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The Constitutional Heritage of Europe

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Opening session

Introductory statement on the constitutional heritage of Europe by Mr Antonio LA PERGOLA
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1. The Venice Commission is moved by the hospitality offered by this old and famous centre of learning. It is an ideal setting for our seminar. We meet in a city where you can hear the heartbeats of a time-honoured European cultural tradition, and the constitutional heritage with which we are concerned is part and parcel of this world of culture. Since the Middle Ages, Montpellier has, like universities of similar lineage in other countries, shaped culture at home and across national boundaries. That is the double aspect of the way Europe has grown. Today, there is, as always, cross-fertilisation at work between the values or achievements we ascribe to Europe as a whole and those which differentiate and sometimes even divide our countries. Let me take this point further by way of introduction to our seminar. Our constitutional heritage ought to be seen against the background of this European oneness that does not stifle but, in a sense, fosters national differences, for it is actually interwoven with the threads of our domestic constitutionalism. The distinguished rapporteurs will no doubt till the land that here lies fallow. I will for my part only cast a glance at the ground to cover. Two questions come to mind. How do we take stock of such values as we share, and how do we put them to fruition? Ours is not a passive legacy. Economists would say that inherited wealth is a capital worth investing in new ventures. Here is a sound notion with which lawyers and political scientists can agree. Our legacy from the past is the foundation on which the Europe of the future can arise and is in fact being built.

2. First of all, then, we need the skills of in-depth legal comparison to discern what our constitutional heritage is and what it means today. We must bring this notion into conceptual focus through the lens of our absorbing interest in the Europe ahead of us. Now, there is more than one possible view of our constitutional heritage. We can describe it in terms of broad principles, such as political pluralism, the rule of law, the defence and promotion of human rights. This is a common stock of values and a heritage. We have seen it revive where it had been lost in the dark spells of totalitarianism. After the breakdown of the ideological walls, it is shared by old and new democracies alike, and the Council of Europe is its depository.

We can hardly maintain, however, that thus defined our constitutional heritage is the exclusive preserve of European soil. It belongs in more ways than one to Western civilisation at large. Not by chance, the political tradition rooted in the West runs throughout the critical trials of history as the powerful and cohesive force that has brought Europe - the Europe proud to be the homeland of freedom, I mean - on the same ideological side with the nations that were its filiation across the Atlantic Ocean. Now, political pluralism, the rule of law and human rights are no more than basic principles, and they had to be developed in the constitutional systems of

European countries. The constitutional heritage has thus been embodied in the constitutional law laid down to articulate the political order of each nation state. What we need, then, is a closer comparative view of the field we are scanning. There are differences as well as analogies in the "mise en oeuvre" of the heritage we find in the common background of our constitutions. The angle of vision must therefore shift to the recurring features of basic texts now in force which bear the stamp of a distinctively European outlook on the issues at stake in constitution making. It is a challenging inquiry. What trends of present day constitutionalism have reached the stage where you can regard them as an all round European development of the basic principles, the hard core of which is our common legacy? There is a good deal of variety even within the mainstream of generally accepted solutions. Nonetheless, certain data at our disposal stand out as clearly indicative of the constitutional tradition that prevails in Europe. One is parliamentary government, where the Prime Minister and the Cabinet are responsible to the elective House of Deputies. Another is the institution of the Constitutional Court, which had been established in several countries of Western Europe and has been catching on in a good many of the newer democracies. Both of these data point at the difference between the European and the American versions of constitutional democracy. Yet another common feature worth mentioning is the generalised acceptance by all countries concerned of the fundamental principle according to which the treaty establishing the Union and the law of the Union must be applied directly even in the face of incompatible internal legislation. A striking parallel development is the rank acquired by the Convention on Human Rights and the related system of guarantees with Strasbourg as its seat.

3. Of course, the topic of this seminar covers a much larger field than the above indicated areas of interest. What matters most, however, is not how many principles of constitutional theory or givens of experience we can assemble, but how we set them in a European perspective to explain that they draw their proper significance from one and the same inspiring source of tradition. Our constitutional heritage is, as I have said at the beginning, necessarily affected by the unity always intertwined with diversity in the flux of vicissitudes that have made Europe the great fold where our nations and peoples live together. Commonly held views on the Hauptprobleme of constitutional law have given rise to varying choices when they have been put in place in national systems, and these differences have in turn elicited a renewed interest in the original model - in its substance and inner logic, as it were - from which this or that country had departed according to its own needs. Our heritage has been formed piecemeal and not infrequently through a circulation of constitutional models which, though differently applied in different places, have in the course of time gained uniform acceptance and thus a firm foothold in European tradition with their true and full meaning. Examples are not far to seek. Let me consider those I have suggested before.

3.1. Parliamentary government has its cradle in Britain, and there it has by successive stages developed into the two-party system, with its harsh majority rule and the Prime Minister and the Leader of the Opposition facing each other from both sides of the aisle in the House of Commons. The fact of the matter is that the government is voted into office by the majority of the electorate. Once established, it can as a rule rely on a well disciplined majority in Parliament. It will hardly ever be toppled from power by means of a no-confidence vote.

This type of political regime, imported from Britain into continental Europe, had over a long period of time been combined with proportional representation, and the result, in some cases at least, had been the making and unmaking of coalition cabinets and the chronic instability of the executive. But constitutional and electoral reforms have taken place or are being debated to bring the model back in line with the fashion in which it works across the Channel.

3.2. Different ideas have crossfertilised in the European area of constitutional justice, too. In the continental sense, constitutional justice is centralised justice. The power to interpret the fundamental law, pronounce the invalidity of unconstitutional statutes and settle other constitutional controversies resides in a judicial body especially established to exercise these functions. That was the European answer, first engineered by Kelsen in Austria, to the problem, as that scholar and constitutional architect viewed it, of providing a judicial guarantee for the observance of the rigid constitution. The solution seemed the opposite to diffuse judicial review of legislation, such as we find, say, in the United States. In fact, standing before the Court had been limited to the higher ranking organs or to a fraction of the members of Parliament, and in this sphere of the judicial process the individual has no place. But that was an incomplete system. The constitution is an all engulfing body of rules that concern the individual no less than organs or powers.

The fully-fledged role of a Court which is guardian of the constitution cannot therefore be, as the German expression goes, only the abstract control or review of norms. It must be linked to the flow of controversy where individuals may be involved as litigants. The Court's jurisdiction should dip into the waters of everyday litigation. The spirit of diffuse judicial review had to be absorbed into the European system of constitutional control. And it has been. New avenues of access to the Court have been provided for. Suffice it to recall the German and Austrian Verfassungsbeschwerde, or the Spanish amparo, or the incidental question of constitutionality referred to the Court by other judges (in Italy, Germany, Spain and Austria), or the appeal from decisions certain Courts in Portugal are enabled to give on constitutional questions.

The idea of centralised constitutional justice has been put to test of experience, and the model has been given the full significance it required but had not acquired. Nowadays, it concerns in most national systems the legitimacy of the exercise of power under both the abstract and the concrete control of norms, as well as the varied area of constitutional disputes, ranging from the traditional conflicts between organs to controversies that hinge round the vindication of basic individual rights or arise from cases pending before other judges.

3.3. Last but not least, there is the principle of the direct effect of the law of European Union and of its supremacy over incompatible national legislation. It has been formulated by the Community Court of Justice, and it has with perhaps a touch of rethorical flourish been labelled by some commentators as judge-made federalism. We can read it, however, more simply, as a new formulation of the long-standing principle, according to which international law is part of the law of land, and is directly applied and enforced by national judges. The novelty is that international law has developed into the law of the Union established by the Treaty. And this law is in each member state part not just of the law of the land, but of the supreme law of the land. But the origin of such an impressive evolution still lies in the principle that relates to the direct application of international law. We can see this principle observed within the circle of European nations, whether members of the Union or not. It will, of course, be differently understood in a country like Britain, with its common law and without a written constitution, and in the continental countries, where the constitution is rigid and the legal system codified as everywhere else in the world of the civil law. On the continent, international law is part of internal law by constitutional fiat. Basic texts enshrine the principle by providing that general international law is incorporated at once with no need of implementing measures. And the principle has in quite a few countries been carried over from customary international law, which is the only area where it would obtain in Britain, to conventional international law. Moreover, some constitutions recognize both international customary law and treaties as sources of internal law endowed with a higher internal rank than ordinary legislation. In addition to all this, there are provisions especially written into national constitutions to authorize the transfer of powers to

international institutions in general, or to the European Communities, and now to the Union in particular. Such clauses have generally been read by Courts as implying the immediate internal effect of the Treaty establishing the Community and of all regulations, decisions and directives adopted by the Community organs. The Community Court has, furthermore, evolved the doctrine of the prevalence of the Treaty and of secondary Community law over national legislation as a corollary of the system designed by the basic agreement to govern integration. National Courts have each of them sooner or later come round this point of view. The solution has been worked out in the new context of the European process, but in substance it has been adapted from the constitutional engineering of the relationship between international law and municipal law.

This widespread tradition of internationalism in European constitutional law goes back, if we want to trace the point in time when it was acknowledged by constitution-makers as a common tenet of legal civilisation, to that Indian summer of peace between the world wars, which was the esprit de Genève and of the world around the League of Nations. It was only a transient season, true, before the aggressive mood of nationalism set in to sow the seeds of conflict. Who could deny, however, that the legalism of the esprit de Genève has with the help of hindsight been revisited and improved by the new esprit de Strasbourg after World War II? The road that leads to limitation of sovereignty and collective decision making among or over and above nation states was paved by the relationship between international law and municipal law, as established by several of the present-day basic charters. The provisions they adopt concerning this issue should be read in the light of their antecedents. Article 55 of the French constitution, art. 25 of the Bonner Grundgesetz, art. 96 of the Spanish constitution, art. 9 of the Austrian constitution, art. 10 of the Italian constitution and similar provisions in other basic texts derive from the same pressing sense of internationalism that had inspired previous charters. These trends of constitutional law are consistent enough to figure in the showcase of our heritage.

4. The next question we have to address concerns the way in which European countries can put their constitutional heritage to fruition. The answer is offered by their common endeavour to make Europe an integrated system, a close-knit family of states. The great experiment of our time is integration, and this word covers in a broad sense a variety of international institutions such as those, different in scope and membership, that have flourished in Europe. For our present purposes we may, however, focus attention on the European Communities now within a single Union, and on the Council of Europe. European states have to share some at least of the constitutional values here considered to become members of both these institutions. Indeed, the essential mission of the Council of Europe is to promote and monitor the observance of our common heritage. The Council sets specific standards to this effect, which prospective members must meet and comply with, as all members do, after admission. Its evaluation of how the constitutional heritage is actually observed by any state under scrutiny may condition the possible admission of that same state even into the European Union, for membership in this last body rests on compliance with constitutional requirements as well as with Single Market and Single Currency standards that concern the soundness of the internal economy.

Here we face a new and engrossing chapter of applied constitutional theory. How do we assess the values of heritage as guidelines for the active involvement of nation states in European integration and for the possible growth of the Union they join as members? I can only broach the subject. It is one that deserves more space.

4.1. The observance of constitutional principles held in common legitimises, as has been shown, membership in the Council and in the Union. Moreover, these principles are transitive values. The Community to which member states have transferred such powers as it needs to

develop into a Union is so arranged as to conform - tendentially and within limits, to be sure - to the constitutional legacy shared by its component parts. Let us consider our Union in the making. It is the most advanced stage of integration in the sense I am describing, in so far as its structure and decision-making are endowed with democratic legitimacy and not exclusively entrusted to bureaucracy or diplomacy at the supranational level. In the context of integration, therefore, constitutional heritage provides a reliable support of homogeneity. The parts must be consistent with the whole and with one another. It could not be otherwise. Without a modicum of homogeneity integration would not work as a coherent process. What this modicum should be is an open question. It is less than what would be required in federal communities where members are generally cast in the same mould, as all of them are expected or indeed bound to adopt a highly homogeneous, if not an identical form of government. But it is a higher degree of homogeneity than that we come across in universal organisations like the United Nations or in other groupings of states where there is wide scope for difference in the constitutional structure of the participants.

4.2. Let me revert now to my previous examples and test them on the ground I am exploring. It is precisely to satisfy the kind and degree of homogeneity required by integration that member states need in my view to share a parliamentary form of government, and a system of constitutional guarantees which will have to accommodate the primacy and direct effect of Union law. Besides, these constitutional features circulate from the periphery to the centre of the system. The Union has its own Parliament and Court of Justice. This latter body monopolises the interpretation of the Treaty, guarantees its observance and therefore plays within its own field of jurisdiction a role comparable to that of a national constitutional Court. Parliament will grow in importance as the Union develops. As things are, it is, though democratically legitimised by direct popular election, deprived of many if not most of the functions normally vested in a legislature. Control over policy making and its implementing process is in good measure still in the hands of national Parliaments. The transition of parliamentary democracy from member state to Union is significantly restricted. And the Union is not destined to become any kind of a federal superstate, where the principles of constitutionalism could be enthroned in their plenitude, even when the powers of European Parliament will have been perfected. The more perfect Union we may aspire to is a generalised system of codecision, a balance between the parliamentary and the intergovernmental bodies, with the Commission in between as a peculiar executive which is neither a supranational government nor simply a top echelon of eurocracy. The one area where the constitutional heritage is relied upon as a powerful catalyst of integration is, in sum, that of judicial guarantees. The thrust of the great European experiment is the creation of an open space as a seedbed of individual rights and of an emerging common citizenship side by side with national citizenship in the State of origin. The rights flowing from the Treaty and from secondary European legislation tie in with the root-rights, the basic human rights any person must enjoy to be a user of the market and a citizen of the Union. The rights to political participation and diplomatic protection listed in the Maastricht Treaty as common rights of citizenship are fresh additions to the sphere of individual. And this whole constellation of rights and freedoms is guaranteed by the primacy of Union Law and of treaties and enforced by Courts. The common heritage finds its place in this context through judicial protection. The Maastricht Treaty envisages the protection of individual rights as a fundamental objective of the Union, for the pursuance of which it has established a European citizenship. It also stipulates that basic rights as guaranteed by the Rome Convention and as they result from the constitutional traditions common to the Member states are principles of Community law. Thought the Treaty does not spell out a bill of rights, it recognises the Rome Convention (and the Strasbourg based system of guarantees) as a source of fully justiciable Community law. The added reference to the common traditions of Member states is charged with a high significance

which all interpreters must take into account. It means that the Union is built on the respect and, again, on the judicial safeguards of the basic human rights that form part of our heritage.

It is the rule of law, then, more than any factor of homogeneity, that becomes the energizing principle of integration as a new dimension of constitutionalism, as a way to enrich the individual with a charter of rights and a citizenship beyond the boundaries of the nation-state. There again, Europe is the scene of unity in diversity. Our common patrimony of rights is guaranteed by a multiple set of jurisdictions, depending on the circle in which European countries are grouped. Municipal Courts will guarantee basic and other rights according to domestic law and the Union Court and the Strasbourg Court will move in when the conditions are met for them to be seized with a case that concerns the individual. But there is at all rates just one basic underlying principle. Heritage has come to the service of the human person. The right to freedom, which spawns all other rights, is now entrenched in Europe and by Europe as a single source of our shared constitutional values.

First working session

General interest of the concept of a European constitutional heritage

a. The concept of European constitutional heritage
by Mr Dominique ROUSSEAU

b. European constitutional heritage and the history of Europe
by Mr Gérard SOULIER

c. Europe's constitutional heritage and social differences
by Mrs Hanna SUCHOCKA

d. The end of the millennium: The triumph of constitutionalism in Europe
by Mr Florin Bucur VASILESCU

a. The concept of European constitutional heritage - Report by Mr Dominique ROUSSEAU

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European constitutional heritage! Taken singly, each of these three words falls within the legal domain, yet together they form a concept which appears incongruous, not falling within the lawyer's normal range. How can "European" and "constitutional" be combined when there is no European nation, European state or European constitution ? What legal meaning can be attached to the combination of "constitutional" and "heritage" ? To be sure, "European constitutional law" would have prompted less puzzlement, echoing a discipline which is known in all the European states and is gaining currency in textbooks, symposia and learned articles. It is even the subject of a doctorate seminar at the University of Montpellier, for example!

At the risk - if it is a risk! - of treading the borderline between law and political philosophy, the idea of European constitutional heritage should be preferred and maintained. More flexible and open-ended than European constititional law, it is put forward here as a hypothesis to help understand constitutional Europe. Economists think about economic Europe by studying criteria for the convergence of national economies, sociologists speculate about the convergence of European societies1, trade unionists about the Europe of industrial relations, artists about

1See eg Vers la convergence des sociétés ? Sciences humaines. No 14, special issue, September-October 1996.

cultural Europe ...; why should lawyers, especially constitutionalists, not speculate about constitutional convergence in Europe ? To do so with method, some kind of measuring instrument is required, and that is where the hypothesis of Europe's constitutional heritage comes in. We have chosen to use this instrument not to look for constitutional convergence criteria in the law of the European Union or the Council of Europe, but to find them - if they are there to be found - in national constitutional law. In other words, constitutional harmonisation will be approached from the bottom up and not from the top down; comparative interpretation will, if the hypothesis is correct, enable us to extract the content of the European constitutional heritage (I) and to define its nature (II).

I. THE CONTENT OF THE EUROPEAN CONSTITUTIONAL HERITAGE

If heritage - according to the dictionary definition - is "property that has descended to an heir", Europe's constitutional heritage is a hotch-potch of monarchies and republics, democracies and dictatorships, protection of human rights and their denial, federalism and Jacobinism, the primacy of Parliament and its subjection to the Executive, the abasement of the judiciary and the recognition of its independence (A). That no doubt explains why the heirs, today's Europeans, have exercised a right to choose those parts of the estate which they wished to keep and enjoy, leaving the others to go uninherited. The content of Europe's constitutional heritage has thereby been transformed and has become a set of principles identifying constitutional democracy (B).

A. The inheritance: a constitutional hotchpotch

The term "hotchpotch" may surprise, or even shock. It has been customary to portray Europe as having bequeathed to its peoples and to the world a precise legacy - liberty, equality, citizenship, solidarity - all tending in the same direction: towards realisation of the democratic ideal. This picture is not entirely false; it is merely distorted by the omission of another, darker side of Europe's past. Whether in the organisation of political authority (1) or in the system of constitutional values (2), the European constitutional heritage is, to say the least, one of contrasts.

1. A motley institutional inheritance

The idea of a constitution, a western invention, as Professor Jean Gicquel has written2, from the outset embraced two contradictory aspects, according to whether it was seen as the work of Nature, the set of rules and organisation of power peculiar to a human community, wrought by time and maintained by the tradition that underpins its authority; or as the work of men, an act of will by which they freely organise the rules of communal life, control their destiny and transform history. Plato, in The Republic, or Aristotle, in The Athens Constitution, do not neglect the human element in the invention or reform of political systems, but they show above all how forms of government - aristocracy, oligarchy, democracy - succeed one another according to a natural logic largely beyond the control of men, who are powerless to activate, delay, still less to stop it.

From the 16th century onwards, the trend is reversed, with the idea of a contract as the foundation of political society. Locke, Hobbes, Rousseau, each in his own way, asserts the power of men, against nature, against the force of tradition, to build a political association according to rational precepts. 1789 marks the triumph of this idea and, two centuries on, it is still alive today. In reforming or changing their countries' constitutions after the fall of

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2 Jean Gicquel. Droit constitutionnel et institutions politiques. Montchrestien. 14th ed.1995.p 21.

communism, the constitution-writers of central and eastern Europe have done as their forefathers did in the 18th century, re-writing the terms of the social contract: pluralism, the rule of law, separation of powers, human rights; seeking, through the law, to build a new society, a new relationship with the state and a new form of government. Yet the old idea has not completely disappeared. Great Britain still finds it a bizarre idea to set down a society's way of living in writing, in solemn texts; and, echoing the criticisms levelled by Burke, Bonald and Maistre against the pretensions of the men of 1789, communitarian philosophy sees the detachment of things from nature, imposed by human reason, as one of the main causes of the "malaise in modernity"3, and proposes a return to a society founded on acceptance of everyone's traditional place and role.

In addition to this first contrast inherent in the constitutional phenomenon itself is the contrast between different systems spawned by men's imaginations. Europe, unlike the United States, which have kept faith with the same constitution for two centuries, has theorised and experimented with every possible combination of powers. While the Empires - French, German, Austro-Hungarian - have disappeared, the republican form of government has spread, but has not been installed everywhere; monarchy dies hard and although polls say it is in danger in Great Britain, they also reveal the pupular support it enjoys not only in northern Europe, but also in Spain - for all its republican reputation - and in Belgium, where the King is all that remains to hold together the Flemish and Walloon communities. Europe's institutional diversity can also be seen from its constitutions. Some adopt the parliamentary model - Germany, Spain, Italy, Czech Republic, Hungary, ..- whilst others blend the presidential principle of election of the Head of State by the people with the parliamentary principle of government accountability to parliament - Austria, Portugal, France, Romania, Poland ... This diversity becomes positively kaleidoscopic when we turn from the texts to actual constitutional practice. France and Portugal, for example, theoretically fall into the category of semi-presidential systems but in Lisbon the President of the Republic does not govern and politics follow the classical parliamentary pattern. On the other hand, in Italy and the Czech Republic the President, who is not elected by the people, can - as in the case of Vaclav Havel when the last government was formed - play a more important role than some Heads of State elected by universal suffrage. And for all that they are also parliamentary systems, Great Britain and Italy, Spain and Slovakia, Germany and the Netherlands do not "work" in the same way.

Completing the picture is the extraordinary variety of ways in which the constitutionality of laws is monitored 4and it should not be forgotten that some states - for example, Great Britain and the Netherlands - still refuse to introduce any such monitoring, deemed contrary to their parliamentary tradition. Lastly, to the despair of the partisans of a single institutional model, Europe offers examples of every possible form of the state: unitary in France, Greece and Romania, regional in Italy, community-based in Spain, federal in Germany, Austria and Belgium, confederal in Switzerland.

Moreover, the richness of the European constitutional heritage is not confined to the variety of the political constitutions of which it is made up; there is equal variety in its social constitutions.

2. A philosophical heritage of contrasts

3Eg Charles Taylor. Le malaise dans la modernité. Cerf. Humanités.1995.

4See eg Dominique Rousseau. La justice constitutionnelle en Europe. Clefs Montchrestien.1995. 2nd edition.

The variety of constitutional values to which European states subscribe does not stand out as clearly as their institutional diversity. Since the fall of communism, the predominant impression has been of standardisation, now that all European peoples proclaim their support for human rights. But behind this apparent unity, there is no lack of contrast, of opposition and contradictions.

The first is between rights as freedoms and rights as dues. Whereas the former imply that the state refrains from interfering, leaving a free space for the exercise of freedom of movement, of opinion, of labour and enterprise, the latter require the state to intervene to satisfy everyone's entitlement to education, housing or health. Not only do not all European states attach the same importance to these two kinds of rights, but the balance struck by the authorities between the right of ownership and the right to housing, freedom of conscience and the neutrality of education, freedom to work and the right to strike - to mention but a few examples - vary widely from one country to another. The dialectical spirit is much in evidence nowadays when the peoples of the "old" liberal societies seek to defend threatened social rights and those of the former communist societies claim priority for individual freedoms.

Second contrast: even within the category of rights as freedoms, the legal situation varies just as widely. Principles such as the right to life, individual liberty, respect for human dignity, the right to a hearing and a fair trial, freedom of conscience .... enshrined though they are in the constitutions of all the European states, do not underpin similar legislative systems or judicial arrangements with regard to abortion, private drug-use, homosexual marriage, criminal procedure, the status of religions or the use of minority or regional languages. Here, a person's religion appears on his identity card, there it does not; here anyone can apply to have a provision declared unconstitutional, there he cannot; here, court procedure is inquisitorial, there it is accusatorial; here the presence of a lawyer is provided for from the beginning of police custody, there it is allowed only some hours or some days later; here the privacy of the home is confined to the private premises of natural persons, there it includes professional premises, etc ... Every state has its own particular history which explains these different interpretations of the same principles.

More contrast when principles sharply mark out a society as an "exception" among European countries. For example, the French notion of laïcité (secularity), which is by no means shared by all European countries, or the - again French - assertion of the unity of the people, which runs counter to the general trend in favour of recognising minority rights. Distinctions of this kind are not unimportant for they reflect two possible images of Europe's political construction; either a juxtaposition of communities with separate identities, each with its own, different rights, or an area of equality governed by universal principles.

No doubt these constitutional variations, like musical variations, share a common theme, in this case human rights, and are capable of being reconciled. This is obviously not so when the contradiction focuses on the unifying theme of fundamental rights. Yet intolerance, the suppression of individual liberties, enslavement, genocide, are also part of Europe's political heritage. Europe is not only the land of human rights, it is also the land of barbarity. Vichy France, Hitler's Germany, the Greece of the Colonels, Ceaucescu's Romania, Husak's Czechoslovakia - everyone can complete his own list - dreamed up, drafted and implemented constitutions, laws, court verdicts, administrative measures, a whole body of law inspired by totalitarian philosophies. The fact that they have now disappeared from the European horizon does not mean they can be forgotten; they represent a moment in European history, they have left traces in people's minds, in institutional practices and, most important, they may re-emerge at any time. In eastern Europe, the new democratic culture of the rule of law has constantly to

ward off authoritarian temptations, still strong in places. In western Europe, this same culture is burdened by racist, nationalist, authoritarian ideas purveyed with growing success, in France for example, by extreme right-wing parties. But it is obviously the "events" in former Yugoslavia which have been illustrating for the last six years that this dark side of the European political heritage is not dead, that barbarity can return almost easily and with the same fury in the heart of the Europe of human rights; and, worse still perhaps, that this Europe seems incapable of constructing, proposing and imposing an institutional solution in keeping with the universal democratic values it claims to uphold.

This continuing history at least has the merit of reminding contemporary Europeans that their inheritance is made up of both Light and Darkness. They may be optimistic and believe that evolution is on the side of Light, but they must also be realistic and admit that the victory over barbarity is never permanently won. Consequently, they must always seek to choose among their inheritance that which may push back the Darkness. Inheritance is a matter of choice.

B. The chosen inheritance: constitutional democracy

From the mixed bag of their constitutional past, Europeans, by an act of political will, have chosen the principles whereby their constitutional practices and values converged in the same direction, the direction of constitutional democracy. Not all Europe's peoples made this choice at the same time. But today, having followed different paths and different histories, they share a common inheritance of two principles: free elections (1) and constitutional protection of fundamental rights (2).

1. The convergent logic of the principle of free, pluralist elections

The power of suffrage which any citizen of a European state now regards as a natural right is - should there be any need for a reminder - something that was won in sometimes violent struggle against powers which sought everywhere to preserve the rules governing the acquisition and exercise of political power: the rich against the poor in the days when the vote was subject to a property qualification, men against women at the time of male suffrage, adults against the young at the time of suffrage by "reason" ... And the struggle is not over, for, despite the Maastricht Treaty, the vote is still restricted to nationals, rather than citizens.

Be that as it may, it is clearly stated in all European constitutions that the only legitimate origin of power is universal suffrage insofar as sovereignty, ie the power freely to decide the rules of life in society, belongs neither to any one person, nor to a party as guide, but resides in the people. This link between the sovereignty of the people and universal suffrage is important, because it implies that the vote is not simply a designation technique or procedure, but an essential, consubstantial attribute of popular sovereignty; to abolish it would be not merely to destroy an instrument, but to remove the source of democratic sovereignty. For that same reason, election by the people of their leaders is not in itself sufficient; that election must also, because it is the word of the Sovereign, be conducted according to rules which guarantee its authenticity. Accordingly, in order that their sovereignty may not be a fiction, the people must be able to vote at regular, "reasonable" intervals, to choose between candidates or parties defending different political options, and express their opinion freely. In other words, the distinguishing feature of elections in the European constitutional heritage is placing citizens in a position to make a political choice free of compulsion or pressure. Accordingly, in all European states, elections are organised in such a way as to afford the candidates equal access to means of propaganda, freedom of information and political assembly, and the secrecy of the ballot. Without these rules designed to guarantee freedom of choice and the sincerity of the vote, universal suffrage cannot

produce democratic elections. The bad taste left by the general elections in Bosnia on 14 September 1996 is a good illustration: there was an electoral process, but was that process democratic when the conditions that, according to the European constitutional heritage, make an election democratic, were not, in the view of most observers, met ?

Apart from some parts of former Yugoslavia still under the pressure of nationalist clashes, the free choice of rulers by the ruled by means of democratic elections is tending to become established throught the whole of Europe. The general adoption of this principle can, in the medium term, favour the convergent development of national institutional practice on two major issues. Firstly, the structure of the state. Today, Europe is broadly divided into unitary states and federal states. But, because it is applied in virtually all European states at all levels - local, regional and national - the principle of democratic elections can help overcome this divide. It is true that the nature and extent of powers vary and continue to separate unitary from federal states. However, it is only to be expected that local or regional assemblies elected by popular suffrage will demand and eventually obtain an increase in their powers and greater decision-making autonomy. In Spain, Belgium and Portugal, but also in France since the 1982 decentralisation legislation, the democratic election of regional assemblies has drawn these countries into a local government logic which reduces the difference from federal states or even, as in Belgium, facilitates the transition from a unitary to a federal structure.

The principle of democratic election of rulers by the ruled also favours convergence in the practical operation of European political systems. Since the fall of the Berlin Wall and the abandonment of Soviet constitutional principles, all constitutions are founded on the principle of separation of powers. Yet Europe continues to be divided into states with a flexible separation of powers - or parliamentary system - and states with a complex separation of powers - or semi-presidential system5. But again, this difference, although useful for the theoretical classification of constitutions, is less important than the principle whereby the ruled elect their rulers democratically. Whether the system be parliamentary or semi-presidential, however the separation of powers is regulated by the national constitution, power is everywhere concentrated in the Executive by virtue of the electoral logic which attributes control over legislation to the winning camp and its leader. The pre-eminence of the Executive is neither a specifically French phenomenon nor excusively an effect of the semi-presidential system; it is also found in nominally parliamentary systems. In Spain as in Germany, in Great Britain as in Hungary, Sweden and Greece, the Executive rules. Admittedly, in those countries power is wielded by the Prime Minister and he is not directly elected by the people. But these differences pale in comparison with the way the elections work: by voting conservative, the British elect John Major, the Germans Helmut Kohl, the Spaniards José Aznar; by voting socialist, the Greeks elect Costas Simitis and the Hungarians Gyula Horn6. In other words, it is a common feature of all the political systems of Europe that he who decides, whether he be called President of the Republic, Chancellor or Prime Minister - is appointed as a result of an election by universal suffrage.

Because of this, "separation of powers" changes in meaning. It no longer means - or not to the same extent - separation between the legislative and executive powers, since the ruling coalition possesses both; it now means separation between the majority which governs and legislates, and the opposition which checks, challenges, proposes and prepares to win the majority at the next

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5 See above, Section A.1, para. 3.

6 In practice, moreover, the difference from France is even smaller, because in Germany, Italy, Hungary ... the general election campaign is based on the leader of the party or coalition, amounting to "presidentialisation" of the parliamentary elections.

election. This form of separation of powers, as described in particular by Maurice Duverger7, is a feature of all Europe's political systems and enables the principle of democratic alternation in power to be regarded as a fundamental element of the European constitutional heritage. Especially as it has implications which are also crucial to Europe's constitutional identity: for democratic alternation to operate, the political contest must remain open, ie respect for the rights and fredoms of individuals and groups must be effectively and continuously guaranteed.

2. The convergent logic of the principle of respect for fundamental rights

Actual constitutional provisions governing the organisation of public authorities offer little sign of convergence between Europe's political systems, so varied are they and so much do they differ from one country to another. But this once important aspect of constitutions is no longer so crucial today. Not only because, as we have seen, the logic of democratic elections considerably reduces the theoretical divergences between the parliamentary, presidential and semi-presidential organisation of powers, but especially because, over the last forty years - more recently in France and, of course, in the countries of central and eastern Europe - constitutions have been mainly concerned with the rights and freedoms of individuals and groups. To put it somewhat starkly. constitutional law is less the law of rulers' rights and more the law of human rights. In this light, three main convergences may be discerned in European constitutions.

Firstly, there is great similarity in the lists and the wording of fundamental rights. Since the fall of the dictatorships in Spain, Greece and Portugal in the mid-70s and the soviet regimes at the end of the 80s, all the European constitutions have enshrined, sometimes in very similar terms, the same rights: individual liberty, freedom of movement, freedom of opinion and expression, political and trade union freedom, freedom of the press, freedom of education, right to own property, respect for privacy, human dignity, etc. From these similarities there emerges a common idea of rights, a shared view of the desirable social order combining the principles of the social market economy and a pluralist democratic society. From one end of Europe to the other, constitutions enshrine the right to own property, the right of enterprise and workers' right to benefit from social protection, to strike or to participate through their trade unions in the determination of their working conditions; from one end of Europe to the other, constitutions also enshrine pluralism of the press, education, trade unions, political parties and, more generally, of opinions and ideas.

Secondly, the primacy of the constitution is tending to become a principle shared by all European states. Formally, this has always been the case since, within domestic law, the constitution is regarded as the supreme law. But in the formerly totalitarian societies of southern and eastern Europe, the only real rule to override all others was the political will of the single party. And in democratic societies the assimilation of popular sovereignty to parliamentary sovereignty placed the focus on legislation, ie the primacy of the law. Nowadays, these exceptions are tending to disappear. Everywhere, except in Great Britain, it is accepted that legal acts must comply with the Constitution, including Acts of Parliament which, in the words of the French Constitutional Council, express the general will only subject to the constitution8. This re-affirmed primacy of the constitution is becoming an effective common principle only because of the growing practice on the Continent of subjecting legislation to constitutional scrutiny.

7See eg Maurice Duverger. La Monarchie républicaine. R Laffont.1974.p 198.

8C.C. 85-197 D.C., 23 August 1985. R. p 70.

Thirdly, the major development of recent years has been the expansion of constitutional justice in Europe9. Confined after the Second World War to Austria, Germany and Italy, it reached France in 1958, Spain and Portugal after the fall of the dictatorships, Belgium in 1980, and from 1990 onwards the whole of central and eastern Europe. Great Britain has remained aloof from this movement, as have also the Scandinavian countries, the Netherlands and Luxembourg. According to Professor Constantin Kortmann, this "Nordic" peculiarity is due to the fact that these states have no constitutional tradition founded on the notion of sovereignty and, unlike the other states of the European Union, do not need to establish a system of constitutional scrutiny to curb the excesses of a sovereign power10. That may well be so, but it also true both that these states, like Greece, have a form of diffuse constitutional scrutiny exercised by the ordinary courts in the course of ordinary proceedings, and that there is a growing current of opinion in favour of establishing a special constitutional court. The movement is not over and what matters more than the actual method of scrutiny, which in fact varies from one constitution to another, is acceptance of the principle of scrutiny and, where appropriate, disapproval of legislation enacted by a democratically elected majority if it is found to be contrary to the constitution and in particular to the fundamental rights which it lays down. As we know from the work of the Venice Commission, this principle is now widely acknowledged: while parliamentary sovereignty was beyond doubt the defining feature of the European constitutional heritage in the 19th and early 20th centuries, that of the contemporary age and certainly a party of the next century will be the critical scrutiny of constitutional courts.

II. THE NATURE OF THE EUROPEAN CONSTITUTIONAL HERITAGE

Because it does not immediately fit into the pre-formed categories of Law, the European constitutional heritage prompts the same questions as the Declaration of the Rights of Man did in 1789: Is it a moral guide to states' political conduct ? a philosophical treatise on the best political system ? a text stating legal obligations incurring liability to penalties if not observed ? a constitutional, or even supra-constitutional charter ? Lawyers tend to like thinking in terms of alternatives, the choice of one answer automatically ruling out accepting the truth of the others. Perhaps they need to learn to accept complexity, including the complexity of legal notions, and to see in their contradictory qualities not a structural defect but the reason for their dynamism. So it is with the European constitutional heritage because it belongs to the realms of both philosophy and law: to the first because it defines a democratic culture in which Europe's identity is being shaped (A), to the second because it favours the emergence of a body of European constitutional law (B). It is both, and its qualities interlock.

A. The European constitutional heritage, the melting-pot of Europe's identity

Societies and peoples, like individuals, need to have a self-image, an identity. This is not a fact of nature but is constructed through the social interactions in which the individual and groups are involved. While the need for identity is an invariable, the form in which individuals or groups think of themselves necessarily varies according to time and circumstances. So it is today: national identity is hard-pressed, for example, by the process of globalisation (1); but history continues and the European constitutional heritage, because if "works" like a political culture shared by the peoples of Europe, is helping to redefine their identity (2).

1. The disintegration of national identity

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9 Dominique Rousseau. La justice constitutionnelle en Europe. Clefs Montchrestien.1996. 2nd edition.

10 Constantin Kortmann. Souveraineté et contrôle de constitutionnalité. Revue Adm.1994.No 282. p 574.

It would obviously be rash to announce, here and now, the death of the nation-state. Not that it is the natural form of political organisation of societies or that it manifests, in Hegelian terms, the end of history. On the contrary, the nation-state is the product of a long history that began in the 13th-14th centuries, continued through the Renaissance, was developed by the French Revolution and reached its apogee after the First World War when US President Wilson imposed on Europe as a peace policy the principle whereby every nation is entitled to constitute a state. As a product of history, the nation-state can also disappear.

There are seemingly no signs of this today. All over Europe, peoples manifest their attachment to this form of political organisation: the collapse of the Soviet empire has re-awakened national feeling and, in the Caucasus and the Balkans, fires many a conflict to redraw state maps on the basis of nationality; in western Europe, nationalist parties are increasingly popular with the electorate and anti-European or Euro-sceptic talk focusses mainly on preserving the nation-state and national identity.

And yet, the nation-state is in crisis. Vivian Forrester's latest novel, L'horreur économique11 describes the emergence of a new social order in which real power is held by "transnational private economic networks which increasingly dominate state authorities and, outside any territory, any governmental institution, form a kind of nation which steadily increases its control over countries' institutions and policies". All the attributes of the nation-state thus disintegrate. Sovereignty, which means the nation's independence, its non-subjection to any outside authority, determination by the people alone of their destiny, is thwarted when the economic, but also cultural transnational "networks" impose their laws and their images on states powerless to resist. Territoriality, meaning the state monopoly of authority over the geographical space contained within its borders, also suffers when business develops according to a spatial logic which pays no heed to the nation-state. The legitimacy of national public authorities, which signifies their citizens' recognition of the need for institutionalisation of power in order to guarantee the social contract, is further weakened when they perceive the state's inability to impose order in its territory.

In short, the political element of sovereignty, the material element of territory and the organic element of institutionalisation of power, which traditionally served to define the state, are crumbling. When that happens, the personal element, the nation, crumbles too. Individuals can no longer recognise themselves in a community which, in losing its territory and its political authority,loses the instruments by which to identify itself as a national community. The sense of belonging to a nation grows gradually as each individual is convinced, by reason or by force, that it is worthwhile, for his security and well-being, to allow the "national" level to prevail over the other groups to which he belongs - family, region, social class, religion, etc. If the national bond no longer has meaning and value for individuals, it unravels, as illustrated by the resurgence today of existential questions: what does it mean to be French, Belgian, Spanish, German, Italian ? Similarly, the sense of belonging to a nation also depends on a representation of space contrasting inside and outside: to belong to a nation is to be inside a closed space separated from other national entities. However, the disappearance of frontiers is dissolving that representation, further precipitating the crisis of the nation-state.

In this fluid and uncertain situation, obviously all kinds of identity proposals flourish, offering themselves as substitutes for national identity. Some contend that the social bond must be rebuilt by reviving grass-roots solidarity: the family, the town, the region; others focus on membership of a religious community - Catholics, Protestants, the Orthodox Church - or of a linguistic or

11 Viviane Forrester. L'horreur économique. Fayard. 1996.

sexual community, as a means by which to refound a collective and individual identity; some have even not given up the idea that the nation-state could come back into its own ... if frontiers were restored and the integrationist or federal logic of European construction abandoned.

So, like the rest of the planet, the European states are torn betwen a process of globalisation which breaks down their legitimacy and a flowering of special identities which dissolve the sense of national belonging. Yet the demise of democratic values is not the logical or inevitable conclusion of these two contradictory but equally destructive trends. In this context of crisis, the European constitutional heritage can open the way to reconstruction of European peoples' identities.

2. Construction of the European identity

To propose the European constitutional heritage as a way to construct a new identity is simply, some will say with malice, to add another substitute identity to those already on offer. In a way, this is true. But the problem is not one of replacing one identity principle by another: while the need for identity is common to all individuals and all groups, it is organised in forms which vary, evolve and change with time and with the particular history of each social formation. In other words, the citizens of the Old World are not condemned to see themselves forever in national form. The real question, or at any event the most interesting one, is the principle on which identity is constructed today. In relation to those already described, the principle of the European constitutional heritage has three distinguishing features.

Firstly, it embraces modernity, whereas others express forms of allegiance corresponding to now outdated situations. The nation is itself a principle of identity recognition which superseded or overrode traditional groups - family, region, religion - in which individuals found their way of thinking and behaving; and the national bond prevailed only because at a particular time it corresponded to the space of relevance for economic development. Reviving pre-national reference groups or preserving national belonging by force makes no sense in the age of globalisation. On the other hand, by embracing this process, the European constitutional heritage offers a frame of reference permitting both its development and its control, while rendering it intelligible. Secondly, the mainspring of the heritage principle is not any particular territoriality; here, too, it proposes an identity reconstruction in keeping with the contemporary disappearance of frontiers. It is confined to Europe, but instead of it being the territory that determines the identity, it is identification with the heritage that shapes the European space, whose borders shift with the allegiance that peoples pay, refuse or withdraw from that heritage. Thirdly, the identity constructed by this heritage is capable of universalisation. Not because it is empty of substance or detached from European life, traditions or history; the heritage is filled with these lives, traditions and histories which, as it were, it combines into a founding narrative of European identity. But, because the heritage is built continuously in a movement reflecting that narrative, the identity it produces is also shaped in and by criticism of its content and consequently remains always in suspension, always open.

Identities rooted in blood, the soil, racial group, tradition or territory are thus succeeded by an identity based on acceptance of, and belief in, a set of principles which the European peoples share and in which they see and recognise themselves. In short, communitarian identities are succeeded by constitutional identity. This identity's value, its superiority lies in its incorporation and transcendance of the many identity traits previously constructed. The European constitutional heritage may be presented as an "in-between" concept, a principle lying between concrete particular and abstract universal. Far from being a cold set of reasoned assertions that destroys all sense of solidarity within affective communities, it is made up of principles which

not only come from the values recognised by the European peoples but also reflect those values, that is to say at once transform them, generalise them and return them to the states. Unlike national identity constructed by destroying or subjecting "particularist" allegiances, constitutional identity, by grafting onto the universal or universalisable principles of the heritage the different ways in which individuals and groups see themselves, enables other identities to be deployed without conflict.

How is this "marvel" possible ? No doubt a case of an idealistic lawyer getting carried away! Yet, like it or not, the logic is quite simple. In a Europe made up of societies with different political, cultural, linguistic and religious histories, the rallying factor - the heritage - can only be principles, principles that are both shared and respect diversity. The identity of heritage, unlike that of the nation, does not produce unity or uniformity; it produced harmony, in that the European heritage "works" like a common constitutional culture which socialises citizens sufficiently to enable them to live together their particular histories and to transform them precisely by relating them to one another. Can the heritage do more ? Can it also produce a body of European constitutional law ?

B. The European constitutional heritage, melting-pot of European constitutional law ?

The distinction between European constitutional heritage and European constitutional law might appear Byzantine. But it is not; rather it serves to identify different legal realities and areas (1). But, while the two notions are distinct, they are interrelated and the heritage favours the emergence, if not of the European constitutional law, of a European constitutional law (2).

1. The distinction between European constitutional heritage and European constitutional law

The expression "European constitutional law" can be understood in at least two ways. It can refer either to all the rules, principles and institutions posited by European treaties, those of the European Union and/or the Council of Europe, or the rules, principles and institutions common to the national constitutions of the European states. In either case, the meaning is purely metaphorical. The European treaties cannot be described as a "European constitution" for want of having been submitted to popular approval, of any clearly organised separation of legislative and executive powers, of inclusion in a single text readily identifiable by the people, or of any provision for scrutinising the European authorities' decisions for compliance with fundamental rights. No doubt more or less developed elements are to be found in these treaties which belong to the constitutional realm; no doubt it is also possible to imagine a genuine European constitution being drafted to replace all the European texts, agreements, protocols, arrangements and the like. But to affirm today, as the Strasbourg Court has done, that the European Human Rights Convention is the constitutional instrument of the European public order in the field of human rights12, or, like the Court in Luxembourg, that the Community treaties, although concluded in the form of international treaties, nonetheless constitute the constitutional charter of a Community of law13, has more to do with political or strategic intent than with describing Europe's actual institutional system.

The second sense of the expression "European constitutional law" is more difficult to refute, being much closer to the definition we have given of the European constitutional heritage. So

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12 European Court of Human Rights. 23 March 1995, Loizidou v. Turkey, Preliminary Objections, para. 75.

13 Opinion 1/91, R.U.D.H., 1991. p 91.

the relationship between the two ideas needs to be explained. It is really quite simple: the word "heritage" refers to a set of principles, "law" to the implementation of those principles in particular legal systems. The principle of free elections at regular intervals is found in all the national constitutions and so is one element of the European constitutional heritage; but the implementation of that principle varies from one state to another: in some, members of parliament have to be re-elected every four years, in others, every five; in some, they are elected by proportional representation, in others by a majority ballot; in some, only the legislature is elected by universal suffrage, in others, the wielder of executive authority also... Similarly, because it is also shared, the principle of scrutiny of legislation for compliance with the constitution is part of the European constitutional heritage; but is carried out in different ways in different countries: diffuse in some, concentrated in others; a posteriori in some, only a priori in others... And so it is with all the principles that make up the heritage.

While convergence is naturally a characteristic of the notion of heritage, divergence is just as necessarily a characteristic of the notion of European constitutional law. Indeed, employed in the singular, the term is not strictly correct; it would be more accurate to speak of European constitutional laws. Some people, knowing lawyers' liking for making play with categories, will interpret this distinction as mere casuistry of no consequence: one man's European constitutional heritage is another man's European constitutional law. It would suffice to agree which term to use. But agreeing on the terms implies that they are not interchangeable and that each identifies a particular reality. In this instance, grouping together the constitutional principles common to Europe's various states under the term European constitutional heritage rather than under European constitutional law is justified in order to avoid confusion about the complex process of European construction. The word "law" refers to precise rules governing the organisation of society and cannot therefore, on pain of giving the impression that the various states organise the constitutional principles they have in common in the same way, serve to designate those principles.

In short, European constitutional heritage and European constitutional law are situated in two different spaces of reference. The first refers to meta-national space and expresses the constitutional culture common to the European states; the other refers to national space and expresses the way in which each state interprets, translates and adapts those principles to its own particular political history. Obviously, these two spaces are not watertight; but they must each first be correctly identified in order to be able to determine the relationship between them and, in particular, the possible influence of the heritage on the construction of European constitutional law.

2. The relationship between the European constitutional heritage and European constitutional law

The relationship between European constitutional heritage and law must be seen in dialectical terms. The heritage is fed by European constitutional law; the principles of which it is made up are extracted from the different national constitutions as the result of an intellectual operation of comparison and synthesis which distils the general or universal content of the common provisions worded differently in different countries. This operation, it is true, is not simply a matter of rewriting; through the effort of abstraction required by couching the different national constitutional provisions in the unified form of a principle, the latter naturally has a relatively autonomous content of its own. However, the constitutions of the European states remain the source of the heritage principles. This link between European constitutional heritage and law is acknowledged moreover both by the European Human Rights Convention and by the Maastricht Treaty which stipulates (Article F) that "The Union shall respect fundamental rights ... as they

result from the constitutional traditions common to the Member States, as general principles of Community law".

Conversely, the heritage principles influence European constitutional law and may bring about changes favouring convergence. This feedback process obeys the rules of "constitutional acculturation". The heritage functions as the common constitutional culture in which European citizens are socialised. Accordingly, the latter are gradually led not only to share and assimilate common principles but also to share and adopt a common way of putting them into practice in terms of law. In other words, differences in national translation of the heritage principles can diminish under the effect of the constitutional socialisation they produce. In several European states, the principles of respect for privacy and the right to a fair trial have already brought about constitutional or legislative changes which are now causing their practical arrangements to converge. Similarly, the principle of the primacy of the constitution is not only pushing traditionally recalcitrant countries towards the idea of constitutional scrutiny of legislation, but also, throght the comparison of systems, is favouring gradual harmonisation in the organisation of constitutional justice. For instance, extension to private individuals of the right to refer matters to the Constitutional Council appears inevitable to its former president, Robert Badinter, insofar as this is the rule "in all the major democracies that have constitutional courts".

Slowly, too slowly for some, not slowly enough for others who seek to curb or even reverse the trend, the heritage is bringing about convergence in European constitutional law. However, progress is not homogeneous; its pace and intensity vary according to the subject matter. At the present time, all the national constitutions contain two broad categories of provisions: those which organise the separation of powers, share legitimacy and power between institutions and govern relations between them - what Maurice Hauriou called the political constitution - and those governing fundamental rights and their protection against the acts of the authorities and private persons, whether natural or legal persons, - what the same Maurice Hauriou called the social constitution14. However, the tendency towards convergence of rights is not the same in the two types of constitution. Where the "political constitution" is concerned, it is clear, despite narrowing of differences, that the divergences continue to prevail: some states are monarchies, others republics; in some, the President of the Republic is elected by the people, in others by the Parliament; some have two assemblies, others a single chamber; some have a federal structure, allowing for "regional" legislative powers, others a unitary structure in which legislation is the prerogative of central government; some have an organically independent judiciary, others only a judicial authority of which some members, the prosecution service, are subject to the hierarchical authority of the Minister of Justice.... The obstacles to the formation of a body of European constitutional law, in the sense of institutional law, are therefore substantial and will probably long remain so for it is the institutions, the structure of the state, the form of government that express national traditions and history.

On the other hand, where the "social constitution" is concerned, it is equally clear that convergences outweigh divergences. This is due not only to the statement of the same fundamental rights in the European constitutions; it is due above all to the fact that the national courts, and especially the constitutional courts, interpret these rights convergently and derive comparable legal effects from them. Comparing constitutional case law, we find a dual convergence. Firstly, the courts employ the same methods to act as the guardians of constitutional rights: they assess the reasonable, logical or excessive and disproportionate nature of violations of particular liberties. They then arrive, for the main categories of freedoms, at often similar interpretations and findings.

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14 Maurice Hauriou, Précis de droit constitutionnel, Sirey, 1929.

For example, the Belgian Cour d'Arbitrage, in a decision of 21 december 1990, ruled on the constitutionality of the legislation on the restriction and control of electoral expenditure and the public funding or political parties in the same terms as the French Constitutional Council in its decision of 11 January 1991: 'The law does not violate the principle of equality - declared the Belgian Court - provided that the funding seeks to ensure the satisfactory operation of democratic institutions in keeping with the plurality of opinion, and takes into account the balance of political forces resulting from the franchise, which implies that it must have the effect neither of affording the dominant parties an advantage, nor of placing the small parties at a disadvantage". The Spanish Constitutional Court found, like the French Council, that while teachers in private establishments may be required to exercise discretion in order that the particular character of such establsshments may be respected, they continue to enjoy their freedom of opinion; and, in ruling on an amparo appeal it annulled a decision to dismiss a teacher on the sole grounds that he did not practise the religion of the Catholic school that employed him.

Equality, which is certainly the principle most frequently relied upon in appeals to constitutional courts, is treated in much the same way, whether the scrutiny be a posteriori or a priori. In either case, the constitutional courts hold that the equality principle must be considered concretely, in actual circumstances, and that is not violated when the legislator treats different circumstances in different ways.

In Belgium, the Cour d'arbitrage defined its doctrine in its decisions of 13 July 1989, 28 September 1989 and 13 October 1989: 'The constitutional rules of equality between Belgians and non-discrimination do not rule out differences of treatment between different categories of persons, provided that the differentiating criterion can be objectively and reasonably justified; such justification must be assessed in relation to the purpose and the effects of the rule in question; the principle of equality may be deemed violated where it is shown that there is no reasonable relationship of proportionality between the means and the aim." In Spain, again, the Constitutional Court adopts the same reasoning: violations of the principle of equality may be found constitutionally acceptable only if founded on "objective and reasonable justification, in accordance with generally accepted criteria and values", if the justification is, as in Belgium, appropriate to the purpose and effects of the provision concerned and if there is "a reasonable relationship of proportionality between the means and the ends".

Thus, through the judiciary, through the work of the constitutional courts, a body of European constitutional law is being constructed, in the sense, this time, of a common law of fundamental rights. This construction is lacking neither in originality nor in historical and theoretical interest since it shows a European constitutional law which, unlike national constitutional law, is being created without reference to a sovereign power - the nation or the people - without intervention by a constituent assembly, without even any formal constitution; this constitutional law is above all law made by the constitutional courts. No doubt it forms part of the contemporary trend in national constitutional law, which is also being profoundly transformed by the growing authority of the constitutional courts; and no doubt it also effectively safeguards, in the spirit of Article 16 of the 1789 Declaration of the Rights of Man, the rights of persons and groups in all European societies. But it is not to disparage the work of these courts to contend that European constitutional law will not exist as such and assume genuine democratic importance until such time as the peoples of Europe have, by the adoption of a formal text, manifested their will to acquire a common political authority to live and realise together a shared design for society. This formal text will be, quite simply, the European constitution. The European constitutional

heritage cannot take its place; but it is certainly the home, that is to say the place where the European family can, gradually, gather together under the same roof.

b. European constitutional heritage and the history of Europe - Report by Mr Gérard SOULIER

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The question raised in this seminar is clearly not innocent. It refers us first of all to its author. In a preparatory document Dominique Rousseau formulates "the hypothesis that a European constitutional heritage may be gradually identified in the complementary and convergent jurisprudential work of the constitutional judges". In the first place, he asks us about "the relevance of the concept of European constitutional heritage" and he also asks us to reflect on "the interest of the notion of European constitutional heritage".

We should not be more innocent than the author. We may assume that, as a capable researcher, he has some idea of the answer. We also have his public statements, on page 4 of the cover of his work on constitutional justice in Europe: "... beyond the differences, the principle and practice of constitutional justice profoundly transform the legal-political systems and more generally the aspect of democratic citizenship, whose shape will in future be determined by a European heritage of rights and freedoms rather than by national circumstances".15

Dominique Rousseau's hypothesis is clearly an interesting one and we owe it to him to discuss it.

Let us begin with the use of the word "heritage" ("patrimoine") in this field. There is nothing inappropriate in that, in so far as there is nothing new about the use of the word heritage in a figurative sense. Lexicographers have shown that in the twelfth century expressions such as patrimonium populi for "public revenue" and patrimonium Crucifixi for "possessions of the Church" were used, while the expression "heritage of Saint Peter" to indicate the temporal possessions of the papacy has been in evidence since the thirteenth century.16 The general meaning, "that which is transmitted to a person or a community from ancestors or preceding generations", may therefore be applied in the socio-cultural field; and while its use in this sense tends to be more widespread at the present time, it is not something that only began during the last few years. For example, Pierre Chaunu speaks of the eighteenth century as one of the "two or three most important legs of our heritage" and considers that the Age of Enlightenment represents "the lasting eighteenth century, which forms part of our heritage".17 A further example is provided by the President of the Federal Republic of Germany, Mr. Roman Herzog, on the occasion of a speech to the European Parliament, in which he cited the following phrase from Ortega Y Gasset: "if today we were to take stock of our intellectual property ... we would find that most of [it] derived not from our respective fatherlands but from our common European origin".18 In the cultural field, therefore, it is possible, without being over-audacious, to speak of a European heritage. All that, of course, assumes that we have the advantage of an inventory.

In the legal and political field the use of the word "heritage" has also been established for many years; as we shall see, it is also well established in connection with the construction of Europe.

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15 D. Rousseau, La justice constitutionnelle en Europe, Montchrestien, col. clefs, 1992; emphasis added.

16 Cf. Dictionnaire historique de la langue française (A. REY, editor) Paris, Le Robert, 2 vols., 1992.

17 P. Chaunu, La civilisation de l'Europe des Lumières, Arthaud, 1971; champs, Flammarion, 1982, pp. 11-12.

18 "Europe" bulletin, Brussels, no. 6581, 11 October 1995.

In this field there are elements associated with constitutional law. The idea of a "constitutional heritage" therefore seems admissible: but can that formula be raised to the status of a concept?

It is clear that "constitutional heritage" cannot in any event be a concept of positive law. It is not laid down in any legally authorised text and can only be a concept of the theory of law or of the sociology of law. So what does it consist of and what use does it serve?

The expression must be broken down into to its constituent parts. The adjective "constitutional" raises no problems in so far as the object is easily identifiable. It is therefore to the noun "heritage" that we must turn our attention. It is easy to find substitutes for this word: expressions such as "constitutional traditions" or "constitutional patrimony" ("acquis constitutionnels") or even "constitutional principles" could quite adequately cover what can come under the term "constitutional heritage". It is principally a manner of speaking. From that aspect, the word "heritage" is simply a relatively convenient linguistic sign, because it creates an image; it allows all kinds of "assets" inherited from previous generations to be conjured up, whether historic monuments or various cultural or political social products. It should be noted, moreover, that nowadays the expression is laden with highly positive connotations in all its uses: heritage is a communal asset which inspires respect and which should be preserved, protected, even safeguarded (there are "masterpieces in danger") and, lastly, celebrated. The increasing success of "heritage day" - perhaps a modern manifestation of ancestor worship - shows a very wide public is sensitive to a past or a history which it has inherited. As the status of the word has risen the reference to heritage confers value on things, while deep down there is an emotional dimension that attaches to the word: when a particular object or a particular institution becomes part of heritage that means, to a certain extent, that it is placed on an altar and no longer affected by the passage of time.

Is it necessary to go further? Can the expression really be made into a concept? We need to experiment with the expression "constitutional heritage" by applying to the word "heritage" the various forms in which the word is normally used. We know, for example, that a heritage has both an active and a passive aspect and that it can be used to advantage just as it can be wasted. That is certainly not what we have in mind when we speak of a cultural heritage, for example, and the same undoubtedly applies where we advance the idea of a European constitutional heritage. What becomes part of the heritage is what is best, but that should not make us forget - although there is a risk that we shall do so - that in history the best has constantly accompanied the worst: for example, the prodromes of racist theories appeared in the same period as the philosophy of human rights was established, in the century of the "Enlightenment"! However, we may pursue the investigation by deliberately yielding to the game of the metaphor. The resource of the game may prove fertile: as Heraclitus said, "it is the instinct of the game, unceasingly awake, that calls new worlds to light".19

This leads us to take an interest, first of all, in the consistency of this heritage: how was it formed? what does it consist of? - all questions which, in a word, raise the problem of the constitution of the heritage. We shall then go on to examine matters connected with the subjects affected by this heritage, i. e. those who established it, but even more those entitled to succeed to it, in short, that which has to do with the devolution of the heritage: does this European heritage concern only Europeans? Similarly, is it the heritage of all Europeans? History can shed some light on these various questions.

I. THE CONSTITUTION OF A COMMON EUROPEAN HERITAGE

19 Cited by G. Deleuze, Nietzsche et la philosophie, PUF, 1962, p. 28.

Our research has two objectives: we need to establish where the word "heritage" comes from and where the thing comes from. As regards the word, we need to ascertain for how long have we spoken of a "heritage" in this sphere and who established the use of the word. In other words: who are the inventors, if not of the European heritage, at least of the concept? As regards the thing, we need to establish what the content of this heritage is and how it is constituted. That is what leads us from recent times to more remote times. History consists in going back through time.

A. The invention

In the field of European legal and political institutions the concept of "common heritage" ("patrimoine commun") is found in several important European diplomatic instruments. It is apparent that it is the authors of these documents who were the inventors of the concept itself.

The first reference is found in the Brussels Treaty of 17 March 1948, which, after being modified and completed by the Paris Protocols of 23 October 1954, constitutes the legal basis of the Western European Union; it is next found in the Statute of the Council of Europe of 5 May 1949 and also in the Preamble to the Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. These three documents are very close as regards their inspiration. In the first, the High Contracting Parties undertake "... to fortify and preserve the principles of democracy, personal freedom and political liberty, the constitutional traditions and the rule of law, which are their common heritage". In the second, the States Parties to the Treaty "[reaffirm] their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy". Article 1 states that "[t]he aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage ...". Lastly, in the Preamble to the Convention, the States signatories thereto refer, "as the governments of European countries", to their "common heritage of political traditions, ideals, freedom and the rule of law ...".

This attachment to common values is also found in the European Community, not in the Treaties but in the important Declaration on the European Identity adopted by the Copenhagen Summit on 14 December 1975, with, admittedly, a lexical variation, which makes no fundamental difference: the Member States of the Community refer to a "common heritage" of which they propose to make an "inventory"; they also evoke "a civilisation which is common to them" and which finds expression in "the principles of democracy, the rule of law, social justice - the objective of economic progress - and respect for human rights, which constitute fundamental elements of the European identity".

The words "heritage", "patrimony", "identity" and "civilisation" cover virtually the same elements in the legal and political field in the form which it has taken in the history of Europe: individual and political freedoms, democracy, the rule of law or legislation (a metonym for law when used in this sense) are their primordial references, since those three elements are intimately associated with moral values. It will be noted that the Statute of the Council of Europe gives priority to spiritual and moral values and thus confers on them a sort of metapolitical scope. In fact the elements which define the broad lines of this common heritage are themselves comparable to these values: respect for persons and their fundamental rights and the rule of law are values which are at the same time legal, political and moral.

Returning in this way to the invention of the concept of common heritage enables us to understand how a word was chosen. It proceeds simultaneously from an act of consciousness and from an act of will. Consciousness, in the first place, of an extreme threat. The anguish expressed by Paul Valéry at the end of the First World War became, after 1945, the anguish of a continent. Phrases too well known to be repeated: "We other civilisations now know that we are mortal", or: "Everything was not lost, but everything felt that it was dying". Paul Valéry expressed the same anxiety at a conference held at Zurich on 15 November 1922: "... we are almost destroyed by what is destroyed ...; our fears are infinitely more precise than our hopes ...".20 After an even more terrible second world conflict in which the stakes were no longer merely territorial, as in previous wars, but concerned an entire civilisation, consciousness of the threat was commensurate with the hardship sustained. Hence the idea of confirming the existence of a heritage common to Europe: heritage in order to exorcise the spirit of destruction; common in order to ward off these fatal divisions. That which makes up the heritage must be preserved in any event, like a common asset that is to be handed down from generation to generation but cannot be disposed of by these generations, an asset that is in a way inalienable, like an asset in mortmain.

Consciousness of the threat thus determines the will. The heritage has been invented in both meanings of the word: we find, as we discover a treasure, that certain institutions established in the course of history form a heritage representing that which is most precious in the political and legal order. There is also invention in the meaning of a creative act, one might say a performative act: 21certain institutions are set up as elements of a heritage and by the very fact of being declared as such become institutions which are in some way above the others. This happens at the same time as the constituent elements of this heritage are stated.

B. The inventory

If we wish to keep to the essentials, the inventory of this heritage can be drawn up quite easily. The diplomatic instruments mentioned above clearly defined the assets of the estate: the fundamental rights of persons, the essential rules of political democracy including respect for pluralism and rights of expression for the minority and minorities, the rule of law. The principles recognised by the major international texts are also recognised in theory. If we take Western political systems as a reference framework, which compared with European constitutional systems represents a wider group which embraces them, in the way in which the species includes all the features found in the various types,22 we may agree on this summary suggested by J.L. Quermonne: "Government by the majority which respects the minority, based on free elections at regular intervals and observance of the State governed by law". The author goes on: "This democracy has a history ...".23

In the body of the work, J.L. Quermonne uses the word "constitutionalism", with which he associates the guarantee of fundamental rights and the principles of a State governed by law. He defines the word as follows: "the public powers are required to respect the Constitution, as are the citizens, which means ... that the public powers must allow the constitutionality and legality

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20 P. Valery, Variétés I et I, 1924-1930; Gallimard, coll. idées, 1978, pp. 13, 15, 22.

21 in the meaning given to the word by linguists; cf. J.L. Austin, How to do things with words, 1962; French translation entitled Quand dire, c'est faire, Le Seuil, 1970.

22 The specifically European elements of the Western world are described below.

23 cf. J.L. Quermonne, Les régimes politiques occidentaux, Le seuil, coll. points, Third Edition, 1994, p. 4 of the cover; the elements presented there are explained in pp. 18-19.

of their acts to be reviewed by an independent judicial body".24 Here we are at the centre of the problem: and at the centre of the centre is the control of constitutionality, the dominant theme of this seminar. We must therefore stop there.

D. Rousseau observes that it is only during the last 20 years or so that the control of constitutionality has become widespread in Europe (apart from in Great Britain, of course). Is that sufficient time for the development to be capable of being regarded as already forming part of the legal, political and, in part, constitutional heritage, if that concept is accepted, with the idea of an irrevocable acquisition that we would associate with it? That brings us to a more detailed analysis of the concept of heritage.

When we refer to heritage we are referring to history; when we make an institution part of heritage we confer a certificate of historicity on it and thus a depth and value commensurate with the length of time it has been incorporated. Because all society is an historical formation, it necessarily develops its own history, which, in return, has an kind of legitimising value towards everything that is institutionalised in time. It may even be said that the longer an institution's history, the more venerable it is. "Do not think only in the short term", taught Braudel,25 whose entire work is built on the distinction between three historical tempos: "the fast tempo of events, the extended tempo of episodes, the slow, lazy tempo of civilisations".26 The question therefore becomes: within democratic institutions, what is the historical depth of the control of constitutionality? It is necessary to step back.

Does democracy, with its essential procedures, belong to the extended tempo? After all, democracy, in the sense in which we mean it, is very recent in our history. It has only been established on a long-term basis in France since the foundation of the Third Republic, and if we consider that universal suffrage has only really existed since 1945, when it was extended to women, that makes only fifty years or so, which is derisory in terms of history. However, the institutional movement at the origin of democracy undeniably dates from the French Revolution, and the Revolution did not happen all of a sudden: we can go back in time and incorporate in that history a movement of ideas which was clearly stated in the philosophy of the Enlightenment, we can make of that philosophy the extension of a process begun at time of the Renaissance, and go even further back to the great and long movement for the emancipation of the towns during the Middle Ages (it was said at the time that "the air of the town makes one free") and even, as regards the "imaginary institution"27 - so very active during the Revolution - to the ancient city.

The recognition and guarantee of fundamental rights also has a long and slow history which one can read by going back, for example, to the great English documents, right back to the Magna Carta of 1215. French history was written in a different way, but the historical elaboration was also long; it may be regarded as coinciding with the historical elaboration of democracy, since the two things are inseparable. Thus a writer like Esmein, who, under the Third Republic, denied that the Declaration of 1789 had constitutional value, none the less considered that the principles proclaimed in 1789 appeared, in the eyes of the drafters of the 1875 Constitution, "as a heritage

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24 op. cit. p. 19.

25 F. Braudel, Ecrits sur l'histoire, Flammarion, 1969, coll. Champs, 1989, p. 61.

26 F. Braudel, Grammaire des civilisations, Arthaud-Flammarion, 1987, p. 30.

27 cf. C. Castoriadis, L'institution imaginaire de la société, Le Seuil, 1975, in particular p. 179.

definitively established as that of the French people".28 It will be noted, first, that the concept of a legal-political heritage is definitely not new and that it also seems itself to have a certain historicity and, secondly, that fundamental rights assuredly form part of that heritage. However, its use is limited to the national level.

If we restrict the investigation to the more strictly constitutional (in the formal meaning of the word) question, we shall see that constitutionalism really developed in the nineteenth century but that it began with the French Revolution and, more precisely, it is worth remembering, with the registers of grievances, none of which demanded the abolition of the monarchy, while all or virtually all demanded a constitution as the end of absolutism; and it is true that the theory of the social contract, combined for the occasion with L'Esprit des lois, had prepared the ground.

The control of the constitutionality of legislation does not seem to have such historical depth and it was not found in the imaginary institution or, if you wish, in the social representation of democracy. The question was discussed at the time of the Revolution, however, and, furthermore, by the Convention. What must be stressed is that in the revolutionary debate the idea of a control of constitutionality was linked with respect for human rights, which were intended to be put beyond the reach of the representative authorities. Robespierre himself stated on 10 May 1793 that: 'The Declaration of Rights is the Constitution of all peoples ...; let it be unceasingly present in all minds; let it shine at the head of your Public Code; let Article 1 of the Code be the formal guarantee of all human rights; let Article 2 state that any law which human rights is tyrannical and void". However, Robespierre did not say how or by whom such a law should be declared void. This is where Sieyès stepped in, with that great address to the Convention on 2 Thermidor of Year II: "First of all, I demand a jury for the constitution (jury de constitution) or, to francicise the word "jury" somewhat and to distinguish its sound from the sound of the word juré (juror), a jurie constitutionnaire; what I demand is a genuine body of representatives with the special mission of hearing claims against any violation of the Constitution ... Give the constitution a safeguard, a salutary brake to contain each representative action within the limits of its special powers, establish a jurie constitutionnaire".29 The proposal was vigorously opposed, however, especially by Thibeaudeau: "This monstrous power would be everything in the State. In seeking to give the public powers a guardian we would provide them with a master who would put them in chains in order to watch over them more easily". Thus the jurie constitutionnaire proposed by Sieyès eventually became the Sénat conservateur of the Constitution of the year VIII.30 Thus control of the constitutionality of legislation took the form of a bad memory in what is generally called the "republican tradition".31

A striking feature of this question, as of so many others, is the fact that the revolutionary debate cut across a line of argument the essential part of which was quickly reached but which has since remained virtually unaltered. We must not let ourselves be deceived, however. The same words do not have the same meaning in fundamentally different historical contexts. The Declaration of Rights in 1789 established a break with the past. It represented a revolutionary act, a new institution; it was the Revolution itself. It is therefore understandable that its authors wished to

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28 A. Esmein, Eléments de droit constitutionnel français et comparé, Sirey, 1914, p. 561. Esmein considered that in the body of the Constitution of the Third Republic the guarantee of rights "has only the value of a restriction or moral obligation imposed on the legislative power" (p. 564).

29 These two speeches are cited in A. Esmein, op. cit., pp. 599-600.

30 According to Article 21 of the Constitution, the Sénat conservateur was to "uphold or annul all measures referred to it as unconstitutional by the Tribunal or by the Government".

31 cf. C. Nicolet, L'idée républicaine en France, Gallimard, 1982, in particular p. 349 et seq.

protect it and place it above legislation and above constitutions. Once these rights have become part of the popular heritage and are recognised as such by an undeniable consensus, the question of their protection does not arise in the same terms. Furthermore, the experience of the Third Republic shows that this consensus allowed a real development of public freedoms, by both legislation and case-law, in particular the case-law of the Council of State. This experience tends to show that control of the constitutionality of legislation does not seem to be a logical and necessary implication of the historical development of democracy or indispensable to the success of fundamental rights. A more specific question then arises: does the establishment of control of the constitutionality of legislation in France, or, more accurately, the assumption by the Constitutional Council of the role of a constitutional court (contrary, it should be observed in passing, to the letter of the Constitution itself)32 represent sufficient progress for our democratic institutions to justify its inclusion in our heritage?

An inventory cannot dispense with a balance sheet. The balance sheet should be drawn up in minute detail, but that would be inappropriate here. It should be stated that the breakdown of profits and losses makes it necessary to go beyond the national context. At the domestic level, at the outset, it is possible, without going into the underlying justification, to point to recent legislative developments which rather represent a step backwards in matters of public freedoms, although the Constitutional Council found no fault with them. To take just one example: identity checks, which according to the liberal and republican tradition were limited strictly to cases where the courts had authorised them or where an offence was being or had just been committed, have been widely extended by all governments during the last 20 years. During the debates on the "security and freedom" act in 1978 Mr. Peyrefitte, in response to critics, inserted a requirement that these checks should be carried out courteously. That little joke has since been removed, but now checks can be carried out where there is a risk of disruption of public order. In the right circumstances everyone becomes a suspect. One might also mention the recent amendments to the French Code on Nationality, which call in question a tradition (and therefore the heritage in such matters) and also introduce a degree of legal uncertainty for children born in France to foreign parents. From the point of view of the fundamental rights of persons, this balance sheet shows a liability, a certain loss which the Constitutional Council did not oppose, or which it did not believe it should oppose.

If we now go beyond the national context, the present situation is paradoxical. One the one hand, the national authorities are no longer autonomous within the usual meaning of sovereignty. In the actual field of fundamental rights, the mechanism established on the basis of the European Convention has become relatively effective with the development of the case-law of the European Court of Human Rights. The view might be taken that, overall, there has been a benefit at this level and, while certain rules of the Convention have been interpreted as having direct effect in the domestic order, the impact of that breach of the principle of sovereignty remains limited. That is not the position at the Community level, however.

The Court of Justice of the European Communities has meticulously established a line of decisions with a weighty constitutional impact. The Court of Justice summarily stated that the Community constituted an autonomous legal order, in other words an entity whose principles of explanation and legitimation were to be found in the Community itself. Thus, by conferring direct effect on the Treaty and then on certain directives, whenever the actual content of the provision in question so permitted, the Court gave maximum extent to the principle of the direct effect of Community rules. The Court also laid down the general principle of the primacy of Community law over the domestic laws of the Member States, to the extent of considering that

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32 None of the provisions establishing and organising the Constitutional Council uses the words "judge" or "court".

the validity of a Community measure could not be called in question, even where it ran counter to "either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure", and stated that "[t]he validity of such measures can only be judged in the light of Community law".33 However, the Court made good the loss sustained by the States as a result of fundamental rights being taken into charge at Community level: "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community". Constitutional traditions common to the Member States or common European constitutional heritage may be regarded as equivalent concepts and therein the place of fundamental rights is confirmed.

The Court added the finishing touch by proclaiming that the Community is "a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".34 In more sober terms, the Court describes the Treaty of Rome as "the constitutional charter of a Community based on the rule of law".35 To speak of a "Community based on the rule of law" does not only mean that the Community has a legal basis; it means that the concept of a State based on the rule of law is transposed to the Community level, with all that implies: the application of the principle of legality; the existence of a court with jurisdiction to review the question of whether all the acts of the institutions established, including, therefore, the acts of the Member States in their capacity as sub-groups of the Community, are in conformity with the Constitution (in this case, therefore, with the basic Treaties which take the place of a Constitution). The paradox is clear to see: on the one hand we have this extraordinary promotion of the control of constitutionality on the basis of which the European construction operates and proceeds; on the other hand we have a reduction in the control of constitutionality at the national level in so far as the Constitution is clearly no longer sovereign owing to the establishment of what might be called an overhanging constitution instituted at Community level.

The balance sheet is therefore contrasting, to say the least. It is all the more contrasting because the Court of Justice generally tends to give priority to material criteria rather than formal criteria, while the primacy of the basic Treaty, as interpreted by the Court, is ensured in any event. The control of constitutionality is fully effective only in so far as legal rules are organised along hierarchical lines in the form of a pyramid. The European construction is very different: in addition to the plurality of sources, which is favoured in various ways (by the mechanism of "mutual recognition", for example), there are the "de-hierarchisation" and "de-formalisation" of the law which characterise Community case-law.

What conclusion is to be drawn on this point? We should take time to reflect on the following anecdote. One day a French politician, a former minister, a supporter of great causes and a great talker who regularly appears on television, related a conversation that he had had with Cho en Lai: "What is your opinion of the French Revolution?" he asked. "The French Revolution?" his Chinese host replied after reflecting for a short time: "It's a little too early to say!" We may admire the appropriateness of such an answer and appreciate such sharpness of mind. We may

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33 Internationale Handelsgesellschaft, 17 December 1970.

34 Parti écologiste "Les Verts", 23 April 1986.

35 Opinion concerning the Treaty on the European Economic Area, 14 November 1991.

also see in the remark, independently of the calculation of the politician, real wisdom. After all, even in France the bicentenary of the French Revolution give rise to serious discussion of the question whether or not it was over; the discussion concerned history and at the same time the way in which history is made.36 Therefore the discussion is not closed. In any event, however, the idea of indefinite and continuous progress, as Condorcet, for example, thought, seems to have been revoked in our time. History undoubtedly has a meaning (in a certain sense), but there is no longer a high society to believe in a single meaning. As Braudel says, we must "abandon the linear".37 Furthermore, the examples of the Third Republic and Great Britain, where the absence of any control of constitutionality did not mean that fundamental rights (which are the most important issue) were threatened to a greater degree or guaranteed to a lesser degree than elsewhere, and, on the other hand, the equivocal example of the Constitutional Council, do not allow the formal conclusion to be drawn that the control of the constitutionality of legislation has definitively become part of that which is brought together under the name of common European heritage. At the very least, and without adopting the Chinese approach more than is necessary, we should accept that it is perhaps a little early to say.

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36 cf. O. Betourne and A. Hartig, Penser l'histoire de la Révolution, deux siècles de passion française, La découverte, 1989, versus F. Furet, Penser la Révolution française, Gallimard, 1978.

37 F. Braudel, Ecrits sur l'histoire, op. cit., p. 290. This work dates from 1959, i.e. a time when it was widely believed that history and progress followed the same route, hand in hand.

In any event, if the control of constitutionality, as an element of this heritage, is at least a matter for controversy, it is surely possible to agree on fundamental rights, at least on the principle itself. From this aspect, the decision of the Court of Justice in Internationale Handelsgesellschaft represents a form of the solemn inclusion of fundamental rights in the common heritage. But all has not been said: are these rights extended everywhere and by everyone in the same way? That remains to be verified. It is therefore necessary to turn to those claiming rights under others. Who are the heirs of this European constitutional heritage and what to they do with it?

II. THE DEVOLUTION OF THE HERITAGE

The heritage is the product of an historical accumulation that cannot be reduced to a simple addition. Each of its constituent elements has its own history, but that history cannot be separated from the history of other elements (for example, baroque art cannot be separated from the Counter-Reformation); nor can it be separated from a wider history which encompasses it. The history of Europe is the sum of a number of histories: the history of the peoples of which Europe consists, the history of the many cultural currents which flowed over these various peoples, in confrontations as in all kinds of cultural and commercial exchanges, forming transnational sub-groups across the continent; it is possible to speak of unities, but not of a unity. How, then, can we extract from that constantly effervescent and constantly disintegrating whole a heritage which is actually common to Europe and of which the European peoples are be the heirs?

This heritage is not shared out according to the rules of the Civil Code which determine the order of devolution of property. It bears more resemblance to a common undivided asset of which Europeans are in a way the usufructuaries. But who are these Europeans? Europe, it must be said again, is not one, with apologies to Nietzsche; it was never one and it is still a long way from being one, even if an aspiration in that direction has emerged during this century. Is the legal-political heritage essentially at issue here is the heritage of all Europe? Is it the heritage of Europeans alone? Where we speak of Europe and European civilisation, we always mean, although generally by implication, the western part of the continent, which, no doubt wrongly, has become identified with the continent itself, while Eastern Europe has been ignored and, too often and for too long, disregarded.38 Whatever the position may have been in the past, however, and whatever it may be now, it is in the sub-group of Western Europe that the direct descendants, in short the heirs entitled to a reserved portion of this heritage, are found. Is a portion of some kind not available for the various types of collaterals in the other Europe, or even, to use the language of Braudel, "the other Europes"? There is nothing to prevent them from claiming rights as regards this heritage, of course: but do they enjoy them to the same extent?

A. The heirs in the direct line: Western Europe

It would be necessary here to undertake a long genealogical research and go back to the most distant ancestors of the societies of Western Europe. That journey back into history would encounter many obstacles, the first of which is represented by all the stories, fables and legends that all peoples tell one other about themselves. Clearly, history must take these myths into

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38 cf. G. Soulier, L'Europe, Histoire, Civilisation, Institutions, A. Colin, 1994 (Part 1, chapter 1).

account - and make history out of them - but it must not submit to them. Let us take the example of France.

As Marc Bloch rightly stated, "There is no history of France, there is only a history of Europe". In its full sense, Marc Bloch's aphorism is evidently aimed not only at the history of the territorial State and all the battles fought against the neighbouring powers for the purpose of extending or defending that territory, but also, and even particularly, at the history of French society or French civilisation. Following the historiography developed in the sixteenth century and elevated to the status of national religious dogma in the nineteenth century, generations of French people learned at school: "Our ancestors the Gauls ...". The Gauls, a Celtic people from Germany - and therefore conquerors, in short immigrants! - who had taken their name from a Germanic language, Frankish, Walha, whence also comes Galois, which is not to be confused with its homonym galois, from galer, to amuse oneself, which produced galant (gallant), on whose basis this common place of ancestors who were great drinkers of barley beer and much given to womanising was established. Virtually nothing of these brave Gaulois remains in our culture, just a handful of words.39 As far as history is concerned, it would be far more accurate to say "Our ancestors the Gauls (we should not go so far as to disown them), the Greeks, the Romans, the Jews, the Germans, the Arabs, the Vikings ...", but legends live on. Clovis? He was a Frankish chief (and therefore of Germanic origin). Charlemagne? He is called Karl der Grosse by the Germans, who claim him as much as the French do. Although no historian worthy of the name enters into this type of quarrel any more,40 it was clear when we saw the anniversary of the baptism of Clovis that it was myths, rather than history, that continued to form the basis of political attitudes. If we were to pursue the study of the French example, it would be necessary to make a count of everything that France owes to Italy, in terms of architecture, music, or even, and this may come as a surprise, its vocabulary (French has borrowed much from Italian in the areas of the arts, clothing and cooking), even when France was at the height of its influence, in the seventeenth century, to such an extent that at the time people spoke of "French Europe".41 We should add those renowned Frenchmen like Lulli, of Florentine origin, or Paul Valéry, who was born at Sète but counted Genoese among his ancestors.

Referring to Mauss, Braudel envisages a civilisation based on three elements: a cultural area, borrowings and refusals.42 Even when it is reduced to the Western part, the European cultural area is difficult to define. What are the elements which form the basis of this "coherence in space" and this "permanence in time" which, according to Braudel, make it possible to recognise a civilisation or a culture? For within Western Europe, between the various historical groups which formed, how many refusals there were! The religious wars in the fifteenth and sixteenth centuries, which saw the advent of the Reformation, showed everywhere the mutual refusal displayed with extreme violence by Catholics and Protestants. As we know, the scope of the quarrel was not purely theological; it marked the conflict between two cultures, two profoundly different concepts of the relation between the individual and the group. Dynastic calculations became involved, then the emergence of modern nations, the rivalry between powers, both in

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39 cf. A. Rey, "Le Gaulois (La langue gauloise)", op. cit., TJ, p. 877: "In French the Gallic presence is, if not disabled, at least imperceptible and very deep".

40 cf. Carlrichard Brühl, Naissance de deux peuples, Français et Allemands (IXe-Xe siècle), Fayard, 1994.

41 It is piquant to observe that this expression was due to an Italian diplomat; cf. L. Reau, L'Europe française au siècle des Lumières, 1938, republished 1971.

42 F. Braudel, Ecrits sur l'histoire, op. cit., p. 292 et seq.

and outside Europe, relegated the religious question to a secondary level; none the less, according to Braudel, there is still a "series of differences in conduct and attitudes which draw an imperceptible and irreducible frontier between Anglo-Saxons and Catholic Europe".43

However, the borrowings outnumbered the refusals. Although different mentalities remain, the countries which make up Western Europe have consistently crossbred their influence. Romanesque art, present to such an extent in France, is not from just one country and it was in Catalonia that the first signs of it appeared; the baroque, which originated in Italy, spread to many places in the Continent. Here we again find the amazing role played by Italy in the history of the Continent! The influence that Italy has consistently exercised on all of Europe and in all spheres is all the more striking when we consider that this country, which was belatedly united into one State, was never a great power in the sense that Spain, France, England and Germany in turn were. None the less, it was from Italy that the decisive inventions in the economic history of Europe came: the first private banks (in the twelfth century), the bill of exchange (thirteenth century), the first stock exchanges (fourteenth century), the first forms of commercial companies (fifteenth century).44 It must be acknowledged that certain countries have had a made a greater impression on the history of the Continent than others, and what is true for the arts is also true for thought - what would philosophy in Europe be without German philosophy? - and, of course, for legal institutions. Was it not the "constitution of England" that inspired the best-known chapter in L'Esprit des lois? As for the French Revolution and the 1789 Declaration, we know the considerable influence they had on all the emancipation movements which marked European history in the nineteenth century.

Does this mean that among the heirs some might claim a kind of priority right? Among various heirs, as presumptuous as they are presumptive, some seem to claim such a right, from England, the "Mother of Parliaments", to France, the "homeland of human rights", as though their history had made them the appointed keepers of the common legal heritage or, if you will, the guardians of the "family jewels" and thereby entitled them to prevail over the continent. Of course, such claims are inadmissible. The particular purpose of what has just been briefly said about to civilisation was to recall that, while all these countries of Europe formed individual and even very distinct cultures, the wealth of these various cultures comes from the very fact that they never ceased to be open cultures that were open to the influence of others. The way in which each of these countries was formed is indeed quite different: the conception of the State is not the same, the invention of democracy did not proceed at the same pace or follow the same routes,45 but they all ended up with similar institutions: the very ones that appear in the inventory and to which the great European texts mentioned above refer. They all thus contributed to the formation of what takes the place of the common heritage in the order of the legal and political institutions. It is that, even, that gives both opportunity and meaning to the idea of European construction. The desire to put an end to confrontation was not in itself enough. What was required, beyond the different languages, was a form of common language.

But where does Europe stop? The European construction is caught in "the dialectic of deepening and widening", as J.L. Quermonne says,46 since the six founding countries received three, then

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43 F. Braudel, Grammaire des civilisations, op. cit., p. 388.

44 cf. J. Delumeau, La Civilisation de la Renaissance, Arthaud, 1984, p. 201 et seq., 219 et seq.

45 On the "process of democratisation" in Europe, cf. G. Soulier, op.cit., p. 157 et seq.

46 J.L. Quermonne, Le système politique de l'Union européenne, Montchrestien, Second Edition, 1994, p. 141 et seq.

four, then six, then nine new States, while ten or more have expressed their wish to accede to the common institutions. That does not count the American proposals to bring everything together in a vast "Euro-Atlantic Community from Vancouver to Vladivostok"47 Would the concept of a European common heritage still have a meaning if it were extended indefinitely to the collateral lines? Their authority to take possession of the common heritage cannot be determined without being examined.

B. The collaterals: from Vancouver to Vladivostok?

There is a Western Europe that has long been separated from Eastern Europe and there is a Western World which extends beyond Europe and therefore outside Europe.

The relation of Western Europe with Eastern Europe has been possible since the collapse of the Soviet system. Has it been made easy? In this sphere, more than in any other, it is too soon, much too soon, to say. Of course, it is possible to record, in all the countries henceforth freed from the system of domination to which they were subjected, the establishment of democratic institutions, with, virtually everywhere, the creation of constitutional courts. Moreover, it is perhaps in these countries that they may well be most useful, in so far as the principle of legality familiar in Western legal systems is different from the former mechanism of socialist legality. These countries thus show a desire to be in some way entitled to benefit from the common European legal heritage. We should take note of this and even rejoice to see the family circle grow.

However, the right must be put in its place. The carnage in the former Yugoslavia, following which there were only losers and innumerable victims, is still too recent to be forgotten. That merciless confrontation between Southern Slavs, people speaking the same language, who were united by a common will following the First World War, showed that the very old fracture that cut Europe in two had not been resolved. There is thus a twofold problem: the problem posed by a very long separation and that posed by very different cultural, political and legal traditions. Once again, we need to go back in time.

The very old fault line stretching, with a few variations, from the Baltic to the Adriatic has a very long history. Its origin was an administrative reform of the Roman Empire under Diocletian in 293, establishing the Tetrarchy; then in 395 Theodosius divided the Empire between his two sons, giving one the pars occidentalis and the other the pars orientalis; then there was the increasing confrontation between the Catholic and Roman West and the Greek and Byzantine East, which culminated in the mutual excommunication of the Pope of Rome and the Patriarch of Constantinople in 1054.48 A vehement hatred for the Christian West developed in the East following the sacking of Constantinople by the Fourth Crusade in 1204, to the point where a Byzantine dignitary declared: "It is better that the Turkish turban should rule at Constantinople than the Latin mitre".49 The West allowed the Ottomans to take possession of Constantinople in 1453, and for centuries the Ottomans occupied all the Balkans, and even advanced as far as the gates of Vienna. Ten centuries of Byzantine Empire, five centuries of Ottoman Empire and also centuries of Tsarist Empire suffice in themselves to show that the West and the East of Europe have never experienced the same history. And in modern times, while Western Europe launched

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47 The idea was launched by American Secretary of State James Baker at Berlin on 18 June 1991, at a meeting of the Council of the CSCE.

48 It was not lifted until 1965, by the Second Vatican Council called by Pope John XXIII.

49 Cited by P. Lemerle, Histoire de Byzance, P.U.F., Que sais-je?, Tenth Edition, 1990, p. 126.

its conquest of the world and developed its power, the East regressed into what historians have called the second serfdom. Then came the Bolshevik Revolution and, after the Second World War, the iron curtain, which fell along the very line that has cut Europe in two for more than fifteen centuries. The line of separation, incomprehension and hostility between the two Europes will have been administrative, religious, political, economic, military and strategic. What happens in the short term may conceal what happens in the long term, but it must not make us forget it. That repetition of the break, in the same place throughout the centuries, cannot fail to leave strong traces. In spite of that, perhaps the time has come for the two Europes to be reconciled: but that will probably take some time.

If we now turn to "our American cousins", we can of course see strong similarities with Western Europe. In both universes the concept of democracy is indistinguishable from the recognition of the fundamental rights of the person. That is most certainly of major importance. Beyond that common basis, however, the differences are many and significant. Even keeping to what is the very heart of this common constitutional heritage, the recognition and guarantee of fundamental rights, it is possible to indicate summarily some differences which are by no means negligible.

In spite of appearances, the general inspiration of human rights and fundamental freedoms is not the same. In the American Constitution there is constant reference to God. Tocqueville observed about religion in America that "everyone believes it without discussing it". The idea of the separation of the Church and the State, the idea of secularity, are literally unintelligible there. That is not at all the case in Europe. The reference to God is found in only a few European Constitutions and is studiously avoided in the majority of cases. The French concept of human rights, for example, is deliberately secular. Correlatively, these fundamental rights are generally perceived as the fruit of social struggles, as historical conquests, as rights proclaimed towards and against the authorities rather than a gift of providence. The question of the essence of these rights is a matter for the individual conscience. In Europe religious freedom implies the right to be atheist and everyone is philosophically free in his conception of man, free to take the view that the rights which he has at his disposal have a divine, rationalist or purely historical and social basis. As far as the law is concerned God does not exist: all that exists is the right to believe or not to believe. It follows that government practice is generally confined to religious neutrality, even in those countries where the Constitution makes reference to God. It is hard to imagine that a head of State or a head of Government in Europe would order days of prayer or thanksgiving, as President Bush did at the time of the Gulf War. This collective religiosity has no equivalent in Western Europe.

As regards the substance of these rights, there are also marked differences: thus the Second Amendment of the United States Constitution (1791) gives individuals the right to bear arms, and it is well known that any attempt to restrict this right - having regard to the scale of crime involving bloodshed and its considerable growth nowadays - comes up against the determination of the gun merchants' lobby and also the will of a great number of Americans who support what they regard as a fundamental right. This is radically precluded and inadmissible in Europe; it might even be said that the European spirit finds the idea horrific. Such a prerogative is connected with the archaic idea of the right to take justice into one's own hands; it is incompatible with the idea of a society governed by law or that of a State subject to the rule of law (Article 12 of the French Declaration of 1789 makes express provision for the establishment of a public force for the use of all). Better still: respect for life led all European States to set an example by abolishing the death penalty, which was regarded as a remnant of barbarity. Additional Protocol No 6 to the European Convention on Human Rights, which was adopted in 1983, has been ratified by some 20 States; in a Resolution adopted on 4 October 1994 the

Parliamentary Assembly of the Council of Europe expressed the view that "the death penalty has no lawful place in civilised societies" and recommended that the acceptance of new members should be conditional on its abolition.

Furthermore, the European concept of human rights includes social rights: political democracy and social democracy are indistinguishable; in other words, European democracy has a social component which implies that the public power has a role in the allocation of resources and in social protection, which has given rise to a strong tradition of public service, mainly in education and health. All the written Constitutions of the Member States of the European Union which have been adopted since the Second World War enshrine these economic and social rights alongside civil and political rights, and these democratic values were also incorporated in the Treaty of Rome: one title is devoted to "Social Policy" and covers employment law, social security law, trade union law ... This notion of social rights is unknown in American constitutional law and, more generally, in the American system, which confers absolute privilege on individualism in its utilitarian and puritan version. Thus the very notion of politics - of what is political - is appreciably different. Tocqueville wrote: "Peoples always show the effects of their origins". The scope of American history is the immediate, that extreme form of short time constituted by the short term; it is thus a quite different history, in which heritage cannot have the same meaning as in societies with a long history. Besides, the American claim to represent the ultimate and insurpassable example of democracy is clearly unacceptable for a European. There is no universal model of the State and democracy if we challenge the idea that the American model is its paradigm.

It is true that the world is evolving at an increasing pace and that historical cultures are increasingly giving way - and risking their heritage, those pieces of crystallised history! - under the uniformising pressure of numerous economic, political and technical factors. What Braudel said in 1959 takes on its full significance today: "Let us make haste and travel before the world looks the same all over!"50

50F. Braudel, Ecrits sur l'histoire, op. cit., p. 306.

c. Europe's constitutional heritage and social differences by Ms Hanna SUCHOCKA

Minister of Justice of Poland, Member of the European Commission for Democracy through Law

The pursuit of Europe's constitutional heritage is a very important problem. It is important among other things because it forces one to consider and reflect on the question "What does Europe really mean?" What countries should a consideration of Europe's constitutional heritage encompass? I have the impression and, at times, even the justified fear that even with problems requiring deeper historical reflection, there is a tendency to succumb to the now dominant thinking of a divided Europe. The result of this is that Europe is viewed only in terms of the countries integrated into the European Union or possibly the Council of Europe. Such an approach in may view is very dangerous. It leads to the evaluation of "Europeanness" according to organisational criteria. If one belongs, preferably to the European Union, one is in Europe. If one does not, then one remains beyond the pale of discussion on Europe.

Seeking an answer to the problem of Europe's constitutional heritage requires complete detachment from currently existing organisational structures as well as from the division of Europe created as a result of one international agreement or another. Only reaching down to the roots of European constitutionalism will enable us to formulate a more precise definition of Europe. What tendencies have characterised the emergence of European constitutionalism and, by the same token, what we refer to as 'Europeanness' - our common European identity? In this realm, legal experts, who always have a tendency to seek more formalised answers, must enlist the aid of historians. Otherwise, our discussion may become flawed.

In starting my discussion, I should like to cite the well-known Polish historian and politician, Prof. B. Geremek. In one of his addresses, he recalled the Europe of Charlemagne and the Europe of the Emperors Otto as being very useful to our debate on our European point of reference. He stated: "Charlemagne's empire determined the architecture of a European community in a way that seems downright paradoxical, if one considers how permanent were the boundaries it established - boundaries which nearly all European ideas invoke. By contrast, the idea of the empire of the Ottos is, for all intents and purposes, known only to historians and is therefore covered with dust. The Ottos built their empire on the basis of the principle of regionalisation. A medieval miniature depicted that principle as the meeting of four great regions: Italia, Germania, Gall and Slavonia. The fourth region, in which the Ottos included the three Christian nations of Bohemia, Poland and Hungary, therefore also constitutes an element of this European edifice."51

Today Europe's unity is largely based on common political and economic institutions. Those institutions could not have emerged in the form we know today, had they not been preceded by common European cultural annals. Culture is the deepest current of human collective life as well as the most profound principle of the unity of societies. For that reason the construction of a common European home cannot take place without reflecting on that which constitutes its deepest foundation.52

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51 Europe - but where are its boundaries / Meeting of a discussion circle from Bergedorf, 10-11 June 1995 in Warsaw, Warsaw 1996, page 12.

52 R. Buttiglione, J. Merecki SDS: Europa as a Philosophical Concept, Lublin 1996, page 27.

With such an understanding of Europe, one cannot ignore the entire complex process in which constitutionalism developed in that part of Europe which at present is not formally a member of the European Union but is deeply rooted in the whole of the European tradition, culture and law. It should be remembered that it was Poland that had Europe's first constitution, the Constitution of the Third of May 1791.53 The Polish constitution was clearly the fruit of an age which endowed Europe and the entire Euro-Atlantic civilisation with many features which remain characteristic to this day. As H. Izbedski wrote: "A modern constitutional concept, the principle of the nation's sovereignty, construction of civil rights stemming from the inalienable freedom of the individual, the separation of powers - all that the political thinking and constitutionalism of the Age of Enlightenment contributed to the annals of human achievement." To a greater or lesser degree, all those elements were found in the Polish constitution.54

I believe it is important to what extent individual states - especially those liberating themselves from the community system - consider themselves included in Europe's entire constitutional system. Of particular interest is the extent to which that common European heritage has influenced the constitutional solutions adopted by individual post-communist countries. I believe the example of those countries can be particularly important. They had all been subjected to an experiment involving the creation of common Soviet-bloc political solutions based on principles different from those typical of Western Europe which we regard as our common European heritage.

What features are characteristic of that heritage? In general terms, one may say that two currents constituted the basic elements shaping European constitutionalism. One current was connected to the French Revolution and encompassed both France's entire constitutional laboratory as well as the Polish constitution of 1791. The second current was the Kelsen Doctrine with its concept of constitutional judiciary. Those two trends made a fundamental imprint on what we refer to today as Europe's constitutional legacy. They constituted a kind of framework in which the basic principles of European constitutionalism were shaped. Those principles include:

- the sovereignty of the nation;
- separation of powers with a two-stage executive characteristic of the European system, ie a head of state (monarch or president) and a government chief;
- guarantee of the freedom of individual rights;
- constitutional judiciary, ie supervision over the constitutionality of laws carried out by a separate constitutional tribunal.

In this connection, the question sometimes arises as to whether constitutional tribunals constitute an element of the common heritage. Personally I believe they do. In fact, as I have mentioned above, to me this is one of the key elements of the European legacy. To this evaluation it is irrelevant whether such tribunals exist in all countries. It is also not important if there are countries which do not envisage such a body. It is also irrelevant whether the competence of such a tribunal oversees the law in a substantive or simply an abstract manner. The main thing is to enshrine the role of the constitutional tribunal in the concept of separation of powers, allow it

53J. Baszkiewicz, La Constitution du 3 mai 1791: entre la tradition et l'avenir [paper is MS form].

54H. Izdebski, Constitution of 3 May amongst the constitutions of this century, Panstwo i Prawo, 1991, No. 5, p. 3.

to oversee legislation enacted by parliament and make its ruling final. The basic significance of the tribunals hinges on developing new areas of checks and balances and that includes monitoring parliament, the legislative branch of government.55

An essential element of Europe's constitutional heritage is political pluralism, expressing itself both in the party system as well as in the freedom to create organisations.

These general principles take on specific institutional forms in individual European countries. Without breaking out of the framework of separation of power, individual countries also define mutual relations between state organs in different ways, depending on their tradition and custom.

In this light, it is undoubtedly fascinating to analyse the extent to which "social differences" form a part of these general principles; and, on the other hand, the extent to which the constitutional framework of European tradition limits the guarantee of certain rights stemming from social differences. In pursuing this line of our discussion, we should ask ourselves: to what extent does the pursuit of certain differences go "against the grain" of European tradition and cancel it out and to what extent does it enhance this tradition by developing the very general principles regarded as the essence of the European heritage?

At this stage, I should like to call attention to a very essential albeit controversial difference which is not mentioned in what is traditionally conceived as particularismes sociaux. I am referring to the social phenomenon of the decades-long communist system and its attempt to create a new constitutional order. In my view, that was the biggest social peculiarity of the 20th century. Its objective was to create a social system and, within its framework, a system of government based on principles contrary to those of developed European tradition. That marked an attempt to create a constitutional system ignoring what we refer to as Europe's constitutional heritage.

The question that arises (and should be answered) is to what extent has that constitutional experiment displayed certain features of permanence. Did it creatively enrich the European heritage or was it so artificial that this "new" constitutional order disintegrated with the collapse of the political system it was to serve?

Since the problem consists of establishing whether the difference concerns only the institutional peculiarities or the basic principles as well, the answer should be sought first and foremost by cataloguing the principles on which that system was based. A juxtaposition of principles can provide the basis on which to formulate a reply to the question: were the social peculiarities of socialist constitutionalism able to creatively supplement the European heritage? The most characteristic features of that system included:

1. Rejection of the separation of power and its replacement with the principle of unity of power,

2. Acceptance of the concept of citizen's rights rather than human rights,

3. Recognition of the will of the state as essential to creating individual freedom (rejection of the personalistic concept),

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55 As J. Zakrzewska wrote: "Many European countries, especially afterthe Second World War, contributed new experiences to Montesquieu's constitutional principles; it was then that many new constitutional tribunals were called into being".

4. Recognition of the leading role of a single party which meant the rejection of political pluralism,

5. Rejection of the concept of monitoring the constitutionality of legislation owing to the binding principle of unity of power and the supremacy of parliament among state organs.

Even this sketchy outline of differences between socialist constitutionalism and that of Western Europe clearly shows that the principles of socialist constitutionalism did not fit the framework of the previously-mentioned currents which shaped Europe's constitutional development. It should be noted that the concept of unity of power was among the political experiments of the French Revolution. It did not, however, become a permanent element of European tradition. In all democratic countries (an exception is Switzerland owing to the different origins of its system) the principle of separation of power constitutes the cornerstone of the democratic, law-abiding state.

The entire above catalogue clearly shows that this marked an attempt to construct a system alien to European constitutional tradition. That was amply demonstrated in practice. The moment the Soviet-influenced communist system collapsed, there emerged a general tendency to restore the traditional tenets of European constitutionalism. Those tenets were regarded as the cornerstone of a democratic order unlike the principles of socialist constitutionalism which paved the way to an authoritarian system.

Amid the arguments and entire phraseology of returning to Europe, the tendency to invoke constitutional tradition and to restore constitutional principles rooted in the European legacy have become one of the visible elements of the said return to Europe.

That aspiration is explicitly expressed, for instance, in the preamble to the Constitution of the Czech Republic of 16 December 1992: "We, the citizens of the Czech Republic [...], determined to build, protect and develop the Czech Republic in the spirit of the inalienable value of human dignity and freedom [...] as a member of the family of European and world democracies..."

A characteristic thing is a stronger tendency among post-communist states than among traditional European states to enshrine in their constitutions precisely those principles which had been eliminated and which are regarded as the foundation of democratic order emanating from European tradition.

These include issues centring on the definition of the status of the individual. As a result of Western European evolution, the concept of human dignity, together with the concept of freedom, has become an integral element of political relations. Those two concepts have delimited the scope of the catalogue of human rights. The idea of human freedom came to us from the Age of Enlightenment. It found its constitutional expression during the time of the French Revolution. K. Michalski described it beautifully while opening the seventh round of talks at Castel Gandolfo in August 1996, as the Enlightenment idea of freedom of the human individual, accompanied by the equality and brotherhood of all people, is the nerve of the culture in which we live.

A characteristic feature of all post-communist countries is the exceptionally strong emphasis they place in their constitutions on the value of freedom and human dignity. More strongly stressed than in Western constitutions is the need to protect human dignity. In fact, human

dignity has become the central point of reference when defining the rights and freedoms of the individual.

One can also discern references to vaguely-defined laws of nature when such terms as "natural" or "inviolable human rights" appear. The constitution of the Hungarian Republic of 1990 in paragraph 4 "recognises the inviolable and inalienable basic human rights...". Similarly, the Czech Charter of Basic Rights and Freedom of 1992 recognises the inviolability of "natural human rights". Poland's draft constitution likewise contains a similar formulation: "Natural and inalienable human dignity constitutes the source of the freedoms and rights of man and citizen and is inviolable."

I have mentioned those constitutional formulations only by way of example. The aim of those formulations is obvious. Such clearly-formulated norms of constitutional rank are meant to enshrine Western European thinking about the human individual. This reflects a visible need to underscore links with the entire European legacy. For in the West such principles were never called into doubt or questioned. They constitute a logical stage in democratic and constitutional evolution.

A consequence of according such rank to the role of the individual is the construction of a detailed catalogue of human rights. It is also significant that in constitutional language there has been a return to human rights and not simply to the "citizens' rights" so typical of socialist constitutions. A characteristic feature is the clear reference (both the terminology and the scope of such a catalogue) to the European Convention of the Rights of Man. It is something of a European charter of human rights. Its content and the catalogue of rights it encompasses are a clear reflection of Europe's constitutional heritage. By clearly alluding to this convention, individual states wish to emphasise their presence within the system of European values.

In analysing the constitutions of the post-communist states in terms of basic political principles and the catalogue of human rights, it may be stated that the unique social difference of having been subjected to the communist sphere of influence has exerted the strongest influence on the shape of the new constitutions - a backlash against what communism stood for. The dominant trend is a desire to break with socialist constitutionalism and its principles and to enshrine the Western European constitutional legacy.

As this general statement is being made, attention should also be drawn to three additional factors and their relationship to the European legacy. These are factors traditionally counted among the particularismes sociaux, namely religious and ethnic differences as well as references to natural law.

I shall begin with the latter. An analysis of the new constitutions of the post-communist countries raises the question whether or not invoking "some"natural law belongs to the European constitutional heritage.

I believe it would be difficult to provide an unambivalent answer, although one can observe an increasing tendency to return to the laws of nature. Ever more frequently in the contemporary world positive law displays a need to invoke "some" higher law. The mutual relations between natural law and positive law are one of the more important debates under way in the world today. The discussion on the significance of natural law is in fact a sign of our times - times in which we are witnessing the mass violation of the rights of individuals and entire nations. Such occurrences always move people's consciences and create the need to invoke higher values, to

seek transcendental points of reference and clear ethical norms. Ethical norms as moral norms governing human behaviour, which are rooted in centuries-old European tradition, are regarded as a kind of guarantee of the ethical behaviour of entire human collectives, nations and states. In this situation one may observe a phenomenon which might be called a return to natural law. In natural law a carrier of such desirable values is sought. Natural law is the frame of reference of a just order, whereas positive law is its contradiction and undoing. For that reason one can observe in many contemporary states a strong tendency to directly invoke natural law as a just law and - in case of any clear conflict of norms - to reject positive law. It no longer suffices to state that enacted laws are the sole source of order and justice simply because they have been enacted.

Pure, formal legality does not constitute an element of the constitutional legacy. An excessively formalised approach to legality, devoid of axiological references, should rather be regarded as a breach in European tradition. It is recognition of the reference to natural law that constitutes an element of the European heritage. It is the need of the new democracies to clearly identify with European constitutional tradition that manifests itself in strongly-emphasised references to some "higher" law.

A prominent feature of the post-communist states has been the ethnic factor. It should not be forgotten that some of those states, after all, emerged as a result of ethnic pressure. In this regard one notes a number of differences which are clearly reflected in their constitutional solutions. This includes a tendency to more strongly emphasise protection of the rights of people belonging to such groups as national or language minorities.

It is my impression that the problem of national minorities and the protection of their rights has become a European constitutional issue only fairly recently. The constitutions of the 19th century did not really deal with that problem. The European Convention on Human Rights also lacks proper regulations in the area of minority rights. Reflecting the European tradition of protecting individual rights, the European Convention in article 14 merely alludes to the principle of equality and bans discrimination. In this respect, the constitutions of the post-communist countries differ markedly from traditional Western European ones. A contribution of the former are clear resolutions pertaining to the defence of minority rights. Such regulations can be found not only in the constitutions of states faced with true nationality problems such as Croatia, Slovenia and Hungary56 but also those which are ethnically relatively homogeneous such as Poland.57

In this context, the question undoubtedly arises: to what extent is protection of minority rights becoming an immanent element of Europe's constitutional legacy? In my view, we are dealing here with a clear tendency towards "enhancing" that legacy with elements of key significance to European political relations in the second half of the 20th century, namely guarantees of national-minority rights. In that sense, the contribution of the post-communist countries to that process is significant.

A characteristic thing is that religious differences have not exerted so essential an influence on differentiated constitutional solutions. The common European heritage appears to be freedom of conscience and religion and the principle of religious pluralism. The common European heritage

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56 Compare article 61, 64 and 65 of the Constitution of Slovenia, article 15 of the Constitution of Croatia of paragraph 68 of the Constitution of Hungary.

57 Poland's draft constitution contains an extremely well-developed passage guaranteeing Polish citizens belonging to national and ethnic minorities the freedom to retain and develop their own language customs and culture as well as the rights to create their own educational, cultural and religions institutions.

is the independence of church and state coupled with the principle of equality of all churches. We find this principle in all constitutions regardless of the religious differences appearing in individual states.

An essential feature of the European heritage in this area is the liquidation of the religious state. All the post-communist countries identify with that tradition and have accepted the standards existing in the constitutions of the Western states - standards shaped in the course of Europe's historical development.

Even this extremely cursory analysis enables us to arrive at one conclusion - namely that Europe's constitutional legacy is very strong indeed. The social differences existing in individual states have not cancelled out that heritage. On the contrary, there exists a clear tendency to enshrine it. There is a tendency to inscribe existing social differences into the mainstream of the general European legacy. For all of us at the threshold of the 21st century, extremely important is the extent to which we succeed in enriching that more than two-century-long heritage. It is extremely important to stop thinking in terms of a divided Europe, as that leads to the erroneous conclusion that only the western half of the continent is the sole repository of Europe's entire constitutional heritage.

d. The end of the millennium: the triumph of constitutionalism in Europe by Mr Florin Bucur VASILESCU

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"Europe has reached such a summit of power that history has nothing comparable to the huge scale of its expenditure, the grandeur of its commitments and the size and continuing maintenance of the armed forces, even where they are quite useless and serve only for show."

It is not to any of the modern creators of Europe today that we owe these words. They were spoken neither in Rome nor in Maastricht. They are the thoughts of Montesquieu, Baron de La Brède, in his fundamental work "L'Esprit des lois".58 They may be a premonition of our common destiny in the near future. Another French visionary was Renan. In his famous address at the Sorbonne on 11 March 1882, entitled "What is a nation?", he said: "Nations are not eternal. They begin and they will end. A European federation will probably replace them. But this is not the law in the century in which we live".59 Renan was right. Even though there is perhaps no other example of the huge efforts and countless obstacles which such a grandiose project might have been able to tackle.

This is all the more true in that those involved in seeking to bring it about have never been, and even today are not in complete agreement at least on methods, if not on the aims sought. There still many contradictory approaches which separate the peoples of our continent due to the special features which differentiate them.60

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58 Montesquieu, L'Esprit des lois, Paris, Garnier Frères. No date, Book XXI, Chap. XXI, p. 346.

59 Ernest Renan, Pages françaises, Paris, Calmann-Levy, 1921, p.71.

60 As Gugliemo Ferrero also aptly noted during the last world war: "Given its diversity, Europe has always been and will always be a rich museum of States in which the strongest are strong enough not to fear the weakest, and not to take advantage of their superiority. Only this balance can establish among the States of Europe the minimum of trust necessary for all to survive". (Pouvoir, Les génies invisibles de la cité, Paris, Plon, 1945, p. 191).

It was perhaps in the knowledge of the scope and importance of these difficulties that on 8 February 1965 Georges Vedel entitled his brilliant lecture to the Institute of European Studies of the Free University of Brussels "The contradictions of Europe", in which he reviewed the main obstacles in the path of European unity. What continues even today to arouse interest in te very valuable ideas then put forward is also the graphically expressed misgiving: "What use is Europe?". This chain of thought was introduced by the following observations by an American scholar (Stanley Hoffmann): "What strikes one here, as in other domains, is the third danger, that of a vacuum: the absence of any kind of European design for a European model for culture and society [our underlining]. It is easy to answer that there has never been a European model and that those which we identify in the past are retrospective intellectual reconstructions; but this was not the way that non-Europeans saw Europe".61

Is this a correct judgement, or a challenge? It can probably be invalidated by a number of arguments. Of these the most recent, and best founded, is perhaps that advanced by Jean-Louis Quermonne. The argument is that there are convergences which produce a European political model whose most significant feature is the fact that no country of the European community has imported the American model. The specific features of the European model might therefore be: the retention by European political systems of parliamentarianism, the existence of a parliamentary majority based on voting, recourse to national referendums, decentralisation, the existence of an established civil service and, above all, the European model for controlling the constitutionality of government.62

It remains to be seen whether the adoption of this model is possible, and in general valid, in the light of Europe's centuries-old contribution to the world in respect of political organisation. We shall confine our approach to modern times, including a reference to classical thought, above all that of Aristotle, who in fact marked the starting point of all political thinking.

Thus the question is, does today's world contain several models of political structures? And given that their institutionalisation cannot be separated from their constitutionalisation, can one speak of different types of constitutionalism? From among these, is it possible to discern and describe a type of European constitutionalism?

These are questions so profound in their approach that they inevitably go beyond the purpose of this study. But it is possible that a reasonably general approach might stimulate fertile discussion with a view to subsequent development.

For Jean Gicquel, constitutional law itself is "a testimony to Western civilisation", and three of its basic themes cannot be separated from the constitutional movement in the West. These themes are: confidence in the individual, going back to writers of the ancient world, Christianity, the feudal world and the eighteenth-century philosophy of the Enlightenment; a belief in the virtues of dialogue, which has led to political pluralism and the relationship between electors and their elected representatives; and a taste for rational organisation reflected in the invention of representative government, the function of representatives and the holding of contested elections.63

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61 G. Vedel, Les contradictions de l'Europe, a course given on 8 February 1987, Institute of European Studies, Brussels, 1965, p. 24.

62 J.L. Quermonne, Existe-t-il un modèle politique européen?, in "Revue française de science politique", Vol. 40, No. 2/1990, pp. 201-203.

63 J. Gicquel, Droit constitutionnel et institutions politiques, édition XI, Paris, Montchrestien, 1991, p. 27 et seq.

In practice, all these achievements belong to Europe. Constance Grewe et Hélène Luiz Fabri comment:

"Europe, with the United States, is the cradle of constitutional law. This is not only an historical role. Even today, European constitutional law exercises a major influence in the world, as shown by ideas such as that of the State based on the rule of law, fundamental rights and the parliamentary system".64 [our underlining].

We thus have not only the existence of a European type of constitutionalism, but also the definition of some of its characteristic features.

European constitutionalism began to gain ground concurrently with the first conflicts between the monarchy and the well-to-do classes. From the outset, it was the expression of a movement aimed at curbing the excesses of monarchs, firstly as regards individuals and secondly as regards their property. In the long run it therefore identified itself with the continuing struggle of individuals to defend the ideal of human liberty and dignity. The result was also the features which characterised it, each of them in its way embodying, more or less directly, the same lofty desiderata.

The advance of European constitutionalism was not a triumphal march. At times it was halted or fell back. The dreadful experiences of totalitarianism were also typical of Europe. But fortunately these have been overthrown by peoples and the international community. After such enforced halts, the caravan of civilisation folded its tents and resumed its advance.

This is the way that the phenomenon of European constitutionalism should be envisaged, bearing in mind its historical, and no doubt democratic trends, and going back to its origins, which are noted above. What is important to us as we analyse its characteristics today, at the end of the millennium, is its success, expressed by its unprecedented propagation both across our continent and elsewhere.

What we consider worthy of note is the great importance of the political and juridical doctrines which backed up or even preceded some of the conquests of European constitutionalism. In some cases these conquests were the result of contributions made by outstanding figures. In others, major political movements, above all revolutionary ones, produced fundamental changes and the emergence of new concepts which substantially altered all political and constitutional thinking throughout the continent.

1. The first doctrine which was basic to European constitutionalism, and has remained one of its basic features, is the principle of the separation of powers in government. There is no denying its European origin. Its foundations were laid by Aristotle65 and it was developed in particular in the seventeenth and eighteenth centuries as a result of the political thought of Locke66 and Montesquieu, the latter giving it its ultimate and lasting form. There is no doubt that the principle elaborated by these great thinkers preceded the appearance of (and is referred

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64 C. Grewe and H.L. Fabri, Droits constitutionnels européens, Paris, P.U.F., 1995, p. 9.

65 Aristotle, Politics, Chapter X - The three powers in any government.

66 J. Locke - Two treatises on government (1690).

to in) the first written constitutions adopted in the following years, first in the United States of America and later in France and other European countries.

However, the significance and underlying reasons of this principle were in our view not the same for those who founded or developed it; nor for Montesquieu, who stands alone for the brilliant light he shed on it. For Aristotle, it represented no more than a distribution of the exercise of power, since in this way "government is necessarily right";67 by the separation of powers is meant a principle of the technique of good government. John Locke admittedly proposes a theoretical basis for the division of powers into legislative, executive and judiciary, to be exercised for the general good; the subordination of executive power (the monarch) to the legislative (parliament), with the sovereignty of the latter, since conflict between these two powers - expressed for example by the monarch's refusal to convene parliament - creates what is in fact a state of war against the people, justifying recourse to arms to remove the party at fault.68 But these are precisely the major signposts of the British Constitution which followed the Glorious Revolution of 1688; Locke's work was published in 1690, ie only two years afterwards.69

In our view, Montesquieu's message is a different one. It is true that he accorded to the separation of powers the values of a principle of the art of politics. But at the same time he showed himself to be a fierce enemy of tyranny, a declared partisan of the freedom of the individual, which he considered to be achieved by moderate governments since such governments are naturally considered as a means and not an end, precisely with a view to achieving the ideals of justice and human liberty.

Seen in this way, "L'Esprit des lois" remains fully topical and even modern in outlook for our century, as a triumph of fundamental human rights. We refer not only to the well-known views expressed in Book XI, Chapter 6 (On the constitution of England) to the effect that there is no political freedom where several powers are in the same hands, since the concept of freedom is "… the tranquillity of mind which comes from each individual's belief in his own safety";70 we also have in mind the penetrating observations to be found throughout the work: "When the innocence of citizens is not assured, neither is their freedom";71 "Laws which condemn a man to death on the evidence of a single witness are fatal to freedom".72 Despotic governments demand unconditional obedience, since "man is a creature who obeys the will of another"73 and they are therefore based on the fear they inspire "… fear must therefore make cowards of the people".

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67 Aristotle, op. cit.

68 John Locke, op. cit.

69 It is rightly argued that the "Two treatises on government" was planned during Locke's exile in Holland, but it was undeniably "updated" after his return to England in February 1689; the same month saw the adoption of the famous Bill of Rights.

70 Montesquieu, op. cit.

71 Ibid.

72 Ibid. Cf. the Latin saying testis unus, testis nullus.

73 Ibid.

This modern significance of Montesquieu's ideas deserves comment. G. Vedel said in 1964: "Montesquieu's ideal is the organisation of liberty, in other words of modern government";74 and Professor Ph. Ardant notes that "Montesquieu seeks a system of government which prevents despotism and guarantees each citizen's freedom".75 Thus Montesquieu belongs to the vanguard of the political thinking of his time, as noted by Mr Roland Dumas:

> "His concept of freedom is well in advance of his time… The meeting point of customary freedoms and political freedom is a novelty which had only to be formulated to become obvious".76

We all know the criticisms levelled at the theory of the separation of powers, which are still current today, if only to judge from the reputation of its interpretation by Ch. Eisenmann; in the opinion of G. Bacot, Eisenmann was not the only one to misinterpret Montesquieu's theories; not even Carré de Marlberg seems to have understood Montesquieu entirely,77 still less the German school at the end of the last century.78 This would make it difficult to explain why even today, in the 1990s, some of the constitutions adopted, in particular after the abolition of totalitarianism, still hail him as a figurehead, while others rigorously draw up fields of activity strictly defined for each of the three powers, carefully avoiding "encroachment" by any one of them on the fields of the others.

Probably no one today could advocate adherence to the letter of the principle of the separation of powers (which conflicts with the unicity of the power of the State) such as that principle is set out in "L'Esprit des lois", and one should not dwell on this. But in that case, why has it so arrested our attention today?

Of course, its persistence is due also to "its impact on public opinion, which continues to believe in it, and on politicians, who persist in invoking it".79 But is this explanation enough?

In our view, the principle of the separation of powers remains topical for several reasons.

Firstly, its mere evocation implies a political organisation which excludes dictatorship, despotism and violation of individual freedoms. This may be an additional reason for the contempt in which it was held by totalitarian regimes, which considered it, according to Marx, as a commonplace expression of the division of labour in the activity of the State.

Secondly, many of the classifications of contemporary democratic political systems of government are based on the relations between the executive and the legislature as viewed by Montesquieu. Probably no one would contest the genuine separation between government and the opposition, the former deriving its power from the domination exerted by the majority party

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74 G. Vedel, Montesquieu et l'esprit des lois, preface to the Oeuvres complètes de Montesquieu, Paris, Seuil, 1964, p. 10.

75 Ph. Ardant, Institutions politiques et droit constitutionnel, 5è édition, Paris, LGDJ, 1993, p. 42.

76 Roland Dumas, Le peuple assemblé, Paris, Flammarion, 1989, p. 211.

77 G. Bacot, L'Esprit des lois, la séparation des pouvoirs et Charles Eisenmann, in "Revue du droit public et de la science politique", No. 3/1993, p. 619.

78 On similar lines, see Marcel de la Bigne de Villeneuve, La fin du principe des séparations des pouvoirs, Paris, Sirey, 1934, and other authors.

79 P. Pactet, Institutions politiques et droit constitutionnel, Paris, Masson, 1989, p. 113.

through the executive (the government, and as appropriate the head of State) and the legislature (by means of the parliamentary majority).

But it must be recognised that no other classification, even based on the party system, can on its own provide adequate criteria for a full and accurate analysis of modern constitutional regimes. Our view is that on the contrary, a combined investigation of both aspects, making use of classical criteria, can be regarded as helpful for a scientific approach which seeks to get closer to contemporary realities.

Thirdly, the principle remains thoroughly topical for democratic governments today by virtue of the exact definition of the field of activity of each "power" (or authority, or functions of the State) and of the care taken to avoid interference between them, while at the same time respecting the obligation "to act in agreement".

Lastly, the value of the principle has been brought out by the grievous experience of the totalitarian regimes which wreaked havoc in Europe for much of this century. These regimes can be described as the most eloquent examples of the "confusion" of powers in the hands of the same individuals or groups of individuals, exactly as noted by Montesquieu.80 There is not need to dwell on what this meant for the fate of millions of individuals, for decades on end.

How is the principle of the separation of powers reflected in contemporary constitutionalism?

The French Declaration of Human Rights and the Rights of the Citizen of August 1789 states in Article 16 that a society in which rights are not guaranteed, and the separation of powers is not laid down, has no constitution. This text, adopted by France's Revolutionary National Assembly, still retains today its legal validity (cf. the constant practice of France's Constitutional Council, even if its judgements do not refer explicitly to the principle with which we are concerned).81

Some of the constitutional texts of western States list the three powers: legislative, executive and judiciary (Article 2 of the Fundamental Law of Germany, Article 3 of the Constitution of Denmark, Article 6 of the Constitution of Ireland, Article 2 of the Constitution of Iceland, Articles 36, 37 and 40 of the Constitution of Belgium). Article 26 of the Constitution of Greece refers to them as "functions", and Article 114 of the Constitution of Portugal stipulates that the sovereign authorities (the President of the Republic, the Assembly of the Republic, the government and the courts) shall respect the principles of separation and interdependence laid down in the Constitution.

Turning to the former socialist countries, those which explicitly embody in their constitutions the principle of the separation of powers in the State are: Bulgaria (Article 8), Slovenia (Article 3), Croatia (Article 4), Estonia (Article 4), Belarus (Article 6), Russia (Article 10), Federative Republic of Yugoslavia (Article 12), Moldova (Article 6) and also other former Soviet republics in Asia. It should be noted that all these constitutions have been adopted during the present decade. The Czech Constitution also mentions the three powers (Article 2), and while in other

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80 For example, it was by means of a parliamentary majority that the Nazi Party voted the law of 24 March 1933 which entrusted legislative and constituent powers to the government for a four-year period (A. Hauriou, J. Gicquel, P. Gelard, Droit constitutionnel et institutions politiques, Paris, Montchrestien, 1975, p. 660).

81 P. Albertini, in "La déclaration des droits de l'homme et du citoyen de 1789", edited by Gérard Conac, Marc Debene and Gérard Febrel, Paris, 1989, Economica, p. 341.

countries (Romania, Slovakia, Hungary) there is no direct reference to the principle, the fields of the three major categories of public bodies are rigorously defined.82

We consider that all these examples bear out the fact that the principle of the separation of powers is by no means out of date, but is to be found in one form or another, directly or indirectly, as a pillar of European constitutionalism in most of the constitutions at present in force.

2. A second basic feature of European constitutionalism consists of the proclamation, promotion, defence and guarantee of inalienable fundamental human rights.83

By its breadth of scope, firstly European and later worldwide, the basic text which engendered the appearance and spread of individual human rights in society is the Declaration of Human Rights and the Rights of the Citizen of 26 August 1789, a document of vital importance for the French Revolution. With the generosity of its ideas, the conciseness and precision of its provisions, its nature as a political programme and catalogue of human rights and freedoms in 1789, it represents one of the most important milestones in the defence of the individual against injustice and oppression.

Much has been written on this subject, but in the present century scholarly research and lively controversies have tried to challenge its originality as European, bearing in mind a number of affinities or influences in relatively similar manifestos adopted on the other side of the Atlantic.

In agreement with Professor Charles Fohlen, we consider that "… the Declaration of Human Rights finds its place at the meeting point of two traditions: one Anglo-Saxon (with its transatlantic extension), the other French, expressed by the aspirations of the Age of Enlightenment".84

There is no need to dwell on the influence of the political thinking of the great scholars whose work illuminated the Age of Enlightenment, since at that time and thanks to these scholars Europe became the homeland of the expression, and philosophical-political basis, of individual rights.

It is true that the Anglo-Saxon tradition, as reflected in memorable texts of a constitutional nature which preceded the Declaration of Human Rights, also had an undeniable impact. While there are those who do not recognise the merits of Magna Carta, or the Great Charter, regarding it as the expression of "a typically feudal conflict",85 we note that the Charter, signed in 1215, comprises the first barriers erected against absolutism in the defence of individual rights. How could one interpret otherwise the provisions of Chapter 20 to the effect that a freeman can only be fined in relation to the importance of his offence? Or the statement in Chapter 1 that the freedoms accorded in the Charter are accorded for all time? Or the provisions of Chapters 39, 40 and 41, which make lawful judgement necessary before an individual can be sentenced to any

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82 We add that in numerous decisions the Constitutional Court of Romania has applied the principle, and refers directly to it in the content of these decisions.

83 We owe this list to Professor Jean Touscoz in "Les droits de l'homme et l'Europe", in "Mélanges en hommage à Jean Boulouis", Paris, Dalloz, 1991, p. 495.

84 Ch. Fohlen, La filiation américaine de la Déclaration des droits de l'homme, University symposium held in Paris (Sorbonne) from 6 to 8 March 1989, p. 23. On the same lines, cf. J.P. Costa, Les libertés publiques en France et dans le monde, Paris, STH, 1989, pp. 20-21.

85 Ch. Fohlen, in the study referred to in footnote 27 above, p. 24.

major form of punishment (here we have the germ of the later Habeas Corpus Act); and also stipulate protection from arbitrary proceedings and the right of free circulation for all (including the right of leaving or entering the kingdom)?

But there is no doubt that the major English constitutional texts underlying the defence of individual rights were those adopted in the seventeenth century (Petition of Rights - 1628, Habeas Corpus Act - 1679 and Bill of Rights - 1689), ie those resulting from the conflict between king and parliament.86 Given the flexible [unwritten] nature of the British constitution, based on fundamental laws adopted over the last three centuries, one might venture to describe it by comparing it to an ancient mansion, altered so much at different times by a number of builders, that it is difficult to discern its basic structures.87 This may be true of the structures, but not of the principles, which include guarantees, in specific legal provisions, such as the guarantees of individual liberty, the right to self-defence, and freedom of election of members of parliament. Some of these provisions are to be found in relatively similar formulations in Articles 7 and 9 of the Declaration of Human Rights; others directly influenced the drafting of a number of its other provisions.88

Deserving of closer study is the influence, exaggerated by some writers, of the American declarations of independence, namely that of 4 July 1776 drafted by Thomas Jefferson on the lines of that of Virginia adopted on 1 June 1776, and those which preceded the constitutions of four of the colonies (future states) of New England, which were to create in 1789 the first federal republic in the world. We all know the famous controversy between Jellinek and Boutmy at the beginning of this century, with Jellinek arguing - backed up by quotations from the works of Professor Aulard - that without America and the constitutions of its various states, Europe might not today have had such legislation regarding freedom; and that the Virginia Declaration of the Rights of Peoples was more or less the text of the future French Declaration of 1789.89 In addition, in 1945, Professor Chinard published studies showing that the draft declaration prepared by La Fayette comprises notes and corrections by Jefferson, who was in Paris in 1789 as United States Ambassador.90 It is a fact that La Fayette presented this draft to the National Assembly. Right up to the end the draft was one of the most important of all the many proposals tabled, and this explains why it figures to a large extent in the final document adopted on 26 August 1789.

The fact is that, without denying that there is a degree of transatlantic influence, the Declaration of Human Rights is a document with its own system of values, which pursues its own goals and defines concepts specific to a different kind of revolution from that which led to the proclamation of the United States of America.

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86 It is worth noting that some English authors consider that the beginnings of the modern constitution of England date from the period of the 1688 Glorious Revolution (John Adler, Constitutional & Administrative Law, London, MacMillan, 1994, p. 14).

87 John Adler, op. cit., p. 8.

88 Emile Boutmy even considers that the 1789 Declaration can be compared to the Bill of Rights adopted in 1689 (Etudes de droit constitutionnel, Paris, A. Colin, 1909, p. 279). On the same lines, cf. Ch. Fohlen, op. cit., p. 27.

89 Georg Jellinek, La Déclaration des droits de l'homme et du citoyen,Revue du droit public, Vol. 18, 1902.

90 Gilbert Chinard, La Déclaration de 1789, in "Déclaration des Droits de l'Homme et du Citoyen et ses antécedents américains", French Institute in Washington, 1945, p. 16.

During the debate in the National Assembly on 11 July 1789, Lally-Tollendal said: "I beg of you to consider again the vast difference between a young people announcing its entry to the world, a colonial population breaking off its ties with a far-off government, and a huge nation, one of the foremost nations of the world, which has for 14 centuries lived under its own government".91

In his turn, Boutmy also stressed the fundamental underlying reasons which separate the two concepts.

As regards government, the claims put forward in the American declarations were moderate: guarantees of the life, liberty and right of each citizen to pursue happiness. By contrast, the positive and categorical French declaration solemnly asserts that governments cannot be regarded as legitimate without the consent of those governed.92 In reality, the American declarations did no more than justify the fact that the "break" with the mother country had become necessary after the repeated and unsuccessful appeals by the colonists to the justice of that country, with the 1776 declaration actually based on the list of appeals addressed to the British monarchy.93 Charles Fohlen also notes the great importance accorded to the law in the French declaration, and the remarkable difference in the definitions of equality. While the American declarations are confined simply to recognising it as sacrosanct, the French declaration renders it effective and operative, by declaring equality to be a right ("Article 1 - Men are born and remain free and equal in rights").94

Recently, François Furet also noted, as a fundamental difference between the two concepts, the fact that, unlike France, the Americans did not have to destroy an aristocracy based on birth and the right of primogeniture. They even found it necessary to retain inherited social traditions (we do not speak here of the aim of settling a number of immediate interests), by contrast with the French Revolution, which sought to propose a model declaration of rights which would embody universal values.95

Lastly, in a recent study, Georges Vedel showed that the most important difference lies in the concept of national sovereignty, unknown to the American founding fathers. This is based on two principles: power is only legitimate by virtue of the agreement of those governed (the people or the nation), and sovereignty itself is transferred from the crown to the nation, thus acquiring new legitimacy and greater power. Thus supported, the law will fulfil an exclusive function which gives it virtual control over human rights. Human rights will thus depend entirely on parliament, and the law will become infallible; incidentally this fact explains the long drawn-out resistance in France to any control of the constitutionality of laws, which is inconceivable as being against "the expression of the general will of the nation".96

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91 Quoted by Professor Gérard Conac from "L'élaboration de la déclaration des droits de l'homme et du citoyen de 1789", edited by Gérard Conac, M. Debene et G. Teboul, Paris, 1989, Economica, p. 17.

92 E. Boutmy, op. cit., pp. 27-28.

93 Ibid., p. 283.

94 Ch. Fohlen, op. cit., pp. 27.28.

95 François Furet, Introduction, "L'Héritage de la Révolution française", Paris, Hachette, 1989, p. 20. On the same lines, cf. Luc Ferry: "La révolution américaine qui en demeurant n'a pas à rompre avec l'Ancien Régime mais seulement à réaliser l'indépendance", in the same volume "Droits de l'homme", p. 286.

96 Georges Vedel, Abrégé de l'histoire des droits de l'homme en France depuis 1789, in "Commentaire", No. 59, Autumn, Paris, 1992, pp. 640-641.

As noted by Gérard Conac, "In adopting a declaration, the National Assembly was satisfying an expectation which had therefore not been aroused solely by the American model". Mere mimicry is far from explaining such a decision.97

We therefore consider that despite inherent influences due to the spirit of the times emanating from the North American declarations, the Declaration of Human Rights and the Rights of the Citizen represented, and was to continue to represent a key benchmark in the enhancement and development of the personality of the individual, characterised by its specificity, innovation and universality. In this way, it becomes one of the basic elements used by Europe to construct its own form of constitutionalism; and in the present century it has found its most genuine expression in the European Convention on Human Rights, which entered into force in 1953 and was followed by the adoption of other declarations and protocols broadening the sphere of the protection of individual rights and including their internationalisation.

These fundamental changes were reflected in two stages in the constitutions of European States. In the first stage, texts were confined to putting on record the fact that the defence of fundamental human rights and liberties is one of the cardinal aims of democratic States. At the second stage - concurrent in the former socialist States with the first - those drafting constitutions made provision in basic legal texts for the fact that international treaties to which the countries concerned are contracting parties, form part of municipal law, and have priority in the event of a conflict with the national legislation of these countries. For example, the possibility is foreseen of a violation of basic human rights and liberties by means of domestic regulations, and the right is reserved to individuals to have recourse to legal appeals before international bodies, in accordance with the rules agreed in the context of the Council of Europe.

The first stage includes constitutional regulations regarding the special nature of the protection of fundamental human rights and liberties in Italy (Article 2), Germany (Article 2), Greece (Article 2), Portugal (Article 2) and Spain (Articles 10 and 53). It may be no accident that all these States are States which experienced authoritarian or totalitarian regimes before the reintroduction of democracy. The former socialist States have also included similar regulations in their constitutions: Bulgaria (Article 4), Hungary (Article 8), Romania (Article 1), Slovakia (Article 12), Estonia (Articles 13 and 14), Slovenia (Article 5), Croatia (Article 3), Macedonia (Article 8), Russia (Article 15), Belarus (Article 2), the Federative Republic of Yugoslavia (Article 10), Moldova (Article 4) and Ukraine (Article 4). The Czech Republic and Latvia, on 16 December 1992 and 10 December 1991 respectively, adopted laws (charters) of a constitutional nature concerning the defence of the rights of citizens; these texts undoubtedly contain constitutional norms having the same purpose.

Some contemporary constitutions contain provisions on the interpretation and legal value of the rules expressed in legal conventions; these are on the lines noted above, but the approach is not the same. While France (Article 55), Germany (Article 25) and Greece (Article 28) provide that international conventions shall have supremacy over domestic law (in France, subject to reciprocity), in the Netherlands (Article 9) supremacy applies only if specified by the law; in Spain (Articles 10 and 96), Portugal (Article 8) and Austria (Article 9) the Constitutions state that international rules form part of national law, but there is no reference to their supremacy in the event of conflict with national legislation.

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97 Gérard Conac, op. cit., p. 8.

The relationship between the two categories of law are regulated in the same way in the Federative Republic of Yugoslavia (Article 16), Lithuania (Article 138) and Hungary (Article 7); and the Slovenian Constitution (Article 8) states that Slovenian laws must comply with international principles and treaties which, once ratified and promulgated, come immediately into force. The Constitutions of Romania (Article 20), Bulgaria (Article 5), Slovakia (Article 11), Croatia (Article 134), the Czech Republic (Article 10), Russia (Article 15), Belarus (Article 8) and Moldova (Article 4) stipulate that international agreements have supremacy in the event of conflict with national legislation.

In this way, European constitutionalism completed its process of development, by imposing and guaranteeing to the full its finest qualities precisely as regards the sphere most closely related to the human being, namely human liberty and the development of each individual's personality in conditions of equality and guaranteed protection for all.

3. The third basic feature of European constitutionalism is the definition and assimilation of the idea of the State based on the rule of law. This is the fruit of German and French juridical thought, summed up in Anglo-Saxon jurisprudence as the fundamental principle of the rule of law.98

Given its complexity and aims, the rule of law appears to be a concept which is eminently in need of being perfected. Professor Picard writes: "[It is to be feared] that the rule of law is never achieved once and for all, and no State can be so presumptuous, vain and overbearing as to claim that it has reached such perfection. Rather the rule of law appears as a kind of ideal, though this does not mean that it is mere wishful thinking"99 [our underlining]. It is a political and legal myth of our times, as it was in the eighteenth century, when people spoke of the social contract, or law, as the expression of the general will.100

In Professor Picard's opinion, which we share, the State based on the rule of law is one in which power is wielded in accordance with the law, and government organs are subject to the due process of law, which has always provided an opportunity to evoke the law against them, whatever the actions of the government, or the administrative or legislative forms they may take.101

The concept of the rule of law is a creation of German juridical doctrine from 1850 onwards (von Mohl, von Gneist, F.J. Stahl), continuing towards the end of the century with Gerber and above all Ihering.102 The opinions of G. Jellinek, however, do not in our view concord with those of other authors. Jellinek considered that the activity of the State could be divided into two categories: that which is conducted freely and determined by the general interest, not by special legal rules; and a regulated form of activity directed to performing a legal obligation,103 and

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98 Cf. J. Adler, op. cit., p. 38 et seq.

99 Etienne Picard, L'Etat de droit, unpublished, p. 1.

100 Ibid.

101 Ibid., p. 2.

102 J. Chevalier, L'Etat de droit, Paris, Montchrestien, 1992, p. 9 and above all p. 11 et seq.

103 G. Jellinek, L'Etat moderne et son droit, Paris, Giard et Brière. 1911, Vol. II, p. 327.

therefore derived from positive law. Of these, the first is the more important, since a State whose activity depends only on rules is not a practical concept.104 Free activity is carried out in the first place, by its very nature, in the field of legislation. The administration must be subordinate to legislation: thus in a normal situation, at a certain stage in the State's development, the administration finds itself subordinate to the law.105 Jellinek's categorical conclusion is that a normal State can be defined as one in which the law prevails, and the administration and the judiciary perform their activities in accordance with the law.

However, in the view of this renowned German writer, the modern theory of the State based on the rule of law, as formulated by von Mohl, von Gneist and Stahl, adds nothing new, because all this has been common knowledge since Plato and Aristotle.106 Laband also rejects any possibility of self-limitation by the State. He shows that one cannot consider that in a State the legislative power is supreme, and that it can lay an obligation on the State itself; this would destroy the unitary concept of the State and be in contradiction with the principle of sovereignty characterised by indivisibility.107 It is true that legislation applies not only to individuals but also to public authorities and government bodies: it targets not the power of the State but the authorities which, invested with power by the State, act on behalf of the State. Therefore, if laws are violated by the government or its national representatives, ie government bodies or civil servants, it is not the power of the State which enters into conflict with itself, but the persons who, by breaking instead of complying with the law, are in opposition to the law as agents of the State. Thus State power in the abstract is never related to the law, since the State can at any time modify, suspend or abrogate a law.108 The only writer who comes nearer to the content of the idea of Rechtsstaat is R. von Ihering in his remarkable work "Der Zweck im Recht", translated into French in 1901 under the title "L'Evolution du droit". He shows that a legal norm has an external action on individuals and, much more important, an internal authority bearing on public administrations with the force of an abstract imperative.109 From the bilateral nature of the constraint imposed by the law stems the obligation for the State to submit itself to the law it has itself passed.110 And public order is guaranteed only where the State respects its laws.111 "A government which violates the legal order established by itself announces its own decay."112 Lastly, a government cannot order or forbid anything which is not written in an enactment. The State can by means of legislation limit the freedom and spontaneity of its action, solely where this is essential, and without ever going to extremes.113

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104 Ibid.

105 Ibid., p. 322.

106 Ibid, p. 322.

107 P. Laband, Le droit public de l'Empire Allemand, Paris, Giard et Brière, 1901, Vol. II, p. 362.

108 P. Laband, op. cit., pp. 362-363.

109 R. von Ihering, op. cit., p. 227.

110 Ibid., p. 238.

111 Ibid., p. 251.

112 Ibid., p. 260.

113 Ibid., p. 278.

After its first faltering steps, the French concept received its consecration in the reference work of Carré de Marlberg, entitled "Contribution à la théorie générale de l'Etat" (1920-1922).114 The passage which has become a household word is as follows: "By a State based on the rule of law is meant a State which, in its relations with its subjects and in order to guarantee their status, itself complies with the rule of law; [our underlining] and whose every action on its subjects proceeds from rules which determine the rights of the citizen, or which define in advance ways and means to achieve the goals of the State. Each of these two types of legislation have the effect of limiting the power of the State by subordinating it to the system of law and order which they embody".115

Carré de Marlberg highlights the fact that a government must remain within the law, that is to say within the limits established by itself, its action being made possible only in conformity with the law; and act in accordance with the law, that is to say in accordance with the provisions of legislative texts, and solely by virtue of these texts.116 "Thus the law not only limits government activity but also conditions it".117 Lastly, this new fact also marks the development of the concept under study: the rule of law assumes that the State's own self-imposed limits are in the interest of its individual citizens, and that the latter have the possibility of appealing to the State in the defence of their rights.

Thus the rule of law guarantees citizens, through the enforcement of these rules (limits), the possibility of legal recourse to a court or other legal authority empowered to annul or modify the administrative act which has harmed the individual.118 The conclusion is that the ultimate aim of a State based on the rule of law is the defence of citizens against abuses by organs of the State.119

Carré de Marlberg's reasoning leads to the conclusion that, if the State submits to the rules and limits established by itself, then logically the executive power is also required to respect these rules and limits; and if citizens' individual rights are established in the Constitution, then logically they "must be beyond any possibility of violation by parliament".120

Unfortunately, in Marlberg's time, the individual could appeal only against administrative acts or court decisions or legal acts affecting him; he had no recourse against a legislative act, and the constitutional text of the Third Republic did not institute any authority empowered to meet such a requirement.121 It is unnecessary to stress that on this point Marlberg is one of the theoreticians who established the basis of the need for control of constitutionality by individuals availing themselves of the concept of the rule of law.

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114 **Published in Paris in 1920, Sirey, 2 volumes.**

115 **Op. cit., Vol. 1, pp. 488-489.**

116 **Ibid., p. 488.**

117 **Ibid.**

118 **Ibid., p. 490.**

119 **Ibid.**

120 **Ibid., p. 492.**

121 **Ibid., p. 493.**

At the present time, the characteristic emphasis of the doctrines relating to this concept is still laid on these same aspects; by challenging anew the undeniable privilege enjoyed by the law in the French legal system, the theory of the rule of law directly confers legitimacy on the control of the constitutionality of laws.122 The State based on the rule of law is therefore quite different from a "legal" State. In the latter, as noted by Leo Hamon, the administration acts only to implement and enforce the law (this means that parliament is not subject to rules); whereas in the State based on the rule of law, the State itself is obliged to respect the higher rules of law, firstly those in the Constitution, and secondly civic rights, which are themselves of a constitutional nature.123 This highlights the special importance of the control of constitutionality, which has become an essential component of what is meant today by a State based on the rule of law, alongside other legal means of redress available to individuals against arbitrary or illegal action by government bodies. This gives us a new appreciation of law and of those who are called on to apply it independently and objectively. "Judges are therefore the cornerstone and the essential condition of the rule of law … In fact, the rule of law gives the judge a sacrosanct role… . Invested with the role of guardian of values, the judge is appointed to defend values against the capricious will of majorities and against the supremacy of legislation whose sole concern is efficiency."124

This being the case, it is easy to understand the concern of new constituent legislators to embody the rule of law in fundamental laws as one of the most important aims. It is not surprising that the first of these laws was that of Federal Germany. Article 28 stipulates that the constitutional order of the Länder must be in conformity with the principles of a republican, democratic and social State based on the rule of law in accordance with the fundamental law. This implies that the concept of the rule of law must be inferred from all the provisions of the fundamental law.125 The Constitutions of Spain (Article 1) and Portugal (Article 2) also refer to the rule of law.

In practice there has been widespread support in the former socialist countries for this important foundation of a democratic society. With the exception of Macedonia and Lithuania, which refer to it in the preamble of their Constitutions, in all the other countries it is listed among the foremost principles guiding the State's activity, and is referred to in each Constitution: Poland, Russia, Belarus, Romania, Moldova, Slovakia, Czech Republic (Article 1), Slovenia and Hungary (Article 2), Croatia (Article 3, the term used being "the reign of law"), Bulgaria (Article 4), Federative Republic of Yugoslavia (Article 9), Estonia (Article 10), etc.

Thus European constitutionalism recognises not only the supremacy of the law but also the supremacy of the individual in his or her relations with the State in all cases when action by the State leads to the violation in any form whatsoever of the human rights and freedoms enshrined today in all civilised societies.

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122 J. Chevallier, op. cit., p. 33.

123 Leo Hamon, L'Etat de droit et son essence, in "Revue française de droit constitutionnel", No. 4/1990, p.703.

124 J. Chevallier, op. cit., p. 150.

125 Cf. M. Fromont, République Fédérale d'Allemagne, Etat de droit, in "Revue du droit public et de la science politique", No. 5/1984, p. 1206.

4. The emergence and development of the European model for controlling the constitutionality of laws

More than a century ago, Herbert Spencer wrote: "In the past, the major political superstition was the divine right of kings. Nowadays the major political superstition is the divine right of parliament … . The divine right of parliaments means the divine right of majorities".126 The doctrine of the rule of law indicates as perfectly possible the danger of excessive parliamentary sovereignty, which may even be in violation of the provisions of fundamental laws. Thus the problem of controlling the constitutionality of laws has always had and will always have a value of a very special practical nature.

An erroneous view, entertained even today by some authors, is that the control of constitutionality began with the Marbury v. Madison case (1803) in the United States. It is erroneous because the control of constitutionality began in Europe - not just anywhere, but in England. The pioneer of the supremacy of the power of the judiciary over laws voted by parliament was Sir Edward Coke (1552-1634). As the chief justice of a higher court, he ruled in 1610 (the Bonham case) that the common law had been violated by a law of parliament. Given the many cases in which common law had reviewed acts of parliament "and rendered some of them null and void", he stated that "when an act of parliament is contrary to justice and common sense, or is detestable or cannot be implemented, the common law will apply and will nullify it".127 Coke's theories were put into practice in England for a short period, but it was in the Crown Colonies of North America that they had the greatest impact and were fully adopted. The Courts of these colonies did not uphold the laws adopted by their legislative assemblies in cases where they conflicted with charters granted by the mother country or, later, with the constitutions adopted by the new States in the eighteenth century.128 In this manner the judicial control of constitutionality came into being. While it was not reflected in the Constitution of the United States adopted in Philadelphia on 17 September 1787, it proved a vital need in view of the existence of a host of laws in each federal State. Its theoretician, who by his arguments laid the foundations of its necessity, was Alexander Hamilton in his well-known study No. 78, published in The Federalist. He argued that where there was an irreconcilable difference between the laws and the Constitution, there was no doubt that preference must be given to the text having superior validity and binding force; in other words, the Constitution must have preference over the law. No legislative act could be valid which was contrary to the Constitution.129

Thus, after having been introduced in 1803, the date of the judgement given in the well-known case referred to above, there came into being what European doctrine described as the American model of constitutional justice. Its main feature is that a case may be brought before any of the country's courts, and tried in the same way as any other case.130 In a case where a law is ruled unconstitutional, it is not applied to that particular case, ie the ruling concerns only the parties to

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126 H. Spencer, The man versus the State, 1884.

127 Jean Beaute, Sir Edward Coke. Ses idées politiques et constitutionnelles, Paris, P.U.F., 1975, p. 75.

128 Ibid., p. 80.

129 The Federalists - Creators and critics of the Union,1780- 1801Stephen Kurtz, New York, John Wiley & Sons, 1971, p. 53. See similarly Chr. Starck, La constitution, cadre et mesure du droit, Paris, Economica, 1994, p. 21.

130 L. Favoreu, Les Cours Constitutionnelles, Paris, P.U.F., 2nd edition, 1992, p. 5.

the dispute. This offsets the absence of a single jurisdiction, which is the main disadvantage of this system.131

Romania is one of the countries to have adopted this model, and to have suffered from its adverse effects. Well-deserved notoriety has attached to the ruling by the Romanian Court of Cassation in 1912 that, in view of the fact that the Romanian Constitution did not protect constitutionality, the control of the constitutionality of laws came unreservedly within the jurisdiction of any judge to whom a case of this kind was referred.132 The solution adopted in 1923 by the Constituent Assembly to deal with this diversity of jurisdiction was that in future the constitutionality of laws should be decided solely by the Court of Cassation, meeting in a joint session of its divisions (Article 103). This was a first example of the difficulty of introducing the American model in Europe on the lines in which it had been institutionalised in the United States. Other examples are individual cases in which judges have refused to apply laws regarded as unconstitutional, even though their national constitutions did not directly empower them to do so (Norway, Greece). The only country which enshrined this power explicitly in the Constitution was Portugal, in the 1911 Constitution (Article 63).133

European legal thinking worked out another way of controlling constitutionality. Its author was the Abbé Siéyès, in his famous address of 2 Thermidor of the year III (2 July 1795). He argued for the creation of a "panel of constitutional lawyers" which would be responsible for annulling arbitrary acts contrary to fundamental laws, and would thus constitute "a genuine court of human rights".134 His proposal was rejected, and the 1795 Constitution makes no mention of it. But he brought it up again after the coup d'état of 18 Brumaire, and this time he was successful. The Bonapartist Constitution of 1799 devoted a special chapter to the Senate as a conservative force.

This Constitution made the Senate responsible for annulling laws referred to it, and deemed unconstitutional, by the government or the courts; its sphere of control also extended to government decrees.135 The hopes placed by Siéyès in the Senate were, for well-known reasons, not fulfilled. These reasons prevailed again after 1852, when the Republican Constitution created a Senate on similar lines. However, a new solution appeared to this kind of conflict and was to prove workable in the first place in Europe.

After lively and heated discussions by German and Austrian jurists in Vienna in 1862 and in Mainz in 1863 on the subject of the control of constitutionality, this solution was contained in a work published in 1885, which was surprisingly original and is still topical: "A Constitutional Court for Austria". Its author was Georg Jellinek. Starting with the premise that there was a need to defend the Constitution against "parliamentary injustice", he advocated the creation of a preventive legal body assigned to the Tribunal of the Empire, which would thus become a "Constitutional Court". This body would rule on conflicts between ordinary and constitutional

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131 D. Rousseau, La justice constitutionnelle en Europe, Paris, Montchrestien, 1992, p. 22.

132 Cf. my article on these lines in the Revue Administrative, Paris, No. 283/1995, January-February, entitled "Contrôle juridictionnel et contrôle politique", p. 40.

133 P. Bon, Jorge Miranda, Franck Moderne and others, La justice constitutionnelle au Portugal, Paris, Economica, 1989, p. 13.

134 J. Bredin, Siéyès: La clé de la Révolution française, Paris, de Fallois, 1988, p. 514.

135 J. Barthelemy et P. Duez, Traité de droit constitutionnel, Paris, Daloz, 1933, p. 204.

legislation, and appeals might also be lodged by the parliamentary minority.136 Thanks to Jellinek and the studies of other scholars following on from him, it was in 1920, immediately after the end of the First World War, that the first constitutional courts were set up in Czechoslovakia and Austria. The drafting of the Austrian Constitution, adopted in 1920, benefited from a contribution by the great theoretician of constitutional courts - Hans Kelsen. Kelsen expounded the bases of his theory in a now famous article: La garantie juridictionnelle de la Constitution, published in the "Revue de droit public" in 1928. His argument was that since the Constitution was the basic juridical act underlying the hierarchy of legal provisions, all others should conform to it. The Constitution contains not only rulings concerning the organs of State and the legislative process, but also rulings on the theoretical relations between the State and citizens or, in other words, a list of fundamental rights.137 Laws cannot derogate from these rules and principles. The fact that these views retain their modernity today is due also to Kelsen's analysis of the position of the law in relation to international treaties. "If a law, even a constitutional law, is in conflict with a treaty, it is irregular, that is to say, contrary to international law."138 The principal guarantee of the correct working of the State is that an unconstitutional act may be annulled.139 By whom? Not by parliament: it would be naive to imagine that parliament would annul a law voted by itself, since it considers itself a free and creative body, by no means one whose competence is "bound" by the provisions of the Constitution.140

The only body which can fulfil such a function will be a body independent of parliament and of any other State authority, namely a constitutional jurisdiction or court.141 This body will have constitutional powers to review the actions of parliament and the government as participants in the legislative process. Unconstitutional acts will be annulled through the application of the rules laid down in the Constitution, a constitutional court thus having the role of "negative legislator".142 Kelsen analysed in detail the purpose of the control of constitutionality, the criteria which are basic to its operation and its results. With the exception of republican Spain (in 1931), the example of Austria and Czechoslovakia was not followed in the period between the two world wars, since the countries of Europe had reservations about the novelty of this proposed solution.

The "fashion" of constitutional courts only really began after 1945, when, - after the annulment of the Anschluss - the Austrian Court, in abeyance since 1937, resumed its work. The first new constitutional courts were created by the Constitutions of Italy (1947), Federal Germany (1949), France (1958), Turkey (1961) and Yugoslavia (1963).

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136 S. Peyreu-Pistouley, La Court Constitutionnelle et le contrôle de la consitutionnalité des lois en Autriche, Paris, Economica, 1993, p. 28.

137 H. Kelsen, op. cit., p. 207.

138 Ibid., p. 211.

139 Ibid., p. 221.

140 Ibid., p. 223.

141 Ibid., p. 223.

142 Ibid., p. 226.

There then followed a wave of new courts in the 1970s and 1980s (Spain 1978, Portugal 1982, following an amendment to the 1976 Constitution, Belgium 1983);143 next came the countries which had abolished the totalitarian regimes in Central and Eastern Europe: Poland, Hungary, Romania, Bulgaria, Czech Republic, Slovakia, Slovenia, Croatia, Federal Republic of Yugoslavia, Macedonia, Albania, Belarus, Moldova, Russia, Ukraine and Lithuania and even smaller States such as Andorra and Liechtenstein.

All these constitutional tribunals, courts or boards correspond to the "European model" characterised by Professor Louis Favoreu on the following lines: their constitutional status, their institutional and in particular juridical context, their prerogative of examining constitutional disputes, the appointment of judges by political authorities, the exercise of a genuine jurisdiction outside the framework of the ordinary courts.144 The European model avoids the diverging interpretations which may arise between courts (eg in the case of the diffuse control of the American type), by immediately providing a single solution to the problem of constitutionality.

Cases brought before these courts refer solely to the constitutionality of a law, and the ruling of each court has universal application, not only for the parties to the dispute.145 Along with other advantages as regards the composition and procedure of the courts, this explains the spread of the European model to other continents, particularly in South America (Bolivia, Ecuador, Colombia, Chile, Peru),146 but also in Africa (Egypt, South Africa, the Malagasy Republic, Congo)147 and Asia (Syria, South Korea, Thailand, Mongolia).

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In our view, the foregoing considerations express the salient features of the birth and development of European constitutionalism as regards both theory and legislation. We have chosen the chronological aspect. There was no other possible approach, since all these features are equally important and together constitute an indivisible whole. It is however noteworthy that this has, perhaps by chance, highlighted the upward march of European constitutionalism, starting with a principle of the art of government used at all times to combat oppression of the individual and culminating in the full defence of individual rights and freedoms under the protection of constitutions. At the end of this millennium we can all see for ourselves that European constitutionalism has been, and remains, a factor making for civilisation and democracy. The political history and experience of peoples have confirmed its virtues. It has now spread across all Europe, and even beyond its frontiers.

Thus its triumph is complete. The great family of the peoples of Europe, notwithstanding all the contradictions still to be overcome, notwithstanding the inherent differences between its members, cannot do other than have a common destiny. We can be sure that now and in future, the contribution made by constitutionalism, which first emerged in Europe, will continue to be just as important - perhaps differing in its ways and means, which will necessarily have to be

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143 L. Favoreu, op. cit., p. 4.

144 Ibid., op. cit., pp. 16-23.

145 D. Rousseau, op. cit., pp. 22-23.

146 J. Lambert, A. Gaudolfi, Le système politique de l'Amérique Latine, Paris, P.U.F., 1987, p. 273.

147 Gérard Conac, Les Cours suprêmes en Afrique, Paris, Economica, 1989, Vol. II, P. X et seq.

suited to future times. It is up to those who have inherited it from its creators of more than two centuries ago to show themselves worthy of their precursors.

Second working session

Conditions for a common institutional heritage

a. Identifying a common parliamentary heritage
by Mr Constantin KORTMANN

b. The conditions for a common state heritage: The mutlinational state of Europe
by Mr Stéphane PIERRÉ-CAPS

c. Ukraine's constitutionalism in the context of the constitutional heritage of Europe
by Mr Serhiy HOLOVATY

a. Identifying a common parliamentary heritage by Mr Constantin KORTMANN

Professor, University of Nijmegen, Netherlands

1. Introduction148

The reply to this question is probably "no" if we consider all the States world-wide. But is the answer any different if we confine ourselves to the member States of the Council of Europe or the European Union? As we shall see below, the answer is both yes and no.

The ensuing comments relate exclusively to the member States of the European Union, of which, as we know, there are currently fifteen. This paper comprises eight paragraphs which, in contrast to the French tradition, are not in two parts each. The Dutch are less Cartesian (formally) than the French. There is a concluding section at the end.

2. Parliaments

All the member States of the European Union have had an institution representing their peoples at least since the nineteenth century. This institution is referred to by different names in different countries. For instance, the French and British systems of constitutional law use the word "parliament", whereas other constitutions set out a special title, which often has historical significance. This is the case in the Netherlands, with its "Staten-Generaal", Spain, whose Constitution refers to the "Cortes generales", and also the Danish "Folketing". Beyond this diversity of designations, it is established that the representative institutions of all these States symbolise a democratic constitutional structure. Perhaps they can even be considered to be the cornerstone149 of western democracies, as they will, in time, also be in the countries of eastern Europe. At all events, Protocol No. 1 to the European Convention on Human Rights presupposes the existence of a national parliament: Article 3 of the Convention requires States to hold

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148 This article is loosely based on "Volkeren vertegenwoordigd, De Interparlementaire Unie 100 jaar, 's-Gravenhage 1989; aan deze zijde van het Binnenhof, Gedenkboek ter gelegenheid van het 157-jaar bestaan van de Eerste Kamer der Staten-Generaal, 's-Gravenhage 1990; L. Prakke, C.A.J.M. Kortmann (red.), Het staatsrecht van de landen der Europese Gemeenschappen", Deventer 1993.

149 The Constitutions of European Union member States do not follow any set pattern in this regard. Some of them place parliament above the government (the executive), as, for example, in Germany and Belgium. The French and Netherlands Constitutions place the executive above parliament. We should avoid drawing conclusions from this on the constitutional importance of the various institutions.

regular, free elections by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

However, the importance and usefulness of parliaments cannot be seen in isolation from the constitutional and political culture within which they operate and which they, to some extent, represent and embody. For instance, the parliament of a State which was or is a monarchy may have greater powers than that of a state which has always been a republic, even though we would probably expect the opposite. By the same token, a parliament may be politically weaker than the dominant political parties, which was long the case in the Soviet Union. There are still some regimes which are basically partocracies. Any lawyer addressing the subject of a common parliamentary heritage must therefore tread very carefully. Abstract distinctions between parliaments based solely or mainly on constitutional texts are liable to be misleading. It would, for instance, be wrong to conclude that because all European Union member States have parliaments there must be a common heritage and future. We most look into this problem more closely.

3. Representative democracy and direct democracy

In most European Union States, parliament represents the people (or the electorate), takes decisions (sometimes in co-operation with the government) binding upon the citizens (adopts laws), or takes other decisions forming the basis of other mandatory rules. For example, Article 50 of the Netherlands Constitution lays down that the "States-General" represent the whole Dutch nation. Article 38 of the German Constitution stipulates that the members of the Bundestag are the representatives of the entire German people, and Article 51 of the Greek Constitution lays down that members of parliament represent the nation. Such Constitutions also provide that parliament (or one of its chambers) is responsible for adopting legislation. This is why in most European Union countries parliament is the basis of the legal system, leaving to one side the constitution in the formal sense. Representative democracy is no doubt a common heritage.

Nevertheless, in some European Union States representative democracy coexists (partially) with a form of direct democracy based on the referendum or the democratic right of petition. France and Italy are examples of this system150. It would be beyond the scope of this paper to discuss the advantages and drawbacks of such forms of direct democracy. Suffice it to say that the possibility of holding a referendum tends to detract from parliament's constitutional and political power, and sometimes even from the Constitution itself. This can be seen in the French system: while the Constitutional Council monitors the constitutionality of legislation adopted by parliament, it refuses to fulfil the same function in the case of legislation adopted by referendum, regardless of the logic of this position151. It is doubtful whether most States in the European Union would be prepared to consider direct democracy as a common heritage or as a common institution in the future. The Germans and British would probably object, given their constitutional and political history. They are firmly attached to parliamentary debate, with one side attempting to convince the other on the basis of an exchange of arguments, rather in the manner of a court trial. Discussions have been going on in the Netherlands for fifteen years now on a new corrective referendum facility enabling the electorate to reject legislation which has

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150 I am deliberately disregarding constitutional and purely consultative referenda.

151 See Constantin Kortmann, "Souveraineté et contrôle de constitutionnalité" (Sovereignty and supervision of constitutionality), La Revue Administrative 1994, p. 574 and 575.

been adopted by both chambers of Parliament. This would involve revising the Constitution, something which is very unlikely to happen. However, even if such a referendum were successfully introduced, it would only enable people to say "no". It is generally acknowledged that we find it easy merely to vote "no" because we do not have to think of the consequences or to produce any positive alternative.

4. The Constitution and Parliament

The basic principle of the British constitutional system is well known: the sovereignty of Parliament. Leaving aside Community law, the United Kingdom Parliament is all-powerful: it can do and undo what it wishes. The British Parliament can therefore be considered as a genuine sovereign "legibus solutus", as monarchs used to be. The situation is different in the other European Union States. Each of them has a written Constitution (which is generally rigid from the procedural point of view) which limits parliament's legislative and other powers. These limitations are partly based on the principle of the separation of powers. For instance, continental parliaments have no powers to exercise civil, criminal or administrative judicial functions. Furthermore, the legislator152 is bound by the fundamental rights ("Grundrechte", "droits fondamentaux") secured under constitutional texts and provisions laying down specific legislative procedures. There can be no question of parliamentary sovereignty, as parliament is the prisoner of the Constitution. This is particularly true in the case of France, where the distribution of powers is based on Articles 34 and 37 of the Constitution, a system unknown in the other European Union States. However, thanks to, or because of, the Constitutional Council's case-law, the French legislator's room for manoeuvre has been greatly extended since 1958153, and it might be contended that the French legislator now has basically the same powers as legislators elsewhere.

With the exception of the United Kingdom, therefore, we can conclude that the European Union States all have parliaments which must exercise their powers within the limits of written Constitutions. As the sections of these Constitutions dealing with the legislature are fairly similar in terms of both wording and interpretation, it would be no exaggeration to state that at least the legislative powers of parliaments in the European Union point to a common heritage: the legislator must take decisions that are important for society and for the organisation of the public authorities. Furthermore, this does not alter the fact that the government, not parliament, determines de facto the content of a piece of legislation, with parliament merely "applauding" government bills rather than helping draft them. This applies particularly to States whose Constitutions grant their governments powerful procedural weapons such as the "vote bloqué" (an enforced vote on a text containing only government amendments) and the "engagement de responsabilité" (a procedure under which the government is made answerable for its acts) vis-à-vis the adoption of a text.

5. Unicameralism and bicameralism

Bicameralism is the more common system in European Union member States, although Denmark, Greece, Finland, Luxembourg, Portugal and Sweden all have the unicameral system. We therefore cannot consider bicameralism as a common heritage of the EU States, especially when we realise that the reasons for the creation of an upper chamber vary from one country to

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152 The legislator is often parliament, although it is sometimes parliament in conjunction with the government.

153 See Dominique Rousseau, "Droit du contentieux constitutionnel" (Constitutional litigation), Paris, 1995.

the next. It is logical for a federal state like the Federal Republic of Germany to have such an institution as the "Bundesrat". This upper chamber is made up of representatives of the governments of the "Länder" and has powers which relate primarily to the position of these "Länder" in the constitutional system. The Belgian Senate is another manifestation of a federal state. The raison d'être of the House of Lords must be sought in British history. It served to protect the King against the democratic body, which was and is the House of Commons. As the British are very deeply attached to their constitutional history, they have never seriously considered abolishing this chamber of Parliament, which seems rather strange to continental eyes. In other States, such as the Netherlands and Spain, the existence of bicameralism is more difficult to explain. In the Netherlands, when the monarchy was instituted (1814), the "Eerste Kamer" was made up of members appointed by the King and was comparable to the House of Lords. Ever since 1848 its members have been elected by the members of the provincial States. This would suggest that the "Eerste Kamer" is a representative body for the 12 provinces. However, this is not the case, since candidates for election can reside anywhere in the country. The "Eerste Kamer" is currently primarily considered as an institution which may (and must) exercise complementary supervision of the conformity of proposed legislation with the Constitution and the general principles of law. In Spain, Article 69 of the Constitution describes the "Senado" as a "Cámera de representación territorial", which is why its members are elected partly by the inhabitants of the regions and partly by the regional parliaments. In practice, however, the "Senado" seems to have little to do with territorial representation: its members act more in line with their national parties' policies than in defence of regional and provincial interests.

Ireland is a special case. The upper chamber (Seanad Éirean) has 60 members, 49 of which are elected and 11 appointed. Of the elected members, 6 are elected by the universities (!) and the other 43 by outgoing members of the upper chamber, the members of the newly elected lower chamber and members of local councils, a total of some 900 persons. There are five groups of candidates representing education, agriculture, employees, trade and industry, and the civil service. The Prime Minister newly elected by the lower chamber appoints the aforementioned 11 members. These regulations might suggest some form of corporatist arrangement, but in practice the senators behave like "normal" politicians, as in Spain.

There are, however, other differences among the bicameral systems. In some States both chambers in principle have the same powers, whereas in others the lower chamber has considerably wider powers. We shall come back to this point.

6. The electoral system

The countries of the European Union have an enormous variety of electoral systems, especially when one considers bicameral elections. I shall confine myself here to systems of election to the lower chambers. For instance, the Netherlands has a proportional system which is virtually mathematical, the United Kingdom has a relative majority system based on single-candidate constituencies, the French system embraces an absolute majority in the first ballot and a relative majority in the second and is based on single-candidate constituencies, and other countries such as Germany and Italy have mixed systems, which again vary considerably. As we know, these systems result in different memberships of the lower chambers. Under the proportional system, a variety of parties are represented in the chamber, whereas the majority system tends to create a homogeneous majority and opposition. Where electoral systems are concerned, Europe is far from having a common heritage. It would, moreover, be erroneous to attempt to explain the composition of lower chambers solely with reference to the electoral system. The structure and

stability of the political parties also plays a part. In States such as Germany and the United Kingdom the configuration of the political parties remains fairly constant. On the other hand, the Netherlands, Belgium and Italy show a fair degree of instability, reflected in a fairly high percentage of "floating" electors and variable parliamentary coalitions.

Broadly speaking, majority systems are at least theoretically aimed at achieving a type of political power which can take decisions (such as legislation) easily, while proportional systems emphasise the representation of the electorate within the political authority as well as decision-making based on compromise. It is noticeable that the northern countries, including the Netherlands, prefer the proportional system, whereas southern European States have systems which generally lead to bipolarisation.

7. Relations between government and parliament

At first sight relations between government and parliament in European Union countries would seem to have a common denominator: the government must win the confidence of either both houses or of the lower house of parliament. Furthermore, the government, or individual members thereof, must answer parliamentarians' questions. But the similarity stops there.

In the first place there is a distinction between "positive confidence" and "negative confidence". In Italy and Spain a new government must win the confidence of the majority in parliament (or in the lower house) by means of the "investitura/investidura". The French Constitution also sets out this principle, but it has happened that a newly appointed Government has failed to submit its programme to the National Assembly for approval, and instead has waited for a spontaneous vote of no confidence, which was then rejected. The constitutional law of the Nordic countries and of the Netherlands does not set out any "positive confidence" requirement. The Government can remain in place until parliament or the lower house expresses its lack of confidence. This explains why minority governments are fairly common in Scandinavian countries. The Government is presumed to have Parliament's confidence unless proved otherwise.

Secondly, there are differences in the mechanisms for a (spontaneous) vote of no confidence. In some States, eg the Netherlands, such a vote can be taken in each chamber154. In the great majority of EU countries, only the lower house can force a government to resign.

Thirdly, there are major differences in the regulations governing votes of no confidence. Neither the United Kingdom nor the Netherlands has a written constitutional basis for a vote of no confidence. It is a constitutional convention, which is in fact scrupulously respected. In most other States the Constitution contains provisions on votes of no confidence. But this does not imply similarity. For instance, Germany, Belgium and Spain have the constructive vote-of-no-confidence system, under which parliament cannot overthrow a government unless it first of all appoints a new Prime Minister. The principle is that if you want to overthrow anyone you have to pay. Although the French system does not have such a constructive vote of no confidence, it requires an absolute majority of members of the National Assembly. The Danish and Irish constitutions merely provide that the government must resign if it loses the confidence of parliament. A motion of no confidence must be adopted on an absolute majority of members present, as in the Netherlands and the United Kingdom.

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154 I note that votes of no confidence are extremely rare in the Netherlands upper chamber. Some constitutional writers and politicians consider such votes unconstitutional.

Lastly, we might point out that in several countries parliament can only take a vote of no confidence in respect of the whole government, as a single unit. This applies to Germany, Belgium, France and Spain. In Denmark, the United Kingdom and the Netherlands, a vote of no confidence can be taken on an individual minister or on the whole government, which, at least theoretically, facilitates parliamentary supervision and sanctioning.

The counterbalance to the vote of no confidence is the right of dissolution, which is common to the constitutional laws of all the States under consideration. However, once again this right does not always constitute a common heritage. Although in general only the lower chamber can be dissolved, the Spanish, Italian and Dutch constitutions also provide for the dissolution of the "Senate". Some States place no material or procedural limitations on the right of dissolution; examples are Denmark, the United Kingdom and the Netherlands155. The French system is fairly similar, although the Constitution prohibits dissolution within a year after the elections. The Constitutions of Spain (Article 115) and Portugal (Article 175) contain analogous provisions. The German "Grundgesetz" sets out very detailed regulations on dissolution, and only permits it in certain specific cases (Articles 63 and 68), which is explicable by the concern in the Constitution to prevent coups d'état in the Bundestag.

French constitutional law has a peculiarity which is not to be found in any other State. The President of the Republic is empowered, freely and without countersignature, to dissolve the National Assembly. This mainly happens after presidential elections which have produced a presidential majority different from the parliamentary majority. In other European Union States the Prime Minister (or government) enjoys the right of dissolution, which is in keeping with the traditional parliamentary system.

The foregoing comments might lead us to conclude that although the systems of constitutional law in all fifteen EU countries on the two main mechanisms of the parliamentary system are based on the same principles, the legal details are fairly heterogeneous.

The same is true of relations between government and parliament in terms of the principle of the separation of powers. Under this principle there should be a reasonably clear distinction between the organisation and powers of parliament and those of government. The United States of America is a classic example of the principle. In European Union States the separation of powers is mainly reflected in the independence of the judiciary which is secured inter alia by Article 6 of the European Convention on Human Rights. In other respects the constitutional systems diverge substantially. We might look at a few examples. In France and the Netherlands ministers cannot simultaneously be members of parliament (the dualistic system), whereas in the United Kingdom they have to be (the monistic system). In other countries, such as Germany and Spain, ministers can but do not have to be members of either chamber. French laws are adopted by parliament, whereas in the Netherlands this role is played jointly by government and parliament. Some Constitutions, such as those of France, Italy and Spain, allow the government to establish legally binding regulations, whereas others, such as those of Germany and the Netherlands, prohibit such activity on principle. In most European Union countries parliament decides on its own rules of procedure and agenda. The French Constitutional Council monitors the constitutionality of the Assemblies' rules of procedure and the Government establishes priorities in the agenda, etc. Again it is difficult to detect any common heritage in this situation.

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155 It should be noted that a second dissolution on the same grounds is prohibited under a Dutch constitutional convention.

8. Parliamentary powers

One feature common to constitutional law in all fifteen EU countries is that parliament adopts or helps draft legislation156, and that it supervises government activities. Nevertheless, there are some very obvious differences in matters of drafting legislation. For instance, most Constitutions provide for two chambers and stipulate that the lower chamber must take the final decision (Spain, France157 and the United Kingdom). On the other hand, in Italy and the Netherlands the two chambers are on an equal footing: both have to agree to the adoption of a piece of legislation. However, we should add that the Dutch "Eerste Kamer" has no right of amendment: parliament has to take or leave proposed pieces of legislation as they stand.

In some bicameral systems the upper chamber takes part in the formulation of all legislation. This applies to France, Italy and the Netherlands. The situation is different in Germany and Belgium, where the Constitution distinguishes between laws adopted solely by the lower chamber and those adopted by both chambers. This distinction is linked to the federal nature of these two States: in principle, the upper chamber is only involved in the preparation of laws relating to the interests of the component parts of the Federal State ("Länder" and "régions" or "gewesten").

The situation with regard to certain special laws is very similar in all fifteen EU countries. The legislator adopts the budget and, if so prescribed, approves international treaties. On the other hand, constitutional revision procedures are many and varied. Some constitutions, such as those of Spain, France, Italy and Ireland, prescribe or permit referenda to decide constitutional issues. Others, like those of Germany and the Netherlands, lay down a purely parliamentary procedure which is special and involves qualified majorities158. France has three different procedures, namely the two set out in Article 89 and the one stipulated in Article 11, although the constitutionality of the latter is somewhat doubtful.

What of supervisory powers?

The British Parliament is rightly considered as the "mater parlementorum" where supervision of the deeds and acts of government members is concerned. It was here that the concept of ministerial responsibility saw the light of day. Question hour, which is currently shown on television, is the envy of the other European Union parliaments, which are always trying to imitate it, in vain159. In the United Kingdom, like the other European Union States, parliamentary debates may, in principle, be followed by votes or resolutions, including the vote of no confidence which we discussed above. Apart from the latter, such motions are not legally binding on the government, but they may have political consequences and jeopardise the government or an individual minister. However that may be, such votes or resolutions are a common means of parliamentary expression. To my knowledge, only French constitutional law prohibits any motion having an external effect apart from those laid down in the Constitution.

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156 In paragraph 4 we dealt, albeit in a very general manner, with legislative powers per se.

157 There are exceptions, such as implementing laws relating to the Senate.

158 In the Netherlands a revision may be adopted after two readings, while the lower chamber is dissolved in the period between the two readings.

159 Although we might wonder whether supervision of the House of Commons is as reliable as it seems, in view of the extreme form of the British majority system.

Such motions may therefore be considered as a common heritage of the parliaments in the European Union States.

The same applies to a number of other means of supervision, such as the consideration and discussion of governmental documents by parliamentary committees and the possibility of setting up select committees of inquiry. Nevertheless, differences are also noticeable here. For example, parliamentary inquiries are more common (and more protracted) in Germany and the Netherlands than in France, where the right of inquiry is fairly strictly regulated.

9. The "controller" of the Constitution

The real controller of the Constitution is, of course, the constituent power. However, this power only acts incidentally. Normally, the constituent power is dormant, only stirring very rarely. When it does awaken, it is often in order to effect a minor constitutional revision. It is also obvious that a Constitution must be interpreted and enforced by the legislature, the executive and the judiciary. So the question arises as to who should be the ultimate interpreter of the Constitution. Before the second world war the answer was clear: the interpreter was the legislator, the democratic political authorities. That was why the law was said to be inviolable, a word which appeared in the pre-1983 Dutch Constitution.

Since the war the situation has been rapidly changing. Supervision of the constitutionality of laws by either the ordinary or special courts has gained a foothold in the constitutional law of most European Union countries. But does this entitle us to see a common heritage in this field? There are two reasons for doubting it. The first is that a number of European Union States, namely Finland, the United Kingdom, Luxembourg and the Netherlands160, still lack such supervision. Furthermore, in Denmark and Sweden, even though supervision of constitutionality is not precluded, it is more theoretical than actual. Such States, which have no experience of authoritarian or oppressive regimes, feel little need for a non-elected body to supervise constitutionality. They trust the political authorities to exercise caution and restraint, and in fact the latter do generally act on the basis of an overall consensus negotiated in parliament and with the "social partners".

The second reason is the wide variety of systems for supervising the constitutionality of legislation. We need only compare the highly developed German system, with its "abstrakte und konkrete Normenkontrolle" and its "Verfassungsbeschwerde", with the French system, which only provides for a priori supervision. In fact the latter only applies to implementing laws and ordinary laws which have been referred to the Constitutional Council. Once laws have been promulgated, they are "inviolable", just as they used to be. Moreover, those States which do have supervision systems have organised them in widely differing ways. While Germany, Belgium, Spain, France and Italy have special courts, Denmark, Greece, Ireland and Sweden entrust supervision to the ordinary courts.

10. Conclusion

Over the past few years it has become fashionable to say that parliamentary systems are in crisis, and this is sometimes justified. It is true that some European Union States have experienced, or

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160 **Even though the Netherlands has no system of supervision of the constitutionality of laws, Article 94 of the Constitution requires every judge to verify the conformity of all national legal rules, including the Constitution, with the directly applicable rules of international treaties. Such verification results in something very similar to supervision of constitutionality.**

are experiencing, highly disturbing political instability and financial and other scandals, and have encountered politicians of doubtful reputation and morality. It is also true that the responsibilities and powers of EU parliaments are being cut back under the influence of European, and even global, unification, even though nobody with their experience and competence has been set up in their place. We might also point out that many modern-day democracies have entrusted decision-making powers to bureaucrats, and this seems to be an irreversible process.

However, none of this justifies relinquishing the parliamentary system. The very reverse is the case. If Europe is to remain democratic and provide sufficient safeguards against tyranny and war, we must identify the common foundations of the European parliaments, compare their modes of operation, develop mutual understanding and learn to respect differences. Is it not remarkable that De Gaulle and Debré wrote a Constitution the parliamentary section of which was influenced by British constitutional conventions? Is it not surprising that the Spanish Constitution borrowed many features from the German and French Constitutions? Does not the Dutch Constitution provide a good example of the relationship between international and national law? And there is much to be learnt from the German, Belgian and Spanish Constitutions regarding the "statal form" of a future Europe.

The foregoing paper has emphasised, or perhaps overemphasised, the differences between the fifteen EU parliamentary systems. There are undoubtedly even more differences. Such (over-) emphasis might lead us to conclude that "the fifteen of us are too different to live together". Such a conclusion would be very wrong. Mutual understanding and coexistence cannot be achieved by "papering over" our differences. When we play hide-and-seek we often forget that in fact the differences bear witness to such basic underlying values as human autonomy and dignity, pluralism, the rejection of an absolute political "truth", respect for other opinions and the need for a public authority which is able to act, but with restraint. These values can be discovered, or rediscovered, by clearly and sincerely pinpointing our differences and acknowledging that we (sometimes) have a different lineage. Is there a common parliamentary heritage? If we wish it to be so, the answer, in the end, can be "yes".

b. The conditions for a common state heritage - the multinational state and Europe by Mr Stéphane PIERRÉ-CAPS

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Summary

In the United States, in October 1995, during a meeting of former Heads of State and Government who had witnessed the collapse of the Berlin Wall, President François Mitterrand made a significant political point: "The great issue of the 21st century will be to reconcile two needs: those of the great unions embracing different communities and the need of each community to assert itself as such (...). Do we have the politicians and parliaments capable of finding a way of organising this boundless world, with a few major centres of co-ordination meeting the requirements of international law (...) and, at the same time, can we formulate minority rights enabling each person to live as he or she wishes?.161

These thoughts are particularly relevant to the European continent, in which political entities are today grappling with two simultaneous trends - one, incidentally, being generated by the other - which are calling into question the way in which the State is organised: globalisation, which makes for standardisation, and isolationism, pursued in an effort to assert an identity (and perhaps even out of self-defence). A twofold process of integration and disintegration is eroding modern European States. According to certain authors, the amplitude of this process can be measured by the yardstick of federalism: "One can identify a federative process occurring through disintegration, matched, within the nation-States, by a process of integration through assembly".162

This geographical and spatial phenomenon cannot be explained solely by the originality of the way in which the Community was forged; it also has historical roots:

- in England, France and Spain, the first nation-States were constituted from medieval Christianitas onwards. Therefore, from the very beginning, this way of organising the body politic appears to be a highly localised phenomenon - at any rate, it is typically European;

- but, at the same time, and on the same scale, the Holy Roman Empire (1648-1806), followed by the Habsburgs, strove to promote a rival political model which was confederal and multinational.

So, to refer to the conditions for a common State heritage in today's Europe only makes sense if this original feature is taken into account: as of the Renaissance, two models of State organisation have been competing for political legitimacy and supremacy. European public and constitutional law is a telling reflection of this confrontation:

- On the one hand, as far back as the 15th century, in Hungary, and from 1576 in France, when the Six Livres de la République by Jean Bodin were published in Lyons, the advocates of sovereignty provided the State with an argument for its legitimacy which the revolutionaries in 1789 were wary of challenging.163

- On the other hand, the Holy Roman Empire, although stripped of its substance after the Treaties of Westphalia, produced an institutional system and an anti-absolutist theory of

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161 Le Monde, 12 January 1996.

162 Maurice Croisat and Jean-Louis Quermonne, L'Europe et le fédéralisme, Paris, Montchrestien, 1996, p. 9.

163 On the emergence of sovereignty as a "monopoly on the enactment of positive law to the advantage of the sovereign prince", cf. Olivier Beaud, La Puissance de l'Etat, Paris, PUF, coll. Léviathan, 1994, pp. 62-68 (quotation p. 62).

the State, known under the name of Reichspublizistik, formalised by Leibniz as far back as 1670. Founded on the search for a balance between the Emperor and the Empire States, Reichspublizistik appears as a "model of federative constitution"164, contrasting with what was to become, at the end of the 18th century, the nation-State. While we are indeed now witnessing the emergence of a European type of "intergovernmental federalism", that is to say one which is based on "European political culture",165 as stated in the writings of Maurice Croisat and Jean-Louis Quermonne, it owes its originality partly to this model, even though the two authors base their arguments on the European hypothesis of a "federation of nation-States". Furthermore, is "constitutional patriotism", as recently formulated by Jürgen Habermas, not strangely reminiscent of "Empire patriotism",as formulated in particular by Friedrich Karl Von Moser (1723-1798)?

However, from the middle of the 19th century, the European nations, having arrived at a degree of self-awareness, clearly turned to the political and legal model of the nation-State, adopted as a result of the French Revolution in 1789, which gave it a universal dimension. It was thus transformed into an instrument for combating any form of despotic government. It was brought to the knowledge of the European people through the Napoleonic Wars and the ideology of the principle of nationalities.166 It is of course the idea of the nation which supported and justified this right to a State - the nation which the revolutionaries of 1789 identified with liberty and which was their sole instrument in the combat against absolute monarchy. And, since it was a question of replacing monarchic despotism with a new form of political legitimacy, the principle of nationalities was used as an argument for propagating, abroad, the ideology of national sovereignty and at the same time the principle of a single, indivisible republic, ie a nation-State. The rationalism and universalism of the Age of Enlightenment, transformed by the messianic promises of the revolutionaries, took care of the rest. Each people and each nation would only attain political liberty by providing itself with its own State with national sovereignty. The principle of nationalities thus represented the obligatory stepping stone towards the nation-State, which was thus inherently against the dynastic State. Furthermore, the whole world was called on - in a decree of the Convention of 19 November 1972 which decided, in the name of France, to "offer fraternity and assistance to all people who wished to regain their liberty" - to subject itself to this political principle of territorial division, whereby there must be as many States as there are nations. Further still, the frontiers of each State must necessarily, ie rationally, correspond to the frontiers of one and only one nation.

In 1919, the partitioning of the Austro-Hungarian and Ottoman Empires sanctioned the triumph of the nation-State, in spite of significant theoretical efforts made in Austria-Hungary itself to safeguard the multinational State.167 Admittedly, for some time, first the Soviet Union and then Yugoslavia in 1945 were able to pretend to perpetuate the multinational character of their own political entities under the ideological cloak of "socialist federalism".

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164 Jacques Le Rider, La Mitteleuropa, Paris, PUF, coll. Que Sais-Je?, 1994, p. 32.

165 Op. cit., p. 10.

166 In this connection, it was at the very beginning of the 19th century that the idea of self-determination became established as terminology with the appearance of the word nationality; this primarily designated shared human origins, history and traditions, reflected in a collective desire to have the same political destiny; the principle of nationalities meant nothing other than the right to independence of the social group thus defined.

167 Cf. Otto Bauer, La Question des nationalités et la social-démocratie, Paris-Montréal, EDI-Guérin Littérature, 2 vol.,1987, 594 pp. - Karl Renner, Das Selbstbestimmungsrecht der Nationen (Nations' Right to Self-Determination), Leipzig and Vienna, Deutike, 1918, 293 pp.

But after the fall of communism, the cause appeared to have been heeded. The creation of Slovakia and Slovenia, and even Macedonia, proclaimed a "nation-State of the Macedonian people" by the Constitution of 17 November 1991,168 and the ethnic partition of Yugoslavia show how attractive the nation-State is, whether it partakes of the right to self-determination, a modern version of the principle of nationalities, or whether it lapses into nationalistic excesses. Moreover, on considering the centrifugal forces at work in Belgium and Spain, if not in Italy, which the tendency towards federalism, so aptly described as leading to disintegration, hardly seems to be able to keep in check, one cannot but notice the irrepressible fissiparous propensity of a model for the organisation of the body politic which seems to be destroyed by the principle on which it is intrinsically based.

This successive chain reproduction of the nation-State in Europe clearly signifies the total failure of a multinational State, as is blatantly borne out by the Bosnia-Herzegovinian State resulting from the Dayton Agreements. At the very most, one can quote the exception of Switzerland, which, "for one and a half centuries, has been steering a middle course between a confederation of cantons and a federal State, protected from the turmoil of the international political arena, at the cost of isolationism and prudent reliance on its own values".169 In fact, the Swiss "model" hardly seems exportable.

But appearances can be misleading - the attraction of the nation-State in Europe after 1989 was based on a substantialist concept, ie an organic and cultural or even community-based, concept of membership of a social group. It is completely at variance with the integration process which is equally at work on the European continent in as far as this is based primarily on a legal system, which is very formal - the Community Treaties could thus only be defined as "the constitutional charter of a Community based on the rule of law".170 In seeking to govern relations between people by means of an encompassing legal system of this kind, this integration process paves the way for transnational political integration in which the centre becomes a structure that is neutral in relation to its own components, as in the case of the former Reichspublizistik.171 Accordingly, a Europe of regions seems to be a combination of circumstances capable of favouring regional emancipation, but also, eventually, of preventing the emergence of a true, founding political unity.

In fact, the conditions for a common State heritage presuppose that the contradiction has been resolved. It is therefore important to dispel the paradox of the nation-State (1.), which exhausts itself by constant reproduction and carries its own decline within itself. This is precisely where the paradigm of the multinational State (2.), as a political means of organising a Europe that has finally found its feet again, lies.

1. THE PARADOX OF THE NATION-STATE

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168 Text in Michel Lesage, Constitutions d'Europe centrale, orientale et balte, Paris, La Documentation française, 1995, p. 355.

169 François Borella, La construction politique de l'Europe : la querelle des modèles, in l'Autriche dans l'Europe, Revue d'Allemagne, t. 28, No. 2, April-June 1996, p. 137.

170 CJEC, Opinion 1/91 RUDH, 1991, p. 91.

171 Similarly, Olivier Beaud pointed out that, "being inherently formal, the prescriptive conception of nationality allows for the possibility of a multinational state and, at the same time, relativises the concept of 'nation' and the distinction between foreigners and nationals", whereas considering nationality to be tantamount to citizenship in the name of a spiritualist conception precludes any political and legal horizon other than that of the nation-State (op. cit., p. 120).

"We must ask ourselves why people find it 'natural' and reasonable that every nation, and one nation only, should form a common political system".172 This question, which was asked by Otto Bauer, sums up the whole issue of the nation-State: a true political concoction which combines the right to self-determination, held up since decolonisation as a tenet of international public law, and the principle of the unity of the State - to each nation its State - which is no less intangible.

This isomorphism of the State and the nation, founded on an idea which is a legacy of the 18th century, according to which the nation is the appropriate framework for the affirmation and the advancement of the individual, is expressed in legal terms in a famous saying: "The State is the legal personification of the nation".173 This sums up the whole French theory of public law. Accordingly, the State is the fruit of the delegation of sovereignty to the organs of political power - including the nation - as provided for by the Constitution. This is why the nation does not legally exist outside the State. Moreover, German legal theory says the same thing, albeit with a different set of arguments, Jellinek's theory of the nation as an organ. It is this identification of the State with the nation which is perpetuated by the French Constitutional Council when it states that "the Constitution (...) recognises only the French people, composed of all French citizens, irrespective of race, origin or creed".174 The German Constitutional Court, not to be outdone, highlights the concept of the "people of the State" (Staatsvolk) which is both the subject and the object of State power.175

The entire force of this argument lies in its capacity to reduce the social basis of the State to a single concept, the nation then appearing as the expression of a unified and homogeneous body politic of which the undivided component is none other than the citizen. No-one would doubt that this gives the nation-State a legitimacy which, precisely, was always lacking in the multinational State (A.), this legitimacy being the primary cause of its universalism and, again since 1989, of its proliferation on the very continent in which it originated (B.).

A. The legitimacy of the nation-State

It was by winning the battle for political legitimacy that the nation-State replaced the multinational State as a form of organisation of the body politic - the decisive moment in this respect was the end of the first world war. The question remains as to why the multinational State was not able to take advantage of a form of legitimacy similar to that which supported the nation-State as early on as 1789.

In fact, it was the trend underlying the principle of nationalities and then, after 1945, the right to self-determination that provided the nation-State with the basis for its own principle, ie justification for establishing a unified social basis for itself. The nation of 1789, founded on the liberty of man and the citizen, spawned the right to self-determination, which in turn produced the nation through the revelation of the people to themselves. Indeed, Professor Charles

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172 Otto Bauer, La question des nationalités et la social-démocratie, op. cit., p. 196.

173 Adehmar Esmein, Eléments de droit constitutionnel français et comparé, Paris, Sirey, 1927, t 1, pp. 1-2.

174 Cons. const., Dec. No. 91-290 DC of 9 May 1991, JO, 14 May 1991, p. 6350.

175 Cf. Albrecht Weber, Commentary on the decisions of the Federal Constitutional Court of 31 October1990, RFDC, pp. 553-555.

Chaumont has highlighted the fact that human rights and peoples' rights have common roots - "The 'inclination' of man to a national existence, in its dialectical and historical evolution, is transformed into the right to self-determination, which, once legally established, is embodied in State sovereignty".176 In other words, creative energy which grows out of the drive for peoples' rights becomes channelled to the advantage of the universalisation of the political model of the nation-State. The right to self-determination thus appears as an instrument for structuring an international society exclusively composed of nation-States. As the natural rite of passage to the nation-State, peoples' rights thereby fulfil a sacred function, so that one cannot confuse "the people" in their irrepressible desire for national unity with infra-national communities, whatever they are called: communities, nationalities, ethnic groups, even national minorities.

Self-determination therefore appears as the ideal instrument for the legitimisation of the nation-State. On this point, the revolutionary virtue of nationalism and the resources of positive law have joined forces to provide a solution that has been remarkably continuous for two centuries in order to structure international society and, especially, European society into an uncontiguous State model. It is this very model which, after the heady days of decolonisation, saw the collapse of the Berlin Wall and the fall of communism as the opportunity for reorganisation, giving legitimacy to German reunification as well as to the right to independence of the central European nations without a history: those nations without a State which had never existed politically - Slovakians, Slovenians and Macedonians.177 From 1848 to 1989, the maps of the States of Europe was regularly redrawn by virtue of the principle of nationalities, especially in 1919.

It is also this principle, which, in contrast, underpins the metamorphoses of the multinational States, which, from the German Confederation to the Ottoman Empire - taking in Austria - still governed the whole of central Europe in 1848. The legitimacy of the multinational empire was, however, based entirely on the personal allegiance of the subjects to the Emperor, in accordance with the dynastic principle. The situation of the Habsburg Empire is in this respect exemplary because it failed to adapt to the growing demand for universal suffrage throughout the 19th century, and to accommodate the demand for equality in the autonomy of the various national groups, it ended up by rendering the legitimacy which had supported it totally obsolete, and at no time was it able to come up with an alternative political model to the driving force of the nation-State. However, the break-up of the Austro-Hungarian and Ottoman Empires in 1919 did not signify ipso facto the pure and simple disappearance of national pluralism in the political entities in the Danube and the Balkans. For lack of authentic multinational States, ie States in which no dominant national group exists, where political power is not identified with any particular national culture, the new central European political entities appear, to a greater or lesser extent, to be States of national minorities, in which the "centre" reflects a dominant national culture - the other nations then being considered as minorities.178

Far from disappearing with the former empires, multinationalism was metamorphosed by reduction, as it were - national minorities followed nationalities, with the result that public law

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176 Charles Chaumont, Recherches du contenu irréductible du concept de souveraineté internationale de l'Etat, Mélanges Basdevant, Paris, Pédone, 1960, p. 150.

177 Cf. Stéphane Pierré-Caps, La Multination. L'avenir des minorités en Europe centrale et orientale, Paris, Odile Jacob, 1995, pp. 37-50.

178 I have borrowed this terminology from the distinction referred to in a memorandum from the Secretary-General of the United Nations - Definition and classification of minorities, Memorandum submitted by the Secretary-General, United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, New York, 1950.

specialists had to use a great deal of imagination to provide an organisational framework for the national heterogeneity of political entities newly created in the name of a legitimacy which was, nevertheless, contradictory to pluralism. This shows the instability and fragility of "nation-States" which had been established in this part of Europe, which bore no small share of responsibility for the worst disaster that this harassed continent had ever experienced.

Yet the paradox of the nation-State was reinforced after 1945, with the help of the issue of human rights, which had a standardising influence and served as a foundation for the United Nations, and was to justify decolonisation. Admittedly, for some time, the Soviet, Yugoslav and Czechoslovak multinational federations (the last-named being bi-national) were able to delude people by eliminating all reference to the minority question in the name of proletarian internationalism and the social division of labour. But, after 1989 and the disintegration of the Soviet Union, the partition of Yugoslavia and the strange Czechoslovakian divorce, the multinational State, a phenomenon specific to central Europe, inherited from the Holy Roman Empire, seems to have been wiped off the European political map, appearing only as a sort of precipitate (in the chemical sense of the term) of the right to self-determination. It was doomed to disappear precisely because of the "theory of political legitimacy, which requires that ethnic boundaries coincide with political boundaries".179 This is borne out by the mere fact that the nation-State has proliferated in Europe since the fall of communism. Has the nation-State therefore become the only constituent element of a common European State heritage?

B. The proliferation of the "nation-State"

This proliferation can be noted because of the quasi-physical process of fissiparous reproduction. The principle of unity at work in the right to self-determination unremittingly counteracts any heterogeneous element which may impede the active attempt to make a single State coincide with a single nation and which, as such, must be excluded from the concept of statehood.

Such is the strategy of excluding people who are different, as legitimised by peoples' rights and explicitly formulated in the memorandum of the Serbian Academy of 1986: "The establishment of full national and cultural integrity for the Serbian people - in no matter which republic or province they should find themselves - is their historical and democratic right".180 This strategy entails territorial recomposition for the sole purpose of assembling all the members of a nation within a single State. This aspiration to make the State coincide exactly with the nation can only be achieved through violence when the presence of other national groups hinders the setting up of a Greater Nation through territorial unification. This is the point at which the demand for a nation-State becomes pathological and the right to self-determination is misused, for the elimination of those who are different is necessary in order to achieve it. One cannot forget that this strategy is essential to a certain form of determinism as regards the nation-State, of the resurgence of which Ernst Gellner had a premonition, noting that "territorial political unity only becomes homogenous in certain cases - if it kills, expels or forcibly assimilates all non-nationals".181 One cannot but notice that nation-States were repeatedly founded in this way in the Balkans as the Ottoman Empire gradually disintegrated.

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179 **Ernst Gellner, Nations et nationalisme, Paris, Payot, 1989, p. 12.**

180 **Text in Mirko Grmek, Marc GJidara, Neven Simac, Le nettoyage ethnique, Documents historiques sur une idéologie serbe, Paris, Fayard, 1993, p. 265.**

181 **Ernst Gellner, Nations et nationalisme, Paris, Payot, 1989, p. 13.**

Admittedly, peoples' rights have also seen brighter futures; no-one would be able to contest the cogency of German reunification, or even Slovakian, Slovenian and Macedonian independence,182 even if the last three States also have significant infra-national communities. Elsewhere, the State makes use of this trend in order to consolidate a regained national identity. What could be called a social need for a State is thus clearly reflected in the loyalty to a political and legal model of the nation-State inspired by French constitutionalism, which makes it all the more difficult for a pluralist body politic to belong to a State which officially refuses to grant it this status, as in Bulgaria, or which endeavours to supervise it more or less strictly, as in Romania or Slovakia.

This last factor bears witness, if such were necessary, to the remarkable nature of the process for the constitutional establishment of the nation and the State in central and eastern Europe after 1989. Those attracted to the nation-State model, inherited from the western part of Europe, must reckon with tenacious multinationalism, a legacy of an imperial past, which is in fact specifically central European. What is more, the impact of the nation-State in this region stems from a remarkable collective perception of the concept of the nation. This social need for a State is not nurtured only by the subjective, purposeful and spiritualistic conception of the nation and its form of political organisation, that is to say of the French-style political nation, RENAN's famous "desire to live together". It is built as much, if not more, on the German-style Kulturnation, the organic and cultural nation of Herder, bound together by a language. In what the Germans call Mitteleuropa, the nation is much more a collective entity than a collection of individuals. Here, the elective concept and the ethnic concept of the nation are now joined together in the same passionate desire to assert their identity, bound together by a single fear, that of globalisation.

Now, from this angle, it is highly significant that this "ethnicisation" of the nation-State is spreading to the Europe based on integration, that of Brussels and of Strasbourg, even if the institutional strategies used can arouse doubts as to the term given to this phenomenon. On a more neutral and more optimistic note, Maurice Croisat and Jean-Louis Quermonne observe that "Since the 1970s we have been witnessing (...) processes leading to federalism, independence and decentralisation, which are all challenges to the system of the unitary state. These processes are diversified and often complex reflections of pluralist cultures which are constantly evolving and which can be favourable to the evolution of the European Union towards federalism."183

The argument is in indeed attractive. However, for it to be valid, this "federal process entailing disintegration", which is broadly apparent in Belgium, Spain and Italy, and even in France and Portugal if one is prepared to include movements towards decentralisation at work in these two countries, needs to be stabilised. Now, this stabilisation is far from certain in view of the centrifugal processes fuelled by those wishing to assert their identity, which enable one to put forward an argument which is much more pessimistic and less marked by analysis of the evolution in the forms taken by States - in eating away at "the unitary state order" in the name of

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182 Even if, in this last case, the choice of the nation-State is potentially dangerous, Macedonia being, de facto, a multinational State. Indeed, the Albanians of Macedonia (forming between 20% and 40% of the total population of the country according to sources), understood this perfectly well. Demanding a constitutional status as a founding and constituent people of a multinational Macedonian State, they did not participate in the referendum on independence of 8 September 1991.

183 Op. cit., p. 11.

national pluralism, these centrifugal forces in fact partake of a state/national ideology which they wish to pursue for their own ends. There are two strands to this ideology:

1. Either the aim is to create a nation-State specific to the culture concerned, which has attained a degree of self-awareness. The Belgian example is very revealing in this respect. Since 1970, Belgium has been a permanent constitutional drawing-board on which the barriers intended to reflect the compromises painstakingly established between linguistic communities, are being constantly broken down through increasingly strong demands for autonomy. In the circumstances, the institutional choice of federalism in 1993 could also be analyzed as the ultimate phase preceding partition. This is borne out by a recent draft of the Flemish Constitution, drawn up by five legal experts and awarded a prize by a private Foundation, the prize-giving ceremony having taken place in the Flemish parliament on 17 September 1996. Even though this text was supposed to be the Constitution of a federal State, it nonetheless aroused the perplexity of the French-speaking Belgian press, 184if only because while calling for "federalism", it largely upheld the Flemish demands for fiscal autonomy and partial federalisation of social security, not to mention its linguistic nationalism - Flemish citizens have the "duty" to learn Dutch and, while the right to vote is given to foreigners who have lived in Flanders for five years, they must know Dutch.

Similarly, mention could be made of the case of Italy. The "model Federal Constitution for the Italians", recently drawn up by Professor Gianfranco Miglio,185 dissects Italy, under the cover of a federalist essay, into three cantons, in a manner strangely reminiscent of the pre-unification geopolitical situation, producing an entity that smacks much more of a confederation than a federation, with a Neapolitan South, a Roman Centre and a Milanese North.

2. Or the aim is unification with the neighbouring mother nation, a hypothesis which was put forward in public on Belgian parliamentary premises, as is borne out by the renewed interest in reuniting Wallony with France.186

One can therefore note the ambivalence of this movement towards disintegration, which also tends to reveal a new legal situation - that of a multi-State nation, of a divided nation, especially in central Europe (Hungary, Romania, Albania), through the mother-nation's outside view of neighbouring political entities in which a more or less sizeable (but always a minority) part of its own national diaspora lives. Here the term multi-ethnic nation reflects the interplay of a set of mirrors whereby an introspective look at one's own society's multinationalism finally sheds light on the intense collective dereliction of what was previously a Great Nation, and is today fragmented by State frontiers.

This shows just how complex and unpredictable the on-going processes are. The fact remains that this continuous reproduction of the nation-State could also mean the historical exhaustion of a political/legal model which was perfected by the French revolution two centuries ago. If, as Jacques Delors says, Europe must take on the institutional form of a "federation of nation-States", it remains to be seen whether it is a question of the present nation-States or those of a

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184 Cf. Le Soir, 18 September 1996, La Flandre a sa première Constitution; and, further: Vrai fédéralisme à "2 + 2" ou antichambre du séparatisme? Le Nord fête les auteurs de la première Constitution flamande.

185 In the context of the Fondazione per un'Italia Federale, of which the headquarters is in Milan.

186 Cf. Jean De La Gueriviere, Ces Belges épris de Marianne, Le Monde,12 October 1996.

Europe balkanised into nation-States. Already, the nation-State sometimes merges with its own caricature. The reductio ad absurdum is shown by the example of the State of Bosnia and Herzegovina stemming from the Dayton Agreements of 1995. This appears to be a virtual State - in the sense of an artefact - in so far as it is a denationalised State, by which I mean that at no time did the Dayton Constitution deal with the organisation of a true political community, ie a distinct social group sustained by a desire to live together, of which the State would, as it were, be the projection and the reflection. There is no constitutional reference to a human substratum which would justify the existence of the Bosnia-Herzegovinian State, and would, in a word, legitimise it. It is, for instance, striking to note the absence of any reference to the words people and nation, let alone national sovereignty, in the Constitution.

Now, these concepts of people and of a nation or even of national sovereignty which the Constitution of the Bosnia-Herzegovinan State so carefully avoids are, on the contrary, referred to without any restriction by the Constitutions of two Entities. Thus, Article 1 of the Constitution of the Republika Srpska defines the latter as "the State of the Serbian people", ie a true nation-State endowed with a real social basis. Moreover, the same article defines the territory of the Republic as "the territories of the Serbian ethnic entity". The Constitution of the Bosnia-Herzegovinan Federation defines this Federation as a group of territories occupied mainly by Croatian or Muslim communities, amongst which Croats and Muslims exercise their "sovereign rights" (Article 1). This double rapprochement is profoundly revealing if it is looked at from the traditional angle of the theory of constituent elements of the State in constitutional law. Obviously, there is no doubt that a population does live on the territory of the Bosnian State, but this is a mere sociological observation. The population of Bosnia remains a mere substratum, and it is not legally defined by the Dayton Constitution. One would search in vain for the least reference to the nation as a legal institution which expresses the unity of the social basis of the State. On the other hand, this constitutional approach is fully operational in the Constitution of the Republika Srpska, which fully reflects the multi-state Serbian nation.

These considerations primarily concern the nature of the Bosnia-Herzegovinian State, which, if only in terms of constitutional law, seems to be a pure illusion. As for the actual organisation of political power, it is clear that the "Centre" has no raison d'être other than the preservation of a Bosnian State in the eyes of international law. This exclusively spatial rather than human perception of the reality of the State in the eyes of contemporary public international law is not without risks if one has to go as far as total disregard for the principle of constitutional autonomy in order to assert the international existence of a State which, if only from the point of view of constitutional law, obviously does not exist. A true discrepancy between international law and constitutional law is clearly apparent - although Bosnia can be granted the status of a State in accordance with formal criteria laid down by international law, constitutional law cannot content itself with such an empty shell, in as far as it does not have a true social basis, having ruled out, from the very beginning, the only possible means of preserving Bosnia as a State entity with full sovereignty, which was to preserve multi-dimensional identities and to foster civic, State-building nationalism.187

This is where the radical impossibility of the nation-State lies. By not being able to draw its raison d'être from an authentic human substratum, it is forced to look for legitimacy which it is

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187 **Sekerez, Una, Nation and State Building in Bosnia and Herzegovina - University of Central Europe, Prague, http:/www.cep.yale.edu/projects/studcon/papers/95/sekerez.html: "That way was the preservation of multi-dimensional identities and the fostering of civic, State-building, nationalism", p. 8.**

intrinsically lacking in the formal criteria for a State in international law. But a State cannot be built on nothing on a long-term basis.

Conversely, the Bosnian example explains the need to institutionalise multinationalism in law, and thereby restore this dimension of the political organisation of Europe since the end of the Middle Ages, which has been overshadowed and historically denied, but is inherent in the European State heritage, if only by virtue of the process by which it has been incorporated.

2. THE PARADIGM OF THE MULTINATIONAL STATE

In fact, there is nothing new about references to the decline of the nation-State as an historical form of organisation of political entities. In a text written soon after the second world war, but which remained unpublished until 1990, Alexandre Kojeve188 had a foreboding that the "nation-States"189 would give way to "political groupings" which were more extensive, which he suggested calling "Empires" - "The modern State and current political reality require bases wider than those represented by the Nations in the true sense of the term. In order to be politically viable, the modern State must be based on a 'vast "imperial" union of related nations'. The modern State is not truly a State unless it is an Empire".190 The use of the word "Empire" to describe this transnational political grouping (by a Hegelian philosopher, what is more) is obviously not neutral in a European context. As far back as the 19th century, German public law theorists put forward a similar idea - "The superior culture of the State cannot let itself be hemmed in by the narrow confines of nationality; there is the human element in the State which goes beyond the frontiers of each nation. On the other hand, in every nation there are gaps which the State fills in by asking for the help of another nation, and it is the friction between the two which provides a sound basis for the life of a people (...). The most highly developed States do not limit themselves to a single nationality, but bring together national elements in a human order which is greater than the sum of its parts".191

These intuitive thoughts are now politically and intellectually relevant, because, of course, planetary globalisation does not only affect political and economic structures, but also, amongst other things, the cultural and social dimension of human beings, whose migration is the most visible aspect of the transnational phenomenon, particularly in Europe. Hence the crisis in the nation-State, previously apparent from "ethnicisation". As Professor Gurutz Jauregui has rightly pointed out, the classic concepts of ethnic groups, nationality and citizenship are now in competition with - if they have not been replaced by -new notions and situations such as integration, assimilation, syncretism, pluralism, cultural interdependence and acculturation.192 From a legal and political point of view, this competition radically affects the traditional conception of State sovereignty; "(...) the organisation of European macro-power necessarily implies an in-depth reorganisation of infra-national micro-powers and, particularly, an in-depth revision of the principle of sovereignty, which remains hard to defend, at least in the accepted

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188 Alexandre Kojeve, L'Empire latin. Esquisse d'une doctrine de la politique française. (27 August 1945), La Règle du Jeu, No. 1, 1990, pp. 89-123.

189 Underlined by the author.

190 Art. cit., p. 91.

191 J-C Bluntschli, German political dictionary, "Nation und Volk Nationalitätsprinzip", 1862.

192 Gurutz Jauregui, El poder y la soberania en la aldea mundial, El Pais, 20 July 1996; the author teaches constitutional law at the University of the Basque country.

meaning of the term".193 And it is of course not only a question of the changes in the notion of sovereignty elicited by Community supranationality.

If the notion of heritage means not only that which has been inherited, but also that which has been made to yield a profit, one needs to turn towards the part of the European State heritage which has been left without an heir, ie the multinational political tradition, which is itself greatly overshadowed by a dogmatic vision of the right to self-determination with the one aim of founding a contemporary international society on the nation-State. If there is at least one lesson to be learned from the Yugoslavian war, it is that of the transformation of the right to self-determination, conceived as an instrument for the legal embodiment of multinationalism (A.) and, as such, an instrument for calling into question direct relationship between the State and the nation (B.).

A. Self-determination as an instrument for setting up a multinational State

Measured in terms of self-determination, the events which have occurred in Yugoslavia and in the former Soviet border regions since 1989 clearly reflect the considerable dangers of likening self-determination to the right to a State. This approach amply explains the pathological nationalism we are today witnessing, in as much as there are, as we know, many more "nationalities" in Europe than there are States in which they can be placed. And even if it were possible to find States for them, how would one go about it in places where, as Ernst Gellner pointed out, "these potential nations (...) do not, or did not, until quite recently, live in compact territorial units, but have been mixed with others, in complex ways"194, without resorting to ethnic cleansing surgery, which, in the age of European integration and the success of supranational human rights justice, is pointless, signifying only political regression.

Events in Yugoslavia have at least generated a pressing need to leave behind the deterministic logic of self-determination, whereby the nation-State is the only acceptable basis for international relations. Indeed, we know that the failure of a multinational Bosnia also means that a nation-State in this area artificially maintained within the 1991 frontiers is absolutely impossible.

Paradoxically, it was the conflicts over nationality born of the splitting-up of two multinational States whose apparent cohesion was based on organised constraint which was to restore the right to self-determination, in all its fullness, to the national minorities, as a result of the work of the Arbitration Commission of the Conference on Yugoslavia, before this right was solemnly consecrated by the Pact on Stability in Europe.

In any event, the impact of the decisions made by this cog in the wheels of the Conference on peace in Yugoslavia went far beyond the Commission's authority, in as much as it tried to map out a true international status for national minority groups. In order to do that, it was necessary to remove the contradiction between the right to self-determination and the territorial integrity of the existing State.

The Commission, having been called on by Serbia to settle the question of the right to self-determination of the Serbians of Croatia and those of Bosnia-Herzegovina as one of the

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193 Art. cit., p. 91.

194 Ernst Gellner, Nations et nationalisme, op. cit., p. 13.

constituent nations of Yugoslavia, considered in its Opinion No. 2, delivered on 11 January 1992, that whatever the circumstances, the right to self-determination could not lead to a modification of frontiers existing at the time of independence (ut possidetis juris) unless the States concerned agreed otherwise. It would be over-hasty to conclude that the principle of territorial integrity of the new independent States resulting from the dissolution of an existing state entity must prevail over the exercise of the right to self-determination unless one insists on believing that the latter means nothing other than the right to a State.

What the Serbians of Croatia and Bosnia have been denied is the right to secede in order to rejoin Serbia, ie the right to a nation-State, which could only be exercised to the detriment of the multinational situation of one, if not two, neighbouring States. This does not rule out the right to self-determination, but it is no longer seen exclusively as a principle for the creation of a State in the name of a right to independence which would be exercised only once. On the contrary, it represents a principle underlying the existence of a State, and, as such, is designed to protect national identities by means of an appropriate status. Such was the decisive contribution of the Arbitration Commission.

This is, in fact, the only way to reconcile the right to self-determination with the principle of territorial integrity. In the view of the Commission, this reconciliation is based on a system for protecting the rights of peoples and minority groups that States are obliged to guarantee in accordance with international law in force. Given the territorial integrity of the existing State, the right to self-determination of minority groups and of peoples integrated in the State thus precludes the right to secession. In return, these communities have a right, which is not subject to limitation, to the preservation of their own national identity, which the incorporating State must protect and guarantee in accordance with the general international law in force. And to give more strength to its argument, the Commission did not hesitate, even in its first opinion, to raise the rights of peoples and of minority groups to the rank of jus cogens. Even though its assertion has hardly any legal implications, it does at least show that the right to self-determination is in the process of changing from a principle for the creation of a State by virtue of the right of a people to become a State to a principle for the organisation of a State by virtue of the right of a people not to become a State.

In the European context, which is marked by a revival of nationalist and regional activism, this new formulation of peoples' rights195 brings to mind the idea of a new modus vivendi between the State and the nation, which is no longer founded on their reciprocal identification. This is why the Arbitration Commission was able to state that, on the basis of agreements between the Republics in question, the members of the Serbian populations of Bosnia-Herzegovina and Croatia could if they so desired, be given the nationality of their choice, with all the ensuing rights and obligations with regard to all the States concerned. As Professor Alain Pellet pointed out, this argument "suggests a very striking dissociation between nationality and territoriality, certainly fruitful for the future"196. It embodies the essential idea of multiple citizenship within heterogeneous national political entities, which bilateral treaties on neighbourly relations must from this point onwards translate into positive law.

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195 This question is discussed at greater length in S. Pierré-Caps, L'autodétermination: d'un principe de création de l'Etat à un principe de constitution de l'Etat, Report to the Fifth Congress of the French Association of Political Science, Aix-en-Provence, 23-26 April 1966.

196 Alain Pellet, Note sur la Commission d'arbitrage de la Conférence européene pour la paix en Yougoslavie, A.F.D.I. 1992, p. 341.

These treaties are now assembled in the Pact on Stability in Europe adopted at the conclusion of the Paris Conference, on 21 March 1995. The principal objective of this conference was to encourage the States of central and eastern Europe to ensure that solutions to their minority group problems, where they existed, respected the inviolability of their frontiers. A tried and tested legal formula was used to this end - that of the bilateral agreement on neighbourly relations, destined to become widespread in the area concerned which was to become the melting pot of European Law on Minority Groups197. This owes much to the reorganisation of European "infra-national micro-powers", without which it would not be possible to establish "European macro-power". From this point of view, the bilateral neighbourly relations treaty is a device for reviewing State sovereignty in an established form, which has been embodied in legal theory for more than four centuries.

The Germano-Polish Treaty of 17 June 1991 is a model treaty of this kind, and one which to a greater or lesser extent served as a basis for most subsequent documents, even if, at the outset, the document was the consequence of a diplomatic "package deal" in which the proclamation of the inviolability of the Oder-Neisse line was at stake. The new approach to the right to self-determination necessarily entails the proclamation of the inviolability of frontiers which were established in the backwaters of history. By applying §32 of the Copenhagen Declaration of the CSCE of 29 June 1990, which specifies that "to belong to a national minority is a matter of a person's individual choice", the treaty conveys an impressionistic concept of membership of a minority, in which designation of the citizen of a minority group as such is somewhat subjective. Article 20, §1 of the Treaty lays down that 'The members of the German minority in the Republic of Poland, ie people with Polish nationality of German lineage or those who adhere to the German language, culture or tradition (...) have the right, individually or together with the other members of their group, freely to express their ethnic, cultural, linguistic and religious identity, and to maintain and develop it without being hindered by any attempt whatsoever to assimilate them against their wish (...)" In any exchange of letters on the same day as the signing of the treaty, the German Government equally recognised "the people of Polish origin or those having opted for the Polish language, culture or tradition who live in Germany", which is in itself a significant exception to the German law of nationality, based on jus sanguinis.

What is new in these clauses is that separation of the status of national from the status of citizen is based on free, personal choice - Article 20 §4 expressly specifies that membership of a minority "is a personal decision which should not give rise to any disadvantage (for those who take advantage of it)". And it is precisely here that we find that the right to self-determination, in the offing since 1990, has been resurrected: it has become an individual public right - an individual, constitutional right to a national identity. Such a right differs markedly from the traditional concept of the right to self-determination, the collective right to a nation-State, within the meaning of public international law. Moreover, this right brings to mind a truly existentialist conception of national identity, which could equally be described as elective, in as much as it can be distinguished from both nationality by virtue of residence and nationality by virtue of origin. It can thus be distinguished from the "ethnic" tendencies which underlie European nationality-based claims.

One can therefore consider that the Germano-Polish Treaty, which was imitated by other treaties of the same type in central Europe198, began to undermine the isomorphic relationship between

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197 Cf. Norbert Rouland (dir.) Stéphane Pierré-Caps, Jacques Poumarede, Droit des minorités et des peuples autochtones, Paris, PUF, coll Droit fondamental, 1996, p. 230.

198 The last of this type was recently signed by Hungary and Romania on 16 September 1996.

the State and the nation. Furthermore, the institutionalisation of transfrontier relationships provided for in this legal instrument is overseen by bilateral joint committees appointed for the purpose. By enshrining the dissociation of membership of a nation from membership of a State, the treaty outlines a new way of living together in political entity, in a renewed dialectic between the single and the multiple, between uniformity-inducing globalisation and national isolationism. This shows the extent to which the dissociation between the State and the nation can make for co-ordination of the multiplicity of multinational micro-powers and European "imperial" macro-power, thereby reinstating an inherent multinational political tradition.

B. Towards dissociation of the State and the nation

We have seen that considering self-determination to be tantamount to the right to State independence performed the ideological function of legitimising the nation-State, which has become the universal model for the organisation of society. Logically speaking, the resurrection of self-determination, under the effects of events in Yugoslavia, necessarily implies that we must reconsider the absolute dominance of the nation-State, whose active search for unity in its own social basis is all too often deadly, and indeed unsuited to the era of European transnational integration.

This challenge prompts us to turn to the alternative model of state organisation that the central European political entities incarnated, willingly or not, until the turn of the century. Moreover, just as the theoretical arguments of the Prince's legal advisers, and then the philosophers of the Age of Enlightenment, prepared the coming of the nation-State, the multinational State was the subject of particularly advanced conceptual reflection. It is this polished theory of the multinational State that we are now rediscovering in as far as it offers a principle for understanding the interplay of infra-national micro-powers and supranational macro-power - what Edgar Morin called the unitas multiplex199.

In the final years of the Austro-Hungarian Empire, the jurisconsult Karl Renner (1870-1950) had begun to explore the paths towards the multinational State, the only way, according to him of perpetuating a concept of Austria that the Habsburgs could no longer incarnate in the age of universal suffrage, and, consequently, of thwarting the levelling effect of the nation-State. Despite a totally different approach adopted in 1919, his thoughts gave rise to an elaborate theory of the multinational State. For while it is true that, as it has been noted, the nation has in general become the State and, consequently, the driving force for historical progress, it is none the less true that the geopolitical map of Europe, along with the current needs of communication and the economy, now makes it impossible to divide Europe completely into nation-States in the time sense of the term. In fact, the multinational State aims at one and the same time, to resolve the specific difficulties caused by the existence of national minority groups within composite States (Mischstaat) rather than to announce the advent of the Internationale. The latter is, according to Renner, a legal concept rooted in the fundamental medieval idea of universality (the Oecumene). It is from this idea of universality that the concept of the nation took off in order to divide up the European continent into a conflictual constellation of nation-States. Renner's idea, expressed in a posthumous work, published in 1964 - Die Nation, Mythos und Wirklichkeit (The nation, myth and reality)200 - was to eradicate nationalism once and for all by making the nation the driving force for a new form of universality, reflected nowadays in

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199 Edgar Morin, Penser l'Europe, Paris, Gallimard, 1987, 228 pp.

200 Die Nation, Mythos und Wirklichkeit, Vienna, Europa Verlag, 1964, 139 pp.

economic progress and globalisation. Ultimately, he saw the multinational State as a preliminary step towards a world State (Weltstaat).

Suffice it to say that the nation is the veritable personality (Persönlichkeit) of historical evolution, whereas the State is nothing but the instrument of power of this personality. As a result, there is an intermediate legal entity between the individual and the State - the national community. The impact of this incursion by the nation into the sphere of law is considerable - if only because it frees it from state supervision. This also explains the remarkable repercussions which its advocate intended the nation, as an institution, to have. "The establishment of the nation as a legal entity, particularly as a corporate public law entity, is a prerequisite for the organisation of national relations and the postulate behind all the structures of a nation"201. Indeed the nation as a legal institution can only be understood if one first challenges the national State and its obsession with territory, which leads it to strive to ensure that one State coincides with one nation. The "personification" of the nation therefore leads to a breakdown of this ambiguous relationship between the nation and the State, particularly as membership of a national community formed in such a way does not originate from an objective situation of territorial determinism of any kind. On the contrary, the nation is built on the basis of a choice of membership freely expressed by each individual. In fact, the whole system devised by Renner is based on this right of the individual to national self-determination: in the same way as, in modern States, religion is a matter of personal choice - the individual alone is able to decide to which nation to belong: "Only a declaration made freely by an individual before the competent authority can determine membership of a nation. This right to self-determination of the individual corresponds to the right to self-determination of the nation."202

The right to self-determination, which underpins and gives legal expression to this individual choice, is the antithesis of the principle of nationalities in its absolute form as a principle on which to base States. Renner thus levelled a severe criticism at the principle of nationalities, contrasting it with the principle of nationalities as a principle for the internal organisation of the multinational State. In fact, this right to self-determination is in keeping with a new approach to the idea that the State should have the same boundaries as the nation, the very purpose of which is to show that, although State and nation are logically complementary, they need not coincide. On the one hand, therefore, there is the nation-State, and on the other the multinational State.

It is therefore not surprising that self-determination as conceived by Renner -but also more or less consciously rediscovered since the fall of communism - makes for a new relationship between the nation and the State. Indeed, they no longer fit together perfectly, for the nation now exists as a distinct legal entity. By virtue of this fact, the nation has freed itself from the State to lead its own life under the aegis of the State. The nation freed from the State is matched by a denationalised State, a State that is neutral in relation to the national groups it shelters. This set-up is fully in keeping with the tradition of Reichspublizistik. To look ahead, it is also this institutional duality which reflects the new relationship of the nation to the State and thus foreshadows an alternative model for political organisation which is capable of adapting to national pluralism as well as to supranational integration.

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201 K Renner, Das Selbstbestimmungsrecht der Nationen (the right to self-determination of nations), Leipzig and Vienna, Deuticke, 1918, p. 118: "Die Konstituierung der Nation als juristische Person, im besonderen als geschlossene Körperschaft öffentlichen Rechts, ist die Voraussetzung jeder Ordnung der nationalen Verhältnisse und das Hauptpostulat jeder organischen Auffassung der Nation."

202 K Renner, Das Selbstbestimmungsrecht der Nationen, op. cit., p. 111: "Über die Nationszugehörigkeit kann nichts anderes entscheiden als die freie Nationalitätserklärung des Individuums vor der dazu kompetenten Behörde. Dieses Selbstbestimmungsrechts des Individuums bildet das Gegenstück jedes Selbstbestimmungsrechts der Nation."

Indeed, these two institutional pillars are able to converge within the European integration process which is underpinned by a federal logic, in the broadest sense of the term; federalism is here intended to mean the political and sociological phenomenon whereby two or more political entities, two or more States, join forces with the aim of jointly managing their common affairs in order to gain strength, and, at the same time, to protect the freedom of their members, of the component political entities, ie to allow them to manage their own affairs. Federalism is therefore founded on a dialectical relationship. It is a question of building a large whole and at the same time of protecting small communities. Such is the problem of federalism, which consists in attempting to establish a more or less stable balance between these two requirements: the establishment of a supranational political entity on the one hand, and the recognition of national pluralism on the other. In other words, one cannot exist without the other.

Further, does Article F of the Treaty of Maastricht not set down in its first paragraph: "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy"? This is repeated in the Declaration of the Heads of State and of Government of Member States of the Council of Europe, gathered in Vienna on 9 October 1993, who recognised that "the protection of national minorities is an essential element of stability and democratic security in (the) continent".

This shows how topical Karl Renner's thoughts are: at a time when national identity is being called into question throughout Europe, this shows that the political unity of a State is not inevitably synonymous with national unity, that the two can coexist in a new form of State - in which the State represents the national cultural communities (Nationalitätenbundesstaat). What will be left once the transfer of the powers of nation-States or even those of national cultural communities to the European Union has been completed? For instance, in connection with a case which challenged the linguistic policy of a member State - Ireland - which obliges the teachers in state vocational schools to have a knowledge of the Irish language, did the Advocate General, Mr Darmon, not declare that: "The preservation of languages is one of those questions of principle which one cannot dismiss without striking at the very heart of cultural identity. Is it therefore for the Community to decide whether or not a particular language should survive? Is the Community to set Europe's linguistic heritage in its present state for all time? Is it to fossilise it?"203

More precisely, the thoughts of Renner are at the heart of the debate which is taking place today on the redistribution of sovereign powers at supranational and infranational level in Europe. Consider, for example, the principle of subsidiarity, which we know takes pride of place in German constitutional theory and which primarily concerns the sharing and allocation of responsibility in such a way that each level of public organisation has the tasks that it is best able to accomplish with efficiency. But it should be borne in mind that the principle is primarily a "principle of political ethics", in as far as it is based on an "organistic vision of society", of which it expresses the "community" aspect. "Society is based not so much on individuals as on various communities in which the individual is placed and which make for his or her personal development."204 The form of national autonomy conceived by Renner incorporates the idea of subsidiarity, in as far as it represents the yardstick and the principle of an institutional

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203 **Conclusions on CJEC, 28 November 1989, Anita Groener v. the Minister for Education and the City of Dublin Vocational Educational Committee, C-379/87, Reports, 1989 - 10, p. 3982 § 19.**

204 **Vlad Constantinesco, Le principe de subsidiarité: un passage obligé vers l'Union européene?, Mélanges Jean Boulouis, Paris, Dalloz, 1991, p. 38.**

equilibrium founded on complementarity between cultural affairs, handed over to self-administered national entities, and the general affairs handed over to the multinational sovereign federal State. The State as imagined by Renner is a State based on the principle of subsidiarity.205

But the concept of the multinational State has done more than simply optimise distribution of responsibilities within heterogeneous national political entities. While it may favour the incorporation of central European States into the European Union by providing its own institutional solutions, it also has the immense advantage of providing an appropriate solution to the nationality-based conflicts which are undermining these States. In this connection, one cannot forget the fact that the central European States, but also those of western Europe, are home to multi-state nations, the nation being in the majority in one State, even identifying with that State, but in a minority in the neighbouring State or States. A multi-State nation is a nation divided by State frontiers. Here again, the political model as conceived by Renner can provide novel answers. Although it respects existing frontiers, it also tends to relativise them, to give them a spiritual dimension by favouring the cultural unity of a nation divided by a State frontier. Further, the Pact on Stability in Europe already provides for the transfrontier reconciliation of a divided nation and may pave the way for a confederal approach to intermingled nations. It remains, here, to translate into law what is already possible as a result of means of communication.

When considering the conditions for a State heritage common to the whole European continent, one must take into account the primary duality behind the organisation of political entities in Europe, especially as they are being organised by means of a process of integration which, on many points, runs counter to the fragmentation of existing state structures. The nation-State is not in the best position to resolve this contradiction, in spite of the constitutional changes which it has generated in order to curb the process of fragmentation, whether it is called federalism, autonomy or decentralisation, since it seems destined by its own principle of legitimacy to reproduce itself indefinitely, by virtue of a sort of kinetic energy. On the other hand, the Fall of the Berlin Wall allows a stifled political memory to resurface - one which European integration provides with its legitimacy - the tradition of the multinational State.

At a time when the nation-States of central Europe are preparing, on a more or less short-term basis, to discover the supranational ideal which sustains the European strategy, which is a resurgence of the ancient Christian idea of a united Europe, their own experience of State unity and national diversity has made Europe painfully aware of its own unsolved issues. In fact, the European State heritage could very well resemble this mirror game, which alone can efficiently help to structure a budding political entity - a Europe of nations and peoples.

c. Ukraine’s constitutionalism in the context of the constitutional heritage of Europe by Mr Serhiy HOLOVATY

Minister of Justice of Ukraine, Member of the European Commission for Democracy through Law

Introduction

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205 Cf. Chantal Millon-Delsol, L'Etat subsidiaire, Paris, P.U.F., 1992, 231 pp.

In the history of Ukraine, there are four main periods of state building. They are the period of Kyivan Rus, the Kozak State, the Ukrainian National Republic and the current era of Ukrainian independence. Each was accompanied by an attempt to give a legal foundation to the state, a process that can generally be described as a process of constitutionalism. This legal history is almost unknown both within Ukraine and outside its borders. This paper briefly highlights some aspects of constitutional development in each period.

Kyivan Rus and the Historical Background

During the XI to XII Centuries the Kyivan state, known as Kyivan Rus, developed in the context of the established forms of government administration of current European states. The most important legal document of this era, Ruska Pravda, was written by Yaroslav the Wise in 1016 after his victorious battle against Sviatopolk. The Ruska Pravda was given to the people of Novhorod after the battle with the injunction to "live by this word as I have written; adhere to it." However, the destruction of the state, caused above all by the attacks of the Tatar-Mongol hordes, ended the process of the establishment of their own state by the Ukrainian people and the creation of its legal content.

The renewal of the process of building the Ukrainian state occurred during the Kozak Period (XVII-XVIII) also known as the era of the Hetman state. The main element was a republican form of government, according to which the leader, the hetman, was directly elected by the people. The dominant state principle of this period was to tear Ukraine away from the power of Moscow. In legal documents these ideas were embodied in the form of the political memoir of Pylyp Orlyk, The Foundation of the Rights of Ukraine, written in defence of the national and state rights of Ukraine, and Agreements and Constitutions of Laws and Freedoms of the Zaporizian Host fashioned by Pylyp Orlyk in the form of an agreement with his electors and the Zaporizian Host, the nation, on 5 April 1710.

The Constitution of Pylyp Orlyk

Agreements and Constitutions of Laws and Freedoms of the Zaporizian Host of 1710 can be acknowledged as the first European constitution in a modern sense. It contained the main principles to govern the establishment of the state. Above all it emphasised the principle of freeing Ukraine from "foreign domination" which in modern usage is the principle of independence or state sovereignty. Also, to a certain extent, the Constitution is based on the principle of the separation of powers between the legislative, executive and judicial branches. The Rada was the legislative body. The Hetman was obliged to agree all important state matters with the Rada in advance. The Court also was to function independently and the Hetman was specifically prohibited from personally making decisions about punishments. The General Court was required to base its decisions on the law.

The ideas of human and natural rights of the Kozaks and the right of the people to protest against humiliation are found in the political memoir The Foundation of the Rights of Ukraine.

On the basis of these documents we have the complete foundation to insist that on the one hand the ideas of the Constitution of Pylyp Orlyk preceded the principles of the French revolution by 80 years. They corresponded with and occasionally preceded the ideas of the "natural rights" of the nation for "independent and equal existence" among other nations of the world, and the idea of the rights of the people to "change or cancel" the government and to "overthrow that

government" that subjected the nation to "absolute despotism" that were materialised in the American Declaration of Independence.

On the other hand, the Constitution of Pylyp Orlyk of 1710 was written under the influence of the Western European idea of parliamentarianism, which established the beginning of republican and parliamentary forms of government in the state structures of Hetman Ukraine far in advance of the wave of bourgeois democratic revolutions in Europe.

Unfortunately, as a result of historical circumstances, the Constitution of Pylyp Orlyk, never came into effect as a living legal document.

The Constitution of the Ukrainian National Republic of 1918

The more contemporary contribution of Ukraine to European constitutionalism occurred at the beginning of the XX Century during the third era of state building in Ukraine. The draft constitution prepared by the Ukrainian National Party in 1918 proposed the introduction into Ukraine of a presidential republic that would differ from the one that existed in the United States, the classical model. At that time, no presidential republican model existed in Europe.

The Constitution of the Ukrainian National Republic, also known as the Statute about State Government, Rights and Liberties of the National Republic, can be considered as the unique outcome of a creative search by leading representatives of political and legal currents in Ukraine. In its content it was a typical form of the new types of constitutions of the second wave. The Constitution of the Ukrainian National Republic of 1918 may be seen as a reaction of Ukrainian society against colonial status that existed during the period of the Russian empire.

The content of the Constitution of the Ukrainian National Republic is comparable to the other new European constitutions which in those times were characterised as the most democratic. In fact, the UNR Constitution was the first of the second wave constitutions adopted by European countries. It was adopted on 29 April 1918. The Weimar Constitution was introduced in 1919, a year later. Other new European Constitutions that could be characterised as highly democratic, those of Czechoslovakia and Poland, were adopted at the beginning of the twenties.

The UNR Constitution affirmed a wide circle of citizens' rights. It included a prohibition against detention of a citizen without an "order of the court", with the exception of arrest at the place of the commission of a crime. However, in the latter instance, the person arrested was to be released within 24 hours unless a court established a basis for further detention. The Constitution abolished the death penalty, corporal punishment and other acts that lower human dignity. Confiscation of property was prohibited as a penalty.

The UNR Constitution contained provisions in regard to the rights of nations to develop their cultural institutions. The protection of national or ethnic rights in both an individual and a collective sense far exceeded similar provisions in other contemporaneous constitutions. We might note that the protection of minority rights continues to be an axiom of Ukrainian constitutionalism and may be one reason why Ukraine has remained as an island of ethnic peace amidst ethnic conflicts that rage throughout the region. Freedom of religion was also guaranteed.

The UNR Constitution declared the principle of equal rights between men and women and established freedom of movement not only for citizens but also for foreigners. Citizenship could only be abolished through court procedure. The right to voluntarily relinquish citizenship was

fixed in the constitution. Its authors established the foundations of a democratic election law. A separate section of the UNR Constitution introduced the institution of so-called national personal autonomy and mechanisms for its realisation.

In addition to the protection of human rights and freedoms found in the constitution, it is important to note that the majority of rights and freedoms of an international-legal level were included in the General Declaration of Human Rights and further specific documents adopted in relation to human rights.

The originality of the UNR Constitution lies in its distinctive model for the organisation of state power. In particular, it contained provisions about the head of state – the president, part of whose functions were given to the head of the legislative body. The drafters of the 1918 Constitution moved away from the traditional understanding of the idea of the separation of powers that were proposed by Charles Montesquieu. A significant part of the Constitution was influenced by ideas of J.J. Rousseau that were popular among contemporary socialist political currents. During his lifetime, Rousseau often disputed the ideas of Montesquieu.

The influence of J.J. Rousseau on the authors of the 1918 Constitution can also be seen in the acceptance of broad measures of direct democracy. Thus, it foresaw the so-called "national legislative initiative" that provided that a specific draft law came into force through the support by 100,000 electors. At this time on the European continent the concept of the "national legislative initiative" existed only in Switzerland. The UNR Constitution also introduced a mechanism for the dissolution of parliament, the All-Nation Assembly of the UNR, on the basis of the decision reached by referendum. It is characteristic that the model proposed by the authors of the UNR Constitution for the establishment of state structures, in spite of its originality, has certain similarities to the constitution proposed in Switzerland, the home of J.J. Rousseau. This is the so-called directory republic which differs above all from the classical parliamentary republic in the absence of the post of president.

The strategy of the authors of the 1918 Constitution to solving the model of the organisation of state power has its objective explanation. This period of state building in Ukraine occurred under the conditions of complicated political processes on the territory of a former empire, during a fierce political struggle among democratic forces of Ukraine who disagreed on questions of national state development and on their assessment of the danger of the possibility of the creation of authoritarian structures and so on. Today, the lessons of the establishment of Ukrainian statehood during 1917 to 1920 are not only interesting for us but also to a certain extent are instructive and real.

The method for the adoption of the UNR Constitution of 1918 was also original. Unlike other new European constitutions which were adopted by parliament or by specially convened constituent assemblies, this constitution was adopted by the decision of the Ukrainian Tsentrailna (Central) Rada. The Tsentrailna Rada, on the basis of the principle of its formation and by its membership or functions absolutely could not be seen as a parliament, and only in a very restricted sense could be characterised as a constituent assembly. In any case, its membership was not formed on the principles of direct elections. Representation in the Ukrainian Tsentrailna Rada was partly on a territorial basis and partly on a corporate basis but one that excluded a political corporate character. This is also shown in the fact that the second name of the Constitution of 1918 was "statute". This second name underlined the temporary character of the Constitution of 1918, and identified it as a constitution of a transitional period.

Its specificity also lies in the fact that it was drafted and adopted in the conditions of the absence of functioning state mechanisms in Ukraine.

Unfortunately, the UNR Constitution, like the Orlyk constitution, never came into effect as a result of the overthrow of the state which ultimately ended in the establishment of the Ukrainian Soviet Socialist Republic.

The 1995 Constitutional Accord Between the President and Parliament of Ukraine - a Unique Form of Contemporary European Constitutionalism.

The next period of constitutionalism started in the nineties with the collapse of the Soviet Union and the attainment of Ukrainian independence. The lengthy economic crisis in Ukraine that followed and the delay in legal, political and above all economic reforms, caused a sharp political conflict in Ukraine between the legislative and executive branches of power. Potentially, it might have reached the same degree of crisis as was reached in Russia in October 1994 when the President used the military to close parliament or even as is developing in the current conflict of 1996 in Belorussia.

Ukraine was able to avoid the Russian or Belorussian models of escalating conflict between the President and Parliament during the conditions of the transition to democracy and a market economy through a method that is unique in European constitutionalism in the second half of the XX Century – the method of making the Constitutional Accord between the President and Parliament and then working strictly within its provisions.

The Constitutional Accord of 1995 is an example of a successful attempt to reach a civilised and legal solution to social and state problems in conditions of a sharp political crisis. The Constitutional Accord became the only possible method during the transitional period within the confines of the existing constitutional order to partially abolish old constitutional bodies and at the same time to reach a political agreement between the President and parliament to accept the temporary resolutions passed by parliament without the necessary qualified majority that normally is necessary for constitutional change.

The conclusion about the Constitutional Accord reached by the Parliamentary Assembly of the Council of Europe was that it "may easily be regarded as a mini-constitution. Its mere existence suggests that political conflicts in Ukraine come to an institutional and peaceful solution. The Agreement (sic), while defining the relationship between the different organs of the State, may play a crucial role in the constitutional process of separation of powers."206

The Constitutional Accord in its essence is a unique type and source of constitutional law. It was created simultaneously by the legislative and executive branches of Power and is characterised by a series of special features. It is important to underline, that the object of the Constitutional Accord consists of the regulation of social relations, whose appearance and development are connected with fundamental aspects of the development and functioning of the state as an organisation of power. In particular, this refers to the status of the various branches of power, the principle of the separation of power, mechanisms for its realisation and so on. The subjects of the Constitutional Accord were the highest bodies of state power: the President of Ukraine and the Verkhovna Rada of Ukraine. It is a temporary act, a temporary agreement. The

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206 **Doc. 7398. Opinion on the Application by Ukraine for Membership of the Council of Europe of the Committee on Legal Affairs and Human Rights. Rapporteur: Mr Nemeth. 25 September 1995.**

Constitutional Accord was made to be valid only until the adoption of the new Constitution of Ukraine. During the period that the Constitutional Accord was in place, legal, including constitutional norms that contravened the provisions of the Constitutional Accord, were suspended. However, the Constitution of 1978 with amendments continued to be in force. The preceding characteristics demonstrate the unique nature of the Constitutional Accord and show it to be a very specific type of legal document.

It is true that as a result of the Constitutional Accord, the constitutional process in Ukraine was ruptured. However, this rupture, as noted by the Venice Commission, was of a temporary character that was to last "only until such time as the full legality of the normative order is restored through the adoption of the new Constitution."207

Objectively, the Constitutional Accord was an innovation, a new word, not only in European, but also in world constitutional practice. Perhaps it should be seen as analogous to the form of agreements that governed relations during feudal times such as the Magna Carta of 1215 or the Golden Bull of 1222. It is similar in that the Constitutional Accord was the product of an agreement between two representative bodies of power in Ukraine – the Verkhovna Rada and the President. Confirming the Constitutional Accord, both parties acted as representatives of the people, in accordance with accepted constitutional theory. It is well known that the normal method of adopting a constitution is through a constituent assembly, by parliament, or by referendum. Both a constituent assembly and parliament are collegial bodies that are elected as representative bodies by the people. This principle was maintained in the making of the Constitutional Accord - the fundamental law can only be adopted either directly by the people or by its elected representatives.

Several points of the juridical character of the Constitutional Accord also deserve attention. On the one hand, it can be seen as an extraordinary independent and self-empowering form of constitutional creation. This can be seen from the main requisites of the accord: the existence of a preamble, the internal structure, the order of its execution and so on. On the other hand, the Constitutional Accord can be characterised as a non-traditional method of promulgation of the Law on State Power and Local Self-Government in Ukraine that was passed by the Verkhovna Rada on May 18, 1995. This may be seen from the content of the preamble, which notes that the Accord is made to "avoid disagreements among existing norms of the Constitution (the Fundamental Law of Ukraine and the norms of the Law on State Power and Local Self-Government in Ukraine. Both characterisations have a basis for existence).

It is possible to affirm without any doubts that the Constitutional Accord, both the fact that it was reached and the nature of its contents, served as an original type of entry pass for Ukraine for admission to the Council of Europe. Ukraine became the first and only country to obtain membership in the Council of Europe without a new constitution. This again affirms the unique and original path that Ukraine is taking to freedom, democracy and general European security.

Although the Constitutional Accord disrupted the constitutional process it also enabled the continuation of the constitutional process. Both the President and the Verkhovna Rada agreed at the time the Constitutional Accord was reached that it was essential to create the necessary

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207 **Cf. Doc. CDL(95)40. Opinion on the Present Constitutional Situation in Ukraine Following the Adoption of the Constitutional Agreement between the Verkhovna Rada of Ukraine and the President of Ukraine on the Basic Principles of the Organization and Functioning of the State Power and Local Self-Government Pending the Adoption of the New Constitution of Ukraine. Adopted by the Venice Commission/European Commission for Democracy Through Law at its 24th meeting on 8-9 September 1995, Strasbourg, 11 September 1995.**

conditions for speeding up and concluding the constitutional process in Ukraine. The Accord required that the new Constitution of Ukraine be adopted no later than one year from the date that the Constitutional Accord was executed.

The Constitution of Ukraine, 1996[208]

The Constitution of Ukraine, adopted by the Verkhovna Rada on 28 June 1996, can be characterised as a constitution of the new sort or a constitution of the third wave. Constitutions of the third wave are constitutions that have been made after the Second World War. At the same time, it contains certain "family characteristics" found in constitutions of countries of Central and Eastern Europe. The latter are often named post-totalitarian or post-communist constitutions.

However, it is possible to note marked variations among the constitutions of these countries although all were adopted in the first half of the nineties. These differences are caused by the existence of different historical experiences of nation building in the different states, the degree and type of their ties to the former so-called socialist camp and the socialist empire, their legal traditions and schools of thought, the state of society during the period of their acceptance and so on. Practically every post-totalitarian constitution has its specificities, each introduces innovations into the existing European experience. The above applies in full measure to the Constitution of Ukraine of 1996.

Among the constitutional innovations in the Constitution of Ukraine relative to European experience it is important to first note those that regulate the status of the higher state bodies. For example, Article 85, Section 34, of the Constitution empowers the Verkhovna Rada to adopt decisions about sending requests to the President or, the demand of a member of parliament, a group of members of parliament, or a committee of the Verkhovna Rada, supported by no less than one third of the composition of parliament. This request, without doubt, may be of an informative nature. At the same time, under certain conditions, it may be a mechanism by which parliament exercises control over the government as foreseen in Article 87 and may be associated with the expression of non-confidence in the government. The provisions of Article 85, Section 34 introduces a fairly non-traditional control in the systems of controls and balances between the legislative and executive branches of power.

Article 103 introduces another innovation of a theoretical character. Article 103 clearly defines the officially representative nature of the mandate of the President. In this manner, a conceptual approach is suggested by which political representation is tied with a delegated mandate from the people that is decided in accordance with the results of general elections and determines the appropriate authority of respective state bodies. We may note that today general constitutional theory accepts that representative bodies may only be elected by the people, and should have a collegial character. In this manner, an approach is introduced in accordance with which the representative bodies of state power in Ukraine are the President and the Verkhovna Rada.

Another innovation is found in Article 93 which gives the right of legislative initiative to the National Bank of Ukraine as well as other bodies. In particular, the Constitution devotes particular attention to the status of the National Bank of Ukraine. This can be explained through objective reasons, but in any case, this is also new.

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208 I wish to thank Professor Volodymyr Shapoval, a judge of the Constitutional Court of Ukraine, for his assistance to this part of the paper. Much of this section is based on an unpublished essay on the Constitution of Ukraine.

It is possible to highlight other innovations found in the Constitution but the list is quite extensive. The above give an idea of the some of the unique provisions found in the Constitution of Ukraine.

Conclusion

As noted in the introduction, the Ukrainian state does not have a continuous history. Nevertheless it is possible to note four main periods of state building and independence in Ukraine. They are the period of Kyivan Rus, the Kozak period, the period of the Ukrainian National Republic and the current period of Ukrainian Independence. Each period was accompanied by an active process of constitutionalism. Often the resulting constitutions and constitutional documents that were promulgated were in the forefront of prevalent constitutional theory and practice in contemporaneous Europe.

Unfortunately, one result of the tragic history of Ukraine is that the constitutional record has only been sporadically studied and is generally unknown both in Ukraine and beyond its borders. This paper is a small attempt to highlight some specific constitutional developments introduced by Ukraine to European constitutionalism. It is hoped that with continuing Ukrainian independence, both its legal and constitutional heritage and current developments will become an object for study by legal scholars.

Third working session

Conditions for a common heritage of fundamental rights

a. Common fundamental rights in the case-law of the Court of Justice of the European Communities
by Mr Jean-Claude GAUTRON

b. Who is the holder of fundamental rights - the individual and/or groups?
by Mr Rainer HOFMANN

c. On the function of fundamental rights
by Mr Gregorio PECES-BARBA

a. Common fundamental rights in the case-law of the court of justice of the European communities by Mr Jean-Claude GAUTRON

Professor, Montesquieu University -Bordeaux IV

If the description of fundamental rights as the body of rights and freedoms protected by the Constitution is undoubtedly not entirely satisfactory in comparative law, that description is quite inappropriate in the Community legal order, which is based not on a Constitution but on international treaties. Although the case-law of the Court of Justice has evolved along constitutional lines at the same time as the Community legal order has gone through a process of constitutionalisation209 - it is a "Community based on the rule of law" according to the

209 R. Kovar, La contribution de la Cour de Justice à l'édification de l'ordre juridique communautaire. Recueil des Cours de l'Académie de Droit Européen. 1993 Vol. IV-1, p. 25.

judgment of 23 April 1986210 - and although the development of those fundamental rights has followed the same direction, the specific nature of the Community has produced particular effects from the outset. Since the objectives and activities of the Community were economic, the Treaties emphasised the economic freedoms, and more incidentally the social freedoms, of the nationals of Member States in order to succeed in establishing a vast market based on the free movement of goods, persons (both natural and legal) and the means of production. The Treaties therefore mention rights which are very similar to fundamental rights but which hinge on the principle prohibiting discrimination on the ground of nationality. Moreover, while the mixed character of the Community legal order leads it to borrow from the techniques (and rules) of international law and those of domestic law, it is by nature an autonomous legal order.

Initially the separation of the Community legal order from the aspect of both national legal orders and the international legal order meant that the necessity for a Community definition and guarantee of fundamental rights was forgotten. Several means of establishing fundamental rights were available to the Community: by revising the Treaties (which was limited to the provisions of the Preamble to the Single Act and to Article F(2) of the Treaty on European Union), but there was no catalogue of fundamental rights and the Community institutions chose to resort to Common Declarations or Resolutions;211 by acceding to international treaties which were conceived for States (including the European Convention on Human Rights); or by means of judicial decisions, often described as the "judge-made" method.212 It is this last method that has consistently prevailed.

I. Individual fundamental rights, a category of general principles in Community law

The judicial thinking that led to the insertion of individual fundamental rights in the general principles of Community law has its origins in the weakness of the Treaty provisions, which contrasts with the constitutional traditions of the Member States: fundamental rights (FGR), constitutionally guaranteed rights (Austria), human rights (Finland) or rights of freedom (Denmark and Italy). These rights are inscribed in the constitutional provisions, where they form a catalogue, or laid down in the form of directly applicable guarantees. Although the French Constitution of 1958 lays down only a few fundamental rights, it refers to the Declaration of 1789 and the Preamble to the Constitution of 1946, on which the Constitutional Council has conferred constitutional value.213 The situation in England is unusual, since there is no written Constitution, but the absence of such a Constitution is compensated by the existence of ancient provisions and by case-law. In France the Constitutional Council has used its power of interpretation to confer an extensive and concrete content on written measures.214

The Treaties establishing the Communities did not contain an exhaustive list of fundamental rights - which led to subsequent demands that a list be drawn up, or that the Communities should

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210 Case 294/83 Partie écologiste "Les Verts" v European Parliament [1986] ECR 1339.

211 The most complete of these is the Declaration of Fundamental Rights and Freedoms adopted by the European Parliament on 12 April 1989 (OJ 1989 C 120).

212 The word is that of Mr. A. Dauses, La protection des droits fondamentaux dans l'ordre juridique des Communautés européennes, Revue des Affaires Européennes, 1992/4, p. 11.

213 In an important decision delivered in 1971 on freedom of association, the Constitutional Council raised a legislative rule to the rank of a constitutional principle.

214 Cf. C. Grewe and H. Ruiz Fabri, Droits constitutionnels européens, P.U.F. 1995, in particular p. 155 et seq.

accede to the European Convention on Human Rights215 - for two essential reasons which were considered complementary at the time when the Communities were established. The first is the technical and economic character conferred on the Communities, especially the ECSC; and the second is the perception of a division of work in Europe following the implementation of the European Convention on Human Rights in application of Article 3 of the Statute of the Council of Europe.216

Certain provisions of the Treaties, in application of the concept of a common market, lay down general principles which are very close to fundamental rights. That is so of the rules on freedom of movement for workers (Article 48), freedom of establishment and freedom to provide services (Articles 52 and 59) and the prohibition of any discrimination on grounds of nationality (Article 6 as amended by the Treaty on European Union) and, where pay is concerned, sex (Article 119). However, the degree to which power was transferred to the Community institutions made it necessary to ensure that fundamental rights were guaranteed at a level equivalent to that attained by the Member States. In the absence of a specific revision of the Treaties, which would have had too evident a constitutional meaning - and would therefore have provoked very strong reluctance - the Court of Justice turned to a systematic construction.

A. Extension by the Court of the general principles of law

1. The general principles in the Community legal order are the product of the methods of interpretation used by the Court and in particular the principle of practical effect (effet utile) or purposive (or teleological) interpretation which dominates the Community construction and which is not inconsistent (apart from the frequency with which and the extent to which it is used) with the traditions of international law.217 Initially a subsidiary source of the law, the general principles have been interpreted in such a way that they have been added to the original law without acquiring a higher value than written law, by the effect of the general clause on the competence of Court of Justice in Article 164 of the EEC Treaty: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed". In its Opinion 1/91 on the compatibility of the (first) draft agreement on the European Economic Area, the Court reinforced the authority which it derives from Article 164 by rejecting a draft agreement which might have resulted in the Court of the European Economic Area interpreting the provisions of the agreement in a way which was incompatible with the internal case-law of the Community.218

The general principles of international law occupy only a limited place, since they might contradict the structure of the Community legal order, such as the principle of reciprocity of obligations, and Member States cannot take the law into their own hands.219

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215 Cf. infra.

216 Namely the acceptance of the "principles of the rule of law and the enjoyment by all persons within [the] jurisdiction [of the member States] of human rights and fundamental freedoms".

217 Cf. D. Simon, L'interprétation des traités d'organisations internationales, morphologie des conventions et fonction juridictionnelle, Pedone 1981.

218 Opinion 1/91 [1991] ECR I-6079. The Court further observed that an ad hoc revision of the Treaty would not resolve the issue.

219 Cases 90 and 91/63 EEC Commission v Luxembourg and Belgium [1964] ECR 625.

The principles peculiar to the Community legal system are the consequence of the institutional nature of the Community (the principle of institutional equilibrium) or from the functions conferred on it (and in this case they are sometimes an extrapolation of rules in written law, whether primary law or secondary law (for example: the principle of Community preference was derived from the agricultural policy)).220

Certain general principles are by nature "axiomatic"221 or "inherent in any organised legal system",222 such as the principle of lawfulness, respect for the rights of the defence or the principles that guarantee the certainty of legal relations. Lastly, the Court of Justice has identified a number of principles common to the laws of the Member States, a process which initially remains consistent with the internationalist tradition in Article 38 of the Statute of the International Court of Justice (the "general principles of law recognised by civilised nations") and by reference to Article 215(2)223 on non-contractual liability. This reference is useful but rather indirect, since the "general principles common to the laws of the Member States" mentioned in Article 215 refer primarily to the principles governing the liability of the public powers in the various States and not to general principles of law stricto sensu and since, furthermore, the court was led to derive an autonomous system of liability224 when it found no real convergence. The Court has accepted a number of principles: the equality of those subject to the law, the principle of the right to a court, which has had numerous effects, the principle of the hierarchy of rules, undue enrichment, the principles concerning the withdrawal of measures combined with legal certainty.

This general construction calls for two remarks to which I shall return below. First, it is apparent, even by means of a discursive survey, that general principles and fundamental rights are sometimes closely interlinked where the beneficiary is the person, even though the Member States are also concerned by the same principle: in this sense the extension of general principles to fundamental rights by case-law was implicit from the outset. This interlinking weakens any attempt at a clear-cut classification.

The second observation is that the case-law theory of general principles already contained the problematic of fundamental rights as regards the requirement of a common character, since the Court had shown real flexibility as regards general principles. Moreover, it may be found that one and the same principle may have simultaneously a general (axiomatic) character, a specifically institutional character and a common (or partially common) character in the laws of the Member States.

2. In ECSC cases the Court refused to examine the validity of Community measures in the light of the fundamental rights recognised by the German Constitution on the ground that it did not have power to ensure observance of rules of domestic law, even constitutional law.225 The

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220 Case 5/67 W. Beus GmbH & Co v Hauptzollamt München [1968] ECR 83.

221 The expression is that of J. Verhoeven, Droit de la Communauté européenne, Larcier 1996, p. 250.

222 J. Boulouis, Grands arrêts de la CJCE, Volume 1, Fifth Edition, p. 80.

223 "... the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants ...".

224 F. Fines, Etude de la responsabilité extracontractuelle de la Communauté économique européenne, LGDJ, 1990, in particular p. 22 et seq.

225 Case 1/58 Friedrich Stork & Co v High Authority [1960] ECR 225 and Cases 30-38 and 40/59 Präsident Ruhrkohlen-Verkaufsgesellschaft mbH v High Authority

Court adopted this position, which was consistent with the respective autonomy of the Community and domestic legal orders, in order to ensure that Community law was not subordinated to the constitutional provisions of the Member States.226 The risk of that happening refers to the theory of structural congruence, which formed the basis of a number of decisions of the German courts. Advocate General Lagrange had already suggested that the Court should agree to examine the validity of Community measures in the light of the general principles common to the laws of the Member States.

The establishment of the case-law on direct effect and the primacy of Community law led to a change of viewpoint, since Treaty law "could not be overridden by domestic legal provisions" (Case 6/64 Costa v ENEL [1964 ECR 585) and it was therefore appropriate to ensure that fundamental rights enjoyed the same level of protection in the Community legal order as under the laws of the Member States. The autonomy of the Community and domestic legal orders was preserved by reasoning which contains a genuine innovation in the rules and the sources of law. In Stauder227 the Court had indicated that:

> "the provision at issue contains nothing capable of prejudicing the fundamental rights enshrined in the general principles of Community law and protected by the Court".

The grounds of the Internationale Handelsgesellschaft judgment,228 in which the Court gave a preliminary ruling on a question referred by a Frankfurt court, are more explicit:

> "Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure;
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> However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice".

The Court stated that it was guided by the constitutional traditions common to the Member States "within the framework of the structure and objectives of the Community": the process involved was one of selection and transposition.

[1960] ECR 423.

226 D. Mancini and V. Di Bucci, Le développement des droits fondamentaux en tant que partie du droit communautaire, Recueil des cours de l'Academie de droit européen, 1991, vol. 1, p. 36.

227 Case 29/69 Stauder v Ulm [1969] ECR 419.

228 Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel [1970] ECR 1125.

The Court subsequently widened that judicial construction to international agreements concluded by the Member States:

> "The international treaties on the protection of human rights in which the Member States have cooperated or to which they have adhered can also supply indications which may be taken into account within the framework of Community law".229

3. This mechanism of transposition was not immediately accepted by the German Constitutional Court. In a judgment of 29 May 1974 the Court had held that the fundamental rights guaranteed by the Federal Constitution prevailed over inconsistent measures of secondary Community law. The Constitutional Court's position expressed its mistrust of the extent to which fundamental rights were protected in the Community system, given the institutional deficiencies which it indicated: it therefore reserved the right to examine the conformity of secondary Community law with the Constitution after it had referred the matter to the Court of Justice for a preliminary ruling. That restrictive position was abandoned on 22 October 1986, after the Single Act had conferred wider powers on the European Parliament and, according to the Federal Constitutional Court, as long as the Court of Justice ensures that fundamental rights are given a level of protection comparable to that which they enjoy under the Basic Law.

That reasoning by the German Constitutional Court recognises the Community theory elaborated by the Court of Justice. That theory led to Article F(2) of the Treaty on European Union, which is worded as follows:

> "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional principles common to the Member States, as general principles of Community law".

It should be pointed out that this provision, which is purely declaratory, adds nothing to the existing system according to which fundamental rights are recognised and guaranteed. Furthermore, Article F(2) is aimed at all the parties to the Treaty, including those not covered by the Court's jurisdiction (Titles V and VI on intergovernmental cooperation).

B. The proximity of general principles and individual fundamental rights

The question may be put as follows: may the confirmation of a general principle lead, depending on the person of the beneficiary, to the gradual recognition of a new individual fundamental right?

1. The inclusion of the principle of proportionality in the text of the Treaty on European Union230 is the consequence of a judicial evolution which has tended to widen its application to all areas of Community law without exception. When the Treaties were originally drawn up such a general provision could not be included because the Court of Justice had not yet

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229 Case 4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v EC Commission [1974] ECR 491. The judgment was delivered in the context of the accession of France to the European Convention on Human Rights. The Court subsequently confirmed the reference to the Convention (Case 36/75 Rutili v Minister for the Interior [1975] ECR 1219, then to the United Nations Covenant on Civil and Political Rights.

230 Article 3b, third paragraph: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

developed the theory of the general principles of law.231 It is still apparent that those who drafted the Treaty on European Union took care not to place the principle of proportionality on the same level as the principle of subsidiarity, but that they none the less emphasised the link between the two principles, which are complementary as regards limiting the powers of the Community.

When viewed from the aspect of the common heritage, the subject of this colloquium, the principle of proportionality raises two distinct but complementary problems: is it a general principle common to the laws of the Member States and does it lead to the creation of fundamental rights?

The first question illustrates the ambiguities of any attempt to categorise general principles on the basis of their origins or the sources which inspired them. Jean Boulois, after emphasising that a principle established as "common" may be maintained as a general principle of law or that a principle which is supposed to be inferred from the nature of the Community may lack specificity and have its origins in various legal orders, chooses to make of such a principle a general principle inferred from the nature of the Community (the concept of a common market).232 Other writers prefer to see a principle inferred from the laws of the Member States,233 even though the majority emphasise the German origin of the principle of proportionality. The principle of proportionality is not written but, being derived from the first twenty articles of the Basic Law, in particular Articles 2 and 12, it was established by the Constitutional Court as a general principle of constitutional value: in fact it is regarded by writers as one of the essential components of a State governed by law (Mr Fromont and A. Rieg, Introduction au droit allemand)234 and it is therefore binding on both the executive authorities and the legislative authorities. As Mr Akehurst observes,235 one of the main reasons for its inclusion in the Community legal order is the extent to which the German courts have made use of the preliminary ruling procedure provided for in Article 177 EEC.

Although the principle of proportionality was largely inspired by German law, that was not the only source of inspiration. By its nature the principle of proportionality includes a method of

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231 The Treaty contained special provisions which helped the Court to elaborate a general principle of law:
- Article 36 on (national) exceptions to the free movement of goods, which the Court subsequently established must be necessary and proportionate to the aim pursued;
- Article 40(3), which provides that the common organization of agricultural markets is to be limited to pursuit of the objectives of the common agricultural policy (set out in Article 39);
- Article 85(3) lays down a negative condition for declarations that paragraph 1 is inapplicable: the agreement, decision or concerted practice (or category thereof) concerned must "not ... impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives" (positive conditions);
- Article 115, which provides that priority is to be given to measures "which cause the least disturbance to ... the common market";
- Article 226 lays down a similar condition in respect of protective measures.

These references show the plural origin of the same general principle of law which may be inferred from the rules laid down in the Treaty and at the same time from a fuller judicial construction.

232 J. Boulouis, Principes généraux, Répertoire communautaire Dalloz, 16 and 62 in particular. Well-founded though it may be, this classification is rather inconsistent with the application of proportionality to certain aspects of staff disputes. For a case concerning the dismissal of a member of staff, see Case 18/63 Estelle Schmitz v European Economic Community [1964] ECR 163.

233 See Dictionnaire juridique des Communautés européennes.

234 M. Fromont, République fédérale d'Allemagne: l'Etat de droit, Revue du Droit Public 1984, p. 1203.

235 In the application of general principles of law by the Court of Justice of the European Communities, Yearbook of Public International Law 1982, p. 39.

judicial control which reduces the share of discretion of the decision-making authority and may go as far as to introduce a number of assessments which are very close to equity, a new approach which should normally lead the judge to exercise self-restraint. The dimension of the judicial power is essential. It is also possible to suggest that the principle is present in the various national legal orders while the fact that the principle is established at Community level may encourage its adoption in the national legal orders.236 The evaluation by the English courts of whether conduct is reasonable (the "rule of reasonableness") is inspired by proportionality. Under the influence of Germany (or even, in anticipation, of the Community!), the Spanish Constitutional Court decided on 15 October 1982 that proportionality was a general principle of law. In French law the genesis of the principle of proportionality is inherent in the decisions of the administrative courts and the Constitutional Council: measures of administrative procedure (since 1933), the so-called "cost-benefit" balance (especially since 1971),237 especially where private property or interests are adversely affected, control of manifest error of appreciation where the administration traditionally had unfettered power to assess the facts. Sensitive sectors which were originally immune to control of that type (the immigration authorities, disciplinary proceedings, etc.) gradually came within the jurisdiction of the administrative courts. Under the influence of administrative case-law, the Constitutional Council extended its control to manifest error,238 beginning with its decisions on the nationalisation laws239 and the laws on New Caledonia.240

Without returning at this point to the debate on the extent to which general principles of law must be common, the principle of proportionality may be regarded as being inferred from the national laws concerned.

The second question, which concerns the extent to which proportionality is established in common fundamental rights, calls for qualified remarks. In legal writing, proportionality is not as a general rule included among the classifications or lists of fundamental rights, which do not give an accurate (and up-to-date) account of what C. Grewe and H. Ruiz Fabir call "the gradual development of fundamental rights".241 None the less, the principle of proportionality constitutes a right of defence of the individual as against the public powers, the State or the institutions of the Community. In the judgment in which the theory of fundamental rights was first stated, Internationale Handelsgesellschaft,242 the Court was faced with the fact that the plaintiff undertaking relied before the German courts on both the rights of property and proportionality, on the ground that the non-recoverability of the deposit payable in agricultural transactions constituted a disproportionate violation of the right of property which was not justified by the objectives of the agricultural regulations. In the same way the principle has been

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236 Cf. infra II. C.

237 Conseil d'Etat 28 May 1971,Société Ville nouvelle-Est, Rec. p. 409.

238 Reference should be made to the theory of Philipp, Le contrôle de proportionnalité dans les jurisprudences constitutionnelles et administratives françaises. Ed. Economica, 1990.

239 Decision no. 81-132 of 16 January 1982.

240 Decision no. 85-196 of 8 August 1985.

241 In Droits constitutionnels européens, P.U.F. 1995, p. 154 et seq.

242 Cited above.

extended to penalties that the institutions may apply to economic transactions and therefore to undertakings and individuals.243

In a case concerning milk production244 the Court observed that:

> "Nor, as thus interpreted, do the regulations infringe the right to property or the freedom of the producers concerned to pursue an occupation. Those rights, which are part of the fundamental rights the observance of which is ensured by the Court, are not absolute rights but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of the markets, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of these rights".

The principle of proportionality plays a part in reconciling contradictory rights in the sphere of fundamental rights. It is also going through new developments in connection with relations between private persons in the domestic legal orders as a result of indirect effect, i.e. of an interpretation of the general rules of private law.245 However, the ambivalence of the principle, illustrated by its inclusion in the Treaty on European Union, is clear: it serves to protect both the rights of the States - as a structural principle - and, as we have said, the fundamental rights of the person.

2. The principle of the right to be heard (droits de la défense) was directly established in the system applicable in contentious proceedings246 before the Court had declared that it was inspired by the rules of the European Convention on Human Rights and Fundamental Freedoms, in particular Article 6 § 3, which covers particular applications of the general principle of the right to a fair hearing.247 It is in the field of non-contentious procedures that the Court has laid down the principle for the benefit of the States (system for control of aids), Community servants248 and undertakings where the outcome of the procedure may involve a penalty or an act which adversely affects the person concerned.

In Hoffmann-La Roche, a case concerning the powers and obligations of the Commission in connection with the abuse of a dominant position, the Court pointed out that:

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243 The Court of Justice established an express link between the right of ownership and proportionality in Hauer concerning a Community regulation on the common market in wine and wine products which prohibited owners from planting additional vines (Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727).

244 Case C-177/90 Kühn v Landwirtschaftskammer Weser-Ems [1992] ECR I-58.

245 On this point, see W. Van Gerven, Principe de proportionnalité, abus de droits et droits fondamentaux, Journal des Tribunaux, 11 April 1992, pp. 305-309. On the effects of fundamental rights in private relationships, reference should be made to Grewe and Ruiz Fabri, op. cit., p. 181 et seq.

246 Cases 42 and 49/59 SNUPAT v High Authority [1961] ECR 53.

247 Although the Strasbourg institutions have given it a wide interpretation, Article 6 § 1 of the Convention makes provision for "civil rights and obligations" and "any criminal charge"; cf. F. Sudre: Droit international et européen des droits de l'homme P.U.F., Second Edition, p. 202.

248 Case 35/67 Van Eick v EC Commission [1968] ECR 329: "Although the Disciplinary Board only constitutes an advisory body of the appointing authority, it is bound ... to observe the fundamental principles of the law of procedure".

> "[o]bservance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings".249

Is the right to be heard a fundamental right common to the Member States? The constitutional laws of the States generally establish concepts which are comparable but more flexible: equal treatment in proceedings, procedural guarantees, the audi alteram partem rule. Legal writers in Germany take the view that this right has constitutional value because it is presumed to be contained in the fundamental principle of human dignity laid down in Article 1 of the Basic Law. In France the Constitutional Council promoted the principle of the right to be heard to the rank of a fundamental principle recognised by the laws of the Republic in criminal matters in a decision delivered on 2 December 1972 (Law on the development of prevention of accidents at work)250 and in a decision of 20 July 1977 concerning non-contentious proceedings (deductions from officials' salaries).251

In Transocean Marine Paint252 the Court held that "the procedure for hearings ... applies the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his view known", on the basis of the principles common to the Member States, following a comparative analysis by Advocate General Warner of administrative law in the Member States, and although the principle was unknown in administrative proceedings in Italy and the Netherlands. The Court held that the principle was a mandatory requirement in a State subject to the rule of law.253

Furthermore, the case-law of the organs of the European Convention has had an indirect influence on the case-law of the Court of Justice, even though the Court of Justice has stated that "[t]he Commission [of the EC] ... cannot, however, be classed as a tribunal within the meaning of Article 6 of the ... Convention".254 Clearly, there are differences in interpretation between the Community jurisdiction and the Convention jurisdiction, given the different objects of the two legal orders.

3. The protection of legitimate expectations is not described as a fundamental right by the Court of Justice: the principle is not found in the European Convention on Human Rights and is not always given the same recognition in the domestic laws of the various Member States. A component part of the general principle of legal certainty, the protection of legitimate expectations has to do with whether or not the citizen (or the Member State) can rely on a rule which is advantageous to him being maintained. The question has arisen in cases concerning the

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249 Case 85/76 Hoffmann-La Roche & Co AG v EC Commission [1979] ECR 461.
Case 40/85 Kingdom of Belgium v Commission [1986] ECR 2321, paragraph 28: "... observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law".

250 Decision no. 76-70, 12 February 1972, Rec. p. 39.

251 Decision no. 77-83, 20 July 1977, Rec. p. 29.

252 Case 17/74 Transocean Marine Paint Association v EC Commission [1974] ECR 1063.

253 This case also illustrates the relative nature of any attempt to classify the general principles, which in many cases have more than one source.

254 FEDETAB agreements: Joined Cases 209-215 and 218/78 Heintz van Landewyck Sàrl v EC Commission [1980] ECR 3125.

withdrawal of administrative measures.255 Where a situation has been created unlawfully the principle of legitimate expectations may come up against the fundamental principle of lawfulness. While it may be compared with the principle of good faith or the rule of estoppel in the international order, the national sources of the principle are more difficult to discern.256

Once again, German law provided the principal reference. Like the principle of proportionality, the principle of protection of legitimate expectations forms part of the concept of a State governed by law. Its recognition by the administrative courts (revocation and withdrawal of acts, retroactivity of norms) led the German Constitutional Court, on the basis of an interpretation of Article 20 of the Basic Law, to confer constitutional value on the principle in a judgment delivered on 2 February 1978.257

In comparative European law there are more or less analogous methods of reasoning: the protection of legitimate expectations by the English courts does not amount to a general principle - the same applies in Ireland and in Denmark -while the Netherlands courts use a series of criteria to assess the legitimacy of the confidence created by the public authorities.

Until recently French law did not recognise the protection of legitimate expectations as a general principle.258 However, Articles L80 A and L80 B of the Fiscal Procedures Book (the former is also found in the General Tax Code) allow a taxpayer, in certain conditions, to rely on an a error in law based on a legitimate belief in the event of a change in doctrine by the tax authorities. In other cases outside the field of taxation the administration is liable where a competent official under an obligation to provide information has given inaccurate or incomplete data, provided that the individual concerned has behaved prudently and reasonably. The same applies in the case of promises which are not kept, although an economic operator is always under a duty to act prudently.259

These prolegomena of a theory of legitimate expectations have their equivalent in Community case-law: the protection of legitimate expectations cannot be relied on against a manifestly unlawful act or in favour of a situation susceptible of being altered or the object of which, for economic reasons, requires periodic adjustments. None the less, the plea may be submitted in proceedings to have an act set aside and in proceedings to establish liability.260

C. A functional limitation

1. The selection of fundamental rights, like the selection of the general principles of which they form part, must be effected in a way that is fully compatible with the Community legal

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255 Joined Cases 7/56 and 3-7/57 Algera v Common Assembly [1957-58] ECR 39 "... The need to safeguard confidence in the stability of the situation thus created ...".

256 See the study by F. Hubeau, Le principe de la confiance légitime dans la jurisprudence de la CJCE, Cahiers de droit européen 1983, p. 143.

257 See commentary by M. Fromont in Revue du droit public 1979, p. 1654.

258 Cf. infra, II.c.

259 Council of State 24 April 1964, Société des Huileries de Chauny, Rec. p. 245, submissions of G. Braibant.

260 The plea is frequently submitted by States in proceedings to have a decision set aside. That was so in one of the first Spanish cases before the Court, Case 203/86 Spain v Council [1988] ECR 4563, cited by J.C. Gautron, L'insertion de l'Espagne dans les mécanismes du contentieux communautaire in Dix ans de démocratie constitutionnelle en Espagne, Ed. du CNRS, 1991.

order. It is subject to the requirements of necessity and coherence, "... within the framework of the structure and objectives of the Community" (Internationale Handelsgesellschaft, cited above). That marks a fundamental difference from the practice of the Strasbourg organs, whose functions exclusively concern the definition and scope of the rights and freedoms guaranteed in the States by the Convention.

This means that the Court quite naturally applies the general principles and fundamental rights which follow directly from the wording of the Treaties and thus removes the distinction between the substantive rules of law and the principles of Community law. The same applies to the principles and fundamental rights which follow from the specific nature of the Community. In this sphere the Court may find it necessary to decide between conflicting principles; thus it held that the principle of solidarity in the Community prevailed over the principle of proportionality and the right of property relied on by undertakings which sought protection of their commercial interests.261

The recognition of a general principle or a common fundamental right is not sufficient to ensure that it is included in the Community legal order: it may only be included if it is not contradicted. Likewise, rights based on common constitutional traditions or inspired by the European Convention on Human Rights (or other conventions on human rights) are subject to certain limits, which the Court defined in Nold (cited above).

This leading judgment was upheld in subsequent decisions concerning property,262 freedom to follow an occupation263 or the right to respect for private life.264 These limitations are therefore less narrow than the derogations admitted by the Strasbourg organs.

2. A further major difference from the case-law of the organs of the European Convention on Human Rights is that the Member States are required to recognise and guarantee individual fundamental rights within the operative scope of the Treaty, or only where the act of the State is connected with Community law. When the Court of Justice examined a prohibition on residence from the aspect of the principle of freedom of movement for workers laid down in Article 48 of the EEC Treaty ("subject to limitations justified on grounds of public policy" (Article 48(3)), it held that the "limitations placed on the powers of Member States in respect of control of aliens [other than those in Directive 64/221] are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms ... and in Article 2 of Protocol No. 4 of the Convention ..., which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests 'in a democratic society'".265

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261 **Case 254/78 Valsabbia v Commission [1980] ECR 907.**

262 **Case C-44/89 Georg von Deetzen [1991] ECR I-5119.**

263 **Case 265/87 H. Schräder [1989] ECR 2263.**

264 **Case C-62/90 Commission v Germany [1992] ECR I-2575.**

265 **Case 36/75 Rutili v Minister for the Interior [1975] ECR 1219.**

More explicitly, Advocate General Trabucchi indicated in his Opinion in Watson and Belmann,266 a case which concerned expulsion for failure to comply with certain administrative formalities, that:

> "[t]he protection of the rights of man accordingly forms part of the Community system, even as against the States, inasmuch as the fundamental right relied upon involves a relationship or a legal situation the regulation of which is among the specific objects of the Treaty".

The Court took up the matter again in Wachauf:267 it ruled that national regulations adopted for the purpose of implementing Community law must respect fundamental rights. The limits of the obligation were defined a contrario in a number of judgments: in Cinéthèque268 the Court observed that "[a]lthough it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, in this case, an area which falls within the jurisdiction of the national system". However, in that case the Advocate General had suggested that restrictions on the free movement of goods based on the exceptions in Article 36 or mandatory requirements should be construed in the light of the Convention. As Joël Rideau maintains,269 the Cinéthèque decision could be distinguished from the Rutili decision by its subject-matter (the free movement of goods rather than freedom of movement for persons).

As F. Mancini and V. di Bucchi emphasise,270 the Court wished to avoid competition with the organs responsible for supervising the Convention and to preclude any control extending beyond cases where Community law was applicable.271 However, on a reference from a national court for a preliminary ruling, the Court of Justice may find it appropriate to provide the national court with the points which will enable it to determine whether national legislation is compatible with the European Convention "provided that that legislation falls within the scope of Community law".

Furthermore, the scope of the Court's control has been extended to national measures which derogate from Community law:

> "In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined

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266 Case 118/75 Watson and Belmann [1976] ECR 1185.

267 Case 5/88 Wachauf [1989] ECR 2609.

268 Joined Cases 60/84 and 61/84 Cinéthèque SA v Fédération Nationale des Cinémas Français [1985] ECR 2605.

269 J. Rideau, Droit institutionnel de l'Union et des Commaunautés européennes, LGDF, 1994, p. 132.

270 Op. cit.

271 Case 12/86 Demirel v Stadt Schwäbisch Gmünd [1987] ECR 3719: "[the Court] has no power to examine the compatibility with the European Convention ... of national legislation lying outside the scope of Community law".

provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court".272

Thus the limitation is a strictly but fully operational one

3. Fundamental rights are subject to limits "justified by the general objectives pursued by the Community, so long as the substance of the right is not impaired" (Nold, cited above). In that regard, the Court is guided by the limits in the constitutional orders of the States, since the right of property and the freedom to follow an occupation are not "absolute prerogatives" and include "limitations relating to the public interest". A number of constitutions refer to the obligations to which the right of property is subject, to its social function or its social use. Article 1 of Protocol No. 1 to the European Convention includes a reference to restrictions in the "general interest", while as regards the majority of conditional rights the Convention provides for a general public interest clause which allows statutory restrictions to be imposed in the public interest on condition that they are necessary in a democratic society.

II. Individual fundamental rights, an indication of the common European heritage

The relationship between individual fundamental rights and the common European heritage is dialectical in nature, as is Community law itself. The Community legal order has fed on conceptions and rules that are prevalent in the Member States ever since the stage when the Treaties were drawn up. It is for the Community institutions gradually to adopt common rules which are established directly in the internal order of the Member States or transposed by those States in accordance with the procedures applicable or the particular features of their legislative systems. In that sense Community law may be perceived as a permanent mechanism of structural adjustment follow which a common European right tends to emerge. It is clear that many other factors play a part and that Community legislation and case-law go hand in hand with changes, which are also brought about by technology, ethics, culture and the internationalisation of the economy, and provoke adaptations and changes in the domestic legal orders.273 What happens is that Community legislation and case-law reveal them, accelerate them and give form to them in the field to which they apply. Although that very general approach may be applied to the rules on competition, the rules governing the civil service, public markets or, for example, the rules governing the liability of the public powers, the question also arises in connection with individual fundamental rights.

A. From comparative law to Community law

The concept of "constitutional traditions common to the Member States", which was established by the Court of Justice and reproduced word for word in Article F(2) of the Treaty on European Union, is obviously not completely clear. It is less precise than the reference, also made by the Court in the leading judgments cited above, to the "fundamental rights recognised and guaranteed by the constitutions of the Member States". It is possible to see practical reasons in this semantic division. First, although the reference to constitutional traditions has a less precise meaning then the reference to fundamental rights, it allows the Court to go beyond the categories of fundamental rights in the domestic legal systems, where they exist, and to avoid

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272 Case C-260/90 ERT [1991] ECR I-2925.

273 Of particular interest is the analysis by Mireille Delmas-Marty, in particular the pages which she devotes to the "European laboratory", p. 223 et seq. in "Pour un droit commun", Ed. du Seuil, 1994.

certain purely domestic divisions connected with the distinction between intangible fundamental rights and those subject to review, or to the distinction between rights that can be directly relied on in the domestic order and those which need to be implemented by legislation. It may be that the Court also did so because certain rights are not rigorously set out in the constitutional texts although they have constitutional value (where the courts have so declared) or constitutional scope. Secondly, as Guy Isaac states,274 the Court endeavours to identify a "maximum standard, that is to ensure that the highest national guarantee is applied at Community level". That openly progressive approach allows the Court to dispense with seeking a common denominator which might be nothing more than the expression of the lowest common denominator, which would run contrary to the search for the level that is most advantageous to the beneficiaries (a permanent principle in human rights matters) and might lead to objections from the courts in States where the system of defining and protecting fundamental rights is more advanced. Moreover, as Mr Dauses observes,275 the case-law of the Court of Justice may also include the general principles of administrative law and judicial law, which are very similar to fundamental rights, such as the principles of legal certainty, the protection of legitimate expectations or proportionality, in view of the constant overlapping of general principles and fundamental rights.276 There is no strictly positivist definition of "constitutional traditions" in European comparative law.

Similarly, the "common" nature of fundamental rights must be given a flexible interpretation, since, as the Community periodically grows larger, the concept of jus communis may constantly be called in question. In his Opinion in Zuckerfabrik, a case concerning the second paragraph of Article 215 of the EEC Treaty, Advocate General Roemer observed that a principle might be declared a common principle provided that it was "widely recognised", without there being any need for the Court to determine to what precise arithmetical extent it was "common". It will be recalled that the extra-contractual liability of the Community, despite the wording of the second paragraph of Article 215, was established autonomously following what Mrs Fines calls a "fruitless comparative study".277 Although one of the applications to attract most attention as regards the right of property and the free exercise of trade, work and other occupational activities was the application in Nold, it should be observed that in that case the Court referred both to the common constitutional traditions and to the international treaties on the protection of human rights. In Hauer278 the Court also referred to the constitutional rights recognised in the Member States and to the European Convention.

In Johnston, a leading case on the right to obtain a judicial determination, following an action based on the infringement of a Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, including promotion, and vocational training, the Court ruled that the right to obtain an effective judicial remedy before the national court followed from the general wording of the directive, especially Article 6, but that, more broadly, it reflected "a general principle of law which underlies the constitutional traditions common to the Member States"; the Court went on to state that [it] "is

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274 G. Isaac, Droit communautaire général, Masson, Fourth Edition, p. 156.

275 M. Dauses, La protection des droits fondamentaux dans l'ordre juridique communautaire, Rev. trim. de droit européen, 1984, no. 3, p. 407.

276 Cf. supra, I.B.

277 F. Fines, op. cit., p. 107.

278 Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727.

also laid down in ... the European Convention for the Protection of Human Rights and Fundamental Freedoms".

In referring to both domestic sources and an international source the Court appears to show a preference for a single document containing clearly expressed provisions. Is it therefore possible to speak of a very early decline in the reference to "common constitutional traditions"?

B. From Convention law to Community law

The above-mentioned uncertainties regarding the reference to the "common constitutional traditions" induced the Court, from 1974, to take account of the fundamental rights in certain articles of the European Convention. As I have said, this new approach has the advantage for the judge of making a comparative research, which may prove uncertain, unnecessary. One of the main rules of the law on "human rights" is that the highest norm must benefit the individual and therefore prevail in every case. The Court of Justice decided along those lines in Opinion 2/91 on the compatibility with the Treaty of Convention No 170 of the International Labour Organisation.279 Paragraph 18 deserves to be cited in full: "For the purpose of determining whether this competence is exclusive in nature, it should be pointed out that the provisions of Convention No 170 are not of such a kind as to affect rules adopted pursuant to Article 118a. If, on the one hand, the Community decides to adopt rules which are less stringent than those set out in an ILO convention, Member States may, in accordance with Article 118a(3), adopt more stringent measures for the protection of working conditions or apply for that purpose the provisions of the relevant ILO convention. If, on the other hand, the Community decides to adopt more stringent measures than those provided for under an ILO convention, there is nothing to prevent the full application of Community law by the Member States under Article 19(8) of the ILO Constitution, which allows Members to adopt more stringent measures than those provided for in conventions or recommendations adopted by that organization".

Apart from the above-mentioned imperfections in the "character common" to the Member States, the search for the highest norm may lead to contradictory appreciations or discrepancies. The advantages of recourse to the European Convention arise from the unity of the norm throughout the European area because it is accepted in the same way by all Member States. As regards their authority in the Community internal legal order, fundamental rights have the same authority as the principles and are therefore superior to secondary Community legislation and to national measures adopted to implement Community law. In application of their incorporation in Community law, the Court makes clear that once the principle is accepted there is no further need to refer to the source, be it domestic or international.

1. The place of the rules set out in the European Convention as regards Community law is rather special, since they have not been incorporated into Community law. Although the Court of Justice considers that "[t]he international treaties on the protection of human rights in which the Member States have cooperated or to which they have adhered can also supply indications which may be taken into account within the framework of Community law", the Community is not bound by the rules of the Convention. None the less, a number of writers had suggested that the Community might be bound by the Convention, on the model of the GATT,280 provided that all the States had adhered to it. The Court's position has not changed and is consistent with

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279 Opinion C-2/91 [1993] ECR I-1061.

280 Joined Cases 21 to 24/72 International Fruit Company [1972] ECR 1219.

the position adopted by the European Commission of Human Rights, which does not accept the admissibility of an application against a Community measure (CFDT v European Communities, decision of 10 July 1978) but may accept the admissibility of an action against a national measure that implements Community law (Procola v Luxembourg, decision of 1 July 1993). This decision goes some way towards correcting the interpretation which had been given of the M. and Co. decision of 9 February 1990, where the Commission declared inadmissible ratione materiae an application against a measure implementing a judgment of the Court of Justice (and not a Community measure).281

The somewhat unclear scope of the Convention in the Community machinery for the establishment of individual fundamental rights raises a number of questions:

- may Article 6 of the Convention, and therefore the right to a fair hearing, be invoked against a judicial decision refusing to refer a matter to the Court of Justice for a preliminary ruling?282

- since the Court of Justice of the European Communities is not bound by the decisions of the European Court of Human Rights, differences in interpretation may arise, the risk of this being increased by the specific features of the Community legal order. It is common knowledge that in Hoechst the Court of Justice held that the right to respect for the home laid down in Article 8 of the Convention did not extend to business premises, contrary to the case-law of the European Court of Human Rights.283 In one situation, in order to prevent possible differences in interpretation, the Court of Justice preferred to wait until the European Court of Human Rights had decided the matter. The case is well known: it concerned the appraisal, from the aspect of Article 10 of the Convention (on freedom of expression and freedom to receive and impart information), of the prohibition in Ireland on the distribution of information on clinics performing abortions abroad.284 On a reference for a preliminary ruling, the Court took the view that although abortion might be described as a service, the activity of students associations which distributed the information was not economic in nature and, accordingly, since the prohibition of that activity in Ireland did not constitute a restriction on the freedom to provide services within the meaning of Article 59 of the EEC Treaty, the Court was not empowered to compare it with the fundamental rights deriving from the European Convention on Human Rights.285 That case illustrates the difficulties of the functional limitation mentioned above and also the risks of conflicting decisions. We know that the European Court of Human Rights considered that the relevant Irish domestic law was in breach of the principle of the freedom to receive and impart information and thus violated Article 10 of the Convention.

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281 J.P. Jacqué, Communauté européenne et Convention européenne des droits de l'homme in La Convention européenne ... Commentaire article par article, Economica, 1993.
G. Cohen Jonathan, La Commission européenne des droits de l'homme et le droit communautaire: quelques précédents significatifs: Europe, December 19 4, chronique 10.

282 G. Cohen-Jonathan and J.P. Jacqué Activités de la Commission européenne des droits de l'homme AFDI 1989, p. 514 et seq. The authors draw a comparison with the reasoning of the German Federal Constitutional Court in Solange II.

283 Case 46/87 Hoechst [1989] ECR 2589.

284 Case C-159/90 The Society for the Protection of Unborn Children v S. Grogan [1991] ECR I-4685.

285 Cf. Laurence Idot: A propos de l'interruption volontaire de grossesse: premier bilan de la jurisprudence de la Cour relative à la libre prestation de service in 1991, Europe, November 1991, no. 1 chronique p. 4.

Two solutions, possibly cumulative, have been envisaged in order to ensure that the European Convention on Human Rights and, more broadly, fundamental rights are more fully respected in the Community: the so-called "catalogue of fundamental rights", which the European Parliament decided to reject in 1973 but to which it returned when the Treaty on European Union was being drafted, or accession by the Community to the European Convention on Human Rights. Since the project of a catalogue of fundamental rights caused questions to be asked (difficult negotiations between States, the risk of incompleteness or duplication, inappropriateness to the structure and mode of operation of the Community),286 that left the prospect of accession to the Convention. That approach had received the enthusiastic supported of the Commission and the European Parliament in 1979 and was again taken up by the Parliament when the Treaty on European Union was being drafted.

The accession route was provisionally closed by Opinion 2/94 delivered by the Court on 28 March 1996 following a request to the Court from the Council of the European Union under Article 228(6) of the EEC Treaty. The admissibility of the request for an opinion, in the absence of an agreement framed in sufficiently precise terms, led the Member States to adopt opposing positions. The Court chose to examine the admissibility of the request solely from the point of view of the competence of the Community and not from that of its substance, i.e. the compatibility of accession to the Convention with the provisions of the EEC Treaty, in particular with Articles 164 and 219 on the competence of the Court of Justice.287 In reliance on the principle laid down in Article 3B that the Community only has those powers which have been conferred on it, which may possible be widened by the use of implied powers, the Court stated that no provision conferred on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field and that Article 235 did not provide sufficient basis for changing the Treaty to such an extent. Accession could be brought about only by way of amendment of the Treaties prior to the integration of the European Convention in the Community legal order. As Professor Denys Simon points out, the Opinion of the Court has the effect of placing human rights in a classic system in which powers are allocated by area instead of making them, in accordance with its established case-law, into a horizontal principle which would underlie all the activities of the Community.288 It is true that in the absence of a specific proposal accession would have meant legal change, in particular as regards the judicial architecture of the system, as Opinion 1/91 stated more forcefully. In Opinion 2/94 the Court recalled the classic position of the Community regarding fundamental rights.

2. The scope of the rules of the European Convention on Human Rights as regards the common European heritage may be evaluated in a number of ways.

First, the Court of Human Rights describes the Convention as a "constitutional instrument of European public order ('ordre public')" (the Loizidou v Turkey judgment of 23 March 1995, Series A no. 310). While it is true that the concept of public order is difficult to define, it is

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286 Cf. Ch. Philip, La Cour de Justice des Communautés européennes et la protection des droits fondamentaux dans l'ordre juridique comunautaire, AFDI, 1975, especially p. 405.

287 Article 164: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed". Article 219: "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein".

288 D. Simon, Europe, no. 6, June 1996, chronique 6 p. 1.

generally seen by writers as the expression of values common to a society and, in the case of the Convention, a society made up of several national societies. Analysing these common values, F. Sudre emphasises the concept derived by the European Court of Human Rights of principles peculiar to a democratic society and the objective function of fundamental rights which are designed not only to protect the individual but also to guide the organs of the State, and indeed to help establish the internal structure of the States.289 The structuring function of the Convention is plain where the institutional effects of the right to a fair hearing are concerned (independence and functioning of the courts, means of access to judicial control). In spite of the rarity of State applications, the collective guarantee remains one of the fundamental principles of European public order, while the Commission's power to bring matters before the European Court and the long-term development of the individual petition (Protocol No. 9 and the future Protocol No. 11) operate in the same sense.

A second approach consists in comparing the rights protected in the system of the European Convention with the rights guaranteed by constitutional norms (the theory of parallelism). The following table was presented by the French delegation to the Ninth Conference of European Constitutional Courts, held at Paris in May 1993;290 it could be extended to all European legal systems.

A third factor must be taken into consideration, namely the influence exerted by the European Convention on Human Rights on constitutional courts and administrative courts through the authority of the decisions delivered by the Strasbourg Court. In a study of the French administrative courts, Joël Andriantsimbazovina291 has endeavoured to identify three forms of authority of that case-law: binding authority (autorité de la chose jugée); what he describes as "persuasive" authority; and authority deriving from interpretation (autorité de chose interprétée), which is impregnated with the concepts in force in the Community order but difficult to implement in the case of the Convention unless there is some provision for dialogue between the judges.

The Constitutional Courts have also borrowed from the techniques of interpretation used by the European Court of Human Rights in order to ensure the effective protection of fundamental rights or to order the legislature to exercise its powers.

3. The capacity of the Court of Justice to be guided by the rules of the European Convention on Human Rights292 has the advantage of erasing the differences caused by the differences in the status of the Convention in the various national legal orders (it may have been incorporated in the national legal order, or be directly applicable, or have primacy), which might increase even further with the enlargement of the Council of Europe and the corresponding growth in the number of Parties to the Convention. In the field of Community law raising the rules of the Convention to the status of general principles of the Community legal order confers

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289 **F. Sudre: Existe-t-il un ordre public européen? in Quelle Europe pour les droits de l'homme? Bruylant, Brussels 1996, p. 39 et seq.**

290 **See endnote at the end of this report.**

291 **J. Andriantsimbazovina: L'autorité des décisions de justice constitutionnelles et européennes sur le juge administratif français. Thesis, Bordeaux 1994.**

292 **The principles which the Court of Justice has borrowed from the Convention, apart from the right of ownership and the freedom to exercise professional activities (cited above) concern the inviolability of the home, the non-retroactivity of criminal provisions, the right to a court, the protection of the name and human dignity, the right to a fair hearing, respect for religious beliefs, the protection of family life, the rights of the defence and freedom of expression, i.e. a collection of rights which constitute the common European heritage.**

an additional degree of authority on them. As regards their application by the courts, the Court of Justice has an extensive role because of the preliminary ruling procedure, which establishes a direct relationship with the national courts. Furthermore, seen from the aspect of the common heritage, the Court of Justice, because of its composition, tends to erase the distinction between the romano-germanic system (which is principally based on binding authority) and the common law system (which emphasises precedent and thus to a large extent the authority of interpretation), and thus brings together binding authority and authority deriving from interpretation.293 The fundamental issue is undoubtedly that tradition in the continental countries does not recognise that case-law has a normative role: this is the source of a certain concern as regards the case-law of the Court of Justice in general, and in the area of fundamental rights in particular.

C. Community law and law common to Europe

The fundamental rights established by the Court of Justice are therefore situated at the pivot of three legal orders: the national (constitutional) legal orders, the order deriving from the European Convention and the Community legal order. As I have said, the consequence is a paradigm of complexity that is not ready to fade away, in some way a provisional status, perfectly illustrated by the conditionality in the Solange II judgment or in the M. and Co. v FGR decision of the European Commission of Human Rights, the common inspiration of which has been emphasised.

In order to reduce the risks of divergence, a number of writers have suggested that the Court of Justice might refer a question to the European Court of Human Rights for a preliminary ruling on the interpretation of the Convention. That suggestion is not compatible with the current state of the law, since the Community may be guided by the Convention but it is not bound by it.294 It would be illusory to imagine that an agreement on accession to the Convention (should the Treaties be amended) or an agreement on cooperation could put the Court of Justice in a position where it could make use of a mechanism not available to the courts of the Member States.

The formation of a common body of law in Europe thus encounters both procedural and substantive difficulties which are very characteristic of the political structure of the continent. Federal solutions have been simpler. In 1925 the Supreme Court of the United States, in Gitlow v New York, extended the scope of the Bill of Rights to the legislative and administrative measures of the Federal States, whereas it previously concerned only the federal authorities. In Canada the Constitution of 1867, and then more recently the Charter of 1982, established the status of citizenship consisting of political rights and a few fundamental rights.295

However, while the European Convention has had a considerable influence on the fundamental rights recognised and guaranteed in the Member States, the influence of the fundamental rights of the Community legal order cannot be ignored. In different circumstances the theory of the

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293 cf. J. Andriantsimbazovina, op. cit., p. 893. The writer cites the grounds of the Kruslin judgment of 24 April 1990 delivered by the European Court of Human Rights: "In a sphere covered by the written law, the 'law' is the enactment in force as the competent courts have interpreted it".

294 A number of Governments suggested a similar arrangement when the request for an opinion on the accession of the Community to the Convention was being considered: questions for a preliminary ruling might be ... in order to maintain the autonomy of the Community legal order.

295 Article 8A of the Treaty on European Union establishes the right to move and reside freely within the territory of the Member States as one of rights of European citizenship. This is a fundamental right which Community nationals enjoy even if they do not come within the specific provisions of Articles 48, 52 and 59 of the EEC Treaty.

fundamental rights of the Community legal order also exercises two influences: a direct influence, since the Member States are required to respect them when they apply or implement Community law; and an indirect influence in so far as the solutions applied are susceptible of influencing the sphere of the extra-Community legislative or administrative activities of the States (the contagion effect).296 The latter effect has paradoxical links with the nature of the Community. As a common public power (G. Isaac), the Community, despite the change of initials in 1992, has as its principal mission to regulate economic situations. According to the European historical tradition, rights proclaimed have primarily concerned the person in globo, his rights in political life or in judicial life. It is interesting to note, therefore, that Community law is pressing for the application in economic fields of concepts which were not initially envisaged from the economic point of view. That explains the inevitable promotion of the rights of undertakings, which are legal persons. Although its bases are subtle, the case-law of the Court of Justice of the European Communities reflects the main tendencies of this common European heritage, which is itself in a state of permanent change.
Footnote no. 82:

Cf. Revue française de droit administratif, September-October 1993, p. 849 et seq.

The table below includes no references to the International Covenant on Civil and Political Rights.

Type of right	Basis in the Convention	Constitutional basis
Right to life	Article 2, ECHR	no. 74-54 DC 15 January 1975 Cons. no. 9
Prohibition of torture and inhuman or degrading pain or treatment	Article 3, ECHR	PFRLR
Prohibition of slavery, servitude and forced labour	Article 4, ECHR	PFRLR
Right of everyone to liberty and security of person	Article 5, ECHR	Article 2, Declaration of 1789 Article 66, Constitution
Right to a fair hearing before an independent and impartial tribunal	Article 6, ECHR	- principle of the rights of the defence (PFRLR) - principle of the independence of the courts (Article 64, Constitution and PFRLR)
Presumption of innocence	Article 6, ECHR	Article 9, Declaration of 1789

296 J. Weiler, The European Court at a Crossroads; Community Human Rights and Member State Action in Liber amicorum Pierre Pescatore, Nomos, 1987, p. 821 et seq.

Type of right	Basis in the Convention	Constitutional basis
Prohibition of the retroactivity of criminal laws and the imposition of heavier penalties	Article 7, ECHR	Article 8, Declaration of 1789
Right to respect for private and family life, home and correspondence	Article 8, ECHR	- paragraph 10, Preamble of 1946 - Article 66, Constitution
Freedom of thought, conscience and religion	Article 9, ECHR	- Article 10, Declaration of 1789 - paragraph 5, Preamble of 1946 - Article 2, Constitution
Freedom of expression	Article 10, ECHR	Article 11, Declaration of 1789
Freedom of peaceful assembly	Article 11, ECHR	PFRLR
Freedom of association	Article 11, ECHR	PFRLR no. 71-44 DC, 16 July 1971
Right to marry and found a family	Article 12, ECHR	paragraph 10, Preamble of 1946
Right to an effective remedy before a national authority	Article 13, ECHR	Article 16, Declaration of 1789
Prohibition of discrimination in the enjoyment of the rights guaranteed	Article 14, ECHR	Article 6, Declaration of 1789 Article 2, Constitution
Guarantee of property	Protocol No. 1, Article 1	Articles 2 and 17, Declaration of 1789
Freedom of education	Protocol No. 1, Article 2	PFRLR no. 77-87 DC, 23 November 1977
Right to free elections	Protocol No. 1, Article 3	Articles 3 and 24, Constitution
Right to come and go	Protocol No. 4, Article 2	Article 2, Declaration of 1789 no. 79-107 DC, 12 July 1979
Right to enter the State of nationality	Protocol No. 4, Article 3 § 2	Article 2, Declaration of 1789
Right not to be expelled from	Protocol No. 4, Article 3 § 1	PFRLR

Type of right	Basis in the Convention	Constitutional basis
the State of nationality		
Procedural rights in connection with expulsion	Protocol No. 7, Article 1	Article 16, Declaration of 1789, Article 16, Constitution
Right of appeal to a higher court in criminal matters	Protocol No. 7, Article 2	- Article 16, Declaration of 1789 - general principle of law, according to the Council of State
Right to compensation following reversal of criminal conviction	Protocol No. 7, Article 3	Principle of equality before public burdens inferred from Article 13 of the Declaration of 1789
Ne bis in idem	Protocol No. 7, Article 4	Article 8, Declaration of 1789
Equality of spouses	Protocol No. 7, Article 5	paragraph 3, Preamble of 1946

b. Who is the holder of fundamental rights - the individual and/or groups? by Mr Rainer HOFMANN

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I. Introduction

Since the demise of the seemingly so firmly established economic, legal, political and social order in the formerly socialist countries of Europe, the process of European integration has - again - gained considerable momentum. This is particularly well reflected in the fact that the Council of Europe the membership of which had been restricted, for almost 40 years, to the "Western" part of our continent, has now become, within a very short period of time, a truly pan-European international organisation. Another development of probably even greater relevance constitutes the envisaged enlargement of the European Union although it seems quite inconceivable - at least as regards the foreseeable future - that this supranational organisation will have a geographic extension as large as that of the Council of Europe.

1. Respect of the constitutional heritage of Europe in the field of fundamental rights as a precondition for European integration

There seems to be unanimous acceptance of the view that this process of European integration presupposes, inter alia, the existence of a common legal basis shared by all participants in this process. This precondition already found its very clear expression in the 1949 Statute of the Council of Europe, in particular in its Art. 3 that limits membership to States which respect the principles of the rule of law and of the enjoyment of human rights and freedoms; their maintenance and further realisation are, moreover, identified as one of the Council's principal

aims in Art. 1(b) of its Statute. The essential importance of human rights for membership of the Council of Europe is well reflected in the relatively recent, but nonetheless already firmly established practice of making the admission of new member States contingent upon their readiness to sign and to ratify - within a reasonable period of time - the 1950 European Convention on Human Rights (ECHR) and its Additional Protocols, and upon a positive assessment of the existing human rights situation in the respective State based upon pertinent reports authored by independent experts, usually members of the European Commission or Court of Human Rights. Thus, human rights and fundamental freedoms as enshrined in these instruments and as applied and interpreted by the competent Strasbourg organs may rightly be considered as constituting the public order of Europe. In this context, it must be stressed that the interpretation given to the substantive human rights provisions - and, in particular, to the applicable restrictive clauses such as, e.g., "necessary in a democratic society" - by these organs seems to be consistently - albeit not always explicitly - based upon a previous attempt to identify the pertinent standard common to all - or at least a large majority of - the member States.

This essential relevance of a common standard of human rights protection as a corner-stone of European integration and the requirement of a State`s adherence to those standards as a precondition of its participation in that process is now also established as regards the European Union. Transforming the pertinent jurisprudence of the European Court of Justice that had been developed over the years into positive "primary" law, Art. F (2) of the Maastricht Treaty on European Union (TEU) now unequivocally states the Union`s respect for fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member States, as general principles of Community law. Moreover, Art. J 1.(2) TEU declares the respect for human and fundamental rights to constitute one of the major aims of the Union`s Common Foreign and Security Policy. As a consequence thereof, the human rights record of a given State necessarily constitutes an important factor to be taken into account in the framework of the relationship between such State and the Union and Communities respectively, in particular as regards applications for accession to the Union.

Thus, there can be no doubt that, from a legal point of view, further European integration will have to be based upon a common standard in the field of human rights and fundamental freedoms. This is also a political conditio sine qua non: It is simply inconceivable that the "ever closer union" envisaged in Art. A TEU will be accepted and supported by the peoples of Europe were it not based upon such common standards. Consequently, the identification of the elements that constitute those common standards, or to put it in the words used by the conveners of this seminar: the constitutional heritage of Europe, is of primordial importance for the process of European integration to be successful.

2. The question of individual and/or group holdership of fundamental rights as part of the constitutional heritage of Europe

For many years, global and European discussion on human or fundamental rights was characterised by a rather sharp antagonism between the "West" and the "East"; somewhat simplifying the issue, one might describe it as follows: Whereas the former - at least predominantly - adhered to the view that such rights must be protected as individual rights against possible interferences by state authorities, the latter emphasised not only the importance of social, economic, and cultural rights as compared to the "traditional" civil and political rights, but stressed also the "collective" character of (most) fundamental rights thus denying or at least reducing the traditional role of fundamental rights, i.e. to guarantee and to protect the life, liberty and personal integrity of the individual. Furthermore, the "East" also strongly supported the

emergence of the so-called "third and fourth generation" rights, including rights to peace, to development, and to self-determination as rights of peoples or groups.

Subsequent to the end of the cold war-period, i.e. the above-mentioned demise of socialism in Europe, this antagonism as regards the "hierarchy" between civil and political rights, on the one hand, and social, economic, and cultural rights, on the other hand, seems to have been overcome: The accession of the formerly socialist European states to the Council of Europe and, thus, their adherence to the - in principle - "individualistic" perception of fundamental rights often coincided with the enactment of new constitutions generally comprising bills of (the traditional civil and political) fundamental rights of the individual and usually perceiving social, economic, and cultural "rights" rather as directives for state policies than as justifiable rights which can be enforced by the Court and thus are genuine "rights" of the individual. This new approach is - as a rule - also reflected in the jurisprudence of the newly established Constitutional Courts; this assessment seems to hold true also with regard to those states where legislative endeavours to enact completely new, "Western-type" constitutions with a "modern" bill of rights of the individual have - at least so far - not yielded any complete success.

On the other hand, the demise of socialism in Europe also seems to have been the development which resulted in an enhanced discussion as to the existence of (certain) group rights: rights of persons belonging to national minorities (this notion comprising cultural, ethnic, linguistic, and religious minorities) vs. rights of national minorities. It is indeed interesting to note that the - most often quite successful - struggle of such minorities for the recognition of their "rights" in the "old" ("Western") member States of the Council of Europe, such as, e.g., Austria, Belgium, Denmark, Finland, Germany, Italy, Spain, Switzerland, and, however to a much lesser extent, in France and the United Kingdom, had not resulted in such a discussion on any larger scale. According to a widely accepted view, it was the demise of socialism that opened the gate for the renaissance of "nationalism" and the concept of the nation-state in "Eastern" Europe which, in turn, seems to have triggered the re-emergence of minority (rights) issues in this part of Europe. These developments led not only to partly peaceful, partly belligerent dissolutions of "old" and the creation of "new" states, but also brought the issue of the legal and political situation of (persons belonging to) such minorities and their "rights" under international and domestic law into the focus of the international and, in particular, the European community. Almost inevitably, this process also implied the emergence of the above-mentioned discussion as to who is to be considered as the holder of such rights: the persons belonging to such a minority as individuals and/or the minority as a group.

It is an undisputed fact that the existence of unsolved minority issues or problems constitutes a most serious risk for peace and stability in many areas of Europe and, thus, poses a considerable threat to the process of European integration. Therefore, it is necessary to identify not only those rights of (persons belonging to) national minorities that may be considered as forming part of the common constitutional heritage of Europe but also to seek to answer the above-mentioned question as regards the holder of such rights since, for obvious reasons, the answer - if one can be given - might rightly be considered as also forming part of the constitutional heritage of Europe.

To this end, it seems appropriate to examine this issue as it is addressed, first, in a number of domestic European legal systems, and, second, in public international law, or more precisely: in regional, i.e. European, public international law. It should be stressed, moreover, that, reflecting the rather general theme of this paper and, thus, the task entrusted to its author, it should not be

limited exclusively to the question of minority rights; however, with a view to the acute importance attached to this issue, it seems justified to devote particular attention to it.

Finally, two last introductory remarks seem to be called for: The first concerns the notion or concept of the so-called "collective exercise" of (individual) fundamental rights, and the second the question as to whether not only natural persons (individuals), but also legal persons of private and/or public law may be holders of fundamental rights.

The first notion or concept, familiar to some domestic European legal systems, reflects the -quite convincing - assessment that some individual fundamental rights such as, in particular, the right of the worker to organise with its corollaries, namely the rights to engage in collective bargaining and to resort to collective measures such as strikes, may only be effectively implemented if "collectively" exercised. It must be emphasised, however, that the "collective" exercise of a fundamental right held by the persons concerned as individuals does not alter the holdership and, thus, the legal status of such a right: It remains a fundamental right of the individual and does not become a group right. However, this concept might serve as the legal tool to bridge the gap between the concepts of individual rights and group rights also as regards the issue of minority rights.

The second concept, i.e. the acceptance of legal persons as holders of (some) fundamental rights such as, in particular the right to property, is to be found in some national legal systems. It has been rightly observed that this applies to those countries that are inspired by "d`idées plus organicistes telles qu`elles ont été defendues dans les pays germaniques et par le catholicisme social"297, i.e. in particular Austria, Germany, Greece, Italy, Portugal, Spain, Switzerland, and, more recently, also Estonia; in contrast thereto, a very large number - if not the majority - of European states seem to have adopted the "French model" according to which holdership of individual rights is restricted to individuals. Notwithstanding the conceptual interest of this question, it must be emphasised that it has little, if any relevance for the topic of this paper since the concept of group rights does not (necessarily) perceive such a "group" as a legal person.

II. Overview on national legal systems

Since the aim of this seminar consists of attempting to identify the (common) constitutional heritage of Europe, it seems appropriate to start with a brief overview of the historical developments concerning the concept of fundamental rights in Europe; bearing in mind the topic of this paper, this overview will focus on the question of the holdership of such rights. This (historical) overview will be followed by an analysis of the existing national legal systems as to their position with regard to the question of holdership of fundamental rights. Ideally, such an analysis ought to cover all member States of the Council of Europe; however, with a view to the limited resources available and conscious of inevitable restrictions as to time and space, this paper will only deal with the legal systems of some of the member States. Obviously, the choice being made reflects, to a certain degree, this author's discretion which, in turn, is based upon the amount of - factually and linguistically - accessible sources.

1. The historical background

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297 See C. Grewe/ H. Ruiz Fabri, Droits constitutionnels européens, Paris, 1995, P. 172.

The historical development of fundamental rights, first as intellectual concepts and later as part of positive law, may be subdivided into three major phases: The first one, dating back to ancient Greece and Rome298, covering the philosophical and theological developments of early Christianity299 and the Middle Ages300, and ending in the aftermath of the Reformation301, is characterised by the emergence of limitations of royal power and privileges, rights granted to the estates (nobility, clergy, "freemen") and, at the most, singular rights302; the absence of fundamental rights of the individual, both as a concept and in law, is hardly surprising since, in a period where a person was seen as a member of a group, the idea of fundamental rights held by the individual could not be conceived.

The second phase could be described as being characterised by the laying of the intellectual foundations for the recognition of the concept of liberty and of natural rights of men303, an intellectual process which found its textual repercussions in some of the English constitutional documents304; thus, this phase the end of which might be dated to the proclamation of the 1776 Virginia Bill of Rights, saw the emergence of the concept of fundamental rights of the individual as a result of the "discovery" of man as an individual member of society.

The third phase started with the proclamation of (modern) bills of fundamental rights in the U.S.A.305 and the 1789 Déclaration des droits de l'homme et du citoyen306 - documents which

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298 **Within the framework of this paper, it is impossible to enter into the debate as to whether the concept of human liberty as developed by Platon and, in particular, Aristotle did indeed embrace the concept of liberty of men "against" the polis or state; on the contrary, it seems correct to state that liberty existed "within" the polis or state which means that we cannot speak of fundamental rights as rights held by the individual and opposable to the state.**

299 **The distinction between the civitas terrena and the civitas caelestis as developed by Augustinus in his De civitate dei did not allow for, it is suggested, the conceptualisation of fundamental rights in the modern sense, i.e. rights opposable to the state.**

300 **Of particular relevance in this context was, of course, Thomas Aquinus according to whom the sovereign was bound by divine law and, thus, was not allowed to violate the dignitas humana embracing life, liberty and property of men; it is important to stress, however, that these "rights" were not considered as being held by all individuals and the pursuit of individual goals not considered as their raison d`être.**

301 **Particular importance, in this context, is to be attributed to Calvin`s thoughts and their influence upon later philosophers such as Hooker, Althusius, Coke, Grotius, Milton, and Locke, and to the Monarchomachs such as, e.g., Buchanan and du Plessis-Mournay and their concept of a contract concluded between the sovereign and the people (not the estates) that bound the sovereign not only to the ius divinum and the ius naturale but also to the leges fundamentales (lois fondamentales, fundamental laws) as conditions of that contract.**

302 **The foremost example of such instruments is, of course, the Magna Charta Libertatum of 1215 which had an enormous influence on similar charters in Spain, Denmark, Brabant, and elsewhere. It should be stressed, however, that - although these instruments usually included some habeas corpus and other individual rights (held, however, by certain individuals such as "freemen" only) - they should be seen rather as pacta concluded between the sovereign and the estates than as bills of fundamental rights held by individuals.**

303 **Within the framework of this paper, it is impossible to describe this very complex process; among the various strands should be mentioned the emergence of the modern ius naturale - that was no longer based upon any religious foundation - as developed by continental lawyers and philosophers such as, in particular, *Althusius*, *Grotius*, *Pufendorf* and Huber, on the one hand, and their counterparts on the British Isles such as, in particular, Coke and Locke, on the other hand; although it must be admitted that Hobbes made an important contribution to this development, it seems quite doubtful whether he might be considered as a proponent for the existence of fundamental rights with a view to his Leviathan as not being bound by the "natural rights" of men.**

304 **These are, in particular, the 1679 Act of Habeas Corpus, the 1688 Declaration of Rights, and the 1689 Bill of Rights; however, mention should also be made of their precursors, the 1627 Petition of Rights and the 1647 Agreements of the People.**

305 **In addition to the 1776 Virginia Bill of Rights must be mentioned the 1776 Constitution of Pennsylvania and the 1791 Amendments to the (Federal) Constitution; these may be considered as the first examples of modern constitutions combining the concept of state power being bound by a set of rules distributing competences and establishing procedures with the concept of state power being bound by the respect for fundamental rights held by all individuals.**

306 **In this context, it is not necessary to elaborate on how much the 1789 Déclaration owes - it is suggested: in contrast to the American Bills of Rights - to the philosophie des lumières, above all to Rousseau`s contrat social, but also to Montesquieu, the Physiocrates, and Voltaire.**

either served as models for or, at least, heavily influenced the bills of rights of the national constitutions of continental Europe, in particular in the 19th century but also, to a lesser extent, in the 20th century307; these bills of fundamental rights of the various national constitutions then resulted in the emergence of "national" theories of fundamental rights based upon these constitutional provisions308, theories that are focussed, with certain variations, on the individual as holder of such fundamental rights.

Notwithstanding the still rather unchallenged predominance of such "national" theories of fundamental rights, it is suggested that we have entered the transition period to a fourth phase that is characterised by the search for common standards as regards fundamental rights; this development is largely due to the emergence of the concept of fundamental rights as universal rights held by all individuals throughout the world after World War II and, in Europe, to the above-mentioned necessity to found the process of European integration upon a common concept of fundamental rights as part of the constitutional heritage of Europe. In this context, in particular with a view to the above-mentioned re-emergence of the concept of group rights as a possible means of dealing with the issue of national minorities, the topic of this paper also re-emerges , namely the question as to who is the holder of fundamental rights, individual and/or group, a question which must be clearly distinguished from the previous dispute between the "Western", or "liberal", or "individualistic" concept of fundamental rights and the "Eastern", or "socialist" or "collective" concept of fundamental rights.

2. Selected examples of national legal orders

a. The Nordic States: Denmark, Finland, Iceland, Norway and Sweden

Among the five nordic states, Sweden (in 1976), Iceland (in 1994 in the context of the incorporation of the ECHR into Icelandic law) and Finland (in 1995) have added "modern" bills of (fundamental) rights to their Constitutions. All these provisions are clearly based upon the concept of individuals as the sole holders of such fundamental rights309. With a view to the legal status of national minorities310 and the related question as to who is the holder of rights relevant in this context, it is, however, interesting to note that the Swedish Regeringsform does

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307 **This paper is clearly not the proper place to re-open the - it is suggested: rather useless - dispute as to which one of these documents was of major importance for this development, a dispute that so violently opposed, at the beginning of this century, Georg Jellinek and Emile Boutmy, and which was overshadowed by clear chauvinist assumptions; nonetheless, it seems justified to recall two aspects: First, whereas the American instruments introduced justiciable rights of the individual to be enforced by the courts against state authorities, the 1789 Déclaration was - in the words of Pound - of a basically "hortative character", i.e. their provisions were "exhortations addressed to the agencies of government as to how they ought to act". Second, it must be emphasized that practically all catalogues of fundamental rights introduced into national constitutions in the 19th century were, following in particular the influential model of the provisions of the 1831 Belgian Constitution, clearly inspired by the 1789 Déclaration - both as regards their texts and their primarily programmatic character. Only after World War II, starting with the enactment of the 1947 Italian Constitution and the 1949 Bonner Grundgesetz, the justiciability and enforceability of fundamental rights became a common feature of European constitutions, in most cases connected with the creation of special Constitutional Courts. Thus, it seems justified to state that it took almost 200 years for these two major concepts to be merged resulting in the current European human rights law.**

308 **This is particularly true with regard to the Federal Republic of Germany where jurisprudence and doctrine developed quite a sophisticated theory of fundamental rights (Grundrechtsdogmatik) which, it seems, has been and still is of considerable relevance for the pertinent developments in, e.g., Austria, Italy, Spain and the "new democracies" of the former socialist countries but also for the jurisprudence of the Luxembourg European Court of Justice and the Strasbourg Commission and Court of Human Rights.**

309 **This is particularly well reflected in the (amended) Section 1 of Chapter I of the Finnish Government Act (one of Finland`s Constitutional Acts) which now reads: "Finland is a sovereign republic the constitution of which shall guarantee the inviolability of human dignity and the freedom and the rights of the individual as well as promote justice in society." (emphasis added by the author).**

310 **Since Iceland is an ethnically extremely homogenous nation, there is no need for any particular provision on minority rights.**

not make any mention of the Sami or Finnish minority, whereas the amended Section 14 of the new Chapter II of Finland`s Act of Government311 seems to consist of a blend of individual language-related rights equally accorded to persons belonging to the Finnish-speaking majority and the Swedish-speaking minority, and of an implied recognition of group rights to "the Sami as an indigenous people, the Romanies, and other groups".

The Constitutions of Norway312 and Denmark (from 1953) include bills of fundamental rights held by individuals but that do not refer to national minorities313.

It should be mentioned, however, that Norway introduced, in 1988, a new Art. 110 (a) into its Constitution that seems to recognise a group right of the Sami minority314. In contrast thereto, the legal situation of the German speaking minority in Denmark is primarily based upon the contents of the 1955 Bonn-Copenhagen Declaration; it guarantees the specific rights held by the persons belonging to that minority but does not provide for any (group) rights held by that minority.

b. The Baltic States: Estonia, Latvia and Lithuania

The Constitutions of all three Baltic states include modern bills of rights315 that all provide for fundamental rights held by individuals only.

Among them, only the Estonian Constitution of 1992 guarantees some specific rights to persons belonging to national minorities316. It appears, however, from the pertinent legislation in force in both Latvia and Lithuania that the specific rights dealing with minority concerns are accorded

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311 This provision reads: "(1) The national languages of Finland are Finnish and Swedish. (2) Everyone`s right to use his or her own language, whether Finnish or Swedish, before a court and other authorities, and to have the documents in that language shall be guaranteed by an Act of Parliament. All branches of government shall look after the cultural and societal needs of the Finnish and Swedish speaking populations in Finland according to the same criteria. (3) The Sami as an indigenous people, and Romanies, and other groups shall have the right to maintain and develop their own languages and cultures. The right of the Sami to use the Sami language before authorities shall be prescribed by an Act of Parliament. The rights of those using sign language and of those who are in need of interpretation or translation because of a disability shall be secured by an Act of Parliament." It should be mentioned, furthermore, that the special status of the Åland Islands is based upon a special Act of Parliament according quite a comprehensive autonomy to the Islands and its inhabitants; for details see R. Hofmann, Minderheitenschutz in Europa, Berlin, 1995, p. 86 et seq.

312 In force since 1814 with, however, several amendments.

313 It should be stressed that the special status of the Faroe Islands and of Greenland which both benefit from a very comprehensive autonomy is based upon specific Acts of Parliament of 1948 and 1978; for details see F. Harhoff, Faroe Islands, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. II, Amsterdam 1995, p. 257 et seq.; and G. Alfredsson, Greenland, in: R. Bernhardt, ibid., p. 623 et seq.

314 This provision reads: "The state authorities shall be obliged to create the conditions that allow the Sami ethnic goupe to preserve and develop their language, culture and way of life."; see E. Smith, Constitutional Protection of minorities: The Rights and protection of the Sami population in Norway, Scandinavian Studies in Law 34 (1990), p. 235 et seq.

315 It should be mentioned, however, that Latvia has opted for a somewhat different approach than Estonia and Lithuania: Since the present Latvian Constitution, i.e. the 1922 Constitution which was fully restored in 1993, did (and does) not have any provisions on fundamental rights, the legislator adopted, in 1991, the Constitutional Law on the Rights and Obligations of Citizens and Persons; see I. Ziemele, Latvia, in: M. Scheinin (ed.), International Human Rights Norms in the Nordic and Baltic Countries, The Hague, 1996, p. 73 et seq. (at 77).

316 According to Art. 49, everyone has the right to preserve his or her ethnic identity; according to Art. 51 (2), everyone belonging to a national minority has the right to receive answers from state and local authorities and their officials in the language of that ethnic minority provided that their members constitute at least half of the permanent local residents. Although Art. 50 guarantees to ethnic minorities the right to establish institutions of self-government in the interests of their national culture, the pertinent 1993 Law on Cultural Autonomy for Ethnic Minorities makes it clear that the corresponding rights are held by the individuals belonging to a minority and not by the minority as a group; for details see R. Hofmann, supra note 16, p. 80 et seq.

to the persons belonging to the various national minorities and may not be considered as group rights317.

c. The Western Central European States: Austria, Germany and Switzerland318

The various Acts and provisions of certain laws that form the constitutional order of Austria guarantee fundamental rights as rights held by individuals319; this applies, in particular, to those provisions that accord specific minority rights such as Arts. 66-68 of the 1919 Peace Treaty of Saint-Germain-en-Laye, Art. 7 of the 1955 Austrian State Treaty and Art. 7 of the 1990 Act on Minority Schools320.

The German Constitution, the 1949 Grundgesetz, provides for a bill of fundamental rights. Their holders are - with the exception of legal persons entitled to the holdership of certain fundamental rights under Art. 19 (3) Grundgesetz - individuals and not groups321. It does not mention national minorities322. Thus, the constitutional protection of the rights of national minorities in Germany is based upon pertinent provisions of the Constitutions of those Länder where persons belonging to national minorities are domiciled: Brandenburg323 and Saxony324 as regards the Sorbian minority and Schleswig-Holstein325 as regards the Danish and Frisian minorities. All these provisions create an obligation incumbent upon the state to protect and promote the distinct identity of such minorities; only Brandenburg guarantees both a right of the Sorbian people and a right of the (individual) Sorbs to have that identity protected and promoted. This indicates the concurrent existence of both an individual and a group right326.

The fundamental rights enshrined in the Swiss Constitution as well as those developed by the jurisprudence of the Bundesgericht are conceived as rights held by the individual. As regards the legal position of minorities it must be stressed that Switzerland as a multi-lingual federal state in

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317 For details see R. Hofmann, ibid., p. 107 et seq. and p. 111 et seq.

318 The author is aware of the fact that both Slovenia and, in particular, the Czech Republic are, geographically, as "westerly situated" as Austria; he chose, however, not to deviate from the recently established practice to consider both countries as forming part of "Eastern Central Europe".

319 It should be recalled that the ECHR has the status of constitutional law in Austria; moreover, it is appropriate to note that the 1920 Bundesverfassung does not include a bill of rights.

320 See T. Marauhn, Die rechtliche Stellung der Minderheiten in Österreich, in: J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), Das Minderheitenrecht europäischer Staaten, Teil 1, Berlin, 1993, p. 224 seq. (at 230).

321 For details see B. Pieroth/ B. Schlink, Grundrechte, Heidelberg, 12th ed. 1996, at p. 153 et seq.

322 It should be noted that a proposal to introduce an Art. 20 b into the Grundgesetz failed in 1992; for details see D. Murswiek, Schutz der Minderheiten in Deutschland, in: J. Isensee/ P. Kirchhof (eds.), Handbuch des Staatsrechts, Vol. VIII, Heidelberg, 1995, p. 663 et seq. (at 688).

323 Art. 5 of the 1992 Constitution of Brandenburg guarantees the right of the Sorbian people to protection and promotion of their national identity and accords to the persons belonging to that people several rights concerning education and the use of their language that are more specifically regulated in the 1994 Law on the Sorbs.

324 Art. 5 (2) of the 1992 Constitution of Saxony guarantees the right of national minorities to protection and promotion of their national identity and its Art. 6 guarantees the right of the Sorbs to preserve their language and culture by adequate measures in the field of education and culture.

325 Art. 5 of the 1990 Constitution of Schleswig-Holstein accords to the Danish and the Frisian minorities a right to protection and promotion of their cultural identity.

326 For details see M. Hahn, Die rechtliche Stellung der Minderheiten in Deutschland, in: J.A.Frowein/ R. Hofmann/ S. Oeter (eds.), supra note 25, p. 62 et seq.

which the cantons hold far-reaching competences, shows quite a number of legal particularities when compared with other European states. This situation explains the particular emphasis that Swiss federal and cantonal law attributes to the question of linguistic rights. If such rights - as, e.g., in the field of education or as concerns the contact with administrative and judicial authorities - are granted, they are - as a rule - accorded to the individuals belonging to the respective cantonal or local linguistic minority but not to the linguistic327.

d. The Eastern Central European States: Croatia, Czech Republic, Hungary, Poland, Slovakia and Slovenia

The 1990 Constitution of Croatia contains quite a comprehensive bill of fundamental rights held by individuals328. As regards the position of national minorities, it is interesting to note that its Art. 15 guarantees to the "members of all peoples and minorities" equal protection and to the "members of all peoples and minorities...the free expression of their national identity, free use of their language and cultural autonomy"; thus, even the legal institute of cultural autonomy is construed as an individual and not as a group right329.

It must be emphasised, however, that in contrast thereto the 1991 Constitutional Law on Human Rights and Freedoms and Rights of Ethnic and National Communities and Minorities, which provides for a very wide range of fundamental rights to be held by the individual members of the various minorities, formulates in its Art. 5 cultural autonomy as a right held by the minorities; nonetheless, the subsequent articles that specify the contents of this cultural autonomy (in particular rights relating to education, use of language and political representation) are construed as rights held by the individual persons belonging to a minority330.

In the Czech Republic, fundamental rights are enshrined in the 1991 Charter of Fundamental Rights and Freedoms which, subsequent to the dissolution of Czechoslovakia, became part of the constitutional order of the Czech Republic as explicitly stated in Art. 112 of the 1992 Czech Constitution331. This Charter consists of quite a comprehensive bill of fundamental rights all held by the individual332. This applies also to its Arts. 24 and 25 that guarantee specific educational and linguistic rights to persons belonging to national and ethnic minorities; it should be mentioned, however, that their right to develop their distinct identity may be exercised "in association with others"333; this may justify the characterisation of that right as having a considerable group-right aspect.

The Hungarian Constitution, originally enacted in 1949, has been the object, in particular since 1989, of far-reaching amendments. These concerned also the bill of fundamental rights

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327 For details see D. Richter, Die rechtliche Stellung der Minderheiten in der Schweiz, in: J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), supra note 25, p. 308 et seq.

328 See J. Kregar/ B. Smerdel/ I. Simonovic, Die Verfassung der Republik Kroatien, in: J. Marko/ T. Boric (eds.), Wien, 1991, p. 205 et seq. (at 220 et seq.).

329 See J. Marko, Der Minderheitenschutz in den jugoslawischen Nachfolgestaaten, Berlin, 1996, p. 20 et seq.

330 Ibid., p. 25 et seq.

331 See M. Hosková, Die Selbstauflösung der CSFR, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 53 (1993), p. 733 et seq. (at 709).

332 See M. Hosková, Die Charta der Grundrechte und Grundfreiheiten der CSFR, Europäische Grundrechte Zeitschrift 18 (1991), p. 36 9 et seq.

333 For details see M. Hosková, Der Minderheitenschutz in der Tschechischen Republik, in: P. Mohlek/ M. Hosková, Minderheitenschutz in der Republik Polen, der Tschechischen und der Slowakischen Republik, Berlin, 1994, 83 et seq.

contained in its Chapter XII (Arts. 54-70/K). All of them are clearly construed as rights held by the individual, an assessment which is confirmed by the pertinent jurisprudence of the Hungarian Constitutional Court334. The only exception to this rule constitutes Art. 68 which deals with the rights of national and ethnic minorities; according to Art. 68 (2), "the Republic of Hungary accords protection to national and ethnic minorities" and "guarantees their participation in public life, exercise of their own culture, use of their language, instruction in their mother tongue...". This constitutional provision constitutes the basis for the very comprehensive 1993 Act on the Rights of National and Ethnic Minorities. This Act guarantees in its Chapter II (Arts. 7-14) a number of rights of persons belonging to such minorities as individual rights and in its Chapter III (Arts. 15-20) a range of "community" rights held by the minorities as groups such as, e.g., the right to the creation of the conditions necessary for instruction of minority languages, and for the broadcasting of radio- and TV-programmes in the minority languages, or the right to be represented in Parliament. Thus, it is justified to state that Hungary is one of the few countries the legislation of which expressly recognises the individual and group-rights character of minority rights335.

The Polish Constitution, originally enacted in 1952, has since been, in particular in 1992, the object of quite far-reaching reform. These legislative steps did not concern, however, the fundamental rights provisions: It must be stressed that, notwithstanding a large number of pertinent projects and even bills aiming at the introduction of a "modern" bill of fundamental rights, the Polish Constitution currently in force still contains the fundamental rights provisions drafted for the 1952 Constitution. On the other hand, it must be emphasised that Polish jurisprudence and doctrine concur in the position that fundamental rights in Poland are rights held by the individual and not by groups. As regards national minorities it is interesting to note that the 1952 Constitution - in contrast to the 1921 and 1935 Constitutions - does not explicitly mention national and ethnic minorities. Thus, their legal position is based upon the wide range of bilateral treaties concluded by Poland since the early 1990s with her neighbouring states and a number of statutes; these are generally worded in such a way as to guarantee a considerable set of rights of the persons belonging to such minorities and, thus, constitute individual and not group-rights336.

The 1992 Constitution of Slovakia which was enacted even before the dissolution of Czechoslovakia, contains in its Chapter II an extensive bill of fundamental rights that is, with minor differences, identical with the 1991 Czechoslovak Charter of Fundamental Rights and Freedoms. As mentioned above337, these provisions are construed as guaranteeing rights of the individual. This assessment applies also with respect to Arts. 33 and 34 of the Constitution: although they are, more or less, identical with Arts. 24 and 25 of the mentioned 1991 Charter the wording of which implies a certain group-rights aspect338, they are consistently interpreted by Slovak officials as according rights to be held by individuals only339. This official rejection of

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334 See L. Sólyom, Zum Geleit zu den Entscheidungen des Verfassungsgerichts der Republik Ungarn, in: G. Brunner/ L. Sólyom, Verfassungsgerichtsbarkeit in Ungarn, Baden-Baden, 1995, p. 59 et seq.

335 For details see R. Hofmann, supra note 16, p. 178 et seq.

336 For details see P. Mohlek, Der Minderheitenschutz in der Republik Polen, in: P.Mohlek/ M. Hosková, supra note 38, p. 9 et seq.

337 See supra note 37.

338 See supra note 38.

339 For details see M. Hosková, Der Minderheitenschutz in der Slowakischen Republik, in: P. Mohlek/ M. Hosková, supra note 38, p. 119 et seq.

the (potential) group-rights character of minority rights found its explicit expression in the Declaration made by the Slovak Parliament at the occasion of its ratification of the 1995 Hungaro-Slovak Treaty on Good Neighbourliness; in that Declaration, it is expressly stated that Slovakia, "in accordance with the common position of European states", recognises and guarantees minority rights only as individual and not as collective or group rights.

The 1991 Constitution of Slovenia contains in its Chapter II (Arts. 14-65) quite a comprehensive and detailed bill of fundamental rights. As a rule, they are construed as individual rights340.

An important exception therefrom constitutes Art. 64 that accords to "the indigenous Italian and Hungarian ethnic group and to the persons belonging to them..." certain rights in the field of education, use of language, and political representation. Thus, it must be stressed that the Slovenian Constitution combines individual and collective/group rights with respect to (some of the) national and ethnic minorities in Slovenia341.

e. The Western European States: Belgium, France, Ireland, Luxembourg, Netherlands and United Kingdom

The "coordinated" Belgian Constitution of 1994 that reflects the completion of the long process of changing Belgium from a central to a truly federal state, contains in its Chapter II (Arts. 8-32) quite a comprehensive bill of fundamental rights; they are construed as individual rights. The very complex "federal" structure of Belgium is based upon three (linguistically determined) communautés (Flemish-speaking, French-speaking, and German-speaking) and three régions (Wallonie, Flanders, and Bruxelles) that form the federal state. The distribution of competences between these different entities and specific legislation concerning, in particular, the legal position of persons whose mother tongue is not the "official" language of the entity to which belongs the municipality in which they are domiciled, seem to justify the conclusion that Belgium constitutes quite a special compositum mixtum of territorial and personal autonomy (which implies a certain recognition of "group-rights"), on the one hand, and individually held rights related to the "minority-status" of persons, on the other hand342; it is, therefore, suggested that Belgium constitutes a "special case" that, as regards the question of holdership of minority-related rights, falls outside the traditional dichotomy between individual or group rights.

In the context of this paper, it is not necessary to recall the debate as to the legal importance of the Preamble of the 1958 French Constitution with its reference to the Preamble of the 1946 Constitution and the 1789 Déclaration des droits de l`homme et du citoyen. Suffice to mention that, since the famous decision of the Conseil Constitutionnel of 16 July 1971343, the French constitutional order comprises all the rules that constitute the bloc de constitutionnalité including the 1789 Déclaration, the 1946 Preamble and the principes fondamentaux reconnus par les lois de la République; this approach permitted the Conseil Constitutionnel to develop, in numerous decisions handed down over the subsequent years, a judicial system of fundamental rights protection comparable to that existing in countries with an explicit bill of fundamental rights laid

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340 See I. Kristan, Verfassungsentwicklung und Verfassungsordnung Sloweniens, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 53 (1993), p. 322 et seq. (at 337 et seq.).

341 For details see J. Marko, supra note 34, p. 129 et seq.

342 For details see R. Mathiak, Die rechtliche Stellung der Minderheiten in Belgien, in: J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), supra note 25, p. 1 et seq.

343 Liberté d`association, J.O. du 18 juillet 1971, 7114.

down in the very text of the Constitution344. Analysing this jurisprudence and the pertinent doctrine, it seems justified to state that France clearly adheres to the position that conceives fundamental rights as - at least most predominantly - being held by individuals and not by groups.

As regards the legal position of (national or ethnic) minorities, suffice to recall the well-known reservation made by France with respect to Art. 27 of the 1966 International Covenant of Civil and Political Rights and the official and - apparently generally shared - view that such minorities do not exist in France345. From this point of view, the decision of the Conseil Constitutionnel of 9 May 1991346 in which it declared the formulation "peuple corse, composante du peuple français", used in Art. 1 of the Statut de la collectivité territoriale de la Corse, to be in violation of Art. 2 of the 1958 Constitution, did not come as a surprise.

The 1937 Constitution of Ireland guarantees, in particular in its Art. 40, a range of fundamental rights that are construed as individual rights. Notwithstanding the pertinent legislation that, based upon its Art. 8, aims at the protection and promotion of Gaelic, it is suggested that the Irish population, notwithstanding some differences as to the languages being spoken, is of such a homogenous composition that it would be incorrect to use the legal term "minorities" when addressing the topic of the Gaelic-speaking community in Western Ireland.

The Constitution of Luxembourg, originally enacted in 1868 and, since then, having been the object of several amendments, contains quite a comprehensive bill of fundamental rights construed as individual rights. Notwithstanding the linguistic situation to which Art. 29 of the Constitution implicitly refers, it is suggested that, with a view to the homogenous composition of the population of Luxembourg, it would be incorrect to assume the existence of national or ethnic minorities in Luxembourg.

The Constitution of the Netherlands was enacted in 1983; in line with other "new" Constitutions, it provides, in its Chapter I (Arts. 1-23), for a comprehensive set of fundamental rights construed as individual rights. As regards the legal position of the Frisian-speaking community, it should be noted that this language is recognised as official language of the Netherlands, may be used in contact with local courts and administrative authorities, and is being taught in schools. It seems not justified, however, to perceive the pertinent legislation as according group rights to that community, but rather individual rights to be exercised by the persons belonging to that "minority".

Notwithstanding numerous pertinent endeavours, even in recent times, the constitutional order of the United Kingdom, i.e. the various acts, statutes, conventions, customs and other legal documents that form the "Constitution of the United Kingdom", does not yet comprise a modern bill of fundamental rights. It seems, however, justified to state that the pertinent legislative and judicial practice based upon common and statute law and, more recently, increasingly influenced by the provisions of the ECHR (notwithstanding the fact that it is still not implemented as directly applicable law), confirms the view that fundamental rights are -at least a rule - conceived as individual rights. Seen from an outsider`s - comparative - perspective, the United

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344 See, e.g., J. Rivero, Les libertés publiques, Tome 1, Paris, 6th ed. 1991, p. 174 et seq.

345 For details see J. Polakiewicz, Die rechtliche Stellung der Minderheiten in Frankreich, in: J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), supra note 25, p. 127 et seq.

346 J.O. 14.5.1991, 6350.

Kingdom clearly constitutes a multi-national state which could justify considering the inhabitants of the Channel Islands, the Isle of Man, Northern Ireland, Scotland and Wales as "national or ethnic minorities" within the framework of the United Kingdom347. It must be recalled, however, that the public debate as to the further development of the legal and political autonomy (devolution) of, in particular, Scotland and Wales, did not focus on the status of the persons concerned as members of a "minority" but on the question as to whether and to what extent structures of a regional autonomy might or should be introduced. On the other hand, it must be stressed that the legal provisions that guarantee, e.g., the right to use Gaelic (Scottish) or Welsh before courts of law are formulated as individual rights348.

f. The Southern European States: Italy, Portugal and Spain

In its Art. 2, the 1947 Constitution of Italy, stipulates that Italy recognises and guarantees the inviolable rights of man, as individual or as member of the social communities within which the development of his personality takes place. This approach is also reflected in some of the provisions that specifically deal with fundamental rights (Arts. 13-54): This applies, in particular, to Art. 19 (freedom of religion) and is reflected in Arts. 29 (rights of the family), 33 (right to found private schools), and 39 (right to found trade union and their rights).

Nonetheless, with a view to the fact that the vast majority of fundamental rights are clearly construed as individual rights and, bearing in mind that the aforementioned provisions could be understood as expressing the possibility of an "collective exercise" of individually held fundamental rights, it seems questionable whether it would be correct to assume that the Italian legal order recognises group-rights as such. The legal position of the various ethnic or national minorities in Italy349 is based upon Art. 6 of the Constitution according to which Italy protects "linguistic minorities" by specific provisions. In fact, this protection that ranges from the very far-reaching status of the German-speaking population of South Tyrol to the rather undeveloped protection of groups such as the Albanian or Greek speaking communities in Central and Southern Italy, is based upon a very complex set of laws and decrees enacted by the central authorities, on the one hand, and legislation passed by the competent regional or provincial bodies. This complexity which is particularly obvious as regards South Tyrol, makes it extremely difficult to determine whether the Italian model of minority rights protection is based upon an individual or group-rights approach. However, it seems justified to state, applying all due caution, that even with respect to legislation that deals with the status of groups, the actual exercise of the rights accorded to them depends upon the concerned individuals` decision to declare themselves as persons belonging to that group. Thus, it seems that the Italian model combines - in quite a unique way - aspects of territorial and personal autonomy, on the one hand, with aspects of rights individually held by the persons belonging to such a minority (group) and group - or at least group-related - rights, on the other hand.

The 1976 Constitution of Portugal contains in its Part I (Arts. 12-79) an unusually comprehensive bill of fundamental rights. With the exception of a few provisions concerning,

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347 See, e.g., T. Marauhn, Die rechtliche Stellung der walisischen Minderheit in Großbritannien, in: J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), supra note 25, 161 et seq.

348 See, e.g., Section 1 of the 1967 Welsh Language Act which reads: "In any legal proceeding in Wales or Monmouthshire the Welsh language may be spoken by any party, witness or other person who desires to use it,...".

349 See, e.g., K. Oellers-Frahm, Die rechtliche Stellung der Minderheiten in Italien, in: J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), supra note 25, p. 192 et seq.

e.g., the legal status of the media, the political parties, and the trade unions, all these rights are construed as individual rights. It seems, however, incorrect to understand the mentioned exceptions as the expression of group rights; rather, they should be interpreted as rights either accorded to legal persons which pursuant to Art. 12 (2) may hold certain rights, or as "collectively exercisable" (individual) rights. Due to the homogeneous composition of the Portuguese people, there are no (ethnic or national) minorities.

The 1978 Constitution of Spain contains in its Title I (Arts. 10-55) a comprehensive and detailed bill of fundamental rights. All these rights are construed as individual rights although it must be emphasised that in some cases (political parties, trade unions, etc.) the "collective exercise" of the pertinent individual rights through such bodies is recognised. The re-introduction of democratic government in the 1970s also brought the recognition, in Arts. 2 and 3 of the Constitution, of the right to autonomy of the nacionalidades and regions as components of the Spanish state, and of the languages other than Castellano in those Comunidades Autónomas where they are spoken. In fact, such "regional languages" as Basque, Catalan and Gallego have been made official languages in the statutes of autonomy of the Comunidades Autónomas concerned; this implies, in particular, that they may be used before their courts and administrative authorities and, to a varying degree, in the field of education. It remains, however, doubtful whether these legislative measures might in fact be qualified as the recognition of minority rights since the peoples concerned either constitute the numeric majority in, or at least a very large portion of the population of, the respective Comunidades Autónomas. Therefore, it seems more appropriate to consider the Spanish model as a rather unique process of "federalisation" or "regionalisation" of a formerly centralised state which also resulted in the equal status of "regional languages"350.

g. The South-Eastern European States: Albania, Bulgaria, Greece, Macedonia, Romania, Turkey, and Yugoslavia

Pending the enactment of a new Constitution, the constitutional protection of fundamental rights in Albania is based upon the 1993 Act of the Charter of Fundamental Rights and Freedoms that added an extensive Chapter to the 1991 Act on the Major Constitutional Provisions that serves as a kind of provisional Constitution. The fundamental rights enshrined therein are - as a rule - construed as individual rights. This applies also to Art. 26 of the 1993 Act that guarantees specific rights to "individuals belonging to minorities"351. Thus, it seems justified to state that Albania adheres to the concept of the individual as the (sole) holder of fundamental rights.

The 1991 Bulgarian Constitution contains a rather comprehensive list of fundamental rights construed as rights held by the individual. This assessment applies also to those provisions that regulate the specific rights of persons belonging to groups that, in the internationally used terminology, constitute national or ethnic minorities352. Thus, it seems correct to state that Bulgarian law does not recognise group-rights.

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350 For details see, e.g., S. Oeter, Die rechtliche Stellung der Minderheiten in Spanien, in: J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), supra note 25, p. 369 et seq.

351 See F. Hoffmeister, Die rechtliche Stellung der Minderheiten in Albanien, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 55 (1995), p. 798 et seq.; and L. Loucaides/ J. Makarczyk, Report on Human Rights in the Republic of Albania, Human Rights Law Journal 15 (1994), p. 242 et seq.

352 It should be noted that the official Bulgarian position, insofar strongly influenced by the French model, does not recognise the existence of "national or ethnic minorities" but usually refers to persons of non-Bulgarian descent or speakers of non-Bulgarian languages; see M. Hosková, Die rechtliche Stellung der Minderheiten in Bulgarien, in: J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), Das Minderheitenrecht europäischer Staaten, Teil 2, Berlin, 1994, p. 1 et seq.

The 1975 Constitution of Greece provides in its Arts. 4-25 for a comprehensive bill of fundamental rights that are construed as individual rights. It does not mention any national or ethnic minority. So far, the only "minority" the existence of which is recognised in the Greek legal order constitute the remaining "Muslim inhabitants of Western Thrace" (ethnically Turks and "Pomaks") whose legal protection is based upon the pertinent provisions of the 1923 Lausanne Treaty353. Thus, it seems correct to state that Greek law does not recognise group-rights.

The 1991 Constitution of Macedonia contains quite a comprehensive bill of fundamental rights that are - as a rule - construed as rights held by the individuals. This applies also to its Art. 48 that recognises the rights of the members of the non-Macedonian "nationalities" (nacionalnosti) freely to express, promote and develop their national identity and, to that aim, to found associations and institutions, and to receive instruction in their mother tongues354. Thus, Macedonian law is clearly based upon the recognition of individual rights and does not recognise group rights.

The 1991 Romanian Constitution contains quite a comprehensive list of fundamental rights all construed as individual rights. This applies also to provisions such as Arts. 6, 32 (3), 59 (2), and 127 (2) since they all guarantee specific rights to "les citoyens appartenant aux minorités nationales"355; in fact, the very strong opposition of Romanians and Romania to grant "collective" or group-rights to the Hungarian minority in Transsilvania constituted the reason why this Constitution was rejected by the Hungarian members of Parliament and resulted in the very protracted process of negotiating the Hungaro-Romanian Treaty on Good Neighbourly Relations which was not signed until very recently and, indeed, did not bring the recognition of group-rights as demanded by the Hungarian side.

The 1982 Constitution of Turkey guarantees a large number of fundamental rights as individual rights. As regards the position of "ethnic or national minorities"356, it must be stressed that the Turkish doctrine of state, similar to France, excludes the existence of any non-religious minority and legally recognises only the rights of the Turkish citizens who belong to non-Muslim minorities as enshrined in the 1923 Lausanne Treaty. As a consequence thereof, the 1982 Constitution does not mention "minorities". It should be noted, moreover, that, according to the official Turkish position, all minority-related provisions of that Treaty, i.e. also those that refer to Turkish citizens who do not speak Turkish, do not apply to muslim "minorities" such as, in particular, the Kurds.

The constitutional order of the Federal Republic of Yugoslavia comprises the 1992 Federal Constitution, the 1990 Constitution of Serbia and the 1992 Constitution of Montenegro. All three documents contain quite comprehensive bills of fundamental rights construed as individual rights. As regards the legal position of national minorities357, it must be noted that all three

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353 See A. Filos, Die rechtliche Stellung der Minderheiten in Griechenland, in: J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), ibid., p. 61 et seq.

354 See Sir J. Freeland/ G. Jörundsson, Report on developing legislation, human rights and the rule of law in the Former Yugoslav Republic of Macedonia, Human Rights Law Journal 16 (1995), p. 365 et seq.; and J. Marko, supra note 34, p. 291 et seq.

355 See F. Böhmer, Die rechtliche Stellung der Minderheiten in Rumänien, in. J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), supra note 57, p. 216 et seq.

356 See C. Rumpf, Die rechtliche Stellung der Minderheiten in der Türkei, in: J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), supra note 25, 448 et seq.

357 For details see J. Marko, supra note 34, p. 205 et seq. who, however, emphasises the group-related aspects of most of these individual rights, see p. 220 et seq.

documents guarantee, in, however, differing wording and extent, specific rights to the members of such minorities but not to the minorities as groups.

h) The Eastern European States: Belarus, Moldova, Russia and Ukraine

The 1994 Constitution of Belarus contains in its Part II a comprehensive bill of fundamental rights construed as individual rights. This applies, in particular, also to Art. 50 (3) that guarantees to everybody the right to use his or her mother tongue358. It is interesting to note that the Constitution, in contrast to the 1992 Act on the National Minorities in the Republic Belarus, does not refer to national minorities but to national communities. It should be mentioned, moreover, that all relevant statute law, such as the mentioned 1992 National Minorities Act, grants rights to the persons belonging to such minorities and not to the minorities as groups.

The 1994 Constitution of Moldova contains an exhaustive catalogue of fundamental rights construed as individual rights. Its Art. 10 (2) guarantees to all citizens the right to preserve, develop and express their ethnic, cultural, linguistic and religious identity359. Thus, it seems justified to state that Moldovan law is - primarily - concerned with fundamental rights as individually held rights and does not - at least as yet - recognise group rights360.

The 1993 Constitution of the Russian Federation contains in its Chapter II an exhaustive catalogue of fundamental rights construed as individual rights361. This applies also to its article 26 that guarantees to everybody the use of its national language362. It should be noted that the Constitution, in contrast to its draft (Art. 70), does not provide for a right to cultural autonomy, and only stipulates, in its Art. 68 (3), an obligation incumbent upon the state to respect the right of all peoples to preserve their mother tongue and to create the conditions necessary for the respective languages being learned. It is questionable whether this provision might be interpreted as the granting of a group right; it rather seems to be limited to an obligation of the state to promote these aspects of minority issues.

The most recently enacted Ukrainian Constitution contains in its Chapter II (Arts. 21-68) quite an exhaustive catalogue of fundamental rights construed as individual rights. As regards national minorities, it should be noted that its Art. 11 obliges the state to promote the development of the ethnic, cultural, linguistic, and religious identity of the national minorities; furthermore, Art. 53 (3) - the only provision which explicitly deals with "minority rights" - guarantees to the citizens who belong to national minorities and in accordance with the law363, the right to be instructed in their mother tongue.

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358 See C. Schmidt, Der Minderheitenschutz in der Rußländischen Föderation, Ukraine und Republik Weißrußland, Berlin, 1994, p. 142 et seq.

359 See K. Jungwiert/ M. Nowicki, Report on the Legislation of the Republic of Moldova, Human Rights Law Journal 15 (1994), p. 383 et seq.

360 It should be emphasised, however, that this author did not have any access to recent documents concerning the legal position of the multi-national Gagauze region nor of Transnistria; it appears that, at least for some time, the establishment of a kind of autonomy, in particular for the Gagauze region, was quite seriously considered envisaging models involving the recognition of some kind of group rights.

361 For details see T. Schweisfurth, Die Verfassung Rußlands vom 12. Dezember 1993. Entstehungsgeschichte und Grundzüge, Europäische Grundrechte Zeitschrift 21 (1994), p. 473 et seq.

362 See R. Hofmann, supra note 16, p. 127 et seq.; and C. Schmidt, supra note 63, p. 21 et seq. and Nachtrag.

363 The pertinent laws are also based upon the concept of rights held by the individuals and do not recognise group-rights, see M. Hosková, Die rechtliche Stellung der Minderheiten in der Ukraine, in: J.A. Frowein/ R. Hofmann/ S. Oeter (eds.), supra note 57, p. 352 et seq.

3. Concluding Observations

By way of conclusion, it is, thus, justified to state that the vast majority of the legal orders of the European states conceive fundamental rights as rights held by the individual. Only Hungary, and Slovenia, and, to some extent, Finland and Norway, while adhering to the mentioned concept with respect to the "traditional" fundamental rights, have recognised the "mixed" character of minority rights as combining individual and group-rights aspects. Moreover, the legal systems of some countries such as, in particular, Belgium, Italy, and Spain, that adhere to the general position as regards those "traditional" fundamental rights (i.e. they are held by the individuals), have developed specific solutions as concerns "their" national minorities that are characterised by varying degrees of combinations of territorial and personal autonomy and the recognition of certain group-rights aspects.

III. Recent Developments in Public International Law

1. The Universal Level

Since this paper is concerned with the identification of a common European legal heritage, the following section will primarily deal with pertinent developments in regional (European) Public International Law. It must be mentioned, however, that the issue of group rights has acquired again considerable attention, in particular in public international law doctrine364. Notwithstanding some recent developments (such as, e.g., "third generation" rights, rights of indigenous peoples) that question the appropriateness of the assessment that the international protection of human (fundamental) rights is primarily based upon the concept of such rights as being held by the individual, it is suggested that it is still correct to state that, with the sole exception of the right to self-determination as enshrined in Arts. 1 of the two 1966 International Covenants, there is still no general recognition by States of the concept of group rights. There is, admittedly, growing consensus that some of the fundamental rights as laid down in the pertinent universal human rights instruments involve some aspects of collective exercise or that they may be exercised "in community with others", but this does not mean that the rights concerned are rights held by a group and not by the individual.

Finally, with respect to the specific issue of minority rights, it must be emphasised that Art. 27 of the 1966 International Covenant on Civil and Political Rights - still the most important guarantee of such rights on the universal level and the only one that constitutes applicable "hard" law - is clearly worded in such a way as to be understood as being concerned with rights held by "...persons belonging to such minorities...". Thus, notwithstanding the growing acceptance, based upon the fact that the rights provided for may be exercised by such persons "in community with the other members of their group", of the existence of a certain "collective element" in that provision, the rights recognised are individual rights365. The still very strong reluctance of almost all States to accept minority rights as group rights became even more obvious in the context of the drafting of the 1992 UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The - still most widely

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364 See, e.g., F. Capotorti, Are Minorities Entitled to Collective International Rights, in: Y.Dinstein (ed.), The Protection of Minorities in International Law, The Hague, 1992, p. 505 et seq.; N. Lerner, Group Rights and Discrimination in International Law, Dordrecht, 1991; and B.G. Ramcharan, Individual, collective and group rights: History, theory, practice and contemporary evolution, International Journal on Group Rights 1 (1993), p. 27 et seq.

365 See M. Nowak, CCPR Commentary, Kehl am Rhein, 1993, p. 495 et seq. (notes 31 et seq. to Art. 27 CCPR).

shared - understanding of such rights as individual rights is not only witnessed by the title of this Declaration itself, but also by the wording of its various provisions which - insofar as they speak of rights - consistently refer to the "persons belonging to minorities" as the holders of such rights366.

2. The European Level

There can be no doubt that, as regards the European level, the ECHR still constitutes the most important instrument of human rights protection. Again, there might be growing acceptance of the view that some of the rights guaranteed by the ECHR and the Additional Protocols involve some "collective elements" insofar as they might be exercised in community with others, but there remains the unquestionable fact that all these rights are drafted as rights held by the individual and not by groups.

Since 1990, Europe has been witnessing increased endeavours to draft regional documents ensuring the protection of minorities including projects for a pertinent additional protocol to the ECHR367. At this stage, it must be said that the results of all these efforts have to be considered as rather unsatisfying: notwithstanding their very limited contents and their specific wording that is characterised by a most unusual number of "escape clauses" and formulations allowing states a very wide discretion when implementing the pertinent provisions, neither the 1992 European Charter for Regional or Minority Languages nor the 1995 Framework Convention for the Protection of National Minorities have entered into force. As concerns the subject of this paper, it must be stressed that both documents do not recognise any kind of group rights; quite to the contrary: Art. 3 (2) of the Framework Convention explicitly states that "persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others"; the rejection of the group-rights character of any of the rights "flowing from the principles" of the Framework Convention is made particularly clear in the pertinent paragraph 13 of the Explanatory Report368.

Finally, mention should be made of the fact that the quite numerous bilateral treaties relating to the protection of national minorities that have been concluded in recent years between Central and Eastern European states, all provide for certain rights of the persons belonging to such minorities, but do not - as a rule - recognise the concept of group rights.

3. Concluding Observations

By way of conclusion, it seems, thus, justified to state that, both in universal and regional public international law, individuals are still the holders of the fundamental (human) rights protected by the pertinent international documents. The same assessment applies also to the various instruments dealing with minority protection: They, too, are concerned with rights held by the individual persons belonging to such minorities, notwithstanding the fact that it is recognised that such rights can be exercised individually and/or in community with the other members of such groups.

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366 See, e.g., R. Hofmann, supra note 16, p. 24 et seq.

367 For an overview see R. Hofmann, ibid., p. 38 et seq.

368 See R. Hofmann, ibid., p. 200 et seq.

IV. Conclusion

Based upon the fore-going analysis, the answer to the question put to the author seems to be quite obvious and easy: The holder of fundamental rights is the individual and not the group. This would apply not only with respect to the "traditional" civil and political rights, but also as regards more recent developments such as, in particular, the "rights of minorities": with only a few exceptions, these rights are not granted - as group rights - to "the minority", but -as individual rights - to the persons belonging to the respective minority. This implies that it is the individual holdership of fundamental rights that may be considered as forming part of the constitutional heritage of Europe.

Notwithstanding this conclusion based upon the lex lata, it seems necessary to question, de lege ferenda, the appropriateness of this answer as regards "minority rights" with a view to the further development of this emerging branch of human rights law. After all, there is one fundamental difference between the "traditional" fundamental (human) rights and "minority rights": whereas the individual holds the former and is in need of the protection effected by them simply as a human being, the individual holds the latter and is in need of the protection effected by them because he or she belongs to a group of individuals that is in need of particular protection if it wants to preserve and develop its distinct identity. Thus, all specific rights held by individuals belonging to a national minority necessarily have a "group-related" character.

Therefore, it is suggested that there is an urgent need to overcome the traditional dichotomy369: The question whether "minority rights" are (only) individual rights or (only) group-rights is misleading, constitutes a "fausse querelle"370 since, it is suggested, "minority rights" are, to some extent, a category of its own having individual rights as its foundation to which group-related rights have to be added.

If, moreover, the assumption is correct that the widespread rejection - or at least reluctance -of recognising this dual quality of "minority rights" results from fears that such recognition would inevitably entail the strengthening of political demands for territorial autonomy which, then, would lead to secessionist movements, it seems necessary to recall that those States that opted for the granting of various forms of territorial or personal autonomy or "mixtures" of the two and, thus, accomodated the wishes of "their" national minorities, seem to have entered into a more stable situation. Thus, it is suggested that the recognition of "minority rights" as individual and group rights is in the best interest of States and does not jeopardise their existence: the problem to be solved is not autonomy or integration but autonomy and integration.

c. On the function of fundamental rights by Mr Gregorio PECES-BARBA
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I. INTRODUCTION

In modern legal culture rights have essentially been analysed from a structural point of view. Kelsen provides the clearest example of that position. However, that theory cannot be established for research into human rights. Perhaps because the doctrines of human rights were

369 .5 See, e.g., J. Marko, Autonomie und Integration, Wien, 1995, p. 195 et seq.; and F. Rousso-Lenoir, Minorités et droits de l`homme: L`Europe et son double, Bruxelles, 1994, p. 71 et seq.

370 F. Rousso-Lenoir, ibid., p. 75.

based on agreements, particularly in the school of rationalist Natural Law, the most frequently used approaches have studied human rights in their purposes, and therefore in their functions, while, at least prima facie, ends and purposes are identified. In the context of this seminar, which claims to approach the concept of a constitutional heritage of Europe, that point of view is also more appropriate.

It is necessary to avoid all the theoretical problems raised by the concept of "function" used in mathematics, logic, linguistics or other sciences and to concentrate solely on the sense used in legal studies of the theory and sociology of law. Functions may be defined as the set of tasks which fundamental rights achieve in society and also within the legal system. While a structural analysis enables us to know what these rights are, and how many of them there are, a functional analysis enables us to know what purpose they serve.371 The information resulting from a functional analysis may, where appropriate, prove useful for our understanding of the common meaning of the fundamental rights declared and protected by the various European States.

The functions of fundamental rights are either external to the legal system or internal to it. That means that we can study them from the external or the internal point of view, in relation with human society or with the other sectors of rights which form the legal order. In the first case we reflect on the action of fundamental rights as part of the Law, in the organisation of social life and in the individual's place in society. In the second case we regard them as a sub-system inside the legal system and examine what purpose they serve and what their task is within the body of rules and institutions which, in each case, form the Law of the countries of Europe.

To conclude this general introduction, it should be pointed out that in those approaches one places oneself in the public morality, traditionally called justice, according to Aristotle, who discusses the entire range of ends and objectives that the Law must achieve to reconcile a society with the idea of justice. In order to achieve those objectives it is necessary to take account of the entire moral, legal and political tradition which constitutes the heritage of modern European culture, from the Renaissance, with the high values of liberty, equality, solidarity or fraternity, and security, built on the initial idea of human dignity in a society where man is the centre of the world - anthropocentrism - and in which he is centred on the world - secularisation. The ideas which follow can certainly not be explained in the context of a different political and legal culture, but in a culture organised in a liberal, social and democratic State subject to the rule of law. They are not original but they attempt to interpret and prolong a seed produced by the contribution of a vast plurality of contributions of human reason in history.

II. THE FUNCTION OF RIGHTS IN SOCIETY

The principle function of fundamental rights in modern society is to direct the organisation of society, and principally of the Law, as a system of social organisation, in accordance with human dignity, to enable it to realise the contents identified by that dignity. After the classical world, and especially after the Renaissance, in the studies of Pic de la Mirandole, Angelo Poliziano, Pietro Pomponazzi, Luis Vives, Giordano Bruno and others who followed them, the elements of that dignity are each person's capacity to choose, to reason and to construct general concepts, to communicate and to decide on his ultimate purposes, his morality and his idea of

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371 See the expression "fonctions du Droit" ("functions of rights" in Dictionnaire encyclopédique de théorie et de sociologie du droit, published under the direction of André-Jean Arnaud and edited by Vicenzo Ferrari, Librairie Générale de Droit et de Jurisprudence et Story-Scientia, Paris Brussels, 1988, pp. 162-163. See also Norberto Bobbio, Della Struttura alla funzione, Edizioni di Comunità, Milan, 1977.

well-being. Fundamental rights therefore help everyone to achieve in full these signs of his human condition.

The importance of that function lies in its capacity to identify the concept of "human rights" and to follow all the dimensions of its content. The public morality that we call "human rights" acts in the ethical perspective as a moral claim and, if it is incorporated in positive law, as a fundamental right. It is therefore possible to speak of the functions of human rights as morality and of their function as rights. In the first case they have a task which is critical of positive law, which does not recognise them, and they attempt to develop and therefore to transform themselves into positive law of fundamental rights. In the second case they are a legal rule.

In the liberal tradition, the tendency has been to identify rights from a structural rather than functional point of view, which prevented economic, social and cultural rights from being incorporated in the concept of fundamental rights. In fact the form of individual, civil and political rights372 was regarded as the criterion for identifying rights as such. Essentially, there were two viewpoints: the idea of universality, from the outset, of the holders of rights and the relationship of equality as identity of conditions. In fact, for individual, civil and political rights, differences of race, religion, ideology, sex and social condition cannot justify unequal treatment. In that sense, all persons are holders of the rights "ab initio". That is the idea of universality and the principle of non-discrimination. Economic, social and cultural rights, such as the right to education, the protection of health, housing or social security, were originally conceived to satisfy fundamental necessities of those who could not resolve them on their own. Differences must therefore exist if these rights are to be established. The condition of their existence is specifically a situation of necessity, which cannot be generalised and is not the same in all citizens. The criteria of universality "ab initio" and equality as identity of conditions are impossible in this case and are replaced by the search for equality on the basis of difference and by universality as an end rather than a starting point. The great debate about the social State, because of the refusal of the conservative sectors of liberalism (who advocate the reduced State) regarding the support of the public powers in providing what is required, necessarily includes the calling in question of economic, social and cultural rights and the refusal to recognise advancement as one of the functions of rights.

If, on the other hand, the criterion to establish the concept and content of human rights is the one which we indicate in the reflection on their function in society, economic, social and cultural rights are fundamental rights within the full meaning of the expression, because they claim to establish minimum conditions of homogeneity, in order to place everyone in a sufficient condition to enjoy other rights. We must not forget the teachings of a historical survey. The struggle for political rights and economic, social and cultural rights was conducted by the same social and intellectual sectors and their opponents defended the exclusivity of individual and civil rights. One explanation of the reasons for the appearance of fascism in the twenties and thirties, which is supported by such well-known figures as Hermann Heller, Harold Laski and Fernando de los Ríos, in Spain, is that it was in part a defence by the middle classes against that

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372 **Individual and civil rights constitute the first historical generation, which resulted from the liberal revolutions in England, America and France. In that generation the principle of the sovereignty of the nation, or, I should say, the people, was recognised, but political rights were not. The struggle for universal suffrage and the recognition of the right of association, a condition of workers being incorporated in political participation, occupied a large part of the nineteenth century, and for the majority of time was carried on against the liberal sectors who supported individual and civil rights but were opposed to political rights becoming general. Constant's actual idea of the rights of the Ancients and the rights of the Moderns is a sign of that great historical battle. Eventually, as a result of the intellectual effort of the progressive and socialist liberal sectors and the workers' struggle, political rights gradually became general. The fact that today, at the end of the twentieth century, individual, civil and political rights are considered at the same level does mean that they can be classified in the same generation. Since the criterion is one of historical classification, it is clear that, from that aspect, they belong to two different generations.**

pressure for social homogeneity by intellectuals and workers' parties. In any event, at least in certain countries, liberal points of view were abandoned by a sector of their habitual advocates because of that pressure for economic, social and cultural rights.

The argument that the function of human rights is to establish a social organisation capable of assisting everyone to achieve the highest possible level of humanisation at every historical moment opens up the concept of fundamental rights and permits a broad vision of the European heritage. Each group of rights envisages that task according to its potential. The starting point of economic, social and cultural rights is the unequal distribution of wealth and property which prevents a large number of persons from satisfying their needs on their own, and that situation may also prevent them from achieving the minimum level of humanity needed to enjoy other rights. Freedom and equality would be purely formal if a large number of persons could not decide freely and could not choose their private morality. According to that function, rights serve not only to protect against the evil effects of power but also to obtain benefits from it.

In should also be pointed out that that function presupposes a concept of fundamental rights capable of influencing the organisation of social life in the sense indicated, which shows the current importance of the analysis of writers of the protestant rationalist school, like Pufendorf, who emphasised the idea of effectiveness, that is the need to go beyond the moralistic approach in order to arrive at the legal approach. The morality of rights marks the purpose, indicates the direction and serves as a guide to what should be done, but it is only when they are established in positive law that the objectives of changing reality can actually be achieved. For that function, it is therefore not enough to speak of moral rights (droits moraux) and it is necessary to speak of legal rights (droits juridiques), although that perspective is linguistically complicated in languages like French, Spanish or Italian, since the same word is used to indicate the subjective and objective aspects of the right.

The problem just mentioned raises a question which is central today, namely the question of inadequate economic assets, that is the limitation of means to carry out the tasks which derive from the exercise of certain rights, especially in the group of economic, social and cultural rights. In that sense, the reflections of David Hume in the section on Justice in An enquiry concerning the principles of morals are particularly relevant. The functional point of view shows how it is not enough to have a justified moral claim and that such a claim is not susceptible of being incorporated from the theoretical point of view in a subjective right, a freedom, a legal power or an immunity, which are the forms which human rights can take in positive law, but that it is also necessary that social effectiveness is possible.

When case-law or legal writing approach that idea of the essential content of rights, which is present in the German and Spanish constitutional systems, and attempts to establish its meaning, they identify it with their structure, with the idea of legal nature, but also with the function, in society, of reference to the legally protected interests (which, in our case, are the development of the human condition itself).

III. THE FUNCTION OF RIGHTS IN THE LEGAL SYSTEM

Fundamental rights fulfil two functions within the legal system: first, from the objective point of view, they are a sub-system, and together with values and principles form the fundamental material rule on the basis of which the other rules of the legal order are identified. In this first function, the principles of organisation and interpretation and fundamental rights have the same function. Secondly, from the subjective point of view, fundamental rights represent, in the rules

of law, justified moral claims of individuals and groups in the form of subjective rights, freedoms, legal powers and immunities. Judgment no. 11/1981 of the Spanish Constitutional Court of 8 April 1981 expresses that idea in its fifth recital, where it speaks of the twofold character of fundamental rights: "In the first place ... they are subjective rights, rights of individuals. At the same time, they are essential elements of the objective legal order of the national community, when that community takes shape as the framework of a common form of life which is human, just and peaceful ...".

In a certain sense, these two functions correspond, from the point of view of the theory of justice, with all the slight distinctions which must be drawn in these cases, and from the viewpoint of European legal culture of the end of the twentieth century, to those represented by classical natural law, and by modern rationalist and protestant natural law. From the point of view of the history of human rights, their initial function is the subjective function, as natural rights. With the appearance and development of the constitutional movement, an objective function of human rights also appears as a material element, produced by the extraordinary legislature ratione materiae, in the words of Carl Schmitt. From that point of view, the objective dimension of human rights as a sub-system inside the legal system goes beyond the "rule/system" dichotomy and adds as a third type that sub-system which relates them to the idea of an institution expounded by Santi Romano, Hauriou, de Delos and others. Both dimensions are necessary and support one another. It is a phenomenon of interpenetration, to use Renard's terminology.

A. Objective function: fundamental rights as a material element

From this viewpoint, rights form part of the fundamental rule of any legal system which serves to identify the rules which belong to the legal order. In the structural approach of classical positivism, that of Kelsen, for example, the validity of these rules was identified only by formal criteria. Two questions had to be answered: "who orders?" (i.e. the organ competent to create rules), "how are orders given?" (i.e. the procedure established for the creation of each type of rule: constitution, statute, regulation, judgment of a court, etc.). With constitutionalism and the process of positivation, human rights allow the question "what order is given?" to be answered by indicating the necessary outlines of rules and the limits of rules lower down on the scale if they are to be regarded as valid and as belonging to the system. Alongside the formal rule, the competent organ and the pre-established procedure, they constitute, together with principles and the higher values of Article 1.1 of the Spanish Constitution of 1978, the fundamental material rule of the system which allows the possible content and the limits of all other rules to be established. They represent the fundamental constitutional decision which allows rules to be produced, applied and interpreted, in accordance with that axiological system which establishes directions and serves as a guide for the legislature, the executive and the judiciary.

In the European constitutional tradition that function appears more expressly in the actual Constitution, that is the case of Article 1.1 of the Spanish Constitution, or it will be established by the case-law of the Constitutional Courts (as in the case of Germany, for example). In any event, a future European Constitution should incorporate a declaration of the rights which, together with the principles and higher values of the legal system, should fulfil that function.

The consequences of what has been said above are as follows:

1. Competence to interpret and develop these rights and principles belongs to the legislature, within the framework of the Constitution, with the guarantee of the Constitutional

Courts. Since in the majority of cases it is a question of models which are open, abstract and formed by general legal concepts, the determination of these rights and principles demands complementary rules which will extend them. As competence to create rules belongs to the sovereign power, and very frequently to the constituent power, the central decisions regarding their interpretation belong to the legislative power. It is necessary to place great emphasis on the role of the criterion of the interpretation and application of these rights and principles, because in legal culture we are going through a period of "judicialism". In this objective dimension, rights act as a guide and limit for the legal power of Parliament, in that area of clarity reserved to the relationship between the Constitution and legislation. To establish a direct relationship between the Constitution and the judiciary, even in the form of the Constitutional judge, as Ronald Dworkin, for example, does, without specifying the competence of Parliament, offers the judiciary advantages which are not appropriate to our legal culture.

2. The preeminence of the judiciary becomes evident in cases of darkness and obscurity, where lacunae exist, in the absence of rules, or where antinomy or contradiction exists between two rules, or where the legislature exceeds the limits of free decision which Parliament's scope for free action always presupposes. Here we are no longer faced with a political choice between a number of possible solutions within the framework of the Constitution but with legal reasoning which, ultimately, is a matter for the Constitutional Court. In that operation the Court must clearly indicate the limits of its action and not enter the space of political interpretation which belongs to the legislature.

3. In their more general dimension of providing criteria for interpretation, fundamental rights are used by all the legal operators which apply the law. They provide a guide for any rule-making activity and also establish the limits of such activity.

Lastly, it should be pointed out that the European tradition of modernity assumes that State is tolerant, pluralistic and neutral, and therefore that this objective morality will not present mandatory normative contents which presuppose an intention to replace personal initiative in order to achieve the free choice of individual morality. In our cultural context no conception of good and well-being, of one church or one philosophical school can claim advantages and thereby form the nucleus of public reason. Public morality cannot claim to sweep aside the private morality of the individual, which is a practice of totalitarian States (all well-being depends on the State), but neither can the private morality of a church or of a scientific or philosophical concept become the nucleus of public morality or treat all citizens as believers. In the balance between public morality, incorporated in the law, as principles and rights, and private morality, which presupposes a concept of good and well-being, is the difference between democratic societies and closed totalitarian or sectarian societies. Only when public morality, in the form of legal rules, establishes a general obligation, which might affect private morality, or the conscience of the individual, is conscientious objection, which is a fundamental right linked with ideological freedom or freedom of conscience, allowed in advanced democratic societies. Conscientious objection is a limit to obedience to the law, established by a rule of law, which protects the conscience but which is not a consequence of the decision of the conscience but of a decision of the constituent legislature, the ordinary legislature or the Constitutional Court. Leaving the decision to the conscience might presuppose a return to the state of nature, where the consequence indicated by Montesquieu would occur: no-one would be free if the decision as to obedience were left to the free choice of the subject.

B. Subjective function: fundamental rights as subjective rights, legal powers and immunities

It is by this function that human rights, which historically were conceived as natural rights and later as legally recognised moral claims, are properly recognised. Normally, this function is exercised on the basis of three dimensions which constitute their function of protecting the person, participation and advancement. Exceptionally, in extreme cases, where a rule of law stands in the way of the free choice of private morality, a fourth function of human rights is found as dissension in the face of the majority "consensus" in order to guarantee the individual conscience as against the fulfilment of obligations imposed by the majority. The first three dimensions of this subjective function follow the lines of the majority consensus in order to make moral autonomy and independence possible, while the fourth opposes that consensus for the same purpose.

The high values and principles which, as a moral root, form the basis of the subjective function are freedom, equality, fraternity or solidarity, and security. One of the great debates at present and, no doubt, in the future is probably the one about the integrity of this depository of morality and the individual and combined development of all these dimensions. In Europe the defence of this point of view, from which I look at the situation, presupposes the claim of the social State. The arguments in favour of precluding the function of advancement mark the final stage in the struggle for a reduced State which would not concern itself with individual needs and their satisfaction. If the function of human rights in society as a whole is considered, these subjective functions are necessary for the implementation of a form of social organisation which might make possible the free development of the human condition. The function of protection establishes free spaces where the holders of the rights can act freely and without interference to exercise freedom of choice. The function of participation has as its source the instruments, such as universal suffrage, which make possible individual intervention in the formation of the public will and in the functioning of the public services. It represents the status activae civitatis, in the well-known formula of Jellinek, and means that in a democracy the political power is neither alien nor external to the citizens (heteronomy) but that it is basically composed of their will (autonomy). Thus the political power which accepts that morality of human rights, which agrees to convert it into a political morality with the participation of citizens in the organs of legal production, into legal morality - fundamental rights - is not a separate power but a power subjected to moral, political and legal rules created after the direct or indirect intervention of citizens using the rights which integrate that function.

The function of advancement comes from certain situations of the person which prevent the development of his condition and which cannot be resolved solely by the efforts of the individual. That capacity requires the support of the public powers to compensate for and take the place of the action of the persons concerned. The values of equality and solidarity are the basis of that position, which has a long tradition in Europe, according to which not only the conditions of abstention and participation, but also the conditions of advancement, form part of the common good of a political society. These problems of the needs which must be satisfied if the human condition is to be achieved are not private problems which each person must resolve but come within the subjective function of fundamental rights, creating legal claims with corresponding obligations on the public powers or individuals within the framework of economic possibilities and the means available. Finally, the function of dissension protects those who differ from the criteria of the majority where the legal rules which derive from the majority are incompatible to a serious degree with their individual consciences and endanger their private morality. In the history of human rights that situation represents the final stage in the institutionalisation of resistance to power initiated by the implementation of certain individual rights such as freedom of thought, expression and conscience.

With the function of protection, rights attempt to prevent intrusive and undesired conduct; with the functions of participation and advancement, rights are concerned with socially desirable behaviour by making it necessary, achievable and advantageous. The function of dissension is not concerned with desirable conduct or with undesired conduct, but only with conduct which, being supported by the majority, can affect individual choices and prevent the development of the human condition. If we consider these functions from the point of view of ideologies, the first (the function of protection) has a liberal basis; the second (the function of participation) has a democratic basis; the third (the function of advancement) has a socialist basis and the last (the function of dissension) has a "new liberal" basis. The distinction between the liberal basis of the function of protection and the basis of the function of dissension is that in the former everyone is protected against interference, on the basis of the consensus on individual autonomy, but no account is taken of conduct which differs from the consensus, while in the function of dissension a minority is protected against interference, because the only conduct considered is that which differs from the consensus for important moral reasons which are regarded as sufficient by the law.

If we analyse this subjective function in its entirety, in relation to power, we can say that rights serve to limit power and prevent its evil effects, secondly to contribute to its formulation, and lastly to obtain the support and advantages of its contributions and its services. If we consider rights in relation to civil society, they serve to defend the members of society from the power, from themselves, in order to be effective and go beyond the state of nature, to communicate and establish links between civil society and power, faced with the attitudes of a power which is separate from society (totalitarian State control of life) or a civil society which does not consider power (anarchist privatisation of life). In this sense, they represent one of the signs of identity of a democratic society in the face of totalitarian and anarchist positions.

C. The holders of the rights and the way in which they are organised in the subjective function

To complete the analysis of the subjective function of rights, it is necessary to consider the persons in whom those rights are vested, the holders entitled to exercise them, and also the form in which they may be exercised, as subjective rights, as freedoms, as legal powers and as immunities.

(a) the holders of the rights

In an initial approach we can speak of abstract human rights and concrete human rights. The former are the classic rights, as they appeared in history as rights of man and the citizen, they were the rights of homo juridicus. They constituted the only category of rights until the nineteenth century, and especially the twentieth century, when the rights of actual man, the rights of situated man, began to be considered. The former include the rights of certain groups of persons identified by physical, cultural and social conditions. In the second group, one may consider the rights of prisoners, parents, children, the elderly, the handicapped, consumers, users of public services, etc. These rights are conferred on those groups of persons who for various reasons are in a situation which is inferior compared with the generic person in whom the rights are vested, "man or citizen", and need special protection if they are to attain the general level. The reasons for that difference may be to do with culture (women), age (such as children and the elderly), physical condition (such as the handicapped) or place in society (such as consumers,

users of a public service or convicted persons). In those cases there is justification for special treatment which identifies the differences and organises ad hoc rules for those cases.

From a different point of view, it is possible to distinguish the rights of groups and communities, individual rights which may also be the rights of groups and communities, and individual rights which cannot be extended to groups and communities.

Among the first of these are freedom of religion and creed recognised to churches and the right of trade unions to form confederations, found international trade union organisations or join such organisations. With this group, we envisage corporative dimensions, which are essential if it is understood that in a modern democratic society the idea of a direct relationship between the individual and the State, supported by extreme individualism (on this point, see J.-J. Rousseau), is untenable. The person thus finds fulfilment in groups, and it is in fact the importance of groups in a democratic society which indicates the essential task of pluralism, which always refers to groups and not to individual persons.

If we envisage the individual rights which may be conferred on groups, we can point out, among others, the right to honour, the inviolability of the home and correspondence, freedom of residence, freedom of teaching or the right to a court.

Lastly, we find rights which can only be conferred on individual persons, such as freedom of conscience, the right to vote in political elections, or the right to the assistance of a lawyer in criminal proceedings.

In that reflection, it should be pointed out that analogies between the rights of the situated person and the privileges of the middle ages are only apparent. While the function of medieval privileges was to preserve and maintain the existing inequalities, and to protect certain groups which were benefited from unequal treatment, the function of the rights of the situated person, on the other hand, is to achieve equality which does not exist when the rights are conferred to their holders. The two philosophies are completely opposed. We can attribute to those rights of the concrete person the categories of generality and abstraction peculiar to modern rights, because each person in that situation holds the corresponding right. As for the universality which is preached as a characteristic of classic rights, it can also be defended for these rights of the specific and situated person. In that case, universality appears as a universality for the future, or as a premature truth and, in that sense, we speak of universality as an end, situated at the point of arrival. We are faced with the difference between universality as a pre-established fact and universality as an objective.

(b) the ways in which rights are organised in the subjective function

It has already been pointed out on a number of occasions in this paper that rights are presented as subjective rights, freedoms, legal powers and immunities.

A fundamental right is a subjective right when, as against the holder of the right - the active subject - there appears an identified subject, with a legal obligation as a consequence of that right - the passive subject. It is said that A is the holder of a subjective right which he can demand X of B, or when B has obligation X to A. The rights found in the function of advancement are always subjective rights. The same applies to the right to be assisted by a lawyer. In all these cases the right has as a correlative a duty or obligation.

A fundamental right is a freedom if its holder, A, is free vis-à-vis B to do or not to do X. That amounts to saying that B does not have a subjective right that A should or should not do X. A freedom always has as correlative a "non-right" of the other partner in the relationship; we do not have the right that the other is obliged not to interfere with our core of freedom, but no-one has the right to interfere with it. In that case, the partner is not concrete and identifiable, but generic - freedoms are situated in the function of protection. Freedoms are therefore fundamental rights erga omnes and those who are not the holders of these rights, or, better, those who do not need to bring them into play, do not have the right to prevent their implementation.

A fundamental right is a legal power when its holder, A, may oblige, and produce legal effects as against B by means of the act X. That comes about if B is subjected to A, that is if B's legal position is affected by the act X of A. In that case, the correlative is a "non-immunity" or a legal link. The most typical examples of a fundamental right as a legal power are the right to a court or the right to political participation, because in these cases the correlatives of the legal power, the judges, or the other parties in legal proceedings, or the public powers in the case of the right of participation, cannot prevent the effects of the exercise of the rights.

A fundamental right is an immunity when its holder is exempt, that is free, as against the effects of act X of B, that is when B is unable by means of that act to alter the legal situation of the holder of the right. Rights situated in the function of dissension, conscientious objection, are achieved as immunities. The correlative of an immunity is incompetence, that is the absence of a legal power to require conduct or abstention.

IV. CONCLUSION

The point of view of these functions, which allows us to know the purpose served by fundamental rights, from the viewpoints which we have just examined, helps to measure the homogeneity of the European heritage, in constitutional matters, in that dogmatic dimension composed of the material content of the Constitutions. What we have is a sketch which may be used in a comparative study of the Constitutions and to identify the common elements which may be found in them. The European constitutional heritage cannot in any event be limited to that level of comparison, and the common elements must serve for the great ethical, political and legal effort of building a dogmatic part (fundamental principles, values and rights) of a future Constitution of Europe. Until it has realised that aim the European Union will always be limited and incomplete.

Closing session

The Constitutional Heritage of Europe
by Mr Jean-Claude SCHOLSEM

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Professor, Faculty of Law, University of Liège, Member of the European Commission for Democracy through Law

CONCLUSIONS

1. I am well aware of the great honour bestowed on me in being asked to draw some rudimentary general conclusions from this seminar's day-and-a-half of intensive work. It is an

honour, but quite clearly also an extremely perilous and well-nigh impossible task, considering what a wealth of work we have achieved and how difficult it is to stand back and evaluate it objectively.

If, as Cho En Lai claims, it is still a little early to assess the lessons of the French Revolution, then it is certainly rash, if not foolhardy, to claim to draw conclusions from our meeting straightaway. Seeds take time to germinate and eventually bear fruit.

2. The theme of our studies and our discussions was the constitutional heritage of Europe.

Should we have added a question-mark to the title? Or put it in inverted commas? Or both? I am not quite sure. All I know is that we could not have chosen a more stimulating theme. As Professor Rousseau put it so appropriately, we set out in search of constitutional convergence criteria for European integration. Why should this idea be left to economists alone? Legal experts are also capable of daring and imagination, and in this instance they have proved it beyond doubt.

This approach raises many questions. Firstly, why is this notion of "constitutional heritage" so attractive? As Professor Soulier so rightly points out, it conjures up a marvellous image. It has an immediate value. It "makes law", if you will allow me the expression, without itself being law. It also evokes a major, fundamental concept of private law which all jurists, and perhaps more particularly public law specialists, regard with a degree of nostalgia. The concept of heritage, which is less backward-looking than that of tradition, finally seems to be in harmony with neo-liberal concepts and - though this is pure hypothesis - to fit in with this trend and groundswell of opinion. As our Chairman, Mr La Pergola, Professor Rousseau and others pointed out, it can only be a selective heritage. The dynamic and operational nature of the concept and its opening up to the future were stressed by all the speakers. For confirmation we only need refer to Article F, para. 2 of the Treaty on European Union which talks of: "the constitutional traditions common to the member States" and to Article 1 of the Statute of the Council of Europe which refers to "the ideals and principles which are their common heritage".

3. We set out, therefore, in search of our heritage and our heirs. This means exploring the past, and in this connection it has to be said how necessary Professor Soulier's praise, defence and illustration of the extended tempo is. It is even vital at a time when in all our countries the tyranny of the instantaneous and the immediate pose a terrible threat to the truly free thought which is the very basis of all genuinely democratic societies.

To understand Europe, or the various kinds of Europe, it is necessary to go back 15 centuries to the time when the western and eastern empires divided. This great schism is still lying dormant within us. The tragedy of Yugoslavia, which showed Europe to be so powerless, is one sad illustration of this.

It is true, as all the speakers have observed, that since the fall of the Berlin Wall an idea of homogeneity has been gaining ground. As Ms Suchocka points out, the rejection of socialist constitutionalism was sudden and total. The desire of countries freed from communist oppression to bind themselves securely and permanently to Europe is unequivocal. That desire is very intensely experienced by us in the Venice Commission, and I can honestly describe its work as an exhilarating task.

However, the end of the great divide in European legal and political thought does have its paradoxes, at least on the face of it. As Professor Hofmann shows, it was at the very moment that the collectivist vision collapsed throughout Europe that a new problem emerged, affecting groups but dealt with by positive law in an essentially individualistic way, namely the problem of minorities. The Venice Commission has studied this matter in depth and made practical proposals. And Ms Suchocka wonders whether the protection of minorities is already part of our common constitutional heritage or is something as yet too new and too unstable, too diverse and shifting for us to judge.

4. Taking up Professor Soulier's metaphor, the heritage has been handed down both to the direct heirs, namely western Europe, and to those cousins in central and eastern Europe who, more than ever before, are firmly demanding their share of their inheritance . Where does this leave our American cousins? Our roots, of course, are the same. The original inspiration dates back to the great revolutions of the end of the 18th century. But there are plenty of differences too which serve to highlight the unique nature - in time and space - of the European heritage.

There are differences in the institutions, with a presidential system on the one hand and a variety of parliamentary or semi-presidential systems on the other. In the United States there is a less open attitude to the relationship between domestic law and international law, which President La Pergola pinpoints at once as a particular European characteristic. There are also differences with respect to fundamental values. There was much lively discussion as to whether ideas differ on either side of the Atlantic on the relationship between the temporal and religious order, although feelings on this are far from uniform from one European country to another. However, in our opinion, the main difference lies in the specifically European idea of democracy as both liberal and social, in other words, the setting of economic, social and cultural rights on an equal footing with the "traditional" civil and political rights.

These points were taken up and expanded on by other rapporteurs. Ms Suchocka, for instance, dwelt on the common principle, going beyond specific national characteristics, of the separation of State and religion. Professor Peces-Barba also took up this point, making a distinction between public and private morality, and also emphasised the importance in European thought of economic, social and cultural rights. These rights should not be regarded as secondary in nature simply because they are second-generation ones. Their universality and the concept of equality which underlies them are part of the objective. As the author put it so well, they are a "truth ahead of their time".

5. However, having talked about direct and indirect heirs and the way in which they have received and shared out the heritage, perhaps the time has come to take stock and, as Professor Rousseau would put it, draw up a balance-sheet of assets and liabilities. We should not forget the liabilities, otherwise we risk lapsing into other-worldliness and self-glorification. Europe certainly does have a negative legacy of oppression, dictatorship and brutal violation of human rights. This is a suppressed part of our constitutional heritage which it would be unwise to assign too quickly to the past in order to be rid of it. As Professor Pierré-Caps points out, there are also forgotten legacies such as that of the multi-national imperial State, typical of central Europe, which is attracting renewed interest as the dual trend towards European integration and the weakening of national links progresses.

Professor Rousseau extracts two major principles from the constitutional "hotchpotch": on the one hand, free, fair, contested and entirely pluralist elections in keeping with Article 3 of the First Additional Protocol to the European Convention on Human Rights and, on the other hand,

respect for fundamental rights. These two principles are bound to reinforce one another. As he sees it, the elective principle will have the long-term effect of aligning political regimes, bringing them closer together in spite of their legal differences and possibly even influencing State structures in the same way. As a result of this principle therefore, the differences between unitary, decentralised and federal States would be at least reduced if not entirely eliminated. This is indeed an audacious theory, but it is a line of enquiry worth investigating more thoroughly.

As regards the second principle, namely fundamental rights, there may be more points of convergence here than anywhere else. Constitutions use fairly similar lists of rights, despite some national variations and differences of emphasis in wording and interpretation. And we should not forget the harmonising effect exerted by the European Convention on Human Rights and its impact on the wording of the new constitutions of the countries returning to democracy.

6. Furthermore, the pre-eminence of the written constitution which enshrines these rights and liberties in its social provisions is recognised everywhere, or at least practically everywhere. Not in the United Kingdom of course, but this is what we might call the theory of exceptions. It would seem that Europe is designed in such a way that, as the saying goes, there is always an exception to prove the rule. Professor Kortmann provides numerous illustrations of this "rule of exceptions" when discussing institutions.

The question of a formal constitution is clearly linked with that of reviewing constitutionality. The statements and discussions on this matter revealed a wide variety of different viewpoints. Chairman La Pergola, Ms Suchocka and, of course, Professor Rousseau count the review of constitutionality among our common achievements, whereas Professor Soulier sees the matter with the historian's more critical eye. Since, for the most part, the practice of reviewing constitutionality dates only from the post-war period, we lack perspective. Its links with democracy are not clear. It cannot be denied that there has been some decline - at least in relative terms - in rights and freedoms in some of the countries where there is such supervision. It is also clear from a historic point of view that democratic values have thrived at times and in countries where there was no review of constitutionality, as under the 3rd Republic in France. As a specialist in comparative law, Professor Kortmann is also more sceptical as to whether the monitoring of constitutionality is common to all states. Naturally, by force of circumstances, he does not comment on the United Kingdom. He hardly broaches the subject of the Nordic countries in the broadest sense - Sweden, Finland, Denmark, the Netherlands and Luxembourg. It should also be noted that, in France and in Belgium, constitutional courts were only introduced for reasons - incidentally quite different reasons - which had very little do with a concern to improve protection for human rights. In France, review is only conducted a priori and in Belgium it remains, at least in theory, only partial.

This debate prompts two questions. First: should we not be attempting to identify within our common heritage various historic strata representing the contributions of successive generations? Secondly: ought we not to distinguish within the European corpus - if we can describe so diverse a whole as a corpus -sub-sets based on even more intrinsic characteristics? In this connection, Professor Pierré-Caps contrasts the peculiarly western view of the State with that of central Europe. In analysing the various approaches to minority rights, Professor Hofmann also divides Europe up in a certain way. Other subject areas might require different geographic groupings. This would at least seem to be a line of enquiry worth pursuing.

Reviewing the law in relation to higher standards brings us on to the question of natural law. Ms Suchocka wonders whether we might be witnessing a renaissance of natural law. It is a question

that cannot be evaded, for when a judge is dealing with extremely general principles and ideas like the concepts of the European Convention on Human Rights and censures the law on this basis, is there not a danger of blurring the distinction between positive law and natural law?

This raises the question of the role of the judge in our conception of democracy. On this fundamental question there has been a profound change compared with the legacy of the French Revolution. National courts, and constitutional courts in particular, seem to become more daring every day. And what of supranational or international courts? Professor Gautron offers a striking example to illustrate what might be called the tactics of the Court of Justice of the European Communities in the area of fundamental rights. The European treaties say relatively little about the subject. The very purpose of the treaties, the fact that they are only treaties, explains this relative silence, along with the desire to leave room for the "other Europe" embodied by the Council of Europe. The Court of Justice could not subordinate Community law to the various constitutional systems for fear of undermining its primacy and unity. Accordingly, it constructs fundamental rights protection on the basis of general principles. These are sometimes deduced from the spirit of the Community's legal order. In other cases they are drawn from domestic law, but this is no easy matter because of the great difficulty of establishing the common nature of certain laws and because of the great risk that this comparative approach will lead, not to the highest possible degree of protection but to the lowest common denominator. Finally, these principles may be based on the European Convention on Human Rights and the case-law of the Strasbourg Court. But here too the Luxembourg Court is anxious to preserve its freedom of interpretation and only takes "other European law" as a source of inspiration.

8. This is an interesting example of the way in which legal models circulate in Europe, borrowing from one another in a process of osmosis and hybridisation which is so typical of the unity and diversity of European thought. This circulation operates in various ways. It may be direct and, as it were, horizontal. As Professor Rousseau points out, Robert Badinter's proposal to extend the possibility of referral to the French Constitutional Council was based on the experience of all the major democracies where constitutional courts exist. Circulation may also be indirect, through supranational case-law. Professor Gautron gives the enlightening example of the principle of proportionality which has reverberated between national law and Community law before being passed on to other "local" systems of law. The case-law of the European Court of Human Rights provides us with many other examples of this exchange, this mutual enrichment of legal systems and case-law. There is no doubt that, in the area of human rights, the legal systems of European States have become part of a broader whole which is a collection of "local" systems.

It is in this area therefore that harmonisation may be most promising and comparative analysis most productive. Hence the value of Professor Peces-Barba's study on the objective and subjective functions of human rights in society and within the legal system. The links between these functions - protection, participation, promotion and dissension - and the related practical organisation of the rights and freedoms provide us with a ready-made key for identifying the various systems of positive law, namely the European Convention on Human Rights, Community law and national systems.

9. In searching for a common heritage we have voiced opinions which have sometimes converged and sometimes differed. During this seminar too, as was to be expected, there has been unity and discord. And since we are talking about the heritage, it seems to me that we will be leaving this seminar with a greater wealth and diversity of ideas than when we arrived. With a few more certainties but, most importantly, with a great many productive questions of the kind

which rekindle and stimulate debate. At the heart of these questions is what a native of this region once referred to as this small promontory of Asia. What city could have been more apt a venue for this seminar than Montpellier and its famous university, with its past, its diversity and its location right on the shore of the cradle of European civilisation? There is still a wealth of material to cover and many paths to be explored. I hope that the wish expressed at the very outset of this seminar will be fulfilled, and that although it is the first of its kind it will certainly not be the last!

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Despite the progress of European integration, each European State is still functioning according to its own constitutional rules and the Treaty of Rome has not been transformed into a European Constitution. Following the disappearance of the iron curtain, time seems ripe to try to identify a core of common principles forming together the constitutional heritage of Europe.

On the basis of a review of the major areas of constitutional law, participants at this seminar, organised in co-operation with the University of Montpellier, examined whether, apart from free elections and the protection of human rights, there are other principles like the review of constitutionality of legislation by an independent court which may be regarded as part of such a constitutional heritage of Europe.

The European Commission for Democracy through Law (Venice Commission) is a consultative body on questions of constitutional law, created within the Council of Europe. It is made up of independent lawyers from member States of the Council of Europe, as well as from non-member states. Almost fifty States participate in the work of the Commission.

The Commission launched its UniDem (University for Democracy) programme of seminars and conferences with the aim of contributing to the democratic conscience of future generations of lawyers and political scientists.