THE FEDERALIST

a political review

To look for a continuation of harmony between a number of independent unconnected sovereignties situated in the same neighbourhood, would be to disregard the uniform course of human events and to set at defiance the accumulated experience of ages.

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The Federalist was founded in 1959 by Mario Albertini together with a group of members of the Movimento Federalista Europeo and is now published in English and Italian. The review is based on the principles of federalism, on the rejection of any exclusive concept of the nation and on the hypothesis that the supranational era of the history of mankind has begun. The primary value *The Federalist* aims to serve is peace.

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Europe and Immigration

The recent disembarkation in Italy of large groups of illegal immigrants, and the tensions generated by these arrivals, prompt reflection on Europe's inability to deal efficiently with both the causes and the manifestations of what is one of the biggest and most dramatic phenomena of our times.

The mass exodus, from economically weak countries to the industrialised world, of men and women hoping to escape poverty and find work is one aspect of the current process of globalisation. It is a phenomenon which, apart from being historically inevitable, is one which could, if approached correctly, be turned to the advantage both of the immigrants' countries of origin (for these countries, emigration has the effect of relieving the socially destabilising pressure of overpopulation), and of the countries towards which the migration is directed, in particular the countries of Western Europe which are currently going through a phase of profound structural transformation and experiencing a serious population crisis. Furthermore, in the industrialised West, the workforce is no longer adequate to meet a number of requirements which could easily be satisfied by imported labour.

However, immigration can only be beneficial if it is directed and regulated by a political power which is capable of implementing a coherent economic policy, has a firm control over the territory and works in close collaboration with the countries from which the flow of immigrants stems. In the absence of these conditions, the migratory flow will be damaging to the economies of developing countries, depriving them of the most valuable section of their workforce without, furthermore, guaranteeing the migrants decent conditions in their countries of destination, where very often they become victims of social outcasting, thus contributing to the increase in delinquency and urban decay.

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The fact remains that a rational system for managing immigration,

one which brings out its positive and reduces its negative aspects, can only be based on containment of the phenomenon — not through restrictions, but through measures which target its causes. The migratory flow towards industrialised regions can only be reduced by the injection of capital and business initiative into areas where the workforce overabounds. This does not mean improving or reorienting state aid for foreign development, which in the past has been shown to be ineffective and often even counterproductive. There is, rather, a need to exploit a trend to which globalisation spontaneously gives rise and which, with respect to emigration, is a specular phenomenon: the so-called de-localisation of production, i.e., the setting up, by companies from industrialised countries, of labour-intensive production plants in countries where labour is abundant and inexpensive. This allows a section (sometimes the most skilled and most enterprising) of the population of less fortunate countries to avoid the inevitable trauma and uprooting of emigration and to begin, in tranquillity, working towards their own future wellbeing. At the same time, in the countries exporting capital, those companies which have invested in production plants abroad find themselves more competitive, thanks to the low production costs incurred in the social and economic areas to which they have transferred their activity.

However, this creation of employment opportunities abroad must have the underlying and concrete support of public powers able efficiently to direct and protect these operations. The absence or inefficiency of such support would, by creating uncertainty among entrepreneurs and increasing the risks inevitably involved in investment abroad, (especially in areas which are radically different, politically, socially and culturally), deter companies from investing and favour the unscrupulous approach to business which is based on high short-term gains: the result would be exploitation of the workforce and of the environment. At the same time, in the absence of an adequate policy geared towards internal investment and the retraining of the workforce, the de-localisation phenomenon would, in the industrialised countries which transfer their production activity abroad, immediately lead to an increase in unemployment in the sectors directly involved, affecting less skilled workers in particular.

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In Europe, the lack of a coherent Union policy on immigration is dramatically obvious. The strategies on immigration adopted by the

governments of the member states, (if they can indeed be called strategies), and their relationships with the countries from which the immigrants originate are, being weak and divergent, ineffective. In fact, the one thing that does emerge from these strategies is a policy of closure. To be effective, a policy for the integration and employment of immigrants would require an expanding economy, and thus the launch of a vast plan for restructuring the European economy and channelling investments into major infrastructures and advanced technology. Such a plan was, in fact, proposed in 1993 by the former President of the European Commission, Jacques Delors, but was never taken up. The European economy has continued to be conditioned by the so-called "competitive disinflation" produced, in view of the forthcoming creation of the single currency, by the need for convergence of the budgetary policies of the countries of the Union (which is, on its own account, an inexorable necessity). And, unless radical political changes come about, the European economy will continue to move along these tracks even after the start of Monetary Union, with the European economic policy based exclusively on the philosophy and the undertakings of the Stability Pact which excludes any European budgetary policy, rendering each of the governments of the Union exclusively responsible for the management of its national budget, with heavy sanctions imposable on those who fail to keep it balanced. As a consequence, the policy on immigration implemented by the governments of Europe has, in the past, been limited (and in the absence of radical political changes, will continue to be limited) to attempts to stem the flow by closing the frontiers. This is of course a policy which is, given the porosity of the European frontiers, bound to fail and one which, furthermore, has two disastrous effects: first, it prevents the governments of Europe from focusing on the problem of how to manage the flow of immigration (bringing out its positive aspects to the benefit of both the immigrants and their own economies) rather than on the unsolvable problem of how to stem it. Second, it presents Europe as an exclusive and ungenerous association of rich countries which, jealously guarding their wealth, are reluctant to collaborate with the surrounding area.

All this is compounded by the problems generated by the application of the Schengen Agreement and of the provisions of the so-called "third pillar" of the Maastricht Treaty. The issue of visas and residence permits to citizens of non Community countries, the maintenance of public order, the fight against criminality and drug trafficking, and common policies in the field of justice and home affairs are considered by the governments of the Union's member states to be problems directly pertaining to

national sovereignty and which must, through their exclusion from those areas decided by majority vote within the Council of Ministers and controlled by the European Parliament, remain firmly in the hands of the national states. However, as things stand at the moment, the governments' attachment to their national sovereignty has a rebounding effect: their refusal to relinquish any part of their sovereignty has created a situation in which, following the removal of internal frontiers, the control of migratory flows, decisions on the concession of political asylum and residence permits, and the deciding and carrying out of measures for the expulsion of aliens become the competence of the state through which the immigrants entered the territory of the European Union in the first place. This means that each of the governments of the Union has no choice but to renounce the possibility of implementing a policy of its own to regulate the flow of migrants into its territory, and relies on the capacity of its partners to apply the rulings decided at European level, bound, furthermore, to the interpretation of these rulings applied by each of these partners. Thus, instead of being controlled by the Union, the position of all the governments which entered into the Schengen Agreement depends, in this sphere, on the actions of those countries whose external borders are more extensive and more difficult to control. As a result, all the states forfeit any effective control over their own territory and thus relinquish totally that sovereignty which they so jealously wanted to guard.

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The closed attitude of the European Union towards the question of immigration goes hand in hand with its incapacity to draw up a coherent foreign policy plan that would allow it, among other things, to create the conditions for a rational policy based on the transfer of production activity abroad and the development of the countries from which the migratory flow originates. A plan for a foreign policy of this kind should include the rapid realisation of the planned enlargement of the Union to embrace the countries of eastern Europe and a firm undertaking to promote, through active and carefully targeted collaboration, the peace process in the Middle East with the ultimate objective of stimulating in that area the implementation of a plan for federal unification. However, this enlargement can only come about if the Union proves able, through a radical strengthening of its own decision-making capacity, to deal with the many, and difficult, problems which this will generate: failing to do this, it will remain trapped within its current borders, or will dissolve into

a vague free trade area, the member states forfeiting, instead of sharing with new members, the benefits that integration has bestowed on them. And in Middle Eastern affairs, Europe, despite investing more heavily than the United States in this region, will nevertheless remain subordinate to the action of the US (which has, moreover, proved incapable of setting the peace process in motion once again). On the other hand, the impotence and selfishness of the Union were, in December 1997, harshly exposed by the despicable treatment which Turkey received at the hands of the European Council at Luxembourg: the Council even went so far as to exclude Turkey from the list of the countries which are candidates to join the Union (in spite of the fact that Turkey is tied to the Union by a treaty of association stipulated as far back as 1963). The drive towards modernity and democracy which is currently strong in Turkish society runs the risk of being frustrated by Europe's short-sighted and mean-spirited attitude, and were this to happen, it would lend strength to the forces which favour, instead, authoritarianism and Islamic fundamentalism.

The fact remains that, regardless of which aspect of Europe's inertia and irresponsibility is in the spotlight, the roots of the Union's incapacity to act always lie in the absence of the democratic and federal institutions needed to give voice to the general European interest and to assist, at the same time, those peoples with which Europe, due to its geographical proximity, should be collaborating most closely. Until now, the periods of stalemate, slowing down or crisis in the process of European unification have been justified by the governments responsible for provoking them as being in their national interest. Now, however, the creation of Europe (through the transfer of national sovereignty into the framework of a European federal state) represents, for all the states of the Union, the only real national interest that remains. That which is nowadays declared to be "in the nation's interest" is in fact that which, preserving the institutions to which their power is linked, is in the interests of only a section of politicians, civil servants and diplomats, and of the most parasitical sectors of society which depend on them for survival. Europe's problem is that these interests can now be expressed through well-established political and institutional channels, while the common European good does not have such instruments at its disposal and is thus destined to remain within the vague sphere of ideals. Fighting for Europe means making sure that these ideals become tangible, provoking concrete action on the part of men.

The Institutional Reforms of the Amsterdam Treaty

ANTONIO PADOA-SCHIOPPA

1. *Introduction.* *

The aim of this paper is to set out and evaluate the main institutional changes agreed by the governments of the European Union at the end of the work of the 1996-97 Intergovernmental Conference (IGC).[1] The making of these changes was in fact the most important task faced by the Conference, which was convened in accordance with Article N of the Maastricht Treaty.

Important as they are, let us leave aside, therefore, Treaty changes relating to the extension and specification of the Union's competence and policies in the sectors of the first pillar (economic and monetary union — employment policies first and foremost), the second pillar (foreign and security policy), and the third pillar (justice and home affairs), as well as the important innovations introduced in the area of fundamental rights and citizenship.

2. *Nomination of the Commission.*

Major changes have been made to the procedure for nominating the President of the Commission and the Commissioners.[2] The President must, as before, be elected by the "common accord" of the governments of the member states, although provision is no longer made for the prior consultation of the European Parliament. However, the Parliament must, by a vote, formally approve the governments' nomination (whereas under the terms of the current Art. 158.2, the European Parliament is simply required to give its approval of the whole Commission, at the end of the selection procedure).

The Commissioners, meanwhile, must "by common accord" be selected by the states and by the President of the Commission (CT, Art. 214.2=158.2); until now, the President only had to be consulted. With governments forced to take into account the greater powers given to the President in the selection of the Commissioners, the President therefore assumes a more significant role. In turn, the European Parliament, voting at the start of the procedure, will be given a much bigger say in the choice of President; indeed, in order to avoid rejection by the European Parliament of their candidate for the presidency, governments, when deciding who to put forward, will quite probably have no choice but to take into account the Parliament's political majorities and political leanings.

The requisite of "common accord" among the governments still holds, in other words, the Commissioners must still be selected by unanimity. Likewise, the President must be elected unanimously, despite the difficulties that this procedure (in which each individual government is assigned the right of veto) has generated in the past.

There does perhaps exist a way of overcoming this obstacle: if the European parties forming the two biggest alignments were each to nominate a candidate for the presidency *during* the run-up to a European election, the outcome of the election itself would determine which candidate should be called to the leadership of the European Commission and, from a political point of view, it would be difficult for governments to object to the instatement of an individual who, through the European election, has been shown to have the support of the electorate.

3. *The Number of Commissioners.*

Formerly, one of the problems most frequently encountered in the preparation of an IGC concerned the number of Commissioners. There was (and still is) considerable concern over the possible negative effects of increasing the number of Commissioners to reflect the enlargement of the Union (one new Commissioner per new member state). It was felt that, in order to function with the necessary efficiency, a collegial organ of government should not comprise too many members.

On this point, the IGC concluded that, upon the next enlargement of the Union, member states with two Commissioners will have to give up one of these Commissioners.[3] Before this reform can come into force, however, there will need to be a reorganisation of the weighting of votes within the Council to compensate adequately those states (France, Germany, Italy, the UK and Spain) which stand to lose one of the two Commissioners to which they are currently entitled. And this could come about through a new procedure providing either for a reweighting of the

votes (so as to reduce the current over-representation of the small states in the Council) or, in relation to decisions in areas where qualified majority voting is to be applied, for the need to reach a dual majority: in other words, both the prescribed majority of the weighted votes[4] and the majority of the peoples represented (or, perhaps, of the number of member states).

The solution adopted by the IGC is far from perfect. Indeed, while we are faced with the prospect of the number of Commissioners rising in excess of 20, the governments have so far conspicuously failed agree on what is the ideal number (which implies, in principle, their rejection of the idea of one Commission member per member state) and on the establishment of new criteria for the weighting of votes within the Council (even though, with the prospect of enlargement of the Union, this is something which they all consider necessary). By being prepared to give up the possibility of nominating a second Commissioner, the larger states have demonstrated a degree of flexibility so far not matched by the smaller states (or at least by some of them).

In this area, the IGC therefore had to settle for a dual deferment: the deferment of the decision over the new voting procedure and the deferment of the more general question of a reform of the institutions of the EU, although with reference to the latter, it has been agreed that, at least one year before the membership of the Union exceeds twenty, a new IGC will be convened to start work on a review of the composition and functioning of the Union's institutions.[5]

This second deferment can be likened to what happened at Maastricht. It must be pointed out, however, that the Commission has lost no time in approving the proposal to start immediately the negotiations which will lead to the entry to the Union of six new member states; thus, the number of 20 states provided for in connection with the convening of the new IGC may easily be reached sooner than the governments expected. It is clear that it was precisely in order to hurry along this review of the Community institutions (which has been put off for too long) that the Commission formulated its proposal in this way. However, let us not forget that, according to the terms of the Treaty (CT Art. 49 = Art. O), the unanimous agreement of the Council will be needed in order implement any reforms, and this will be the difficult part.

The first deferment — which as we have seen links agreement over the number of Commissioners with agreement over the reform of the voting system and fixes as a limit the date of the next enlargement of the Union — cannot be considered a short-term deferment, given the considerable time needed for the negotiation and entry into force of future enlargements of the Union.

In this case, as in the case mentioned earlier, the European Parliament could play a decisive role: since the support of the Parliament is required for enlargement of the Union (CT Art. 49 = Art. O) of which a number of governments, including Germany, are particularly in favour, the Parliament could make the prior reform of the Community institutions (starting with reform of the voting procedures within the Council) a condition for guaranteeing such support.

4. *The European Parliament: Size and Electoral Procedure.*

In its institutional capacity, the European Parliament (EP) will be partially strengthened by the work of the IGC.

Reference has already been made to its powers in the procedure for selecting the President of the Commission. Meanwhile, as regards the size and composition of the EP, the number of Euro MPs is to be capped at 700;[6] furthermore, as the smaller states are currently over-represented, an undertaking has been made (once again, given the failure of the governments to reach an agreement, a deferment had to suffice) to redetermine how many representatives each member state should have in order to ensure appropriate representation.[7]

The Parliament itself may, with the agreement of the Commission, establish the duties of the members of the EP and the rules governing the exercising of their functions: however, these must be unanimously approved by the Council of Ministers.[8] Thus, not even in the sphere of its own mode of operation does the EP rule supreme.

As regards the objective of a single electoral procedure for European elections, the EP retains its power to develop proposals. Indeed, the new Treaty assigns the Parliament the task of developing a single proposal which may take the form either of a common procedure or of a set of principles shared by all the member states:[9] the latter is the less ambitious option and, furthermore, is not particularly realistic given that it is precisely the lack of common principles (over the alternatives of proportional, semi-proportional and majority systems) which underlies the failure to establish a common electoral procedure. In any case, the EP has no decision-making power in this regard: it can only issue proposals.

5. *The Co-decision Procedure.*

Two important innovations must be underlined in relation to the

legislative role of the EP; these concern: first the co-decision procedure itself, and second, the legislative areas where this procedure applies.

With reference to the first, the co-decision procedure is, in part, modified by the Treaty. The Treaty of Maastricht (Art. 189b) provided for an extremely tortuous procedure for the approval of decisions over which the Council and the EP failed to agree, a procedure which allowed the matter to be passed back and forth as many as 11 times before the EP pronounced a definitive 'yes' or 'no'. The new procedure worked out by the IGC, which provides for a maximum of seven phases, therefore represents a considerable simplification.

Furthermore, the EP is undoubtedly given a more prominent role in the legislative process: 1) the Commission's initial proposal must immediately be submitted to the EP; 2) passing judgement on the proposal, the EP may introduce amendments, which must then, by qualified majority voting, be approved by the Council. 3) If the Council passes the amendment (or if the EP has not in fact proposed any amendments), the act is adopted; 4) otherwise, the position of the Council (established by qualified majority voting) is put before the EP which can accept it expressly or tacitly (in which case, the act is adopted) or, with an absolute majority, throw it out (in which case, the act is definitively rejected), or, with an absolute majority, propose further amendments. 5) If, with a qualified majority, the Council approves these further amendments, the act is adopted. 6) However, if these further amendments proposed by the EP are not all approved by the Council, a conciliation procedure is initiated which brings together the members of the Council and an equal number of Euro MPs in an effort to reach an agreement. 7) This may lead to the adoption of a single text approved by both organs (the EP by a qualified majority, and the Council by an absolute majority) or to the definitive abandonment of the project.[10]

This new procedure is doubtless an improvement on the previous one, not only due to the elimination of certain phases, but also because it is likely that, in the majority of cases, the procedure will reach its conclusion in the third, fourth or fifth phase. Furthermore, the consensus of the absolute majority of the Parliament is no longer required in order to make amendments to the Commission's initial proposal and this is another important innovation as it sees the EP operating more like a national parliament. However, the requisite of an absolute majority — notwithstanding the difficulties that can be generated within the EP by political fragmentation and by the very character of the Parliament — still applies in the subsequent phases of the procedure outlined.

The scope of application of the co-decision procedure is extended considerably to embrace sectors in which, under previous Treaties, the cooperation procedure (Art. 189 C) was applied. With respect to the cooperation procedure, the legislative procedure known as co-decision grants the EP more extensive powers (placing it on an equal footing with the Council): this movement from cooperation to co-decision covers 11 areas of legislation.[11] In addition, in four cases, co-decision replaces the simple consultation of the EP which has been the requirement until now.[12] In a further case, it replaces the assent procedure,[13] and in another seven cases, the application of co-decision stems from provisions introduced *ex novo* by the Treaty of Amsterdam.[14] Altogether, as indicated in the notes, it covers a significant body of legislative areas.

On the other hand, it must be pointed out that, with a few exceptions,[15] all the most important matters on which the EP is, through the consultation procedure,[16] called upon simply to express an opinion, remain the competence of the Council — decisions which, as a rule, can only be made upon the unanimous vote of the Council.[17] Thus, since this long series of fundamental areas remain the sphere of the Council, the EP, the organ which is the direct expression of the will of the people at European level, has failed to acquire new legislative powers, and the basic contradiction usually termed the "democratic deficit" remains unresolved.

6. *The Powers of the Council of Ministers.*

There is no doubt that the Council is the organ most favoured by the IGC. It is also true to say that, being extended to 13 states (which do not include the United Kingdom and Ireland), the Schengen Agreement[18] becomes a "Community" agreement. However, as far as both the second and the third pillars are concerned, the new Treaty endorses the virtually exclusive powers assigned to the Council by the Maastricht Treaty, and the corresponding limitation on the powers of the Commission (to say nothing of the EP which, at best, has merely to be kept informed).

Requiring only the prior consultation of the EP, even the various new policies decided at Amsterdam (relating to the free movement of people, immigration, right of asylum,[19] social policy[20] and employment[21] to give just a few examples) provide for decision-making power only at Council level. The rule that the most important Council decisions must be reached unanimously is consistently applied and, with the exception of the employment strategies to be delineated by the Council, applies to all the cases cited here (including the Schengen Agreement).[22] As far as the

former is concerned, the EP is merely consulted and, unusually, the qualified majority voting system is applied within the Council.[23]

In a number of provisions, the IGC establishes the principle of majority decisions within the Council. In several cases, the unanimity rule provided for by the previous Treaties is replaced by the qualified majority voting system,[24] and in a further dozen cases, policies brought in by the new Treaty can also be adopted if they are supported by a qualified majority: this applies to the question of sanctions for violation of fundamental rights,[25] to certain categories of joint action within the sphere of foreign and security policy,[26] and to issues connected with the single market and monetary union[27] which are generally (although not always) the areas in which the EP is conceded the power of co-decision.[28]

In addition to all this, the Treaty of Amsterdam introduces, in the context of the Council's decision-making process, a new and vastly important institutional measure: termed an "abstention" procedure, it allows one or more member states to abstain from applying certain decisions relating to foreign or security policy, without however preventing the other states of the Union from committing themselves to such decisions.[29] The procedures involved will be examined in more depth further on, in the section dealing with flexibility.

The importance of this new measure lies in the fact that, in certain conditions, it provides a means of overcoming the deadlock which can be generated by the unanimity rule, removing from the dissenting state or states the power of veto which they would otherwise be in a position to exercise. This does not mean that the right of veto is abolished, however, as each state retains the right to decide to vote against a motion, rather than simply abstaining from it.

In reference to the second pillar, certain decisions which implement common strategies or positions are, as illustrated, subject to qualified majority voting.[30] However, in this case too, a let-out clause is provided for which allows any member state to oppose such decisions on the basis of "important and stated reasons of national policy": when this happens, the decision is referred to the European Council, its adoption depending on a unanimous vote by the same.[31]

7. *The Court of Justice.*

The Court of Justice is to assume a significantly larger role, with its competence extended, within limits established by the new Treaty,[32] to judicial cooperation in criminal and police matters. The Court also

acquires judicial power in matters of immigration, even though certain limits again apply,[33] and in matters relating to the action of the Union's institutions in the areas of human and fundamental rights.[34]

8. *Flexibility and Closer Cooperation.*

The so-called "flexibility" hypothesis constitutes a new area which merits particular attention and which involves a procedure allowing a number of states not representing the full membership (but which must number at least eight of the fifteen) to cooperate more closely on certain matters within the framework of the Union. Actions decided as a result of this procedure will apply only to those states which legitimately undertook this cooperation at the outset, and the other states will have no grounds for impeding the implementation of the relative decisions.[35]

It is important to consider carefully two clearly distinct aspects of this new concept of flexibility: first, the preliminary conditions laid down for setting the procedure in motion and second, the rules determining the validity of the decisions reached.

The new Treaty in fact lays down certain conditions which must be fulfilled before this procedure for closer cooperation can be set in train: as well as establishing eight as the minimum number of states which must be in favour, the objectives of the cooperation arrangement must coincide with the objectives of the Union, preserve the basic principles of the Treaties and respect the framework of the Community's institutions; cooperation can only come about if it represents the last option open, once the lack of support on the part of the other states has been ascertained. Finally, the initiative, which must remain open to the other states, must not by its nature undermine the *acquis communautaire*.[36]

The rules determining whether or not the new procedure of flexibility may be adopted differ in different areas of EU competence.

In the sphere of the European Community (the first pillar), the decision to authorise recourse to the flexibility procedure must, upon proposal by the Commission, and following consultation of the EP, be reached by the Council through the application of qualified majority voting.[37] But provision is made for a "let-out" clause: should any state choosing not to participate in the cooperation arrangement consider it necessary, for important and stated reasons of national policy, to oppose the request for authorisation presented, by a qualified majority of states which are in favour of it, the authorisation of the cooperation arrangement will not be put to the vote,[38] and thus the procedure will not be adopted.

As regards the competence of the Union in matters of police and judicial cooperation (third pillar), the Treaty establishes that moves for closer cooperation should start at Council level; in this case, the Commission is required merely to express an opinion and the European Parliament simply has to be kept informed.[39] Here again, any member state can, on the basis of important and stated reasons of national policy, block this procedure.[40]

A similar procedure is adopted in reference to the Union's competences in the area of foreign and security policy (second pillar): as outlined earlier, dissenting states can abstain rather than oppose. When the Treaties demand a unanimous vote (second pillar decisions usually have to be reached unanimously), the vote or votes of the abstaining state or states — providing that, in accordance with Art. 148.2, they represent overall a number of votes not in excess of one third of the total: thus no more than 25 out of 76 — are not counted.[41] Moreover, the provisions of this article indicate clearly that dissenting states are free to decide whether to exercise their right to abstain (thus allowing the other states to proceed), or whether instead to *oppose* the proposal, thus blocking the decision. If a dissenting state opts for abstention, the decision reached by the other states would, in accordance with the conditions and limits already mentioned, commit the Union even though the abstaining states would be under no obligation to apply it.[42] However, also in cases where provision is made for a possible decision by majority, it is equally possible (as illustrated above) that states may oppose the decision on the basis of stated reasons of national policy.[43]

Thus, as far as all three pillars are concerned, the flexibility arrangement can be adopted only if no state opposes it in the preliminary stages. However, the power of the right of veto has, in that it can only be exercised on the basis of "important and stated reasons of national policy", been reduced. It is therefore foreseeable that, at least in some of those cases in which a state would previously have exercised its right of veto without being under any particular obligation to explain its motives, states will in future find it more difficult to exercise this right, especially when they can produce no real or explicable "important and stated reasons" for doing so.

Turning to the second aspect, the procedural rules governing the implementation of flexibility arrangements, the Treaty determines, first of all, that while all member states can be present and take part in the discussions, only the states in favour of the closer cooperation arrangement can actually vote on the decisions relating to it: in those cases in which the Treaties demand unanimity, this will be taken to mean

unanimity of the states actually joining in the initiative. On the other hand, in cases where action can be decided by a qualified majority, the said majority will be calculated on a proportional basis in accordance with the provisions of Art. 205.2 = 148.2.[44] Thus, the authors of the Treaty appear to intend that the number of votes corresponding to the states choosing not to support the cooperation initiative should first be subtracted from the overall total of 76 weighted votes, and that the qualified majority should be worked out on the basis of a proportion between the total number of votes corresponding to the participating states and the number of votes in favour of the action (which in turn corresponds to the proportion between the overall total of 76 votes and the 54 votes required in accordance with Art. 148.2).[45] From this, it emerges clearly that the new procedure is applicable not only in areas where the Treaties make provision for decisions by majority, but also in areas where they demand unanimity. Having said that, there are in fact specific rules which regulate the different areas.

If the closer cooperation initiative is undertaken within the framework of the European Community, (that is, within the sphere of the first pillar), it *cannot*, as laid down in the new Treaty, be extended to areas in which the Community has exclusive competence.[46] This limitation reduces enormously the impact of the new procedure since central areas like the free movement of goods, services, persons and capital are excluded from it.[47] Likewise, the area of citizenship is expressly excluded.[48] It is furthermore stressed that cooperation must neither alter the policies, actions and programmes established by the Community, nor create discrimination among member states.[49]

With regard to cooperation in the areas of policing and justice (third pillar), where qualified majority voting applies, at least 62 favourable votes (cast by a minimum of 10 states) are necessary in order for a decision to be taken.[50] This implies that decisions requiring unanimity must also require the participation, and unanimous consensus, of 10 states or more (representing no fewer than 62 votes in favour).[51]

The same criteria (at least 10 states voting, at least 62 votes in favour) apply for the adoption of decisions in the sphere of foreign and security policy wherever the new abstention procedure is applied.[52]

In principle, the scope of the new flexibility provisions is remarkable. The procedure introduced by the new Treaty allows important decisions to be taken, within the framework of the Community, by a proportion of its membership. However, two major limitations remain, reducing considerably the positive potential of new procedure: the possibility for all

states to exercise their right of veto in the preliminary stages, and the failure to extend the provisions to areas in which the Community has exclusive competence.

9. *Subsidiarity.*

The Treaty devotes a special protocol to the principles of subsidiarity and proportionality[53] — the latter limits the actions of the Community to that which is strictly necessary to achieve the objectives of the Treaties.

In reference to subsidiarity, precise criteria are introduced. The Commission is called upon to render explicit the coherence of its proposals with the principle of subsidiarity, with the restriction of legislative activity to the minimum, with the margins of freedom which states should be allowed in the application of the directives, and so on.

The protocol also establishes that the principle of subsidiarity, as expressed in the Treaty, is not applicable in areas where the Community has exclusive competence, only in areas of joint competence.[54] This distinction appears questionable as subsidiarity seems to be equally applicable to decisions and laws in sectors which are the exclusive competence of the Community, especially in view of the mechanism of the directives and the optimum relationship between common principles and national specifications; the excess of regulation at European level could, in part, be corrected through recourse to the principle of subsidiarity.

What is important, however, is that the protocol stresses one of the fundamental features of subsidiarity which was not brought out in the Maastricht Treaty, i.e., its capacity to work in two directions. Indeed, depending on the circumstances, the principle can represent the basis for weakening the role of the higher level within a political system when effective action is possible at a lower one, and *vice versa*, can strengthen the role of the higher level when the lower one is found to be insufficient for the pursuit of given ends.[55]

10. *Conclusions.*

Several aspects of the new Treaty, positive and negative, which, in reference to the institutional reform of the European Union, have been dealt with by the present author on a number of occasions in recent years,[56] can by way of a conclusion be underlined here.

Despite being heralded by the Treaty of Maastricht, there has still been no definition of a hierarchy of rules enabling a distinction to be

drawn between those of a fully legislative nature and those which have a regulatory function (the aim being to restrict intervention of the EP to to the first of these). The greater involvement of the national parliaments in the development and approval of the Commission's proposals,[57] decided by the Conference, may help to render deeper and more effective the contribution of the individual governments to the construction of common but not necessarily uniform policies — providing, however, that no further level of decision-making is added to what is already a complex process at Community level.

The failure to identify a new system of weighting the votes, one which does not favour so overtly the smaller states, and the failure to determine the ideal number of Commissioners are, in turn, due to the failure to reach unanimous agreements, even though all the governments agree on the need to do just this; hence the deferment of these matters to a new Conference. It will not, however, given the existing rules on reform of the Treaties, be easy to overcome this state of *impasse*.

There are different and deeper rooted reasons for the failure to achieve other objectives. While it is true that, with regard to co-decision and the nomination of the Commission, the role of the European Parliament has been strengthened considerably, the co-decision procedure, despite being much improved in the new Treaty (and this is extremely important), is still not extended to the most significant areas which, on a decision-making level, are still the exclusive province of the Council. In other words, the gap known as the democratic deficit still remains to be filled. The connotations of this are more serious if we recall that most of the new economic legislation applied by the states of the European Union stems from Community legislation. Furthermore, the fast-approaching launch of monetary union will, being a fundamental step towards economic union, render ever more pressing the need for decisions relating to the EU's economic policy to be joint decisions, taken democratically. It is absurd to think that countries can, in the long term, remain linked to an order in which monetary policy is managed at supranational level, but in which there is no possibility of dealing with questions relating to economic policy at the same level. Even though the Community is, by the Treaties, granted the necessary competence, it is obstacled by the decision-making process at European level which is, in too many areas, handicapped by a lack of democratic control over decisions, (which only the European parliament is able, through co-decision, to overcome), and by the blocking of controversial decisions through the exercising of the right of veto at Council level.

The decision-making processes operational within the Council of Ministers have undergone only minor alterations. Unanimity is still required for decisions relating to the most important areas within the first pillar, and this even more markedly the case with reference to the second and third pillars. It hardly needs to be underlined that this procedure has the effect of blocking any decision to which even just one state is decisively opposed, thus producing deadlock in many situations in which it would be preferable to reach decisions; and enlargement of the Union can only render this situation more acute. And yet, as envisaged intelligently by the EEC Treaties of the 1950s, provision could easily have been made for a process of gradual transition from unanimity to majority voting in a series of first, second and third pillar areas.[58] Equally serious is the perpetuation of the requisite of the unanimous consensus of the Council and the unanimous ratification by the member states within the process of the revision of Community treaties: the provision contained in Art. N (ex Art. 236) of the Treaty represents a real obstacle to all future reforms, an obstacle which sooner or later must be acknowledged and removed.

Certainly, the new procedures of abstention (in foreign and security policy) and flexibility, or closer cooperation (in the areas of the first and third pillar) will allow measures to be taken by a number of states not representing the full membership, and without the need for unanimous agreement among the states. This measure, which was already introduced by the Maastricht Treaty in relation to the areas of the single currency and social policy and which is widely extended here, represents an important step in the right direction. Even in this regard, however, the governments, wary of moving forward too fast, introduced a so-called "emergency brake" clause which allows any member state, on the basis of "important and stated reasons of national policy" to oppose, and thus block the implementation of the new procedures. Furthermore, no real innovations are introduced in relation to the need for unanimity: decisions taken by states involved in a closer cooperation arrangement must be reached by all the states participating in such an arrangement. Thus, the right of veto raises its head once again, or in other words, continues to prevail on all levels.

In conclusion, we are still faced with two major problems: the democratic deficit resulting from failure to extend the EP's power of co-decision and the inability to reach decisions due to the maintenance of the national governments' right of veto. These problems can be considered the obstacles in the way of the establishment of an adequate institutional

and constitutional order for the European Union, and likewise as obstacles preventing us from reaching the threshold of irreversibility in the process towards the unification of our continent along federal lines: a process begun almost half a century ago and which has already produced astonishing results in the economy and in the economic wellbeing of the people of Europe.

When faced with the question of how these limits can be overcome, it is clear, from the experiences of recent years, that asking governments to renounce their right of veto and their exclusive legislative powers is asking too much.

Unless exceptional circumstances prevail, such as those of the immediate post war period, which are no longer present today, a power will never, by the very "nature of things", be prepared spontaneously to impose limits on itself. The drive needed for this to come about can originate only from a well informed and mobilised public opinion, from pressure exerted by local and regional communities, and from the intervention of the only organ which can, legitimately, represent the people of Europe: the European Parliament. The Parliament could establish the launch of a new constituent phase, one in which it assumes an active role in the process of institutional reform, a condition for guaranteeing its support for enlargement of the Union.

In the light of the diffident innovations introduced by the Treaty of Amsterdam, the European Union still lacks a proper constitutional structure. And with the prospect, undoubtedly positive, of enlargement of the Union to embrace the countries of central-eastern Europe, the Community appears from an institutional point of view, to be running the serious risk of regressing rather than evolving.

NOTES

* Abbreviations: TA = Treaty of Amsterdam; CT/EU = the consolidated text of the Treaty on European Union; CT/EEC = the consolidated text of the European Economic Community Treaty (see Note 1); IGC = Intergovernmental Conference; EP = European Parliament.

[1] This presentation of the results of the summit of the European Council in Amsterdam (16-17 June, 1997) is based, where necessary, on the French version (edited by the European Communities) of the text of the new Treaty (*Treaty of Amsterdam*, Luxembourg 1997, pp.

144,: hereinafter, TA), although reference will, for the most part, be made to the consolidated text of the Community Treaties, edited by the European Communities (*Consolidated Treaties,* Luxembourg 1997, pp. 168: hereinafter, CT/EU and CT/EEC, in which the new regulations passed in Amsterdam are inserted in their appropriate positions within the systematic order of Treaties on European Union and on the European Economic Communities and numbered according to a new system for numbering the articles of each of the two Treaties. Original reference numbers are given alongside the new ones.

[2] CT/EEC, art. 214.2/158.2.

[3] Protocol on enlargement, art. 1 (TA, p.111).

[4] Protocol on enlargement, art. 1 (TA, p.111).

[5] Protocol on enlargement, art. 2 (TA, p.111).

[6] CT/EEC, art. 189/137.

[7] CT/EEC, art. 190.2/138.2.

[8] CT/EEC, art. 190.5/138.5.

[9] CT/EEC, art. 190.4/138.4.

[10] CT/EEC, art. 251.2-6 (replaces art. 189 B).

[11] More precisely (here again we refer, using both the new and the old reference numbers, to the text of the articles of the CT/EEC): prohibition of discrimination on the basis of nationality (CT/EEC, art. 2/6); transport policies (CT/EEC, art. 71.1/75.1); sea and air transport (CT/EEC, art. 80.2/84.2); aspects of social policy (art. 2.2 of the relative protocol); European Social Fund (CT/EEC, art. 148/125); job training (CT/EEC, art. 150.4/127.4); trans-European networks (CT/EEC, art. 156/129d); European Fund for regional development (CT/EEC, art. 162/130e) ; technological research and development (CT/EEC, art. 172/130o); the environment (CT/EEC, art.175.1/130s.1); development cooperation (CT/EEC, art. 179.1/130w.1). It is to be remarked that not all the sectors mentioned come under the procedure of co-decision, only those parts of each which were, until now, subject to the procedure of cooperation, according to the indications contained in the articles and paragraphs of the Maastricht Treaty specified above.

[12] Public health, organ transplants and veterinary and phytosanitary measures (CT/EEC, art.152.4/129.4 already art.43); social security regulations for application to immigrant workers from other member states (CT/EEC, art.42/51); right of establishment of overseas citizens (CT/EEC, art.46/56.2); regulations on professional work and self-employment (CT/EEC art. 47/57.2).

[13] The right of citizens to move freely within the European Union (CT/EEC, art.18/8a.2).

[14] Employment incentives (CT/EEC, art.129/109R); social policy, equal opportunities (CT/EEC, art. 141.3/119.3); transparency (CT/EEC, art. 255.2/191a.2) fraud damaging to the financial interests of the Community (CT/EEC, art. 280.4/209a.4); customs cooperation (CT/EEC, art. 135/116); statistics (CT/EEC, art.285.1/213a.1); the protection of personal data (CT/EEC, art.286.2/213b.2).

[15] Following the innovations listed above, the simple consultation of the Parliament is now required in the following cases (here, for the sake of brevity, we quote the articles giving only the old reference numbers): active and passive electorate for council and European elections (art. 8b ; completion of the provisions on citizenship (art. 8e); customs duties (art. 14.7); serious effects on employment in the field of transport (art. 75.2); sea and air transport (art. 84.3); harmonisation of fiscal laws (art. 99); the reconciliation of national legislation (art.100); the movement of citizens of non Union states until 1995 (art.100c.1); specific measures to guarantee competitiveness in industry (art. 130.3); actions outside the Funds in the sphere of economic and social cohesion (art. 130b); research and technological development (art. 130n-130o); decisions and measures relating to the environment and to town and country planning (art.130s.2); mode of execution of regulations passed by the Council (art.145); categories of actions brought before the Court of First Instance (art. 168a.2); alterations to the statute of the Court of Justice (art. 188); election of the Court of Auditors (art. 188b); system of own resources which member states are recommended to adopt (art. 201); auditing, control of responsibilities and rules relating to implementation of the Community budget (art. 209); international agreements (art. 288§3); implicit powers of action (art. 235); actions relating to the social security and representation of workers and other measures in the sphere of social policy (Encl. I/14 Eleven-member agreement on social policy, art. 2.3); foreign and security policy (art. J.7); justice and home affairs (art. K.6). In the area of monetary union, among the cases which require a unanimous decision on the part of the Council, the consultation procedure is implemented in the following: excessive budget deficits (art. 104c.14); exchange rates for the ECU (art. 109.1); election of the President of the European Monetary Institute (art. 109f.l): other tasks of the EMI (art. 109f.7).

[16] Only in the following cases, which the Council may decide by majority voting, do the Treaties require that judgement be passed by the European Parliament through implementation of the consultation procedure (again only the old article reference numbers are given): suppression of restrictions on the freedom to offer services (art. 63); provisions regulating competition (art. 87); aid given to states (art. 94); the movement of citizens of non EU countries (art. 100c.3); specific technological research and development programmes (art. 130i.4); measures concerning the environment and town and country planning in relation to which it has been (unanimously) agreed to proceed on the basis of majority decisions (art. 130s.2). On the question of monetary union, among the cases which the Council may decide by qualified majority voting, the consultation procedure must be implemented in relation to: adoption of the statute of the European System of Central Banks (art. 106.6), the rules governing consultation, by the Council, of the European Monetary Institute (art. 109f.7); decisions relating to the start of the third phase (art. 109j.2 and 4); and the abrogation of derogations (art. 109.k.2).

[17] See note 12, above.

[18] The protocol on the Schengen Agreement (TA, pp.93-96).

[19] CT/EEC, art. 67/art.73 O (p. 65).

[20] CT/EEC, art. 137.3/118 (p.102).

[21] CT/EEC, art. 128.2/109 Q (p. 97).

[22] The protocol on the Schengen Agreement, art. 2.1 (TA, p. 94).

[23] CT/EEC, art. 128.2/109 Q.

[24] Right of establishment of overseas citizens (CT/EEC, art.46.2/56.2); scientific and technological programmes (CT/EEC art. 166/130i.1-2); joint technological research and development programmes (CT/EEC, art. 172/130o).

[25] Suspension of the Treaty conditions for member states which violate the principles of democracy, human rights and fundamental freedom (CT/EU art. 7/F.1).

[26] Implementation of joint strategies or actions in the area of foreign and security policy (CT/EU art.23.2/J.13.2, p.20). Procedural questions relating to foreign and security policy are decided on the basis of a simple majority of the members of the Council (CT/EU art.23.3/J.13.3).

[27] Guidelines on employment (CT/EEC, art. 128.2/109 Q); incentives for employment (CT/EEC, art.129/109 R); the workplace and social exclusion (CT/EEC art. 137/118.2); equal opportunities (CT/EEC, art. 141/119.3); health (CT/EEC, art. 152.4/129.4); transparency CT/EEC, art. 255.2/191a.2); fraud (CT/EEC art. 280.4/209a.4); statistics (CT/EEC, art. 286/213b); overseas countries (CT/EEC art. 300.1/228.1); customs cooperation (CT/EEC, art. 135/116).

[28] See Note 14, above.

[29] CT/EU, art. 23.1/J.13.1.

[30] See Note 26, above.

[31] CT/EU, art. 23.2/J.13.2.

[32] CT/EU, art.35/K.7; art. 40/K.12; art. 46/L.b.

[33] CT/EEC, art. 68/73 P.

[34] CT/EU, art. 46.c/L.c. It is not clear whether this refers only to Community institutions, or also to national institutions.

[35] CT/EU, art. 43.2/K.15.2.

[36] CT/EU, art. 43.1/K.15.1.

[37] CT/EEC, art. 11.2/5.a.2.

[38] CT/EEC, art. 11.2/5.a.2.

[39] CT/EU, art. 40.2/K.12.2 (1st parag.).

[40] CT/EU, art. 40.2/K.12.2 (2nd parag.).

[41] CT/EU, art. 23.1/J.13.1.

[42] CT/EU, art. 23.1/J.13.1.

[43] CT/EU, art. 23.2/J.13.2.

[44] CT/EU, art. 44/K.16.

[45] For example, the votes of the states participating in the cooperation arrangement amount to 59, a qualified majority of 42 votes would be required (76:54=59:x; therefore, 54*59:76=41.9); if the votes of the participating states totalled 46, a majority of 33 votes would be needed (76:54=46:x; therefore 54*46:76=32.6).

[46] CT/EEC, art. 11.1a/5.A. 1.a.

[47] A specific investigation is required in order to determine where the closer cooperation procedure provided for by the flexibility clause is in any case applicable (i.e. in which areas of the first pillar).

[48] CT/EEC, art. 11.1.c/5A. 1.c.

[49] CT/EEC, art. 11.1.b; 1.e (5A. 1.b; 1.e).

[50] CT/EU, art. 40.2/K.12.2; the weighting criterion is that provided for by art. 205.2/148.2 of the CT/EEC.

[51] This conclusion is, in effect, borne out by the referral — art.43.1.h/K.15.1.h of the CT/EU, new title on flexibility — to the "additional criteria" of art. 40/K.12 of the CT/EU and 11/5A of the CT/EEC.

[52] CT/EU, art. 23/J.13.2.

[53] Protocol on the application of the principles of subsidiarity and proportionality (TA, pp. 105-108).

[54] Protocol cit. Note 53, art. 3.

[55] Protocol cit. Note 53, art. 3 ("[the principle of subsidiarity] allows an intervention on the part of the Community, within the limits on the powers of the same, to be strengthened when circumstances render this necessary, and vice versa, to be limited or suspended when such an intervention can no longer be justified").

[56] A. Padoa-Schioppa, "Dalla CEE all'Unione europea: una riforma istituzionale necessaria", in *Il Federalista*, XXXI (1989), pp. 267-76; Idem, "Notes on the Institutional Reform of the EEC and on Political Union", in *The Federalist*, XXXIII (1991), pp. 62-72; Idem, "Sur les institutions politiques de l'Europe nouvelle", in *Commentaire* n. 58 (1992), pp. 283-92; Idem, "Verso la costituzione europea, principi e procedure", in *Quale federalismo per quale Europa*, Brescia 1996, pp. 425-46.

[57] Protocol on the role of the national parliaments (TA, p.113).

[58] At least in one case, the new Treaty makes provision for this: in the area of immigration, asylum and the movement of persons. After a transitory five-year period, certain measures may, after consultation of the EP, be decided by the Council by a qualified majority, or through application of the co-decision procedure. (CT/EEC art. 67.3-4/73.o.3-4: with reference to the measures covered by the CT/EEC art. 62.2/73 J).

Notes

REGIONAL UNIFICATIONS AND REFORM OF THE UNITED NATIONS SECURITY COUNCIL

World Order and the Structure of the UN.

The United Nations charter was drawn up, by the Conference of San Francisco, on the basis of the hypothesis that peace would be assured by the collective strength of those states which, in coalition, defeated the Axis powers in the Second World War. Consequently, five states (the United States, the Soviet Union, China, France and the United Kingdom) were given a permanent seat on the Security Council, and assigned the power of veto.

The charter embraced, at the same time, the further principle that all nations must contribute to the maintenance of peace. Provision was therefore made for the inclusion of a second category of states (non permanent members of the Security Council) selected in rotation, according to a criterion of "equitable geographical distribution," to sit on the Council for a period of two years.

When, in 1963, an amendment of the statute raised the number of non permanent members of the Security Council from six to ten, the General Assembly passed a resolution defining the geographical criteria according to which these states were to be chosen: five from the African and Asian states, one from Eastern Europe, two from the Latin American states, and two from Western Europe and "other states."

The principles governing the distribution of seats on the Security Council substantially led to the definition of eight large geographical regions: the United States, the Soviet Union (replaced in 1992 by the Russian Federation) the Republic of China (replaced in 1971 by the People's Republic of China), Western Europe, Eastern Europe, Africa, Asia and Latin America, to which was added the residual ninth category of "other states."

The political principle according to which the decision-making power was placed substantially in the hands of the world's most powerful states was, in part, corrected by the rule in force in the General Assembly that each state was entitled to one vote which, absurdly enough, saw a continental state like China afforded the same status as a city state like San Marino. As a result, a number of states representing less than 10% of the world's population can form a majority within the General Assembly. It must be stressed that this state of affairs cannot be considered democratic, even though there are some who erroneously apply this term when referring to the voting system adopted by the General Assembly. Democracy demands, rather, application of the "one person, one vote" principle.

Not only does the UN lack a democratic structure, it does not have any power of its own to wield at supranational level, surely an essential requisite of an organisation which aims to ensure the maintenance of peace. The UN has neither military forces, nor financial resources of its own. It is not, of course, a world government. It is, rather, a diplomatic machine. It is not an independent actor on the international political scene so much as the stage on which states (particularly the great powers) play their parts.

The history of the period following the Second World War has, of course, been shaped by bipolarism and by the Cold War, in other words, by the division of the world into two spheres of influence, American and Soviet, which non-aligned countries tried to eschew in the hope of forming a third grouping of states — the Third World between the two worlds struggling to dominate the planet. In this period, the UN was paralysed by the power of veto reciprocally exercised by the two superpowers.

The Unification of the World.

The collapse of the Communist regimes and the dissolution of the Soviet Union resulted in the disappearance of one of these two worlds, which are now united by their mutual subscription to the principles of representative democracy and market economy. The Third World, whose very existence depends upon the existence of the other two, is no longer the vehicle of a design which might be seen as an alternative to these principles. The example of China bears this out: indeed, the hefty economic growth of this country has been made possible by the introduction of market economy elements which can, in turn, only really be allowed to bear fruit by the democratisation of the country's political

institutions. Neither, as shown by the emergence of an aggressive trade union movement in South Korea, and the growth of a movement for democratic reform in countries like South Korea, the Philippines and Taiwan, can the authoritarian capitalist regimes of eastern Asia be considered a valid alternative. And the same can be said of Islamic fundamentalism, characterised by its opposition to the world market, to democracy and to religious freedom. The political change that is taking place in Iran provides confirmation of the fact that no state can isolate itself for any length of time, remaining on the fringe of the globalisation process. In more general terms, the defeat of the communist and fascist regimes of the 20th century supports the hypothesis that no closed form of society can resist the force of globalisation.

Therefore, these three worlds are now coming together to form one world, without any other qualification, as a system is established which will give rise to a new order whose features are, however, still ill-defined. The movement towards a world economy, which is sweeping aside all the obstacles placed in the way of the formation of a single world market, is the clearest possible demonstration of the fact that the world is moving irresistibly towards unity. For the first time in history, the market economy is assuming world dimensions, driven on by the revolution in production, communication and information techniques.

Globalisation is not only impelled by economic incentives, but also by an irresistible historical force, stronger than the will of any government or any party: the force unleashed by the evolution of the mode of production. In all areas of life, it is imposing much broader dimensions than those of the sovereign states, even the largest ones.

The Crisis of the Sovereign State and the Decline of Power Politics.

The expressions "crisis of the sovereign state" and "decline of power politics" describe a general trend emerging within the spheres of international organisation and the structuring of the state. This trend can be adequately comprehended in the light of the federalist theory whose interpretation of the events of contemporary history revolves, indeed, around the concept of the crisis of the sovereign state. The most important, but not the only, factor behind the crisis of the sovereign state is the contradiction between the national dimensions of the state and the internationalisation of the production process, itself the result of a turning point in the evolution of the mode of production: the scientific revolution. The world has become more and more closely interdependent as an

increasing number of problems have acquired broader dimensions than those of the nations themselves. That the extent of this phenomenon is universal is demonstrated by the fact that the world's most powerful state (the United States) seeks, through NAFTA, a means of acquiring the dimensions needed to compete with the large economic areas which are forming in the world.

There is, however, another problem which characterises the crisis of the sovereign state: the profound change in the way in which security is organised. The cost of the arms race has become intolerable for the United States and Russia. And it is not only the destructive nature, but also the very cost of arms which has generated a crisis in power politics. Indeed, power politics is so expensive that it ends up by turning against those who practise it. In other words, in this era of global interdependence and weapons of mass extermination, power is tending to become self-destructive.

As a result of this, the superpowers abandoned the Cold War thoroughly exhausted. Putting an end to military confrontation, collaboration was deemed the best means of survival. Therefore, nuclear arms and other weapons of mass destruction have brought about the decline of power politics and have opened the way, with the new Soviet strategy based on the principles of "mutual security" and "non offensive defence", to the exhaustion of the *raison d'état*. All this shows that the new course of world politics is not only to be attributed to goodwill, but is, above all, born of necessity.

Finally, while the role of sovereign states is declining on the world's political stage, new protagonists are starting to come to the fore: political groupings which embrace a number of states and nations, the prime example being the European Union. The significance of this trend lies in the fact that there no longer exist states which have the power and resources needed to achieve world supremacy. The superpowers, having sought to unite the world under their respective dominion, have given up their mutual political and ideological competition, realising that the arguments in favour of cooperation carry more weight. In other words, in the post-bipolar era, the world has come to realise that no state or alliance of states can hope to dominate the world and, with this awareness, all strive to gain maximum benefit from the globalisation of the markets.

The Formation of Regional Groupings of States.

In the fifty years following the end of the Second World War, the

structure of the Security Council has remained substantially unaltered. Despite changes in the balance of world power, it still reflects the order established by the powers that won the war.

The end of bipolarism, the order which, until the fall of the Berlin wall, controlled the world, was accompanied by the dissolution of the Soviet Union and a decline in the power of the United States, which now, more and more, depends on UN support to legitimise its international policing interventions. The crisis of the national state in Europe has coincided with the increase in the influence of the European Union within the world economic system; at the same time, Germany and Japan, precisely because they were compelled to give up the role of military powers following their defeat in the Second World War, and therefore not obliged to bleed themselves dry in the arms race, have become major economic powers with greater influence on the international scene. Finally, in the southern hemisphere, as well as the emergence of subregional powers in Africa (Egypt, Nigeria and South Africa), Asia (India, Pakistan and Indonesia) and Latin America (Brazil and Argentina), integration processes are under way which appear to be creating the political and economic conditions necessary for the independence and growth of these geopolitical areas.

The way in which the world states system is evolving has led to the formation of new regional groupings of states. China and Latin America are the only areas which have, in the period since the Second World War, maintained almost entirely unaltered their original geo-political features. However, the formation of Mercosur (embracing Argentina, Brazil, Paraguay and Uruguay and showing, after the economic agreements reached with Chile and Bolivia, a tendency towards enlargement) has rendered Latin America a much more dynamic economic area and set in motion a process of regional integration. The United States, meanwhile, has been the driving force behind the creation of a North American economic area which embraces Canada and Mexico (NAFTA). The Soviet Union has been replaced by the Commonwealth of Independent States, and the collapse of the Communist regimes in the Soviet Union and in central and eastern Europe has made it possible to overcome the divide between the two Europes, opening up the way towards enlargement of the European Union as far as the borders with the Russian Federation (thus drawing in central and eastern European countries and the Baltic republics). Africa is divided into two geopolitical areas: sub-Saharan Africa and the Arab world, which includes the Middle East. Asia, meanwhile, encompasses four regional areas: China, the states of

southern Asia, grouped around India (Saarc), the states of South East Asia (Asean) and Japan. The latter which has, until now, remained in a relatively isolated position, is likely to be driven by the recent economic crisis in Asia, to seek greater integration with the surrounding area.

Finally, there is the South Pacific region which, following the establishment of the South Pacific Forum, is starting to emerge as an independent area.

The taking on of regional dimensions is proving to be the way to create the economic space required for the development of modern production techniques and to acquire the weight needed to obtain real independence from the great powers. If the European Union which, having nurtured a process of economic integration, is now moving towards political union and extending its powers to the area of foreign and security policy, can be seen as a pilot project, it is foreseeable that the other ten large regions which are taking shape in other parts of the world may, in the future, become the protagonists of the new world order of the post bipolar era.

The Trend towards Fragmentation.

The movement towards unification is contrasted (but not obstructed) by a trend towards the fragmentation of multinational states and international organisations. While its epicentre lies in the former Communist bloc, this trend has nevertheless taken on global proportions, involving both the United States, where a re-emergence of secessionist tendencies has materialised in the Southern states, and the European Union, where there is a growing number of separatist movements: in the Basque Provinces, Catalonia, Corsica, Padania, Scotland etc.

This is a trend which has its roots in two events. First, the collapse of the bipolar system together with the lack of a new world order — the antagonism between the blocs represented a uniting force among alliances and states which today is lacking — has left the way clear for the emergence of disintegrative forces which disseminate fierce tribal conflicts, sow hatred and violence everywhere and lead to the erection of new walls. At the same time, the universal ideologies of democracy and communism (which fought for world dominion during the Cold War, and are now perceived as the hegemonic expression of the superpowers) allowed the emergence of archaic forms of collective identity of an ethnic or religious nature. Micronationalism and tribalism now fill the gap created by the loss of legitimacy of communism and the exhaustion of the universal aspirations of democracy which, paradoxically, went hand in

hand with the increasing diffusion of democratic régimes.

Second, the process of globalisation, which unifies the world, makes societies uniform and brings down barriers, induces in circumscribed territories a desire to return to one's roots, a reaction which is the expression of a need for solidarity within local and regional communities. To this can be added the crisis of the national state which has accompanied the loss of impetus of the forces that formerly fostered centralisation and nationalism. All this creates space both for autonomist and separatist movements. Ethnic identities, and the sinister racist connotations which distinguish them, are presented as the formula which legitimises the new powers which are rising out of the ashes of the old order.

European and Partial World Government.

Europe is the decisive ground in the clash between the trend towards unification and the trend towards fragmentation. Indeed, in the building of peace among the member states, the European institutions have produced more substantial results than the UN, a fact which must be taken into account in the formulation of plans to reform the organisation.

The federal unification of Europe will represent the starting point of the overcoming of the political formula of the national state. The European federation will be a model of a multinational political order, the first form of international democracy, the first step towards world unification. Indeed, the transformation of the Union into a federation will show how the political formula of the national state can be overcome through the transfer of powers to higher and lower levels, and through the creation of a multinational state. States will have to learn to organise power on different levels of government, which are both independent and coordinated, in order to create among nations divided by secular hatred and discord the legal and political conditions allowing them to live together as equals, each one preserving its own identity. It is a model which will allow other regions of the world which aspire to unity, and indeed the whole world, to develop a formula that reconciles unity with diversity.

Furthermore, the European federation will be the first concrete example of international democracy, the first form of democratic government set up above the level of the historically established sovereign states. This is the direction which must be followed if control of international politics is to be taken away from the great powers and placed in the hands of the people.

The European parliament, the embryo and first manifestation of international democracy, will be more inclined than other international institutions to extend this experiment on a world scale. The sooner it obtains full legislative and control powers not only in the field of economic and monetary policy, but also in the field of foreign and security policy, the sooner its influence on world politics will grow. On this subject, it is important to underline that, in the field of international commerce, the European Union already behaves as a single state and, being the world's the strongest commercial power, it wields considerable influence. It is a vital interest of Europe to keep the world market open and to strengthen the international institutions which make it possible to pursue this end. This is why the European Community promoted the establishment of the World Trade Organisation.

So, within the G7, the European Commission sits alongside the big four member states of the European Union. The coming into force of economic and monetary union in 1999 will open the doors, to the European Commission, of the International Monetary Fund and the Bank for International Settlements. The euro will become a world currency, thus creating the conditions needed for a reform of the current international monetary system which is based on the supremacy of the dollar.

On the contrary, in the area of foreign and security policy, still governed by the principle of unanimity, the European Union is not, however, in a position to act effectively.

In conclusion, the missing link, the factor which would allow the world to move decisively towards a peaceful order, is a Europe that is able to act as a single subject. While, in the context of bipolarism, European federation was an experiment of unification conducted within the confines of the Western bloc which aimed to create a third pole between the superpowers, in the post Cold War world, it becomes an independent centre of power which tends to act as a hinge between East and West and between North and South. Unlike the United States, it has a vital interest in developing positive relationships, based on cooperation, with the areas adjacent to it: the former communist world, the Mediterranean and Africa. Although the first task is to complete the process of European unification in the eastern and southern regions of the continent, there is also the need to strengthen the international institutions (OSCE, the Lomé Convention and the Mediterranean Forum) which bind Europe to its neighbouring continents.

It is a mistake to think that a Europe endowed with its own foreign and defence policies would represent a threat to Russia; on the contrary, this

could only help to guarantee Russian security. Equally, with its own foreign and defence policies, Europe would have the power to condition United States policy, to move it to collaborate more closely with Russia and to strengthen the UN. In this way, the conditions would be created for close cooperation, on the basis of the shared principles of democracy and market economy, between the European Union, the United States, the Russian Federation, and Japan, and for the creation of a *partial world government* which would have the character of an invulnerable alliance, and would be able to steer the world in the direction of unification and to strengthen the powers of intervention of the UN.

The OSCE (despite the fact that it does not include Japan), the creation by NATO and the Russian Federation of a common institution, and the recent inclusion of Russia in the G7 are the first signs of the emergence of a new world order, one which sees all northern countries agreeing on common principles of defence and economic cooperation. And it is the pattern of international relations, now characterised by the reconciliation of Russia and America, which represents the distinctive new feature of these post bipolar era bodies. An order is emerging which is no longer antagonistic, no longer built to counteract the enemy but, one whose real task is, rather, to govern the process of world unification.

The Transformation of the Security Council into the Council of the Great World Regions.

As a result of the redistribution of power following the collapse of the bipolar system, the current composition of the Security Council is an anachronism. Hence the need to enlarge and transform the latter from a directorate of the five major powers into a more representative body. This problem can be tackled in two different ways. The traditional way is to admit to the Security Council the strongest states, which have risen to the top positions in the hierarchy of world power. This proposal itself has three variants. The first provides for the assignment of permanent seats to Germany and Japan; the second envisages the enlargement of the Security Council to embrace five new permanent members (Germany and Japan, plus three states representing, respectively, Africa, Asia and Latin America). These new permanent members would not, however, be allowed the power of veto and there would, furthermore, be an increase in the number of non permanent members. The third variant, put forward by Italy, proposes, in addition to the two existing categories of Security Council members, the formation of a third category comprising ten semi-

permanent members, drawn from a list of thirty states representative of the great world regions. These members would rotate more frequently (one biennium in three).

What these three proposals have in common is the intention to enlarge the Security Council through the inclusion of the strongest states, entrusting them with the task of representing the interests of the smaller states belonging to the same region. Thus, Germany would represent the Benelux, Scandinavian and central and eastern European countries, Japan would represent the countries of the Far East, South East Asia and some of the Pacific region, and so on.

The states which have campaigned most actively to change the composition of the Security Council are those which were defeated in the Second World War. Precisely because they occupy second, third and fifth places among the main state-contributors to the UN budget, Japan, Germany and Italy want a *status* befitting their contribution. The two proposals which would modify the composition of the Council in favour of these states are proportional to the ambitions both of the two great economic powers (Germany and Japan) and of a medium size power like Italy which cannot aspire to a permanent seat.

The plan to assign permanent seats to Germany and Japan (aiming to find a rapid, or so-called *quick fix* solution to the problem of Security Council reform) formerly supported by the United States, has proved to be unrealistic and been abandoned. It would have strengthened the hegemony of the North over the South of the world and would also have assigned three seats to Western Europe, and therefore a totally disproportionate weight. The second plan, currently supported by the United States, has run into similar difficulties as the countries of Latin America, Asia and Africa are not willing to be represented by the biggest states within their respective continents.

All these solutions (including the one based on the creation of a category of semi-permanent members) encounter the hostility of those excluded, especially of those countries which claim to be more entitled to belong to this body. They all reflect the principles of domination and inequality which shaped the current structure of the Security Council, but which are no longer adequate to meet the needs of the modern world, and are incompatible with the objectives of equality and justice now emerging in the sphere of international relations.

The best way to ensure a fair reform of the Security Council is through the formation of regional groupings of states. The reorganisation of the world order on this basis represents an alternative not only to the

hierarchical organisation of power, determined by the disparity between states of different sizes, but also to the fragmentation of the world into a mass of small and tiny states which find themselves up against larger states.

The difference between the sizes of the member states is, indeed, the main reason why the UN is unable to work well. The constant increase in the number of member states of the UN (there are currently 185, more than three times as many as in 1945) is indicative of an alarming trend towards fragmentation and anarchy. What is needed, first of all, is to encourage regional groupings to emerge and strengthen their cohesion within the General Assembly, so that they can be represented within the Security Council.

The growing cohesion of the European Union within the UN is strictly related to the degree to which the process of unification leading to the launch of the single currency in 1999 has advanced. Recent research into the voting behaviour of EU members within the UN shows an 86 per cent rate of cohesion; in other words, the EU is, in the overwhelming majority of cases, already behaving as a single subject in the bosom of the UN. This means that the conditions are maturing for it to be given a permanent seat on the Security Council.

In September 1997, the Foreign Affairs Committee of the Italian House of Deputies concluded a study on the United Nations, approving a document which calls for the EU to be assigned a permanent seat on the Security Council. Then, during a speech made to the General Assembly on September 25th, Dini, the Italian minister of foreign affairs, confirmed that this proposal had the support of the Italian government, thus paving the way for a different solution from the one favoured until that point.

The birth of the euro will strengthen considerably the powers of intervention of the EU on an international level, bringing ever closer a time when Europe will be able to speak with a single voice on a political level too. The current weakness of Europe's international position is due to the fact that decisions on foreign and security policy must be taken unanimously. This is the gap that must be filled to make possible the inclusion of the EU on the Security Council. As well as constituting recognition of the rights of all the states of the Union to be represented on the Security Council, with no distinction made between permanent and non permanent members, EU membership of the Council would also resolve the problem of Germany's demands for representation. It must be considered that the admission of Germany to the Security Council would encourage, in that country, the development of a foreign policy independent of that of the EU and thus provide a stimulus for the rebirth of German nationalism.

The European Union, precisely because it is the most advanced of the processes of regional unification developing in the world, could become the focus of an initiative to reform the Security Council along regional lines. The significance of enlarging this organ to include the European Union, would be to offer mankind an example of a form of international organisation whose influence in the world is based on the power of attraction of its system of integration rather than on military strength, thus providing other world regions, which are still composed of separate sovereign states, with the impulse to move towards federal unification.

In short, this solution offers three advantages: 1) all states (rather than only the most powerful ones, which is currently the case) would be represented on the Security Council through their respective regional organisations, 2) the hegemony of the superpowers and the inequality among states could gradually be overcome through the reorganisation of the UN on the basis of the formation of groupings of states of equivalent size and power; in particular, the developing countries in Africa, the Arab world, Latin America, southern Asia and South East Asia can find in political and economic unification the way to emerge from their current condition of dependence, 3) the unfair discrimination between permanent and non permanent members could finally be overcome by replacing the right of veto with a majority vote system.

Lucio Levi

ASPECTS OF THE EVOLUTION OF EUROPEAN UNIFICATION IN THE PROJECT PRESENTED BY THE COMMISSION FOR CONSTITUTIONAL REFORM INSTITUTED BY THE ITALIAN PARLIAMENT

Introduction.

The transfer of increasingly significant shares of sovereignty by national states to EC institutions, which has, and continues to characterize the process of European unification, has inevitable repercussions on the constitutions of many EU member states. Indeed, ever since the post-war period, the various countries have, while conserving a strong sense of common values, nevertheless found different ways of regulating their supranational integration through constitutional channels; and this applies particularly to most of the continental legal systems.

In recent years, following the ratification of the Maastricht Treaty, and with the prospect of further transfer of powers to European level, the significance of the relationship between national constitutions and European unification has been increasing steadily, and in this context, the recent proposal to add several articles relating to the European Union to the Italian Constitution can be seen as paradigmatic, as it embraces problems shared by various constitutions.

The most recent attempt (still in progress) to bring about a broad revision of the Italian Constitution has been, of course, the institution, through the constitutional law no. 1 of 1997, of a parliamentary commission to develop "projects for a revision of Part II of the Constitution, with reference in particular to form of state, form of government and bicameralism, system of guarantees."[1] The above constitutional law provides for a different procedure of ratification from the one (written in Art. 138 of the Constitution) which is ordinarily applied. The new procedure involves a preliminary examination by the Commission of the projects which have been submitted to it, followed by the communication to the houses of parliament of a project developed by the Commission (this stage was concluded on November 4th, 1997), debate of the same by parliament and finally, if the procedure manages to get this far, the ratification of the project by both houses, this ratification taking the form of a single constitutional law to be sanctioned at a later stage by referendum.

The project for constitutional reform, defined by the bicameral Commission on November 4th,[2] contains among other things a section,

"Titolo VI", which is made up of three articles entitled "Italy's participation in the European Union."[3] It is a completely new addition to the existing text of Part II of the Constitution, designed to introduce, for the first time, constitutional rules relating to Europe. The present paper, however, will deal only with Art. 114, the first of the three articles contained in "Titolo VI", which, in the texts published during the work of the bicameral Commission, is entitled "Participation in EC building and procedures for the conferment of further powers."[4] This article is in fact the one central to a definition of the constitutional position of Italy *vis à vis* the evolution of the process of European unification.

A brief analysis of the work of the Commission on this aspect, a subject which will be picked up again further on, will be followed in this paper by an examination of the legal-political aspects of the text in question, in an attempt, as far as possible, to distinguish between questions of legality and those of political opportuneness.

The Drawing up, by the Commission, of Art. 114.

There were two reasons why the bicameral Commission decided to approach constitutional reform with regard to relations between Italy and the EU: the first, a formal one, was the presence, among the projects presented to the two branches of parliament and examined by the Commission, of proposals for a revision of this area; the second, of a substantial, or rather legal-political, nature was the firm belief of many jurists and many political figures, including the foreign minister, that there existed a need, particularly in the wake of the Maastricht Treaty, to modify the Italian Constitution with regard to the question of European integration,[5] also to reflect the constitutional changes implemented upon ratification of the Treaty by other states.[6]

After its first meetings, the Commission was split into 4 committees, each given particular areas of competence. Issues relating to "a constitutionalization of the process of European unity and, in particular, to legislation relating to the relinquishing of quotas of sovereignty" were entrusted to the Committee on Parliament and Legislative Sources.[7] After being elected by the said Committee as its spokesman on the European issue, D'Amico MP (Rinnovamento Italiano) immediately expressed misgivings (doubts which had already emerged and which, not without foundation, have coloured all discussion of the question of the constitutionalization of Italy's membership of the EU) over the relationship between the reforms proposed and the first part of the Constitution

(especially Art.11, considered to constitute the basis for Italy's involvement in the process of EC integration[8]) whose revision, it should at this point be recalled, is precluded by the constitutional law by which the Commission itself was instituted.

In the course of the discussions conducted by the Committee, which in actual fact dealt mainly with questions relating to the reform of parliament and of legislative sources, the opinion emerged that there existed a need to "render explicit the transfer of sovereignty to the European Union," an idea generated by a firm belief in "the need to build into the Constitution the principle of Italy's membership of the EU, given that the existing Art. 11 of the Constitution cannot, to this end, be considered sufficient."[9] These notions are present in Art. "A" of both the article drafts presented by the spokesman during the work of the Committee.[10] The article itself, which underwent only minimal changes between its first and second drafts, provided substantially for the following: 1) Italian membership of the EU, and the possibility, in compliance with "the supreme principles of the Constitution" to transfer further powers to the EU; 2) within the context of the EU, the subordination of Italian action to the pursuit of certain objectives; 3) a formal revision of the Constitution to be carried out whenever there is a transfer of powers to the Union which requires modification (or even, in the second draft, derogation) of the Constitution; 4) the possibility, for certain bodies, to request a control by the Constitutional Court of the legality of powers transferred to the EU.

It is important to underline that, in addition to a general and not particularly innovative declaration of Italy's membership of the EU and of the criteria on which this membership must be based, a mechanism of constitutional revision was proposed as a means of ratifying the transfer of powers to the Union,[11] something for which, until now, ordinary laws have always sufficed.

The work was then taken up again by the Plenary Commission, with the spokesmen delivering the proposals, based on the debates conducted by the committees, destined to become the texts which would be debated and put to the vote by the Commission.[12]

In his introductory speech, D'Amico underlined that the first article proposed should be seen as a form of constitutional "cover" for Italy's involvement in the process of European integration, necessary to rectify the rather forced interpretation of Art. 11 which had been used to justify the ratification, by ordinary laws, of the EEC and EU treaties.[13]

The contributions of other speakers revealed, on the one hand, concern over the proposal to constitutionalize the principles guiding Italy's role in the process of European construction, based on the fear that these principles may to a certain extent oppose those sanctioned by the first part of the Constitution, effectively creating two separate tracks. This fear was accompanied by requests to render more rigorous the procedures for the transfer of sovereignty, with provision being made for: a procedure for revision of the Constitution, preventive checks to be conducted by the Constitutional Court and the possibility of requesting referenda on European treaties.[14] Some, on the other hand, were of the opinion that there is no need to build such detailed principles into the Constitution, it being sufficient to state "that the action of the Republic within the EU is carried out with the aim of ensuring that the citizens are granted an increasingly broad democratic role in the decision-making process;" those who hold this view are convinced that a process of constitutionalization hinges merely on the "obligation to increase the level of democratic involvement in EU decision-making mechanisms."[15]

Following discussion and the presentation of amendments, the spokesman rewrote the text he had originally drafted. The alterations, however, were of a minor level, apart from the exclusion of parag. 3, the one concerning the provision for a procedure of constitutional reform.[16]

Further amendments to the text were proposed, debated and approved during the meeting at which the article, in the version that ultimately went before parliament, was passed.

The first amendment debated was the one proposed by commissioners Boati and Pieroni (Green Party), destined to form the basis of the final draft of the article. This text echoed Art. 11, talking in terms of limitations of sovereignty rather than the conferment of powers and competence,[17] and instead of listing principles with which Italy should conform, it correlated "the alienation of sovereignty with the principle of increased democratic involvement" in the EU.[18]

To this text was added, upon the suggestion of Salvi MP (Democratic Left), the main part of the amendment proposed by the group of the Democratic Left, which provides for: further "limitations of sovereignty sanctioned by an absolute majority of the members of both houses," thereby reintroducing the idea, albeit different from the constitutional solution, of a more rigorous procedure. It could, substantially, be seen as a middle way between the elimination of any reference to procedures leading to further limitations of sovereignty and the request to have recourse to constitutional law.[19] This proposal was immediately explained in these terms by Salvi himself who, believing that Art. 11 of the

Constitution had been applied beyond its scope, maintained that the process of integration and eventual transfers of sovereignty must be guaranteed not only by a respect for principles, but also by a procedure which is "not destined to bring everything to a halt, this being precisely what would occur in the case of a constitutional revision procedure" and which would furnish the "instruments of guarantee (...) with which we are not, at the present time, equipped."[20] The aforementioned middle way also went some way towards appeasing those opposed to the possibility of relinquishing areas of sovereignty[21] whose views culminated in the amendment (subsequently rejected) in favour of the implementation of a constitutional reform procedure for every transfer of sovereignty, proposed by senator Salvato (Communist Refounders), and in her insistence (approved) on provision being made for the possibility to request referenda on the subject (something which in fact is already provided for, in relation to all international treaties, by the reform of the current Art. 75).

On the other hand, the "Salvi" proposal led senator Elia (Italian Popular Party) to object that the introduction of a new legislative source would "modify Art. 11 of the Constitution," on the basis of which recourse has never before been had to constitutional laws.[22]

On June 30th, 1997, the Commission presented its first draft of the project to parliament.[23]

Subsequently, following the presentation of amendments by members of parliament who were not on the Commission, a small bicameral committee was set up to make a few alterations to the text, then, on November 4th, 1997, the bicameral Commission approved the revised project to be debated and voted upon by the houses. As regards the article of interest to us here, apart from formal changes, the variations made to the text approved in June were the following: 1) all reference to "further" limitations of sovereignty was eliminated to avoid the risk of generating doubt over the legality of decisions ratified prior to the reform (and it is important at this point to recall that, in the course of the debate, the chairman of the bicameral Commission had underlined, in response to the fear expressed by senator Elia that the introduction of the more rigorous procedure in question may cast doubt over the validity of the ratification of previous treaties, that the text in question, with its references to "further limitations" would not in any case have been applicable to that which had occurred in the past, marking the introduction of tighter procedures for the future only;[24] 2) provision was made for the possibility that an *ad hoc* referendum may be requested on the limitation of sovereignty law, thus tightening up the procedure still further and rendering it even more

similar to the solution based on constitutional reform.

These debates, which were both rapid and complex, resulted in the drafting of Art. 114 of the project brought before the houses on November 4th, 1997. This article runs as follows:

"Italy takes part, on equal terms with the other states and in compliance with the supreme principles of the Constitution and the inviolable rights of man, in the process of European unification: it promotes and supports a system based on the principles of democracy and subsidiarity.

Limitations on sovereignty sanctioned by an absolute majority of the members of both houses are admissible. The law will be submitted to a referendum when, within three months of its publication, such a referendum should be requested by a third of the members of either house or by eighty thousand voters, or by five regional assemblies. Unless it is approved by a majority of legitimate votes, the law put to referendum will not be promulgated."

This is the text which is discussed herein.

The Constitutionality of the Reform Proposed by the Bicameral Commission.

What emerges clearly from the debate outlined above, is the importance of interpretation of Art. 11 of the Constitution, with reference, in particular, to the extent of limitations on sovereignty and to the legislative acts able to determine them.[25] While this is not the right place to look at this question in depth, the account of the debate nevertheless shows that there is an increasing feeling, particularly in relation to the ratification of the Maastricht Treaty, that Art. 11 was, in hindsight at least, an inadequate basis for Italy's participation in the process of European unification.[26]

If, on the other hand, the interpretation of the Constitution which "views the national state as a value which should not be pursued, supporting instead the subjugation of the same to supranational entities" were to be adopted, Italian support for a federal Europe would be beyond question. The said interpretation, upheld also by the present author, identifies federalism as the real "constitutional directive," given that peace and justice among equals cannot be had without the subjugation of the absolute sovereignty of states to a federation of the same, and thus favours "the possibility of introducing a supranational state through a treaty that can be ratified and implemented by *ordinary law*," in compliance, obviously, with the "liberal and democratic" values of the Constitution, for the complete affirmation of which the subjugation of the

national state is a requirement.[27]

Having said that, let us look at how the Italian Constitutional Court interprets the aspects of Art. 11 which are of interest to us here, that is, the legislative acts that provide for "limitations on sovereignty" and, in general terms, the "counterlimitations" which these acts themselves encounter. In short, according to the Court's now well established interpretation of the article in relation to these aspects, it is possible on the basis of Art. 11, and to the ends indicated by the same, to institute "supranational" bodies and to determine the consequent limitations of sovereignty by means of ordinary laws which have the power to authorize the ratification and implementation of the relevant treaties. This procedure is limited only by the need for compliance with the fundamental principles of the Constitution and with the inalienable rights of the individual, a limitation applicable even to the reform of the Constitution itself (decision no. 1146/1998 of the Italian Constitutional Court).[28]

Following on from what has been said so far, it must be considered that the reform proposed by the bicameral Commission, which introduces (as much in the hypothesis of provision being made for the application of a constitutional law as in that of provision for a special *ad hoc* majority), a procedure for deciding those limitations of sovereignty that are an inevitable part of the process of European unification, which is different and more rigorous than the one actually applied as routine parliamentary practice (which complies with the decisions of the Constitutional Court, in other words the "existing constitution"), and that, even without altering the wording of Art. 11 of the Constitution, this reform would nevertheless have repercussions on the provision contained therein. This is truer still in the light of the fact that the said article "is not only of substantial, but also of procedural value."[29] From this arises the first doubt over the legality of the reform. Upon consideration, it appears in fact that paragraph 2 of Art. 114 of the project proposed by the bicameral Commission goes beyond the Commission's own sphere of competence, laid down in the Constitutional law by which the Commission itself was instituted (constitutional law no. 1 of 1997) to develop projects for a revision of Part II of the Constitution which, entitled "the organization of the Republic" is substantially devoted to the rules governing the organization of the state.[30]

The second doubt over the legality of the reform, more general but whose implications are more far-reaching, is generated by the unquestioned inclusion, among the fundamental principles of the Constitution, of Art. 11, and of the principle of Italian adherence to a supranational

system to which it is linked.[31] Consequently, even through constitutional law, this guiding principle of the Italian Constitution (to the pursuit of which the constituent assembly has bound the Republic) is untouchable, and this in turn means that the questions of legality, raised here in reference to the proposal put forward by the bicameral Commission, may be considered founded even should this proposal be advanced in the form of a "normal" constitutional law, (in other words, without implementing the procedure in question, reduced as it is to an overall revision of the final part of the Constitution).

Furthermore, with regard to the rest of the article in question, and paragraph 1 in particular, it is to be noted that no significant innovations emerged from the work of the bicameral Commission, which limited itself, rather, to an explanation of the principle of openness to a supranational system, (with precise reference to the process of European integration), and to the assimilation of certain interpretations of the Constitutional Court, an opportune move in view of the political centrality and the legal importance that the process of European unification has acquired, not to mention the prospects for its development. The text proposed contains, first of all, the assertion that "Italy participates," in accordance with the conditions provided for by Art. 11 and by the decisions of the Constitutional Court (equality and respect for inviolable principles), "in the process of European unification," an assertion which, on the one hand, is a statement of what has occurred and an assimilation of the interpretations of the Constitutional Court and, on the other, a highlighting of one aspect of the constitutional directive contained in Art. 11. Secondly, again highlighting principles already contained in the first part of the Constitution, it indicates the ends which Italy must pursue as it plays an active part in the process of European integration: the principles of democracy and subsidiarity. In short, the bicameral Commission seems, so far, to see the overall reform process currently in progress as an opportunity to determine the position of the Italian Constitution *vis à vis* European integration, with a view, in the short term, to applying these guidelines in a concrete manner.

In the light of these considerations, the tightening up of procedures provided for in paragraph 2, (whose poor compliance with the written constitution, has already been illustrated herein) appears all the more significant, constituting the main innovation within the reform, almost as though all the constitutional problems linked to the process of European integration were of a procedural nature. Furthermore, a marked lack of consistency emerges between the assertions contained in paragraph 1,

which, reflecting the line of interpretation so far adopted, establish, for the law makers, the framework within which eventual procedures for "deepening the EU" should operate, and paragraph 2 which puts an extra obstacle (procedural, not substantial) in the way of European integration. Although this inconsistency may in part be due to the genesis of the article, (the result, as we have seen, of a hurried fusion of different proposals), this is no reason to consider it any the less serious. On the contrary, the gravity of this inconsistency increases if a further aspect is taken into consideration, paradoxical if attributable to an oversight, alarming if the product of political will. Indeed, judging by its position, the more rigorous procedure regulating the transfer of powers seems to refer exclusively to Italy's involvement in the process of European integration and not to other supranational organisations, be they existing ones or those set up *ex novo*. Thus, eventual treaties providing for limitations of sovereignty in favour of entities other than those of the EU would be governed exclusively by the terms of Art. 11, and, as such, could be approved through the application of ordinary legislative procedures. Thus, a treaty which limits Italy's sovereignty, transferring powers to an existing entity which has nothing to do with European integration (the UN, for example) or a newly established supranational organisation (such as a Mediterranean alliance with North African countries) would enjoy, from a procedural point of view, different and more favourable treatment than one transferring powers to the European Union!

Quite apart from the hypothesis (not, given the record of the bicameral Commission, so very far-fetched) that there may exist a political desire, whose substance would have to be verified in parliament, to place procedural obstacles in the way of European unification, doubts remain over the soundness (political as well as legal) of this proposed reform.

Reform of the Italian Constitution and European Federation.

Had one of the aims of the constitutional reform discussed in this paper been to set the process of European integration, which is now effectively and very much under way, moving in the direction indicated by the guiding principles of the Italian Constitution, then it would be appropriate to broach the issue from another angle.

The problem of the relationship between the Constitution and the process of European unification, given the advanced stage that the latter has reached, is not the formal question of the juridical source (constitutional law, ordinary law, *ad hoc* source) which has the legitimate power

to transfer, in part, the sovereignty of Italy to a European authority, so much as the substantial question of the conformity of the process of unification with the principle of democracy, in terms both of the genesis of the new holder of sovereignty and of the way in which this new authority functions. It is no longer possible to ignore the need, within the process of European unification, to guarantee the compliance with the principle of democracy as the basis for sovereignty which is implicit in a "federalist" reading of Art. 11 and in its balancing with Art. 1 of the Constitution; in other words, the need to ensure that there exists a directly proportional relationship between the transfer of national sovereignty and the creation of a supranational democracy.

The centrality of this question has been highlighted by various interpretations of the famous decision on the Maastricht Treaty delivered by the German (Federal) Constitutional Court. In this decision which, in another way, binds the future of European integration to precise conditions, it is indeed to be "noted that the German Constitutional Court does not exclude that the Union may one day become a federal state," indeed, it "foresees the conditions on which [according to the fundamental principles of the German Constitution] the founding of a future European federal state depends, in particular the condition of full and total compliance with the principle of democracy." This principle "whose reconstruction, in terms of content, begins with universal suffrage... forms the constitutional basis of all the theories embraced by the decision" which, at one point, declares that "... the extension of the tasks and functions of the European Communities encounters limits deriving from the democratic principle": from this assertion, it follows that "the creation of a proper federal state is thus admissible providing the principle, to its fullest extent, is effectively absorbed by the European institutions."[32] What is more, as increasing still further the competence of Community bodies would conflict with the democratic principle, we are "thus left with a choice between a EU unable to govern the process of its own development and of the integration of member countries, continually facing the threat of action taken on the basis of national constitutions, and a Union founded on the consensus of the people of Europe who, by virtue of their own constituent role (in turn strengthened by forty years of Community integration), are able to free themselves from their dependence on national government."[33]

In the light of these considerations, it is not clear why the decision was taken, upon the ratification of the Maastricht Treaty, to insert, into the German Constitution, the special article on European integration (Art.

23, paragraph 1) which seems also to have been a source of inspiration to the bicameral Commission in Italy[34] especially in view of the fact that Art. 24 of the German Constitution (the equivalent of Art. 11 of the Italian Constitution) formed the sole basis for the FRG's ratification of the treaty that would have led to the institution of a European Defence Community (and the related European Political Community)[35] these being forms of union necessitating the transfer of large shares of sovereignty by national states to European institutions.

Constitutional choices over Europe are however based on a fundamental debate which, while not falling within the scope of this text, must at least be touched upon here. In general terms, this debate is represented by the contraposition of those who believe that it is necessary and appropriate to give Europe its own constitution, creating a federal state, and those who do not accept this view, believing that there exists no legal basis for such a move.[36] These two opposing positions generate, schematically, two different solutions to the problem of this *democratic deficit* in Europe and, as a result, two different conceptions of the role of national constitutions. From a federalist point of view, the solution is "to constitutionalize Europe,"[37] to give the future European political subject a constitution, striving therefore to create the most favourable conditions, with regard to domestic constitutional law, for the pursuit of this objective. Opponents of this view maintain that the most that can be done is to find a way of increasing the involvement of national parliaments in EU decisions, building into national constitutions specific rules to this end.

From the point of view of bringing the process of European integration into line with the democratic principle, the proposal developed by the bicameral Commission makes several specifications which are, in fact, little more than explanations of points covered in Part I: provision is made, in paragraph 1, for the promotion of the EU according to principles of democracy and subsidiarity, thus providing an indication of what, in terms of content, the evolution of European integration should mean — that is, continued pursuit of the clearly federalist ideal according to which national sovereignty is limited in favour of European sovereignty.[38]

At this point, the question may be raised of whether, within the limits imposed on the current revision operation, it would (or would have been) admissible to establish further criteria, based on the same principles, to govern future developments within the sphere of European unification.

By intervening on the "organizational-procedural" part of the Constitution, it would have been possible to render explicit the influence — which may in any case be deduced — that the democratic principle must also exert in a procedural sphere. Indeed, as well as establishing the framework on which reformed European institutions should be based, this principle must be reflected in the procedural aspects of all future developments within the process of European unification.

Respect for the democratic principle means, therefore, opting for a democratic method of managing the procedures inherent in any development of the process of European unification that is to conform fully with this principle. The adoption of a democratic method means, in this case, having recourse to a mechanism that provides for a form of legitimation of, and popular participation[39] in the procedure by which a European sovereign entity is established. And being a democratic procedure for the conferment of sovereignty on a democratically structured institution, this must, of course, be a constituent method.

As far as the modality of its concrete actualization is concerned (which may vary among states, despite remaining within the framework of certain rules common to all those taking part in the process), this idea of a democratic method must be interpreted in broad terms, with provision made, alternatively or together, for the involvement of parliaments (national and/or European), for a people's referendum, for the election of an *ad hoc* assembly, etc. In this way it would be possible both to respect the characteristics and to use the instruments of the various constitutional systems.

This method is, in any case, an alternative to the diplomatic and intergovernmental one so far applied to the process of European integration (the European Political Community being the only possible exception). Provision must be made for the democratic legitimization not only of the body (domestic) called upon to ratify treaties, but also of the one (European) responsible for the preparation and approval of the document which gives rise to the new entity (in other words, to a constitution), since this sovereign entity "will be not solely the fruit of the expression of the constituent will by a new subject, nor that of the terms of a contract among pre-existing subjects, but that of a complex act which will contain both these aspects, and whose result will be a document that will have both the characteristics of a constitution and those of a treaty."[40]

Besides respect for the democratic principle, the procedural aspect of which cannot be ignored, in Italy, the 1989 referendum on Political Union helped to increase support for a constituent method of managing procedures designed to increase the powers of the EU.

Without wishing to overemphasize the significance of the referendum in question,[41] it is an indisputable fact that it was on the basis of the

constitutional law no. 2, 1989 that parliament decided to "declare a referendum on the conferment of a constituent mandate on the European parliament... elected in 1989." Leaving aside formal difficulties relating to the instrument used to adopt the referendum, its object appears to be perfectly in line with the fundamental principles underlying the process of European unification, which it may, in a way, be seen to realize; the relative constitutional law is, therefore, completely legitimate from a substantial point of view[42] and sets an important precedent of how even constitutional instruments can be used to actualize the federalist directive contained in the Constitution. The question put before the electorate was the following: "Do you think that the European Community should be transformed into an effective Union with a government answerable before parliament, and that the same European parliament should be given a mandate to draft a European Constitution to be brought, for ratification, before the competent bodies of the Community's member states?" And an overwhelming majority, over 88 per cent, went on of course to answer "yes".

Leaving aside questions over the legal efficacy of the referendum *vis à vis* the Euro MPs (an issue which became irrelevant when the European parliament in question reached the end of its term in office), the real importance of this referendum lies in its political impact and the ensuing responsibilities placed on political bodies. Because this was not a question referred to one particular body, because it was one regulated by constitutional law, all the representative bodies found themselves politically bound to adapt to the views expressed by the electorate on the subject of European unification. Clearly, such obligations could always be removed at a later date as a result of changes in the views of the electorate, which need not necessarily be expressed through a referendum, but may also be deduced from the results of subsequent elections. In this case, constitutional propriety would demand that the new orientation be explicitly declared in parliament, when the government receives the support of parliament, or through the passing of a special parliamentary motion. Until this happens, the validity of the political preferences expressed by the electorate at the 1989 referendum seems to be indisputable. Indeed, the final part of the question identifies specifically the constituent method which has been seen to be inherent in the principles of the Constitution, support for this method being confirmed by the will expressed by the electorate in response to a questioned regulated by constitutional law.

At this point, Italy's support, political and constitutional, for the use

of a constituent procedure for regulating further developments in the area of European unification, is clearly demonstrated, irrespective of the presence, or otherwise, of an explicit declaration of the same in the wording of the Constitution.

Conclusions.

Just a single hope and a few considerations remain to be expressed.

In relation to the current process of constitutional reform, it is to be hoped that the provision for tighter procedures regulating further limitations on sovereignty (Art. 114, parag. 2) may, as requested by several amendments, be removed. Meanwhile, no amendments favouring adoption of the constituent method appear to have been presented, although it does appear, from views and interpretations of political developments, that there is a movement in this direction.

Having examined the specific case of Italy, it is important, in conclusion, to underline the significance of the relationship between national constitutions and revisions of national constitutions on the one hand, and the process of European unification on the other.

"The Constitution is not there to build history... so much as to create obstacles (in an attempt to protect valid interests), and to remove obstacles (in order to take instruments of dominion away from centres of power)."[43] History is built within the political sphere and on the basis of the political will of the people, and when that will is strong, there exist no formal obstacles that can stop it in its tracks; however, by acting within a framework of legality, those who support political projects which conform with the values of the Constitution will find that they are facilitated (or at least not hindered) in their task, and that the position of their opponents, conversely, is weakened (or at least, not strengthened).

The Italian Constitution, on the basis of what has been examined here, does not hinder (and may even be said to favour) the process of the creation of a European federation as its values include the transcendence of the absolute sovereignty of the national state, and thus the formation of superior political entities. There is certainly no denying that the construction of a European federation will be bound to include a constituent phase, even though this will be peculiar in nature, having as its object a treaty-constitution. But, providing it is conducted in conformity with the principles of the republican Constitution, this phase need not be, per se, *extra ordinem* and thus illegitimate.[44] Those who constructed the Italian Constitution with thoughts also of a European federation, delib-

erately left what Calamandrei described as an "*ammorzatura*" (Art. 11), in other words, "one of those protrusions sometimes left by architects on the bare walls of a building so that they may, at some future date, add another part to it, perhaps more splendid and more opulent, a part which has not yet been built, but which is already drawn in their imagination."[45] This, then, is the part of the Constitution which makes it possible for Italy to belong to a European federation. It is not, however, the tool for building that federation — it is up to federalists to do that.

Salvatore Aloisio

NOTES

[1] Cf. Art. 1 parag. 4, constitutional law no. 1 of January 24th, 1997.

[2] The project presented by the commission appeared in *Il Sole 24 Ore* on November 5th, 1997.

[3] "Titolo VI" comprises articles 114, 115 and 116.

[4] The other two articles refer, respectively, to the participation of the two houses of parliament and of local government in the definition of community policies.

[5] This aspect recurs in many contributions contained in the proceedings of the convention of the Italian association of constitutionalists, *Le prospettive dell'Unione europea e la Costituzione* (Milan, December 4th-5th, 1992), Padua, Cedam 1995. Moreover, it was on the basis of Art. 11 of the Constitution, (the scope of which will again be touched on further on) that, as with all community treaties, Italy ratified the Maastricht Treaty by ordinary law (law no. 454 of November 3rd, 1992).

[6] For an overall view, cf. P.F. Lotito, "Integrazione comunitaria e regole costituzionali: gli esempi di Francia, Spagna e Germania" in *Quaderni Costituzionali*, 1993, pp.155 ff. *Ibid.* the texts of alterations to the constitutions of France and Germany, pp.149 and 151, respectively.

[7] The words of D'Alema, in the transcript of meeting no. 7 (26.2.97) of the Parliamentary Commission for Constitutional Reform (hereinafter, the Commission).

[8] D'Amico, in the brief report of the meeting, held on 16.4.97, of the Committee on Parliament and Legislative Sources (hereinafter, the Committee). With reference to the section of interest here, Art. 11 of the Constitution runs as follows: "Italy (...) agrees, on equal terms with the other states, to the limitations of sovereignty necessary to create a system able to ensure peace and justice among states; it promotes and supports the international organisations whose activities are directed to this end".

[9] The words given in inverted commas are, respectively, those spoken before the Committee by Soda MP (Democratic Left) at the meeting of 16.4.97 and by senator Greco (Forza Italia) at the meeting of 30.4.97.

[10] Enclosures 18 and 26 of the Committee meetings held on 23.4.97 and on 22.5.97 respectively.

[11] The tightening up of the second draft of the proposal with respect to the first is probably due to remarks made by Crucianelli MP (Democratic Left), (enclosure no. 24; Committee meeting held on 30.4.97) who feels that a constitutional review procedure should be implemented for any modification, through European treaties, of the Constitution.

[12] The text of Art. A (participation in EC building and procedures for the conferment of further powers) submitted to the Commission is, on the whole, the same as those presented to the Committee and has been used, without alteration, as the text forming the basis for discussion by the Commission (Cf. Text enclosed with transcript of Commission meeting no. 30 held on 29.5.97).

[13] Cf. D'Amico, Commission meeting no. 30 held on 29.5.97, pp. 1137-1140.

[14] These opinions had, in part, already been expressed during the work of the Committee, by commissioners Crucianelli (Democratic Left), and Salvato (Communist Refounders) (Cf. Commission meeting no. 31 held on 29.5.97, pp. 1149 and 1169).

[15] Cf. Pieroni (Green Party), Commission meeting no. 31 held on 29.5.97, p.1160. *Ibid.* p. 1190, D'Onofrio (CCD) described European integration as a good thing in itself, and as "essential pillars" both that and the limitations on the transfer of sovereignty already established in the interpretation of Art. 11 of the Constitution.

[16] Cf. enclosure (III.1.5.), on amendments regarding Italy's membership of the EU, presented by the spokesman at Commission meeting no. 39 held on 18.6.97. It is important to note that at the end of this phase of the work of the Commission, D'Amico MP resigned as spokesman.

[17] Boato MP, in particular underlined this point; it is also relevant to recall here a comment made by the chairman of the Commission, D'Alema: "We may set down in writing that the state is transferring competences, but this would be hypocritical as the national state does not transfer comptences, it transfers sovereignty, indeed, this concept is already expressed in Art. 11 of the Constitution." Cf. Commission meeting no. 40 held on 18.6.97, pp. 1510 and 1514 respectively; Boato/Pieroni amendment, *ibid.* , enclosure to amendments no. III.01.15.1.

[18] Words spoken by Pieroni MP, Commission meeting no. 40 of 18.6.97, p. 1510.

[19] In his speech, Senese MP (the first signatory) stressed the will to gather together, in a single constitutional provision, the rules developed, on the basis of Art. 11, by the Constitutional Court in recent years. With reference to the request for a provision to ensure that recourse is always had to constitutional law, he made the point that by constitutionalising the process of unification, "further transfers of power" would already be legitimated by the very first paragraph, and that for this reason the legislative instrument proposed could be considered sufficient. Cf. Commission meeting no. 36 held on 16.6.97, the enclosure to the amendments (p. 1356) and amendment III.1.5.

[20] Cf. senator Salvi, Commission meeting no. 40 held on 18.6.97, pp. 1511 and 1515.

[21] Cf. contributions of commissioners Servello (National Alliance), Salvato (Communist Refounders) and Pera (Forza Italia) during Commission meeting no. 40 held on 18.6.97, pp. 1510, 1512-13 and 1515, 1514 respectively.

[22] Commission meeting no. 40 held on 18.6.97, p. 1511. This aspect will be dwelt upon further, examining in more depth the legality of the reform.

[23] Cf. *Il Sole 24 ore*, July 1st, 1997.

[24] Commission meeting no. 40 held on 18.6.97, p. 1512.

[25] For an overall view, cf. F. Sorrentino, *Corte costituzionale e Corte di giustizia europea*, Milan, Giuffrè, 1970 pp. 87 ff.; for more recent debate on this issue cf. M. Cartabia, *Principi inviolabili e integrazione europea*, Milan, Giuffrè, 1995, pp. 95 ff.

[26] Cf., for example, M. Luciani, "La Costitution italienne et les obstacles à l'intégration européenne", in *Revue française de Droit constitutionnel*, 1992, pp. 663 ff.; L. Paladin, "Il

deficit democratico nell'ordinamento communitario", in *Le Regioni,* 1996, pp. 103 ff.; S. Bartole, "La nazione italiana e il patrimonio costituzionale europeo", in *Diritto Pubblico*, 1997, pp. 23 ff. It is not, on the other hand, easy to support the view that the 1989 referendum can be seen to justify the ratification of the Maastricht Treaty (see G. Lauricella, "In margine alla ratifica degli accordi di Maastricht: la legge costituzionale del 1989 ed il referendum popolare sul mandato costituente al parlamento europeo", in *Rivista trimestrale di diritto e procedura civile*, 1992, pp. 1226 ff.). Indeed, the effects of this referendum, to which we will refer again later on, merit further consideration.

[27] See G. Gemma, "Giurisprudenza costituzionale in materia comunitaria (1964-1976) e superamento della sovranità nazionale", in *Rivista trimestrale di diritto pubblico* ,1977, pp. 1185 ff.).

[28] This line of interpretation is rooted in decisions 14/1964 and 183/1973 and, at least as far as these aspects are concerned, remains unchallenged by subsequent decisions. Cf. P. Barile, "Il cammino comunitario della Corte", (note on decision 183/1973), in *Giurisprudenza costituzionale*, 1973, p. 2406; for information on the evolution of Constitutional Court decisions, cf. F. Sorrentino, *Profili costituzionali dell'integrazione comunitaria*, Turin, Giappichelli, 1994.

[29] Constitutional Court decision 183/1973.

[30] Clearly, the limitations imposed on the revision of the Constitution provided for by constitutional law no. 1/1997 merit broader consideration than they can be afforded within the context of this paper. The case under examination here can, indeed, be considered "borderline" in view of the intervention, in the absence of any modification to the text of Art. 11 (and thus to Part I of the Constitution), on the part of the bicameral Commission in an area (limitations of sovereignty) regulated by the said article, an intervention which modifies the interpretation of Art. 11 established by the Constitutional Court and by consequent parliamentary practice.

[31] This view is summed up in V. Onida, "Costituzione Italiana", in *Digesto delle discipline pubblicistiche*, Turin, UTET, 1989, p. 334. This author shares the belief that the basis for, and constitutional legitimation of the birth of a European federation can be found as far back as the 1948 Constitution.

[32] G.U. Rescigno, "Il tribunale costituzionale federale tedesco e i nodi costituzionali del processo di unificazione europea" in *Giurisprudenza costituzionale*, 1994, pp. 3119 and 3123, note 18. This point is also underlined by L. Paladin, *op. cit.*, pp. 1031-2. The decision mentioned underlines the incompatibility between the procedures contained in Art. 236 of the Treaty of Rome (now Art. N of the Maastricht Treaty) and the transformation of the Community into a federal state. Cf. F. Rossolillo, "Can We Delegate the Founding of the European Federation?", in *The Federalist*, XXXVI (1994), pp. 29 ff.

[33] F. Sorrentino, "Ai limiti dell'integrazione comunitaria: primato delle fonti o delle istituzioni comunitarie?", in *Politica del diritto*, 1994, p. 201.

[34] This view is strengthened by the fact that, according to A. Gattini, the majority of German jurists did not see any need for modification of the Constitution. (Cf. A. Gattini, "La Corte costituzionale tedesca e il Trattato sull'Unione europea", in *Rivista di diritto internazionale*, 1994, p. 115).

[35] Historical-political aspects are dealt with by S. Pistone, *L'Italia e l'unità europea*, Turin, Loescher, 1982, pp. 152-3 and, more broadly, by D. Preda, *Sulla soglia dell'Unione: la vicenda della CPE*, Milan, Jaka Book, 1994. Legal aspects, meanwhile, are examined by G. Gemma, *op. cit.*, p. 1215, note 108.

[36] Emblematic of this contraposition is an exchange of opinions between two German jurists, D. Grimm, "Does Europe Need a Constitution?", pp. 282 ff., conference held at the Carl Friedrich von Siemens Stiftung, January 19th, 1994 and J. Habermas, "Comment on the paper by D. Grimm: Does Europe Need a Constitution? ", in *European Law Journal*, 1995, no. 3, pp. 303 ff., and now also in Id., *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Frankfurt am Main, Suhrkamp, 1996.

[37] Expression attributable to G. Zagrebelsky, "Presentazione", in *Il federalismo e la democrazia europea,* Rome, Nuova Italia scientifica, 1994, p. 13.

[38] This underlines the connection between the principle of subsidiarity, landing place of the EU in its movement towards a federal-type system and the overcoming of the "democratic deficit". P. Caretti, "Il principio di sussidarietà e i suoi riflessi sul piano dell'ordinamento comunitario e sul piano dell'ordinamento nazionale" in *Le prospettive dell'Unione europea, cit.*, pp. 140 ff.

[39] The national peoples of Europe and the federal people of Europe are, together, drawn into a European constituent process (Cf. F. Rossolillo, "Popular Sovereignty and the World Federal People as Its Subject", in *The Federalist* XXXVII (1995) pp. 150 ff.); the present paper refers prevalently to the Italian people, inserted however, into the context mentioned.

[40] F. Rossolillo, *Ibid.*, p. 176.

[41] The value of this referendum was, moreover, seriously underestimated by many jurists, a view summed up by B. Caravita, "Il referendum sui poteri del Parlamento europeo: posizioni critiche", in *Politica del diritto*, 1989, pp. 319 ff. As we have seen, an opposing stance is adopted by G. Lauricella, *op. cit.*; while J. Bartolomei prefers a middle way "Brevi note sul referendum di indirizzo indetto con la legge costituzionale n. 2 del 1989", in *Giurisprudenza costituzionale*, 1990, pp. 891 ff. The latter, defining it as "plebiscitary" underlines the political scope of the act.

[42] This would not apply in the case of a referendum which with its fundamental principle opposes the Constitution; for example, even if it were approved by a constitutional law, a referendum relating to the secession of one of the Italian regions would not, constituting a violation of Art. 5 of the Constitution, be legal.

[43] G. Gemma, *op. cit.*, p. 589.

[44] Such is the view held by M. Luciani, *op. cit.*, p. 589.

[45] P. Calamandrei. "Stato federale e confederazione di Stati", in *Europa federata,* Milan, Comunità, 1947, pp. 34-5.

Viewpoints *

The Problems of Federalism in the Former Soviet Union

SERGEI A. BELIAEV

Introduction.

Since the dissolution of the Soviet Union all Russian draft constitutions have resorted to the federal model,[1] and several other republics of the former USSR have quasi-federal entities on their territory which are inherited from the Soviet period.

Nevertheless, many experts still wonder how authentic and "comparable" post-soviet federalism is to the federal systems of other countries. The Russian thinker Alexander Solzhenitsyn states, for instance, that "Russia is not a federation."[2] Other republics of the former USSR also face a whole series of problems with the *de facto* and the *de jure* status of the autonomous entities and minorities on their territory, problems which cast doubt on the validity of their state structure.

What then is the legal form and nature of the Russian Federation and of other Republics of the former USSR? What special features, defects and problems characterize federalism as conceived in the post-Soviet area, and what are its prospects?

1. *The Problems of the Central Institutions.*

Of all the States of the former USSR, only Russia has formally a federal structure.[3] All the other countries have central legislative, executive and judiciary institutions structured on unitary principles. Some of these states (Azerbaijan, Georgia, Moldova, Tajikistan, Uzbekistan, and

* This heading includes contributions which the editorial board believes readers will find interesting, but which do not necessarily reflect the board's views.

Ukraine) include autonomous entities which are essentially national and territorial in nature, while others have no such entities (Armenia, Belarus, Kazakhstan, Kyrgyzstan and Turkmenistan).

The current structure of the Russian Federation is defined by the Constitution approved by the referendum of 12th December 1993, which came into force on 25th December 1993 after the publication of the referendum results. Article 1 of the Russian Constitution states that "the Russian Federation-Russia shall be a democratic federative law-based State with a republican form of government." Further on, Article 5-3 stipulates: "The federative make-up of the Russian Federation shall be based on its state integrity, a uniform system of state authority, the separation of jurisdiction and powers between the bodies of state authority of the Russian Federation, and bodies of state authority of the members of the Russian Federation, and the equality and self-determination of the peoples within the Russian Federation." Certain other provisions, and above all Chapter 3, explain the juridical conception of federalism in Russia.

The most important role in the Russian federal institutions is ascribed to the Head of State, the President, elected by secret ballot and direct, universal suffrage.

The President has very extensive powers, described in Articles 80-90, 117-2 and elsewhere in the Constitution, relating to the executive, legislative and judiciary power of the Federation. The Constitution states that the President is the "Head of State", "the guarantor of the Constitution... and human and civil rights and freedoms" (Art. 80-1, 2). It is his duty to take measures to protect the sovereignty, independence and state integrity of the Federation.

The President ensures the coordination and interaction of the bodies of state power (Art. 80-2), and, in accordance with the Constitution and federal laws, determines guidelines for state foreign and domestic policy (Art. 80-3). He represents the Russian Federation domestically and in international relations (Art. 80-4).

These provisions have led Professor Patrice Gelard to declare that the quasi-regal powers of the Russian President are at once inspired by the American and French models and by the Russian and Soviet tradition.[4]

The Chairman of the Government is responsible to the President, who nominates him with the approval of the legislative power, the State Duma, and may remove him (Art. 83-a). At the same time, the Government is responsible to the State Duma, which may pronounce itself in favour of dissolving it (Art. 103-b).

According to the Constitution, the Federal Assembly is the "supreme representative and legislative body of the Russian Federation" (Art. 94). The composition of the Federal Assembly is typical of a federal state, being composed of two Chambers, the Federation Council and the State Duma (Art. 95-1).

The Federation Council is composed of two representatives from each member of the Federation (one from the executive, the other from the legislature of each state — Art. 95-2).

The Duma is composed of 450 members (Art. 95-3). Comparison of this number with that of the members of parliament of many other countries reveals a very low number of representatives in relation to the Russian population (around 150 million) — Ukraine has the same number of deputies for a third of the population; Estonia and Latvia have 101 and 100 deputies respectively for populations of 1.5 and 2.7 million.

The federal legislative procedure in Russia is complex. It involves both Chambers (Art. 104-107): not only the State Duma, but also the Federation Council must examine any bills relating to the federal budget, federal taxes and levies, finance, currency, credit and customs control, issue of money, ratification and denunciation of international treaties, the status and defence of the Federation borders, and war and peace (Art. 106).

The judicial systems of the countries of the former USSR, including the Russian Federation, are structured according to the principles obtaining in unitary states and are financed exclusively by the central budget. Whereas many federal states (the United States, Canada, Australia and the Federal Republic of Germany) have relatively decentralized and often elective judicial systems, the nomination of courts of first instance in Russia, as in many countries of the former USSR, is centralized. The Russian President nominates the judges of federal jurisdictions.

The situation is slightly different however as regards higher instances. The Russian Constitution of 25th December 1993 mentions three Courts of higher instance: the Constitutional Court, the Supreme Court and the Supreme Arbitration Court. The judges of these three Courts are appointed by the Federation Council on the President's proposal (Art. 128-1) and the same procedure is followed for the Prosecutor-General of the Russian Federation (Art. 129-2). All the other prosecutors are appointed by the Prosecutor-General (Art. 129-4).

Thus, the members of the Federation have more chance of influencing the composition of the central judicial organs than of the bodies that are closer to them. For a really federal and democratic state it would be more logical to organize the judicial system in a diametrically opposed fashion, as regards the appointment of the justicial bodies, so that the central institutions are truly federal and subordinated only to the Federation, while the Courts and judges of ordinary instance are appointed or elected at the lowest possible level.

The prerogatives of the Presidents of various other states of the former USSR are comparable to those of the President of the Russian Federation. They are elected by direct universal suffrage and secret ballot, except in Latvia and Estonia (whose Presidents are elected by the legislature), and Lithuania (where the President may also, under certain conditions, be elected by an electoral college). Sometimes the Presidents are called Head of State (as in Belarus, Kazakhstan and the Ukraine), sometimes Head of State and Head of the Executive (Georgia and Turkmenistan).

The Presidents of almost all the Republics of the former Soviet Union have the right to appoint and remove the heads of the executive following various procedures which provide for concerted action with the legislature. The Presidents of Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Uzbekistan and Ukraine have the right to dissolve parliament, with some reservations. The President of Latvia has the right to initiate the procedure of dissolving the Seyme (the legislative organ), which is carried out through a referendum (Art. 48). The Presidents of Estonia and Lithuania have the right to announce the organization of early legislative elections under certain conditions (Art. 58 and 97). The monocameral structure of legislative power is relatively widespread among the countries of the former USSR, with the exception of Kazakhstan, Belarus and Turkmenistan.

The President's right of veto is interpreted variously in the different states. While the President of the Russian Federation has for example the right to temporarily veto all federal laws, with the exception of federal constitutional laws and amendments to the Constitution (Art. 108 and 136), the President of Azerbaijan has precisely the right to veto constitutional laws (Art. 123).

The reason normally given to explain the introduction of the federal system in Russia is the multinational nature of the Russian population (out of a total population of around 150 million, about 17 per cent are of non-Russian origin). From this point of view it is hard to understand why other countries of the former USSR, like Ukraine and Kazakhstan (with respective populations of different nationalities of 22 per cent and 60 per cent of the whole), reject any federal state model, maintaining a unitary structure. The proportion of the population of nationality different from

the dominant one is also very high in two Baltic countries: Estonia and Latvia.

To evaluate the general character of the central Russian institutions, as of other countries of the former Soviet Union, it should be emphasised that these institutions succeed institutions of the Soviet period politically and juridically, a factor which has greatly influenced their nature. Indeed, the majority of states created after the disintegration of the Soviet Union have juridically a presidential régime of an authoritarian-bureaucratic nature. In the case of the Russian Federation, the concentration of powers in the hands of the Head of State ensures that this person must carry out a large number of supplementary tasks, and that therefore the destiny of federalism depends on the capacity of the personality invested with this office.

Any discussion of the application of the federal principle by the central institutions must first of all emphasize that federalism also has a democratic dimension. A French author, Louis Le Fur, stressed that in the federal state it is possible to oppose "the constitution of a tyrannical power by an individual or by a group": "...Caesarism and the excesses of democracy are both impossible in a country where the direct action of central power is exercised on powerful public bodies as much as, and sometimes more than, on individuals."[5] Let us examine more closely whether the constituent units of the states of the former Soviet Union are conceived as counterweights to antidemocratic or excessively populist tendencies.

2. *The Problems of the Institutions of the Constituent Units of the State.*

The Constitution of the Russian Federation mentions 89 federated units, of varying type: twenty-one constituent Republics, six Territories (*Kray*), forty-nine Regions (*Oblast*), two Cities of Federal Importance, one Autonomous Region, and ten Autonomous Areas (*Okroug*) (Art. 65). Various states of the former USSR have "autonomous" units on their territory: Georgia (Adsharia, while the autonomies of South Ossetia and of Abhasia are formally abolished and not mentioned in the Constitution of Georgia), Ukraine (the Crimea), Uzbekistan (the Republic of Karakalpakstan), Azerbaijan (Nagorno-Karabakh and Nakhichevan), Moldova (the Republic of Dnestr and Gagauzia-Gagauz Eri), and Tajikistan (Gorno-Badakhshan).[6]

Articles 11-2 and 77-1 of the Russian Constitution recognize the power of members of the Federation to organize their institutions without having to seek the approval of the central federal institutions. At the same time, article 77-1 states that their structure must be based on general principles determined by federal law.

It is significant that the President of the Federation has the right to dissolve the State Duma, but that under constitutional law none of the bodies of Russian central power has the authority to dissolve the legislative organs of the members of the Federation nor to remove the heads (Presidents, Governours, Prime Ministers, etc.) of these members if they are elected by the population.

All the members of the Federation have regimes which attribute an important role to the President or Head of State. The right to dissolve the legislative organ is provided for in at least three republics (Tyva, Ingushetia and Kalmykia). Only in Bashkortostan, Karelia and Sakha (Yacutia) is the legislature composed of two Chambers.

One of the major problems of Russia lies in how the Federation's constitutional norms compare with those of the different subjects of the Federation, which to some extent show aspirations towards decentralization. Thus the Constitution of the Tatar Republic considers the Republic itself as "a sovereign state, a subject in international law in association with the Federation of Russia on the basis of the Treaty on the reciprocal delegation of competences and of objects of regulation" (Art. 61), although the Constitution of the Russian Federation does not attribute the quality of sovereignty and the status of subjects in international relations to members of the Federation. Thus also, the Constitution of the Republic of Tyva, although it considers the Republic itself a member of the Federation, provides for the possibility of secession (Art. 1), which is not provided for in the Constitution of the Russian Federation.

Other republics, with the exception of the Republics of Ingushetia and Kalmykia, also claim sovereignty in their Constitutions, as in the case of the Republics of Buryatia (Art. 1), Kabardino-Balkar (Art. 4) and Komi (Art. 5).

After the proclamation of independence in 1993, the Constitution of the Chechen Republic, dating from March 1992, no longer mentions relations with the Russian Federation.[7] The Republic considers itself as "a sovereign democratic law-based state created as a result of the self-determination of the Chechen people," in which the Chechen Constitution is supreme on its territory and its sovereignty is indivisible (Art. 1).

The Statutes (*Ustav*) of the Regions of the Federation of Russia contain a whole series of norms which contrast with the Federation Constitution.[8] The Statute of the Territory of Stavropol for example

specifies privileges for the inhabitants of the region not granted to non-residents (Art. 13).

Although the division of competences between the Federation and the member states laid down in the Constitution of the Russian Federation is comparable to that laid down in other Constitutions of federal states,[9] it is less centralist. External competences are the exclusive province of the Federation (Art. 71). But joint competences include "the coordination of the international and external economic relations of the members of the Russian Federation and the fulfilment of the international treaties of the Russian Federation" (Art. 72).

As a result of this ambiguity, the Constitutions of many Republics and Regional Statutes interpret external competences (political and economic international relations) more broadly than does the Federal Constitution. Thus, according to the Constitution of the Republic of Tyva, it is the national legislative power which takes decisions regarding war and peace (Art. 63-11), whereas the Russian Federal Constitution attributes this power exclusively to the Federation (Art. 71j). Article 6 of the Constitution of the Chechenian Republic reserves for the Republic the right to join "international organizations, collective security systems and inter-state groupings." The Region of Sverdlovsk attributes to itself the right to "initiate international relations and foreign trade relations independently" (Art. 13).

The solution to such discrepancies lies in the traditional federalist conception of the supremacy of federal law (*Bundesrecht bricht Landesrecht*). According to the Russian Constitution, federal law prevails over members' laws in the case of conflict within Federation or joint Federation and members' terms of reference (Art. 76-5), a principle which corresponds to the constitutional provisions of other federal states. The Constitutions of the Republic of Yakutia-Sakha and of the Ingushetian Republic, however, state that federal laws in the context of joint competences are valid on the territory of the Republic only after their ratification by the Chamber of Representatives (Art. 41-2 and 7-2). For the moment there is no uniform constitutional interpretation of the supremacy of Federal or of members' legislation in the field of joint competences.

The Russian Constitution provides for certain procedures to settle differences. The President may resort to conciliation in cases of dispute between the Federal bodies and those of the various members of the Federation, as also between the bodies of the various members, or call in the appropriate Court (Art. 85-1 and Art. 125-2b), and may suspend any

acts of the executive bodies of the Federation members which contradict the Constitution and federal law (Art. 85-2). In reality however, conflicts of a legal nature are ignored by the central institutions and the federal state bodies are very passive in the regulation of conflicts by constitutional means.

The statutes of autonomous entities within other countries of the former Soviet Union also pose a series of problems relating to legal conflicts. The Republic of Abhasia, previously considered part of Georgia, proclaimed its independence in 1992. Its Constitution, of 26th November 1994, states that Abhasia is "a democratic, sovereign law-based state, founded historically on the right of the people to free self-determination" (Art. 1). Article 3 states that it is a subject of international law. The status of the Republic and the competences of the President (Art. 53) allow the independent conduct of foreign policy. Georgia does not recognize this situation: its Constitution of 24th August 1995 reserves for itself the right to resolve the problem of the status of Abhasia "after the re-establishment of territorial integrity."

The Republic of Crimea declared its sovereignty in the Constitution of 6th May 1992. This Constitution was abrogated by the Ukrainian legislative power — the Supreme Rada of Ukraine — and a new Constitution is currently under discussion. The Ukrainian Constitution of 28th June 1996 does not recognize the state sovereignty of the Crimea nor its right to undertake international relations: it is considered an integral part of Ukraine (Art. 134), and its powers are very limited (Art. 137-138). The legislative power of the Ukrainian Republic reserves for itself the right to dissolve the legislative bodies of the autonomous Republic of Crimea if the Ukrainian Constitutional Court should perceive a violation of the Constitution and of Ukrainian law (Art. 84-28). The Ukrainian law "On the Autonomous Republic of Crimea" of 17th March 1995 states that it is "an administrative and territorial autonomy within Ukraine" (Art. 1), and that its Constitution is only valid if approved by the Ukrainian Republican legislature (Art. 3). The Republic of Crimea engages in relations with other states and with international organizations "only in the sphere of the economy, ecology and culture" (Art. 9) and participates in the "formation and realization of Ukrainian foreign policy and foreign trade policy in questions which affect the interests of the autonomous Republic of Crimea" (Art. 9).

The Constitution of Uzbekistan, of 8th December 1991, states that the sovereignty of the Republic of the Karakalpakstan is defended by Uzbekistan (Art. 70) through the formal recognition of the right of

secession on the basis of a general referendum (Art. 74).

The Constitution of the Republic of Karakalpakstan of 9th April 1993 does not contradict that of Uzbekistan in any significant way. Article 17 establishes that "international scientific, cultural and commercial relations are conducted according to the legislation of the Republic of Uzbekistan and of Karakalpakstan." The head of the national legislature of the Republic of Karakalpakstan is considered the highest official personality (Art. 80) and is responsible to the legislature. However, the Constitution also provides for a President of the Council of Ministers, who is presented to the Karakalpak legislature, with the agreement of the President of Uzbekistan.

The status of the Republic of Dnestr remains undefined in the Constitution of Moldova, although the former considers itself a sovereign state linked to Moldova by confederal relations. The Moldovan Constitution, 29th July 1994, simply establishes that the areas of the left bank of the Dnepr and the south of the Republic may enjoy "special forms and conditions of autonomy in accordance with the special status" (Art. 111).

Another autonomous entity on the territory of Moldova is Gagauzia. The law of the Moldovan Republic relating to the legal status of the Gagauzia (Gagauz-Eri) of 23rd December 1994 states that the latter is "an autonomous territorial formation with a special status based on the self-determination of the Gagauzians while belonging to the Republic of Moldova" (Art. 1-2). Areas whose population is more than 50 per cent Gagauzian may belong to Gagauzia on the basis of a referendum organized by the government of Moldova (Art. 5). The competences of Gagauzia extend essentially to questions of science, culture, training, development, sport, the economy, ecology and a few other fields. The regional legislature can participate "in the government of foreign and domestic policy of the Republic of Moldova in questions concerning the interests of Gagauzia" (Art. 3-b). The most important official in Gagauzia, elected by universal direct suffrage and secret ballot, is part of the Government of Moldova (Art. 14).

An autonomous entity belonging to the Republic of Azerbaijan is the autonomous Republic of Nakhichevan, which is considered "an autonomous state." The most important official is the President of the regional legislative body, whose powers are limited to questions of local importance (Art. 169). On the other hand, another autonomous entity, the region of Nagorno-Karabakh, has not been *de facto* part of Azerbaijan since 1988, when it declared its exit from Azerbaijan and its entry into the republic of Armenia. On 10th October 1991 Nagorno-Karabakh declared

itself a sovereign state with special relations with Armenia: it is mentioned neither in the Constitution of the Republic of Azerbaijan of 12th November 1995, nor in the Constitution of the Republic of Armenia of 5th July 1995.

Although constitutional procedures exist for the resolution of conflicts between the autonomous entities and the states they are part of, these are little used, since such conflicts are often political in nature.

Another problem is linked to the so-called asymmetry of constituent entities, both in Russia and in other states composed of autonomous entities, like Georgia, Ukraine, Moldova, Uzbekistan and Azerbaijan. In the case of the Russian Federation, on the one hand Article 5-4 of the Constitution affirms the equality of the members of the Federation "in their relations with federal bodies of state authority" — the principle of juridical equality of the federated units is one of the cardinal principles of federalism, a presupposition in the theory of the classical federal state.[10] On the other hand, the institutions of the members composing the Federation are very heterogeneous. The Republics often have Heads of State, parliaments or legislative assemblies, Ministers of Foreign Affairs, Ministers of Justice, Ministers of Internal Affairs and Constitutional Courts, while other members of the Federation are ruled by statutes which attribute to them more limited competences. In the Republics there is genuine republican citizenship, which is not provided for in other members of the Federation, and hence more powers than the latter.

The inequality of the members of the Russian Federation is accentuated by the practice of concluding treaties between federal institutions and the executives of members of the Federation concerning the division of competences, treaties which modify or supplement the constitutional norms in this area, establishing differences between the members of the Federation as to their powers,[11] an inequality reinforced by their differences as to human, natural and economic resources.

This asymmetry is equally a feature of the constitutional status of the autonomous entities in other republics of the former Soviet Union, where both the minority and the majority of the populations feel themselves disadvantaged by their special status. A juridical solution to this asymmetry has long been advocated by Grabar, who proposed linking rights to obligations for each entity, so that more rights correspond to more obligations and *vice versa*.[12] Equality would thus be realized through the concept of equity.

Further problems arise from the general geographical, ethnic and demographic context. Some large ethnic groups (Germans, Poles) have

no corresponding federated entity in Russia. In the territory of the same state populations of various ethnic origin live in a dispersed way.

Border changes are a delicate procedural matter, ill-regulated by the Russian Constitution. Such changes need to be introduced by tryly democratic means, with the broadest possible participation of the population, yet the Republican bodies of authority are far from being sufficiently representative and democratic to tackle such problems.

On the whole (in 15 republics out of 21), "non-indigenous" ethnic groups in the Republics of the Russian Federation often represent a considerable portion or the majority of the total population, but they do not have adequate influence: the authorities of the federated members are in most cases controlled by the indigenous community. As Solzhenitsyn has said, "in many regions the power of the communists has been replaced by the power of the minorities, so that one cannot speak of a democratic system."[13]

Solutions to these problems can be found in internal federalism. Republics like Tatarstan (total population 3.6 million, of whom 1.7 million are Tatars and 1.5 million Russians), Bashkortostan (total population 3.9 million, of whom 0.8 million are Bashkirs, 1.5 million Russians, and 1.1 million Tatars), Daghestan (total population 1.8 million, of whom 0.5 million are Avars, 0.3 million Dargins, 0.2 million Kalmyks and 0.2 million Russians), are comparable on a geographic, demographic and ethnic level to countries like Austria, Belgium and Switzerland, and federal reorganization is therefore conceivable. However, the leading groups in the various Republics are opposed to the introduction of federal sub-systems in their territories, preferring to support the establishment of unitary systems "with presidential regimes." The decision of the Constitutional Court "On the territory of Altai" of 18th January 1996[14] indicates a federal solution to relations between the executives and the legislatures within the members of the Federation, without however specifying the structure and characteristics proper to a decentralized system (intra-state entities, two levels of competence, bicameral legislature).

The Russian jurist N. Alexeyev states that in his conception of the ideal state federalism is necessary and inevitable, because local territorial interests must be taken into consideration: "Public bodies of a state of this type must not have a unitary hierarchical structure, but must represent a plurality of systems which produces a hierarchical image of the entirety of the state in all its components."[15] The perfect state must, in his view, be "the state of states," or the "world- state."

3. *The Problems of Local Institutions.*

The aspirations of the population, both in the Russian Federation and in other countries of the former USSR, can to a large extent be satisfied by the authorities of the third level — that of local popular self-government. Let us examine more closely the role of the bodies of self-government.

The organization of local self-government is recognized in Russia as "independent within the limits of its powers" (Art. 12). The bodies of local self-government are not considered by Russian constitutional law as being part of the system of the bodies of state authority (Art. 12), and this limits the application of the principle of subsidiarity in relations between Federation and federated members. Some experts maintain that the constitutional norm on this question needs to be changed.[16] One of the defects of local self-government in Russia is that the "Law on the principles of self-government" of 12th August 1995[17] does not attribute sufficient powers to the local bodies in the financial and fiscal domains, police and justice, immigration and residence, border changes and others.

There are various constitutional interpretations of self-government among the members of the Federation: some (the Republics of Bashkortostan, Sakha-Yakutia and Komi, the Territory of Khabarovsk and Regions of Sverdlovsk and Amur) share the idea that self-government is a continuation of public authority, whereas the Chechen Republic for example keeps it distinct from the bodies of the state. Several members of the Federation currently stipulate that the leaders of local self-government are appointed by higher state bodies.

After the dissolution of the Soviets in 1993 there were no representative administrative bodies of local self-government in many members of the Russian Federation, and their functions were discharged by local executives appointed by the executives of the Federation members. Only in 1996-7 did some municipalities hold elections and reorganize their administrations. And despite size of their population, the federal cities, Moscow (about 10 million inhabitants) and St Petersburg (5 million) — which, under the Constitution of 12th December 1993, are members of the Federation — will not have elected self-government till 1998. Alexandr Solzhenitsyn writes that "the joint resistance of the presidential apparatus, the government, the State Duma, the political party leaders and the majority of provincial governors has so far impeded the creation of organisms of local self-government..."[18]

The leading groups in other countries of the former Soviet Union also

ignore this problem, and many constitutions either mention it briefly or not at all. The Constitution of the Republic of Kazakhstan, 30th August 1995, distinguishes between "local management of the state" and self-government. In the former case the Constitution re-establishes traditional Kazakh bodies (*maskhilates*), which are identical throughout the territory, including the regions with populations of different ethnic origin, and which are part of "the unified system of the executive bodies of the Republic of Kazakhstan" (Art. 87). The Constitution of Turkmenistan, 27th December 1995, also distinguishes between local executive power and local self-government, while that of the Republic of Kyrgyzstan of 10th February 1996 only mentions "the local administration of the state" (Art. 76-77). The Constitutions of Georgia and Latvia contain no provisions relating to self-government.

Local self-government can become an effective means to involve the citizens more actively in the processes of federalization ("municipal federalism") by giving them concrete power, yet its bodies are not taken seriously and at times are even considered a danger for the balance of powers with regard to other levels. The fact that the importance of self-government structures is undervalued as a means of solving the problems of multi-ethnic societies is one of the causes of tensions between the various ethnic groups at the level of administrative bodies and in their reciprocal relations.

4. *The Prospects of Federalism in the Former Soviet Union.*

Federal Constitutions do not *per se* provide final and absolute solutions, and, like federal institutions, can be evaluated only in the context of the concrete development of society.

The Australian expert Saunders emphasizes that no "correct" model or "pre-established characteristics" of federalism exist.[19] Even the classical authors of federalism observed that comparison between federal and unitary states, on the one hand, and between federations and confederations on the other, may reveal many passing similarities.[20] Professor Fleiner identifies an organic link between unitary and federal elements.[21] Pre-revolutionary Russian juridical science saw the difference between the autonomy of the provinces and the participation of members of the Federation as relative.[22]

The problems of federalism in the post-Soviet area coincide with those on the international scene. The post-modern concept of the federal State is in the process of being elaborated by constitutional experts and

covers a new interpretation of sovereignty, of the nation, of constitutionality, of the democratic organization of how institutions function. The current view of federalism is influenced by participation in international or supranational organizations and by the impact of globalization on state structure, which implies a certain limitation of state sovereignty in the interests of humanity. Fleiner calls states "agents of the common interests of humanity."[23]

The tendency to growing affirmation of the bodies of self-government is manifest in several federal countries today, such as Germany and India, and in the provinces of the Republic of South Africa;[24] while back at the beginning of the twentieth century, self-government rather than national autonomy was being promoted by Russian jurists as the preferred solution to interethnic problems.[25] The Russian historical experience of the *zemstvo*, and traditional forms of self-government in other countries of the former Soviet Union, can be utilized to resolve current problems. Past Russian theories of state structure should also be re-examined, such as that of M. Speransky, or those which underpinned the reforms under Alexander II, or D. K. Shilov's concept of the state of *zemstvo*, and others which view the structure of self-government as an integral part of the bodies of power.

Whereas one of the rare successful reforms in Russia — the reform of the institutional system under Alexander II — was promoted from the bottom up (independent Courts and judges, local, regional and urban self-government),[26] first the Soviet Union and then the Russian Federation and other states of the former Soviet Union have been subject to incessant attempts to superficially imitate western institutions particularly at a higher level of society, not at the level of basic democracy.

An important phenomenon closely linked to federalism is the diffusion of common values at the international level. Asserting the multinational community's need for a "natural psychological unit," N. Alexeyev maintains that, to build a perfect state, there has to be a "multinational unit based on a supranational homogeneous culture."[27] The federal state, like every other kind of state, must therefore have an ethical foundation which permeates state institutions and neutralizes the nationalist and fundamentalist tendencies existing in various parts of the world. Characteristic of the ethics of the nascent community is the ability to transcend and encompass nation, state and denomination.

Across the world these features are found in the evolution of regional economic communities, especially in the European Union. Similar quasi-federal experiments in the post-Soviet area (the Community of Independ-

ent States, the Economic Union, the Union of Belarus and Russia, the Central Asian common market, the Baltic common market) have so far been uncertain for the same reasons as attempts at federal reform within the states are uncertain: the bureaucratic-authoritarian nature of the state systems in the countries of the former Soviet Union.

The contemporary evolution of federalism is moving towards a tendency to "redistribution" of classic federal powers in favour of regional (with a view to universal) multinational institutions, on the one hand, and local institutions, on the other. Federalism in the post-Soviet area will be successful if based on universalist tendencies common to all the states and on the organic needs of the most representative groups of the various countries.

Conclusion.

The constitutions of the states of the former Soviet Union seem based on a compromise between the supporters of the unitary state and the interests of the component units of the states. The search for equilibrium between unity and plurality coincides with the classical view of federalism as a synthesis between particularism and collectivity.[28] This approach of compromise has the function of avoiding the two extreme solutions and of finding a convenient solution.

One may however wonder why in practice a proper balance has not yet been found, in Russia and in the other countries of the former USSR, between the central institutions, to whom the constitutions attribute major importance, and the component entities of the states. Observation of the actual situation today rather shows the impotence of the state systems *vis-à-vis* decentralizing tendencies: the Russian central institutions do not control the situation which has been created in Chechenia and in some other regions, just as Georgia does not control the events in Abhasia and South Ossetia, nor Moldova in the Republic of Dnestr, nor Azerbaijan in Nagorno-Karabakh. Some experts believe that in Russia tendencies toward disintegration are prevailing over the process of integration.[29]

The reasons for this phenomenon have in part already been explained: the concentration of powers in the hands of the central institutions, the opposition between the central bodies of the state and the bodies of the component entities, ignorance of democratic self-government and the nationalist and denominational distortions. These tendencies in the post-Soviet area are aggravated by the process of economic decentralization,

in which many economic powers are in the hands of public authorities often fighting amongst themselves for the distribution of industrial infrastructure and natural resources.

The result of the permanent institutional crisis is the incapacity to respond to the needs of social and political life. The inefficiency of the constitutional modifications resides in the gap between reality and constitutional policy, as well as in the irresponsibility of the leading groups of the bureaucracy. Constitutional policy, like other policies, must, on the contrary, be based on the organic needs of social evolution.

NOTES

[1] Sergei A. Beliaev, "Constitutional Debates in Russia in 1992-1993", in *Review of Central and East European Law*, 1994, n. 3, pp. 305-19.

[2] Alexandr Solzhenitsyn, "Das russische Volk steht am Abgrund", in *Fokus*, 1996, n. 42, p. 108.

[3] The references to the constitutions and to the other laws in force in the countries of the former Soviet Union are based on the texts contained in *Novye Konstitutzii stran SNG i Baltii*, 2nd ed., Manuskript, Moscow, 1997.

[4] Patrice Gelard, "L'actualité constitutionnelle en Russie", in *La revue française de droit constitutionnel*, n. 17, 1994, p. 191.

[5] Louis Le Fur, *Etat fédéral et confédération d'Etats*, Paris, Marchal et Billard, 1896, p. 334.

[6] Further references to the constitutions of the members of the Russian Federation are based on the following publication: *Konstitutzii Respublik v sostave Rossiyskoy Federatsii*, Vypusk II, Izvestya, Moscow, 1996.

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[13] Alexandr Solzhenitsyn, *op. cit.*, p. 108.

[14] *Rossiyskaya Gazeta*, 1996, 1st February.

[15] Nikolay N. Alexeyev, *Teorya gosudarstva*, Prague, Izdatelstvo Eraziytsev, 1931, p. 177.

[16] "Razvitiye federativnykh otnocheniy v Rossii: problemy i perspektivy", in *Federalsm*, 1997, n. 1, p. 62.

[17] *Sobranye Zakonodatelstva Rossiyskoy Federatsii*, 1995, n. 35, St. 3506.

[18] Alexandr Solzhenitsyn, "La pré-agonie de la Russie", in *Le Monde*, 27th November 1996.

[19] Cheryl Saunders, "Constitutional Arrangements of Federal Systems", in *Publius*, Spring 1995, p. 78.

[20] Georg Jellinek, *Allgemeine Staatslehre*, Verlag von O. Höring, Berlin, 1900, p. 707; Louis Le Fur, *op. cit.*, pp. 714-717; Charles Rousseau, *Droit International Public*, Volume II, Paris, Sirey, 1974, p. 139.

[21] Fritz Fleiner, *op. cit.*, p. 252.

[22] Alexandr Korf, *Federalism*, 2nd ed., Petrograd, 1917, pp. 94-99.

[23] Thomas Fleiner, "State-Nation-Nationalities-Minorities. New Nation-State Concept for a European Constitution", in *Towards a European Constitution*, Freiburg, Institute of Federalism, 1996, p. 23.

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[25] Paul Vinogradoff, *Itogi XIX veka*, Moscow, 1902, p. 258; Alexandr Yatschenko, *Teorya federalisma*, Yuryev, 1912, pp. 390-396.

[26] Anatole Leroy-Beaulieu, *L'Empire des Tsars et les Russes*, Paris, 1990, p. 205.

[27] Nikolay N. Alexeyev, *op. cit.*, 1932, p. 165.

[28] Alexandr Yatschenko, *op. cit.*, 1912, pp. 2-35.

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Federalism, Regionalisation and Globalisation. Africa.

J. ISAWA ELAIGWU

Introduction.

Federalism is a term which has taken on different connotations in different contexts. Scholars of federalism have also agreed to differ on details. However, it is generally agreed that federalism is essentially a system of government which reflects compromises in a multinational

state. It originates from the desire on the part of the associating members to form a union without necessarily obliterating their identities at subnational levels.[1] Basically, federalism is a compromise solution in a multinational state between two types of self-determination — the determination to maintain a supranational framework of government which on the one hand guarantees security for all in the nation-state, and on the other protects the self-determination of component groups which seek to retain their individual identities. It is an attempt to reflect diverse political, social, cultural and economic interests within a framework of broader unity.[2] As Shridath Ramphal, the former Secretary General of the Commonwealth once aptly observed, federalism presupposes "the need for cooperation in some things coupled with a right to separate action in others. Only federalism fulfils the desire for unity where it co-exists with a determination not to smother local identity and local power."[3]

Very often there are modifications in the relations between these two types of self-determination. If the political pendulum swings towards the federal centre, this is an indication that centripetal forces are more dominant in the political arena. On the other hand, there may be a swing of the pendulum in favour of subnational units and the consolidation of subnational identities — a reflection of the dominant presence of centrifugal forces in the political terrain. Over time, as members of the political community come to understand one another and reach compromises as they manage their conflicts, these two types of self-determination are modified accordingly. Thus, the basic foundation of federalism is nationalism — even though this does come in two forms. At times, the pressures of federalism are such that they push for the creation of a union in the absence of accompanying pressures for real unity among the component units of the federation.

While it is evident that the foundations of federalism must be laid in nationalism, "it cannot be ignored that at the heart of nationalism lies the concept of self-determination. It is, however, a concept of double application, particularly in a federal context for, in relation to federalism, secession is the claimed concomitant of self-determination which can therefore help to destroy federalism just as it serves to build it."[4]

A similar point was made by the former Canadian Prime Minister, Pierre Trudeau when he asserted that the principle of self-determination which makes federalism necessary also makes it rather unstable. If nationalism is relied upon as a glue to hold a unitary nation-state together, much more nationalism would therefore be required in the case of a federal nation-state.[5]

Conflict is a natural element of the existence of all states. It tests the strength or reveals the fragility of the state and creates the basis for future adjustments. However, conflicts beyond certain thresholds are detrimental to the very survival of the state because they threaten the consensual basis of the association. Federalism, as Dan Elazar correctly observed, is a combination of self-rule with shared rule, which takes cognisance of diversity, limits on powers, and agreement among members to pursue mutual interest through consensus and compromise.

But there is a confederal variant of federal-type government. Confederal governments, most of which have, in the past, failed at nation-state level, emphasise the need for central government to retain, for the mutual benefit of its component units, only a few delegated functions. These component units may decide, for example, to vest in the central government powers of defence, (protection), roads, customs, immigration and railways. They would then retain other powers. In the history of confederations, the component units have usually been stronger than the central governments, with mutual fears of domination preventing the emergence of a powerful central government. However, at international level, where the sovereignty and autonomy of states are involved, there is increased support for confederal ideas which often form the basis for the creation of regional or functional organisations. Ivo Duchacek[6] has argued that while the European Union can be considered a regional confederal association, it is intergovernmental organisations such as the UN or the UPU which provide an example of the functional dimensions of confederalism.

These regional and functional organisations have at least two characteristic confederal features — i) "an avowed need for cross-boundary regulation and cooperation", and ii) "opposition to a federal merger which would result in a delegation of significant taxing and executive powers to a common authority."[7] As Duchacek rightly put it, "An important ingredient of this opposition is the fear lest common authority fall under the domination by the most powerful components of the system."[8]

In relation to the current debate over the European Union, between "Confederal Unit" and "Bureaucratic Federalism," Dan Elazar opines that the federal principle, initially hidden within the European Community in the form of functionalism, is now being openly discussed as such. Federalism, in old-new forms such as confederation, federacy, associated statehood and autonomy, is fast becoming Europe's way. This new way provides political, social and cultural autonomy for even more polities

than could be accommodated in the traditional state system, while providing for greater interstate economic cooperation, political cooperation and personal liberty than the old system allowed.[9]

While the struggle on the level of ideas goes on, it can be argued that, like federalism at nation-state level, federalism at European Union (EU) level would experience, over time, adjustments between supranational self-determination (here representing centripetalism) and national self-determination (centrifugalism). The kind of association which would then emerge in the European Union would partly depend on the level of mutual mistrust among its members and the exigencies of globalisation.

Regionalisation is a term often used to denote the existence of territories which have a specific vocation. Thus, within the nation-state one can refer to regions, provinces or subnational states. In addition, one can refer to regional zones within a nation-state, such as the forest or savanna economic regions of a nation-state which may actually include a number of political/administrative regions, states or provinces. The process of regionalisation can also mean the integration or association of sovereign nation-states in a particular region of the world for specific purposes. Thus, the European Economic Community and the Economic Community of West African States are examples of supranational or regional organisations within the global setting. This definition of regionalisation, for our purposes, is used throughout this paper.

The term globalisation refers to the relative liberalisation and homogenisation of the globe caused by the technological revolutions that have taken place since the 1940s. The global or world economy is being liberalised rapidly. There is a "widening and deepening of international flows of trade, finance and information, in a single global market."[10] It is assumed that the liberalisation of national and global markets enhances the free-flows of trade, finance and information, thus promoting "growth and human welfare."

But is this necessarily so? The global transition to the 21st century is marked by a technological revolution. There is the movement from cords to fibre optics; from microcards to microchips; the transformation of clock time into the aggressive concept of time as a commodity. The global system, on the eve of the 21st century, is entering the age of the information superhighway where computer and communication technology, microchips and fibre optics are converging to promote computer mediated networks. With computer and electronic hardware and software systems linked to external data bases and communication networks, the user can communicate and transmit data and information to organi-

sations within or across national boundaries. Integrated services digital networks even allow, in the best equipped hospitals, the transmission of ultrasound scans.[11]

Subscribers to the Internet can use the network for E-mail, file transfer, research and even advertising.[12] Computer pornography has had a profound impact on already declining moral standards in many societies around the globe. Maybe John Herz[13] was right when, in the 1950s, he envisaged the "demise of the nation-state." The implication of all this is that those actors in the global system who possess these skills have a head start over those who do not. They can penetrate the boundaries of the nation-state and make a real mockery of the sovereignty of nations. Paradoxically, technological revolution has undermined the sovereignty of nations and violated the privacy of the individual and groups, and this has occurred at a point in time when the sovereignty of many African states is still very fragile.

The visual and air waves of the global system are now being ruled, on the eve of the 21st century, by various satellite networks which, all the time, are transmitting programmes and material, across national boundaries, affecting or changing the values and culture of many people. The culture of violence transmitted across borders from a country like the United States has taken its toll on the value of human life in Nigeria. Like everything else, man is becoming a commodity in the marketplace. From the "Coca-colanisation" of the world, we have reached the "CNN-isation" of the world. American values, politics and business systems are being broadcast powerfully across nations. Western (especially American) values of democracy, human rights, sound market economy and life style are being disseminated around the globe as models. In the view of non Western countries there has indeed been an attempt, successful at that, to homogenise the world from a Western perspective. The West is thus able to determine the politics of the international banks for reconstruction and development, otherwise known as the World Bank and the International Monetary Fund. Technological skills are giving, to those who possess them, new powers which will make military powers obsolete or only marginally important in the 21st century.

In addition to these trends, which throw into question the relevance of states, there is an on-going paradox. While there are, within the nation-state, explosions of cultural identity (ethnic, racial, religious and so on) and self-determination, national sovereignty is threatened as multinational corporations penetrate national boundaries showing little or no awareness of, or regard for local conditions or jurisdictions. Indeed states

seem to have become too big for small things, and too small for the big."[14]

The United Nations Development Programme (UNDP) in its annual Human Development Report of 1997 noted that the big things pose enormous challenges for international governance — challenges related to the growing interdependence of countries and people as well as the persistent impoverishment of much of the world. While the world has shrunk, the mechanisms for managing the system in a sustainable way for the benefit of all have lagged behind. The accelerating process of globalisation is expanding global opportunities without distributing them equitably.[15]

As the report concluded, "Today's global integration is wiping away national borders and weakening national policies. A system of global policies is needed to make markets work for people, not people for markets."[16]

In the current context of globalisation and the construction of a global hamlet, what administrative framework can be established to control fiscal measures and market forces which tend to go beyond the control of states? Is regionalisation of the world through EU, the North American Free Trade Agreement (NAFTA), the Association of South East Asian Nations (ASEAN), the South Asian Association for Regional Cooperation (SAARC), the Commonwealth of Independent States (CIS), ECOWAS, the Southern African Development Coordination Conference (SADCC) an attempt by states to accept the reality that nation-states are too small for big things?

What is the future of regionalisation or regionalism in the context of globalism? What federal frameworks provide the right compromises and media for coping with the challenges of globalism? How do we balance supranational self-determination with nation-state nationalism? To what extent do crises of identity at subnational level lead to new dimensions of conflict? Is the globalisation process an all-out good for all countries and all peoples? What effect will current globalisation have on Africa? To what extent is there an emergence of regionalism in Africa? Is the federal solution acceptable to African states as they face the challenges of globalism in the 21st century?

In answer to these questions, we suggest that:

i) as nation-states face the challenges posed by globalisation, regionalism has become politically essential;

ii) regional organisation can only be managed through a federal-type solution;

iii) an appropriate federally-derived compromise needs to be estab-

lished in order to manage the tensions between supranational self-determination and national self-determination, which takes cognisance of subnational demands for self-determination;

iv) there are other forms of tension generated within the international system, accentuated by the process of globalisation. Policies are needed to render globalisation sensitive to human or people's needs; and

v) while federalism provides some of the conditions necessary to create regional responses to globalisation, it is nevertheless full of seeds of discord, and these must be addressed.

Globalisation and Regionalism.

There is no doubt from the above discussion that globalisation has tended to drive human societies in various countries towards a homogenisation of tastes and towards common values. The globalisation process has not only eroded profusely the boundaries of nation-states, it has also uncovered their weaknesses. States are now incapable of controlling effectively the ever-expanding parameters of consumption, the dynamics of market forces, and the activities of multinational corporations.

Therefore, the interdependence of states has made regional organisation politically imperative. Regionalisation is an attempt to compensate for the smallness of the state in coping with big problems. It is the widening (through association with other nation-states) of the parameters of capacity and capability of the nation-state so that it is able to cope with the vast challenges of the current international setting.

Paradoxically, while globalisation tends to sweep away all barriers to the formation of a single world market, increases the volume of trade, and expands the parameters of consumption,[17] the reaction of nation-states has, in the main, been protectionist. Thus, in 1968, the European Community (EC) took the lead, establishing an economic bloc which would expand beyond the 15 member countries to include, eventually, all the countries of Western Europe, except Russia, in a frontier-free neighbourhood upholding the four basic principles of free movement of people, free flow of goods, free flow of services and free flow of capital.[18]

In 1993, when the European Union (EU) came into force, it had a population of 345 million and a combined GDP of 6.5 trillion dollars.[19] In what clearly seemed a reaction to developments within the European Community, the United States instigated the formation, together with Canada and Mexico, of the North America Free Trade Agreement (NAFTA). NAFTA aims to create, within 15 years, a free trade area

embracing 370 million Americans, Canadians and Mexicans with a combined annual GDP of 6.7 trillion dollars and a three-way merchandise trade of 270 billion dollars per year.[20] There are also plans to include Brazil, Argentina and Chile in the near future. This "war" of economic blocs caught on very quickly as the Association of South East Asian Nations (ASEAN) which was formed in 1967 decided, in 1992, to set up the ASEAN Free Trade Area (AFTA).[21] The Americans also sought to maximise their advantage by moving to consolidate closer economic ties with ASEAN, Japan and Australia to form the Pacific Basin in 1994.

Another example of this trend is the South Asian Association for Regional Cooperation (SAARC), formed in 1985 and includes Bangladesh, India, Pakistan, Sri Lanka, Bhutan, the Maldives and Nepal; and the Commonwealth of Independent States (CIS) which was formed in 1992 by 12 former Soviet Republics is also an economic bloc in its own right.

This trend of emergence of economic blocs or regions leads us to draw two conclusions; first that the Asia-Pacific area has clearly become the centre of attraction (which is well in line with the notion that the next century will be the Pacific century). Second, that the rest of the Third World, but particularly Africa, does not feature anywhere in this reorganisation of the global economic landscape. This is no doubt a reflection of the huge gap between the rich economies on the one hand, and the very poor and decaying economies of Africa on the other.

In Africa, the first regional organisation, the East African Community, disintegrated in the early 1960s after independence, mainly for political reasons. In 1975, the Economic Community of West African States (ECOWAS) was formed. While this organisation still has many obstacles to overcome, it has demonstrated its determination to maintain peace and stability in the region. ECOMOG, the military monitoring wing of ECOWAS, was set up to restore peace in war-torn Liberia. Not only has it succeeded in doing this, it also oversaw an election in July 1997 which led to the instatement of democracy in Liberia after seven years of civil strife. ECOWAS now has to face the problem of the democratisation and stabilisation of the sub-region in order to form the basis for a more intense form of economic relations. There is also an attempt in Eastern and Southern Africa to form a regional bloc through the South African Development Coordination Conference (SADCC). This is still too young to assess, but it seems gradually to be making its mark in the area.

All this regionalisation of the international system represents, in part, means of coping with the new challenges of globalisation. Essentially, what we are seeing are supranational organisations which require inter-

governmental and bureaucratic frameworks. They also raise the problem of how conducive compromises can be reached among different levels of nationalism or self-determination. Let us now turn to this issue.

Federalism and Regionalisation of the Globe.

Globalisation no doubt creates challenges for nation-states and even regional blocs. Lucio Levi aptly describes some of these challenges: "international market forces are escaping the control of states, whose monetary and fiscal instruments of regulation of the economy have progressively lost their effectiveness... In short, globalisation has dug an even deeper divide between the state which has remained national, and the market, which has become global... The sharpest contradiction of our epoch lies in the fact that the problems on which the destiny of the people depend, like the control of security and the economy, or protection of the environment, have assumed international dimensions, a terrain where there are no democratic institutions, while democracy still stops at state borders that define a context within which only decisions of secondary importance are taken."[22]

While these contradictions are glaring and provide new challenges for regional groups, they raise the issue of conflict management and coordination. One of the first problems faced by members of a regional organisation is how to establish the right compromise mechanism in order to strike a balance between two types of nationalism — supranational and nation-state. Very often, human acceptance of the loss of essential aspects of sovereignty, such as a secure border, lags behind the reality. There is also the fear that the identity of the nation-state may be lost within a supranational framework, especially if there are one or two dominant nation-states. The reactions of nation-states to the Maastricht Treaty and to the creation of a common European currency illustrate how sensitive this issue is.

Herein lies the utility of a federal-type solution to the problems of integration. Federalism not only provides for shared powers, it also provides for shared rule among two or more tiers of government. It guarantees, constitutionally, the powers and functions of the federalised supranational centre, while protecting the identity of the nation-state and the powers which, by mutual agreement, it retains. There is no doubt that the nation-state must relinquish certain political, legal, economic and environmental powers, but its sovereignty in other areas must be protected and guaranteed.

Federalism is also sensitive to diversity — in economic levels, ethnic composition, race and so on. It is sensitive to disparities among the nation-states which belong to the supranational organisations. Federalism provides an opportunity for component units to form a union (without necessarily forming a unitary state) in order to achieve certain ends or goals. The identities of nation-states need not be obliterated, and thus their fears of loss of identity and autonomy are assuaged.

However, in the case of the European Union, there are still problems to be overcome. There are those who would prefer to have a federation of Europe, essentially an out and out state, while others would prefer a confederal solution. While the struggle goes on, and only the future can tell what will emerge, it is pertinent to note, however, that as in all human affairs, as mutual trust develops among the component parts of the Union, as greater levels of interaction lead to greater understanding and better mechanisms for conflict resolution, so the opportunities for adjustment of the federal pendulum, as it swings between centripetal and centrifugal forces, increase.

In Africa, even at national level, few countries operate federal governments. Currently, the only federation is Nigeria. South Africa has a constitution with federal features but does not explicitly call it "federal." Kenya under the Majimbo Constitution had a federal constitution, but it went unitary in 1964. Cameroon abrogated its federal constitution in 1972. The Federation of Rhodesia and Nyasaland disintegrated in the process of decolonisation and liberation struggles. The Sene-Gambian Federation collapsed due, among other things, to an outburst of nationalism.

Why have African leaders alienated themselves from federal government, or indeed avoided it like a plague, even though federalism currently provides a good medium for effecting appropriate compromises within its culturally plural milieu? The new leaders of independent African states found, after assumption of office, that while the colonial governors had seemed omnipotent, they in fact had enjoyed very fragile bases of power. The fragility of the central authority, and the need to consolidate power and authority meant that political structures which were mobilisable were seen as more advantageous than structures which exhorted intergroup reconciliation. A unitary system of government emphasises "penetration" and "control" of subnational units and centralisation of authority.

In this system, subnational units must look to the centre for their power and resources. The crises of authority experienced by the elite induced them to opt for a unitary solution to the problem of state-build-

ing in their ethnically plural states. The leaders at the centre were too preoccupied with the consolidation of the central authority to concede any sharing of powers and functions with subnational units.

Secondly, it was feared that in ethnically plural states federalism crystallised subnational identities and often sharply defined the parameters of operation and degree of loyalty of the component units. Federalism was thus seen as a crisis escalator rather than as a crisis dampener. Inter-ethnic and other dichotomies supposedly become more pronounced under a federal system. In a way, the fears of the élite were genuine. After all, federalism is a paradoxical medical drug which can be purchased on any political market. Just as it provides for the security and survival of the nation because of the very compromises it is capable of effecting, so it safeguards the self-determination of parochial groups. But as pointed out earlier, in reference to the words of Shridath Ramphal, this can lead to secession and thus destroy the federal state.

As we suggested earlier, federalism, while serving as a mechanism for effecting compromises in a multinational state, is full of seeds of discord. The extent to which a federal system survives depends on the ability of political elites in a country to maintain a delicate balance between centripetal and centrifugal forces. Excessive pulls in favour of centrifugal forces may herald disintegration, as the Igbo secession in Nigeria demonstrated. Yet, excessive pulls towards the centre may challenge the very existence of federalism and the cocoon of relative security it provides for the various groups in the society. The bloody riots in northern Nigeria in response to the introduction of a unitary form of government under General Ironsi in May 1966 provide a good example of this, while the current Ethiopian and Sudanese civil wars perhaps illustrate this point even more dramatically.

In the presence of an already fragile central authority, African leaders did not want to take on the task of creating a delicate federal balance between centripetal and centrifugal pulls. While the issue of consolidation of authority was related to state-building, the fear of exacerbating conflict at intergroup or horizontal level was directly related to the issue of unity or nation-building. Many African leaders felt that a unitary system of government provided a more favourable framework for the effective building of nations out of states. They would argue, for example, that the Shona-Ndebele ethnic problems in Zimbabwe would be more sharply defined under a federal framework. Currently, Zimbabwe runs a unitary system of government and both groups are represented in the same political party.

Erstwhile political rivals, Joshua Nkomo and Robert Mugabe sorted out their quarrels and mobilised, within a single political party, their ethnic groups which had been at war with each other. Under a federal system, both leaders would have sought political support from their ethnic groups as they competed for national political offices.

While the federal solution is attractive, the political economy of federalism has made it expensive and politically cumbersome. The cost of maintaining federal and state executives, legislatures and bureaucracies as well as local government councils and their bureaucracies is prohibitive. In addition, the need for bureaucratic outfits for these subnational units calls for the training of skilled workers. With the problems of welfare services, economic growth and other demands on the public treasury, the federal solution was seen by African leaders as expensive. This was one of Kenyatta's reasons for alienating himself from federalism which he saw as "rigid, expensive and unworkable."

There is no doubt, however, that federal solutions in Ethiopia, the Sudan and Zaire would at least have helped to provide some form of security for various subnational units while they cooperated at national level. African leaders are well aware that subregional integration depends on a federal framework to protect the identity and sovereignty of nation-states and to reassure smaller countries as to the intentions of bigger countries. In ECOWAS, Nigeria, while assuming most of the financial burden, has been wary of taking actions which would confirm the fears of the smaller nations. In fact, the smallest member of the organisation provided its chairman for a year — Alhaji Dauda Jawara, the former president of the Gambia.

ECOWAS is also troubled by linguistic divisions. The English-speaking and French-speaking divide is still alive and members are sensitive to it. While the headquarters of ECOWAS is in Nigeria, francophone states are, with one exception, favoured by the location of the body's executive secretaryship. South Africa is certainly a dominant nation in the SADDC, and only the future can tell how the New South Africa will lead this organisation.

Generally, however, for Africa, the greatest paradox is that of seeking to protect national sovereignty in an age of globalisation, one in which national borders have been rendered fragile and porous. There is no doubt that, at some point, members of a regional organisation must adjust its federal pendulum to swing in favour either of supranationalism or of state nationalism. The dominant feeling at any point in time would determine the type of federal solution needed. Perhaps this is where we find the

European Union now. There is no doubt that gradually the pendulum is being regulated. After all, quite some distance has been covered between the EEC and the EU.

Globalisation and Developing Countries.

Globalisation has produced opportunities as well as serious risks. No doubt globalisation "has its winners and its losers." With the expansion of trade and foreign investment, developing countries have seen gaps among themselves widen. Meanwhile, in many industrial countries, unemployment has roared to levels not seen since the 1930s, and income equality levels not recorded since the last century."[23]

As the UNDP Human Development Report of 1997 observed: "A rising tide of wealth is supposed to lift all boats. But some are more seaworthy that others. The yachts and ocean liners are indeed rising in response to new opportunities, but the rafts and rowboats are taking on water — and some are sinking fast."[24]

There is no doubt that globalisation increases the potential of nation-states but it also increases the risks to some nations by exposing domestic producers to very volatile global markets and capital flows that are very large in relation to the domestic economy.

While the Uruguay Round of the GATT (General Agreement on Tariffs and Trade) was expected to increase global income by an estimated $212-$510 billion between 1995-2001, the least developed countries stand to lose up to $600 million a year, and sub-Saharan Africa $1.2 billion.[25] Losses in foreign exchange will translate into pressures on income. Countries in sub-Saharan Africa, especially, will be less able to sustain imports and become more dependent on aid which is already stretched to the limit.

Similarly, under the Uruguay Round, protection of patents and other intellectual rights have received an extended life. Technology transfer has thus become more expensive, as compared to similar situations in the 19th Century or the 20th Century after the Second World War — for developed countries are now enforcing more stringent regulations.

The loss to developing countries from unequal access to trade, labour and finance was estimated at $500 billion a year, about ten times their annual income in foreign aid.[26]

It is therefore clear that the process of globalisation is moving on apace, "but largely for the benefit of the more dynamic and powerful countries of the North and South."[27] Even pattens of consumption are

shifting, with luxury cars, electronic devices, soft drinks and others, fast becoming part of daily life in developing countries — with the absence of such things creating a heightened sense of deprivation. The net result is a flood of imports and a negative balance of trade in many developing countries. Homogenisation of tastes without the relative homogenisation of capabilities is one of the greatest problems of globalisation, characterised as it is by a high level of liberalisation.

There is no doubt that globalisation is widely beneficial, but the control of questions determining the future of peoples, having escaped democratic institutions, remains firmly in the hands of the great powers and gigantic multinational capitalist corporations.[28] In anxiety and desperation, nations are aggregating through regional organisations, but they lack the courage to establish "federal" structures, fearful of erosion of their sovereignty. In an era of inevitable liberalisation, which is expected to yield economic benefits, nations are responding by adopting subtle measures of collective protectionism to assuage their anxiety and insecurity.

In view of this situation, it might be suggested that: i) the United Nations Economic and Social Council should lead the way in establishing guidelines, for adoption by the General Assembly, to govern the role of big nations, multinationals and other powers in the process of globalisation; it should also adopt guidelines designed to counter aggressive protectionism by regional groups, while promoting the benefits of globalisation; ii) the UN, through its agencies, should study, recommend and implement appropriate measures for protecting the weak and the poor in the global system against the adverse effects of globalisation. This may even include fiscal transfers across regional boundaries for purposes of equalisation. After all, poverty anywhere is poverty everywhere; iii) appropriate political institutions should be set up at international level (preferably under the auspices of the UN) to monitor the new wave of interdependence among nations; it should also address inequality as well as issues of peace arising from economic unbalances.

Even then, it is clear that at global level a confederal framework of nations is important to ensure that some order is retained amidst what may turn out, if we are not careful, to be apparent disorder. At regional level, it is becoming clear that confederal arrangements for running regional organisations may prove not to be an adequate response to globalisation. On the other hand, nations are unwilling to lose their sovereignty to become part of a supranational organisation which could be used by a powerful member, or a group of powerful members to their disadvantage.

It does seem that, depending on the regional organisation, the institutional framework is destined to move gradually from old confederal types towards loose federal structures as mutual confidence grows among members. One thing that certainly emerges clearly is the contradictory nature of the response to the exigencies of globalisation through collective regional protectionist policies. It is short-sighted and will be short-lived. Certainly, a global mediatory set of institutions is politically essential if the current globalisation process is not to create a global jungle. We must all accept responsibility for our collective future.

Conclusion.

It is argued, in this paper, that facing the various challenges posed by globalisation, nation-states have found themselves to be too small to cope with these big challenges and regionalisation has therefore become a collective response to them. Yet, in the management of these regional organisations, nation-states are torn between two types of self-determination (two types of nationalism) — the need for a supranational response to globalisation, and the desire to protect national sovereignty and identity, rendered fragile and porous in an era of technological revolution. Thus, the debates over the federal-type solutions to the problems of managing regional organisations will continue for some time yet.

It is argued, therefore, that an appropriate federally-derived compromise needs to be established in order to manage the tensions between supranational self-determination and national self-determination, while also acknowledging subnational demands for self-determination.

In addition, illustrations have been given of other forms of tension within the international system, tensions which are accentuated by the process of globalisation and by the need to develop appropriate policies, and to establish global institutions which would both render the process of globalisation sensitive to human or people's needs and address the problem of inequality among regions and nations.

As the global village shrinks into a global hamlet, more complex organisations and institutions are needed to monitor and regulate the new wave of interdependence, in order to provide a safe and comfortable world for all. Ignorance of, or lack of concern over the side effects of globalisation may, ultimately, be universally harmful. Even those who are strong and apparently comfortable now may find that they have won only a pyrrhic victory over others.

NOTES

[1] See K. C. Wheare, *Federal Government* (1963 edition), London, Oxford University Press 1964; Ronald Watts, *Administration in Federal Systems*, London, Hutchinson Education, 1970; *Publius, The Journal of Federalism* (Fall 1991) vol. 21, no. 4. See also, Dan Elazar (ed.) *Federal and Political Integration*, Ramat Gran, Israel, Turtledove Publishing, 1997, J. Isawa Elaigwu, *The Nigerian Federation: Its Foundation and Future Prospects*, Abuja, NCIR, 1993.

[2] Please note that while Nigeria was politically unitary under the British, it was, administratively, very much decentralised. While Britain always preferred to bestow a form of federalism on its colonies, there is no doubt that it was because of mutual suspicion and fears of domination among Nigerian groups that Nigeria opted for federalism between 1951 and 1959.

[3] Shridath Ramphal, "Keynote Address", in A.B. Akinyemi, P. D. Cole and Walter Ofonagoro (eds.), *Readings on Federalism*, Lagos, Nigerian Institute of International Affairs, 1979.

[4] *Ibid.* p. xxii.

[5] Pierre Trudeau, quoted by Shridath Ramphal, *op. cit.*, p. xxii.

[6] Ivo Duchacek, "Consociations of Fatherlands: The Revival of Confederal Principles and Practices", in *The Journal of Federalism* 12 (Fall 1982).

[7] *Ibid.*, pp. 137-138.

[8] *Ibid.*

[9] Dan Elazar, *Federalism and The Way to Peace*, Reflections paper n. 13, Kingston, Ontario, Institute of Intergovernmental Relations, 1994, p. 8.

[10] United Nations Development Programme, *Human Development Report 1997*, New York, Oxford University Press, 1997, p. 82.

[11] La Porte, E. Ronald et al. "Global Public Health and the Information Superhighway", in *British Medical Journal*, 308, 1651-52.

[12] Michael Batty and Bob Ban, "The Electronic Frontier: Exploring and Mapping Cyberspace", in *Futures* 26 (7), pp. 699-712.

[13] John Herz, *International Politics in the Atomic Age* (1959), and *The Territorial State Revisited: Reflections on the Future of the Nation-state*, in James N. Rosenau (1969).

[14] UNDP, *Human Development Report 1997, cit.*, p. 91.

[15] *Ibid.*

[16] *Ibid.*

[17] Lucio Levi, "Globalization and International Democracy", in *The Federalist Debate* (1997), n. 1, p. 2. See also J. Isawa Elaigwu, *From Might to Money: The Changing Dimensions. Global Transition to the 21st Century,* Kuru, NIPSS, 1995.

[18] Rasheeduddin Khan, "Experiments with Confederations: South Asia", paper presented at the International Association of Centres for the Study of Federalism (IACFS) Conference, *From Statism to Federalism*, at the Centre for the Study of Federalism, Temple University, Philadelphia, USA, September 11-13, 1995, p. 9.

Also M. Butter, *Europe: More than a Continent* (London, 1986), E. Wistrich, *After Nineteen Hundred and Ninety-Two: The United States of Europe* (London, 1989), J. M. Buchanan, K. O. Poehl, V. Curzon (et al.) *Europe's Constitutional Future*, London, Institute of Economic Affairs, 1990, and *From Single Market to European Union*, Brussels, Commission of the European Communities, 1992.

[19] Douglas M. Brown, "NAFTA, Federalism and Integration: Exploring the North American Model", paper presented at the International Association of Centres for the Study

of Federalism (IACFS) Conference, *From Statism to Federalism,* at the Centre for the Study of Federalism, Temple University, Philadelphia, USA, September 11-13, 1995, p. 9. For further reading, see A. R. Riggs and Tom Velk (eds.) *Beyond NAFTA: An Economic, Political and Sociological Perspective*, Vancouver, Fraser Institute 1993; Rod Dobell and Michael Newfeld (eds.) *Beyond NAFTA: The Western Hemisphere Interface*, Lanceville, B.C., Oolichan Books, 1993.

[20] Karl H. Fry, "North American Federalism, NAFTA and Foreign Economic Relations", in Bertus de Villiers (ed.) *Evaluating Federal Systems,* Dordrecht and Boston, Martinus Nijhoff Publishers, 1994.

[21] ASEAN includes Indonesia, Malaysia, the Philippines, Singapore and Thailand, all five of which are pensinsular and island states located in South East Asia.

[22] Lucio Levi, *op. cit.*, p. 2.

[23] UNDP, *Human Development Report 1997, cit.*, p. 82.

[24] *Ibid.*

[25] *Ibid.*

[26] UNDP, *Human Development Report 1992*, New York, Oxford University Press, 1992.

[27] UNDP, *Human Development Report 1997, cit.*, p. 87.

[28] Lucio Levi, *op. cit.*, p. 2.

Federalism in the History of Thought

IMMANUEL KANT *

Debate over the political philosophy of Immanuel Kant, and over his federalist or confederalist ideas is still very much alive and culminated two years ago, in the staging of a number of conventions and in the publication of many works to mark the two hundredth anniversary of the publication of *Perpetual Peace*.

Peace, or the "end to all hostilities"[1] between states, and the quest to create the conditions by which this may be achieved, are in Kant's view, elements crucial to our understanding of what man still has to do in order to be able to realise completely his potential. For this reason, Kant's reflections on these problems are not limited to the essay which focuses directly on this theme, but can also be found in other writings.

As early as 1784, in the *Idea for a Universal History with a Cosmopolitan Purpose*, Kant writes: "The greatest problem for the human species, the solution of which nature compels him to seek, is that of attaining a *civil society* which can administer justice universally.

This problem is both the most difficult and the last to be solved by the human race.

The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed *external relationship* [among the states] and cannot be solved unless the latter is also solved."[2]

Just as it is the duty of individuals to break free from the lawless state of nature, so states are duty bound to do the same, through the establishment of a legal system governing relations between them. While the state of nature among individual men is just a supposition, and may never have been a historical reality, the anarchy of international relations is a very

* The quotations and the text of the *Second Definitive Article of a Perpetual Peace*, below, are taken from Immanuel Kant, *Political Writings*, Cambridge, Cambridge University Press, 1991 (ed. by H. Reiss and translated by H. B. Nisbet). The square parentheses indicate changes made by the writer of this preface.

real fact and one which characterises the situation in which man effectively lives. All that is needed to overcome the state of nature between individuals, regardless of the fact that force was in fact the means used to break free of that state, is an original social contract: an idea of reason. The contract between states, on the other hand, must be real. While the idea of an original contract has in fact never truly been applied to individual men, it will, in relation to states, find concrete application through the formulation, by them, of a "[universal and perpetual peace treaty]" establishing "[the task of right] within the limits of pure reason."[3] The aim of this contract will be the limitation, through coercive laws, of the freedom of states, or rather, the overcoming of the absolute sovereignty of states.[4]

Coercion cannot, however, be the means by which this contract is entered into. Indeed, the possible exertion of force in the creation of a cosmopolitan system would suggest that states recognise the right to force other states to break free from the state of nature, in other words the right of states to make war — and this is precisely what they are seeking to avoid. "The right of peoples shall be based on a federalism (*Föderalism*) of free states,"[5] or rather, based on a contract freely entered into by republican states.

In *Perpetual Peace*, Kant seeks to identify the conditions needed to create this "*civil society* which can administer justice universally." First of all, in order to ensure that it is the people who decide whether or not to make war, the states must be republics. In fact, war itself favours the emergence of this condition: as wars are waged with increasing frequency, involve more men and begin to pervade more deeply the whole of society, leading the state towards self-destruction, "thus sheer exhaustion must eventually perform what goodwill ought to have done but failed to do: each state must be organised internally in such a way that the head of state, for whom the war actually costs nothing (for he wages it at the expense of others, i.e. the people), must no longer have the deciding vote on whether war is to be declared or not, for the people who pay for it must decide."[6] And each state which has undergone this evolution "may reasonably hope that other similarly constituted bodies"[7] will be prepared to enter into the contract that will give rise to a cosmopolitan organisation.

Herein lies the link between the first and the second definitive articles of *Perpetual Peace*. Only republics may freely choose to create a cosmopolitan structure, yet at the same time, this second stage is a necessity. If, even though all states were republics, there existed no cosmopolitan system, war would continue to constitute a threat, or a

reality, and the freedom and right that the republics themselves were supposed to guarantee would fail to be present. For this reason, the cosmopolitan constitution is the perfect civil constitution — the only one able to guarantee right fully and universally.

The question of the institutional model best able to guarantee peace is dealt with specifically in the *Second Definitive Article*, and in order to understand this article fully, it is useful first to consider the concept of "the right of peoples" (*ius gentium*), as intended by Kant in other writings.

In the *Metaphysics of Morals*, Kant analyses this concept in detail: "The situation in question is that in which one state, as a moral person, is considered as existing in a state of nature in relation to another state, hence in a condition of constant war. International right is thus concerned partly with the right to make war, partly with the right of war itself, and partly with questions of right after a war, i.e. with the right of states to compel each other to abandon their warlike condition and to create a constitution which will establish an enduring peace...

The elements of international right are as follows. Firstly, in their external relationships with one another, states like lawless savages, exist in a condition devoid of right. Secondly, this *condition* is one of war...

Adjacent states are thus bound to abandon such a condition. Thirdly, it is necessary to establish a federation of peoples in accordance with the idea of an original social contract, so that states will protect one another against external aggression while refraining from interference in one another's internal disagreements. And fourthly, this association must not embody a sovereign power, as in a civil constitution, but only a partnership or *confederation* (*Föderalität*). It must therefore be an alliance which can be terminated at any time, so that it has to be renewed periodically."[8]

Thus, according to the concept of states, the right of peoples goes this far, as far as the confederation. But Kant concludes the treatise, explaining that, "Since the state of nature among [peoples] (as among individual human beings) is a state which one ought to abandon in order to enter a state governed by law, all international rights, as well as the external property of states such as can be acquired or preserved by war, are purely *provisional* until the state of nature has been abandoned. Only within a universal *union of states* (analogous to the union through which a [people] becomes a state) can such rights and property acquire *peremptory* validity and a true *state of peace* be attained."[9]

In *On the Common Saying*, the right of peoples coincides with the cosmopolitan right, and this emerges clearly where Kant explicitly sets

his position, theory or thesis, against practice or hypothesis. In theory, the right of peoples must correspond to the cosmopolitan right, or better still, must lead to its institution since "a permanent universal peace by means of [the] so-called *European balance of power[s]* is a pure illusion:"[10] perpetual peace is based only on a "state of international right, based upon enforceable public laws to which each state must submit."[11] "But it may be objected [by empiricists] that no states will ever submit to coercive laws of this kind, and that a proposal for a universal [state of peoples]... does not apply in practice."[12]

Kant is aware of the difficulties, but is not induced to change his position which, on the contrary, he reaffirms explicitly: "In the normal order of things, it cannot be expected of human nature to desist voluntarily from using force, although it is not impossible where the circumstances are sufficiently pressing. Thus it is not inappropriate to say of man's moral hopes and desires that, since he is powerless to fulfill them himself, he may look to *providence* to create the circumstances in which they can be fulfilled. [...]

For my own part, I put my trust in the theory of what the relationships between men and states *ought to be* according to the principle of right. It recommends to us earthly gods the maxim that we should proceed in our disputes in such a way that a universal [state of peoples] may be inaugurated, so that we should therefore assume that it *is possible* (*in praxi*). I likewise rely (*in subsidium*) upon the very nature of things to force men to do what they do not willingly choose (*fata volentem ducunt nolentem trahunt*). ...On the cosmopolitan level too, it thus remains true to say that whatever reason shows to be valid in theory, is also valid in practice."[13]

Kant knows that states are reluctant to give up their sovereignty, and this reluctance inclines them towards compromise formulae, like the confederal solution, which he considers a "negative substitute" for the world republic.[14] Thus, both definitions, the theoretical and the practical, can be found in *Perpetual Peace*. Meanwhile, "the concept of international right becomes meaningless if interpreted as a right to go to war. ...There is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form a [*state of peoples*] (*civitas gentium*), which would necessarily continue to grow until it embraced all the peoples of the earth."[15]

The *Second Definitive Article of a Perpetual Peace*, which we publish

below, allows us to identify what is, from the federalist point of view, the crucial point in a reading of Kant's analysis of peace, which can be considered one of the essential points of reference for those wishing to help mankind move a step closer to realising fully the central value of our age. As Mario Albertini has pointed out, Kant's philosophy on peace "applies perfectly to federalism as it is based on the postulate of a legal order at suprastate level." Kant had no knowledge of the mechanism of federal government, and this "prevented him... from appreciating the fact that supreme political decisions must, in a situation compatible with a plurality of decision-making centres, have features of unity and exclusivity (sovereignty)."[16] However, this did not prevent him from envisaging this legal order in a correctly federalist way: in other words, as a power above the level of states.

NOTES

[1] I. Kant, *Perpetual Peace,* p. 93.
[2] I. Kant, *Idea for a Universal History with a Cosmopolitan Purpose* (Fifth, Sixth and Seventh Propositions), pp. 45, 46, 47.
[3] I. Kant, *The Metaphysics of Morals*, p. 174.
[4] I. Kant, *Perpetual Peace*, pp. 103-4.
[5] I. Kant, *Perpetual Peace*, p. 102.
[6] I. Kant, *On the Common Saying: 'This May be True in Theory, but it does not Apply in Practice'*, p. 91.
[7] *Ibidem.*
[8] I. Kant, *The Metaphysics of Morals*, p. 165.
[9] *Ibidem*, p. 171.
[10] I. Kant, *On the Common Saying, cit.*, p. 92.
[11] *Ibidem.*
[12] *Ibidem.*
[13] I. Kant, *On the Common Saying, cit.*, pp. 91-2.
[14] I. Kant, *Perpetual Peace*, p. 105.
[15] *Ibidem.*
[16] M. Albertini, *Il federalismo*, Bologna, Il Mulino, 1993, p. 22.

Second Definitive Article of a Perpetual Peace

The Right of [Peoples] shall be based on a [Federalism] of Free States

Peoples who have grouped themselves into states may be judged in the same way as individual men living in a state of nature, independent of external laws; for they are a standing offence to one another by the very fact that they are neighbours. Each [people], for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to the civil one, within which the rights of each could be secured. This would mean establishing a *federation of peoples*. But a federation of this sort would not be the same thing as a [state of peoples]. For the idea of a [state of people] is contradictory, since every state involves a relationship between a superior (the legislator) and an inferior (the people obeying the laws), whereas a number of [peoples] forming one state would constitute a single [people]. And this contradicts our initial assumption, as we are considering the right of [peoples] in relation to one another in so far as they are a group of separate states which are not to be welded together as a [state].

We look with profound contempt upon the way in which savages cling to their lawless freedom. They would rather engage in incessant strife than submit to a legal constraint which they might impose upon themselves, for they prefer the freedom of folly to the freedom of reason. We regard this as barbarism, coarseness, and brutish debasement of humanity. We might thus expect that civilised people, each united within itself as a state, would hasten to abandon so degrading a condition as soon as possible. But instead of doing so, each *state* sees its own majesty (for it would be absurd to speak of the majesty of a people) precisely in not having to submit to any external legal constraint, and the glory of its ruler consists in his power to order thousands of people to immolate themselves for a cause which does not truly concern them, while he need not himself incur any danger whatsoever.[1] And the main difference between the savage nations of Europe and those of America is that while some American tribes have been entirely eaten up by their enemies, the Europeans know how to make better use of those they have defeated than merely making a meal of them. They would rather use them to increase the number of their own subjects, thereby augmenting their stock of instruments for conducting even more extensive wars.

Although it is largely concealed by governmental constraints in law-governed civil society, the depravity of human nature is displayed without disguise in the unrestricted relations which obtain between the

various [peoples]. It is therefore to be wondered at that the word right has not been completely banished from military politics as superflous pedantry, and that no state has been bold enough to declare itself publicly in favour of doing so. For Hugo Grotius, Pufendorf, Vattel, and the rest (sorry comforters as they are) are still dutifully quoted in *justification* of military aggression, although their philosophically or diplomatically formulated codes do not and cannot have the slightest *legal* force, since states as such are not subject to a common external constraint. Yet there is no instance of a state ever having been moved to desist from its purpose by arguments supported by the testimonies of such notable men. This homage which every state pays (in words at least) to the concept of right proves that man possesses a greater moral capacity, still dormant at present, to overcome eventually the evil principle within him (for he cannot deny that it exists), and to hope that others will do likewise. Otherwise the word *right* would never be used by states which intend to make war on one another, unless in a derisory sense, as when a certain Gallic prince declared: "Nature has given to the strong the prerogative of making the weak obey them." The way in which states seek their rights can only be war, since there is no external tribunal to put their claims to trial. But rights cannot be decided by military victory, and a *peace treaty* may put an end to the current war, but not to that general warlike condition within which pretexts can always be found for a new war. And indeed such a state of affairs cannot be pronounced [unjust, since each party is judge in its own cause]. Yet while natural right allows us to say of men living in a lawless condition that they ought to abandon it, the right of [peoples] does not allow us to say the same of states. For as states, they already have a lawful internal constitution, and have thus outgrown the coercive right of others to subject them to a wider legal constitution in accordance with their conception of right. On the other hand, reason, as the highest legislative moral power, absolutely condemns war as a test of rights and sets up peace as an immediate duty. But peace can neither be inaugurated nor secured without a general agreement between nations; thus a particular kind of league, which we might call a [*league for peace*](*foedus pacificum*), is required. It would differ from a peace treaty (*pactum pacis*) in that the latter terminates one war, whereas the former would seek to end all wars for good. This [league] does not aim to acquire any power like that of a state, but merely to preserve and secure the *freedom* of each state in itself, along with that of the other confederated states, although this does not mean that they need to submit to public laws and to a coercive power which enforces them, as do men in a state of

nature. It can be shown that this idea of *federalism*, extending gradually to encompass all states and thus leading to perpetual peace, is practicable and has objective reality. For if by good fortune one powerful and enlightened people can form a republic (which is by its nature inclined to seek perpetual peace), this will provide a focal point for federal association among other states. These will join up with the first one, thus securing the freedom of each state in accordance with the idea of [right of peoples] and the whole will gradually spread further and further by a series of alliances of this kind.

It would be understandable for a people to say: "There shall be no war among us; for we will form ourselves into a state, appointing for ourselves a supreme legislative, executive and juridical power to resolve our conflicts by peaceful means." But if this state says: "There shall be no war between myself and other states, although I do not recognise any supreme legislative power which could secure my rights and whose rights I should in turn secure," it is impossible to understand what justification I can have for placing any confidence in my rights, unless I can rely on some substitute for the union of civil society, i.e. on a free [federalism]. If the concept of [right of peoples] is to retain any meaning at all, reason must necessarily couple it with a [federalism] of this kind.

The concept of [right of peoples] becomes meaningless if interpreted as a right to go to war. For this would make it a right to determine what is lawful not by means of universally valid external laws, but by means of one-sided maxims backed up by physical force. It could be taken to mean that it is perfectly just for men who adopt this attitude to destroy one another, and thus to find perpetual peace in the vast grave where all the horrors of violence and those responsible for them would be buried. There is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form a [*state of peoples*] (*civitas gentium*), which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present conception of [right of peoples] (so that they reject in hypothesi what is true in thesi), the positive idea of a world republic cannot be realised. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding [*league*] likely to prevent war. The latter may check the current of man's inclination to defy the law and antagonise his fellows, although there will always be a risk of it bursting forth anew. *Furor impius intus — fremit horridus ore cruento* (Virgil).[2]

(*Prefaced and edited by Roberto Castaldi*)

NOTES

[1] Thus a Bulgarian prince, replying to the Greek Emperor who had kindly offered to settle his dispute with him by a duel, declared: "A smith who possesses tongs will not lift the glowing iron out of the coals with his own hands."

[2] At the end of a war, when peace is concluded, it would not be inappropriate for a people to appoint a day of atonement after the festival of thanksgiving. Heaven would be invoked in the name of the state to forgive the human race for the great sin of which it continues to be guilty, since it will not accomodate itself to a lawful constitution in international relations. Proud of its independence, each state prefers to employ the barbarous expedient of war, although war cannot produce the desired decision on the rights of particular states. The thanksgivings for individual victories during a war, the hymns which are sung (in the style of the Israelites) to the Lord of Hosts, contrast no less markedly with the moral conception of a father of mankind. For besides displaying indifference to the way in which [peoples]pursue their mutual rights (deplorable though it is), they actually rejoice at having hannihilated numerous human beings or their happiness.

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