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CSCE SEMINAR OF EXPERTS ON DEMOCRATIC INSTITUTIONS (Oslo, 4-15 November 1991)

CONTRIBUTION BY THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

General Report

INTRODUCTION

At the invitation of the Italian Government, a Conference for the constitution of the Commission for Democracy through Law was held in Venice on 19-20 January 1990. The member States of the Council of Europe participated in the conference; Bulgaria, Czechoslovakia, the Geman Democratic Republic, Hungary, Poland, Romania, Yugoslavia and the USSR were also invited as observers.

At the close of the session, the participants adopted a Resolution by which they set up the Commission for Democracy through Law under the auspices of the Council of Europe. In May 1990 the European Commission for Democracy through Law (also known as the Venice Commission) was established as a Partial Agreement of the Council of Europe.

There were two essential reasons that gave rise to the creation of a European Commission for Democracy through Law. The first was the pressing need for an institutional structure that could give immediate assistance to those countries recently freed from the yoke of dictatorship. One of the critical roles of the Venice Commission was to help these sister nations create the political and legal infrastructure that would make possible the realisation of pluralist democracy, human rights and the rule of law.

The second reason for the constitution of the Commission was the perceived need to re-inforce existing democractic structures that are being confronted by new challenges in this period of our history. We live in a period characterised by rapid geo-political transformation. International agreements multiply creating new configurations in world order. Such agreements can have the effect of rending asunder the harmonious relationship of law and politics characteristic of a liberal democratic State.

Another critical role of the Commission is to re-deploy law in the service of politics and make possible the realisation of fundamental and human rights where they may be lost when frontiers change, or when a constitutional division of powers is modified or when international legal agreements are drawn up without regard to their political and social ramifications.

Pluralist parliamentary democracy has become over the years an outstanding feature of the political identity of Europe and North America; it is part and parcel of our common heritage and may be seen in the same light as the greatest cultural creations. This heritage cannot be preserved in static form; it is the product of a continuing evolution that can never be considered as definitely achieved or perfectly completed. While respecting the vitality of this evolution the European Commission for Democracy through Law seeks to protect the principles that constitute the essence of democratic freedoms, principles held in trust as the birthright of future generations.

INSTITUTIONAL FRAMEWORK

The Commission is established as a Partial Agreement of the Council of Europe.

A Partial Agreement is a practical arrangement by which only member States of the Organisation which are interested in a particular activity choose to participate in it, and share among themselves the relevant budgetary burden.

For all other purposes, a Partial Agreement is an activity of the Council of Europe, and it is conducted within the framework of the Organisation, with the assistance of the Secretariat General.

Concerning in particular the European Commission for Democracy through Law, it should therefore be stressed that its role must be seen in the wider context of the activities of the Council of Europe, of which it constitutes a specialised working instrument in the field of :

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

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

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

COMPETENCE

The Commission was endowed with a permanent operational structure to maintain contacts with experts and research bodies and has the following essential tasks of:

Providing Legal Opinions -

The Commission undertakes legal research on questions addressed to it by the Parliamentary Assembly, the Committee of Ministers and member States of the Council of Europe and provides legal opinions on problems associated with the functioning of the democratic State. Following correct procedure any other State, international organisation or body may benefit from this activity of the Commission.

Think-tank for the Legal Resolution of New Political Problems -

The Commission has become a debating forum and workshop for considering the guarantees furnished by law and for enquiring into the rules that govern the political phenomenon in a democracy. As such it is becoming a reference point where its reflections and proposals could provide greater knowledge of the political and legal cultures of individual countries and, where fitting, it could provide an evaluation of problems of common interest with a view to their solution.

Independent Research Projects -

Within the framework of its programme of activities the Commission carries out studies and research and, where required, may draft normative provisions and international agreements. The subjects of independent research projects would be undertaken in areas that have immediate and practical value to those countries which are in the process of establishing and re-inforcing pluralist democracy. The subjects for theoretical research that lent themselves to immediate practical application in establishing democracy through law were suggested to be: assistance in the creation and reform of Constitutional structures in newly liberated States; the structure and function of local government in a democractic State; the protection of cultural and minority rights in the context of evolving economic and political regionalism; the protection and reinforcement of effective democratic structures in a period of rapid geo-political transformation.

CURRENT AND FUTURE ACTIVITIES

The Commission held five plenary meetings in 1990 and will hold four during the course of 1991. A working group in each of the following areas has been set up: Task Force on Constitutional Reform, Constitutional Justice, The Federal and Regional State, Local Authorities, Minorities.

Task Force on Constitutional Reform

One of the most important undertakings of the Commission to date has been the extremely urgent assistance lent to the process of constitutional reform taking place in Poland, Romania and Bulgaria. The Commission has, through the Task Force, taken an active role in confronting essential questions in the process of constitution building; questions such as the formulation of the law which provides for the separation of powers, for parliamentary democracy, for the rule of law, for the independence of the judiciary, for civil rights and for the constitutional inviolability of the hierarchy of laws.

Poland : the Task Force on Constitutional Reforms started its co-operation with this country by first replying to a questionnaire submitted by a judge at the Constitutional Court of Poland. Following this, the Task Force agreed to examine the first chapter of the draft constitution relating to human and citizens' rights, freedoms and obligations.

At a later stage, the Commission was asked to comment on the whole of the preliminary draft Constitution during two of its plenary meeting. The Commission then charged its Rapporteurs to visit Poland in June 1991 and meet representatives of the Constitutional Commission of the Diet before the draft Constitution was formalised by that Commission.

The Task Force has now undertaken a study of the draft Constitution elaborated by the Senate, at the request of the latter.

Romania : on the occasion of an exchange of views with the Task Force, the President of the Commission for the elaboration of the draft Constitution of the Romanian Parliament submitted a preliminary draft Constitution, that the Task Force undertook to examine. Members of the Commission joined a delegation from the Council of Europe which visited Romania in October 1990 and June 1991, and made contact with the Commission and various other Romanian authorities. The Rapporteurs on Romania have presented preliminary assessments of the draft Constitution, and have been charged to continue their work of assistance with Romanian reforms.

Bulgaria : the President of the Legislative Commission of the Bulgarian Parliament expressed the wish of the Bulgarian Parliament to benefit from the assistance of the Commission during its work of drafting a new Constitution, which started at the beginning of 1991. During its 6th meeting, the Commission heard a presentation on the main principles of the constitutional reform by the Vice-President of the Grand National Assembly of Bulgaria and President of the Constitutional Commission and held an exchange of views thereon.

Albania : a delegation of the Commission visited Tirana on 18-21 October 1991 to hold a preliminary exchange of views with the Constitutional Committee of Albania on the general principles of the future Constitution. The Commission will soon be called upon to examine the preliminary draft Constitution, as soon as it is elaborated.

Estonia : a delegation of the Commission was invited to visit Tallin on 28-29 October 1991.

Latvia : a delegation of the Commission was invited to visit Riga on 30-31 October 1991.

Apart from these on-going projects the Commission rests at the disposition of all States that submit a request for assistance in Constitutional reform.

Constitutional Justice

The working group on Constitutional Justice has had the task of studying the forms of Constitutional control open to the new democracies and assessing with representatives of those countries concerned the mechanism most appropriate for them.

On 8 October 1990 the Commission held a meeting in Piazzola sul Brenta (Italy) with the Presidents of Constitutional Courts or equivalent judicial bodies of the member States of the Council of Europe and of interested States of Central and Eastern Europe, aimed at sharing experience gained by the countries in which such organs exist and have been working for a long time. In the light of the results of this meeting and at the request of the States of Central and Eastern Europe concerned, the Commission decided to concentrate its efforts on the procedure before the Constitutional jurisdiction as a matter of priority. Mr. Steinberger accepted to prepare a report on this issue.

A report on this issue entitled "Models of Constitutional Jurisdiction" was presented to a Plenary meeting in May 1991, where it was adopted and the decision was taken to have it published.

The main conclusion of the report is that the setting up of a permanent special constitutitonal court should be recommended, in particular to newly emerging democracies, which might not dispose of judges in ordinary courts trained in constitutional matters. Such a court would have, in particular, competence in: the review of constitutionality of laws; the resolution of conflicts between organs of the State; the resolution of conflicts between the central State and regional of other subdivisions; the protection of constitutional rights of private persons.

Another subject which was considered at the meeting at Piazzola sul Brenta was the possibility of developing a documentation centre. The case-law of Constitutional Courts, or of analogous bodies at the top of the judicial order, is often far-reaching and concerns issues which arise simultaneously in various countries. These decisions often reflect the underlying demands of society, demands that often cross national boundaries and concern common principles and key rules of civil co-existence and of the democratic system itself. It was suggested that the centre could include, among its institutional tasks, the publication of a case-book or year-book, in various languages, in which the salient decisions of constitutional courts or analogous bodies would be collected and made known on a wide scale.

Protection of Minorities

At the request of Italy and Hungary, the Commission studied the problem of the protection of minorities. In this context, it adopted a list of principles on national minorities, which was presented to the CSCE Copenhagen Conference on the Human Dimension in June 1990 by the President of the Commission. The Commission then continued its work with a view to transforming the list of principles into a draft convention, which has been submitted to the Committee of Ministers for examination.

The Commission furthermore asked one of its members to prepare a report on the notion of Federal State and the protection of minorities.

Local authorities

The Working Group on Local Authorities, having studied the European Charter of Local Self-Government considered that the Charter provided an adequate legal framework; no other binding text appeared to be necessary in order to meet the particular need of the States of Central and Eastern Europe. However, the drawing up of model instruments for the implementation of the Charter may be desirable and the working group is assessing this question at the request of Poland.

The Federal and Regional State

A number of problems associated with regionalism and federalism strike at the heart of present day constitutionalism.

Investigation is being undertaken regarding resolution of problems that arise in cases where a union of States already established may need to accommodate centrifugal forces that pull it towards the looser order of a simple confederation.

In this period of our history the problems of regionalism and federalism are being brought into relief by a radically altered conception of international order, international security and international co-operation. Pacific solutions to problems of regionalism and federalism can be found through legal processes.
The European Commission for Democracy through Law, which unites the rich Constitutional experience of two continents, is fundamentally suited to the task of research and recommendations required for resolution of these problems.

Law is an instrument fit to turn far-reaching ideals into actual rules of behaviour: it is intended to maintain peace, just as it is designed to secure freedom, the twin values of our civilisation. The Venice Commission, as a workshop for constitutional engineering and as an expert body of lawyers, knows that it can serve these ideals. This is the driving force behind its efforts. It takes pride in its involvement in the Council of Europe and looks forward to a closer co-operation with the CSCE in the process of its evolution as a force for harmonious international relations.

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The Commission has adopted the following reports, drafted by some of its members, concerning certain subjects on the agenda of the Study Groups :

APPENDICES

APPENDIX I

RESOLUTION (90) 6

ON A PARTIAL AGREEMENT ESTABLISHING THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

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

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

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

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

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

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

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

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

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

Appendix to Resolution (90) 6

Statute of the European Commission for Democracy through Law

Article 1

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

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

- *the understanding of their legal culture;*

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

2. The Commission shall give priority to work concerning:

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

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

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

Article 2

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

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

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

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

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

Article 3

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

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

3. The Committee of Ministers may unanimously decide to admit any European non-member State of the Council of Europe to participate in the work of the Commission. After consultations with the Commission, the State concerned may appoint either an associate member or an observer to sit on the Commission.

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

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

Article 4

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

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

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

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

Article 5

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

2. The Commission may also hold hearings or invite to participate in its work, on a case by case basis, any qualified person or non-governmental organisation active in the fields of competence of the Commission and capable of helping the Commission in the fulfilment of its objectives.

Article 6

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

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

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

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

Article 7

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

Article 8

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

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

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

Article 9

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

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

APPENDIX II

LIST OF MEMBERS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

AUSTRIA : *Mr. Franz MATSCHER, Professor at the University of Salzburg, Judge at the European Court of Human Rights*

BELGIUM : *Mr. Jean-Claude SCHOLSEM, Professor at the University of Liège*

CYPRUS : *Mr. Michael TRIANTAFYLLIDES, Attorney General of the Republic*

DENMARK : *Mr. Christian TRØNNING, Under-Secretary of State at the Ministry of Justice*

FINLAND : *Mr Antti SUVIRANTA, President of the Supreme Administrative Court*

FRANCE : *Mr. Jacques ROBERT, Member of the Constitutional Council*

GERMANY : *Mr. Helmut STEINBERGER, Professor at the University of Heidelberg*

GREECE : *Mr. Constantin ECONOMIDES, Professor at Pantios University, Director of the Legal Department, Ministry of Foreign Affairs*

HUNGARY : *Mr. Géza HERCZEGH, Vice-President of the Constitutional Court*

IRELAND : *Mr. Matthew RUSSELL, Senior Legal Assistant to the Attorney General*

ITALY : *Mr. Antonio LA PERGOLA (President), Member of the European Parliament*

LIECHTENSTEIN : *Mr. Gérard BATLINER, President of the Academic Council of the Liechtenstein Institute*

LUXEMBOURG : *Mr. Gérard REUTER, President of the Board of Auditors*

MALTA : *Mr Giovanni BONELLO, Barrister at Law*

NORWAY : *Mr. Jan HELGESEN, Professor, University of Oslo*

PORTUGAL : *Mr. José Menéres PIMENTEL, Judge at the Supreme Court of Justice*

SAN MARINO : *Mr. Giovanni GUALANDI, Vice- President Council of Presidency of the Legal Institute of San Marino*

SPAIN : *Mr. Francisco LAPORTA, Director, Centro de Estudios Constitucionales*

SWEDEN : *Mr. Hans RAGNEMALM, Ombudsman*

SWITZERLAND : *Mr. Giorgio MALINVERNI, Professor at the University of Geneva*

TURKEY : *Mr. Ergun ÖZBUDUN, Professor at the University of Ankara, President of the Turkish Foundation for Democracy*

"Constitutional Reforms"
by Mr Jean-Claude Scholsem (Belgium)

I. INTRODUCTION

Among the topics to be studied during the CSCE Seminar of Experts on Democratic Institutions (Oslo, 4-15 November 1991), Study Group A will tackle the question of "constitutional reforms".

This problem is one of the most important to be dealt with. It is also by far the most wide-ranging, since clearly most of the other topics placed on the agenda for this seminar (e.g. the Rule of law and independent courts, division of power between legislative, executive and judicial authorities, the organisation of elections and political parties, the protection of human rights and fundamental freedoms) form part of the process of constitutional reform in the broad sense and are indeed at the very heart of it. Moreover, these topics are the subject of separate reports by the European Commission for Democracy through Law (CDL). That being so, this report does no more than consider in general terms the approach adopted by the CDL with regard to constitutional reforms and ways of improving international co-operation in this field.

II. Objectives of the CDL and constitutional reforms

According to its Statute, the CDL is "a consultative body which co-operates with the member states of the Council of Europe and with non-member states, in particular those of Central and Eastern Europe" (Art. 1, para. 1). "The Commission shall give priority to work concerning:

a. the constitutional, legislative and administrative principles and technique which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law" (Art. 1, para. 2).

In the present context characterised by the establishment of new constitutions, designed to mark the Central and East European countries' return to democracy, it is natural that the CDL should have always assigned importance, or indeed priority, at each of its meetings, to the assistance it might provide in the drafting of these new constitutions. In this respect, the word "reform" seems somewhat weak and even misleading. It is by no means the aim of those countries to reform long-standing institutions that have largely survived (and even less to "revise" existing constitutions), but rather to lay the foundations for entirely new and different institutions that break with the past. Their source of inspiration may of course be their own domestic tradition prior to the establishment of Communist regimes, but seems bound to lie, first and foremost, in the experience of democratic states, in particular the member states of the Council of Europe.

In addition, the purpose of the new wave of constitutionalism, resulting from the collapse of the Communist regimes, is to establish institutions responsible for organising at the legal level a society based at one and the same time on pluralist democracy, the concept of the rule of law and the market economy. The constitutional reform process cannot be separated from this general context of social reform of which it is both the cornerstone and the crowning achievement. The concern then is not merely to reform political institutions alone (as may have been the case at the time of other changes of regime) but to reformulate whole aspects of the country's legal system. This involves intense legislative activity which, in addition, is likely to interfere with the process of constitutional reform in the strict sense and to make it more complicated.

The task is then a considerable one and is especially difficult in that it has to be carried out in a fraught context of political and economic transition and must be completed within a short space of time. This amply justifies the priority given by the CDL to the question of constitutional reforms. The object is firstly to build up a stock of data and facilitate their rapid circulation and, secondly, to establish a multilateral framework for the necessary work and missions by experts and advisors.

III. Working methods adopted by the CDL

The new constitutions being drawn up in various Central and East European countries are all marked by the same historical context. Comparative analysis reveals fairly distinct similarities and common concerns.

At the start of its activities, the CDL set up a Task Force on the subject of constitutional reforms. One of the most important matters to be resolved was whether the CDL was going to favour a thematic approach, i.e. work on common themes by way of several constitutions or draft constitutions (e.g. control of the constitutionality of norms, the list of rights and freedoms) or, on the contrary, consider each draft text as a whole. As a rule, the second approach was followed. The Commission gives its opinion on draft texts submitted to it for consideration, on the basis of preparatory reports drawn up by some of its members in close contact with the country concerned.

This method of work seems bound to be preferred. Each text (or draft text) is a whole whose main qualities are internal consistency and institutional balance. It is, for instance, artificial to dissociate the provisions on rights and freedoms from those concerning the organisation and independence of the judicial authorities and control of the constitutionality of norms. Similarly, one cannot understand the exact implications of provisions under which the law has the right to place certain restrictions or limitations on the exercise of rights or freedoms without looking into the meaning of the word "law" as it appears elsewhere in the constitutional text. Generally speaking, comprehensive study of a constitution helps to provide a more general picture and highlights the internal consistency of the normative and institutional system.

The questions most frequently asked in this connection are the following: would not a particular constitutional provision be more appropriately placed in a legislative text? Does not the list of rights and freedoms mix up provisions for direct judicial penalties and mere objectives? Is the same term always used with the same meaning throughout the text? Should not a series of scattered provisions on the same subject be grouped together? Are the hierarchy of norms and the scope of normative jurisdiction of each body sufficiently defined and guaranteed? Is an overall balance of power ensured?

This approach should not however preclude the other, which consists in comparing, on particular points, several constitutions in force or under consideration. This is especially true since, as already pointed out, the new constitutions being prepared in Europe have many common features. For example, all or most of these constitutions contain the following: a detailed list of rights and freedoms, specific provisions concerning the place of international law in the hierarchy of norms, a modified parliamentary system, fairly extensive presidential powers, recourse within certain limits to the techniques of referendum, establishment of an ombudsman, and a body responsible for controlling the constitutionality of norms.

When a theme common to several or indeed to all constitutions presents significant difficulties in respect of legal technique and is, in addition, sufficiently able to be detached from the constitutional text as a whole, a comparative analysis is in order. Such is clearly the case with regard to constitutional jurisdiction, which is a subject to which the CDL is continuing to devote separate, detailed studies. The same also applies to the tricky problems of the relations between the international legal system and the domestic system. It seems desirable for a systematic comparative study to be undertaken in the future on the subject of human rights and fundamental freedoms, covering the various draft texts being prepared, the constitutional provisions of member states of the Council of Europe (or CDL associate or guest countries) and the relevant international texts.

Then again, other questions seem specific to certain states or are settled in ways more in keeping with domestic traditions. Such is the case in respect of questions of state structure (federalism, regionalism), protection of minorities (a problem which, although arising in fairly different ways from one state to another, is however nearly always present) or the choice between a bicameral and a unicameral system. Yet, even on

these questions, a comparative study with states that have adopted the same structures or institutions (federalism, regionalism, bicameralism) or are faced with the same problems (protection of ethnic, linguistic or religious minorities) cannot fail to be fruitful.

IV. Conclusions

The sole purpose of this report was to describe the CDL's work on the process of constitutional reform against the background of the Commission's work as a whole, with particular emphasis on the working method adopted.

To sum up, attention should be drawn to the following points:

- *the "constitutional reforms" in progress in various Central and East European countries go beyond the scope of mere reforms in the usual sense and, furthermore, extend largely beyond the constitutional framework and relate to nearly all the branches of law;*

- *the "country-by-country approach" adopted in principle by the CDL seems in general to be the most appropriate. It should however be supplemented by a thematic and comparative analysis. In this sense, the CDL's various activities are mutually supportive;*

- *needs in respect of information, information exchange and expert missions are and will remain considerable. They will not cease to exist once new constitutions have been adopted.*

The institutional reforms undertaken will need to be extended at the legislative level. Substantial material and human resources should be made available for this purpose within the framework of European and international co-operation.

Rule of Law and independent courts

Report presented by
Mr Constantin ECONOMIDES (Greece)

As agreed by the European Commission for Democracy through Law, this brief report addresses the question of the rule of law and independent courts in an essentially pragmatic manner.

1. The concept of the rule of law (Rechtstaat, état de droit, stato di diritto) covers, as usually understood, the requirement that the law be respected: domestic law within the State, and international law in the context of international society. Put another way, the State - in the broadest sense of the term - must rule out force, arbitrariness and injustice, abiding scrupulously by the law, that is to say the principles of internal and international legality alike. This basic principle is the nub of the rule of law as a concept.

2. If genuine rule of law is to exist at the internal level, however, it is necessary for such law to be that of a democratic society. This is an absolute necessity. History has taught us abundantly and plainly that there can be no rule of law in a totalitarian State or dictatorship. These latter forms of government have to do with a police state, not with the rule of law.

The concepts of rule of law and democracy consequently go hand in hand, and are indissociable. The first can only exist within the second, although it cannot be claimed that any democratic regime creates a satisfactory rule of law in all cases. It is true that the rule of law is to a considerable extent an ideal that any genuinely democratic State must pursue with all its might and at all times, for the sake of constant improvement.

The rule of law being in this way bound up with democracy, all the conditions inherent in the latter also underlie the concept of the rule of law. Instances include the sovereignty of the people, the representative regime, multi-party system, separation of powers within the State, equality of all before the law, respect for human rights and fundamental freedoms.

3. In present-day democratic societies, the rule of law is closely bound up with the separation of powers or fundamental functions of the State - functions, be they legislative, executive or jurisdictional, which are in the hands of different bodies. The legislative power legislates on the basis of the constitution, the executive power carries out the law through administrative enactments, while the judicial power renders justice and is the guarantor of legality, the proper application of the law, both on the part of parliament (conformity of laws with the constitution) and on that of the government (conformity of administrative enactments with the laws). The role of the judiciary, then, is mainly to protect human rights and fundamental freedoms vis à vis, in particular, the administration.
4. It is consequently imperative that the jurisdictional power shall be independent of the other two State functions - legislative and executive - if it is to be able to carry out its mission freely, objectively, impartially and effectively, in the common interest. We can go so far as to say that this independence is the prime condition for the rule of law. It is guaranteed in fact first by a set of functional guarantees, then by a set of personal guarantees for magistrates, and lastly by means of guarantees which for the most part are inherent in jurisdictional proceedings.

A. Functional guarantees

The jurisdictional function is exercised by courts established by the law, made up of independent magistrates. Their mission is to settle on the basis of the law, and in accordance with organised judicial proceedings, any question coming within their sphere, by means of decisions which are binding on the parties.

The functional independence of the courts is ensured vis-à-vis the other two State powers as follows:

a. Vis-à-vis the legislative power

1. Whenever the courts are confronted with legislative enactments whose contents are contrary to the constitution, they must either, depending on circumstances, set in motion through the intermediary of the competent organ the procedure for the jurisdictional verification of the constitutionality of those enactments, or themselves carry out such verification - if they are empowered to do so - and refuse to apply the anti-constitutional laws.

Verification of the constitutionality of laws by the courts is a fundamental function in a State based on the rule of law.

2. The legislative power must not bring any influence whatever to bear - and still less carry out parliamentary verifications - on the judicial power in connection with trials which are still pending.

3. The legislative power must not, by means of laws specially voted for that purpose, revoke final judicial decisions or decisions reached by arbitration.

The actions outlined under 2. and 3. would constitute interference by the legislative body in the power of the judiciary and would conflict with the principle of the separation of powers.

4. Laws having retroactive effect, concerning particularly the rights and freedoms of individuals, must only be voted in exceptional circumstances and within the strict framework of the constitution.

The rule of law demands that the rights and freedoms of each shall be governed by the law that is in force at the moment of the judgment, and not by a subsequent law having retroactive effect. Retroactive laws may run counter to the principle of equality before the law.

b. Vis-à-vis the executive power

1. Neither judges exercising their functions nor courts as judicial bodies are subject to any a priori or a posteriori hierarchical control on the part of the Minister of Justice or any other body coming under the executive power.

This guarantee of impartiality is self-evident.

2. Judges may not receive any advice, instructions, guidance or orders when it comes to the exercise of their judicial functions. As magistrates, they act in an individual capacity. Without this elementary guarantee judges would not be independent.

3. Decisions of the courts are not presented for the approval of any administrative body. Rather they are binding on the executive power, which must carry them out or help ensure that they are carried out.

4. Magistrates must not exercise political or administrative functions, other than certain specific tasks of limited duration - such as participating in committees responsible for drafting legal codes or other important legal texts.

B. Personal guarantees

The personal independence of magistrates is ensured by according certain guarantees enabling them to carry out their functions completely independently and impartially, and securing them against fear, threat or pressure on the part of - notably - the executive power. These guarantees are, in particular, as follows:

1. The fact that magistrates cannot be removed, i.e. that they are appointed for life and cannot be removed from office until they reach the retirement age laid down by the constitution, other than in the presence of certain established reasons, such as criminal conviction, disciplinary sanction, invalidity, professional inadequacy, etc - which reasons must in all cases be found by a court decision. The fact that magistrates cannot be removed is the fundamental guarantee of their independence.

2. The principle of self-administration of the judiciary, means that a number of important questions relating to magistrates' careers must come within the sphere of the judicial power, i.e. the courts themselves or other collective bodies made up of magistrates: senior judicial councils and disciplinary councils, the latter being judicial authorities or bodies.

The important questions are the following:

- *the promotion, assignment, transfer and secondment of magistrates. Similarly the appointment of presidents or public prosecutors of State Supreme Courts should not be a matter for the government, as it is in several States*

- *inspection of magistrates*
- *direction and management of courts*
- *disciplinary power*
- *annual leave and leave of absence for vocational training.*

It is common knowledge that in all these areas most governments intervene to an extent that varies from one State to another. It would be advisable for there to be less interference of this kind on the part of the executive, and if possible none, so as to enable the judiciary power to be completely autonomous.

3. A third and equally important factor making for the personal independence of magistates is the question of their remuneration, which needs to be determined in the light of the importance of their functions. In particular, no category of officials has the right to be paid more than magistrates.

C. Other guarantees arising from, inter alia, requirements relating to judicial proceedings

The aim of these guarantees is to strengthen the independence, efficiency, objectivity and neutrality of the courts; they are as follows:

1. Civil liability of judges

The independence enjoyed by a magistrate does not exempt him from the liability he may incur in the event of failure to exercise his functions properly. Apart from disciplinary and criminal liability, which is governed by joint rules, there is accordingly - and rightly so - a special regime coming within the sphere of the judicial power, whereby magistrates bear civil liability for any injury they may cause a party through deceit, grave error or denial of justice in the exercise of their functions.

2. Procedure whereby judges may be challenged

If he is to be truly independent, a judge must always be in the position of an impartial and neutral third party. Whenever there are legitimate grounds for believing that impartiality is wanting, therefore, the proceedings whereby a judge may be challenged must be set in motion, at the initiative of the judge himself or of the parties to the trial.

3. Public nature of hearings

The fact that a hearing must be held in public protects litigants from a secret form of justice and ensures that they have confidence in the courts. There may be no exceptions to this principle, other than those provided for in paragraph 1 of Article 6 of the European Convention on Human Rights, the main aim of which is the protection of the interests of minors, privacy and the interests of justice.

4. Public nature of the judgment

Judgment must be passed in public. This principle, which is absolute and brooks no exception, is dictated by the same reasons as those set out under 3.

5. Reasons for judgment

The reasons must be as full and well-founded as possible in terms of the case being judged. The relevance of the judicial argument hinges on those reasons. The judgment must also include, in every case, the opinion of the minority, which is in itself an expression of judges' independence.

*

* *

By way of conclusion, it is worth recalling that the independence of justice - a question of capital importance which is the criterion of the rule of law - cannot be governed solely by legal provisions, even when these are enshrined in the constitution. If the independence of justice is to be reflected in everyday practice, and become a general rule - which will demand a steadfast and constant effort on the part of all - such texts must also be put rigorously into effect, and in their entirety.

"The organisation of elections" by Mr Ergun Ozbudun (Turkey)

When we speak of electoral systems, we normally refer to "electoral formulas" which determine the translation of popular votes into parliamentary seats. However, an electoral system, in its broader sense, has other aspects which often carry important constitutional implications. Some of these issues have now been definitely solved in Western democracies, sometimes as a result of decades-old efforts to ensure true fairness and representativeness of elections. Among these successes one may count the universality of suffrage, equality of votes, the "one-man-one-vote" principle, secrecy of voting and a number of technical rules and instruments designed to prevent intimidation, corruption, ballot frauds, and other abuses. It has been said "in contemporary European elections, there is little opportunity for fraud or dispute about election results. But as long as the possibility exists, it is necessary to establish rules to deal with disputed elections".[2]

A second important problem regarding the organization of elections is the drawing or redrawing of the boundaries of electoral constituencies. "The gerrymandering of boundaries so that one party gets most of its seats by small margins while its rival wastes votes, piling up huge majorities in carefully designed constituencies, has been known in most parts of the world... No country... has developed rules or customs that remove all the advantages that go with being in power, but the campaigning benefits of incumbency for governments and for individual legislators vary widely."[3]

With regard to the first issue, i.e., the resolution of electoral disputes, two main systems can be distinguished.[4] One group of countries, including the U.S.A., the United Kingdom, Belgium, the Netherlands, Luxembourg, Denmark, Norway and Sweden leave the resolution of such disputes to their legislatures. This system is based on the older notion of parliamentary supremacy which sees the legislature as the final judge on questions regarding its own composition and disqualifications of its members. While there is little evidence that contemporary Western parliaments use this privilege for partisan purposes, this system can still be criticized for leaving an essentially judicial function to a political body. It is particularly open to advise in newly installed or restored democracies where the spirit of fair play among political parties is not yet firmly established.

These considerations have given rise to the second system, i.e. leaving the resolution of electoral disputes to judicial authorities. This system is based on the belief that electoral disputes are essentially judicial in character. While a majority of Western democracies have opted for this system, several variations can be observed within this general category. One variation is to grant such competence to Constitutional Courts. This system is used in Austria, France and Malta. A sub-variation is provided by Article 40 of the German Constitution, according to which "the scrutiny of elections shall be the responsibility of the Bundestag. It shall also decide whether a deputy has lost his seat in the Bundestag. Complaints against such decisions of the Bundestag may be lodged with the Federal Constitutional Court". Thus, the German system combines legislative and judicial competence in electoral disputes, leaving the final say to the latter.

Another sub-variation is provided by the Greek Constitution, according to which (Art. 58), "the examination and trial concerning parliamentary elections the validity of which have been controverted either for violations in the manner in which they were conducted or for lack of legal qualifications is assigned to the Special Court specified by Article 100". The Special Court regulated by Article 100 is a combination of Constitutional Court, a court of conflict, as well as the final judge with respect to electoral disputes. This Court is composed of the President of the Council of State, the President of the Supreme Court, the President of the Comptrollers Council, four Councillors of State and four members of the Supreme Court chosen by lot for a two-year term.

Leaving the resolution of electoral disputes to Constitutional Courts or their equivalents can be defended on the grounds that electoral disputes, by their nature, are semi-judicial and semi-political in character, and therefore their settlement should be left to that branch of the judiciary that is most competent and accustomed to deal with political questions. In most countries, however, electoral disputes are resolved by their high courts: Finland (supreme administrative court), Cyprus, Ireland, and Liechtenstein. The Spanish and the Portuguese Constitutions simply state the competence of judicial authorities in this matter. Under the Spanish Constitution (Art. 70, no. 2) "the validity of the certificates of election and credentials of the members of both Houses shall be subject to judicial control, under the terms to be established in the electoral law".

Similarly, the Constitution of Portugal (Art. 116, no. 7) states that "the courts shall be competent to judge the regularity and validity of acts of electoral procedure". One major criticism against this system would be that ordinary courts, because of the background and experience of their judges, are not ordinarily well-equipped to deal with electoral disputes which often involve highly specialized and semi-political questions.

An interesting variation on the judicial resolution of electoral disputes is provided by the Turkish Constitutions of 1961 and 1982. Under Article 79 of the 1982 Constitution,

> *"Elections shall be held under the general administration and supervision of the judicial organs.*
>
> *The Supreme Election Council shall execute all the functions to ensure the fair and orderly conduct of the elections from the beginning to the end of polling, carry out investigations and take final decisions on all irregularities, complaints and objections concerning the elections during and after the polling, and verify the election returns of the members of the Grand National Assembly of Turkey. No appeal shall be made to any authority against the decisions of the Supreme Election Council.*
>
> *The functions and powers of the Supreme Election Council and other election councils shall be determined by law.*
>
> *The Supreme Election Council shall be composed of seven regular members and four substitutes. Six of the members shall be elected by the Plenary Assembly of the High Court of Appeals, and five members shall be elected by the Plenary Assembly of the Council of State from amongst its own members, by secret ballot and by an absolute majority of the total number of members. These members shall elect a Chairman and a Vice-Chairman from amongst themselves, by absolute majority and secret ballot.*
>
> *Amongst the members elected to the Supreme Council by the High Court of Appeals and by the Council of State, two members from each group shall be designated by lot, as substitute members. The Chairman and Vice-Chairman of the Supreme Election Council shall not take part in this procedure.*
>
> *The general conduct and supervision of a referendum on legislation amending the Constitution shall be subject to the same provisions as those relating to the elections of deputies."*

It will be noticed that the Turkish system gives the Supreme Election Council not only the final say on electoral disputes, but also all administrative powers necessary to ensure the fair and orderly conduct of elections. The legislative and executive branches have no say whatsoever either in the selection of the members of the Supreme Election Council, nor in any administrative matter concerning the conduct of elections. The Turkish Constitution (Art. 85) extends judicial control even to the expulsion of members and the removal of their legislative immunities. Under the said article,

> *"If the Grand National Assembly of Turkey decides to waive the parliamentary immunity of a member or disqualify him from*

membership, the member concerned or any member of the Grand National Assembly of Turkey may, within a week of the decision, appeal to the Constitutional Court for the decision to be annulled on the grounds that it is contrary to the Constitution or to the Standing Orders of the Assembly. The Constitutional Court shall decide on the appeal within fifteen days".

Thus, the Turkish system seems to have the advantage of creating a special judicial body with sufficient expertise in electoral matters but which is at the same time completely immune from the political influence of the legislative and executive branches.

With regard to the second important constitutional issue concerning the organization of elections, i.e., "redistricting" or the redrawing of constituency boundaries, many countries have set constituency boundaries with no provision for maximum intervals between redestrictings: Austria, Denmark, Finland, Italy, Norway, Portugal, Spain, Sweden, and Switzerland. Some countries provide for a maximum interval between redistricting arranging from five years in New Zealand, to ten years in Canada and the United States, to fifteen years in the United Kingdom.[5] Leaving the redistricting process to the legislatures carries with it the danger of "gerrymandering" mentioned above. Although such powers of the legislatures are increasingly being "checked by the institution of neutral boundary commissioners and by increased insistence, often by the courts, on equality of numbers and other criteria of fairness",[6] the most effective safeguard in this regard would be to recognize the authority of judicial bodies in redistricting. Again an interesting example is provided by the Turkish Electoral Law, on 10 June 1983, Law No. 2839. While basically every province is an electoral constituency, those provinces that elect more than six deputies according to their population, are divided into more than one consitutencies. Such divisions and the drawing of the boundaries of the new constituencies are entirely within the competence of the Supreme Election Council on the basis of the latest census of population (Arts, 4,5).

"The organisation of political parties - Political parties and democratic institutions" by Mr Francisco Laporta (Spain)

1. If there is a place within the system of democratic institutions where political reality encounters and cuts across the constitutional framework, it is certainly the political party, a place where the "real" political and social processes by which power is shaped converge with the formal, constitutional means of fashioning the political will of State institutions; in other words, political parties are mediators between the State and Society.

However, as political parties are now clearly among the major features and most prominent elements of the democratic system, it is not enough simply to acknowledge their importance for both political life and the State in contemporary society. It really must be pointed out that the parties are a structural landmark which help to define the democratic State. Since such a State is inconceivable without the presence and action of the parties, it is specifically designed and defined as a "party-based State" (Parteienstaat), and present-day democracy is similarly referred to as "party-based democracy".

The elimination of all negative or pejorative connotations from this definition, now achieved, is surely the result of a successful effort to surmount all the theoretical obstacles between democracy and parties, such as Rousseau's theory of the general will ("volonté générale"), the idealistic concept of the people - another one of Rousseau's ideas - and the "classical" ideas derived from it concerning national sovereignty and representation, according to which each member of parliament directly represents the whole nation, without any mediation by other agencies such as political parties. The dropping - in theoretical, but still mainly in practical contexts - of these tenets at last legitimised parties and their political activities, thus finally making possible their institutional recognition and their "incorporation" into the institutions (even the constitutional ones) of the democratic State. This certainly does not, of course, imply that it is impossible, or unnecessary to consider the limits of their activities, nor does it suggest that one of the priorities is to prevent decline of the system into government by the parties.

It is in fact indisputably the case that the party-based State is a political consequence of the democratic State under present conditions. But it is the fact that it is not just a democratic State, without further qualification, but a social and democratic State governed by the rule of law, and therefore a State in which both the political process and those involved in that process are subject to the Constitution and to the law, which means that this syntagmatic form of the present-day State defines the framework and the processes within which the existence of the parties is legitimate.

2. We nevertheless have to acknowledge that the regulations governing political parties have made only limited progress towards recognising the paramount fact that, nowadays, democratic political participation is essentially done through the parties, and scarcely any consideration has been given to the repercussions of this for the form of parliamentary representation, the nature of members' actual task - something which must, without returning to the authoritarian system, be decoupled by the parties themselves from the excessive individuality of each member, as this goes against the reality and legitimacy of present-day parliamentary democracy - the legal arrangements governing the electoral system and, in more general terms, the relationship between the people, the electorate and the elected parties, not forgetting the significant changes which have occurred in relations between the parties and institutions and bodies of the State, still awaiting an appropriate regulated form. Also evident is some delay in legal/constitutional literature on political parties (not repeated in works on political science, which relate much more closely to reality), still based on 19th century parliamentary systems which are no longer relevant; it is therefore necessary to emphasise the urgent need for legal/constitutional studies of this area.

However, the steps taken towards the process of the incorporation and recognition by institutions and regulations of political parties and their functions in democratic systems of government have been taken once and for all, and enable us to refer to a legal, democratic European culture of political parties, or even to a real ius commune europeum. This culture is now valid and prevails in all the States of Europe - both those which have tried and tested constitutional systems and those which, leaving behind them quite different, or even strongly contrasting political forms, are currently developing their constitutional processes. It is likely to include national regulations which are sometimes very schematic.

3. To demonstrate how sound this process is and ultimately how solid the pairing of democracy and political parties is, it has to be emphasised that the constitutionalisation of the parties (their "incorporation", to use the term found in Triepel's famous periodisation) has occurred in virtually every European democratic constitution since the Second World War (eg Article 47 of the 1947 Italian Constitution; Article 21 of Germany's Basic Law of 1949; Article 4 of the 1958 French Constitution; Article 12, which has constitutional force, of Austria's Law concerning the Political Parties, of 1975; Article 29 of the Greek Constitution of 1975/1986; Articles 10, 40 and 117 of the 1976/1982 Portuguese Constitution and Article 6 of the Spanish Constitution of 1978). It is now under way in the countries of Eastern Europe, in response to the differing points of departure, involving a lack of political freedom and the existence of dictatorial regimes. The allowing of parties under constitutional law effectively indicates the rejection of the authoritarian or totalitarian governments which had eliminated them from political life or cynically introduced one-party monopolies.

The ideas of democracy and freedom give us something to think about, as well as helping to define the legal framework in which political parties operate, in relation to both the constitution and ordinary legality (even in those systems always regulated by law, without prejudice to their "material" incorporation). Thus political parties are regarded as key parts of the system of individual freedoms, a fundamental subjective right, afforded the special protection from intervention by the authorities earned for them by their status as organised collective forms of the exercise of fundamental rights, which they in the last analysis enjoy.

This collective aspect of political parties also shows the dual light in which they are viewed by democratic constitutional law, ie that of subjective public law and that of the demonstration or objectivisation of a law having these features, and thus as one element helping to build the objective democratic structure of the State. As an objective factor, the parties "assist" and "co-operate with" the organs of the State in the political process and in the actual shaping of the will of the people, as this is recognised in constitutional and legal texts, in their explicitly acknowledged role as a fundamental tool of political participation and an expression of political pluralism.

But from the subjective and the objective points of view, the democratic system commits the parties as it commits democracy itself. While they are, when they are set up, free to choose their own targets, organisation and operation, the only limits by which they are bound are precisely those implied in every respect by adherence to the democratic principles of freedom and pluralism, as well as the very commitment to loyalty to the State which institutionally incorporates them. In this sense, and this is particularly significant, the mandate for internal democracy and for action on the basis of democratic methods which the parties are given by various constitutions - in general terms, based on this ius commune - in return for their recognition and for the State's action to provide positive assistance and funding, has the merit of giving them objective public tasks. This is surely one of the central points, like all those relating to the limits of parties' action in general, on which the democratic constitutional approach to the regulation of political parties focuses, given the fact that an effort has to be made to strike an always delicate balance between the necessity and inevitability of regulation and the preservation - so necessary to the workings of the State's democratic institutions - of their role as institutions mediating between the State and Society and as the voices of a living and practical social reality, the dynamism of which must be respected.

"The organisation of independent, non-governmental organisations (trade unions, employers associations)" by Mrs Hanna SUCHOCKA (Poland)

I. <u>Background</u>

1. The transition from communist system to democratic state is closely related to transformations in the sphere of trade unions. In Poland it was the struggle for independent trade unions and subsequently the independent and autonomous union itself that started the process of discarding communism.

2. Until the beginning of democratisation in Central and Eastern Europe, two separate trade union systems prevailed in Europe: one based on the principle of the freedom of unions and on pluralism in the West European countries, and the other a monistic system in the Central and East European countries. In the communist countries trade unions were treated as governmental organisations backing up the ruled authority. These constituted a uniform monistic structure subordinated to the communist party's ideological and political direction. Under the specified circumstances where only one leading force stood in front of all the existing civic organisations. That leading force being the communist party, the trade unions had neither the attribute of independence nor that of autonomy. Functions performed by them exceeded the traditionally conceived sphere of union activity. They fulfilled an auxiliary role in the totalitarian state. This was reflected in the existing legal regulations. As a general rule, therefore, the statutes concerning the trade unions found their way into constitutions, particularly in those chapters that referred to the role of the state and to general political principles. Even where a mention thereof was formulated in the civil rights chapter, such formulations simultaneously had an expressly programme-oriented and ideological character without any reference to the freedom of association. Their role was stressed as that of organisations taking part in shaping and implementing socio-economic tasks of the country's development programme, hence of organisations supporting the implementation of the state's goals rather than protecting the employees' rights. Legal regulations of this sort, worked out under statutory legislation, did not respond to the solutions proposed in the ILO Conventions No 87 and 98 on the Freedom of Association and Protection of the Right to Organise.

3. The first attempt to regulate statutorily the position of the trade unions in accordance with the said conventions was that taken up in Poland in 1981, but it was soon wiped out by the introduction of the martial law and by the promulgation in 1982 of a statute which outlawed the first independent and autonomous trade union and which practically did away with the principle of pluralism. No attempts to form fully independent trade unions in the other Central and Eastern European countries were undertaken at that time.

4. In the communist countries in view of the centralised labour system, where the state acted as the only employer, little sense had also the employers' organisations. The concept of employers' organizations made little sense. Consequently, no attempts were made to form msuch organizations, even in Poland.

II. Constitutional Regulations

Democratisation processes in the former communist countries showed an obvious lack of coherence between legal regulations and the transformations materialising in practice. Creation of independent trade unions was a social and political fact which was followed only after a certain time by changes in the legislation: at first just in the statutory legislation and only later in the constitution. This divergence between the still valid constitution and the de facto situation is particularly striking in the Polish circumstances.

The importance of the right to associate in trade unions (the freedom of unions), one of the fundamental human rights resulting from inherent human dignity, suggests the need for its unquestionable recognition by the constitution in a part devoted to human rights. The freedom of unions, therefore, ought to be expressed in a separate article instead of being combined jointly with the traditional political freedom of association. The constitutional norm should be worded so as to exclude any doubt about the fact that the formation of a trade union or employers' organization requires no permit from the state authorities (Refer to art. 2 of the ILO Convention No. 87). The Constitution is also expected to create foundations for the unions' pluralism. All other more detailed issues, as e.g. those applying to the structure and organisation of the union ought to be left for the statute. This is the direction developed in the new draft constitutions of post-communist countries e.g. art. 40 of the Polish draft, which reads: "The freedom to form trade unions and employers' associations is guaranteed with the limitations as accepted by international law ratified by the Republic of Poland".

III. General Principles

The Statute specifies general principles that underlie the activity and the structure of the trade unions and employers' associations. These include:

1. The principles of pluralism: as the right to associate in an unlimited (statutorily) number of trade unions of different structure and according to different territorial and professional criteria. The right of forming trade unions can by no means be restricted to the wage-earners only (i.e. to those remaining in an employer-employee relationship). It must be conceded also to those who perform some form of activity on their own account, like e.g. farmers, craftsmen, taxi drivers, etc. The present-day Polish 1991 law exactly follows that aim. The only restrictions of unions' freedom admitted in this case should in all legislation apply only to public servants whose activities are being regarded as related to politics. Restrictions of that sort appeared highly controversial in the specific Polish situation where activists of the trade union created the first non-communist government and filled the state administration posts.

The scope of restrictions as regards police and military functionaries remaine debatable. A trend towards moderate restrictions in this category of people is observed in the postcommunist countries. It seems unadvisable to adopt prohibitions of association in trade unions and on joining them. Although the right to associate in trade unions denotes both the creation of and membership in the trade unions, a distinction has to be made between those who are allowed to join the already existing trade unions only, without the right of forming unions of their own e.g. those performing outside jobs, the unemployed, pensioners, etc. However, the scope of such restrictions is still very disputable. Continued extension of the union-type protection to the increasingly new professional groups is a regularity in the contemporary world.

2. The principle of independence: this denotes independence from the state administration, territorial self-government and other organisations. This principle is expected to include also the prohibition to delegate employees to act as trade union activists at the expense of their employing institutions for that could lead to a subordination to the employer. Yet that has been an employee's benefit and any departure therefrom meets with substantial difficulties. Similarly controversial is the principle of protection of the durability of the union activists' employment relations. A far-reaching protection, typical for the monistic structure of trade unions and for the centralistic form of economy, is unlikely under the conditions of pluralism and private economy structure.

3. The principle of autonomy: this denotes the freedom for an autonomous shaping of goals, programmes of activity, voting of statutes, laying-down of organisational structures, the right to build up nation-wide inter-union structures and the right to join international trade-union organisations.

4. It follows from the freedom of association that no permit from any state organ is necessary to establish a union. Two forms of association are acceptable: by registration or by notification. In practice, though, a registration at the court is more commonly adopted because of legal status attainable in this way.

5. The principle of the equality of trade unions: it is to be understood that every union has the same scope of competence. There is an admissible departure from that principle in the event of the so-called representative union which because of its size or role performed in the community is deemed to be most authoritative in representing the employees towards their employing institutions. In countries leaving communism, there are very few willing to back up this idea. It is regarded as a sort of threat to pluralism. For instance, in Poland despite the fact that such a proposition has been put forward in the parliamentary draft, it was rejected during the parliamentary discussion.

6. The right of association of employers is based on similar principles with regards to the specificity of professional interests which require collective articulation. The existence of employers' organisations is a necessary prerequisite for the autonomy of collective labour relations. As far as the scope of their actions is concerned, it seems that employers organisations should not be limited to the domain of labour and social policy (as it was traditionally done by the labour unions) but instead include wider aspects of economic policy.

IV. Unions' Competence

1. The powers functioning as a guarantee for union autonomy, i.e. the right for a free voting of union regulations, the summoning of assemblies, conferences, the joining of world organizations, etc.

2. The authority related to the implementation of the basic union function, i.e. the protection of employees' rights. Here, unquestionable are such rights as: the conducting collective bargaining, organisation of protests and strikes. Conditions to use the right to strike must be precisely specified in the legislation by indicating both the categories of persons having no right to strike as well as categories with regard to which such a right has been considerably restricted in order not to allow the entire community life to be paralysed by the strike. Limitations for the right to strike should be in principle specified in the constitution.

3. The trade unions ought to have also the right to provide opinions on the guidelines and drafts of acts regarding trade union tasks. To what extent they should, however, participate in the work of parliamentary committees remains an open question, although in the Polish practice the unions have won that right (not by virtue of law but through certain usage).

On the other hand, it is not advisable to award the trade unions and employers' organisations the right of legislative initiative and the right to proceed with extraordinary appeals at the Supreme Court on matters connected with labour law problems.

The right to create its own electoral list for parliament is also questionable.

V. Conclusion

Democratisation processes going on in the Central and East European countries shall for some time yet have an impact on the developments taking place in the sphere of trade unions. Unions in these systems have always been regarded as political organisations. The same function was fulfilled also by "Solidarity", the first independent union that appeared in Poland. A departure from that way of thinking and perception of trade unions needs time.

"The implementation of Social Rights"
by Mr Giorgio Malinverni (Switzerland)

I. ***INDIVIDUAL FREEDOMS AND SOCIAL RIGHTS***

1. By comparison with the classic individual freedoms, social rights are still very frequently regarded today as second-class rights, for the following reasons:

a. Firstly, the implementation of social rights depends on states taking positive action, whereas their doing simply nothing is sufficient to ensure respect for civil and political rights. It is obviously easier to ask states to refrain from acting than to engage in positive action, which normally implies some financial commitment.

b. Secondly, the great majority of social rights are not enforceable. In fact, only the first generation rights can be claimed directly in courts or before the authorities.

2. These are usually taken as the two distinguishing features of social rights, and their effect is, in general, to make states far more reluctant to allow control bodies to assess their implementation of those rights. For this reason, control procedures in this area are far more rudimentary than those established for civil and political rights.

It has also been found that states are generally less inclined to intervene, either bilaterally or via international agencies, to secure respect for social rights.

3. At the same time, we know that these features do not apply to all social rights, and must therefore be seen in relative terms.

First of all, the implementation of social rights does not always necessarily require positive action by the state. This applies, for example, to the right to choose one's profession freely, the right to establish trade unions and the right to strike. On the other hand, respect for civil and political rights may also encounter material obstacles. This is true, for example, of the rights of prisoners and of living conditions in prisons.

Nor is it always true that social rights cannot be enforced. Undeniably, some social rights can be enforced through the courts. There are recent examples, in the United States, of cases where the courts have heard claims relating to these rights and have enforced them directly, requiring the legislature to intervene.

4. To achieve an ideal society, we obviously need to promote both types of rights, since they ultimately have the same importance. There is growing awareness of this fact (cf for example the Salzbourg Colloquy on the implementation of economic and social rights, organised by the Austrian Institute of Human Rights from 17 to 20 April 1991, and the International Congress of the International Movement of Catholic Lawyers on the enforceability of social rights in Europe, which is to be held in Strasbourg from 22 to 24 November 1991).

For a long time, some states have focused on classic individual freedoms, while others have emphasised social rights. These two groups of states have now come together within the CSCE. They must realise that fundamental rights, individual or social, are indivisible and that implementing the one depends on respecting the other.

II. ***TOWARDS BETTER IMPLEMENTATION OF SOCIAL RIGHTS***

1. The principle of non-discrimination

Social rights may be harder to implement than the traditional freedoms, but the principle of non-discrimination should at least be respected in applying them. In this way, the range of beneficiaries can actually be extended.

2. Social rights and social goals

The next step is to select from among social rights those which are more easily enforceable. A distinction should be made here between social rights proper and social goals.

a. Social rights are genuine fundamental rights, which can be enforced by the courts. They can, of course, be embodied in laws. However, if there are no laws or the laws are inadequate, courts should be able to determine their content for themselves and take them as a direct basis for judgment. In other words, social rights confer entitlement to social benefits. It is obviously hard to list these rights, but the following are those on which I feel that agreement could be reached:

- *the right of anyone in need to the resources needed to maintain human dignity and to essential medical treatment (right to the vital minimum);*

- *the right of every child to free school education;*

- *the right of the homeless to proper shelter;*

- *the right of the victims of serious crime to aid in overcoming their difficulties (cf, in this connection, the Draft Constitution of the Canton of Bern of 9 April 1991, and Article 16 (1) of the Constitution of the Canton of Basel City).*

b. Guaranteeing social rights in constitutions or conventions is justified only if their standard-setting content is sufficiently precise for courts to enforce them. Those which cannot be formulated with sufficient precision should be regarded as merely social goals. Unlike social rights, provisions concerning social goals cannot be enforced directly by the courts. They are primarily aimed at the legislative authorities, which must try to achieve them; for the courts, they serve as a guide in interpreting the law.

The following are examples of social goals which states may try to achieve:

- *making it possible for everyone to support himself by work performed in reasonable conditions, to be protected against the effects of unemployment and to receive paid holidays and adequate rest periods (the "right" to work);*

- *making it possible for everyone to receive training and further training consistent with his tastes and attitudes (the "right" to education);*

- *making it possible for everyone to live in suitable accommodation (the "right" to housing).*

Of course, the distinction between social rights, which confer genuine subjective rights on individuals, and social goals, which the state must attempt to achieve, is not an easy one to make, and deciding to which category a given right belongs may sometimes be hard. The aim here is simply to select, from among the so-called second generation rights, those which constitute their essential core, and which can also be defined with sufficient precision to be implemented like first generation rights.

CONCLUSION

It is difficult to translate social aims into social rights, ie fundamental rights which can be claimed before the authorities and the courts. As we have seen, there are two main reasons for this. First of all, social rights require, more systematically than the classic fundamental rights, positive action by the authorities, and this almost inevitably means involving the legislature. Secondly, social rights cost the state far more than the classic fundamental rights, and funding of the expenditure involved must also have a basis in law.

For this reason, most modern constitutions opt for the social goal technique, leaving the legislature to achieve certain aims.

This does not mean, however, that social rights and fundamental rights are incompatible in any absolute sense. Some social rights - their essential core (see above examples) - can perhaps be written into constitutions like fundamental rights (see J-F Aubert, Un droit social encadré, Revue de droit suisse, vol 110 (1991) I 156, 165; J-P Müller, Die Grundrechte der schweizerischen Bundesverfassung, Bern 1991, p. 39).

Recognising this essential core should be facilitated by the fact that most of its components can be deduced from guarantees explicitly enshrined in constitutions or in the European Convention on Human Rights: personal freedom, human dignity, the prohibition of inhuman or degrading treatment (Article 3 of the European Convention of Human Rights).

In addition to being incorporated in national constitutions, the rights which constitute this essential core might be embodied in a protocol to the European Convention of Human Rights and so be covered by the control machinery established by the Convention (cf, in this connection, the work of the Council of Europe, and particularly the May 1984 draft).

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[2] Richard Rose, "Elections and Electoral Systems: Choices and Alternatives", in Vernon Bogdanor and David Butler, eds., Democracy and Elections: Electoral Systems and Their Political Consequences (Cambridge:

Cambridge University Press, 1983),
p. 29.

[3] David Butler, "Electoral Systems", in David Butler, Howard R. Penniman, and Austin Ranney, eds., Democracy at the Polls: A Comparative Study of Competitive National Elections (Washington: American Enterprise Institute, 1981), pp. 10-11.

[4] Two recent and authoritative volumes containing information on the system of resolving electoral disputes sometimes give conflicting information on a number of individual countries : Buttler, op. cit., Table 2-1; and Parliaments of the World : A Comparative Reference Compendium, Volume I (Inter-Parliamentary Union, 1986: Gower Publishing Company), pp. 106-133, Table 3-4.

[5] Butler, op. cit., pp. 12-19, Table 2-1.

[6] Idem, p. 10.