither the President nor ministers (unless an offence justifying impeachment has been committed); the President cannot dissolve Congress; he is not involved in the passing of laws or of the budget.

Systems of "flexible separation" or "collaboration of powers" are essentially parliamentary systems. Their structure is usually quite complex.

The executive is "two-headed". The Head of State (hereditary monarch or elected President, but not elected by universal suffrage) has a limited symbolic and political role. The Government he appoints must have the confidence of Parliament which can oust it. On the other hand, the executive can dissolve at least one of the Assemblies. While the essential separation of the legislative and executive branches is ensured by Parliament and Government respectively, it is not absolute: the Government has the initiative in matters of legislation and finance, participates in debates and can put pressure on the Assembly by asking for a vote of confidence; as a counter-balance, apart from being able to oust the Government (but not the Head of state), Parliament monitors the way in which the Government performs its functions.

31. If this outline is not completely obsolete from the legal point of view, it has become unrealistic, not because the distinction between presidential and parliamentary systems has lost all meaning but for a variety of other reasons.

Firstly, as far as the presidential system is concerned, it has proved impossible to maintain a "rigid" separation of powers. To give an example, the President in fact enjoys a genuine power of initiative in legislative and financial matters. Congress, for its part, principally through its committees, enjoys the right to examine closely government action in every domain. Each power uses the checks and balances it has been given by the Constitution (the President's right of veto on legislation, the approval of Congress of certain presidential measures) to influence the other. Each is constantly striving to interpret its own powers as widely as possible, so much so that at times certain authors have spoken of a "congressional" system or a "presidential monarchy". The immense power of the media, the federal system and the activity of the lobbies complicates the situation still further. Finally, the role of the Supreme Court, "conservative" or "liberal" by turns, has often been more decisive in American political life than that of either Congress or the President. In short, the

legal framework outlined above, in its simplicity and legal dialectic, bears little relation to political reality.

The parliamentary system has also developed and diversified. Despite the apparent analogy of essential legal requirements (ministerial accountability, the right of dissolution, government participation in legislation, parliamentary control), political practice, the party system, the social environment and the political culture have resulted in enormous differences between the countries which have opted for the parliamentary system. Between the British parliamentary system and the French parliamentary system of the French Fourth Republic or the Italian parliamentary system, there is, if not a gulf, at least a gap.

In the absence of structures and traditions comparable to those of Great Britain, legal remedies have been tried. For example, attempts have been made to "rationalise" the parliamentary system by subjecting ministerial accountability to rules more favourable to government stability (Germany, France). Similarly, the Head of State has sometimes been given more real prerogatives. But the "map" of parliamentary systems remains surprisingly varied.

A combination of the parliamentary and presidential systems has been tried in France since 1958. Is it, as one author claims, a "semi-presidential" system? Up till now it has functioned rather as a presidential system and the brief period (1986-1988) when it seemed to be functioning as a parliamentary system (at the time when the majority in the Assembly was hostile to the President) seems to have served only to prepare the return to a presidential system in 1988. In fact, the French case is remarkable in that in 34 years the French President has been the leader of the parliamentary majority (something which has never happened in the United States), which suggests an "ultra-presidential" system which is nonetheless democratic because this is the result of free elections respecting public freedoms. Paradoxically, this hybrid and intellectually illogical system has enabled France to enjoy a third of a century of constitutional and political stability. The explanation of this paradox is the subject of controversy and the system's future is much discussed. Here again the specific character of the country (France) is such that any attempt to generalise would be fraught with difficulty.

It should be added that the usurpation of constitutional and democratic concepts and theories by more or less military dictatorships in Africa and Latin America blurs the issues still further.

D. THE LOGIC OF CONSTRAINTS

32. In order to clarify the issues, we now adopt a different approach, based on the following postulates: to organise a viable political system, that is one capable both of making decisions and respecting democracy, various ways of dividing powers can be envisaged, but not just any combination of the different parts to be assembled. Some choices result in impossible constraints. It is less a legal question than a pragmatic one.

The parliamentary system in various forms is dominant in Europe. It is based on a symbiosis between Parliament, or at least the principal Assembly, and the Government. This initial choice results in a series of constraints, the most important of which will be enumerated.

The Head of State must not have his own policy. His role can vary. In some cases it will be purely symbolic and ceremonial. But he can be given a more active part to play: for example, everything concerning arbitration, provided the term is understood in a legal and not a political sense; an advisory role in important political matters domestic or foreign; the power to make certain non-political appointments, referring matters to the Constitutional Court, etc. In some countries history has led to this role being performed by a hereditary monarch and constitutional monarchy has proved to be compatible with a democratic system and even to be the guardian of legitimacy (as was the case in Spain a few years ago). But in the absence of the historical conditions favourable to this solution, the Head of State will be an elected President. Following the logic of constraints, it is better that this election is not by direct universal suffrage; such an election might seem to confer on him a legitimacy equal or superior to that of the representatives that would not favour his neutrality; it might even result in conflicts contrary to the logic of the parliamentary system.

The second constraint is that, to avoid government instability, the electoral system should be sought that would be most likely to produce stable, working majorities with common policies which would support a Government carrying out that policy. This would be a majority system or a type of proportional representation with thresholds high enough to discourage the proliferation of parties.

The third constraint concerns the rationalisation of relations with the Government. The Government must be given wide powers to initiate legislation and a monopoly on spending proposals. Most importantly, rules must be laid down linking the fall of a Government to clear procedures, to a clear majority prepared to work with a new Government, if necessary (cf. the German system) requiring those who oust the head of Government to be already agreed on his successor. In short, it should be remembered that a parliamentary system is sick when the fall of a Government is due to a coalition of malcontents who agree only on their dissatisfaction, with no agreement as to what they want to do together after bringing down the Government.

The way Parliament is to be informed about Government measures, the administration and the economy must be defined and particularly open to the opposition, the keystone of a pluralist democratic system.

The right of dissolution should belong to the Government and not the Head of State who should not take such an eminently political decision and who should at most intervene to authenticate the decision. No conditions should be imposed as to the exercise of this right as this would make it ineffective (except perhaps to forbid too frequent dissolutions). The two essential functions of the right of dissolution are to dissuade enthusiasts of ministerial crises (preventive function) and, when it is used, to allow the electorate to settle conflicts between Government and Parliament (curative function).

33. The essential option for a presidential system is constituted by the election of the President by direct universal suffrage. Any system which would allow election on a relative majority should be proscribed since it would give the President a second-class legitimacy too weak for the responsibilities he has to undertake. In France, this is done by allowing only the two candidates best placed in the first round to stand at the second, if the first round has failed to give a result with an absolute majority. But there are other ways of achieving this (for example, single round transferable vote).

The first constraint resulting from election by the people is to give the President the double quality of Head of State and head of Government. This implies a free choice of ministers and the absence of any political accountability of the President and ministers (unless a criminal offence has been committed, particularly violation of the Constitution). The temptation - coming from France - to twin a Head of State elected by the people with a cabinet accountable to Parliament should be resisted. Indeed, as we have already seen, a choice must be made: either the Head of State finds in the Parliament elected under his auspices a faithful majority, and in this case he enjoys, in addition to his own powers, the leadership of the legislature and there is a near concentration of powers; or the parliamentary majority is hostile to him and he is in conflict with the Government issuing from it so that the executive is divided against itself.

The second constraint is to establish a Parliament not dependent on the President so as to avoid a concentration of powers. This supposes that the President does not have the right of dissolution or the ability to call for a vote of confidence.

The electoral system, on the other hand, is not important. As executive and legislature are both products of popular election and independent one from the other, the majority and the opposition are not stable, unchanging formations. Majorities can be composed differently according to the subjects treated (majority of ideas) and a President can govern effectively with a Parliament the majority of whose members belong to a party opposed to his own (this is facilitated in the United States by the loose ideology and discipline of the two major parties). That is why proportional representation can be more easily envisaged.

However, in relation to American institutions, which are the most frequently quoted example of the presidential system, three modifications seem desirable.

The first is to clarify and make official "communications" between the two branches, thus bringing law into line with practice: for example, the President's role in legislative and financial matters should be acknowledged; the dialogue between Capitol Hill and the White House should be more direct and Congress's check on the Administration more clearly defined.

In the second place, a country wishing to follow the American example should lengthen the mandates of the President and the House of Representatives in order to avoid the frequency of electoral campaigns which paralyses political action.

Finally and most importantly, the risks of the system becoming blocked should be reduced if not eliminated. In fact, the necessary convergence of the President's and Congress's decisions and policies is obtained by endless though unofficial dialogue and compromises between the two branches reached behind the scenes in the corridors of power. But it is possible, particularly in a young democracy, that opposition between executive and legislature could harden into impasse, the President being unable to dissolve Congress and Congress being unable to oust the President or his ministers. To avoid this situation, it could be laid down that the President may dissolve the House only on condition that he submit himself for re-election at the same time and, similarly, that the House be able to oust the President only on condition that it went to the electorate itself at the same time.

This solution would have two advantages.

The first is that if there was an insoluble conflict between the two branches, the people would act as arbiter.

But, in reality, this view is rather theoretical. The true merit of the system would be the dissuasive effect on the antagonists. Each branch would hesitate to put its own existence in question and would prefer to resolve the differences separating them by compromise. This would be a sort of balance of "terror" (political terror, fortunately).

34. As for the criteria to be used when choosing between the two types characterised above by their "logic of constraints", it is not a legal question as both options satisfy the criteria of democracy.

As with the other choices, account should be taken of the initial situation and the consequences. As to the former, it should be asked whether the strength of the young democracy would be better served by the electoral procedures and functioning of a parliamentary or of a presidential system. As for the consequences, it should be asked what effects (desirable or undesirable) each of the systems would produce in the medium and long term. Given the necessarily concrete character of such an analysis, no general remarks can be made.

One thing, however, can be said. It might tentatively be suggested that a young democracy in which the bodies of opinion and parties are weak and unclear might be wise to structure the political debate first, then the institutions by the election of a President by direct universal suffrage and therefore adopt a presidential system. The personalisation of the electoral battle and of presidential power has the advantage of giving a code, a language to an unclear political life. There is, however, one situation in which this solution should be avoided: where there is serious inter-ethnic tension in the State. Here, the dominant electoral operation, the presidential election, would risk becoming the occasion of ethnic confrontation and dividing the nation between victorious community and vanquished community and thus of articulating political life around a theme of division. A parliamentary system would be preferable because the essential political combat would take place within the framework of parliamentary elections which, by reason of their multiplicity and the existence of constituencies with different populations, would not articulate political debate

and life around a system of absolute victory or defeat for the various component parts of the nation.

E. CHECKS AND BALANCES

35. We have already seen that the non mixing of powers, whatever the contribution made to it by the separation of powers in the classic sense, is strengthened by laws and institutions serving as checks and balances. The role of federalism has already been cited in this regard and, to a lesser degree, decentralisation and the mediation in certain domains, particularly the social, of intermediate groupings.

Two other elements of the division (or non mixing of powers will be discussed in this section: bicameralism and the institutionalisation of the Opposition.

36. From a democratic point of view, monocameralism (only one parliamentary Assembly) and bicameralism (a Parliament composed of two Chambers) are equally acceptable.

The existence of two Chambers has the effect of accentuating the non-concentration of powers since it divides the legislative branch itself.

The following arguments are usually given in favour of bicameralism.

Bicameralism is of aristocratic origin (the House of Lords) but is justified in a more modern fashion and exclusive of any aristocratic recruitment firstly, in federal States, by the obligation to represent the member States themselves. Similarly, decentralisation in a unitary State is reinforced if one of the two Chambers is elected by local authority representatives. Finally, independently of these considerations, discussion of legislation tends perhaps to be deeper and more pertinent if it is conducted twice.

Some authors add to this classic argument the advantage there would be in compensating for the disadvantages of the type of ballot chosen for the first Chamber by the choice of another type for the second. For example, the disadvantages of a majority ballot, unfavourable to the representation of minorities, used for the first Chamber would be corrected by election to the second Chamber by proportional representation.

If a bicameral system is chosen, the powers given to each Chamber must be specified: equality of powers (complete bicameralism) or inferior powers to the second Chamber (incomplete bicameralism). It seems, in fact, that some federal States, but not all, give equal, if not identical, powers to both Chambers. But the general tendency is to give less power to the second Chamber. In parliamentary systems, the second Chamber cannot overturn the Government. Furthermore, to avoid any blockage caused by persistent disagreement between the two Chambers on legislative matters, it is useful to require that, in the event of a failure to bring about conciliation between the two, the will of the first Chamber will prevail.

It was said above that no democratic principle militated as such for or against bicameralism. It is a question of expediency, inevitable, however, in a federal system and advisable in a non-federal State composed of different ethnic, cultural or religious communities.

37. It must be stressed that in a democracy the Opposition must be regarded as an institutional element. It is essential to understand by this that the Opposition is legitimised not only by the fact that the people of whom it is composed are simply exercising the basic rights of freedom of opinion and freedom of expression. One must go further: it is part of the machinery of democracy, as is demonstrated by the British term "Her Majesty's Opposition".

This is because, as we have already seen, the Opposition fulfils several politico-legal functions. It provides a check on the majority which checks itself hardly at all (in Parliament, the members of the majority are indulgent with the Government). It criticises the actions of the Government and the parliamentary majority thus informing the nation by the ensuing debate. Finally, it prepares for the future: if the majority falls and is rejected by the electorate, it will be ready to assume the responsibilities of power thus avoiding a political vacuum.

But it can only carry out these functions if it has the authority to do so.

As we have seen, the Opposition finds powerful means of fulfilling its role among basic rights and liberties.

But it is necessary to go further and give it special advantages both inside and outside Parliament.

Outside Parliament, two things are essential: State aid for the financing of political parties is obviously much more necessary for opposition parties than for the parties in power. Government and Opposition must have equal access to the media, particularly television.

Inside Parliament, the Opposition must be given certain prerogatives, particularly regarding questions to the Government, investigatory procedures, monitoring the implementation of the budget and, of course, parliamentary debate.

SECTION IV - RIGHTS AND FREEDOMS - THE RULE OF LAW

38. Rights and freedoms and the Rule of Law have been grouped together in this final section not only because the two subjects are intimately related, but also because we did not wish to weigh down an already too long report by discussing matters which are obvious requirements of democracy.

39. It must first be observed that the recognition and respect of rights and freedoms is a sine qua non of democracy, which is not the unconditional reign of the majority over the minority or a State monopoly on collective and individual conduct.

Secondly, we must repeat what we said above (No. 4): while the proclamation of rights and freedoms should have its place - and a prominent one - in the Constitution, it is advisable not to enshrine them in a detailed code which would leave the legislature no role in the modification and realisation of the principles proclaimed. The declaration of rights and freedoms should be characterised by the solemnity and relative brevity required for its dissemination in the political education of present and future citizens.

As for determining the rights and freedoms to be guaranteed, the task is facilitated by the existence of international agreements, from the Universal Declaration of the Rights of Man, by way of the various U.N. texts, the Helsinki Agreement and the European Convention on Human Rights. The agreements are very important for the framing of new Constitutions. On the one hand, they bear witness to the universality of certain rights and freedoms which must therefore find their place in all national systems. On the other, by integrating them into its Constitution, a State is sure (on condition that it is faithful to the proclamation) of being "in line" with international law and, when applicable, the international Courts.

Among the international agreements mentioned, the advantages of the European Convention on Human Rights must be underlined. On many points, no doubt, it coincides with the others, but it is formulated in terms familiar to the legal culture of the European democracies.

40. The Rule of Law (as opposed to the Police State) can be defined by a few formulae which are simple in themselves but which require rigorous application:

- The State and all the organs of State are subject to the law; their action is legitimate only if it respects the law.

- Any dispute concerning the interpretation or the respect of the law must be settled by a Court.

- All Courts must be composed of competent, impartial people whose independence is protected by the Constitution.

- All citizens have the right of access to justice and the right to find a Court able to give a ruling when asked to do so.

41. One last point: should the fact that the State and its organs are subject to the law be understood as meaning only national law or also international law? What is the relationship between national law and international law?

These are vast questions involving complex principles and legal technicalities and can be treated only in passing.

We will limit ourselves to two remarks.

The first is that no democracy can regard domestic law as superior to international law since this is tantamount to making the State a God who is the master of international law which would be valid only insofar as it was recognised by the State, which could moreover withdraw its recognition at will.

A "dualistic" system can be admitted despite its illogicality. The State is subject to international law; it is therefore bound to include in its national law rules that conform to its international obligations; but as long as the Constitution or the legislature have not proceeded to this "reception" of international laws, the organs of state, and particularly the courts, cannot apply those laws.

There is a third type of relationship which is more logical from a legal point of view and more in keeping with the development of the law and of international organisations: international law is superior to domestic law and directly enforceable as such by the national Courts. Treaties in particular - provided they have been signed and ratified by the national organs specified in the Constitution - are superior even to subsequent laws and, in the event of a conflict between treaty and law, even subsequently enacted laws, the national Courts must allow the treaty to prevail.

The second remark is that in addition to measures concerning the relation between international law and national law, a Constitution must envisage the case in which the State joins an "integrated" international organisation (supra-national) like, for example, the European Communities (soon to be the European Union) whose functioning implies the abandoning of a degree of sovereignty on the part of the State and the limitation on certain points of the competence of national organs, notably the national Parliament. The Constitution must make it clear whether such a treaty can be ratified in the same way as an ordinary treaty by the simple authorisation of the legislature or whether ratification can only follow a revision of the Constitution.

CONCLUDING REMARK

42. In this paper, we have proceeded analytically, studying the possible options for the application of each of the great democratic principles.

It must not be forgotten, however, that a Constitution is a whole and that this "whole" must be coherent. Some of the options indicated are doubtless independent the one from the other. For example, a parliamentary system can be twinned with incomplete bicameralism or with monocameralism. But complete bicameralism (equality of the two Chambers) would imply that the Government could be ousted by one or other of the Chambers and this would increase the risk of government instability which militates against the smooth functioning of institutions. Similarly, the voting age can be higher than the age of majority if it is thought that more maturity is required for public affairs than for the decisions of private life. But it would be inconsistent to admit that one could participate in the management of public affairs at an age when one is not judged fit to manage one's own.

In other words, the authors of a Constitution are not in the position of a reader who buys books which might differ greatly from each other and be of heterogeneous types, but rather in that of an engineer building a machine who chooses parts which can work together.

1. Separation of powers and control of constitutionality

The participants in the discussion underlined the importance of the separation (or non mixing) of powers in particular for the countries of the CIS which had been victims of an extreme concentration of powers. For them the first step was to separate powers and then they had to clearly define competences in order to avoid any mixing of powers. It was pointed out, that in reality there were more than three powers, for example an independent ombudsman or autonomous administrative units. These might be dependent both on the president and parliament with the president needing the approval of parliament for the appointment of high officials.

A major problem with respect to the separation of powers in the CIS is the procuratura which might play the role of the 4th power. Under the Soviet constitution of 1936 the procuratura had constituted the highest form of control of all government bodies, including even the Supreme Soviets of Republics. Its role went far beyond the role of the prosecutor's office in the West. In some draft constitutions in the CIS the role of the procuratura as highest organ of the control of legality or constitutionality of all public (and even private) bodies was maintained. In the Constitution of Turkmenistan a special section was devoted to the procuratura. In the draft Constitution of Ukraine it was one of the two branches of the

judiciary. There was a discussion on whether to maintain this institution and there were political forces working in favour of its continuing to enjoy large competences. Even if a compromise solution was found, this solution still contradicted the principle of the non mixing of powers.

It was underlined that it was extremely important to have a constitutional court as instance controlling the constitutionality of state action and that this court was decisive for ascertaining that powers were effectively separated. Introduction of constitutional courts in other countries had had the effect that the constitution was taken much more seriously by all political forces and that there was now a political debate on the constitutionality of new legislation and of executive action. Such a step was therefore an extremely important contribution to making people aware of the importance of the rule of law. The constitutional court might either be a separate court (example : draft constitution of Ukraine) or part of the Supreme Court (draft constitution of Kyrgyzstan). Its role was not yet fully accepted by everybody as was shown by Mr Gorbachov's refusal to appear as witness before the Russian Constitutional Court.

There was a discussion in several CIS countries whether to give private persons the right to seize the constitutional court in cases of alleged inconstitutionality, once all other legal remedies had been exhausted. Some people considered this necessary for the rule of law, others hesitated to introduce such a wide ranging step in countries totally lacking a tradition in this respect. A compromise solution finding a lot of favour was to give such a right to an ombudsman.

2. Problems of representation and of the electoral system

There was a certain euphoria in favour of direct democracy in some of the CIS countries since direct democracy seemed to be the clearest expression of the democratic ideals. Nevertheless not all problems could be solved by referendum and limits to direct democracy had to be laid down.

There was also a discussion on the independence of parliamentarians. Provisions limiting the independence of parliamentarians had been introduced into the draft constitution of Ukraine, contrary to the opinion of the original drafters.

Elections were made difficult because political parties were not yet fully established and the voters had no clear ideas what they stood for. There also was a discussion whether to foresee a first-past-the-post system of electing parliamentarians in constituencies or to foresee proportional representation. It was pointed out that in Western countries a similar confusion of the voters had reigned on the occasion of the first democratic elections. This had been the case in France at the beginning of the 2nd Republic.

It seemed preferable to leave the provisions on the modalities of the vote to the electoral law and not to put them into the constitution.

3. The role of international law

There was a discussion in the CIS on the best way to implement international legal obligations. Article 8 of the draft constitution of Ukraine is worded as follows : "Ukraine recognises the primacy of general human values and respects the commonly accepted principles of international law. Duly ratified or approved and officially published international treaties entered into by Ukraine shall become part of the body of laws and are binding on the activities of governmental bodies, legal entities and private persons."

A discussion whether to give individuals the right to seize international or European courts was only beginning.

The possibility of creating rights of individuals at the level of the CIS as a whole was mentioned. The EEC treaty with its four freedoms as well as other rights created at the European level might inspire solutions to be found at the level of the Commonwealth of Independent States.

THIRD WORKING SESSION

Chaired by Professor Ergun, ÖZBUDUN, Ankara University, Vice-President of the Turkish Democracy Foundation, member of the European Commission for Democracy through Law for Turkey

Political and social consequences of the choice between a presidential and a parliamentary system

a. Report by Professor Juan LINZ, Professor of Political and Social Science, Yale University, New Haven, U.S.A.

b. Summary of the discussion

Political and social consequences of thechoice between a Presidential and a Parliamentary system

I

[*] The ideas presented in the report are developed further in a book edited by the rapporteur and Arthur Valenzuela: "Presidentialismand Parliamentarism: Theoretical and Comparative Perspectives", to be published by John's Hopkins University Press.

This report will deal with the question whether it does make a difference if a country chooses a presidential as opposed to a parliamentary system. The argument can always only be a probabilistic one. There is no certainty that parliamentarism will lead to a stable and safe democracy and that presidentialism will lead to disaster. It also has to be borne in mind that there are elements of convergence between the various systems and that there are similarities which appear in the political process. But my starting point is that there are fundamental differences of conception of the political process and of legitimacy which, whatever may be the elements of convergence to be taken into account, do not disappear.

The analysis is not simply based on an institutional consideration of what powers presidents are granted or not granted in various systems, but on the basic ideal type of a presidential system. There is of course a great variety of presidential systems and a great variety of parliamentary systems. I will not discuss in great detail the parliamentary system, but I want to make it clear that I am not talking about the régime d'assemblée, with a parliament which can make and unmake governments at will, but about the modern type of parliamentary system as it has emerged in Germany under the Grundgesetz, in Spain and in other countries. Even so some of the differences will be valid even for the worst case of a parliamentary system.

II

What now is the fundamental difference between a presidential and a parliamentary system? In a presidential system the president is elected by the people. Even if the actual election may take place in an electoral college like in the United States, this election is nowadays perceived as a direct election by the people. The president therefore derives his powers and legitimacy directly from the people. There is also a legislature, a congress, which is also directly elected by the people and which therefore also has a democratic legitimacy. This is the starting point: we have two democratically legitimate institutions which are independent of each other. It also means that both are elected for fixed periods of time, and neither the president can usually dissolve the legislature, nor can congress, unless in the case of impeachment for criminal activity etc, terminate the mandate of the president.

In a presidential system, the president has real executive powers and is not only a Head of State with representative functions. There are cases of popularly elected presidents who are, by virtue of historical developments and constitutional provisions, symbolic Heads of State, like in Iceland, Ireland and Austria. These are not presidential systems in the sense of our discussion today.

In a parliamentary system, there is only one body which derives his legitimacy directly from the people. This is the legislature or legislatures (although the lower house is usually decisive), out of which the government emerges. The legislature's life depends on the government, which has the power of dissolution, and the legislature can censure the Prime Minister who is the head of the government.

III

What does the dual democratic legitimation in a presidential system mean? Since both institutions are democratically legitimate, there is the question: who decides in the case of conflict which institution is right? Sometimes there are elaborate mechanisms or the Constitutional Courts may play a role, but sometimes the impasse is unresolvable. The potential for conflict between the president and the legislature is one of the main characteristics of a presidential system. In many Latin American countries, the conflict between president and legislature has been solved by the intervention of the military.

The main characteristic of a presidential system is its rigidity. Once you have elected a president, regardless of the degree of his capability or lack of capability and of the mistakes he may make, you have to live with him, unless you find him guilty of having committed a crime. Then the very complicated and crisis prone procedure of impeachment has to be applied. On the other hand, if the president has difficulties with the legislature and is unable to implement his legislative programme, he can do nothing about it. The legislature has a separate fixed mandate and its own democratic legitimacy.

Presidentialism, and this effect was to some extent foreseen by the founding fathers of the United States, is therefore a system to weaken powers. Now we hear all the time that presidentialism is a way to obtain a powerful executive. In fact it is a system that was designed in many ways to weaken powers by their division. A prime minister who has the support of a majority party or coalition has a much stronger position than a president without the support of the majority of the legislature. As a model for presidential systems, usually one has studied the United States and neglected the Latin American countries. Latin American countries were presumed to be unfit for democracy for a variety of reasons, like dependencia, economic under-development, the Spanish national character, etc. Everything was considered but the effect of the institutions. This is quite the wrong approach, not only since institutions are important but also since institutions can be changed much more easily than other factors like the social structure or the political culture. They are one of the few areas where we have the possibility of acting as intelligent political animals. Therefore the study of the implications of the different institutional systems can actually help to consolidate democracy.

IV

The consequences of the direct election of the president naturally depend on the method of election; there is the possibility of a single-round election or there may be an election in two rounds. However, the assumption that is very often made, that the president represents the people as a whole, that he is the representative of the collectivity, in a sense of identity with the people, does not correspond to the facts. There are very few presidents elected by an absolute majority and in multi-party systems presidents are elected by a plurality. In fact, the plurality of some presidents is much lower than that of many Prime Ministers. To mention just one example : Allende in Chile had 36.2% of the vote, obtained by a very heterogeneous coalition, and recently the successful candidate in the Philippines achieved only a much lower percentage.

Regardless of the percentage obtained, it is all or nothing in a presidential system and the candidate who has lost a presidential election often disappears from the political scene. Walter Mondale and Michael Dukakis no longer have a political role and the Democratic party in the United States, after having been beaten by the Republicans in the recent presidential elections, has been virtually leaderless. Of course, this may be different in countries with more homogeneous ideologically oriented parties.

It therefore is a myth to say that the president necessarily has broad popular legitimacy. The same is true of the widespread assertion that under a presidential system you know who will govern you, while under a parliamentary system you don't. The voter in Europe who wants to vote for Mr Kohl or Mr Major knows that Mr Kohl will be supported by the Christian Democrats and the Free Democrats and that Mr Major will be supported by the Conservative Party. He can also have a pretty good idea of who will be in the Cabinet. In a presidential system, it is, for example, impossible to predict at the moment who will be the Secretary of State in a Clinton administration. The knowledge of who will govern in a presidential system is strictly limited to the person of the President himself.

V

The argument that in a presidential system there is a particular individual who is directly accountable to the voters and who can be blamed if things go wrong is another fiction. The president can always say, and Mr Bush is playing this game with a lot of skill at the moment, that he has been prevented by congress from doing what he wanted to do. The split of authority between congress and the president allows the president to say that he could not carry out his programme because he had no majority in congress. Congress obviously can say that it had good ideas and plans, but that the president did not implement these. This kind of game is impossible in a parliamentary system because you can put the blame on the party which is behind the Prime Minister.

Another limitation on the democratic accountability of a president is the fact that, in most presidential systems, he cannot be re-elected. So if a president fails, at the end of his mandate the voters cannot pronounce themselves on his performance. In a sense they can

punish or reward the president's party, but that is difficult since, if the president has been doing badly, his party will usually choose a candidate who can distance himself from the incumbent president and say that his policies will be different.

So if many people say that democratic accountability is clearer in a presidential system, this in fact is not the case.

VI

There is a fundamental difference in the way the legitimacy of the elected president and of the elected congress are perceived. This was already well described in this text from 1852:

> "While the votes of France are split up among the seven hundred and fifty members of the National Assembly, they are here, on the contrary, concentrated on a single individual. While each separate representative of the people represents only this or that party, this or that town, this or that bridgehead, or even only the mere necessity of electing some one of the seven hundred and fifty, in which neither the cause nor the man if closely examined, he is the elect of the nation and the act of his election is the trump that the sovereign people plays once every four years. The elected National Assembly stands in a metaphysical relation, but the elected president in a personal relation, to the nation. The National Assembly, indeed, exhibits in its individual representatives the manifold aspects of the national spirit, but in the president this national spirit finds its incarnation. As against the Assembly, he possesses a sort of divine right; he is president by the grace of the people."

This is a quotation from Karl Marx in his Eighteenth Brumaire of Louis Bonaparte. It shows that it is not a new phenomenon that presidentialism leads to populism and personalisation of politics. A lot has been said and written about the populism and personalisation of politics in Latin America. But it is not just a cultural characteristic, it is the result of the institutions. Presidentialism fosters that kind of leadership.

I could quote to you many texts from Latin American Presidents in which they claim that they, alone, represent the people and that parliament represents all the little interests, all the complexity of society, but not the people. This claim is made despite the president having obtained only, for example, 25 or 37% of the vote. Parliamentarians are said to come from backward or from rural areas, where local organisations and local bosses control the vote. One can dismiss the democratic legitimacy of the elected representatives of the people and run on an anti-party platform. It is not an accident that Latin American, and in particular Brazilian, presidents have usually run under an anti-party line. Since parties are easily questioned in modern societies for a variety of reasons, this anti-party position is destined to be popular. Mr Collor de Mello had only 5% of the deputies in the Brazilian congress, but he felt that he represented the people. That kind of situation would not be possible in a parliamentary system.

This leads to another phenomenon, the kind of relationship the president has with the elected representatives. A prime minister normally emerges out of the chamber and he interacts

with his colleagues there. He sits in the same room on the government bench, in front of the opposition, under the chairmanship of the president of the chamber, he is given the word to speak, he can be asked questions, and so on.

Compare that to the entry of the president into a parliament. He enters ceremoniously, everybody applauds, he makes his state of the union speech, and leaves the chamber accompanied by the president of the chamber. There is no give and take, no equal relationship. He is placed above and not seated within parliament. This is symbolic and has all kinds of behavioural consequences. For example, politicians who wish to encounter the president have to make an appointment at the presidential palace. They are unlikely to meet him in the parliament building.

VII

Another characteristic feature of presidentialism is that it is a uni-personal Government in which the president makes the choice of the cabinet. The cabinet members are presumably the secretaries of the president. The only one who is responsible is the president. In some constitutions Congress has a veto power on the appointment of cabinet members but no power to control or dismiss. If congress is given such power, this mixed system is the worst system imaginable for stability.

Presidential control over the Cabinet presumably leads to a positive characteristic: stability of government. Everybody speaks about instability of government, citing the number of ministers Italy has had recently or France under the Third and Fourth Republics. In a presidential system, the president is, by definition, in power for the term of his mandate. What nobody considers is the instability of Cabinet membership in presidential systems. Blondel fortunately has collected some such data and found, for example, that the average duration of ministers in Chile between 1945 and the end of the Frei presidency was only one and a half years.

The other dimension is that presidential cabinets are not based on coalitions between parties but on the personal trust of the president. Therefore there is a lot of tendency towards technocratic and apolitical appointments, there is a lot of clientelism, and there is a striking discontinuity between membership of cabinets under different presidents. With the exception of the Kennedy to Johnson transition, only two persons have been members of cabinets of different Presidents of the United States in recent decades. That means that anyone who has acquired experience in government will not return to office once the president changes.

Compare that to normal practice in European parliamentary systems, where many ministers, like Mr Genscher, have stayed in office for a very long time.

The continuity of knowledge and experience in public affairs which we find in parliamentary government, even unstable governments like in Italy, is in contrast with the almost total discontinuity under presidential systems.

Now one might argue that the principle of no re-election is not an inherent principle of presidentialism. But in fact, no re-election is the norm and there is an enormous suspicion about re-electing presidents. This has several consequences :

- the "lame duck" phenomenon in the late period of a presidency during which everybody is planning for his succession;

- the fact that the coalition which elected the president may disintegrate early because people are preparing candidatures for the next presidential elections;

- the wish of the president to accomplish as much as possible during his mandate like President Kubitschek trying to finish the construction of Brazilia before the end of his term;

- if a country has found a capable man, it nevertheless has to dismiss him after four years and he cannot continue in office like many prime ministers in parliamentary systems.

This may lead to the temptation for a strong man to change the constitution as President Menem of Argentina now wishes to do.

VIII

Under presidentialism the political class has to produce an outstanding figure every four or eight years. Only one person can win every four years and all others are frustrated. If there is sufficient trust in the system and in the legitimacy of the electoral process, this may be tolerable. But if there is a possibility of questioning the system, the opponents are much more tempted than in the parliamentary system to leave the democratic game and to play other games, because there is no hope for them and no hope at all for minor parties. Presidentialism leads to a zero-sum game, a zero-sum game leads to a much more polarised political process. You have to form all-inclusive coalitions to win the presidency. If you have multi-party systems, you have to include even the more extreme parties, like the communists within the framework of a popular front. If in Spain in 1977 the first democratic elections had been held under a presidential system, there would have been a popular front coalition and a rightist coalition including those reformists who actually made the transition and moderates who by many were perceived as Francoists. The socialists would have been unable to differentiate themselves from the communists and it would have been a totally different game. The game in a presidential system is a zero-sum game and, unless you have a very moderate population with everybody in the centre like in the United States, it is a dangerous game.

IX

Another characteristic of presidential systems is that outsiders can come into the game. Candidates do not need to have behind them the organisation of a party, they do not need other politicians to support them, they nominate themselves and they can appear on the

scene like meteors. This was the case of Fujimori in Peru, Collor in Brazil, or Aristide in Haiti. Now we have the candidatures of Ross Perot in the United States and we had Mr Tyminski in Poland. Very often a popular military leader can become such a candidate. There is a lot of room for demagogic and emotional appeals and for ultra-nationalism, and in our television age this danger is becoming even more important.

The result of all this is a weakening of the parties. Presidentialism is a system that does not encourage strong responsible parties. If the presidential candidate has not got a party to start with, he is interested in getting support from all parties. In Brazil you have the clientelistic device that presidents often select cabinet members from the parties which did not support them. They may also grant important infrastructure projects for constituencies of deputies who are decisive for winning a majority. Obviously this has inflationary consequences.

A president has a very fickle kind of constituency. One of the fascinating things to observe is that presidents start with a much higher popularity than Prime Ministers but can end up much lower, like President Garcia of Peru whose approval ratings fell from 80% to 11%. In such a case a president becomes completely unable to govern during the second half of his term. But he is unable to rebuild his power or to abandon power to another personality of his own party as was the case in Britain with the transition from Mrs Thatcher to Mr Major.

This stability is particularly important for societies facing the enormous problems of transition. The rigidity of presidentalism, making it unable to resolve a crisis of the government without a crisis in the system, is one its most serious drawbacks.

The vice-presidency presumably assures continuity. There are not always vice-presidents and sometimes, when there are, they may be elected in a different vote. This led in Brazil to the absurd situation of Quadros being vice-president to Goulart even though they represented completely opposite political points of view. Even if the president can choose his vice-president, there can be absurd situations. Which parliament in the world would have chosen Isabelita Peron as Head of the Government of the country? But Mr Peron's popularity could impose such a choice. Sarney in Brazil became president following the death of the popular Neves, who had a very different political outlook and now, Collor will be replaced by Franco, again with a different political orientation. The difficulties of vice-presidentialism are manifold but they are not essential, since you can have presidentialism without a vice-president.

X

Presidentialism has important consequences for the whole style of politics. There are enormous varieties of how much power presidents have in the different constitutions. These differences are all very important, but I think that the important thing is that in presidentialism the whole style of politics is different. Now you might say that presidentalism can and has worked. In fact, presidentialism has worked in the United States, but the United States is a very unique political system. It has worked in Costa Rica and, with some qualifications, in Venezuela. One of the characteristics that makes it work in these countries is the two-party system. There is a high correlation between stability and

instability of presidential systems and the two-party system. But two-party systems are not very likely to be generated by societies with very complex social structures and with ethnic, cultural and ideologic cleavages. There is no general tendency towards two-party systems but more multi-party systems.

In multi-party systems you can have presidents elected by a very small plurality and you can have false coalitions. The answer proposed by many constitutionalists has been to propose a second round between the leading candidates for the presidential elections. That can lead to a very absurd situation. The leading candidates may have a very small proportion of the total electorate and they may even be of the same political colour. In addition, the coalition that is formed is an artificial one, and it is not formed by the political leaders. It does not last and there is no commitment for this coalition to continue to support the president. In parliamentarism you can of course break a coalition, but there is a price to pay if you break it and it is known who breaks it. A coalition to elect a president is only an ad hoc aggregation of votes. So the run off may not be the solution. It also creates in the winner a plebiscitarian feeling. Fujimori feels that he is the representative of the Peruvian people even though he was elected with no party behind him only because there was a need to make a choice between two remaining candidates.

XI

Another problem is that presidentialism does not provide for the separation between the functions of head of state and head of government. There is a certain contradiction between the dignified aspect of the authority of the Head of State and the image of the rough politician. The offences to a Head of State are different from the offences to a head of government. To take the Spanish example, the King can play certain roles the Prime Minister cannot play. The advice and support a president or king can give to a prime minister is an element missing in presidential systems.

XII

A fundamental trait of presidentialism is its plebiscitarian character. O'Donnell has called some of the Latin American democracies delegative democracies characterising them as follows :

> "Delegative democracies are grounded on one basic premise : he or she who wins a majority in presidential elections (delegative democracies are not very congenial to parliamentary systems) is then able to govern the country as he (or she) sees fit, and to the extent that existing power relations allow for the term he has been elected."

This delegative democracy weakens the democratic process. Negotiation, consensus building and bringing together of different interests is lost. It does not lead to responsible government and responsible behaviour by the political parties.

I want to underline that in presidentialism, parties can behave irresponsibly. They are not the ones who have to sustain the government, they do not have to vote confidence, they do

not have to pay a penalty for not implementing policy if parliament is dissolved. They will have a tendency to make governing difficult. This is very good when you have a very stable political system and only slight differences of interest in society, but it is not the basis for coherent government policy. Policy cannot be made by the president alone ; the president cannot bear the load that he is supposed to carry in the system.

XIII

There are some issues which I cannot discuss in detail now but which might be addressed during the discussion, for example the problems of transition from presidentialism to parliamentarism.

With respect to the now very fashionable model of the 5th French Republic, I only wish to point out that in many aspects it is very similar to the far less successful Weimar Republic and to the Spanish Republic of the 1930s.

I would also like to mention that there is empirical evidence, coming from an analysis of 38 non-OECD countries, that presidential systems are in fact less stable than parliamentary systems. All this analysis is very complicated and I cannot go into the details now.

One also has to look at the system with respect to many other aspects like the cycle of elections. There is nothing worse in many presidential systems than the system of elections separating elections for the presidency and for congress, with a renewal of congress in the middle of the presidential term, so that you have honeymoon elections and anti-government elections. One can cause much trouble for a president by varying the sequencing of presidential and parliamentary elections.

There are many things which can be improved in presidential systems and make it function better. My thesis, however, is that the problems cannot be solved simply by a little tinkering, but that the problem is the presidential system as such, due in particular to the fundamental duality of the mandate of president and congress, the rigidity of the presidential system and the lack of responsibility of political parties.

1. Is the report's criticism of presidential systems applicable to all presidential systems?

It was argued that a lot of the criticism of presidential systems developed in the report was applicable to the ideal type of presidential system and that modifications to its functioning or the introduction of a semi-presidential system would make that criticism pointless.

For example, there were countries like France where the election of the President required an absolute majority. Once the President had been elected by an absolute majority, nobody questioned his legitimacy, regardless of how slight this majority had been.

If the term of office of a president was considered to be too short in the United States, one could provide for longer terms (7 years for the president in France). The importance of the lame-duck phenomenon at the end of a President's term could be further reduced by allowing for his re-election like in France or the United States.

In practice deadlock situations with the president and parliament blocking each other's initiatives were rare. One could provide that in cases of conflict both sides could call for simultaneous anticipated elections both for the presidency and parliament. Then the people could decide on which side to follow. More important, this possibility would act as an effective deterrent against creating deadlock situations and lead to the need for a dialogue.

On the other hand it was argued that a lot of the report's arguments were applicable even to semi-presidential systems. Semi-presidentialism could function well if a country had well established parties but not in a situation when parties still had to be created. In such a situation the populist character of presidential systems would prevail.

Several participants in the discussion referred to the importance of other factors like the electoral and party system which might make the choice between presidentialism and parliamentarism less important.

2. The case for presidentialism

The need for a strong executive and a strong decision-making body was the argument in favour of presidentialism which was mentioned most often. For example in France before 1958/62, a strong decision-making body had been lacking and some problems like decolonisation had been unsolvable. Therefore in France at that time and in Italy at present, the population had become disillusioned with the political system. In such situations the possibility in presidential systems to have recourse to an outsider might be considered an advantage.

The problem of accountability existed also in parliamentary systems. A coalition was as such not accountable to the voters and, even if in theory each parliamentarian was responsible to the nation as a whole, in practice he was accountable only to his voters or, worse, to the bureaucracy of his party.

It was also argued (and contested) that a presidential system, in particular the election of the President by universal suffrage, was better apt to give a structure to the political process in a country than a parliamentary system.

The distinction in style between parliamentarism and presidentialism, with presidentialism leading to populism and personalisation of politics, was not so clear cut. In parliamentary systems, elections were often perceived not so much as a choice between parties but as a choice between candidates for becoming Prime Minister.

Some of the arguments used in the report against the presidential system might also be used against the parliamentary system. The end of the term of a president was in fact a difficult period but so was the end of term of an elected assembly. The problem of succession was a general problem and small parties also had no chance of coming to power in parliamentary systems like the United Kingdom. In some parliamentary democracies like in Italy it was impossible to foresee which persons would hold which positions in the government, but ministers were always taken out of the same group of people. This instability of government combined with the stability of the ruling class lead to widespread dissatisfaction. It was true that presidentialism worked better in the framework of a two party system, but the same could be said of parliamentarism.

Even if the American model did not seem well suited for the CIS States, the French model of semi-presidentialism might be quite attractive.

3. Arguments in favour of parliamentarism

It was argued that problems which had arisen in some parliamentary systems (Italian, French 4th Republic) were partly due to certain historical factors, like the presence of communist parties which could not be integrated into the political system, partly to defects within the functioning of the system to which remedies could be found. A parliamentary system certainly needed stabilising factors, like a minimum percentage threshold to enter parliament, or the first-past-the-post voting system to avoid fragmentation, or the German system of the constructive vote of censure to enhance government stability. With these

elements a parliamentary system was capable of providing stable government and it seemed better suited to integrate the whole nation into the political process.

In a parliamentary system a consensus might be achieved even on difficult and painful measures. For example in Sweden now the social democratic opposition had agreed with the government on an austerity programme and in Denmark the Prime Minister had invited the opposition to reach a consensus on the reaction to the failed referendum on the Maastricht treaty. Parliamentarism was better able to make painful decisions socially acceptable.

The success of the US presidential system seemed due to specific factors, like in particular the non-ideologically oriented parties, and therefore not transferable to other countries.

4. The choice to be made by the countries in transition to democracy

There was agreement that the CIS countries would have a basic choice between a developed modern parliamentary system like the one practised in Germany or Spain and a semi-presidential system according to the French model. Between these models, each country had to make its own free choice.

Some participants in the discussion considered a semi-presidential system to be particularly appropriate in this situation. The countries concerned had extremely serious problems which required immediate and decisive government action. People therefore wanted a "strong leader". It seemed difficult to adopt a parliamentary system in a country lacking democratic traditions since parliamentarism was regarded as being mainly a series of complicated mechanisms requiring a long historical experience and already well established political parties. The multiplication of ill-defined political parties in the CIS states would make it extremely difficult to have stable parliamentary government.

On the other hand a presidential system was considered as particularly dangerous in countries not having democratic traditions but a tradition of strong authoritarian government. The wide extent of powers enjoyed by a French President was acceptable in a stable democracy, but was it wise to give such power to somebody who had grown up under an authoritarian system? In Africa presidentialism had led to dictatorship.

Presidentialism might hinder the emergence of strong parties and its polarising tendency was dangerous in a new democracy. Parliamentarism seemed in particular superior in multi-ethnic countries since it allowed power sharing between many groups. The checks and balances working in the United States' system were partly extra-constitutional and in new democracies they would be inexistent and therefore the president far more powerful than in US practice.

Many participants had sympathies for a mixed system with ingredients from both presidentialism and parliamentarism, but doubts were also voiced whether a formula of "a strong president and a strong parliament" could really work.

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