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Constitutional Democracy in a Multicultural and Globalised World

Thomas Fleiner
Lidija Basta Fleiner

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Chapter 1 General Introduction

A. From Local Entities to the Globalised Marginalisation of the Nation-State

I. Historical Influences on today's World of States

The State a Shoot of the Enlightement

The actual state has developed out of the European Modernity. It is a fruit of the European period of the enlightement. Hold by commercial interests and designed by the missionary promotion the European states have dispersed the concept of the state by colonialism throughout the globe between the 17th to the 20th century. Within today's globalised world all states confess themselves as equal and sovereign members of the community of states. All have taken over the same philosophical fundament for a political unity from the enlightement theory. The question however which has to be asked ist he follwoing: Can the enlightement period which has originally secularized the state from the unity of the Christian religion give us the guidelines for the path of the state into the future? Has the state of modernity been created in order to solve the actual and the future problems the polities of today's globalised world?

Rapid Change of the World-Map

Looking on the world map and searching the constitutional history of the states on detects with astonishment that out of the actual 194 recognized states only 14 can look back to a uninterrupted nation-state development of some 200 years. Since 660 before Christ when Japan has for the first time built up as a political unity until the declaration of independence of 1776 of the United States of America in average only every 175 years have been created a new state. In the 19th century every four years has been built up in average a new state. Within the first half of the 20th century all 18 months a new state has postulated for full sovereignty and international recognition. In the second half of this century until 1993 all five month a new state has emerged out of the ashes. Since World War two in total 105 new states joined the international community. Actually we are confronted with nu-

merous conflicts which may eventually lead to new states such as in Cyprus, Sri Lanka, Georgia (Abkhazia and Ossetia), Nagorno Karabach, Kosovo Serbia), Canada (Québec), Russia (Chechnya), Somalia, Sudan, Basque Country, Belgium, Northern Ireland, Kashmir etc.

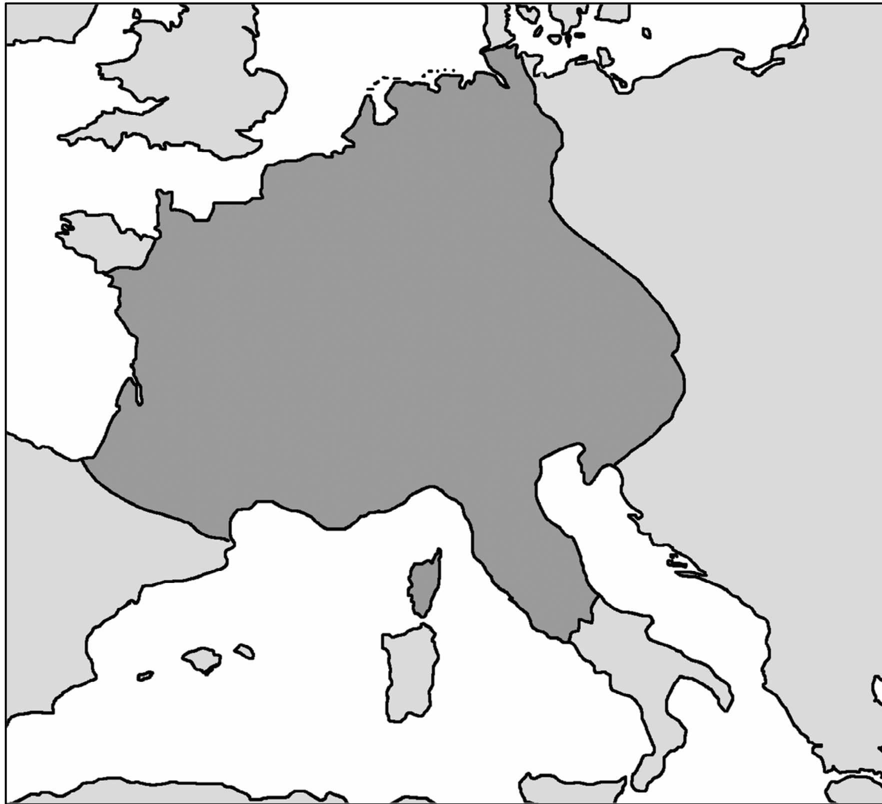
A short overview on the development of the European community of states reveals that there is almost no European state which can look back to a unbroken and uninterrupted history. The Roman Empire controlled at the time of its largest expansion in the year 116 after Christ the entire space of the Mediterranean from Spain to Mauritanian including Egypt and Mesopotamia until the black see. In the north all England (except Scotland and Ireland), actual Germany and a part of Poland and of the Ukraine including today's Hungaria and Rumania were also part of the Roman Empire.

Map. 1. The Roman Empire at 120 after Christ

The huge empire disintegrated first into the East-Roman and West-Roman Empire. The dividing line divides today's Balkan. The Roman Limes a long the Rhine and the Danube which became the shelter for the retreating Roman armies has built up centuries later an important border line which was has ignited later on many different conflicts but which has also been the border line for the creation of states and for the territory of religious communities.

The Empire of Charles the Great

The later empire of Charles the Great expanded to today's France a part of Italy, Germany, Austria. Slowenia and Croatia.

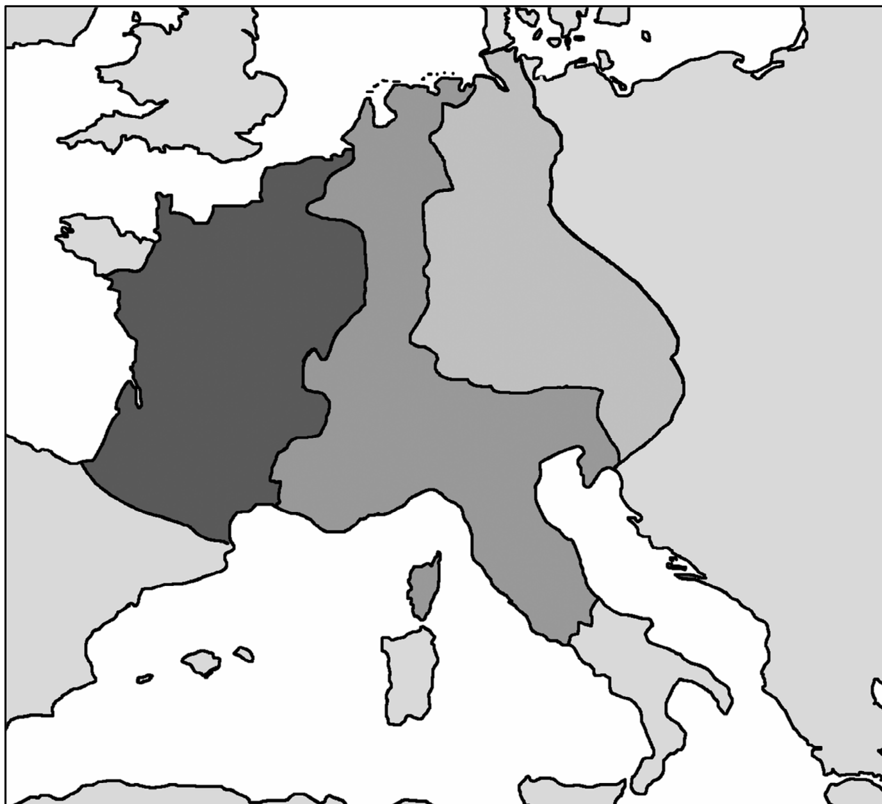


Map. 2. The Empire of Charles the Great

Even more important for today's development of the community of states within Europe has been the division of the Empire of Charles the Great to its three suns. Here one can clearly detect that the middle part which has been transferred to Lothar between later Germany and France bleeded to death in several some times long lasting wars. Some of the states of this region were only able by wars of independence or secession to achieve the possibility to develop independently and harmoniously such as the Swiss Confederation or the Italian Town-States. The Alsace, Lothringen, Luxembourg, Belgium and the Netherlands are all regions or independent states which even today can not be catched by either the French nor the German Nation concept.

The Carolingian Partition

The partition of the empire of Charles the Great to his three suns with equal rights Charles the shaven, (West-Empire), Lothar (Middle Empire) and Ludwig the German (East Empire) left many substantial question open such as e.g. the right of succession as emperor of the entire empire. Moreover the middle empire of Lothar has been divided and transferred to his brothers after his death. This transfer has mainly contributed to the instability between France and Germany. For later centuries the root for the separation and later for the century lasting enmity has been implanted.



Map. 3. The Carolingian Partition

While the French king has never requested also to get the crown of the cesar and emperor of the entire empire the „german“ successor demanded as the only successor of the Emperor the crown and thus the title to rule over the entire former empire of Charles the Great. Logically he and the following emperors required their subordinated kings to defend their proper territory with their own means and armies. The French king however considered himself to be entitled to defend his territory with his proper army. The consequence of this decision of the German

"emperor" was a strong decentralization and federalisation of Germany, which in the year 1800 was divided into not less than 1'800 principalities. For this reason Germany was required in the 19th century first to struggle for its national unity. The development of democracy within the country had to be postponed to the 20th century.

In France however the national unity has never been disputed. The innerstate conflicts in the 19th century have not been initiated on the dispute of the national unity but rather on the conflict between the pre-modern feudal society and the modern bourgeois society ruled by the citoyen. The legitimacy of the nation has never been at stake, but the legitimacy of the governmental system and in particularly of the Monarchy against the later Republic has given ground for several revolutions and coup d'état. The different concept of the German nation as fundament of the German state with regard to the French nation guilt by the constitution has somehow its origin already within the Carolingian partition of Europe.

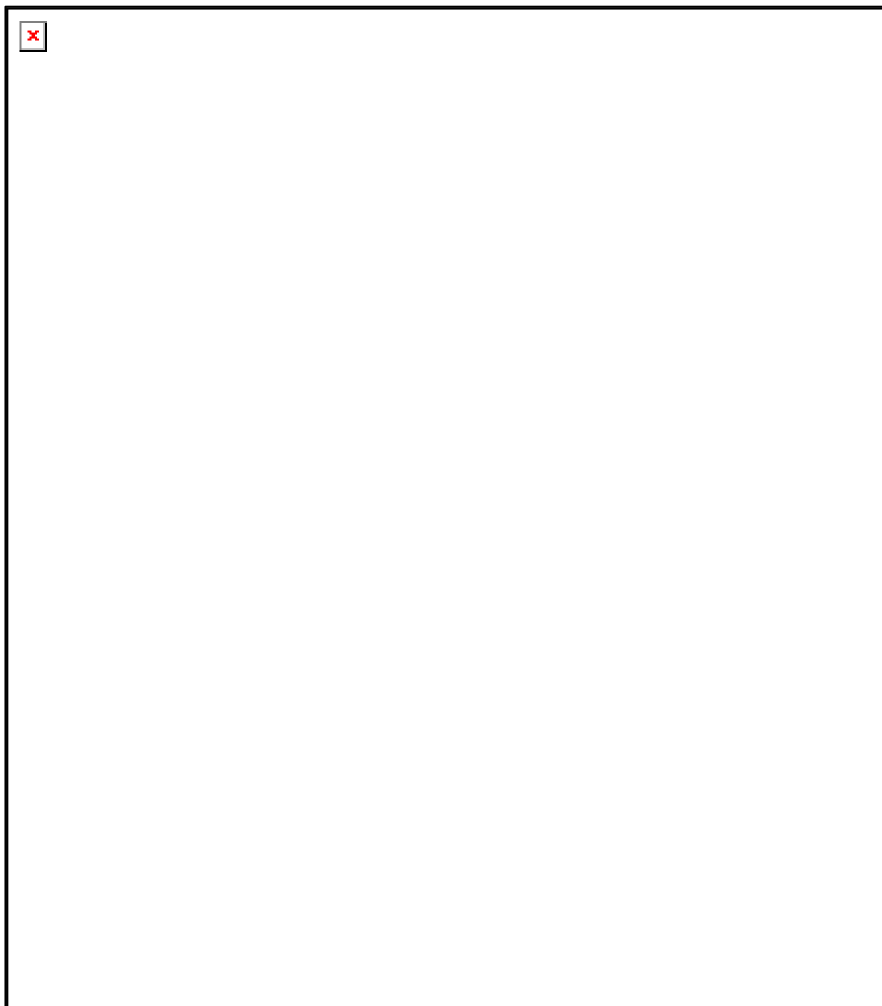
Reformation

Most important with regard to the development of the European world of states was the time of the reformation and the division between the Catholics and the Protestants. With the reformation the protestant state have performed the already carried out political separation of the Holy Roman Empire also theologically by the separation of the pope. The reformation enabled the states which did detach from Rome to renew somehow the connection between pope and emperor within their proper territory. The theological and political fundament for an absolute indivisible sovereignty has thus been led. The conflict between the religions turned into a conflict between states which could only be solved with the peace of Westphalia in the year 1648.

The Peace of Westphalia: The Fundament of Modern Europe

With the peace of Westphalia the political guidelines for the modern Europe and its state diversity have been led. The attitudes of the several principalities towards the religion however did lead to new different controversies among the different states. The secularization of the state and the gradual introduction of the freedom of religion as a minority right finds its modern roots within this period in which also the first appreciation for problems of minorities has been initiated.

While the new European peace has prepared the external conditions for the absolutism of Louis XIV in France in Germany the fundament for decentralization was introduced. The princes were entitled to rule their proper sovereign state and to conclude state treaties and the empire did gradually loose its importance.



Map. 4. The spread of the different confessions after the peace of Westphalia

The peace of Westphalia anchored fort the first time within a writte document the principle of sovereignty of the states as well as the principle of equality of the states. The European power-balance among the different states has been made. Peace between Spain and the Netherland has been established and the bases for a later independent Belgium was led. For the first time the Swiss confederation has received in a written document its already de facto enforced independence from the empire.

England and the Modern Constitutionalism

The peace of Westphalia thus turned into the proper foundation stone for the development of modern constitutionalism. One may be aware that at the same time of the peace negotiations which enabled more secure borderlines on the continent the English Parliament struggled for more power and aroused the first important European revolution in which the parliament did win new sovereign rights with regard to the crown. The *Long Parliament* which in the end of its anarchic rule removed the King and condemned Charles I to death has anticipated the later revolutions in England (1688), in France (1789) and in Russia (1917). With this decision for the first time a parliament has enabled itself to take over sovereign rights and titels, and it lasted 150 years until in France the parliament as *Assemblée Nationale* has in similar way tried to carry through the Republic against the Monarchy.

Congress of Vienna and Congress of Berlin

The two next important congresses for peace which influenced decisively the European state community have been the Vienna Congress of 1815 which has for the first time recognized the Swiss Neutrality as an important element for the guarantee of the balance of equal forces among the European states. The other Congress of Berlin in 1878 has focused on a new balance within the Balkan and with regard to the Ottoman Empire. With these decisions imposing the balance of powers the Berlin Congress has determined the conditions for the conflicts of state foundations and minority rights as well as for the temporary decay of the states in this region.

While within the states of Western Europe the different nations could unite more or less as homogeneous unit within one territory the peoples of the Balkan under the rule of the Austrian-Hungarian double Monarchy and of the Ottoman empire did mix within the same territories as under the foreign rule a people could not establish its proper state. However within the frame of the Turkish Millet-system and the Austrian-Hungarian autonomy the nations and peoples were entitled to certain collective rights which did grant them some personal autonomy. They could foster their language and had some control on the education of their children. As consequence of this personal autonomy the members of different communities and religions could very well develop within the same towns without having to renounce to their personal identity. Thus still today one can find in many towns in the Balkan such as Tbilisi, Sarajevo etc. the Synagogue neighbouring the Mosque, the catholic and the protestant church.

Balkan

After the first World War the Kingdom of Austria-Hungaria was dissolved. Hungary has radically been scaled down with the consequence that this political decision of the allied powers did create new important Hungarian minorities in the Ukraine, in Czechoslovakia, in Rumania and in Yugoslavia. At this time the fundamental principle that each nation should be entitled to have its own mother-state has been developed. Accordingly the states have been established in order to ac-

commodate the different nations. Only with regard to the multi-nation Yugoslavia this was not possible. Then this state covered a territory which has been divided since more than thousand years by the borderline between East and West Rome, between the East and West Christian church and later between the Ottoman Empire and the European Occident. The peoples living since centuries within this territory have been maltreated by history, and as a consequence there is no clear territory for Serbs, Croats, Bosnians, Macedonians etc. Thus the nations winning World War One decided to establish one state as a motherland for all Slaves living in the South, yugo meaning the South in the Slavic languages: Yugoslavia.

Holocaust and the Decline of big States

The 20th century is marked by the holocaust. Never in history a state has decided for the whole world to extinguish a human race from this earth. Such enormity has up to the regime of Hitler and his Nazi party and also since never been implemented into reality. The idea of a supra race connected with the request for legitimacy of the state to decide who belongs to this supra race and which race has to be extinguished can be traced back in its final consequence to the homogeneous state race which in the interest of homogeneity and statehood should be entitled to extinguish all other races threatening the unity and homogeneity of the nation.

The other important characteristic of the 20th century is the liberation of the peoples from external powers of the Ottoman empire, the colonial regimes – and after the fall of the Berlin wall – the implosion of communism and thus the end of the Sowjet and communist imperialism. Such processes of dissolution are always connected to century lasting conflicts as we have learned by history since the Roman Empire has been dissolved. This has with regard to the understanding of the state by the peoples having been ruled by foreign states the following consequences: The political authority by the actual state is often mistrusted as a symbol of the previous compelled rule of the colonial power. Within the historical subconscious emotions the state is always considered as an enemy of the nation. Whoever follows to the colonial rule has to be aware that the state even today lacks genuine legitimacy of the concerned peoples. As in many cases the new state authority has been taken over by the majority nation this nation will be identified with the former colonial state and thus be hated and rejected by the minorities as they hated the former colonial rule. Thus the state has become for many peoples the real image of an enemy. Only a state which is able to grant the previous suppressed peoples unrestricted identity and thus also an unrestricted feeling of freedom can become an acceptable state fort hem.

Necessarily this did lead to large conflicts as the new states in most rare cases covered a territory with a homogeneous population. As in Africa and Asia thus also in Eastern Europe ethnic conflicts that is the powerful struggle for state identity have started with ethnical cleansing.

II. Challenges for the States

a) Globalisation

The Fall of the Berlin Wall

For the new understanding of the state concept the historic event was certainly the fall of the Berlin wall. With this 1989 occurred symbolic fall of the iron curtain the understanding of the state has decisively altered. For 50 years the world was however economically divided by the industrialised and the non industrialised world. Politically much more substantial was the division of the state community into a communist and a capitalist sphere of power. Either the states belonged to the communist or to the western sphere of influence. The two for century existing rigid adversary blocks influenced the way of thinking of the state substantially. The states were the undisputed fortresses of either the liberal-capitalistic of the Marxist ideology. As a major factor of power within the respective alliance the state and its rule were considered as a necessary self-evidence. Nobody questioned its legitimacy. The only question to be asked dealt with the organisation of the state and its governmental system within the respective block. Did it fit to the major ideology of the block and did it provide for a good or bad leadership. The very existence of the state, their borders and their significance was not questioned at all.

Sovereignty of the Global Market

After the fall of the Berlin wall the theory of state faces now a new challenge which is focussed on new issues essential even for the existence of the state as such. And those questions need to be given a understandable and convincing answer. Now that the enmity between East and West has faded away and that the states subordinate continuously and gradually their sovereignty to the global market, which can be ruled to a great extent via internet and that the within the international community the global leadership with regard to a certain world police is taken over by the United States of America one may even ask the question whether the state at all is needed any more and in case for what it is really needed. The central question to each state focussed previously on the human rights issue, which in case of necessity hat to move out to the whim of the local raison d'état. Today the issue of human rights has become a universal standard for the assessment of states. World Bank and International Monetary Fund consider the compliance to those principles as part of the *good governance* a pre-condition for any international financial support. Universal values have marginalised the former important nation-states of Europe to local polities. Are they still needed? Especially since their legal orders have been integrated and thus marginalised into regional organisations extending whole continents such as e.g. the European Union?

Localisation?

While consumers seek the global market citizens demand universality of human rights. Within its social and emotional existence however human beings still feel deeply insecure. They seek security and identity within the local province. Globalisation thus is only a trend of the actual period. In fact it is complemented by the need for local security, local values and local autonomy. Instead of speaking of globalisation one should thus rather invent the work "glocalisation which would better fit to the actual reality. The consequence of glocalisation leads as consequence on the local level to more devolution and decentralization. (UK Scotland and Wales, France Regionalisation, Spain more competences of the regions, Italy federalisation etc.)

The World Bank and the IMF grant credits only to states which not only guarantee good governance on the central level but which also provide for a realistic program of decentralisation which today is considered a part of the principle of good governance. Many actual ethnic conflicts are in fact struggles on the power of the central government. Decentralisation should grant more rights and autonomy to the historically developed peoples. However this leads us to the burning question how the states can on one side transfer some tasks to the global free market and on the other side decentralise essential tasks to local units without loosing their main function as state responsible for the development of the society ruled by this state?

European Union

The European Union finds itself within a special situation. Its roots go back to a treaty aiming to pacify the century lasting enmity between France and Germany on one side and to strengthen the European states by a stronger alliance within the conflict between the west and the east. One had to forge a new alliance of the west against the east, and to overcome the century old enmity between Germany and France. The new community of states should aim at a stronger integration with the help of the economy based on a open European market and thus gradually turn into a politically integrated alliance and community. At the time of the foundation of the originally European Economic Community economy was still regulated on national bases and thus the nation was also prepared to open its market to the region of a state community. At the beginning of this integration process the industries important for the armament of the armies had to be tied together within the Community of Steel and Coal.

Within the area of globalisation the European economic space looses on importance. The political unity of Europe has thus again come into the focus of integration. A uniform currency, the democratisation of the institutions a common foreign policy and the building up of a European "people" with European citizens as important concerns of the aims for a common consensus. Thus the constitution of a still to establish European state has all of a sudden again come into the focus of the political debates.

b) The Engine of State-Building

Multiculturality

With these developments the theory of states is enlarged by a new dimension. By the reality of multicultural polities the federal structure of states gains additional importance. Up to now the main focus of the general theory of the state was on the issue of the question how human beings and peoples should and can be governed and how the power of a polity should be organised and administered to be in the service of the interest of the peoples. Today however the question comes into the foreground what position and tasks the state should have with regard to the world wide tendencies of globalisation and localisation. To what extent can they contribute besides general universally accepted values additional liberal or particular values, how they have to cope with the threat of terrorism of private organisations, how state sovereignty is to be distinguished against the sovereignty of the global market, what values bring or hold together the peoples of a state or a nation. With regard to multiculturality the crucial question is, *which people* respectively "who" should be transferred the power to rule, which majority should be entitled to rule on which minority or should participate or share in common the governmental power and which rights should be given to the minorities.

The draft for a new contract on a constitution for Europe in the version of June 13 and July 10 2003 puts the new constitution under the following main guideline formulated by the ancient Greek THUKYDIDES:

„Χρώμεδα γάρ πολιτεία.… καί όνομα μέν διά τό μή ές όλίγους άλλ' ές πλείονας οίκεῖν δημοκρατία κέκληται". (THUKYDIDES II 37) The English translation for this sentence reads as follows: „Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number". The German version of this text however had a significantly different maning it did read as follows: „The constitution which we have … is named democracy, because the state should not be oriented to a few citizens but to the majority. („Die Verfassung, die wir haben ... heißt Demokratie, weil der Staat nicht auf wenige Bürger, sondern auf die Mehrheit ausgerichtet ist.")

According to the German version democracy means that the state should rule its politics in the interest of the citizens. According to the English translation democracy is the governmental system which transfers the power into the hands of the majority. Those two different versions of translation can apparently be traced back to a different understanding of democracy. Either democracy gives the power to the majority or it requires the state to orient its politic to the interest of the majority. The central question though who should govern over whom is answered with the English version but left open in the German. For the German version THUKYDIDES answers however the question what should be the standard for good governance. The same quotation answers thus within the different translation a totally different question. This reveals that with regard to the most crucial questions of the theory of state there is still no clarity on the highest European level.

Suppression and exploitation of peoples are additional reasons which did lead to conflicts and thus to secession movements division of states and occupation of

foreign territory. The multicultural states of the actual period will always be confronted to this challenge as long as they are not able to create even for their minorities a certain identity. The conflicts between Palestinians and Israeli in the Near East demonstrate clearly that it is not sufficient to grant autonomy to minorities. Either one is capable to build a state in which all peoples can identify within the territory of the state or one has to draw the consequences and to divide the state. The longer the less the peoples will accept to live within a state as second-class nation. Their engine to defend the interest of their peoples community is the need for self-determination according to their proper identity and according to their proper history. The reject policies, which do only respected them as individual citizens. They want also to be respected as a people on equal footing with the majority of the state.

What are the engines which move human beings to the decision to build up new states, to unite with other states , to secede from a state, to centralize or to decentralize? If really all human beings are equal belonging to the species of the homo sapiens why then the states differ so strongly from each other?

Welfare

Human beings want to design their environment in order to be able to live in peace and welfare with each other according to their needs and interests. They want to build up a political superstructure to their society which is accepted from all or which at least promotes values which are acceptable to the big bulk of the society. With this the internal aims of the state are set. They correspond at best the impulse of human beings for more security, power, wealth and recognition.

Religion

The engine which moves society towards the foundation, alteration or transformation of states has always been and is still – partially today – religion. Religion has often put polities under its interest and services. States were asked with their legal order to implement and execute the rules of the religion. On the other hand religion provides the states with legitimacy which enables political power of the state but also for the rulers. In the Christian Middle Ages the Kings did rule the peoples at their whim by the Grace of God. They had absolute power because their authority with the legitimacy of God has never been questioned.

Preservation of Power

The engine for politics and state foundation is finally also the proper interest of men and woman. The state serves the developed structures and their power-holders; it has to preserve with its structures and institutions the achieved political and economical power-position. The state has in earlier times been installed in order to protect the rights of the knights and of the aristocracy. State and law had to serve the developed feudal system. Its hierarchy was protected by the legal order. The feudal system did appear as the order which was wanted by God and therefore could never be changed. As people could expect based on their religion to be

compensated for their sacrifices and suppression in the other world, they accepted the justification of inequalities in this world.

Liberty and Equality

Today the engine to change and alter the state structures including even state border lines is the need of human beings to individual freedom, justice and welfare. The aim of the state is the protection and the promotion of individual freedom. If individual freedom is protected within the democratic polity, then –according to the philosophy of liberal constitutionalism – the pre-conditions for welfare and justice within the society are provided for. Since the French Revolution the political opposites move between the often contradictory demands either for freedom or for equality. Some pretend that without equal opportunities freedom finally can never be achieved. Others claim that too much equality destroys finally freedom itself. They argue that liberty prescribed by the ruler suffocates freedom. Between those two contradictory positions societies did struggle since the French Revolution for the development of the social welfare-state. Liberty is always bound to the common good. Proper interests should never put into question the common interest and be against the common good. Even the right to liberty has to respect the common interest reply the others.

Property and Identity

A further pair of contradicting opposites which are as well motivated by some personal interests as also by collective interests and which may lead to new state structures are property and identity. The state needs to protect namely the property which as already requested by JOHN LOCKE. Property has also to be within the interest of the people contradict those defending the identity of the people and the preservation of the collective interest of the entire population. When e.g. in Switzerland the acquisition of real estate in the area of tourism has threatened to lead to a selling out of the soil of Switzerland the legislature limited the freedom of real estate owners which were only allowed to sell real estate to foreigners to a limited extent.

How Should one Govern Who Should Govern?

The inner engine for the motivation for state building and state development is further defined by the following pair of opposites: How should one govern and who should govern? Those who only put the question with regard to good governance exclude the some how decisive question with regard to the *legitimacy* of the state and of the authority of the state. If one on the other side puts the question towards the democracy within a multicultural state, the problem of the "who" comes into focus: Who should or can legitimately rule the state that is which people or which peoples, which majorities or minorities should be given the power to rule on what other minorities or communities.

External Defence

The defence of external risks such as forces of nature of hostile tribes or peoples has substantially determined the development of states in all centuries. States with open borders (France, China), states with natural borders such as islands (Japan, UK), with aggressive neighbours and states with a territory of strategic importance did develop differently according to their external environment. A dangerous environment did force states to a rigid and often authoritarian and centralistic inner organisation. This is also the case for states in which men and women could only acquire their needs for survival with greatest effort and energy and thus had almost no time to care for issues of state organisation, culture or democracy. States without external threats on the other side and states in which human beings could afford within their leisure time to be interested to their spiritual, cultural and political development had much greater opportunities to concentrate for their inner democratic development.

Economic Influence and International Markets

The need for wealth and economic development did let many states to obtain the necessary goods in other states and consequently aimed at suppress those states and peoples to their proper interests. Economy thus was often the engine to motivate state development not only within the interior, but it did also influence foreign policy including decisions on war and peace. The economic interests of colonialism however have often been concealed by religious motives. The universal claim of the Christian respectively the Islamic religion has certainly strongly induced and legitimised colonialism within the 17th and 18th century as well as the rule of the Ottoman Empire from the 13th to the 19th century within the Mediterranean area.

Religion and Religionist Policies

With regard to the religions one has however to distinguish between religious communities having a universal claim with the believe that mankind should in order to reach heaven adopt the specific religion on one side and religious believes which are limited to a specific *chosen* people without any claim to proselytise mankind for its unique religious believe. Those religions which are reduced to the chosen (by God) people are Judaism, Shintoism and the believe of the Singhalese from Sri Lanka. Externally they are in general not aggressive. But with regard to the interior they are exclusive towards minorities with other religion.

The attack to the World Trade Centre in New York of 9/11 has demonstrated the fragility of our today's civilization which can be threatened in its proper existence not only by enemy states but mainly also by private organisations which are serving fundamentalist religionist policies. The enemies can not any more identified by states but by non state terrorists and their private organisation which may be harboured wilfully or against the will of a certain state. Consequently states which are suspect harbouring terrorists and their organizations are all of a sudden confronted with the fact that other states wage war against the territory of the state claiming not to threaten the government or the civil population but only terrorist

networks. As a consequence the states need in future not only to seek internal legitimacy but also international legitimacy as states which are able to clean their territory from terrorists. One can even pretend that actually states with an legitimacy by the international community do not have to fear that their inner or external legitimacy might be questioned successfully.

B. The Questions of the Theory of State

I. Traditional Questions of the Theory of State

What is the State?

The theory of state has been developed on the European continent. It tried to give an answer to questions related to the development of European states with regard to the secularization, the republican-democratic nation-state and its governmental system. Naturally the theory of state needed to answer the question of the function, the sense, the tasks and the position of the states.

The state as such has never been at stake and discussed. Nobody had any doubt as to the question, whether states are needed. The central issue focused rather on the question what is the substance of a state, what does represent a polity really. To understand the state to know what is its nature and to appreciate how the might of the state is structured and used, these were until recently the main goals of a theory of state.

Legitimacy by Peoples Sovereignty

The question of the legitimacy secular political authority in contrary to the legitimacy of religious authority has therefore always been one of the main issues of the theory of state as well as the question with regard to the good, efficient and just governmental system. People's sovereignty as bases for the legitimacy of the state authority moved to the centre of the scientific concern. Why should the state, which deduces its legitimacy from the people sovereignty, be entitled to issue orders towards human beings or even to require from them to sacrifice their life in case of war of aggression or war of defence? Nobody would question this legitimacy from the ruler who deduces its legitimacy from Gods forces. At least the believers of the same religion would never put in question such decisions. But how can a state which derives its legitimacy from the people claim such title of authority?

Good Governance

Who struggles for political authority naturally strives to convince the governed by its good governance in order to get the legitimacy from the people. The limitation of state powers as well as the tasks of the state in the common interest have thus

been the decisive questions which had to be dealt with by the interdisciplinary science of the theory of state.

II. New Questions of the Theory of State

Majority Principle and Multi-Ethnic State

Today the building up of the European Nation-State is not any more at stake and thus the central issue of the theory of state. At stake is rather the question whether the state with its form of government has clapped-out. The challenge of the multicultural state puts the question of how to govern in the background. Explosive however is the question who should and can govern. The state is in principle nothing else but a political authority installed by human *reflection and choice*. Is such political authority really needed in the area of globalisation and privatisation? Should one not just let the sovereignty of the market decide? Can the majority of a people rule over the territory in which minorities are living? Then as well majorities as also minorities are globalised. Can the democratic majority principle at all be applied to multi-ethnic states?

State Structure and the Fundament of Legitimacy

The answer to the question who is entitled to rule the state has of course also a repercussion to the issue of the organisation and the structure of the state. Federalism e.g. has for a long time only been considered as an instrument of good governance. When federalism however also has to serve to install and to legitimize the alliance of a state for multicultural states federalism becomes also a useful tool to answer the question who should govern. This however requires a federalism which allows multiple loyalties and diversity created not by assimilation and integration but by fostering the differences and specific identities.

Rational Human Being

The real challenge of the actual time is the multicultural state. Up to now the theory of state has almost ignored this basic challenge for modern states. The state of modernity has emerged out of the liberal thought at the time of the development of the constitutionalism of the enlightement. Liberal scholars have continued the idea developed in the period of the renaissance of the sovereignty of the ratio of the individual based on the image of human beings as homo sapiens. This rational creature is independent from its culture, religion and tradition and thus principally equal with all other individuals belonging to this species. Either it is egocentric (HOBBES), a creature which is able to make rational judgements (KANT), which is exploited (MARX), a reasonable *citoyen* (ROUSSEAU) a "homo politicus" or oeconomicus moved mainly by cost benefit analyses.

As equal and mature creature gifted for rational judgements human beings are all over the world able to legitimize similar states and state-authority. At the same time they are entitled to be recognized as equal citizens to participate on state de-

cisions and to obey state law. Culture may either be an essential element of the political life (Germany) or it is totally excluded from the polity. The idea of a *multi*-cultural state is strange to the basic philosophy of the state of modernity.

From the World Image of the Pyramide to the World Image of the Networks

The world image of the middle ages was symbolised by the pyramid with which the clear hierarchy and unity of the entire Christian world under God and its pope was expressed. The world image of the enlightement was the machinery of gears of the age of industrialization and of mechanics rooted in Newton. The states were the sovereign gear wheels of the machinery hold together by international law and sovereign state. The world image of the actual area of globalisation is symbolized by the network. Within a multidimensional network there are almost no clear and transparent structures. Who wants to survive and to drown in this network of public and private organisation needs to be able to control the important nodal junctions and interfaces of the network. The state has given up its monopoly position to private associations, communities and decentralized units. It turned into a competitor competing with the most different power-holders of this network. Which should or can its position be within this network?

An additional challenge is the universalization of Human Rights. While consumers seek the best products with optimal prices on the global market, citizens claim for universal human rights, investors profit from the global financial market, employees flee to their proper social homeland and human beings seek security within their local identity. As mentioned globalisation is challenged by the trend to localisation.

If the states want to take into account the inevitable trend to further globalisation mainly marked by the world wide society of information they need to alter their proper self-understanding: They can not any more build up their legitimacy on a one dimensional image of the human being. They need to integrate into the international network in which they will not any more be able to play a central role as in the machinery or gears. They represent as many other institutions only an intermediate stop at which according to the significance either many important lines come together or at which rather unimportant and very few lines of the network converge.

From National towards Global Economy

The increasing importance of the global market however will lead not only to a gradual marginalisation of the states but also to the diminution of their political influence. The states are almost not any more able to determine decisively the economic development of their country. "National economy" has been indeed replaced by the global economy. The fate of human beings generally seen and the fate of employees is determined by foreign investors. Board members of big international companies decide far from the local working place on profitability and chances of development of the local enterprise. The fate of this enterprise may have decisive influence on the political development of the municipality or even the province. But also within the states enterprises require equal opportunities in

particular with regard to the global market. High wages and social contributions as well as state control with regard to the environment including state taxes are no measured with regard to comparing situations of other enterprises in other states.

The space for autonomous political decisions and measures is radically reduced. Superpowers such as the USA may still be able to steer the global market and namely to put their foreign policy within the service of their economic interests. Middle and small states however are not any more able to such influence. They fall into the dependence of big states if they can not manage to unite regionally within political associations such as the European Union and by this to provide for more political space.

From Universalization to the Universalizer

A part from globalisation the issue of the universalization of human rights becomes crucial. States which would openly and systematically violate human rights will be marked by international media. As soon as media – for what ever reason – accse a state for violating human rights, it has to defend its policy before the international community, other wise it will face interventions of the security council. Elementary violation of human right is considered now according to the Charter of the United Nations of 1945 as a threat to the international peace (Intervention in Kosovo) and may sooner or lager be punished by the international community. With the enforcement of the treaty on the international criminal court criminal law has been internationalised. There is no state and no government which would be able successfully to refer to its raison d'état in order to justify human rights violation and to protect itself from international prosecution. The vehemence by which the United States have fought against this new court shows how much the states feel threatened by this universalization of human rights with regard to their local legitimacy.

States do not any more dispose freely on human rights. Constitutional guarantees constitutional catalogues for fundamental rights are considered today to belong to the minimal standard of a constitution. Recently there have even been adopted constitutions which oblige their courts expressly to respect the jurisprudence of international courts with regard to the protection of Human Rights. (South Africa) As much as this development is to be applauded from the point of view of a world ethic and world moral, as much one may also question this development. Human rights indeed became universal, but their implementation depends on the whim of the "universalizer" of the international commu nity. It is the only power which finally determines the content and orders which states should be declared as violators of human rights. The universalizer however lacks the worldwide democratic legitimacy. It is only accountable to its proper people but not to the alliance of the peoples of the international community. The innerstate constitutions should have the monopoly over the final ethic code of political values but apparently they have lost this monopoly.

C. What is and What Wants the General Theory of State?

I. The State: The Totally Different Society

Can one at all Explain the Phenomena State?

How often the people and media talk of the state! On receptions, international conferences, when terrorism has to be defeated, taxes collected and the traffic regulated. In innumerable occasions we face the state or its representatives without even being aware of. Often it is invisible but its claim to power is finally always visible and often noticeable. What is this invisible some times anonymous bureaucratic some times celebrated construct decked with flags? Why can the state limit our freedom, collect taxes, summon for military service or even condemn to death? Why can the state in case of a controversy with our neighbour decide on right or wrong, divorce a marriage or dissolve a contract or a lease.

Worldwide several different minorities claim their right to have their own state out of their right to self-determination. Within their state of origin they feel as second class people exploited of even suppressed. From a new and proper state they expect the paradise. The worldwide increasingly requested demands which are often rejected and by the mother state and fought with state terror are often the cause for the most terrible and bitter civil wars and conflicts with international dimension.

State and State Alliance

On the other hand the states join together and conclude new alliances either for the interest of peace or under the pressure of globalisation. Those multinational organisations emerging out of such alliances should help the member states to solve the raising complexity of the problems of our times. Can we call thus also these international organisations as states or state like entities? Thus one may reasonably ask the question whether the European Union has already become a state in the traditional sense. If yes, this would be for Germany a somehow almost unsolvable fatal question. Then namely the provision of article 20 of the fundamental law would be violated which determines that all state power has to derive from the people. Would the European Union become a state it would lack the necessary democratic legitimacy. As a consequence all legislation enacted by this union would become unconstitutional. The German Constitutional court has avoided therefore this notion of state with the new label “alliance of states”.

State and Mafia

What makes the difference between the state and a multinational company? How can the state be distinguished from a international Organisation – such as e.g. the United nations, the European Union – or from a football-club or even from a

criminal organisation such as the mafia or a terror organisation? Where does the power of the state come from which it uses in order to enforce state interests? Can one determine immanent limits of the state power? How can the state justify its decisions towards the individuals or towards the entire people? What are the real aims and tasks of the state? How is it organised? How should it be organised? What are ist previous, actual or future possible appearances? What relationship does exist between the state and the economy or specific communities such as cultural, religious or language communities? How and under which conditions can the state decide on its citizens, on foreign workers, tourists or asylum seekers? With the fall of the Berlin wall the question of the „why", the "how" and "the "what for" of the state has to be put in a totally different way.

New World Order?

Challenged by the globalised economy and in particular by the international trade organisation WTO the state policy for social security, employment and salaries faces the increasing pressure of the international competition. The state sovereignty limited to the proper territory of the state has lost the power to solve independently most of the existential issues at its own. Policies on environmental protection, communication, energy, crime, health protection and migration can only be carried on in common with other states on the bases of international cooperation.

Fading away of the state

Some times ago LENIN die forecast the fading away of the state for the sake of the establishment of a new paradise of communist equality. Paradoxically this prediction gets its new significance within a capitalized and globalised world order. Indeed the former proud and democratic republics and nation-states have been able just to keep a small political margin on political decision making such as a bit more or less on social solidarity, decisions on the infrastructure of local traffic and on local security (police). Defence and foreign policy are either integrated into the global economic interests or within the decision of the security council of the UN. The state economic and financial policy with regard to the social balance has to give precedence to the interest of a strong internationally competitive currency. The political system of the states is measured on its standards with regard to human rights, democracy, efficiency, flexibility and its possibility to integrate and to adapt.

From the Homo Politicus to the Homo Oeconomicus

Consumers of international products determine the world. Voters and taxpayers serve finally their interests. The autonomous political discourse has lost its significance and is marginalised within the shadow of the dispute on the capacity to compete internationally on the price- financial and social policy. The globalised bourgeois replaces the citizen who may only struggle for better salaries. The nation states once proud of their powers and possibilities are marginalised to local provinces. They woo jealously for more autonomy within the international com-

munity. One believes that within the globalised competitive economy the *invisible hand* will care for a more just repartition of the goods. Politic as the only real guarantee of justice has lost its credibility. Not the taxes but the prices will have to look for just welfare. The “homo oeconomicus” has indeed replaced the “homo politicus”.

This however is only one side of today’s reality. More than half of the actual 170 states have only been created after the seventies of the 20th century. In most cases those new foundations are a consequence of violent disputes or terrorist upheavals. In other words: Human beings are prepared for the only interest of their proper state to sacrifice their existence and even their life. For all these peoples the new foundation of the state promised a new paradise of freedom, independence, justice and economic development.

The Identity of the Political Community

In many of those states the “political” has become the central focus as symbol of the national or even chauvinist nationalistic unity. The political feeling of a “we” of this new national societies is based on one hand on the rejection of the foreign and alien neighbour-culture and on the believe to the proper values of their religion, history, culture and or language. The state is celebrated as an indispensable symbol of national freedom, unity and independence of all those nations which were able to liberate from the yoke of their former colonial powers and imperialist empires – such as e.g. the Sowjetunion – and establish their proper state. The dissolution of the Ottoman empire did shake the world at the beginningof the 19th century until our days (Near and Middle East and Balkan). In the 20th century the dissolution of the colonial empires and of the red Tsar did multiply the tremors.

The State – a Completely Different Community?

The state of the modern constitutionalism has its reason and its legitimacy based on rational arguments, on a proper judgement of the population and the free choice of the mature citizens. In this sense it is a completely different society compared to the natural communities developed out of nature such as the family. The modern state disposes the exclusive right to use force for the execution of the law and to guarantee security and order. This is a monopoly. Only the security council of the UN can – a part from the state – provide forceful intervention against an aggressor. But this is compared to the monopoly of force of the state very limited. The state is actually still the only construct which – even though the world has globalised – can require from its citizens to sacrifice their life in case of the defence of the country or in cases it provides military forces for the UN peace enforcement measures.

The state is mainly a artificial construct. As artificial unit it can not only be understood as a politically centralised unit which is composed only by single individuals of the civil society. Then, also the civil society is fragmented into different units such as natural families and artificial associations or religious or other communities. The actual multicultural reality and the economic and social pluralistic state embody already a polity which is composed of different collective entities.

Those entities themselves have been united by emotions, cultural and historical values and feel themselves at least subjectively as a community weld together by the common fate. With regard to the frame of the supra-state some of those entities require their proper collective rights such as autonomy. They strive – based on their claim to self-determination deduced from natural law – even at secession. This is the reason why today the tension between the state as the rational by reflection chosen community which is still considered artificial and other emotional communities also felt natural as the family – still a almost not solvable tension with inherent explosive potential for conflicts exists.

II. The Structure and the Different Questions to be Dealt with

Is the Nation State at all Outdated?

Do we thus have to ask the essential question, whether the state in its traditional sense – that is according to the state of modernity – is still needed? Does not the global and invisibal hand care for the stable order of the world economy and by this provide for a just and better repartition of the goods than the multicultural state troubled by inner-state disturbances? Could one not transfer more competences to the international court of justice in order to convey it the general task to assume the responsibility for law and order and for fighting against criminality? Can one consider the state to be a political unity which prepares the development to a political world order that is a polity in transition which will sooner or later fade into a world-state? Or does one have to fragment the proud traditional nation-state into smaller and smallest homogeneous language, religious or cultural communities or ethnicities, because it should limit itself only to care for the traditional and cultural development of its natural community?

Doe we have to recognize such smaller units as state-units and award them with all traditional sovereign rights? When the state has to be considered as a unit founded by *reflection and choice*, which should then be the criteria's according to which the external borders of the territorial sovereignty should be determined? Are there at all generally valid and accepted criteria's to determine the territorial borderlines? Or do borderlines of states not by definition lead to unsolvable conflicts in which millions of innocent victims have to be mourned, because the historical people the language or the religious community or the community hold together by the rational will of its people rejects and fights against the forced state-unity with the "hostile neighbour"? Will the world not sooner or later dissolve into the anarchy of sovereignty islands which fight with each other or into an "apartheid" of sovereignty islands which isolate from each other?

The Question to the „How" and the „Whether" with regard to the State

As an artificial by reflection an choice founded supra-family sovereign community the state can decide on the fate of its peoples. How far can thos competences reach? Where are the limits to be drawn of state authority? Does the voter who is participating in the political process sometimes replace the democracy of the con-

sumer in order to replace the invisible hand and thus representing the free market decide on the just distribution of goods based on a democratic competition?

All those questions are not any more guided by the "why" and the "how", they aim rather at the whether of the state. For the peoples of today they are of crucial importance because they can throw states in existential crises and may lead in many parts of this world to conflicts which are full with the dilemma of insolvability of a Greek tragedy. If those conflicts can not be seriously neutralized one has to fear that the unsolved issues and problems will cause in the next decades some additional millions of innocent lives.

The Uniqueness of the State

An additional not even less burning question is connected to the uniqueness of the state. Has the state indeed still remained the unique legitimate and possible political order of authority? Is its uniqueness not since long time questioned by all those new international organisations – such as e.g. the European Union or the United Nations? The request for deregulation and privatisation reveals that this uniqueness is not only put into question from the outside but also from the inside. Why do state insurance take over tasks with regard to social security? Can private universities not assume major educational functions within the society jus as well as state universities? Can only the state and its agents execute public tasks and if so why? What by the way is at all to be understood by the notion of public authority?

The tasks of this theory of state can not be to deal with these questions in a final and for every body conclusive way. However it can contribute that many deeply emotional conflicts can be reduced to a rational level and that the remaining questions may be replaced by new questions which may hopefully have a smaller potential for conflicts.

History as a Question and as a Response

Actually many states have emerged out of a long-lasting process often initiated or ended by violent conflicts. It would be arrogant the put in question this historical process of mankind and thus to deny the right to existence to a state. What has developed historically and what has been imposed to the society finally with a liberal human rights respecting process corresponds obviously some fundamental needs and values of human beings. This is the main reason why we look in the following chapters to the historical process empirically not only as a reality and a empirical given factor but also as an response to the fundamental needs of human beings. Thus we do not only question *how* the state has been created. We assume that history can also give a normative answer to the question of the justification of the state and thus it responds also to the question why states have been founded. Thus the history of the development of the state namely gives hints as to the justification of the state because it reveals that human being are not able to survive individually without supra-family communities. The fact that humans have joined together into polities proves that humans are basically also political. The homo politicus is a reality it corresponds to the nature of human. Thus human beings need communities which go beyond the natural community of a family and thus

which emerge out of reflection and choice as rational political and state communities.

Interdisciplinary Science

The diverse catalogue of questions proves that one can not expect at all that only one scientific discipline would be not able to give a final answer to all those issues. Who wants to know, how a democratic state is organised, needs to find answers in political science, sociology and constitutional theory. Hints may also be found within the science of economy of organisation or even of psychology. One needs to explore the nature of humans and one would need to know how he/she behaves in community and what mechanisms influence relationships among individuals and groups of individuals such as parties, municipalities of ethnic communist. We have to examine whether one can steer those groups rationally, emotionally or only with threats and physical force. One would also have to research on the question how and to what extent a people or peoples participate in the decision making process. Moreover we need to know, what is the substance of power, how it can develop and appear and what different types of misuse of power one has to face and what institutional and procedural procedures can be taken in order to prevent misuse of power.

The Phenomenon „State“

What therefore is subject of a theory of the state? A theory of the state wants to explain the phenomenon of the state. For this it is indispensable to explore the “substance” of the state. Who wants to give an answer to the question, what the state is, can do it in different ways: One can limit the research to empirical analyses and only reveal what is common to all these constructs which claim today to be “states”. Such empirical analyses require however that the criteria’s and standards are known with which phenomena such as power to govern, constitutional rights, democracy etc. are compared and summarized. This in turn would ask for analytical and theoretical examination of the state. One will have thus to ask what are the essential criteria’s with which communities of humans formed into polities and states are established and which would distinguish the state from a football club or a criminal organisation or a multinational company or even a municipality or an international organisation.

Do Humans Need a State?

Who deals with this question will at the same time also ask whether states at all are justified. Doe we really need a state? Are human beings due to their nature made for a state? Do human need to live within a polity in order to remain human beings? What would one at all understand by the notion “political”? What relationship does the political have with the statehood? Why is the monopoly to use physical force only transferred to a polity? How can this monopoly of the polity be justified?

Empirical State Theory?

Who relies by answering these questions on empirical data such as e.g. the history of the development of the state, must be aware that fictions, wishful ideas and real social facts are closely interconnected and interweaved. Rarely they can be separated from each other. Social facts however should always be analysed ant interpreted realistically and objectively. Unfortunately such interpretations are also often influenced by expectations which the actual political elite may have with regard to those historical facts to be explored. The question with regard to the essence of the state, that is the question what the state is, contains therefore also the question *how* and *why* the state has emerged.

The Different Sciences

Exploring the question why the state is competent to rule over human beings includes therefore different scientific disciplines. The theory of the constitution, jurisprudence, history and even theology as well as philosophy may give some answers specific to their scientific field but not generally valid and concluding answers to the question how and why the state has come into being. The theory of the state thus is by its nature an interdisciplinary science which builds up on the knowledge of various other sciences.

Moreover, the theory of the state can finally also observe the state as a social construct and examine what special position the state and public authority is given by the society compared to other social institutions. This is particularly important, when one has to analyse the relationship of public institution to private associations and lobbies. This is the entry point for the sociology.

Normative Theory of the State?

Scholars dealing with the theory of the state have often not been contented only to analyse the state and its organisation empirically. They did much more focus on the question *how the state should be*. Thus they were looking for valuable criteria's in order to determine what is a "good" and "just" state. In particular the theologians of the middle ages as well the Greek philosophy namely the Stoa did not only observe the state but it also asked how the good state should be organised and what tasks he should be responsible for. How should its decision be made and how should they look like in order to serve the common good of the people. Such normative approaches have been made by IMMANUEL KANT (1724–1804), GEORG WILHEM FRIEDRICH HEGEL (1770–1831), JEAN-JACQUES ROUSSEAU (1712–1778), JOHN LOCKE (1632–1704) and CHARLES LOUIS DE SECONDAT MONTESQUIEU (1689–1755). Today they are taken up under the auspices of actual philosophical and ethical thinking namely by JOHN RAWLS (1921–2002) and its theory of justice, by the neo-marxist and the neo-liberals.

Positivists

A totally different position to such normative approaches have been proposed by the positivist schools. Some settle just to *explore the phenomena of power* within the state society. They ask how power arises, how one can acquire state power,

how it is used and how those who want to keep and hold the power should behave. In the old China HAN FEI TZU († 234 before Christ) did belong to this school. In the Arabic world of the middle ages it was IBN KHALDÛN (1332–1406) and in Europe certainly NICCOLÒ MACHIAVELLI (1469–1527). Those scholars for the empirical analyses of the political state power did not care on the question of justification. They only asked how power comes into being, how it can be expanded, how one can diminish the power of the other, what are the effects of power and what those should do who are interested to sustain and expand their power.

Part of the positivistic school are also those scholars who conceive the state as a mere sum of legal norms but do not at all explore criteria's of the good and just state. For those scholars the state is the sum of all legal norms which can be summarized within a specific territory under the same sovereign. According to HANS KELSEN (1881–1973) the state is in its nature nothing but the system of norms which can only be order and thus legal order(H. KELSEN, p. 16).

The State as an Instrument to Change Society?

Who wants to face the challenge to establish a theory of the state needs to be also aware that the theory of the states belongs to those scientific disciplines which have emerged within the *Continental-European* legal system out of the tradition of the growing nation-state of the 19th century. Napoleon considered the state as his instrument with which he could turn the conservative, aristocratic feudal European society into a liberal democracy. For Germany of BISMARCK the nation state was the instrument to establish the big empire of the "German Nation". The countres belonging to the *Common-Law* tradition on the other side the idea of a collective unit or coporation equipped with a collective sovereignty was quite strange. They did not ask the question what should be the attributes a human association needs in order to achieve sovereignty and to exercise state authority. For countries of this tradition the focus was rather on the main question how the government of human beings should be limited by separation, limitation and mutual checks of powers. The question how the state should be equipped, in order to use its power correctly is not put. While thus the American and British constitutional theory aims at the limitation of the power of the state, in Europe the constitution also is seen as an instrument which enables state power.

Ist he State a Collective Unit?

Lawyers from common law tradition ask how the state should be organised in order to give the law the power to steer the governing institutions efficiently and not how the rulers may interpret the law for their proper interest. Their focus is the Government and much less the state as an abstract and collective unit. The theory of the organisation of the power of the government thus is in these countries rather part of the political science and only exceptionally part to the constitutional theory. A proper science with regard to the theory of the state in this sense is unknown.

The question whether this collective construct does have a special status may be asked pragmatically in the USA for instance when they question the justifica-

tion of the declaration of independence or when the relationship to the *Native Americans* is at stake.

Self-Determination and European Union

On the other hand many young states did emerge out of violent conflicts based on the controversy of the right of self-determination. In these state one cares less on issues with regard to the aims of the state or the governmental system but rather on the issue with regard to state sovereignty, state identity and loyalty to the state. With regard to the member states of the European Union one addresses the question as to the notion of the state. For those countries this question it is decisive to know whether the uniqueness of state hood and sovereignty has already been de facto transferred to the European Union. Would this be the case, the member states would have lost their state-hood and would share it with the European Union and thus not be any longer fully independent states with the attribute of absolute state sovereignty.

State of Modernity

The theory of state is also a theory of the state of modernity. The actual world of states is marked by idea of the state as a result of the philosophy developed in the period of the enlightement. Accordingly the state is legitimized by the people's sovereignty, the rule of law and the civil society composed of equal citizens enjoying all basic human rights. The people's that is the sum of all individuals living with equal rights within the same state territory produce legitimacy. The state of modernity is a secularized state which does not depend on the grace of God as in middle ages. However this request of the enlightement theory is contradicted by many religious communities today.

Eurocentric State Theory?

Often the exposition of the theory of state has been limited to the western European states, in which Germany, France and Italy were on the focus of the research.

This state theory tries to go beyond this limited goal: It intends to understand the state today as a universal phenomena. Within a globalised world order a state theory designed out of the Eurocentric cultural thinking is not any more legitimate.

State Theory: A Child of our Times?

Genera theories of state are – one can pretend – more than other scientific disciplines *children of their times*. They are almost not able to seize the "nature" of the state in its total complexity. They rather try to focus on the problems of the living generation and existing period. In this sense also this state theory will concentrate on issues, which are moving the peoples of our times.

Justification of the State

Hereby we shall focus first on the question of the *justification of the state*. Do we at all need a state, is it superfluous to which men and women could renounce

without any damage and consequences? The we shall deal with the question of the *origin* and of the *nature* of the state. Which attributes are necessary in order to label a community of humans as state with sovereignty? Are the rights which are granted to people's within the state of pre-state nature or are they only granted by the state? Is state sovereignty the origin of all law or is it also bound to comply to certain elementary legal principles? Do certain human communities which feel strongly connected e.g. as ethnic people or as religious community have a right to create an independent state? Can the "political" within the state be decentralised to specific sub-state-units? Are on the other hand alls individuals with equal rights the only possible subjects of state sovereignty? Do minorities such as the French speaking peoples within the English speaking majority of Canada have a right to a special status or even to unilateral *self-determination* and *secession*? Which are the challenges the historically homogeneous states are facing because they turn into multicultural state because of the actual immigration of foreigners? How are states organised? Are polities without separation of powers ruled by a dictator still state in the proper sense? What tasks should be transferred to the state? Should it orient on the model of socialist China or on the model of the capitalistic society? To what extent the state is at all the origin of the law and the legal order? Is law conceivable without state?

Humans are Subjects and Objects of the State

A state is always a *community of men and women*. This human community will first have to be subject of our analyses. Why and how did it come into being? How can it be explained and justified? What relationship does it have to the single individual? What are its competences and its responsabilities? How can ist power be limited? This questions are in tight connection to the issue of human rights. Why and how did the idea of human rights develop? This question leads us to the issue of the rule of law. Its historical development but also the development of the continental European idea of the state of law (Rechtsstaat) is subject of the fourth chapter.

State and Mafia?

Immediatly following out from the former catalogue of issues the following question has to be asked: What is the *essence the proper nature* of the state? What conditions need to be fulfilled in order to mark a community of human beings as a state which consequently can claim to be sovereign and to exert sovereign rights? Would Palestine already now be a state and what would be needed to make it a state? What distinguishes as state-people from a ethnic people or an autochthonous minority, from the aborigines or from nomads such a the Bedouins the Tuareg of the Sinti and Roma? Do these minorities have a right to resistance when they ar systematically suppressed by state terror? Which difference exists to religious communities or to international organisations? What are the pre-conditions and contents of state sovereignty? Can sovereignty be divided? Can political rights be divided and shared by different political communities? What does make the difference between the State and the mafia, terrorist organisation or a football club?

Governmental Systems and State Organisation

As soon as we know more on the nature of the state we can deal with its organisation and in particular with the governmental system. How democratic state power built up from its humans should be designed? How can democracy as majority rule be legitimized? How are modern states organised? How can the different state organisations be distinguished from each other? What types of state organisations do exist? According to what criteria's state organisations should be compared? Does the organisation of the state and the division of state power serve the leigitmacy, the efficiency or the strengthening of state power in general or has the state organisation the mere goal to limit the power of the majority? The seventh chapter deals a part from the traditional states of western tradition also with the organisation of the state *in transition.* Apparantly those states had after the fall of communism to design a new state almost out of nothing. Thus in no other state one can make so clear the tight connection between state organisation and the legitimacy of the state.

The Challenge of Multiculturality

Created by tradition and history or produced by modern migration multiculturality is the most difficult and most threatening challenge to the state of today. In this sense the eighth chapter deals with the issue of federalism as one of the very few tools and state-concepts which did find an answer to the challenge of the multicultural diversity. As a case study for structural solutions the second part of this chapter deals with the federal design of Switzerland.

Symptoms and Causes of State Pathology

Human beings did build up states and the states have to serve the human beings. Structure and behaviour of the state community are designed by humans with their good or bad qualities, with their good or bad behaviour and with their needs interests. Each scientific analyses of state phenomena will thus have to depart from the *specific nature of the human* being. As the science of medicine or of psychology have to deal with the healthy and ill human being also the theory of state has to deal with the "healthy" and "ill" state including the symptoms but also the causes of illnesses. Such normative approach is indispensable a part from the careful empirical research.

Law and Might

The tense relationship between *Might and Law* is well known. Since the origin of history it has marked controversies on the state. Logically it follows that also this theory of state will extensively deal with these counterbalancing forces. Political ethics, ideas of justice, reason and the capacity for knowledge of the human being will also be analysed as the power, its origin and its goals as well as the misuse and its limitation.

Historical Nature of States

All states are historically developed constructs. Their organisation and structure and only be understood out of their historical development. The observation of a specific historical moment does not satisfy for the explanation and understanding of state and statehood. Each theory, each idea, each institution and each governmental system has its proper history. We shall try to include this historical dimension and take it into account as far a possible. However not only history but also the specific character and soul of a people, its religion and geographic condition, economy and the development of the society did mark the different states. Those interactions will also be taken into account.

In the end questions can never be answered finally. They can only be replaced by new questions. Also, this theory of state will not exhaustive answers to those questions but rather point to new issues.

Chapter 1 General Introduction

A. From Local Entities to the Globalised Marginalisation of the Nation-State

I. Historical Influences on today's World of States

The State a Shoot of the Enlightement

The actual state has developed out of the European Modernity. It is a fruit of the European period of the enlightement. Hold by commercial interests and designed by the missionary promotion the European states have dispersed the concept of the state by colonialism throughout the globe between the 17th to the 20th century. Within today's globalised world all states confess themselves as equal and sovereign members of the community of states. All have taken over the same philosophical fundament for a political unity from the enlightement theory. The question however which has to be asked ist he follwoing: Can the enlightement period which has originally secularized the state from the unity of the Christian religion give us the guidelines for the path of the state into the future? Has the state of modernity been created in order to solve the actual and the future problems the polities of today's globalised world?

Rapid Change of the World-Map

Looking on the world map and searching the constitutional history of the states on detects with astonishment that out of the actual 194 recognized states only 14 can look back to a uninterrupted nation-state development of some 200 years. Since 660 before Christ when Japan has for the first time built up as a political unity until the declaration of independence of 1776 of the United States of America in average only every 175 years have been created a new state. In the 19th century every four years has been built up in average a new state. Within the first half of the 20th century all 18 months a new state has postulated for full sovereignty and international recognition. In the second half of this century until 1993 all five month a new state has emerged out of the ashes. Since World War two in total 105 new states joined the international community. Actually we are confronted with nu-

merous conflicts which may eventually lead to new states such as in Cyprus, Sri Lanka, Georgia (Abkhazia and Ossetia), Nagorno Karabach, Kosovo Serbia), Canada (Québec), Russia (Chechnya), Somalia, Sudan, Basque Country, Belgium, Northern Ireland, Kashmir etc.

A short overview on the development of the European community of states reveals that there is almost no European state which can look back to a unbroken and uninterrupted history. The Roman Empire controlled at the time of its largest expansion in the year 116 after Christ the entire space of the Mediterranean from Spain to Mauritanian including Egypt and Mesopotamia until the black see. In the north all England (except Scotland and Ireland), actual Germany and a part of Poland and of the Ukraine including today's Hungaria and Rumania were also part of the Roman Empire.

Map. 5. The Roman Empire at 120 after Christ

The huge empire disintegrated first into the East-Roman and West-Roman Empire. The dividing line divides today's Balkan. The Roman Limes a long the Rhine and the Danube which became the shelter for the retreating Roman armies has built up centuries later an important border line which was has ignited later on many different conflicts but which has also been the border line for the creation of states and for the territory of religious communities.

The Empire of Charles the Great

The later empire of Charles the Great expanded to today's France a part of Italy, Germany, Austria. Slowenia and Croatia.

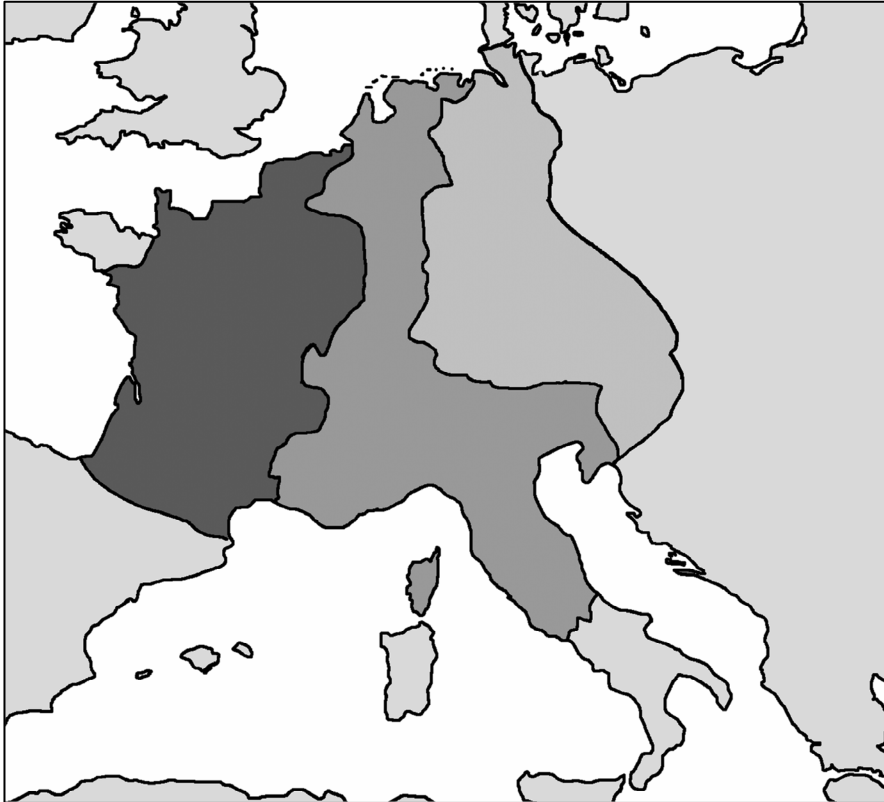
Map. 6. The Empire of Charles the Great

Even more important for today's development of the community of states within Europe has been the division of the Empire of Charles the Great to its three suns. Here one can clearly detect that the middle part which has been transferred to Lothar between later Germany and France bleeded to death in several some times long lasting wars. Some of the states of this region were only able by wars of independence or secession to achieve the possibility to develop independently and harmoniously such as the Swiss Confederation or the Italian Town-States. The Alsace, Lothringen, Luxembourg, Belgium and the Netherlands are all regions or independent states which even today can not be catched by either the French nor the German Nation concept.

The Carolingian Partition

The partition of the empire of Charles the Great to his three suns with equal rights Charles the shaven, (West-Empire), Lothar (Middle Empire) and Ludwig the German (East Empire) left many substantial question open such as e.g. the right of succession as emperor of the entire empire. Moreover the middle empire of Lothar has been divided and transferred to his brothers after his death. This transfer

has mainly contributed to the instability between France and Germany. For later centuries the root for the separation and later for the century lasting enmity has been implanted.



Map. 7. The Carolingian Partition

While the French king has never requested also to get the crown of the cesar and emperor of the entire empire the „german“ successor demanded as the only successor of the Emperor the crown and thus the title to rule over the entire former empire of Charles the Great. Logically he and the following emperors required their subordinated kings to defend their proper territory with their own means and armies. The French king however considered himself to be entitled to defend his territory with his proper army. The consequence of this decision of the German “emperor” was a strong decentralization and federalisation of Germany, which in the year 1800 was divided into not less than 1’800 principalities. For this reason Germany was required in the 19th century first to struggle for its national unity. The development of democracy within the country had to be postponed to the 20th century.

In France however the national unity has never been disputed. The innerstate conflicts in the 19th century have not been initiated on the dispute of the national unity but rather on the conflict between the pre-modern feudal society and the modern bourgeois society ruled by the citoyen. The legitimacy of the nation has never been at stake, but the legitimacy of the governmental system and in particularly of the Monarchy against the later Republic has given ground for several revolutions and coup d'état. The different concept of the German nation as fundament of the German state with regard to the French nation guilt by the constitution has somehow its origin already within the Carolingian partition of Europe.

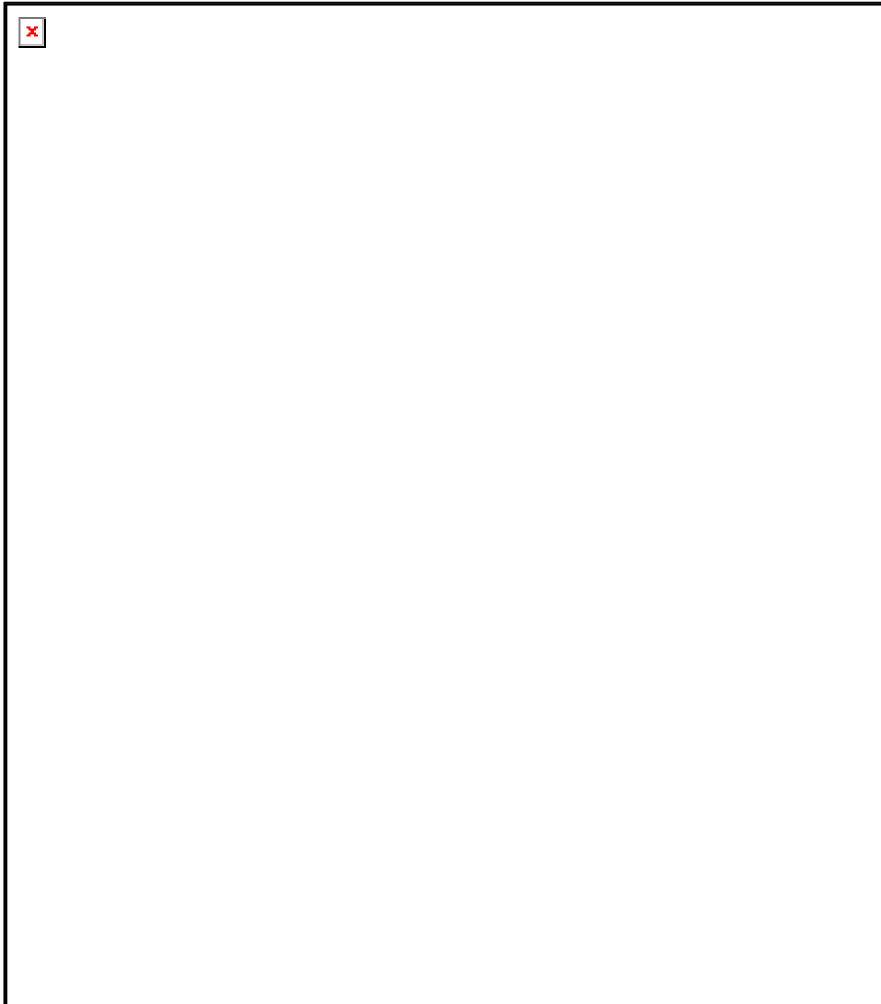
Reformation

Most important with regard to the development of the European world of states was the time of the reformation and the division between the Catholics and the Protestants. With the reformation the protestant state have performed the already carried out political separation of the Holy Roman Empire also theologically by the separation of the pope. The reformation enabled the states which did detach from Rome to renew somehow the connection between pope and emperor within their proper territory. The theological and political fundament for an absolute indivisible sovereignty has thus been led. The conflict between the religions turned into a conflict between states which could only be solved with the peace of Westphalia in the year 1648.

The Peace of Westphalia: The Fundament of Modern Europe

With the peace of Westphalia the political guidelines for the modern Europe and its state diversity have been led. The attitudes of the several principalities towards the religion however did lead to new different controversies among the different states. The secularization of the state and the gradual introduction of the freedom of religion as a minority right finds its modern roots within this period in which also the first appreciation for problems of minorities has been initiated.

While the new European peace has prepared the external conditions for the absolutism of Louis XIV in France in Germany the fundament for decentralization was introduced. The princes were entitled to rule their proper sovereign state and to conclude state treaties and the empire did gradually loose its importance.



Map. 8. The spread of the different confessions after the peace of Westphalia

The peace of Westphalia anchored fort the first time within a writte document the principle of sovereignty of the states as well as the principle of equality of the states. The European power-balance among the different states has been made. Peace between Spain and the Netherland has been established and the bases for a later independent Belgium was led. For the first time the Swiss confederation has received in a written document its already de facto enforced independence from the empire.

England and the Modern Constitutionalism

The peace of Westphalia thus turned into the proper foundation stone for the development of modern constitutionalism. One may be aware that at the same time of the peace negotiations which enabled more secure borderlines on the continent the English Parliament struggled for more power and aroused the first important European revolution in which the parliament did win new sovereign rights with regard to the crown. The *Long Parliament* which in the end of its anarchic rule removed the King and condemned Charles I to death has anticipated the later revolutions in England (1688), in France (1789) and in Russia (1917). With this decision for the first time a parliament has enabled itself to take over sovereign rights and titels, and it lasted 150 years until in France the parliament as *Assemblée Nationale* has in similar way tried to carry through the Republic against the Monarchy.

Congress of Vienna and Congress of Berlin

The two next important congresses for peace which influenced decisively the European state community have been the Vienna Congress of 1815 which has for the first time recognized the Swiss Neutrality as an important element for the guarantee of the balance of equal forces among the European states. The other Congress of Berlin in 1878 has focused on a new balance within the Balkan and with regard to the Ottoman Empire. With these decisions imposing the balance of powers the Berlin Congress has determined the conditions for the conflicts of state foundations and minority rights as well as for the temporary decay of the states in this region.

While within the states of Western Europe the different nations could unite more or less as homogeneous unit within one territory the peoples of the Balkan under the rule of the Austrian-Hungarian double Monarchy and of the Ottoman empire did mix within the same territories as under the foreign rule a people could not establish its proper state. However within the frame of the Turkish Millet-system and the Austrian-Hungarian autonomy the nations and peoples were entitled to certain collective rights which did grant them some personal autonomy. They could foster their language and had some control on the education of their children. As consequence of this personal autonomy the members of different communities and religions could very well develop within the same towns without having to renounce to their personal identity. Thus still today one can find in many towns in the Balkan such as Tbilisi, Sarajevo etc. the Synagogue neighbouring the Mosque, the catholic and the protestant church.

Balkan

After the first World War the Kingdom of Austria-Hungaria was dissolved. Hungary has radically been scaled down with the consequence that this political decision of the allied powers did create new important Hungarian minorities in the Ukraine, in Czechoslovakia, in Rumania and in Yugoslavia. At this time the fundamental principle that each nation should be entitled to have its own mother-state has been developed. Accordingly the states have been established in order to ac-

commodate the different nations. Only with regard to the multi-nation Yugoslavia this was not possible. Then this state covered a territory which has been divided since more than thousand years by the borderline between East and West Rome, between the East and West Christian church and later between the Ottoman Empire and the European Occident. The peoples living since centuries within this territory have been maltreated by history, and as a consequence there is no clear territory for Serbs, Croats, Bosnians, Macedonians etc. Thus the nations winning World War One decided to establish one state as a motherland for all Slaves living in the South, yugo meaning the South in the Slavic languages: Yugoslavia.

Holocaust and the Decline of big States

The 20th century is marked by the holocaust. Never in history a state has decided for the whole world to extinguish a human race from this earth. Such enormity has up to the regime of Hitler and his Nazi party and also since never been implemented into reality. The idea of a supra race connected with the request for legitimacy of the state to decide who belongs to this supra race and which race has to be extinguished can be traced back in its final consequence to the homogeneous state race which in the interest of homogeneity and statehood should be entitled to extinguish all other races threatening the unity and homogeneity of the nation.

The other important characteristic of the 20th century is the liberation of the peoples from external powers of the Ottoman empire, the colonial regimes – and after the fall of the Berlin wall – the implosion of communism and thus the end of the Sowjet and communist imperialism. Such processes of dissolution are always connected to century lasting conflicts as we have learned by history since the Roman Empire has been dissolved. This has with regard to the understanding of the state by the peoples having been ruled by foreign states the following consequences: The political authority by the actual state is often mistrusted as a symbol of the previous compelled rule of the colonial power. Within the historical subconscious emotions the state is always considered as an enemy of the nation. Whoever follows to the colonial rule has to be aware that the state even today lacks genuine legitimacy of the concerned peoples. As in many cases the new state authority has been taken over by the majority nation this nation will be identified with the former colonial state and thus be hated and rejected by the minorities as they hated the former colonial rule. Thus the state has become for many peoples the real image of an enemy. Only a state which is able to grant the previous suppressed peoples unrestricted identity and thus also an unrestricted feeling of freedom can become an acceptable state fort hem.

Necessarily this did lead to large conflicts as the new states in most rare cases covered a territory with a homogeneous population. As in Africa and Asia thus also in Eastern Europe ethnic conflicts that is the powerful struggle for state identity have started with ethnical cleansing.

II. Challenges for the States

a) *Globalisation*

The Fall of the Berlin Wall

For the new understanding of the state concept the historic event was certainly the fall of the Berlin wall. With this 1989 occurred symbolic fall of the iron curtain the understanding of the state has decisively altered. For 50 years the world was however economically divided by the industrialised and the non industrialised world. Politically much more substantial was the division of the state community into a communist and a capitalist sphere of power. Either the states belonged to the communist or to the western sphere of influence. The two for century existing rigid adversary blocks influenced the way of thinking of the state substantially. The states were the undisputed fortresses of either the liberal-capitalistic of the Marxist ideology. As a major factor of power within the respective alliance the state and its rule were considered as a necessary self-evidence. Nobody questioned its legitimacy. The only question to be asked dealt with the organisation of the state and its governmental system within the respective block. Did it fit to the major ideology of the block and did it provide for a good or bad leadership. The very existence of the state, their borders and their significance was not questioned at all.

Sovereignty of the Global Market

After the fall of the Berlin wall the theory of state faces now a new challenge which is focussed on new issues essential even for the existence of the state as such. And those questions need to be given a understandable and convincing answer. Now that the enmity between East and West has faded away and that the states subordinate continuously and gradually their sovereignty to the global market, which can be ruled to a great extent via internet and that the within the international community the global leadership with regard to a certain world police is taken over by the United States of America one may even ask the question whether the state at all is needed any more and in case for what it is really needed. The central question to each state focussed previously on the human rights issue, which in case of necessity hat to move out to the whim of the local raison d'état. Today the issue of human rights has become a universal standard for the assessment of states. World Bank and International Monetary Fund consider the compliance to those principles as part of the *good governance* a pre-condition for any international financial support. Universal values have marginalised the former important nation-states of Europe to local polities. Are they still needed? Especially since their legal orders have been integrated and thus marginalised into regional organisations extending whole continents such as e.g. the European Union?

Localisation?

While consumers seek the global market citizens demand universality of human rights. Within its social and emotional existence however human beings still feel deeply insecure. They seek security and identity within the local province. Globalisation thus is only a trend of the actual period. In fact it is complemented by the need for local security, local values and local autonomy. Instead of speaking of globalisation one should thus rather invent the work "glocalisation which would better fit to the actual reality. The consequence of glocalisation leads as consequence on the local level to more devolution and decentralization. (UK Scotland and Wales, France Regionalisation, Spain more competences of the regions, Italy federalisation etc.)

The World Bank and the IMF grant credits only to states which not only guarantee good governance on the central level but which also provide for a realistic program of decentralisation which today is considered a part of the principle of good governance. Many actual ethnic conflicts are in fact struggles on the power of the central government. Decentralisation should grant more rights and autonomy to the historically developed peoples. However this leads us to the burning question how the states can on one side transfer some tasks to the global free market and on the other side decentralise essential tasks to local units without loosing their main function as state responsible for the development of the society ruled by this state?

European Union

The European Union finds itself within a special situation. Its roots go back to a treaty aiming to pacify the century lasting enmity between France and Germany on one side and to strengthen the European states by a stronger alliance within the conflict between the west and the east. One had to forge a new alliance of the west against the east, and to overcome the century old enmity between Germany and France. The new community of states should aim at a stronger integration with the help of the economy based on a open European market and thus gradually turn into a politically integrated alliance and community. At the time of the foundation of the originally European Economic Community economy was still regulated on national bases and thus the nation was also prepared to open its market to the region of a state community. At the beginning of this integration process the industries important for the armament of the armies had to be tied together within the Community of Steel and Coal.

Within the area of globalisation the European economic space looses on importance. The political unity of Europe has thus again come into the focus of integration. A uniform currency, the democratisation of the institutions a common foreign policy and the building up of a European "people" with European citizens as important concerns of the aims for a common consensus. Thus the constitution of a still to establish European state has all of a sudden again come into the focus of the political debates.

b) The Engine of State-Building

Multiculturality

With these developments the theory of states is enlarged by a new dimension. By the reality of multicultural polities the federal structure of states gains additional importance. Up to now the main focus of the general theory of the state was on the issue of the question how human beings and peoples should and can be governed and how the power of a polity should be organised and administered to be in the service of the interest of the peoples. Today however the question comes into the foreground what position and tasks the state should have with regard to the world wide tendencies of globalisation and localisation. To what extent can they contribute besides general universally accepted values additional liberal or particular values, how they have to cope with the threat of terrorism of private organisations, how state sovereignty is to be distinguished against the sovereignty of the global market, what values bring or hold together the peoples of a state or a nation. With regard to multiculturality the crucial question is, *which people* respectively "who" should be transferred the power to rule, which majority should be entitled to rule on which minority or should participate or share in common the governmental power and which rights should be given to the minorities.

The draft for a new contract on a constitution for Europe in the version of June 13 and July 10 2003 puts the new constitution under the following main guideline formulated by the ancient Greek THUKYDIDES:

„Χρώμεδα γάρ πολιτεία…. καί όνομα μέν διά τό μή ές όλίγους άλλ' ές πλείονας οίκεῖν δημοκρατία κέκληται“. (THUKYDIDES II 37) The English translation for this sentence reads as follows: „Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number“. The German version of this text however had a significantly different maning it did read as follows: „The constitution which we have … is named democracy, because the state should not be oriented to a few citizens but to the majority. („Die Verfassung, die wir haben ... heißt Demokratie, weil der Staat nicht auf wenige Bürger, sondern auf die Mehrheit ausgerichtet ist.“)

According to the German version democracy means that the state should rule its politics in the interest of the citizens. According to the English translation democracy is the governmental system which transfers the power into the hands of the majority. Those two different versions of translation can apparently be traced back to a different understanding of democracy. Either democracy gives the power to the majority or it requires the state to orient its politic to the interest of the majority. The central question though who should govern over whom is answered with the English version but left open in the German. For the German version THUKYDIDES answers however the question what should be the standard for good governance. The same quotation answers thus within the different translation a totally different question. This reveals that with regard to the most crucial questions of the theory of state there is still no clarity on the highest European level.

Suppression and exploitation of peoples are additional reasons which did lead to conflicts and thus to secession movements division of states and occupation of

foreign territory. The multicultural states of the actual period will always be confronted to this challenge as long as they are not able to create even for their minorities a certain identity. The conflicts between Palestinians and Israeli in the Near East demonstrate clearly that it is not sufficient to grant autonomy to minorities. Either one is capable to build a state in which all peoples can identify within the territory of the state or one has to draw the consequences and to divide the state. The longer the less the peoples will accept to live within a state as second-class nation. Their engine to defend the interest of their peoples community is the need for self-determination according to their proper identity and according to their proper history. The reject policies, which do only respected them as individual citizens. They want also to be respected as a people on equal footing with the majority of the state.

What are the engines which move human beings to the decision to build up new states, to unite with other states , to secede from a state, to centralize or to decentralize? If really all human beings are equal belonging to the species of the homo sapiens why then the states differ so strongly from each other?

Welfare

Human beings want to design their environment in order to be able to live in peace and welfare with each other according to their needs and interests. They want to build up a political superstructure to their society which is accepted from all or which at least promotes values which are acceptable to the big bulk of the society. With this the internal aims of the state are set. They correspond at best the impulse of human beings for more security, power, wealth and recognition.

Religion

The engine which moves society towards the foundation, alteration or transformation of states has always been and is still – partially today – religion. Religion has often put polities under its interest and services. States were asked with their legal order to implement and execute the rules of the religion. On the other hand religion provides the states with legitimacy which enables political power of the state but also for the rulers. In the Christian Middle Ages the Kings did rule the peoples at their whim by the Grace of God. They had absolute power because their authority with the legitimacy of God has never been questioned.

Preservation of Power

The engine for politics and state foundation is finally also the proper interest of men and woman. The state serves the developed structures and their power-holders; it has to preserve with its structures and institutions the achieved political and economical power-position. The state has in earlier times been installed in order to protect the rights of the knights and of the aristocracy. State and law had to serve the developed feudal system. Its hierarchy was protected by the legal order. The feudal system did appear as the order which was wanted by God and therefore could never be changed. As people could expect based on their religion to be

compensated for their sacrifices and suppression in the other world, they accepted the justification of inequalities in this world.

Liberty and Equality

Today the engine to change and alter the state structures including even state border lines is the need of human beings to individual freedom, justice and welfare. The aim of the state is the protection and the promotion of individual freedom. If individual freedom is protected within the democratic polity, then –according to the philosophy of liberal constitutionalism – the pre-conditions for welfare and justice within the society are provided for. Since the French Revolution the political opposites move between the often contradictory demands either for freedom or for equality. Some pretend that without equal opportunities freedom finally can never be achieved. Others claim that too much equality destroys finally freedom itself. They argue that liberty prescribed by the ruler suffocates freedom. Between those two contradictory positions societies did struggle since the French Revolution for the development of the social welfare-state. Liberty is always bound to the common good. Proper interests should never put into question the common interest and be against the common good. Even the right to liberty has to respect the common interest reply the others.

Property and Identity

A further pair of contradicting opposites which are as well motivated by some personal interests as also by collective interests and which may lead to new state structures are property and identity. The state needs to protect namely the property which as already requested by JOHN LOCKE. Property has also to be within the interest of the people contradict those defending the identity of the people and the preservation of the collective interest of the entire population. When e.g. in Switzerland the acquisition of real estate in the area of tourism has threatened to lead to a selling out of the soil of Switzerland the legislature limited the freedom of real estate owners which were only allowed to sell real estate to foreigners to a limited extent.

How Should one Govern Who Should Govern?

The inner engine for the motivation for state building and state development is further defined by the following pair of opposites: How should one govern and who should govern? Those who only put the question with regard to good governance exclude the some how decisive question with regard to the *legitimacy* of the state and of the authority of the state. If one on the other side puts the question towards the democracy within a multicultural state, the problem of the "who" comes into focus: Who should or can legitimately rule the state that is which people or which peoples, which majorities or minorities should be given the power to rule on what other minorities or communities.

External Defence

The defence of external risks such as forces of nature of hostile tribes or peoples has substantially determined the development of states in all centuries. States with open borders (France, China), states with natural borders such as islands (Japan, UK), with aggressive neighbours and states with a territory of strategic importance did develop differently according to their external environment. A dangerous environment did force states to a rigid and often authoritarian and centralistic inner organisation. This is also the case for states in which men and women could only acquire their needs for survival with greatest effort and energy and thus had almost no time to care for issues of state organisation, culture or democracy. States without external threats on the other side and states in which human beings could afford within their leisure time to be interested to their spiritual, cultural and political development had much greater opportunities to concentrate for their inner democratic development.

Economic Influence and International Markets

The need for wealth and economic development did let many states to obtain the necessary goods in other states and consequently aimed at suppress those states and peoples to their proper interests. Economy thus was often the engine to motivate state development not only within the interior, but it did also influence foreign policy including decisions on war and peace. The economic interests of colonialism however have often been concealed by religious motives. The universal claim of the Christian respectively the Islamic religion has certainly strongly induced and legitimised colonialism within the 17th and 18th century as well as the rule of the Ottoman Empire from the 13th to the 19th century within the Mediterranean area.

Religion and Religionist Policies

With regard to the religions one has however to distinguish between religious communities having a universal claim with the believe that mankind should in order to reach heaven adopt the specific religion on one side and religious believes which are limited to a specific *chosen* people without any claim to proselytise mankind for its unique religious believe. Those religions which are reduced to the chosen (by God) people are Judaism, Shintoism and the believe of the Singhalese from Sri Lanka. Externally they are in general not aggressive. But with regard to the interior they are exclusive towards minorities with other religion.

The attack to the World Trade Centre in New York of 9/11 has demonstrated the fragility of our today's civilization which can be threatened in its proper existence not only by enemy states but mainly also by private organisations which are serving fundamentalist religionist policies. The enemies can not any more identified by states but by non state terrorists and their private organisation which may be harboured wilfully or against the will of a certain state. Consequently states which are suspect harbouring terrorists and their organizations are all of a sudden confronted with the fact that other states wage war against the territory of the state claiming not to threaten the government or the civil population but only terrorist

networks. As a consequence the states need in future not only to seek internal legitimacy but also international legitimacy as states which are able to clean their territory from terrorists. One can even pretend that actually states with an legitimacy by the international community do not have to fear that their inner or external legitimacy might be questioned successfully.

B. The Questions of the Theory of State

I. Traditional Questions of the Theory of State

What is the State?

The theory of state has been developed on the European continent. It tried to give an answer to questions related to the development of European states with regard to the secularization, the republican-democratic nation-state and its governmental system. Naturally the theory of state needed to answer the question of the function, the sense, the tasks and the position of the states.

The state as such has never been at stake and discussed. Nobody had any doubt as to the question, whether states are needed. The central issue focused rather on the question what is the substance of a state, what does represent a polity really. To understand the state to know what is its nature and to appreciate how the might of the state is structured and used, these were until recently the main goals of a theory of state.

Legitimacy by Peoples Sovereignty

The question of the legitimacy secular political authority in contrary to the legitimacy of religious authority has therefore always been one of the main issues of the theory of state as well as the question with regard to the good, efficient and just governmental system. People's sovereignty as bases for the legitimacy of the state authority moved to the centre of the scientific concern. Why should the state, which deduces its legitimacy from the people sovereignty, be entitled to issue orders towards human beings or even to require from them to sacrifice their life in case of war of aggression or war of defence? Nobody would question this legitimacy from the ruler who deduces its legitimacy from Gods forces. At least the believers of the same religion would never put in question such decisions. But how can a state which derives its legitimacy from the people claim such title of authority?

Good Governance

Who struggles for political authority naturally strives to convince the governed by its good governance in order to get the legitimacy from the people. The limitation of state powers as well as the tasks of the state in the common interest have thus

been the decisive questions which had to be dealt with by the interdisciplinary science of the theory of state.

II. New Questions of the Theory of State

Majority Principle and Multi-Ethnic State

Today the building up of the European Nation-State is not any more at stake and thus the central issue of the theory of state. At stake is rather the question whether the state with its form of government has clapped-out. The challenge of the multicultural state puts the question of how to govern in the background. Explosive however is the question who should and can govern. The state is in principle nothing else but a political authority installed by human *reflection and choice*. Is such political authority really needed in the area of globalisation and privatisation? Should one not just let the sovereignty of the market decide? Can the majority of a people rule over the territory in which minorities are living? Then as well majorities as also minorities are globalised. Can the democratic majority principle at all be applied to multi-ethnic states?

State Structure and the Fundament of Legitimacy

The answer to the question who is entitled to rule the state has of course also a repercussion to the issue of the organisation and the structure of the state. Federalism e.g. has for a long time only been considered as an instrument of good governance. When federalism however also has to serve to install and to legitimize the alliance of a state for multicultural states federalism becomes also a useful tool to answer the question who should govern. This however requires a federalism which allows multiple loyalties and diversity created not by assimilation and integration but by fostering the differences and specific identities.

Rational Human Being

The real challenge of the actual time is the multicultural state. Up to now the theory of state has almost ignored this basic challenge for modern states. The state of modernity has emerged out of the liberal thought at the time of the development of the constitutionalism of the enlightement. Liberal scholars have continued the idea developed in the period of the renaissance of the sovereignty of the ratio of the individual based on the image of human beings as homo sapiens. This rational creature is independent from its culture, religion and tradition and thus principally equal with all other individuals belonging to this species. Either it is egocentric (HOBBES), a creature which is able to make rational judgements (KANT), which is exploited (MARX), a reasonable *citoyen* (ROUSSEAU) a "homo politicus" or oeconomicus moved mainly by cost benefit analyses.

As equal and mature creature gifted for rational judgements human beings are all over the world able to legitimize similar states and state-authority. At the same time they are entitled to be recognized as equal citizens to participate on state de-

cisions and to obey state law. Culture may either be an essential element of the political life (Germany) or it is totally excluded from the polity. The idea of a *multi*-cultural state is strange to the basic philosophy of the state of modernity.

From the World Image of the Pyramide to the World Image of the Networks

The world image of the middle ages was symbolised by the pyramid with which the clear hierarchy and unity of the entire Christian world under God and its pope was expressed. The world image of the enlightement was the machinery of gears of the age of industrialization and of mechanics rooted in Newton. The states were the sovereign gear wheels of the machinery hold together by international law and sovereign state. The world image of the actual area of globalisation is symbolized by the network. Within a multidimensional network there are almost no clear and transparent structures. Who wants to survive and to drown in this network of public and private organisation needs to be able to control the important nodal junctions and interfaces of the network. The state has given up its monopoly position to private associations, communities and decentralized units. It turned into a competitor competing with the most different power-holders of this network. Which should or can its position be within this network?

An additional challenge is the universalization of Human Rights. While consumers seek the best products with optimal prices on the global market, citizens claim for universal human rights, investors profit from the global financial market, employees flee to their proper social homeland and human beings seek security within their local identity. As mentioned globalisation is challenged by the trend to localisation.

If the states want to take into account the inevitable trend to further globalisation mainly marked by the world wide society of information they need to alter their proper self-understanding: They can not any more build up their legitimacy on a one dimensional image of the human being. They need to integrate into the international network in which they will not any more be able to play a central role as in the machinery or gears. They represent as many other institutions only an intermediate stop at which according to the significance either many important lines come together or at which rather unimportant and very few lines of the network converge.

From National towards Global Economy

The increasing importance of the global market however will lead not only to a gradual marginalisation of the states but also to the diminution of their political influence. The states are almost not any more able to determine decisively the economic development of their country. “National economy” has been indeed replaced by the global economy. The fate of human beings generally seen and the fate of employees is determined by foreign investors. Board members of big international companies decide far from the local working place on profitability and chances of development of the local enterprise. The fate of this enterprise may have decisive influence on the political development of the municipality or even the province. But also within the states enterprises require equal opportunities in

particular with regard to the global market. High wages and social contributions as well as state control with regard to the environment including state taxes are no measured with regard to comparing situations of other enterprises in other states.

The space for autonomous political decisions and measures is radically reduced. Superpowers such as the USA may still be able to steer the global market and namely to put their foreign policy within the service of their economic interests. Middle and small states however are not any more able to such influence. They fall into the dependence of big states if they can not manage to unite regionally within political associations such as the European Union and by this to provide for more political space.

From Universalization to the Universalizer

A part from globalisation the issue of the universalization of human rights becomes crucial. States which would openly and systematically violate human rights will be marked by international media. As soon as media – for what ever reason – accse a state for violating human rights, it has to defend its policy before the international community, other wise it will face interventions of the security council. Elementary violation of human right is considered now according to the Charter of the United Nations of 1945 as a threat to the international peace (Intervention in Kosovo) and may sooner or lager be punished by the international community. With the enforcement of the treaty on the international criminal court criminal law has been internationalised. There is no state and no government which would be able successfully to refer to its raison d'état in order to justify human rights violation and to protect itself from international prosecution. The vehemence by which the United States have fought against this new court shows how much the states feel threatened by this universalization of human rights with regard to their local legitimacy.

States do not any more dispose freely on human rights. Constitutional guarantees constitutional catalogues for fundamental rights are considered today to belong to the minimal standard of a constitution. Recently there have even been adopted constitutions which oblige their courts expressly to respect the jurisprudence of international courts with regard to the protection of Human Rights. (South Africa) As much as this development is to be applauded from the point of view of a world ethic and world moral, as much one may also question this development. Human rights indeed became universal, but their implementation depends on the whim of the "universalizer" of the international commu nity. It is the only power which finally determines the content and orders which states should be declared as violators of human rights. The universalizer however lacks the worldwide democratic legitimacy. It is only accountable to its proper people but not to the alliance of the peoples of the international community. The innerstate constitutions should have the monopoly over the final ethic code of political values but apparently they have lost this monopoly.

C. What is and What Wants the General Theory of State?

I. The State: The Totally Different Society

Can one at all Explain the Phenomena State?

How often the people and media talk of the state! On receptions, international conferences, when terrorism has to be defeated, taxes collected and the traffic regulated. In innumerable occasions we face the state or its representatives without even being aware of. Often it is invisible but its claim to power is finally always visible and often noticeable. What is this invisible some times anonymous bureaucratic some times celebrated construct decked with flags? Why can the state limit our freedom, collect taxes, summon for military service or even condemn to death? Why can the state in case of a controversy with our neighbour decide on right or wrong, divorce a marriage or dissolve a contract or a lease.

Worldwide several different minorities claim their right to have their own state out of their right to self-determination. Within their state of origin they feel as second class people exploited of even suppressed. From a new and proper state they expect the paradise. The worldwide increasingly requested demands which are often rejected and by the mother state and fought with state terror are often the cause for the most terrible and bitter civil wars and conflicts with international dimension.

State and State Alliance

On the other hand the states join together and conclude new alliances either for the interest of peace or under the pressure of globalisation. Those multinational organisations emerging out of such alliances should help the member states to solve the raising complexity of the problems of our times. Can we call thus also these international organisations as states or state like entities? Thus one may reasonably ask the question whether the European Union has already become a state in the traditional sense. If yes, this would be for Germany a somehow almost unsolvable fatal question. Then namely the provision of article 20 of the fundamental law would be violated which determines that all state power has to derive from the people. Would the European Union become a state it would lack the necessary democratic legitimacy. As a consequence all legislation enacted by this union would become unconstitutional. The German Constitutional court has avoided therefore this notion of state with the new label “alliance of states”.

State and Mafia

What makes the difference between the state and a multinational company? How can the state be distinguished from a international Organisation – such as e.g. the United nations, the European Union – or from a football-club or even from a

criminal organisation such as the mafia or a terror organisation? Where does the power of the state come from which it uses in order to enforce state interests? Can one determine immanent limits of the state power? How can the state justify its decisions towards the individuals or towards the entire people? What are the real aims and tasks of the state? How is it organised? How should it be organised? What are ist previous, actual or future possible appearances? What relationship does exist between the state and the economy or specific communities such as cultural, religious or language communities? How and under which conditions can the state decide on its citizens, on foreign workers, tourists or asylum seekers? With the fall of the Berlin wall the question of the „why", the "how" and "the "what for" of the state has to be put in a totally different way.

New World Order?

Challenged by the globalised economy and in particular by the international trade organisation WTO the state policy for social security, employment and salaries faces the increasing pressure of the international competition. The state sovereignty limited to the proper territory of the state has lost the power to solve independently most of the existential issues at its own. Policies on environmental protection, communication, energy, crime, health protection and migration can only be carried on in common with other states on the bases of international cooperation.

Fading away of the state

Some times ago LENIN die forecast the fading away of the state for the sake of the establishment of a new paradise of communist equality. Paradoxically this prediction gets its new significance within a capitalized and globalised world order. Indeed the former proud and democratic republics and nation-states have been able just to keep a small political margin on political decision making such as a bit more or less on social solidarity, decisions on the infrastructure of local traffic and on local security (police). Defence and foreign policy are either integrated into the global economic interests or within the decision of the security council of the UN. The state economic and financial policy with regard to the social balance has to give precedence to the interest of a strong internationally competitive currency. The political system of the states is measured on its standards with regard to human rights, democracy, efficiency, flexibility and its possibility to integrate and to adapt.

From the Homo Politicus to the Homo Oeconomicus

Consumers of international products determine the world. Voters and taxpayers serve finally their interests. The autonomous political discourse has lost its significance and is marginalised within the shadow of the dispute on the capacity to compete internationally on the price- financial and social policy. The globalised bourgeois replaces the citizen who may only struggle for better salaries. The nation states once proud of their powers and possibilities are marginalised to local provinces. They woo jealously for more autonomy within the international com-

munity. One believes that within the globalised competitive economy the *invisible hand* will care for a more just repartition of the goods. Politic as the only real guarantee of justice has lost its credibility. Not the taxes but the prices will have to look for just welfare. The “homo oeconomicus” has indeed replaced the “homo politicus”.

This however is only one side of today’s reality. More than half of the actual 170 states have only been created after the seventies of the 20th century. In most cases those new foundations are a consequence of violent disputes or terrorist upheavals. In other words: Human beings are prepared for the only interest of their proper state to sacrifice their existence and even their life. For all these peoples the new foundation of the state promised a new paradise of freedom, independence, justice and economic development.

The Identity of the Political Community

In many of those states the “political” has become the central focus as symbol of the national or even chauvinist nationalistic unity. The political feeling of a “we” of this new national societies is based on one hand on the rejection of the foreign and alien neighbour-culture and on the believe to the proper values of their religion, history, culture and or language. The state is celebrated as an indispensable symbol of national freedom, unity and independence of all those nations which were able to liberate from the yoke of their former colonial powers and imperialist empires – such as e.g. the Sowjetunion – and establish their proper state. The dissolution of the Ottoman empire did shake the world at the beginningof the 19th century until our days (Near and Middle East and Balkan). In the 20th century the dissolution of the colonial empires and of the red Tsar did multiply the tremors.

The State – a Completely Different Community?

The state of the modern constitutionalism has its reason and its legitimacy based on rational arguments, on a proper judgement of the population and the free choice of the mature citizens. In this sense it is a completely different society compared to the natural communities developed out of nature such as the family. The modern state disposes the exclusive right to use force for the execution of the law and to guarantee security and order. This is a monopoly. Only the security council of the UN can – a part from the state – provide forceful intervention against an aggressor. But this is compared to the monopoly of force of the state very limited. The state is actually still the only construct which – even though the world has globalised – can require from its citizens to sacrifice their life in case of the defence of the country or in cases it provides military forces for the UN peace enforcement measures.

The state is mainly a artificial construct. As artificial unit it can not only be understood as a politically centralised unit which is composed only by single individuals of the civil society. Then, also the civil society is fragmented into different units such as natural families and artificial associations or religious or other communities. The actual multicultural reality and the economic and social pluralistic state embody already a polity which is composed of different collective entities.

Those entities themselves have been united by emotions, cultural and historical values and feel themselves at least subjectively as a community weld together by the common fate. With regard to the frame of the supra-state some of those entities require their proper collective rights such as autonomy. They strive – based on their claim to self-determination deduced from natural law – even at secession. This is the reason why today the tension between the state as the rational by reflection chosen community which is still considered artificial and other emotional communities also felt natural as the family – still a almost not solvable tension with inherent explosive potential for conflicts exists.

II. The Structure and the Different Questions to be Dealt with

Is the Nation State at all Outdated?

Do we thus have to ask the essential question, whether the state in its traditional sense – that is according to the state of modernity – is still needed? Does not the global and invisibal hand care for the stable order of the world economy and by this provide for a just and better repartition of the goods than the multicultural state troubled by inner-state disturbances? Could one not transfer more competences to the international court of justice in order to convey it the general task to assume the responsibility for law and order and for fighting against criminality? Can one consider the state to be a political unity which prepares the development to a political world order that is a polity in transition which will sooner or later fade into a world-state? Or does one have to fragment the proud traditional nation-state into smaller and smallest homogeneous language, religious or cultural communities or ethnicities, because it should limit itself only to care for the traditional and cultural development of its natural community?

Doe we have to recognize such smaller units as state-units and award them with all traditional sovereign rights? When the state has to be considered as a unit founded by *reflection and choice*, which should then be the criteria's according to which the external borders of the territorial sovereignty should be determined? Are there at all generally valid and accepted criteria's to determine the territorial borderlines? Or do borderlines of states not by definition lead to unsolvable conflicts in which millions of innocent victims have to be mourned, because the historical people the language or the religious community or the community hold together by the rational will of its people rejects and fights against the forced state-unity with the "hostile neighbour"? Will the world not sooner or later dissolve into the anarchy of sovereignty islands which fight with each other or into an "apartheid" of sovereignty islands which isolate from each other?

The Question to the „How" and the „Whether" with regard to the State

As an artificial by reflection an choice founded supra-family sovereign community the state can decide on the fate of its peoples. How far can thos competences reach? Where are the limits to be drawn of state authority? Does the voter who is participating in the political process sometimes replace the democracy of the con-

sumer in order to replace the invisible hand and thus representing the free market decide on the just distribution of goods based on a democratic competition?

All those questions are not any more guided by the “why” and the “how”, they aim rather at the whether of the state. For the peoples of today they are of crucial importance because they can throw states in existential crises and may lead in many parts of this world to conflicts which are full with the dilemma of insolvability of a Greek tragedy. If those conflicts can not be seriously neutralized one has to fear that the unsolved issues and problems will cause in the next decades some additional millions of innocent lives.

The Uniqueness of the State

An additional not even less burning question is connected to the uniqueness of the state. Has the state indeed still remained the unique legitimate and possible political order of authority? Is its uniqueness not since long time questioned by all those new international organisations – such as e.g. the European Union or the United Nations? The request for deregulation and privatisation reveals that this uniqueness is not only put into question from the outside but also from the inside. Why do state insurance take over tasks with regard to social security? Can private universities not assume major educational functions within the society jus as well as state universities? Can only the state and its agents execute public tasks and if so why? What by the way is at all to be understood by the notion of public authority?

The tasks of this theory of state can not be to deal with these questions in a final and for every body conclusive way. However it can contribute that many deeply emotional conflicts can be reduced to a rational level and that the remaining questions may be replaced by new questions which may hopefully have a smaller potential for conflicts.

History as a Question and as a Response

Actually many states have emerged out of a long-lasting process often initiated or ended by violent conflicts. It would be arrogant the put in question this historical process of mankind and thus to deny the right to existence to a state. What has developed historically and what has been imposed to the society finally with a liberal human rights respecting process corresponds obviously some fundamental needs and values of human beings. This is the main reason why we look in the following chapters to the historical process empirically not only as a reality and a empirical given factor but also as an response to the fundamental needs of human beings. Thus we do not only question *how* the state has been created. We assume that history can also give a normative answer to the question of the justification of the state and thus it responds also to the question why states have been founded. Thus the history of the development of the state namely gives hints as to the justification of the state because it reveals that human being are not able to survive individually without supra-family communities. The fact that humans have joined together into polities proves that humans are basically also political. The homo politicus is a reality it corresponds to the nature of human. Thus human beings need communities which go beyond the natural community of a family and thus

which emerge out of reflection and choice as rational political and state communities.

Interdisciplinary Science

The diverse catalogue of questions proves that one can not expect at all that only one scientific discipline would be not able to give a final answer to all those issues. Who wants to know, how a democratic state is organised, needs to find answers in political science, sociology and constitutional theory. Hints may also be found within the science of economy of organisation or even of psychology. One needs to explore the nature of humans and one would need to know how he/she behaves in community and what mechanisms influence relationships among individuals and groups of individuals such as parties, municipalities of ethnic communist. We have to examine whether one can steer those groups rationally, emotionally or only with threats and physical force. One would also have to research on the question how and to what extent a people or peoples participate in the decision making process. Moreover we need to know, what is the substance of power, how it can develop and appear and what different types of misuse of power one has to face and what institutional and procedural procedures can be taken in order to prevent misuse of power.

The Phenomenon „State“

What therefore is subject of a theory of the state? A theory of the state wants to explain the phenomenon of the state. For this it is indispensable to explore the “substance” of the state. Who wants to give an answer to the question, what the state is, can do it in different ways: One can limit the research to empirical analyses and only reveal what is common to all these constructs which claim today to be “states”. Such empirical analyses require however that the criteria’s and standards are known with which phenomena such as power to govern, constitutional rights, democracy etc. are compared and summarized. This in turn would ask for analytical and theoretical examination of the state. One will have thus to ask what are the essential criteria’s with which communities of humans formed into polities and states are established and which would distinguish the state from a football club or a criminal organisation or a multinational company or even a municipality or an international organisation.

Do Humans Need a State?

Who deals with this question will at the same time also ask whether states at all are justified. Doe we really need a state? Are human beings due to their nature made for a state? Do human need to live within a polity in order to remain human beings? What would one at all understand by the notion “political”? What relationship does the political have with the statehood? Why is the monopoly to use physical force only transferred to a polity? How can this monopoly of the polity be justified?

Empirical State Theory?

Who relies by answering these questions on empirical data such as e.g. the history of the development of the state, must be aware that fictions, wishful ideas and real social facts are closely interconnected and interweaved. Rarely they can be separated from each other. Social facts however should always be analysed ant interpreted realistically and objectively. Unfortunately such interpretations are also often influenced by expectations which the actual political elite may have with regard to those historical facts to be explored. The question with regard to the essence of the state, that is the question what the state is, contains therefore also the question *how* and *why* the state has emerged.

The Different Sciences

Exploring the question why the state is competent to rule over human beings includes therefore different scientific disciplines. The theory of the constitution, jurisprudence, history and even theology as well as philosophy may give some answers specific to their scientific field but not generally valid and concluding answers to the question how and why the state has come into being. The theory of the state thus is by its nature an interdisciplinary science which builds up on the knowledge of various other sciences.

Moreover, the theory of the state can finally also observe the state as a social construct and examine what special position the state and public authority is given by the society compared to other social institutions. This is particularly important, when one has to analyse the relationship of public institution to private associations and lobbies. This is the entry point for the sociology.

Normative Theory of the State?

Scholars dealing with the theory of the state have often not been contented only to analyse the state and its organisation empirically. They did much more focus on the question *how the state should be*. Thus they were looking for valuable criteria's in order to determine what is a "good" and "just" state. In particular the theologians of the middle ages as well the Greek philosophy namely the Stoa did not only observe the state but it also asked how the good state should be organised and what tasks he should be responsible for. How should its decision be made and how should they look like in order to serve the common good of the people. Such normative approaches have been made by IMMANUEL KANT (1724–1804), GEORG WILHEM FRIEDRICH HEGEL (1770–1831), JEAN-JACQUES ROUSSEAU (1712–1778), JOHN LOCKE (1632–1704) and CHARLES LOUIS DE SECONDAT MONTESQUIEU (1689–1755). Today they are taken up under the auspices of actual philosophical and ethical thinking namely by JOHN RAWLS (1921–2002) and its theory of justice, by the neo-marxist and the neo-liberals.

Positivists

A totally different position to such normative approaches have been proposed by the positivist schools. Some settle just to *explore the phenomena of power* within the state society. They ask how power arises, how one can acquire state power,

how it is used and how those who want to keep and hold the power should behave. In the old China HAN FEI TZU († 234 before Christ) did belong to this school. In the Arabic world of the middle ages it was IBN KHALDÛN (1332–1406) and in Europe certainly NICCOLÒ MACHIAVELLI (1469–1527). Those scholars for the empirical analyses of the political state power did not care on the question of justification. They only asked how power comes into being, how it can be expanded, how one can diminish the power of the other, what are the effects of power and what those should do who are interested to sustain and expand their power.

Part of the positivistic school are also those scholars who conceive the state as a mere sum of legal norms but do not at all explore criteria's of the good and just state. For those scholars the state is the sum of all legal norms which can be summarized within a specific territory under the same sovereign. According to HANS KELSEN (1881–1973) the state is in its nature nothing but the system of norms which can only be order and thus legal order(H. KELSEN, p. 16).

The State as an Instrument to Change Society?

Who wants to face the challenge to establish a theory of the state needs to be also aware that the theory of the states belongs to those scientific disciplines which have emerged within the *Continental-European* legal system out of the tradition of the growing nation-state of the 19th century. Napoleon considered the state as his instrument with which he could turn the conservative, aristocratic feudal European society into a liberal democracy. For Germany of BISMARCK the nation state was the instrument to establish the big empire of the "German Nation". The countres belonging to the *Common-Law* tradition on the other side the idea of a collective unit or coporation equipped with a collective sovereignty was quite strange. They did not ask the question what should be the attributes a human association needs in order to achieve sovereignty and to exercise state authority. For countries of this tradition the focus was rather on the main question how the government of human beings should be limited by separation, limitation and mutual checks of powers. The question how the state should be equipped, in order to use its power correctly is not put. While thus the American and British constitutional theory aims at the limitation of the power of the state, in Europe the constitution also is seen as an instrument which enables state power.

Ist he State a Collective Unit?

Lawyers from common law tradition ask how the state should be organised in order to give the law the power to steer the governing institutions efficiently and not how the rulers may interpret the law for their proper interest. Their focus is the Government and much less the state as an abstract and collective unit. The theory of the organisation of the power of the government thus is in these countries rather part of the political science and only exceptionally part to the constitutional theory. A proper science with regard to the theory of the state in this sense is unknown.

The question whether this collective construct does have a special status may be asked pragmatically in the USA for instance when they question the justifica-

tion of the declaration of independence or when the relationship to the *Native Americans* is at stake.

Self-Determination and European Union

On the other hand many young states did emerge out of violent conflicts based on the controversy of the right of self-determination. In these state one cares less on issues with regard to the aims of the state or the governmental system but rather on the issue with regard to state sovereignty, state identity and loyalty to the state. With regard to the member states of the European Union one addresses the question as to the notion of the state. For those countries this question it is decisive to know whether the uniqueness of state hood and sovereignty has already been de facto transferred to the European Union. Would this be the case, the member states would have lost their state-hood and would share it with the European Union and thus not be any longer fully independent states with the attribute of absolute state sovereignty.

State of Modernity

The theory of state is also a theory of the state of modernity. The actual world of states is marked by idea of the state as a result of the philosophy developed in the period of the enlightement. Accordingly the state is legitimized by the people's sovereignty, the rule of law and the civil society composed of equal citizens enjoying all basic human rights. The people's that is the sum of all individuals living with equal rights within the same state territory produce legitimacy. The state of modernity is a secularized state which does not depend on the grace of God as in middle ages. However this request of the enlightement theory is contradicted by many religious communities today.

Eurocentric State Theory?

Often the exposition of the theory of state has been limited to the western European states, in which Germany, France and Italy were on the focus of the research.

This state theory tries to go beyond this limited goal: It intends to understand the state today as a universal phenomena. Within a globalised world order a state theory designed out of the Eurocentric cultural thinking is not any more legitimate.

State Theory: A Child of our Times?

Genera theories of state are – one can pretend – more than other scientific disciplines *children of their times*. They are almost not able to seize the "nature" of the state in its total complexity. They rather try to focus on the problems of the living generation and existing period. In this sense also this state theory will concentrate on issues, which are moving the peoples of our times.

Justification of the State

Hereby we shall focus first on the question of the *justification of the state*. Do we at all need a state, is it superfluous to which men and women could renounce

without any damage and consequences? The we shall deal with the question of the *origin* and of the *nature* of the state. Which attributes are necessary in order to label a community of humans as state with sovereignty? Are the rights which are granted to people's within the state of pre-state nature or are they only granted by the state? Is state sovereignty the origin of all law or is it also bound to comply to certain elementary legal principles? Do certain human communities which feel strongly connected e.g. as ethnic people or as religious community have a right to create an independent state? Can the "political" within the state be decentralised to specific sub-state-units? Are on the other hand alls individuals with equal rights the only possible subjects of state sovereignty? Do minorities such as the French speaking peoples within the English speaking majority of Canada have a right to a special status or even to unilateral *self-determination* and *secession*? Which are the challenges the historically homogeneous states are facing because they turn into multicultural state because of the actual immigration of foreigners? How are states organised? Are polities without separation of powers ruled by a dictator still state in the proper sense? What tasks should be transferred to the state? Should it orient on the model of socialist China or on the model of the capitalistic society? To what extent the state is at all the origin of the law and the legal order? Is law conceivable without state?

Humans are Subjects and Objects of the State

A state is always a *community of men and women*. This human community will first have to be subject of our analyses. Why and how did it come into being? How can it be explained and justified? What relationship does it have to the single individual? What are its competences and its responsabilities? How can ist power be limited? This questions are in tight connection to the issue of human rights. Why and how did the idea of human rights develop? This question leads us to the issue of the rule of law. Its historical development but also the development of the continental European idea of the state of law (Rechtsstaat) is subject of the fourth chapter.

State and Mafia?

Immediatly following out from the former catalogue of issues the following question has to be asked: What is the *essence the proper nature* of the state? What conditions need to be fulfilled in order to mark a community of human beings as a state which consequently can claim to be sovereign and to exert sovereign rights? Would Palestine already now be a state and what would be needed to make it a state? What distinguishes as state-people from a ethnic people or an autochthonous minority, from the aborigines or from nomads such a the Bedouins the Tuareg of the Sinti and Roma? Do these minorities have a right to resistance when they ar systematically suppressed by state terror? Which difference exists to religious communities or to international organisations? What are the pre-conditions and contents of state sovereignty? Can sovereignty be divided? Can political rights be divided and shared by different political communities? What does make the difference between the State and the mafia, terrorist organisation or a football club?

Governmental Systems and State Organisation

As soon as we know more on the nature of the state we can deal with its organisation and in particular with the governmental system. How democratic state power built up from its humans should be designed? How can democracy as majority rule be legitimized? How are modern states organised? How can the different state organisations be distinguished from each other? What types of state organisations do exist? According to what criteria's state organisations should be compared? Does the organisation of the state and the division of state power serve the leigitmacy, the efficiency or the strengthening of state power in general or has the state organisation the mere goal to limit the power of the majority? The seventh chapter deals a part from the traditional states of western tradition also with the organisation of the state *in transition.* Apparantly those states had after the fall of communism to design a new state almost out of nothing. Thus in no other state one can make so clear the tight connection between state organisation and the legitimacy of the state.

The Challenge of Multiculturality

Created by tradition and history or produced by modern migration multiculturality is the most difficult and most threatening challenge to the state of today. In this sense the eighth chapter deals with the issue of federalism as one of the very few tools and state-concepts which did find an answer to the challenge of the multicultural diversity. As a case study for structural solutions the second part of this chapter deals with the federal design of Switzerland.

Symptoms and Causes of State Pathology

Human beings did build up states and the states have to serve the human beings. Structure and behaviour of the state community are designed by humans with their good or bad qualities, with their good or bad behaviour and with their needs interests. Each scientific analyses of state phenomena will thus have to depart from the *specific nature of the human* being. As the science of medicine or of psychology have to deal with the healthy and ill human being also the theory of state has to deal with the “healthy” and “ill” state including the symptoms but also the causes of illnesses. Such normative approach is indispensable a part from the careful empirical research.

Law and Might

The tense relationship between *Might and Law* is well known. Since the origin of history it has marked controversies on the state. Logically it follows that also this theory of state will extensively deal with these counterbalancing forces. Political ethics, ideas of justice, reason and the capacity for knowledge of the human being will also be analysed as the power, its origin and its goals as well as the misuse and its limitation.

Historical Nature of States

All states are historically developed constructs. Their organisation and structure and only be understood out of their historical development. The observation of a specific historical moment does not satisfy for the explanation and understanding of state and statehood. Each theory, each idea, each institution and each governmental system has its proper history. We shall try to include this historical dimension and take it into account as far a possible. However not only history but also the specific character and soul of a people, its religion and geographic condition, economy and the development of the society did mark the different states. Those interactions will also be taken into account.

In the end questions can never be answered finally. They can only be replaced by new questions. Also, this theory of state will not exhaustive answers to those questions but rather point to new issues.

Chapter 2 From the Tribe to the State in a Globalised Environment

A. The Origin of the State Community

I. The Need of Human Beings to Build up Communities

Legitimatcy with regard to the Common People

Who would ask somebody in the street, why he/she pays taxes to the state, he/she may probably get the following answer:" Because we have to pay them" – "Because everybody has to pay taxes" – Because, if we don't pay, the state will force us to pay". If we are not satisfied with these arguments and ask for better explanation such as, where from does the state take the right to require tax contribution from its citizens, the answer may well be: The Government, the Parliament or the People die entitle the state, which in any case needs money and it has to get this money from somewhere. If we are still not satisfied and ask why then the Government, the Parliament or the majority of the 51% of the voters would have the right against the minority of the 49% to collect taxes also from those who did not agree with the decision of the majority our interlocutors might feel stumped for answer. Or he/she will answer this has always been the case or the constitution does entitle the parliament or the majority of the voters to make such decisions which can be compelled even against the minority which opposes such decisions.

One may ask why those answers of the common people are at all relevant in this context. When depart from the fact that the modern state would always need a democratic legitimacy and that each state and legal order needs to have at least some acceptance by the population then of course the opinion of each citizen becomes relevant as the state legal order derives its legitimacy finally from its people. Essential however is that the given explanations would be convincing. Such convincing arguments however can only be found it one questions which justification would entitle state agencies to provide for compulsory measures one gets aware of the general significance and importance such arguments may have.

Legality – Legitimacy

Butt he opinion the Government has had always this right is certainly not precise because "the Government" has not always existed. Once upon a time it has been established. May be after a revolution, a war or an annexation with the support of foreign power or by a some how more or less legitimate decision of the people. If one further goes back to all those different governmental reforms up to the origin of the making of the state and if one inquires the original decision which may have a revolutionary origin, because it could formally and legally not any more be derived out of a constitutional right or an international legal provision. Such revolutionary transformation may have been legitimate because they were supported by the great bulk of the people. However they are not legal because neither the procedure nor the content could be deduced by the former positive law.

The Big Bang: The Constituent Power (pouvoir constituant)

In principle one did describe the Organ or institution which gave the state by a revolutionary act a totally nes constitution which could not any more be derived out of the previous constitution the constituent power or according to the relevant French doctrine the "pouvoir constituent". Many consider this constituent power to be the big bang of the state sovereignty from which all later state decisions can be deduced.

Legitimacy of the BigBang

Where however can the constituent power derive its might to provide for the state and the people a new constitution? When THOMAS JEFFERSON in June/July 1776 drafted for the congress of the fathers of the United States the declaration of independence he certainly was aware of the fact that the dissolution form the British Colonial state and the foundation of a new state could not only be justified with the argument that the United Kingdom exploits and terrorises the American people. He needed in addition to prove that the people of the new states have an original *right* to give it self a proper Government and even a proper independent state and constitution. Hereby he thought of course only to the peoples immigrated into the states having their proper relationship to the Kingdom and Colony he did not think of the native Americans. Those were excluded from his thoughts.

With what justification however can the first establishment of a Government or the decision on the procedure of a first constitutional decision making be supported? Where did e.g. the founding Fathers of the American Confederation get the title to legitimize the member states of the confederation to give themselves new proper constitutions? Why was the diet of the Swiss Confederation in the year 1848 entitled to disregard the treaty of the confederation and to propose to the people and the cantons a new constitution drafted by the diet? Where can the majority of the French population of Quebec justify its demand to found unilaterally a new sovereign state even against the majority of the Canadian people or the majority of the native Canadians?

How can the uniqueness of the constitution making in South Africa be justified? There the illegitimate but legal Apartheid Parliament has formally initiated

the procedure for a new constitution. It followed with this decision a committee which has been composed by the politically representative elite (without direct democratic legitimacy). This committee proposed a double procedure: First should a new constitution *pro futuro* be enacted. Based on this constitution a new constitution making assembly should be elected which would be entitled to establish a new constitution. In addition it mandated a constitutional court to guarantee that the main principles of the constitution pro *futuro* could not be violated.

Where from can the constitution givers deduce their legitimacy for the drafting of a new constitution? This fundamental questions may be answered quite differently: Some may claim that the legitimacy is given because the supporters of the new government are stronger than their adversaries. They would have had the de facto power and based on this power the new government had the title to enact new laws. In other words: Does finally the de facto power legitimize the law? – Others in turn may be of the opinion that the people would have this right based on the natural law of self-determination which entitles all peoples to give itself a new constitution and thus a new governmental system which may have been approved by the great bulk of the people. The majority always has the right to impose the minority its will. This would be a consequence of the democratic principle. – Others however would object that also the majority would have to comply with elementary legal principles and with the rule of law and thus would not have any title to infringe into inalienable rights of the minorities. The first revolutionary state act accordingly can not be described as the Big Bang cause and origin of all later law to be deduced from. As the constituent power should be bound to these fundamental legal principles because all revolutionary movements would – as THOMAS JEFFERSON – proposed derive their legitimacy out of the injustice they did suffer from and it is this injustice which does legitimize them to establish and enact a new constitution, which however would have to respect inalienable rights of every human being. Thus when revolutions derive their legitimacy out from superior legal principles they should not violate those principles.

Legitimacy Superior to the Law

Within the monarchies of the middle ages the answer however would have been different: The monarchs would claim that he/she has deduced his title to rule the peoples from the Grace of God. As the monarch according to this understanding of the pre-modern state is superior to the law he/she can change and alter any time the law and the constitution without any revolutionary ace. A similar argument for the legitimacy of total powers can also be found in states in which either one party, one nationalistic ideology or one religion declares itself to be the sovereign might superior to the law and the constitution.

Legitimacy of the State Unity

Some of the peoples derive their legitimacy to build a unit of the people or of the state from the fact that they re the chosen people and unit by God and thus have the title to build their proper state. The Jewish people considers itself to be chosen as well as the Singhalese in Sri Lanka or the Japanese which are hold together by

the person of the Teno the son of God. A small minority of the questioned people may even deny any right of existence to the state at all. They may argue according to the following principles: As state power as such is negative and bad and as the democratic majority in now case can require to be entitled to enforce decisions on the minority and as in the free market system the "invisible hand" any way looks for justice the state needs to be abolished or at least reduced to the absolute minimum. Mankind has to be liberated as much as possible from the authoritarian rule of the state.

We can see: State authority can be justified by theology (from the grace of God), by anthropological-philosophical arguments (men have inalienable rights), by legal philosophy (humans should not be ruled by humans but by the law in the sense of the rule of law), by sociology (power makes law) and by anthropology (human beings are by their nature political creatures). Those who explore the different theories which consider the state to be something necessary and indispensable and who deduce its title to authority from this point of view have always to refer somehow to the reality or at least to the fictive image of the history of mankind. The evidence that state authority is necessary and indispensable is to be found in the history of mankind because in all societies there have been developments in which supra family political communities have been created which were entitled to rule the human beings part of these supra-family political communities. The history of mankind itself thus is the prove that human beings by their nature need to be hold together by states as political communities holding together several natural communities such as families.

Does history create legitimacy?

In some theories on state authority fiction and historical facts can only be distinguished and separated with greatest difficulties. Some scholars representing the so called contract theories such as THOMAS HOBBES and ROUSSEAU pretend not at all that human beings did conclude in reality a contract and would have transferred a monarch with some titles to rule the society. They still pretend that the social contract is rather a fiction somehow a legal pre-condition or as HANS KELSEN puts it a so called basic norm (Grundnorm) from which additional titles for state authority can be deduced. This fictive assumed free contractual agreement for the building of a polity and for the transfer of titles to rule thus is the justification that is the legitimacy of state authority. Other scholars representing the contract theory on the other hand such as JOHN LOCKE are or the opinion that in human beings ancient times did in fact conclude a first contract in order to set up a polity. In the second contract they transferred limited authority to the rulers. As one can see historical facts and fiction can only be separated from each other with difficulties. Those who consider the state to come out of the nature of human beings and thus are an immanent institution linked to the nature of men and women will try to prove that this political institution has historically always bee in fact a historical construct.

Myth as History

Almost all culture had derived from old legends or other customs a somehow more or less clear idea of the merging of a state polity. Comparing those legends and customs with regard to the different cultures and continents one can detect amazing similarities. Thus instead of going back according to the normal path to the ancient Greek history or the ancient times of the German tribes we shall first look into the Chinese state theory in order to demonstrate that the basic questions with regard to the state development have been asked in earlier times also in other cultures in a most similar way and they have been answered amazingly similar.

The Original Society in the Chinese Tradition

With regard to the development of the human society one can however distinguish two opposite theories. Some are of the opinion that in ancient times the chaos and the conflict of all against all has threatened the survival of mankind (HOBBES; SHANG KUN SHU, cp. GEN WU, p. 49). Other pretend that in old times peace and harmony were predominant (ROUSSEAU, LOCKE, LAO TSE, MARSILIUS V. PADUA, KARL MARX) a condition to which all human beings should be able to come back (MARX, LAO TSE).
Die einen sind der Meinung, der Urzustand sei das Chaos, der Konflikt aller gegen alle gewesen (HOBBES; SHANG KUN SHU, vgl. GEN WU, S. 49), die anderen behaupten, in der Urzeit habe Frieden und Harmonie geherrscht (ROUSSEAU, LOCKE, LAO TZE, MARSILIUS FROM PADUA, KARL MARX, ein Zustand zu dem die Menschen wieder zurückfinden müssten (MARX, LAO TZE).

HAN FEI

The Chinese philosopher HAN FEI, who has often been called the MACHIAVELLI of the old Chinese philosophy gives us the following description of the status of the ancient society: "In the ancient times men did not need to cultivate the fields. They had enough fruits and seed to eat. The women did not need to weave, then there were enough furs from the animals in order to clothe. Nobody cared to get the food, because the number of people was small. On the other side there was abundantly food available. There was no conflict among the peoples. The measures, punishments and rewards were known. All over reigned peace and order. (GENG WU, p. 50) The original state of society was thus a peaceful anarchy. How could out of such anarchy develop a political state authority? According to many old legends of the old civilized nations of Greece Babylonia but also of China one can assume that human beings started to feel insecure and threatened from their environment. Finally a "*talented*" cam and showed how they could protect against wild animals. "Than however a great and holy man appeared and plaited branches of trees to a nest in which he escaped many dangers. But the people was happy so of him that it made him a king. (HAN FEI, Chap. 49 (WU TU), quoted from : W. EICHHORN, Kulturgeschichte Chinas, Stuttgart 1964, S. 11). The bases of authority according to HAN FEI is thus teh talent, the capacity and the quality of the ruler. Based on the charisma the good ruler derives its title to rule the state community.

KUAN TZE

An opposite opinion can be found in the Chinese legalist writing of KUAN TZE. According to this author the original state of society is war: " Then the wise men appeared and enacted supported by the masses of the pople orders in commandments in order to prevent brutal battles. Thus the violent had to hide. The wise did commit for the advantages of the people. He taught the people the virtues and he was accepted as ruler by the people. Virtue and ethic norms have been made by the wise. Because virtue and customs were connected to the reason the people did follow them voluntarily. Right and wrong have been decided by him. Punishment and reward were imposed. Supervisors and subordinates have been given different positions by him. Accordingly the people's were structured and ordered. Thus the state was founded." (KUAN TZE, Kap. II, Abs. 37, zit. aus: GENG WU, S. 52)

The State: The Bulwark against External Dangers

According to the opinion of the old school of the Chinese legalistic school the state that is here the concrete power of the king did develop only gradually. As long as each could life and feed for him or her self a state polity was not necessary. The protection against external dangers which e.g. by war or by wild animals of natural catastrophes threatened forced the human beings to provide common measures. The people transferred the power to the most intelligent, strongest, most capable and elected him or her to the King. Authority emerged out of the need of the society threatened in its proper existence. Monarchy was not a divine institution. The monarch has been empowered by the people. However the humans believed that the king would be superior based on his supernatural forces. Because of his capacity one considered that was also legitimate to guide the people. – Probably the authority of the ruler became also later a patriarchal gesture. "Nobody who is not living on this earth is not a subject of our King" (saying at the time of the Chou Dynasty (GENG WU, S. 53).

Difference with regard to the European Constitutionalism

Remarkable is in both cases the apparently already the old Chinese theory of state has departed very early from a fictive or actual speculated state of society within ancient times. As the enlightement theory in Europe it tried to deduce some important conclusions even relevant for the modern theory of state. Most interesting is to note that obviously also the Chinese theory of state as the much later born European theory of state departed from to opposing speculated states of society in ancient times: the period of *paradise* or the war of *all against all*. The conclusions, which HAN FEI and other philosophers draw from this speculated state of society however differ considerably from the conclusions the state philosophers of the European constitutionalism did draw from this historical fiction or fact. History was used for the Chinese philosophers to prove that the good, wise an capable ruler is needed. The philosopher of the enlightement theory used the fictive ancient state of society in order to deduce from it the secularization of state authority. Based on these arguments they answered the question whether authority of the state unlimited or has to be limited. However they did not touch the issue who

should be the ruler. The answer of this question has been left to the Marxist theory. The secularization of state authority has not been an issue for the Chinese state theory. In China the ruler never ruled by the grace of God. Authority was based on the philosophy but not on the legitimacy of religion. Heaven was the only "authority" to from which state power did drive if ever needed.

The Need of an Order Superior to the Family

The need to a superior and capable King for the protection of the tribe has apparently also been one of the main reasons for the building up first communities with centralised political power. Also the great Arabic thinker IBN KHALDÛN (1332–1406) saw in it the origin of state building. "When men did achieve a certain organisation of their society…. they need somebody who hold them back, mutes their eager for the fray and protects the ones from the others. Because the eager for the fray and injustice are born to humans by nature (IBN KHALDÛN, S. 47). Decisive for IBN KHALDÛN (p. 47), were however not the external threats but the society which by the inner situation of war would dissolute into anarchy. In order to prevent such evolution he wanted the members of the society to build supra-family political state structures. Similar to the later HOBBES also IBN KHALDÛN considered the human being as aggressive creature seeking conflict and battle. Therefore it needs a strong leadership which can hold society together by order.

Undoubtedly, the state institution did develop differently within the different archaic societies (E. A. HOEBBEL, p. 289.). Nevertheless one can detect some common tendences with regard to the early development of these institutions: State-like constructs which are determined by special institutions independent from their persons with centralized power, proper jurisdiction and some general applicable norms are only developing in more complex and developed societies marked by a society with *division of labour*. On the level a society composed of hunters and pickers which are determined by strong economic and social autonomy of the families such institutions are not needed. Only the development towards the extended family, the kinship group and the tribe a new need for superior and long lasting leadership is growing. On the previous level the problems of living together mainly within the family are determined either by the father in the patriarchy or the mother in matriarchy (the people of the Touareg). Some problems between families are often solved by the council of the oldest. Supra-family structures become only necessary when the contacts between families get more tight and more often mainly due to the developing division of labour. (cp. M. V. PADUA, first part chapter III).

Shelter from External Threats

Supra-family institutions develop mainly in cases when the society based on the economic development has achieved a certain level of division of labour, when the society seeks shelter against external threats and when with regard to the internal order the traditional customary law cannot any more be enforced and implemented in order to guaranty the internal security and order. An additional condition namely mentioned by IBN KHALDÛN is the strong *feeling of togetherness* of the

group. As long as namely the elementary preparedness for solidarity is lacking institutions based on a political bases can not be built up at all.

Centralised institution seem in the beginning almost always have some democratic or at least some oligarchic forms of self-determination. Those capable and legitimate to represent the tribe or the group elect democratically the new ruler whom they promises to follow. Very often the ruler – namely in African tribes – is surrounded by some council of the oldest (oligarchic), which does advise him and namely may also limit the misuse of power. (R. SCHOTT, Das Recht gegen das Gesetz in: Recht und Gesellschaft, Festschrift Schelsky, Berlin 1978, S. 605 ff.)

Master of the Tribe

The group expects the master of the tribe, king or prince to lead the tribe within the common interest of the entire tribe that is of the total community. He/she should govern just and take care that the togetherness of the community is sustained and strengthened. He/she decides however alone what is in the interest of the tribe which decisions are just and what he/she can do in order to contribute to the welfare of the tribe. Those who can prove to have excellence and thus are capable, hard working, wise and strong may be elected. If the leader however achieves to build up an army for campaigns, conquests and captures which is totally obedient he can misuse this force in order to strengthen its internal power and to suppress the subjects of the group.

Feudalims

With such powerful army the conditions are provided for a feudalistic patriarchy. The feudal master tries to support his authority by supra-natural law e.g. by pretending that he/she has been given the power by God and he/she exercises the power by the grace of God. With such new religious legitimacy he she tries to become untouchable that is to be considered as master beyond the law which he/she can change at whim every time with regard to his/her subjects. In addition he/she tries to extend its privileges to the family – by introducing the right to hereditary succession – and to his/her court. The maintenance of the army is guaranteed by taxes. He/she distributes estates to his favourites which control under his/her order the people. They help collecting the taxes and exploiting the farmers. The bigger mismanagement the quicker he/she will be removed from power with all favourites and the entire court by other tribes or groups.

Zoon Politikon

Supporting the creation of state institution is also an other factor part of human nature: Whoever reads the history of old nations recognizes the profound truth of the sentence of ARISTOTELES (384–322 before Christ) that the human being by it nature is as *Σοοη Πολίτίκοη* that is a creature which is made for a political community which has supra-family structures. According to ARISTOTELES human beings can not exist as a single isolated creature. He/she is only existing as child, father mother slave etc. and thus part or given social structure. As individual alone he/she can not survive. Every human being exists only as part of a community

within which he/she has certain tasks to fulfil. (ARISTOTELES, I. book, 1253 a and III. book). Also IBN KHALDÛN and the old Chinese theory of state point at the necessary need of the human beings created for social life within a community. Human beings are threatened by the dangers of the nature. They cannot feed themselves when they get old namely they cannot hunt or collect plants. Neither can they produce instruments and improve their capacities for such activity. Human beings are dependent from a community structured by division of labour. His/her sexual drive leads to the creation of communities with human beings of the other sex which need to be outside of the close family or even tribe because of the taboo of incest. Also commerce and handcraft develop supra-family contacts and connections. Moreover the need for security from hostile tribes and from threats of nature as well as common games contribute to the development of some first communities holding several families together.

Worship to the Ancestors

In almost all archaic societies the worship to the ancestors contributes decisively to the creation of new institutions for political authority. Namely within old China but also old Rome and African tribes the worship to the ancestors determines the positions of a family within the inner hierarchy. The authority to enforce customary law is strongly anchored in the ritual of the worship to the ancestors. Who does not comply to the laws of the tribe and the kin-group will be punished by the ancestors. Witchcraft, sorcery and religion have their roots within the worship of ancestors. Common to all these phenomena is that they serve the ruler to extend the once accepted authority and to secure the power against inner trumois.

II. The State of the Modern Civil Society– a Supra-Family State?

The Political Community

The moderne rational state is – contrary to the family established by nature – an artificial polity created by the political will which as only social entity is entitled to legitimacy of unlimited authority including the *monopoly of force*. Contrary to the family which is a natural community the ideology of authority of the modern state is not based on the nature and the social tradition of a pre-determined community but on rational *reflection and choice*.

This view of the polity within the light of the modern rationalism and individualism should not deceive that the modern rational polity has only developed with hesitation lately and slowly. It was caused by the gradual and moving transition from the extended family to the construction of new supra-family polities composed of individual citizens e.g. as political members of the French nation in the sense of ROUSSEAUS or SIÉYÈS.

From the Kin-Group to the Small Family

While the function of the family as economic, production and existential unit has changed during history, the state has been assigned with the development to the welfare-state many new tasks which originally have been within the responsibility of the family. The self-sufficient extended family was not only an emotional but mainly also an economical unit with common production of goods. It was to a large extent self-sufficient. This comprehensive function of the big family which was responsible to care for the existence, survival and the welfare of its members has been radically reduced during history mainly because of the growing social interdependency of the society in the area of modern technology and information technique.

Today the small family is only a mere emotional and only partially a community for common education. The original task to the production and economic unit has been taken over by the state and its social agencies. The economic activity of the members of the family takes mainly place out of the family. Social care, health and education of the children is taken over by the state or the municipality as agent of the state.

The Association of Citizens („Citoyens")

The political association of citizens has originally been composed by the autonomous house-fathers. Autonomy was considered to by mainly the right to use property. Property rights were seen as the general right which included all other liberties and the right to human dignity which should be granted to every human being notwithstanding his fortune or position within the society. The modern industrial society has made the individual independent. The state has extended its perception of the citizens originally only limited to house-fathers to all national members living within the respective territory. The single individual has replaced the house-father originally representing the collectivity of the family. Thus the individual has become the opposite pole to the state polity. The civil society of the free individuals which does not recognize collective rights has replaced the structured feudal hierarchy of the middle ages. The original unity and self-sufficiency of the family has been replaced by the state and its society.

Community of Competitors and Community of Taxpayers

Logically goods are not any more distributed according to the function and position of the families. The just distribution of goods is guaranteed either by the free market and the competition or by the system of the state taxes. The free market should guarantee a just distribution of goods. This aim however can only be achieved by the assumption that the invisible hand guarantees through the free market system welfare and the distribution of goods according to the performance of the producers. The state is still asked guarantee equal opportunities, to prevent monopolies and take care that the free market does not degenerate into anarchy. The state has to care for law and order in order to provide the environment for the free market to develop and to be protected against criminality and misuse of powers. The democratically legitimate welfare however should be guaranteed by the

just distribution of those goods which are withdrawn from the free market such as e.g. education, health protection traffic etc. It is up to the taxing system to guarantee this democratic distribution.

The Modern Citizen is Integrated within a Complex Network

The modern human being is tied emotionally to the family (understood in the largest sense as place of emotional security). Otherwise he/she is consumer, tenant, employee, member of a social security and citizen. With regard to the state he/she participates as taxpayer, voter and contributor to the social security but also as pupil, student, pensioner and in some instances as soldier or as taxpayer for the defence. Moreover as consumer, tenant, employee, participant within traffic and member of the social security he/she is also integrated within the society as user of energy and environment.

Interdependency of the Society

The need of human beings for more social integration and mobility as *zoon politikon* has increased the gradually stronger interdependency of the society. This interdependency of the society requires a rational political administration which is either steered by the democratic majority with acceptable and legitimate criteria's of justice or it is guaranteed by the cost/benefit driven free competitor-society, which is determined not by chaos but by the invisible hand of the free market.

Ratio and Emotions

Reality shows however that emotional ties and needs of human beings can not be reduced only to the family. Human beings can not be divided into three totally separated dimensions: the rational citizen of the state, the cost-benefit driven consumer of the society of the competitors and the emotional member of the family. The complex nature of the human being seeks beyond its family emotional some times even total loyalty. The need of human beings to absolute and not any more questionable values which can only be defended by communities which dispose of the monopoly to use force leads to emotional fundamentalist nationalistic and chauvinistic communist of sects and other ideologically tied societies which tend to instrumentalize the rational state for their proper purposes or to fight against the state which refuses their goals and aims.

Is the state indeed a not only rational but also partially natural community which is tied together by birth, tradition, believe etc. or does it have to become independent from all naturally grown societies and turn into a mere political and rational community with an universal claim (e.g. France) of a community which can be chosen by each individual based on his/her reflection and choice?

Total Loyalty

Ethnic communities require by their members total loyalty. They claim to enjoy a natural right for proper state hood and refuse at the same time the existing superior state legitimacy and obedience. This superior state on the other hand serves its majority ethnicity which may legitimize integration and homogenisation of the terri-

tory up to the total suppression of minorities with state terror, violation of human rights racism nationalistic discrimination as well as inhuman expulsion. On such measures ethnic states build up their authority by the emotions of the majority. On the other hand minorities refuse any loyalty and participation for state decisions with the same emotional totalitarian refusal of their members as they are refused by the majority nation.

These new supra-family artificially constructed communities which require total loyalty represent a totalitarian and authoritarian state hold together by the charisma of the majority when they represent the majority of the nation. When they are in the minority they fight for their proper state within the state. In both cases the rational legitimacy which would belong to the constitutional state is replaced by the charismatic emotional ties which require total identity and loyalty with regard to the religious, language or cultural community.

The original family requires from its member total loyalty. "Dissidents" have been locked out or even eradicated. Family feuds penal liability of the family and total dependence of the family are known forms of such totality which have broken into the state and its regulations with regard to family, hereditary law, guardianship and social security. Can it now as rational community beyond the family community require the same totality of its citizens entrusted to it with their entire fate.

Multiculturality

One has finally to put the question whether the state can remain in fact only a community built up and holding people together only by rationality. Multicultural states try to cope with this challenge with the idea of the melting pot to which the United States are committed or the diversity of the federalist corporatist democracy of Switzerland or the kemalist ideology of Ataturk which did set up a republican Turkey which did based on the rationality of its origin make out of the rationality an strongly emotionalised myth in order to hold the multicultural society together.

Legitimacy over Human Beings and over Territories

Who belongs to the society of the citizens? Dos the human individual really become part of the polity by reflection and choice? Did not many communities replace rationality with myths symbols religious believes or charismatic tradition? The external geographic and territorial conditions of the social contract of many Western European states have been shaped by violent conflicts, wars, coup d'état and revolutions as well as by totalitarian rulers or monarchs. Some western democracies of Europe did with their revolutions accept based on peoples sovereignty the original borders of their monarchies. Oversee the colonial masters however committed to their missionary ideas of a culturally, intellectually and religiously superiority did change and extend the territories according to their needs and interests at whim without questioning the legitimacy of their claim to power with regard to the population living in these territories.

Peoples without a Territory

Finally definitely unsolved are the traditional state rules for community of peoples which do not can not and will not dispose of a determined territory such as the Sinti and Roma, the Tuareg or the Bedouins. They have now possibility to integrate into the modern jacobinist social and state order. On the other hand there are peoples such as the Aborigines in Australia not at all influenced by the legal culture of the roman law which determines that human beings can dominate and own territories and estates. According to their understanding not humans own territories but territories own humans. The peoples are property of the soil they are rooted to. Their territory is part of the human existence. Is it "violated" for instance for the exploitation of oil or other mineral resources the people feels aggressed with regard to its proper existence.

States are not Islands of Sovereignty

Indeed the state can only be a community made by reflection and choice when it disposes of a limited claim to power and authority. Exclusively the concept of a sovereignty limited by the inalienable rights can become the legitimacy bases for the rational state. This means in other words that the claim to sovereignty for the implementation and enforcement of any kind of ethnic interests can neither be demanded by the majority nation nor by the minority nation. States are just no impermeable sovereignty islands as families are no isolated units of the society. States are part of the community of states which in their totality are responsible to the survival of mankind. They bear the responsibility for the environment and are accountable to the next generation. States can within this world society only exert a limited mandate linked with the obligation to care for their territory and for the wellbeing of all humans living within their territory as citizens, gests, foreign employees, asylum seekers or refugees.

A new Concept of the State with Limited Sovereignty

As long as states are able to claim total legitimacy and monopoly to use violence for enforcement in order to defend their interests all communities which feel threatened by their minorities or communities which claim to have statehood in order to pursue their interests will be prepared to perceive ruthless their emotional interests and connections. Only a state concept with a limited understanding of sovereignty which limits also tightly the monopoly to use force will finally avoid that ethnicities on the majority or minority side will seek their only salvation within their proper statehood.

III. Conclusion

Dilemma of the State of Modernity

The state thus has developed as a rational association of men and women superior to the individual family. History proves however that neither the family can be

understood only as a community hold together by emotions neither can the state be reduced only to reason as fundament for supra-family political relations. Moreover the social reality reveals that the family is far not the only human community which is hold together by emotions. Religious communities, language groups and cultural associations can not be understood as only community founded by reason. And also the state is in the least cases a community build up only by reason. This complexity of today's reality has not be taken fully into account by the modern theory of state. For this reason we all are today confronted with the unrealistic idea according to which one has to reduce the state to the pure reason and that the political and in particular the sovereignty has to be centralized within the monopoly of the state to use force. At the same time one would have to deny to all other groups and communities such as language or religious communities but also to federal units the political and rational. The state is not the only political entity which is composed of a mass of individuals with equal rights and with regard to the constitution equally thinking persons.

Request for a new Understanding of the State

For this reason the state needs to grant also to other communities political rights. It has to accept that it does not dispose as only community of the monopoly of the political to be deduced from sovereignty. In other words the state of post-modernity will have to renounce to the monopoly of the sovereignty as the quality which is only centralised within the state. It has to find the path which would allow also other communities hold together by reason and emotion to fulfil political tasks in areas of culture, education and information or even in fields such as health, security and social affairs.

This however presupposes a new and different understanding of the state. Sovereignty cannot any more be considered as an absolute and indivisible quality. Sovereignty is rather to be understood as a limited but also divisible quantity. The state does accordingly not any more dispose unlimited of the lives of its subjects. It is embedded within a globalised whole confronted with multiple loyalty of its citizens. Within this position it has determined tasks and functions with regard to security, police order infrastructure and social services. It can exert this functions on its own but it can also delegate some of them partially to national or international communities.

B. The Different Stages of Development of the Stathood Community

I. Introduction

We have seen that the state is an artificial community built up by human reflection and choice. With regard to this context we have to clarify three questions which

are decisive for the understanding of the state and which should be explored in the following sections.

- Why have human beings been able contrary to animals to create and live within artificial communities?
- Which were the reasons and motives fort he human beings to create beyond their family ties new determined supra-family communities in order to separate from other communities?
- Which were the reasons that human beings werde prepared to join such communities and thus to renounce to some of their proper independence and individuality which even included their obligation to sacrifice their lives – as highest good one can have?

These three questions will be discussed in the following sections and analysed according to the actual different theories.

II. Capability of Human Beings to Speak as the Pre-Condition for State-Building

Robinson Crusoe

Wes hall in the following sections of this theory of state repeatadly refer to DANIEL DEFOES (1659–1731) an his story of Robinson Crusoe and Friday. This story has been written in the elightment period. It impresses because it shows the naturalness the European Colonial powers considered all members of their culture and of the Christian religion as superman. The example of Robinson on its lonesome island makes very clear how people at that time of the enlightement had to feel within a – admitted artificial – primitive society and how they were dependent on abstract rules in order to regulate the common live for the mutual survival.

When Robinson found shelter on this lonesome island one could of course not call this a state. He was totally lost and alone. The contact to the natives came only much later. With the animals which he domesticated he could not build a state. Any state requires a community of reasonable beings which depend on each other and feel to belong to a community. Such feelings, judgements and assessments which are the bases of an artificial society are only possible when the living beings involved in the community can communicate with abstract norms such as e.g. “we need mutually to survive in common” You have to obey me”, “I can order you”, “You have to inform me” etc. Such abstract notions however can only be transmitted by language. Language thus is the indispensable condition for the creation of artificial communities.

Human Capacity for Language and Communication

Without language a state that is a community supra family which is committed to common values is not thinkable. Who can communicate with other people by language and can inform them in a understandable way on abstract norms can also discuss on common values such as the value of national unity, the value of liberty

and democracy and thus seek to find common values un order to bring different peoples by common values together. Only with language the fundament of a polity which is based on solidarity of the member can be established and communicated. With language conflicts among different persons can be rationally solved and decided. Only language enables the communication of abstract rules such as they are found in constitutions and laws.

Values Formulated by Language

But also original ideas on values and prohibitions such as e.g. the prohibition of incest are only thinkable when somebody can understand notions such as mother daughter, husband, wife, sister, brother, uncle aunt etc. and in addition has the capacity to apply such abstract notions to a concrete situation. Worship of ancestors such which was e.g. important for the development of the Chinese social structure of the obligations, which the husband, his wife and her relatives might have to assume after the marriage are only thinkable it peoples are capable to communicate their thoughts by language and are able to apply abstract norms to concrete cases. In addition they must be able to make their proper judgement and have the possibility to make decisions based on their judgments.

Only the Homo Sapiens can Establish a Polity

Only by language common interest can be developed within a society and only by language the members of the society can be induced to submit to the overall interests of the community. "This is namely contrary to other live beings special for the human being that he/she is only able to assess the good and the bad, the just and the unjust etc." (ARISTOTELES, I. Buch, 1253 a) And the tool available to do this is the language.

Animals can not build a "State". As a image for explanation one uses often the expression state of termites. But this construct is not at all a state or a polity created by reflection and choice with common institution competent to enact, to act and to implement common decisions. Termites are programmed for the community. They cannot alter the construct of their community nor can they decide on its territory or even leave the community based on their proper decision.

Thus, the state is an order established by human beings and addressing human beings. It requires the capacity to communicate and to decide.

Plurality of Human Beings who are able to Communicate

Robinson thus could not create on the Island a state community neither with the animals nor with the natives because he did not know of their existence. His isolation made any attempt to build a state impossible.

This situation changed from the moment as Friday appeared on the island. Both human beings needed to develop and to agree on certain basic rules in order to live together. On the bases of a partnership on equal footing or with a hierarchy among the two they could hope to overcome and survive.

III. The Society with Division of Labour as Condition for he Building of a State Community

Need for Protection

That human beings however can come together in order to establish a supra family community they need not only to be capable but also motivated to accept and to obey the rules of this new community. For this they are only prepared when they are convinced of the fact that single individuals or families can not survive without a artificially supra family polity. Thus, they must have a born existential need to create a new supra family political community. As we have already seen, human beings are according to the conviction of many philosophers of old China but also of the European enlightement according to their nature dependent on the state having the power to implement order, because the need for the protection against external and internal dangers an authority able to guarantee order and security for them selves as well as for their families. This protection however will only be necessary when human beings are settled and live together within a closer territory.

If one needs to know why human beings need the state as power for order it is just as important to explore why human beings gradually join to always bigger communities. Why are humans not contented to live isolated within their natural community of the family. Why do they want to join communities beyond the natural community of the family? As we will see in the following sections human beings have obviously according to their nature the need for ever more important and complex division of labour. According to ARISTOTELES humans are community driven creatures because they would not be able simply to survive as isolated individual.

This has already been showed on the lonely island of Robinson. As soon as Friday appears the need is emerging of the two strange humans either to fight one against the other or to try to manage together a strategy for survival. The two humans who are in danger try to meet the challenge of their fate in common. Then it is the *same existential emergency namely to survive on the island which forces them to build a community*. The first step in order to survive on the island is notwithstanding the basic problems of communication to find a common language. The common fate requires solidarity, mutual trust and the readiness to submit to the superior common interest for the interest of survival.

Division of Labour

Already soon Robinson and Friday agree for a *certain division of labour*: The one goes hunting the other guards the hut. The one cultivates the soil the other constructs the hut. The one looks after the fire the other prepares the dinner. Each works at the same time for himself and the other. Such a society based on division of labour however requires that each of the members can count on the other. Such communality is only possible on the bases of mutual trust. Did they not trust each other each of them would have to guard, to hunt, to cultivate and to prepare the

dinner. Division of labour relieves both from some of their burdens. Moreover each of them can perform on activities he is best capable to do and thus serve at best the interest of both. Finally together they have better chances to prevent possible dangers.

Diversity of Qualification and Inclination

The different capacities and interests, the need for community and the common fate are bringing and holding both men together. Very similar probably the first human communities did emerge. However we should not oversee that DANIEL DEFOE did write this novel influenced by the spirit of the enlightement period of the 17th century. Thus it is no unwanted that he describes a *pure society* of men. Probably much more important for the development of the first political communities may have been the *relationship between the two genders towards each other*. These relationships however depend less on a rational consciously lived and chosen attachment to the common fate than on the drive for reproduction and self-preservation as well as on the emotionally sexual bond (some seek the breadwinner the others the prestige). In this respect the already very early established prohibition of incest might have had a significant influence in order to enlarge with the gender relationship the relationship among the families.

Certainly the *extended family* can almost everywhere be seen as the origin of the community live of human beings out of which gradually often forced by the stronger tribe a real supra-family and thus political organisation developed. This is true as well for Japan, China and the African continent but also for Europe, Australia and South America (e.g. the empire of the Incas). The model for the design of the first concept of supra-family authority was certainly the authority of the mother or the father or the oldest in the extended family. They had legitimacy because they were the closest to the ancestors. As within the family the aim of the bigger community was also to organise the protection from external dangers by some kind of division of labour.

Worship of the Ancestors

As already mentioned also closely connected with the political authority was since the beginning the religion, the worship for the ancestors, magic and sorcery. Rulers which can not legitimize their authority by the natural hierarchy of age as progenitor need to try to prove their superiority with other than the natural superiority. The special bond with the oldest and the ancestors gave them wisdom, persuasiveness and legitimacy in order to enact rules for their subjects and to decide on their conflicts. From the worship of the ancestors to the religion and from the religion to the idea that rulers are in this world the representatives of God and therefore legitimate to rule over other people is a small step. Thus kings could rule during centuries either as legitimate representatives of God by the grace of God or as the Teno in Japan as the born of God.

IV. The Stages of State Development

a) *Influence of the Social Environment*

Economy and Geography

If the fundamental theses is correct that finally the stage of development of the division of labour did influence the design for the structure of political communities then also the development of the economy must have influenced the development of the political structure of the states. As we know the division of labour is mainly caused by the stage of the economic development of a society. Therefore we should be able to observe different stages of political development according to the different stages of economic development.

FERNAND BRAUDEL

A decisive influence on the division of labour and on the political development of state institutions had thus the stage of the economy. The most important issue with this regard was as the French historian FERNAND BRAUDEL observes was the question which investment of labour of human beings was necessary for the survival of the society. How much work was needed in order to produce the necessary food for the every day living. If only a few did have to work for the production of food for many then other people could commit to the cultural and institutional development of the country. If the production of food required central institutions such as the irrigation for the growing of the rice plants centralistic forms of organisations were already needed in old times. Did people live out of agriculture as in the middle of Europe, they needed to have the possibility to grind the grain in mills close enough to be reached within a day. This has probably influenced the small decentralised municipal structure in this area. Did the people cultivate the soil with the pickaxe they were only able to feed them selves with their work and performance at best they could feed some of their relatives. In these areas nobody had time for leisure in order to participate in somehow democratic institutions and by no means time was available to build up such institutions. Did the people develop new techniques e.g. to cultivate the soil with the horses and not any more with the slaves the economic conditions for a new order of society was prepared. But only much later this prepared also the fundament for equal rights of all men and women and thus again prepared the cornerstone for an additional important development of civilization.

These rudimentary notes reveal the importance of the geographic and economic conditions for the development of political and social institutions and structures. However they also demonstrate the probably not foreseeable influence of the modern techniques of traffic and communication such as the IT revolution on state and society in the next future. The technical conditions for direct participatory democracy of all humans in politics and thus the limitation of the principle of representation by the parliament are made. Where will it lead us?

Open Questions

Many questions remain however still without any answer. Why did people's in early middle age decide to renounce to the cheap labour of slaves and replace the slaves with the much more expensive horses? Why nations for a long time limit the traffic with ships on the see to the close costs and only later all of a sudden decide to travel a cross the see in order to detect alien peoples and countries and to colonise those nations? Is the answer implied in the Christian religion with the claim of universality? Certainly religions did strongly influence the political development of states just as economy and geography and the environment marked by the climate. A clear answer to these questions could give us some hints, which would allow us today better to foresee the future political development of our civilization influenced by the technical inventions.

b) The First Attempts to Build Political Communities at the Time of the Hunters and Pickers

Council of the Oldest

Already on the lowest stage of economic development that is on the stage of the hunters and pickers we can detect first forms of communities holding peoples together beyond the family ties. Several families join together in groups and form a local community or a group of nomads. These groups are ruled by a master who has a claim for leadership based on his/her capacities. Often we can find first attempts to build a council. The oldest member of the families which are released from daily work in the hut or on the fields can consult with other family masters on the fate of the supra family community. This may lead to the first development of democratic assemblies. The leaders or the council of the oldest will have at first to care for defence against external threats. But they also need to solve inner conflicts and to punish members of the group according to the customs when they did violate some basic customary rules. Out of religious and moral convictions develop gradually ethical norms and out of those first non written legal rules as part of the tradition. In general those communities however are not well structured. If the leader looses the acceptance a new member of the group will have to take over the leadership.

c) The Development of Territorial Communities on the Level of the Planter– the Development of the State of Tribes

Property of Estate and Exchange of Goods – Fundament of the Modern State

On the level of the second stage of the development of society peoples start to become settled and to cultivate the land as planters. As they can produce enough food with their instruments to cultivate the soil the first territorial borders are developing. The regular cultivation of the same area leads to the first ideas of property (Dominium). The need to defend against foreign dangers creates the first real

authority in the sense of the imperium. First stable political structures are developing.

Essential for the development of such political structures were the complexities of the developing social relationships which related to the property of estate were marked by a society living by the division of labour and the exchange of goods. In addition the feeling to be dependent and the need for protection and security of families did increase. On this second stage of the development one can observe rightly the law as a new starting point of modern state development.

Territorial Authorities

With such territorial ideas in the Christian Europe developed the first concepts of state authority. Some first territorial separation of church and state authority developed by the claim to immunity of the church with regard to determined and protected church territories. Districts for special jurisdictions were additional territorial borders of state authority. Interestingly already in this stage of the social development very diverse political structures could develop. On one side some preconditions for an absolutistic despotism were made and on the other side we can find in the first towns attempts for democratic developments.

What are the Probable Reasons for such diverse different political institutions? Who has achieved power is never prepared to hand it back voluntarily

One can assume that already within the rudimentary democratic structures of the first cultures of the hunters some different types of structures of authority did develop. Once a human being has achieved power he/she wants to keep it and rather to expand it in order to provide it for his descendants. Power should hand in unlimited and unaccountable legitimacy. Rulers do not want to give account for their activities. They refuse to prove regularly their capacities. In contrary, they require absolute obedience. Religion and worship to the ancestors are the means to legitimize dictatorship.

Master of the Family

As soon as the leadership of the ruler is guaranteed all possible democratic attempts – such as e.g. the council of the oldest – will be eliminated and the *fundament for a more or less centralized feudal authority is laid*. Such developments can be found mainly in the old China, Egypt, India and Japan.

The institutions of political authority are first limited to mediate conflicts among the different members of the families and, in case family revenge has been institutionalized, also between the families. The leaders had to adjudicate according to customary law and to protect the tribe from foreign invasions. The autonomy of the tribes and families was still large. Thus they were often able to escape the influence of the ruler. Indeed the *master of the extended family had the total power over his relatives*. He could execute sanctions in some cases even the death penalty. This was recognized in the roman law with the ius vitae ac necis of the master of the family. The different family structures may have marked decisively the form and structure of the authority over the extended family. ARISTOTELES e.g.

compares the King with the good housefather: "… thus the master is entitled to govern over his wife and children, on both as free individuals but not in the same way over the wife as statesman and over the children as prince." (ARISTOTELES, I. book, 1259 a-b).

The Development of Ancient Empires

If small tribes need better protection against a strong enemy they seek shelter within the bigger association. The structure of this bigger association could be very loose (e.g. the German empire in the middle ages). In many cases the princes of smaller communities were also able to achieve the power over the entire alliance and deprive the others from power. (e.g. France and China). The former masters of the tribes have then often been degraded to servants of the crown. They lived in the court and supported the ruler when they had his favour and thus could profit from the granted privileges. Such favours and privileges could however only be granted when the ruler could collect enough tithes. In order to press such contributions out of the population he needed a court which was totally loyal and thus prepared to suppress the subjects for the king. Court and king became thus interdependent. The farmers had to pay the price for that.

Economy of Slaves

In some other cases the stronger tribes could conquer new territories and subjugate other tribes. Based on such invasions the feudal authority started to rule with the slaves. The population of the conquered enemy was taken for slavery and given or sold to the subjects in order to help them performing their duties. Within the tribe the master usually tries to honour some members of its family with regard to other members of the tribe. They receive some territories with farmers in order to collect the tithes from them and to enrich themselves. These "honoured" family members support in return the prince.

When the dependence of the followers from their king increased he often tried even further to increase this dependence e.g. with higher taxes in order to consolidate his authority even more. A typical example for such dependence even in the 20th century was Ethopia under the emperor HAILE SELASSIE. When the farmers were not able to pay the 70 to 80% of taxes of their meagre income they were simply expropriated and degraded to employees or even slaves of the feudal master.

Imperium – Dominium

The subjects which did live within the territory of their master were also under his protection but had in turn to be loyal to him. The original power of the master his dominium turned thus into a political authority into the imperium over the bigger association. By this e.g. in Germany developed the feudal law which established the hierarchy of the king as the highest feudal lord.

d) The Development of an Economy based on Division of Labour – the Builing up of the Modern Territorial State

Development of Towns

The later state development was increasingly marked by the foundation of towns. Settlements have developed into towns a long the streets of commerce or on places favourable for traffic or they have been founded by the princes or kings for the protection of borders or as places for court sessions or to protect the roads of the armies. Within those towns some real territorially linked public relationships developed. Towns became domicile and shelters for peoples of different tribes even with different religions namely in the Ottoman Empire and different legal traditions. They had to live within the same town in common and thus needed to be ruled by the same regulations and under the same jurisdiction. Authority thus could not any more refer to the religion or the jurisdiction of a specific tribe. All people within the town had to be treated equally. In the ancient Rome the Gods of all people were shown in the temple in order to have equal respect to all different religious believes.

Ghetto of the Jewish

The middle age towns of the Christian Europe were however also under the auspices of the Crusades against the Islam. The small minority of the Jewish population had to live in permanent fear from progroms. Within those ghettos a new Jewish law developed strongly influenced by the Thora. These rules were however not only based on religion but also of democratic oligarchic origin. By this for the first time some small autonomous districts within the towns could develop and establish some state-like political authority.

Individual

Naturally the space of autonomy of the families within these towns has been reduced. Thus individuals depended much more from products produced in the country side. There the autarky of the extended family was embedded within the whole production of food. In towns extended families lost on importance. More and more they were replaced by single individuals.

Christianity the Sinful Individual

This position of the individual has even been strengthened by the individualistic view of the human by Christianity. Each human being has according to this religion a proper responsibility as individual before God. Thus the individual can also be bearer of rights and duties. With regard to this proper responsibility the individual is not embedded within the family as e.g. in the Japanese Shinto's. It is not a to be neglected small part of the professional or social group as within Confucianism and it has not to find its happiness within an ascetic life by renouncing to its individuality as in Buddhism. Indeed there is no religion which stresses so strongly the individually responsible single person as Christianity. Only within

Christianity each human being is directly responsible for its actions as person and as individual with equal rights before its God. Only Christianity knows the idea of the sinful human being which has been banished out of paradise because he had personal guilt for his behaviour. And precisely this relationship between the human in paradise and the banished sinful human outside the paradise has later decisively marked the different theories of the state.

Towns and Common and Public Welfare

Law and authority were decreasingly linked to tribes but much more on the *territory* of the town. While bondages of the single individual towards the extended family did loosen the dependence towards the superior town did strengthen. One main reason for this was the increasing dependence thanks to the increasing complexity of the division of labour within the town walls.

The town did not only have to provide protection, it was also expected that it provides services for the community: roads, town walls water supply common baths and hospitals and even currency had to be provided for. In short: the political bearer of authority accomplished besides the protection more and more services within the service to the community.

Public Service and Bureaucracy

The interest of the community that is the public interest increased in importance. The dependence from common services of the polity was of course always linked to an increasing bureaucracy. First public employees of the towns have been engaged which had to provide services for the community. While within the area controlled by the tribe some families had important autonomies with regard to the administration of territories the increasing division of labour within the town required also specialization. Tasks and positions of employees or first civil servants have not been distributed according to the families but according to the capacities. This did lead to the development of a public service with professional civil servants a typical feature of the modern state. In close connection to this first attempt of the establishment of a civil service was the development of a stationary professional army. This army was not any more composed of a bunch of voluntarily soldiers but of paid mercenaries and later of trained professional soldiers.

Feeling of Community

The increase of public services, of a bureaucracy, of the stand of professional civil servants and soldiers as well as the development of the new notion of public interest enhanced the new consciousness of being part of a *community* marked this third phase of the development of the state. By comparing with other social developments it can be found in similar form almost everywhere such as in Rome at the time of Cicero, in France of the 16th century in England in the 15th century and in the Ottoman Empire as well as in the Empire of the centre.

Centralising Power

This new consciousness is accompanied by an increasing internal and external power of the ruler. The French absolutism, the Ottoman Empire, England under Elisabeth I. and the Empire of the Centre under the Ming Dynasty attest this truth. The increase of power produces new dependencies of the people from the polity and new dependencies produce new central power. In this phase of the development of the state we can observe consequently an unprecedented struggle for power.

While European leaders strengthen their external power namely with their battle against the church and the internal power against the strengthened aristocracy, rulers of other states subjugate the churches and priests to their central power. The expansion of power enables the ruler to intervene directly within the authority of the previous autonomous housefather and the master of the extended family and to control the single individuals of the different families. The polity as a supra-family community turns into a state which has not families but individuals as subjects.

Legislation

At this time first attempts to develop a proper legislation can be observed. Within the Islamic state however real legislation is not the rule because the law is to be found within the Koran as the only valid legislation for the Moslems. However also the rulers of the Ottoman Empire are forced to enact general rules regulating the behaviour of their subjects. The laws of the Empire of the Centre are considered to be valid only for the common people but not for the aristocracy which is only bound to the rites. Nevertheless those norms are precursors of the modern legal acts because they are valid for all common people according to the principle of equality. Laws in this sense can also be found in the European states of the outgoing middle ages and of the renaissance. Rules of the town guilds or regulations on duties and rights of soldiers, rules of procedures before the courts and regulations prescribing the dresses of the citizens are enacted.

Those regulations reflect the development of a more complex social order. The law has up to now developed mainly as customary law in connection to religious believes. Now the state and in particular the ruler has not only the task to apply the law in concrete cases he/she has also the power to enact new laws. With this power the state starts to steer and design the order of the society. From the highest judge the King turns into the highest legislator.

Aristocracy

In this phase of the state development the different social states start to structure themselves hierarchically. In China those families which were only bound to the "rites" were on the highest level of the hierarchy. They were not obliged to follow the legislation. Within the early Europe the Aristocracy and the state of the church were above the third estate. Within the old Roman empire the aristocracy (patricians), the nobles and the senators had priority with regard to the outlawed plebs. The nobility is always strongly bound to the monarchy and the crown and it is granted special privileges. While the Muslims – as IBN KHALDÛN (p. 191) de-

scribes – that in the earliest time social differences in position among the families did not exist. But in later times the Kings with their expansion of power granted also privileges to the favoured families which were given special mandates. This lead to a aristocracy of public offices.

The nobles stood within the service of the power. They had to administer crown offices. On the other hand they were committed to keep and *expand their privileges*. A strong king such as the Russian Tsar required the nobles to seek for shelter within his court in order to protect against the claims of the people. A weak King as in the UK faced an aristocracy which tried to diminish its power and to expand the power of the Lords.

Development of the Different Legal Cultures

The different opinions and traditions of the Common Law system and of the Civil Law system find their causes also within the different developments of the middle ages. While the countries of the civil law system are influenced by an "activist" stat-concept which is influenced by the idea that the state has the mandate to change the society, countries of Common Law tradition limit the task of the state to be a moderator or independent umpire among the different social forces.

Different Understanding of the State

These concepts have developed since centuries and go back to a different development of justice. The Common Law systems consider the judge namely to be a independent umpire to solve conflicts among the parties and to find the just balance. The Civil Law systems consider the judge as the prolonged branch of the legislature. He/she has as representative of the state to find with blind eyes with regard to the hierarchical position of the parties and with the sword and the balance in its hands but with the exploring eyes for the facts according to the law justice. He/she has to implement the legislation. While with regard to the common law those have right who did win the case within the civil law system those should win the case who have right and it is the task of the judge to find the law which gives the parties the right.

Civil Law System

One can trace back this different function of the judge to the fact that on the European continent of the 12th century the law of the church taught at the universities was of increasing importance. The law was not the law of the people but the law of a scientific and elite, hierarchical separated from the people. The judges representing the hierarchy needed to look for the law for the parties seeking their rights. This law had to be found and applied by scientific and dogmatic analyses. The application of the law and the activity of the judge thus could not any more be exerted by laymen but only by professional experts of the science of the law. This hierarchical thinking corresponded to the new idea of different instances. The more important the court and expert was the higher and closer to the King by the grace of God the more just and true was the decision. Truth and justice were determined by hierarchy.

The judgment was not the result of a battle before a democratically chosen Jury on the facts, but a scientific application of the law on a concrete case. The law received a proper live independent from the facts. The judges needed not only to find the law which had to be applied to the facts, they also decided on the truth with the inquisitory procedure.

Accordingly on the European continent did develop quite a different understanding of the state than in the Anglo-Saxon world. Replacing the king by the grace of God as the fountain from which all law could be deduced the secularized state by the grace of the peoples sovereignty provided the big-bang which in place of the king by the grace of God became the new source for the entire legal order starting with the constitution until to the lowest regulation on the level of the local authorities.

Common-Law

Contrary to the Continental Law the English law was administered by the Norman kings but it remained strongly connected to the jurors coming from the common people. The jurors had to find with the help of the judge the relevant facts with regard to a concrete case accordingly the case had to be decided based on criteria's developed by the wisdom of generations of judges. The facts needed to be determined within a contradictory adversary procedure and for the solution of the conflict just criteria's needed to be found. Law and facts were much closer connected with each other than in the continental procedure where the law had to be applied to a relevant fact.

e) The State of the Complex Industrialized Society: The State of the Parties and the Parliament as Legislature

1. From the Subject to the Citizen

Who has Reason Can say „No"

The territorial state emerged according to the economic and social development in different periods. (cp. the Roman Empire and the European states). The modern rational state of the parties and the legislature however developed only after the industrialization in Europe. In this period economically and philosophically the legal transfer to the state of modernity that is to the nation-state of European tradition was prepared.

The modern industrialized state is the consequence of the economic, cultural and in particular also ideological development of Europe. During Renaissance and later the enlightement period human recognized their capacity to say "no". Who can say no is able to question the state authority. The king by the grace if God cannot any more renounce on any accountability with the argument that divine legitimacy can never be questioned. People recognized that based on their proper reasoning they were able to question any authority.

To say “no” can only the one who is convinced that he/she is able with its proper knowledge and judgement to assess the state authority. Who does assign himself the capacity to judge accepts the “sovereignty of the reason of the homo sapiens. The recognition of the “sovereignty” of the individual reason will bind the state to the people and thus lead to the need of the democratic legitimacy of the state.

Who claims to be able with its reason to distinguish the truth from the untruth, the right from the wrong, will also claim to be able to distinguish the just from the unjust. This opens the path to the modern state ruled by legislation. The laws enacted by the legislature are not any more deduced from a given wisdom. Laws and norms are the result of a reasonable discourse of the people which claims to be better able as any lonely ruler to judge what is just and unjust for human beings.

Homo sapiens

When human beings as the only living beings are capable based on their reason and language to meke independent decisions, then all beings belonging to the species of the homo sapiens must have equal rights and thus be treated equally. The appreciation of the individual reason is the feet in the door to open a century lasting discourse on liberty, equality and equal rights. Persons with the power of judgement need not state authority which would guide them to the correct goal. Thus the ideological condition for granting elementary human rights is made. Property rights, economic freedom, freedom of opinion become the fundamental concern of human beings suppressed by the state authority. Human beings as beings with reason and therefore character with a proper will and intelligence to develop and decide on their proper life-plan can not be degraded to mere objects and subjects.

With the area of industrialization develops the modern state to a state of a nation, to a state with its proper legal order and to a state with free economy and property rights. In the revolution of July 1830 the French king Louis Philopp declared not any more to be the King of France but the King of the French people. This new legitimacy of the monarchy did lead to a new self-understanding of the peoples and of their states. Indeed by the nation the former subjects turned into the citizen as a bearer of rights deciding through elections on state authority.

2. From Slaves in Bondage to Employees

The Misery of the Early Industrialization

The early industrialization in the United Kingdom in the 18th and 19th century expanded the economical division of labour and diminished at the same time the autonomy of the family. People became more dependent in particular from manufacturer and business men within a community marked by the new division of labour. Because of their dependence with regard to their existence the labour force of women, children, elderly and finally also healthy employees was exploited. Their salaries was often under the level of what was needed for survival. Even

though they had to work for ten to twelve hours they could not feed their families with their salaries.

In this time also the economic autonomy of the families in the country side has been almost totally lifted. The farmers with low salaries dependent of their patrons or from the extended families were attracted by the town and its freedom. However within the town they needed to live packed together in miserable apartments and could even not earn enough for their families. As soon as the children came into the age of youth they had to leave the family and earn their proper living.

State Welfare

The polity has been assigned tasks which earlier have been assumed by the extended family alone. Now however the state replaced the family: It did not only protect the peoples from external and internal dangers and guarantee the division of labour with the basic legal principles to upheld the free market system. Now it had to care for school education of the children. Since the small family with low income was not any more able to look for the ill, elderly and handicapped members of the family it had to guarantee the social security with regard to all important risks. This development goes back to the end of the 19th century when social security systems started to develop. The state needed in addition to prevent that the interdependency of peoples could not be misused and the workers not be exploited. In this time first legal guarantees for the protection of the employees have been enacted. The state was forced in the interest of the welfare to intervene in the economy in order to prevent sudden unemployment and to protect threatened economical branches, to counteract inflation and to secure enough supply for the polity in case of war and catastrophes. The welfare of the human being imposes a new important task to the originally minimal state only caring for the protection of the people.

Social Opponents– Social Partners

Has once the relationship of dependency between the people in bondage been given by destiny in the feudal state and thus determined the social position within the hierarchy, the relationship between employees and employers is determined in the period of industrialization by the battles between the labour unions and the employers as the opposing social partners. The state is asked on one side to moderate between opposing social partners. On the other side important state activities are influenced directly by the social partners. The “sovereign” state is not any more asked to serve by the social hierarchy. In future it has to prove it self as a servant of the community split by the struggles of the social partners. The *increasing existential dependency* of the single individual from the state and from employers feeds finally also the *strengthened need of human beings for more liberty and democracy*.

Centralising State Power

The expansion of industrialization has undoubtedly led the nucleus for the development to the *total state*. In the centre of the dispute was not any more the conser-

vation of power and the expansion of the power of certain families. The public interest was not any more exclusively restricted to the exclusive protection of men and women and to the guarantee of certain limited state performances. The just distribution of the income and fortune gets gradually into the centre of the social and political dispute. These controversies are now transferred from the salons of the intellectuals into the halls of parliament and the market place of the media.

Closely connected to the industrialization is thus the *centralization of power*. The small agrarian states and principalities of the 17th and 18th century were not any more able to cope with these new tasks. They had to give in to the need for the foundation of bigger industrial nation-states. The merger to a customary union and then to the German Empire, the foundation of the Italian state but also the foundation of the United states one hundred years earlier were the consequences of this development.

Ties of the Power to the People

The expansion of state power which has even been enhanced by the tools of mass communication has triggered as counter action the claim to democracy. *Separation of powers, democratisation and socialisation* was from now on the catchword. Because one could not any more entrust one monarch with all these powers the power of the state has gradually and increasingly been linked to the parliament composed of the elected representatives of the citizens. The communist and socialist parties however required much more far reaching democratisation which would have included not only the state power but also the economic power. For this reason the claimed for the nationalisation of the economy and at the same time the insinuation of the state under the will of the working class.

With the democratisation and the need to adapt state measures continuously to the changing economic conditions besides the activities of the traditional courts the new functions of legislation and planning become increasingly more important. The state and the people should be steered by legislation. This strengthens the influence of democratic institutions such as e.g. the parliament. However in many instances those institutions are too heavy in order to enact the necessary daily decisions. They can the steer the activity of the state only by general norms of the legislation. The implementation of the laws has to be transferred to the increasingly expanding administration and state bureaucracy, which becomes anonymous, non-transparent and non accountable.

Protect Liberty – Make Liberty

The diverse dependencies in which human beings of the modern society marked by the division of labour have got into need the enactment of new innumerable laws which have as new goal to provide some *free space* for the human beings more and more restricted in their liberty by the increasingly closer network.

The mandate of the state is not any more restricted to protect *law and liberty* it needs also to provide for the *conditions necessary* to make use of the liberty. Needed the state some times to care for law and order, they had later the responsi-

bility to care for the welfare of the community in order to make sure that human beings as free beings could still emancipate within this society.

Urbanization

An important social issue with considerable effects on the development of the state is marked by the increasing urbanization. Within the big agglomerations and in particular within the slums reigns poverty, despair, traffic chaos, collapse of water and electricity supply, unsatisfactory disposal and strikes. Live is paralyzed. Towns with more than 10 million peoples are almost not governable. Economic autonomy of human beings is lower than ever. Communication among the peoples is facing the chaos of traffic hardly possible although people vegetate within the closest imaginable space. The social behaviour is disturbed.

Bureaucracy

The states can keep such developments under control with the only condition that they intervene constantly protecting, distributing, serving and arranging. This gives the bureaucratic administration a momentum to swell into a new *unaccountable state within the state*. Servants of the polities cannot any more be controlled. They establish their proper areas of authority and try in addition often by corruption to enlarge their income. The citizens on the other hand feel helpless extradited to the anonymous bureaucracy. In order to prevent misuse of the power of the administration and to prevent corruption the state has to improve and again expand its institutions with new administrative courts and informal control of the administration such as e.g. the ombudsperson.

Mass Media

Besides the power of the bureaucratic administration the power of the intermediary forces is growing. The influence of the *mass media* which are able to reach and inform in shortest time million of human beings on all spots of the globe has increased within the last 20 years considerably. Contrary to the area of the old chancellor Bismarck of the German Empire politicians who are without charisma within the media have now chance at all to be elected. The media decide today on the fate of head of states and prime-ministers. Democracy happens in the media. Who controls the media controls the state.

The *economic concentration* enabled the merging of huge multinational companies; they are competing independent of their nation state and its territorial boundaries. On the other hand their economic power and importance enables them to influence the policy of man nation-states. The aim of those companies is to diminish the direct and indirect state restriction of commerce and to harmonize or deregulate the state rules and to strengthen the international protection within a free and global market. Equal opportunity on the global level is their aim as long as this ideology is also in conformity with their economic possibilities. As a consequence they invest all their possible means in order to impose their interests on the policy of the states they are interested to. Such interests of course may be totally opposite to the interests of the majority of the population.

3. Four Revolutions!

Glorious Revolution: The Revolution of the Aristocracy

The area of industrialization is dominated by the four revolutions: 1688 within the glorious revolution the English Lords have conquered their power over the Crown. Of course the glorious revolution would not have been possible without the *Long Parliament* and the condemnation of Charles I to the death penalty in the forties of the same century . 1767 the American colonies have seceded from the English Crown and installed in 1787 a democratic republic against all absolutistic monarchies of Europe. As the British in the Glorious Revolution the American revolution was not driven by the will to change society but the power structure of the government and with this the guarantee of liberty of the citizens. In the year 1789 finally the French farmers have initiated the revolution of the bourgeois in order to set up a state of citizens (citoyens) and property owners. Their goal was not only to change the power structure of the state but to change the society. In 1917 the slaves in bondage of Russia have led the state power within the hands of the proletariat which from now on could decide as a collective unit over the state and its authority. They changed society with the total expropriation and nationalization of property in order to control politics and economy. In England the aristocratic lords, in America the colonial people, in France the farmers and in Russia the slaves and lawless employees – of course guided by a intellectual elite – ignited and carried through the revolution.

The Lords in England could keep and even expand their original power besides the crown because they did not get into total dependence of the king as in France. The English aristocrats depended on the commerce and the processing of the wool. They had an interest to sell the products on the open market with optimal profits. Unlike the French nobles they did not depend on taxes which they had to squeeze out of the farmers. They earned their living from the products they could sell on the market. With their power gained by the revolution however they intended not to change the society nor did they want to change the basic state institutions. Revolution meant for them only independence of the aristocracy with regard to the Crown.

The American Independence: The Revolution of a Colony

Also the fathers of the American Revolution did not want to change with their new constitution driven against the colonial power not to change the society. The state and the government which they installed with the constitution of 1789 thus did not to be totally re-designed and in particular the society needed not to be changed. The state was rather in the service of the pioneers of the American independence. The American Revolution was not oriented against the proper state and its structures but against a foreign state. The new state constitution did not at all aim to change the American Society. It rather had to justify a democratic republic vis-à-vis a monarchic European world.

The French Revolution: A Revolution of the Small Bourgeois

In France however the revolution had the goal to change as well the proper state and its governmental system as also the feudal society. The feudal social order needed to be altered. Aristocracy had to be embedded into a state and a new society with equal citizens and a new democratic legitimacy had to be built up. This goal could not be achieved only with a new concept of the state. Thus, the power of the state could not be restricted only to mediate between aristocracy and the bourgeois citizens. They state needed to become an instrument to change the social structure and social order. Instruments for such changes were the laws which needed to steer humans into equal beings. With these expectations to the legislation the law received a new destiny. It was not any more a mere written confirmation of traditional generally recognized wisdom. It had to become an efficient instrument to change the society. The legislation turned thus into the "proper source" of justice as expression of the so called general will (volonté générale) in the sense of ROUSSEAU. Law and justice did not any more depend on the jurisdiction of the courts and their precedents but on the legislature which enacted the norms which enabled the executive and its administration to convert the feudal society into a bourgeois society.

New Understanding of State and Law

The French Revolution thus did lead to a new understanding of the state and the law. The state was not any more assigned to conserve the traditional social order. Justice was not any more an issue for the courts. Justice had to be produced by the parliament as legislature and delivered by the state. Moreover, from now on the courts should loose any jurisdiction over the administration. Interpretation and implementation of the laws should not any more be entrusted to the conservative judges. In order to achieve this goal NAPOLEON created a new law the so called public law which he withdraw from the jurisdiction of the traditional courts only competent on matters of private law. With this unaccountable power the executive could enact without judicial control ordinances, decrees and administrative acts not to be controlled by the traditional courts. Democracy exhausted with the participation with regard to law making. The implementation of the law made by the elected legislature was within the mere responsibility of the unaccountable executive and its administration. With this development a new fundament for the continental European legal culture has been made. A permanent ditch has opened between the common law and the civil law tradition.

The Russian Revolution: The Revolution of the Proletariat

The French Revolution installed in the 19th century the "nation" of the equal citizens (citoyens). 1917 the Russian Revolution was aimed much more universal. It wanted to influence the world beyond the Russian nation. Indeed the Russian Revolution should be the starting trigger for a new world Revolution. Its goal was inter alia finally to remove the state as the real cause of all injustices. The state had according to the idea of communism only transitory character and – once un-

der control of the proletariat – it was oriented towards a social order of an international society with equal humans and no exploiting laws.

The state was not only considered to be an instrument for the inner and national change of the society as in France it was also installed as an instrument for the battle needed in order to carry through and to implement the world revolution. Replacing the legislator the hierarchically leaded party was installed. It had to steer the state and with the state also the constitution in the real interest of the revolution. According to this interest state structure and constitution as well as law could be changed, abolished or renewed at the whim of the party secretary as peak of the hierarchy.

Consequently the world has been divided in two blocks. One block of states was considered to reach the world revolution. The opposite block wanted to defend the national interests of a free economy within a free bourgeois democracy. With this the western states with their economy have been instrumentalized for the defence of their proper values. States became fortresses for their ideological values. Disputes and discussions on the sense, the limits, the value and the tasks of the states have been frozen as well as the entire world of states which did stiffen within the international balance of blocks and their mutual atomic threat.

f) From the Nation State to a Globalised World

1. The Challenge of the Nation State

Supply of Mankind

A main problem of our world order is by no means the *explosion of the world population and the shortage of water and other raw material*. In August 2006 there were already more than six and a half billion people. These are two billion more than at the time the first edition of this book in German has been published 1980. For the year 2020 one expects an increase of the world population to eight billion peoples. (<http://www.ibiblio.org/lunarbin/worldpop/>). Will one be able to prevent world wide conflicts on water-supply and raw material? Does the earth contain enough basic food in order to feed all human beings? Will such incredible growth not destroy the environment and thus finally our planet? Protection of the environment and the use of the raw material as well as of the water is since long time not any more a task which states could solve in a solo run.

Justice of Distribution?

20% of humans dispose today of 80% of the goods and means of production available. The relationship with regard to the capacities of science and research is just a excessive disproportionately. Since the middle of the seventies more than a third of mankind lived in towns. In 1995 already 43% were living in towns. Today more than half of the world population is living in a town. In future each human will be reachable even within the most hidden place in the jungle. Nevertheless the number of illiterates is growing.

Global Need for Knowledge

In future humans will have to solve much more important and complex problems than their ancestors. The human being which did submit to nature needed to know much on the multitude of plants, trees and animals. The anthropologist Jack Roberts found that the Nawajo-Indians needed to know some 12'000 things in order to be able to survive within their environment. The human being which wants to control nature – as the human of the area of industrialization – needs to know much ore. He/she does not only need to know what exists in nature but also what one can do with the nature how it can be changed. Humans who want to cooperate with the nature need to know much more. They need to know all what the obedient to nature needs to know and what the controller of the nature needs to know he/she needs to know every thing with regard to the mutual interactions and all different possibilities. (K. DEUTSCH)

Global Information

Computer and internet have introduced a new technological revolution. The knowledge of mankind is now stored world wide and available for all those who dispose of the necessary infrastructure and are able to use the techniques in order to find the relevant information and to utilize and exploit it. Information including false information can quickly and easily be distributed all over the world. They are not limited by state borders. A state which is e.g. interested into a fair democratic process and thus prohibits the publication of public polls immediately before the election needs to count with the fact that those information can be published on the internet by a provider of an other country and still be distributed to the voters within the relevant country. Up to know the costs and the limited availability of frequencies for radio or television broadcast have limited far reaching publications for many individuals. However today every individual who can afford a PC and an internet connection can distribute information with low costs and low investment. At the same time he/she can also distribute hatred and stir up conflicts as the terror networks of terrorist organisations show.

Mobility

The international possibilities of communication and the worldwide mobility of human beings, products and services will not only lead to a global competition of science and information. Companies seek world wide best places for best conditions of production with the optimal workers and salaries. The clients of services and products do not any more depend on local or national providers. They can receive worldwide offers on the internet. Even employees with low salaries and a low social security can be transported world wide. On ships in international waters they can produce goods which escape any state control and state taxes with regard to the protection of workers and of products. The market of products and services as well as the financial market is globalised. Still, notwithstanding some exceptional misuse the labour market is still locally structured.

The Burden of Debts of the States

The states themselves produce billions of deficits which will have either to be covered by the next generation or it will be marginalised by inflation and thus to be paid by the people living from their pension. Share holder companies feel obliged to produce highest possible gains for the interest of their share holders. The salary of the employee has to give way to the interest of the share holder. Short term gains have priorities to long term interests. Even biggest companies do not hesitate to make false bookings in the interest of the value of the shares. Although social peace has still remained a national value, if it is however disturbed or threatened in the long range companies may look worldwide for other places more secure for their production. Multinational companies but also criminal organisation decide on the turnover which do exceed multiple the budget of many states. The financial market of small Switzerland has a daily turnover of 80 billion Swiss Franks!

American Values

The globalised economy is more and more driven by the Calvinist theology of success oriented on the American values. Who has success in economy, politics, culture, science, entertainment and even in the court or on the battlefield has according to this believe its place in heaven secured. Only the capable and successful human is also a good human. The just distribution of the goods is cared for by the invisible hand. The minimal state (NOZICK) must only look for peace, order, security of the market competition and the property. Equal opportunities of each person should be guaranteed – the assessment of the performances is not to be made by the state but by the consumers and thus by the invisible hand.

Social Peace

The long term interests such as environment or social peace are to be cared for by democracy and the ballot paper, but they are often overseen. The bad experiences of the Manchester liberalism are forgotten. The interest for economic profit raises motivation and performance of humans and companies. However, who may without additional performance still make profits does not shrink back for misuse, corruption and exploitation. The frightening growing indebtedness of the South and the East are examples for such developments. To whom the world wide active companies and their share holders are accountable? Incentive and accountability are the key words of our free market economy. The accountability towards the next generation and the long term interests however is not guaranteed.

2. Challenges of the International Community

Political World Order?

The globalised economy is embedded within a political world order which actually is almost only controlled by the United States. The American President and his Congress men and Senators however are only accountable to their proper constituencies. With regard to foreign policy the American constitution does not at all

provide the same balanced system of checks and balances with regard to internal politics. Thus in cases of failures in international politics and for the egoistic and forceful implementation of the interest of the American economy the government is only accountable to the American constituency but not to the peoples and states concerned. But still has the American President the capacity to exchange foreign governments which seem to threaten American interest according to information which can even not be checked. They intervene in such countries without legitimacy and they pretend to help those countries to establish democratic governments although the very principles of legitimacy and democracy have not been respected.

Local Stability

Even a globalised economy can develop only within stable political conditions of local democracies. Political stability however can only be realized in the long term by states and governments which have credibility and are entrusted by their people. This legitimacy within the modern democracy without genuine solidarity among the different social layers on one side and beyond the ethnic borders can not be achieved.

International Interventions

A consequence of globalisation is the political, economic, cultural and even sporty world wide international but also regional interweaving. World wide the World Trade Organisation (WTO) binds the states to the principles of a global economic competition. On the political level universalization and globalisation is taken car of by the United Nations, which according to their mandate to secure peace after the Second World war have to look globally for peace. Legally binding decisions the UN can only enact by the security council. Thus, all those states who dispose within the security council on a veto power decide alone on peace keeping and peace making measures on behalf of the international community. They define which aggression is a threat and intervention according to chapter VII of the Charter of the UN. Thus, they can also decide which internal conflicts justify an international intervention. Taking into account their factually unlimited militarily and economically possibilities the US have an almost unlimited leader position within this organ. They can decide which states – and when – they want to combat because they accuse them to harbour terrorists

European Union

On a regional level some states in Europe decided after world war two to strengthen their economic ties and to establish an economic community in order to reinforce peace in Europe. The economic interweaving had to serve the political peace. Out of this economic community however has today emerged a political alliance of states which disposes of the worldwide most important economic union. Based on this economic power it can of course also impose world wide political and strategic interests of the member states in case the European Union is unanimous, which is seldom the case. Today the political and economic incentives of

the community are so strong that practically no European state can nor will escape the effect of its undertow.

This community however provokes also the theory of state with a totally new challenge. Big part (over 40%) of the internal domestic law of the member states is founded today on the legal provisions of the European Union. The member states nevertheless insist to keep their traditional symbol of sovereignty which should not at all be transferred to the community. In the centre of the political debate is still the inner politic of the member states. Up to now the European Union was not able to engage and commit the political public for issues of the Union. Legally all decisions of the EU are still considered to be part of although regional but still international law. The European international law turns only by incorporation by the member states into internal state law. The legal motor of the Union has in fact become the European Court of Justice. This court enacts every year guiding decisions for the integration of the European citizens.

What ever position one may have with regard to this new legal construct, one can hardly assign it to a pure international association of states. In fact the union has soaked up part of the inner state sovereignty of the member states. The law and its implementation is federally structured according to the state principles of a federation. Legislation however occurs con-federal. The Union has turned into a "quasi-state" or how the German constitutional court (Bundesverfassungsgericht) pretends to a composite of states sui generis. It is thus undisputed that this new construct has corroded the classical distinction of the legal order between the international and the domestic law.

Sovereignty of the Global Market and Local Common Interest

The increasing inner state and international dependence, the world wide interweaving of humans and the unaccounted expanding power of global companies as the threatening power of international criminality can only then not degenerate into anarchy and thus give the most powerful all rights, when it becomes possible to define the public global interest with a rational and democratic dispute to which each human can participate equally. Moreover international institutions need to submit to democratic control and become accountable in order to counter effectively egoistic regional or even private interests. At the same time the states need to be capable to dispose of a space of autonomy in order to provide security for the people which fear for their live, health and chances for living as pensioners within their local area.

It seems however that this is not any more the decisive question for the state legitimacy. Decisive became rather the question whether the small nation-states are still able facing the global problems to assume their main task that is the "political" in its proper sense. In other words: Is it meaningful to guarantee for the democracy in the small area and to establish on the national level a social state when the free space of the political available to the states and therefore also the space for democratic decisions has radically been diminished and will even more radically undermined by global politics in the future?

Are States Allowed to Expose their Citizens to the Sovereignty of the Global Market?

This question however may be radically opposed by a different reflection. Still, international politics are even today largely dependent from the power of the mighty: Economically, military and strategically important states are able to impose to the international decision making processes their proper interests as unilaterally and egoistically as global companies with a de facto monopoly within over the market. If the smaller states would give up their last still remaining autonomy, did they not expose their citizens to a totally unilaterally and democratically not at all legitimized economic global order?

Reason and Emotions

Also in future the political will keep a local component. Police and order, culture and education, health and environmental protection, housing and traffic as well as social security can not be secured and cared for by worldwide regulations. They can only be reasonable regulated on all levels from the local level upwards to the national and international level.

Two contradictory developments oppose each other: The nationalistic need for local identity and the global necessity for rational cooperation. By their emotions humans are linked to their local environment. History, tradition, identity and feeling to be home are values which can only be transcended locally. Rationally however, we have to admit that in the long term humans would loose their local homes if they are not prepared at the same time to cooperation and participation on the regional and international level. Citizens have to be prepared to transfer some of the political independence in order to regain new regional and international justice. Emotionally people identify with the state as an island of sovereignty within the see of international relationships. Rationally however, one has to accept that this symbol of political independence definitely belongs to the past.

Leviathan-State

On one side the states face claims to strengthen local autonomy which are mainly carried by emotional and some times even nationalistic energies. On the other side one has to integrate into an international political network which restricts radically the space for political autonomy. The question we have to face today is: Does the state clapped out as last sovereign instance, as big bang of the state legal order, fountain of law and justice? If the answer is yes what then remains reasonably the position and function of the traditional nation state within a globalised and localised world?

The state (with the exception of the USA) has certainly clapped out as big bang of the legal order and as absolute sovereign Leviathan. This fact has to be admitted in reality but also in theory. Of course the legal order of international law and of constitutional law is still based on the constitutional fiction of the idea of sovereignty as final legitimacy of state decisions. The factual reality of the international interdependency reveals however that the legal order builds up on a fiction which is not any more tenable in reality. The “raison d’état” is embedded within a inter-

national legitimacy. The question is only what kind of conclusions have to be drawn for the traditional state facing this reality? Will it be totally marginalised or will it still keep its importance as bridge between the domestic law and the international law which is still determined by the states as the main actors on the international level?

Inner and International Legitimacy

The political needs democratic legitimacy. National justice and national legal order count on this democratic legitimacy and acceptance. The state remains still the political unit which has the legitimacy to upheld the inner state balance, to determine local autonomy and to represent the inner state political community on the international level. In addition local instances are needed. They remain the only instances which can assume responsibility for social peace, multiculturality, inner state decentralization, protection of fundamental rights and implementation of international law. This tasks is still within the responsibility of the traditional state. However, it will not any more be capable to claim for absolute sovereignty. The state is bound to the international and partly regional supranational legal order. If it wants to receive credits from international institutions such as the World Bank, it must prove for good governance and demonstrate transparency, democratic acceptance, accountable political power and decentralisation of state power.

The World Order Does not Replace Legitimacy

Still single states will have to support their legitimacy on their common internal order of values which represent tradition, history and culture and which are commonly accepted in order to hold the community together. Only on this fundament the indispensable solidarity can grow. Without solidarity in the interior the peaceful living together even on the international level would be undermined. Up to now the main task of the international legal order was to maintain and restore peace among the peoples. The states were mandated to keep order among the individual citizens. In future namely multicultural states will have to face the task to keep peace not only among individuals but also between the different fragmented communities.

Who Controls the International Division of Labour?

The raising division of labour between humans on the local level has been the cause for early establishments of first political supra family communities. Today the increasing complexity of the international network which expands the division of labour on the international level has created new dependencies. Would those dependencies require new enforceable mechanisms of decision making which would limit the autonomy of the single states?

Holocaust: The Die brutalste Absurdität absoluter Souveränität

Undoubtedly the heaviest and most fateful development for Europe in history was the Holocaust in which the Jewish race was to be totally exterminated from earth. Legitimized by absolute peoples sovereignty the Führer of the German nation de-

cided to exterminate the Jewish race not only in the interest of the German people but even in the interest of mankind. The ideology of nation based on the pureness of the race wanted not to let "polluted" the pureness of its race by an other race. It pretended to be the leading race on earth which is threatened in ist existence. Thus it claimed to be entitled to exterminate the race declared by the Führer as garbage of the nation. The people which is composed of equal human beings and based on this equality of individuals claimed its sovereignty and declared itself to a super-god with regard to all other races which either had to be exterminated or expelled in order to have enough space for the super race the Aryan.

This de-humanization was only possible because the claim to total sovereignty has been transferred to the people thus the people became its own hostage of this total peoples sovereignty. The Holocaust reveals the danger of the absolute not any more accountable peoples sovereignty in the sense of HOBBES *auctoritas not veritas facit legem*.

The Holocaust moreover proves where a pure ethnic understanding of the nation can lead. Thus the Holocaust needs to become the never to forget and historically never to be repeated break in the history of the democratic development of peoples sovereignty. No history of ideas should ever hide or dispel this historic fact. It is part of the reality and of the danger of any idea of an absolute perceived peoples sovereignty.

The Fall of the Berlin Wall

After World War II the world did split in two ideologically different camps and in three big economically very different regions. As long as the states were integrated in the ideological blocks, their statehood, legitimacy and authority remained incontestable. The states were independently capable to save humans from the villain that is from the ideological enemy.

This changed radically after the fall of the Berlin wall in the year 1989. This fall symbolises the implosion of the reign of the communist party within the Eastern European States. It leaved not only a vacuum of power but also a vacuum of state. Wrongly one considered the states of the communist world as opponent of the West but still as states with full sovereignty and thus members of the United Nations. In fact they were not real states in the sense of western constitutionalism. The state was a mere façade and alibi for a hierarchical domination of the communist party. This party did lead the apparatus of power without any constitutional limit. The state was under the rule of the party and the constitution was a mere instrument in order to feign democratic constitutionalism. Once the power of the party has been dissolved the societies "without state" needed first to found a new concept of the state.

g) Universalism and Human Rights

The understanding of the state of modernity is based on the idea that the state has to serve the human. Human beings that is individuals are the origin of the state. The state has to be in their service. Thus, authority is based on the general consensus and acceptance in one part ant the equal right and rule of law on the other part.

The request of ancient times was the other way round: The individual was in the service of the state and thus its subject. How should the question be put today that is in the area of globalisation?

Simultaneously with the globalisation of the market the universalization of reason, the ethic and thus the internationalisation of human rights did develop. The internationalisation of the human rights limits the absolute sovereignty of the states. With this newly developed international discourse on human rights the individual rights are in the focus. Group and collective rights are subjects of requests which lead to autonomy self-determination or even to the secession of determined minorities.

The World Authority of Reason

If today human rights are heavily violated all weak states have no possibility to claim local raison d'état and sovereignty with regard to the new authority of the world reason. They cannot find support within their national, traditional or religious convictions or even pretend that they are embedded in particular values such as e.g. Asian values. Under the guidance of the United states the international community decides which values are subject of the internationally recognized idea of human rights.

Individual Rights

This new development of the idea of human rights is mainly influenced by the individualistic state concept which can be traced back to JOHN LOCKE. Therefore the states have no title to infringe into the core of the inalienable rights. The social contract is bound to the individual rights. For JOHN LOCKE the constitution has the noble and only mandate to limit state power and not as with HOBBES first to enable state power. Based on the idea of human rights powerful states within the international community feel to be empowered pretending to defend human rights to intervene militarily or with economic sanctions into other states notwithstanding the concept of state sovereignty.

Credibility of Human Rights

This good intention leads as final consequence to a political discourse on human rights and away from their legal values. Finally all states which publicly defend the indiscriminate implementation of human rights will always also take their economic, strategic and political interests into account. They will mainly insist for human rights when this also serves their economic interests. With regard to states which are not within the field of their interest advocates for human rights will be defenceless because they do not have the same interest because of the lack of economic interest. States which are in their direct economic interest but powerful and not willing to accept any critic will also not become direct targets of a human rights policy.

In this sense with regard to human rights we can distinguish the four following different classes:

– States which are so powerful tat they consider themselves empowered to prescribe other states how they have to protect human rights: (USA, EU).
– States with a human rights policy which became a target of the powerful in order to impose strategic and economic interests within the region (Iraq);
– Marginal state which are not interesting and therefore often neglected by international polititcs although thy clearly violate human rights. (many African States);
– States which are economically very important and thus nobody dares to question their human rights policy earnestly. (Russia, China).

Unity of the State?

Constitutionalism of modernity has though secularised the legitimacy of the state and its authority and with the construction of the social contract laid it into the hands of the people. Who however the people is, to this most difficult question constitutionalism has no answer. Today the historically developed state claim peoples sovereignty. This sovereignty however is often contested by the minority nations which live within these states although they are not recognized as constituent nations. Thos minority nations claim based on the right of self-determination of the people autonomy or even the right to unilateral secession. With this request the unity of the state is basically undermined and questioned. The unity and indivisibility of the multicultural state is denied.

The theoretical concept of the constitutions which builds up on the concept of the civic individualism and the equality of the homo sapiens denies on its part that individuals which are basically equal can be divided according to ethnicity. The inner peace of the state would be at stake. The state has to reconcile individuals who fight with each others not peoples. The rational legal order can not accept emotional symbols of ethnicity as state building principle. Conflicts between cultural, religious or other language communities which occur within the unity of the state are constitutionally ignored.

The state of post-modernity however will have to face this new challenge. It has not only to reconcile conflicts among individuals but also among different peoples. It does not only need legitimacy with regard to the majority but also with regard to the different minorities.

Nationalism and Minority Problems

The three big revolutions did not lead to the end of history or to the end of conflicts as did neither the fall of the Berlin Wall in 1989 as FRANCIS FUKUYAMA („The End of History“, Bloomington 2000) had pretended. But this event has finally marginalised the nation state as well as the state of the citizens (citoyens). At the same time conflicts have been transferred within the inner society of states. Under the leadership of the United States the international community has with regard to these conflicts taken over the selective function of a world police power however without legitimacy.

With the dissolution of the communist parties also the state-façade of their states has eroded. With the implosion of the authority of the party the legitimacy

of the state authority also imploded. The legitimacy of the state was not touched in homogeneous states where the legitimacy of the territory has never been questioned. But in multicultural former communist states also the legitimacy of the territory of the state imploded. The different peoples living in these territories considered to be without state. The only unity to be considered was the national unity without territory. Thus they claimed an original right to self-determination in order to create a new nation state. However, as those nations were often dispersed and as other nations lived within their territory they were again confronted with regard to these new minorities with the claim to self-determination of those new minorities. Historically the nations in South Eastern Europe were under the domination of the Ottoman or Austrian Hungarian Empire. In both empires the peoples had some original autonomy which did enable them to disperse notwithstanding the territory. Therefore there was no clear territory for either of these nations. All were confronted with new minorities.

The State as Colonial State with a new Constitutional Façade

This sharpening of ethnic conflicts between the peoples "without states" in Eastern Europe has also expanded to the former colonies of the western states. Constitutions and territories which have replaced the former authority of the colonial power are today by many minorities understood as mere alteration of a already lived colonial authority now by the majority nation. Also in some of these cases minority or even majority nation require after the fall of the colonial regime to set up a new state with new borders in which the unreserved legitimacy of all nations.

Rule of Law

Rule of Law and human rights have been universalised namely with the international pact on civil and political rights and the international pact on cultural, economic and social rights of 1966 as well as with the new established International Criminal Court where the USA still do not take part and the new Human Rights Council established 2006. While it is undisputed that all states are obliged to comply to human rights and rule of law the concrete application and content of the human rights has remained controversial. The questions whether social rights are to be considered as well as part of the human rights as the liberty rights and what should be the position of collective rights with regard to the minority rights have remained core-questions of the world wide debate and discourse on human rights. But even with regard to the right to live there are main essential differences. Thus the USA have not abolished the capital punishment and thus accept this right only with the reserve of this punishment. The human right convention and its protocols of the Council of Europe however clearly prohibits the capital punishment in times of peace. It even considers the long time the condemned have to wait for the execution with permanent insecurity as torture and violating article 3 of the convention.

Universality and Universalizer

Even more problematic is the universalization of human rights from the point of view of their content: Who is competent to define the content of those rights? Nobody would today contest the universality of those values. But as long as no legitimate body is established which could define the content universal of the human rights the universality lacks of basic legitimacy. Namely in man recent conflicts the international community has justified its intervention with the protection of human rights committed which are violated by the state to be punished. They claim to be entitled to intervene in order to restore a regime which respects the human rights. The international law however is not prepared for such universalization namely connected with the military intervention and the establishment of de facto protectorate of the United Nations (Somalia, Bosnia and Herzegovina, Kosovo, East Timor or other states (Iraq). It lacks clear fundaments for legitimacy. Moreover international organisations which are mandated to guarantee security are not accountable to any court and have no system of separation of powers and thus lack important rule of law principles. In principle the remaining state apparatus which is gradually replacing the international organisations has its final legitimacy on the other hand within the peoples sovereignty! This peoples sovereignty is not replaced by the international interventions. The international community focus its function to the protection of human rights. The conditions for the establishment of a just order should be coming out of a constituent power which bases its legitimacy on the peoples sovereignty.

International Criminal Court

The community of states made an important step towards universalization of human rights with the establishment of the international criminal court and the possibility to sanction based on international war crimes and law crimes against humanity committed even by the highest representatives of a state. Unfortunately the United states however still refuse to submit to this international criminal jurisdiction. Because this superpower wants to exert on the whole earth police activity in order to protect its interests. Thus, it fears that if the court would have jurisdiction over its military it could politicise its decision and condemn the US and its soldiers with political and not with legal arguments. The main problem however is not politics. The judiciary as third branch within the state has finally always also a political function. The main problem is legitimacy. Though the United States consider themselves legitimate to intervene on behalf of the international community, they deny the legitimacy to the international criminal court to decide on crimes which American soldiers did possibly commit during such interventions. And even a law passed by congress requires the executive to intervene for the protection of American soldiers in case they would have to appear at the international criminal court.

Selective Justice by the Media

Today the media would have the possibility to inform the world public on any brutal violation of human rights committed somewhere in the most hidden corner on

this earth. Internationally known and respected media financed by publicity however seem only to be able to inform the public selectively on human rights violations committed in the world. Thus, they influence also the foreign policies of the states relevant for possible interventions selectively. Some idealistic international non governmental organisations (NGO's) care on their own to inform the international public and the governments in order to mobilise political leaders in the interest of a universal human rights policy. Thus, human rights are since long time not any mere issues of internal decisions of isolated states based on their sovereignty. The idea of human rights is entrusted to a complex international almost not transparent and accountable network which could undermine finally its credibility.

Double Standards in Human Rights Policies

Grave braches of human and minority rights committed by a state can – as we have seen – be condemned by the security council of the UN and implemented with international economic sanctions or even military intervention. The other side of this coin is to be seen in the fact that with such competence of the security council it will make political decisions on human and minority rights violation. Those violations get into the mills of international politics. Who can make credible inner-state suppression before the world public may hope for support of the international community, which if absolutely needed, will be prepared to intervene by accepting the leadership of the US. Thus interventions depend on the strategic interests of the US. Thus the human rights issue turns finally into a target of political interests of the US.

Iraq

The American/British intervention with the coalition of the "willing" in the Iraq has recently proven that the superpower USA is able even without decision of the security council of the UN to militarily to intervene and to occupy foreign territory with the argument of human rights violations, the defence against terrorism and the protection against arms of mass destruction. Though this preventive war has not been expressly legitimized by the Security Council it has not been condemned. Although the Charter of the UN does only justify a military intervention in case of an aggression, now without changing the charter wars presumably for protection of human rights could be waged. The recent intervention of Israel in the Lebanon makes it even possible to make intervene in prevention for the protection of its own security.

Regional Protection of Human Rights

Human rights are not only subject of global but also or regional international conventions providing even for a general legal protection and implementation. A leading role in this context is performed by the European Court of Human Rights of the Council of Europe. This court can decide as final instance on Human Rights violations with a legally binding judgement. With this court the member states have transferred the power to make final decisions on human rights violations even though they might be condemned by an action brought to court by one of

their proper citizens. Thus, in Europe this court is the final instance on those human rights violations provided in the European convention for Human Rights. Even in case a national legislature did violate with the legislation human rights the court may review the case under the human rights convention. It thus becomes also with regard to human rights a final constitutional court with regard even to member states which do not have a proper constitutional jurisdiction with regard to their legislature. Human rights are thus withdrawn from the power of the legislature and even of the constitution maker.

Good Governance

Countries, which depend on international credits of the World Bank of the International Monitory Fund, are only able to get credits from these institutions if the fulfil according to the assessment of those institutions the conditions for a credit. Those conditions are summarized with the requirement of *good governance* or *democratic governance*. Besides to the rule of law those criteria's contain transparency of governmental activities, human rights, public accountability of the government, transparent procedures, access to justice, acceptance of the government and decentralization, elections and/or referenda according to rules of the game known and enacted in advance. Public institutions need be reflect the needs of the people. Authorities have to justify decisions and they must be able to implement those decisions effectively. All people living in the country must be able to profit from the economic development. Every citizen must have the possibility to get information and to inform, freedom of opinion and of information must be guaranteed. Recently the World Bank has even required public functions to be decentralized.

With these standards the question of legitimacy arises again. Wherefrom does an international institution financed with the taxes of the member states deduce its legitimacy to decide on the good or bad governance of a country? Of course the answer is, only in countries with good governance international credits can effectively help and this is in the interest of any tax payer. On the other hand one has to ask on what bases such an international institution can assess good or bad governance? The legal and political responsibility of a wrong decision might have catastrophic consequences. But for those consequences neither the institution nor their servants will have to pay for.

Environmental Protection

For the long term survival of mankind very important is the care for the environment and for the resources. Environment is not limited by state borders: The open see belongs to all human beings as well as the air and the cover of the ozone. And still, each local measure may have negative global effects on the entire Earth with greatest extent. In dailies activities (traffic and use of energy), but also with important risks investments (Atomic power plants) or research projects (gene technology) the effects may have unthinkable consequences on the local, regional but also global environment. Those who act local have at the same time a global responsibility. However international law up to now does not make any one really

accountable. The first attempts to limit the charge of the environment are rejected by the greatest consumer of energy the United States although many federal units within the states have made exemplary legislation (e.g. California) The global environmental protection is embedded within the international network of economic interest!

Terrorists against States

Up to now one did distinguish between the international law as the fundament for international peace and the domestic law as an order which guides human beings within the respective state territory. Now this originally practical line separating two different systems still valid in the 20th century is blurred. Since 9/11 with regard to the new terrorist acts of private but international networks there is no more any – even imperfect law – which could – as for instance the law of wars – guide the states besides the national criminal law against such terrorist attacks and provide for basic principles in order to restore peace between private organisations and states or to regulate the position of those international terrorists. Thus, the USA still refuse to apply to the combatants captured in Afghanistan the Geneva Conventions by claiming them to be unlawful combatants and thus no prisoners of war. Although it is obvious that those people have been captured in a war against a state accused for harbouring terrorist. After recent Supreme Court decisions there is no some hope that basic principles of rule of law might be also applied to such presumed terrorists. Whoever takes a soldier belonging to the US army as a prisoner can be condemned according to a decree of the American president. This was apparently the model for the beginning or the war of Israel against Hezbollah on the territory of Lebanon.

Besides the fall of the Berlin Wall the terrorist attacks of 9/11 in New York have a similar impact on the development of the understanding of the state and its function. For the first time in history a private network organisation such as Al Qaeda has declared and waged war against a superpower. The more powerful a state the more asymmetric and uncontrollable becomes warfare. In future not only states wage war against states but against private organisations organised by internet network and thus almost not reachable at all. As means of self-defence the USA has not and could not directly attack the private organisation – this would have even not been possible – but it intervened into the territory of the state in order to prosecute the members of the organisation. The right to self-defence has been claimed against states and nations which are exposed to terrorist organisations. States and nations may so – as showed in the recent case of Lebanon – been dragged into a war because they are suspected to harbour terrorist organisations. A clear distinction between states and private persons does not any more exist. The states and their population are taken responsible for actions of private organisations within their territory be it only terrorist attacks prepared by internet.

Fading away of Territorial Border Lines of Nation States

Globalisation is fading away border lines between nations and persons. Up to now territory, state and democracy have been constituted within clearly defined border-

lines. State authority was defined by the territory and its border lines. In future territory will gradually loose its constitutive force for the state. The symbol of the independence of the nation state, sovereignty is faded. The increasing international division of power transfers state competences to international organisations on a regional and global level. Even police functions up to now only undertaken by the nation state, traditionally within its domestic competence have been transferred to the international organisations, to the international community or even to the coalition of the willing in the case of Iraq. States have to stand surety for their citizens. They bear the responsibility when they according to the international community they did not provide for sufficient measures against terrorism defined by the international community.

The once sovereign nation states need to accomplish clear expectations of the international community. Also the global market creates expectations to the nation states. Namely multicultural states should be able to provide for inner stability and peace among the different communities. The previous clear defined function to guarantee peace among states and state-communities has been reserved to the United Nations now it has been transferred into the domestic responsibility of the states.

Issues which were of mere domestic competence are no decided by the international community. Nation states and namely weaker states have to submit their raison d'état to the community of states.

Local Responsabilities

This does not mean that the nation state has totally lost its function. In contrary: As state and member of the international community it is still responsible for its domestic stability, harmony and inner security. Social responsibilities, implementation and application of the Rule of Law remain still of the almost exclusive domaine of the nation states. Only the nation states dispose of democratic legitimacy. Though the nation state has lost its fiction of absolute sovereignty, the reality remains that it remains still responsible for its populations, its territory as well as in its interior domain as externally as political unity. This change the nation state can only cope with, when they commit themselves at the same time on the global level for more legitimacy, rule of law and responsibility for the newly established bearer of international power.

Challenges of the 21st Century

This new environment has unforeseen consequences for the states, the world of states and in general on the proper understanding of the state:

1. States cannot any more decide autocratically on the granting of human rights. Since they depend on the international cooperation they have to give account that they guaranty the universally valid core of those rights. The sovereignty of states in any case is not any more the big bang of law and society.
2. With the internationalisation of human rights the states loose their previous claim to deduce from the granting of human rights their authority. Deci-

sions on human rights have not any more their legitimacy within the nation state constitution. However, human rights can only profit from this supra state legitimacy in so far as they are based on a general consensus and committed to security of law and equal rights. With this one has to putt he still open question whether and how far human rights have achieved a universal character and thus have to bet he fundament of each state constitution.

3. The states of our time canot any more decide autocratically on economy and finances. Fiscal income of industrial states need to become internationally competitive. With this condition the social achievements established through centuries are under increasing pressure. There is no important domestic party which could afford to request higher social expenditures and salaries and at the same time to pay the price for lower competitiveness. The space for political decision making has radically diminished with regard to domestic issues such as social, economic, financial, environmental, scientific, educational, health, food and drug, traffic, and labour politics.
4. The strenghtened nationalism will also lead to new structures with regard to the inner state structures. Claimes for more autonomy of minorities, Endeavours for internal peace politics by con-federalisation, federalisation and decentralisation in order to accommodate the interests of different ethnicities and to enhance a peaceful coexistence and togetherness and cooperation within the state will only be possible by accepting new fundamental concepts of the state. The nation state of the 19th century was a democratic unitary state in the French of British sense. Federalism was only considered as an additional tool for better separation of powers in order to limit state power more effectively for the sake of individual freedom. A state composed with different cultures, religions and ethnicities will discover within the new function of identity provided for by decentralization and federalism a new chances in order to achieve legitimacy not only with regard to its minorities but also towards its majority.
5. The interweaving on the international level of the economy will not only continue to merge the states but also their regions, districts and towns. Besides the traditional international treaties among the states also regions and towns will regulate international co-operations beyond their state borer lines. The nation states will their competences with regard to foreign policy not only transfer to international organisations, they will also have to transfer some of those powers within the domestic structures to their local subunits and local authorities.
6. The international interweaving of economy and politic goes back to the human fundamental need to struggle for more freedom space by division of labour and mobility. Division of labour however, produces dependencies. Dependencies on their side produce new power. This power on ist side has to be limited to become accountable and to be controlled in order to be used in the proper interest of the concerned community. For this reason in the age of globalisation we need institutions which commit that the power

produced by the international interweaving is embedded into an accountable and democratically influenced politic.

Chapter 3 The Idea of the Human Being and of the State as Starting Point of State Theories

A. The Influence of the Idea of the Human Being on State Theories

I. Introduction

Need Angels, Need Devil's a State?

The question with regard to the relationship of the state as abstract construct founded by human beings merged to a bigger collective community and its claim to authority and to humans as subjects depends is finally of philosophical nature.

What are the essentials of the human nature which determine the understanding of the state and ist authority?

In other words: Why does the human being as a live being contrary to the animals and plants need a state? And: if humans cannot survive without state how does he finally have to be designed?

The answer can only depart from to extremes:

a) Humans are by nature good beings, all humans are angels: In this case the state would have to be seen as an evil of humanity because angels do not need a state.
b) Humans are by nature evil beings: All humans are devil's and cannot be forced by any state enforcement to peace and law and order.

There is no state philosopher who would depart from the idea that humans are but devil's or angels. There understanding of human nature is always subtly differentiated. For some humans are closer to angel like beings. Therefore the state as compulsory construct and its constitution should be driven towards this understanding. For others on the other side humans are but evil beings which however are capable of learning and thus can be brought to order by reason and force.

When we join with people, we certainly have our own determined idea how these persons should behave according to the human nature. We have expectations with regard to our opposite partner. Humans are proud, sensitive, ambitious, full of hope, loving, malicious, understanding, communicative, depressive, antisocial, helpful and generous. We thus assume that humans based on their nature behave differently as an animal. Does the behaviour of our partner however not correspond to our expectations which we would have from the nature of the human we consider this as abnormal either bestial, devilish or angel like or even sacred.

Humans are Capable to Learn

Let us further imagine that the human is a being which can neither learn nor understand nor is it capable for communication. Such beings can by their nature not at all build a state. For such endeavour beings are necessary which can learn, receive, process and forward information. Also state regulations by law for the living together are only meaningful, when the people living in those states, can be understood but also be obeyed to by each individual. Men and woman need not only understand the laws they must also be able to comply to them based on their proper insight. Without these capacities to assess the correctness of legal orders and without the liberty to decide laws enacted by parliament would just be as unthinkable as the judgement of the judge which presupposes the liberty of humans to reflect and to choose.

Can one distinguish between better and inferior humans? Humans belong as a species belonging to the homo sapiens independent of race and gender to the genus of the highest developed living beings. One could however always observe opinions which considered human beings different according to their race, gender or religion. Based on the different qualities they were assigned to different categories. Such opinions did justify the discrimination of races, nations or general the female gender and legitimized exploitation of individuals as slaves, as humans with less rights (segregation, apartheid) or even as evil race to be expelled or even exterminated (Holocaust)

Humans can Say „No“

In Europe until the 15th century one departed generally from the idea that humans according to their nature are assigned to a given and not changeable position within the structured hierarchical feudal society. According to this understanding each men and women hat its place within the universe. They had to function according to their role and status, which corresponded to their nature.

With the European renaissance starts a radical change with regard to the view of the nature of human beings. In this period the humanists became aware hat human distinguish themselves from other living beings because as beings with reason they are principally equal and therefore as beings with reason they should not be given a predetermined unalterable position within the feudal hierarchy of the society. Some part of their “nature” humans can workout with their own capacity and force. Humans can enlarge their knowledge independently, thus make their opinion and decide accordingly. In short: they can in their own and proper

responsibility say “no” but also “yes”. The nature with their proper reason makes human beings thus to the only being of this world from a mere object to a subject who can with others design its proper environment.

The State with Enforceable Order

With this discover the fundament for the later secularization of the state and the transfer of state authority from the grace of God to the people has been laid. However, almost an as important question remained open. Is the human being indeed by its nature made for a political community – in the sense of the state as a rational artificial construct established by reflection and choice – or could it survive without state? A political construct that is a polity can – if necessary – enforce legal obligations with means of coercion. Some states consider themselves even to be entitled to execute a criminal as revenge or deterrence with the capital punishment. In case of legitimate defence all states still can require from their citizens for the protection of their state integrity to sacrifice their highest good: their life.

In earlier times the king based his legitimacy on religion as a king by the grace of God. Today the states can deduce their legitimacy only democratically that is out of people’s sovereignty. Wherefrom however can the majority within a democracy deduce the legitimacy to rule over the minority? Such legitimacy can finally only be philosophically explained based on the idea of the nature of the human being. Only, if we can make clear that also defeated minorities would need a state limited within its powers majorities are able to justify their decisions with regard to the defeated minorities. Thus, one has to try to explain with the view of the idea of the human nature that a supra family chosen and artificial polity corresponds to a necessary and immanent need to the human nature. If humans were angels they could live without any authority. They would based on their insight by nature always choose the good and correct behaviour. Angels don’t need a government. Those who share this optimism thus will stand up for the position that states are not needed but should be closed for the benefit of mankind.

Evil Humans

On the other side we can find opinions and theories which would qualify human beings by nature as evil beings which can live with each other – without the force of the polity – only in a state of war. Thus the state has to guarantee peace among the people. Would humans be devil’s that state would be meaningless as if they would all behave as angels. States which guide humans with laws are thus only meaningful when human beings on one side need binding obligations as guidelines for the correct behaviour and on the other side are capable to learn and to adapt in order to accommodate to the will of the legislature and the state authority. Thus, the state theories which have initiated in the enlightement the secularization of the state marked by a view of the nature of human beings which moves between the too extremes the human angel like or devil like by nature.

Reasonable Egoists

Some consider however, that humans are beings which pursue their egoist interests but are still able with their reason to act reasonable to a limited extend without coercion and to commit for the general interests of the common good. For the scholars representing these concepts though humans can not live without state and state authority the state should limit its power only for tasks which are absolutely necessary. A part from the state power humans would should be free and able to act according to their reason. The range of different opinions and concepts of this moderate group is very large. It goes from those who focus mainly on the reason of men (I. KANT) up to those endorsing a view of the human being who seeks only his profit (ADAM SMITH), but the guarantee that all get their just profit is not to be provided by the state. The *invisible hand* cares for the just distribution of the goods.

Others again pretend that humans by their nature seek quarrel, conflict and even violence. Thus, they can only survive as mankind it they join into an artificial association which is able to hold them peacefully together with authority, force and coercion.

In the following we shall based on some examples of the most prominent exponents of these different tendencies with regard to the view of human nature and the state theory explore those relationships between the state and its human beings. These explanations will reveal that the view of human nature of the enlightement period which has mainly contributed to a new understanding of the state has decisively been influenced by the view of the human nature already to be found within the earlier Christian philosophy.

II. The View of the Human Nature within the Christian Theology: State and State Authority are Wanted by God and thus Indispensable for Human Beings

The Search to the Human of the Paradise

The European philosophy of state of the enlightement period is essentially marked by the Christian body of thought. In the beginning the thinking of the modern times he power of the ruler has been justified with religious and moral arguments. Then all *these issues have evidently been considered as questions based on a religious background. Only with the modern natural law concept bound to human reason it became possible to separate the ethical issues from religion.*

The *basic theme* of the thinking on the state in the early Christianity is primarily not politically focused on this world *but spiritually conceived for the world hereafter*.

In his essay on “Adam in the theory of state” GEORG JELLINEK (1851 – 1911) has established how much the state theories of the modern constitutionalism have been marked by the atomised already in the Bible designed view of the individual human nature. The decisive question for the theories influenced by Christianity is

to explore the human nature before and after the state of paradise. Would human beings also need a state in their status in paradise? Would human beings not be in a status where they would only seek without any guidelines the good and would only wanting to serve the common good? Is the state a necessary evil and thus a consequence of the original sin? Does the human being accept the power of the state as necessary evil and as logical consequence of the original sin?

a) AUGUSTINE (354–430): The State as Necessary Evil

The Fall of Man by Adam

The fall of man by Adam is understandably either explicit or at least the imaginary condition of the considerations of all state philosopher coming from the Christian theology. For AUGUSTINE (354–430) the state has its bases in the human nature taken from the model of Adam. At the time of the paradisiacal relationship between Adam and Eve to their master the City of God is pre-designed. Mankind has as main goal to achieve the City of God. The realization of this City of God (de civitate dei contra paganso, the city of Gode against the paganes) however will only occur at the end of all times. The sinful Adam and his successor Cain did in contrary create the city of men or the earthly city (civitas terrena), which is essentially marked with the indissoluble curse of the original sin.

Had men as angels been without guilt and sin there would only be the city of God guided by the eternal peace. Because humans are sinful they have to bend to the earthly authority even when it is exerted by evils.

The earthly city, which does not live by faith, seeks an earthly peace, and the end it proposes, in the well-ordered concord of civic obedience and rule, is the combination of men's wills to attain the things which are helpful to this life… And each victory even though it goes to the bad is a punishment of God in order to humiliate the losers and to purify them from their sins be it to punish them for their sins." (AUGUSTINUS, City of God book XIX.)

Original Sin and Power

The earthly city according to AUGUSTINE is marked by war, misery and need. For this reason the first goal of each human community must be to establish peace. This peace however will always only remain a earthly peace. Permanent and eternal peace will only come when the Son of God will come back to earth and establish the City of God.

The theme of the heavenly city and the earthly city is in principle the history of two life-forms of humans determined by religion. The guilt caused by the original sin dominates however the bases of authority In other words: The question with regard to the justification of power is not at all put because this question is a political question. For AUGUSTINE there is no "state power", because the state is a consequence and an idea of the religious setting of humans.

b) THOMAS AQUINAS (1225–1274): No Humans without State

Zoon politikon

THOMAS AQUINAS on the other hand has a totally different view with regard to the relationship of the nature humans to the state. Influenced by the philosophy of ARISTOTLE according to which the human is in its nature dependent on the community he concludes that it is not the guilt of humans, which produces this need to community but his sociability which requires the establishment of authority over the association of higher supra family communities. "In a town however which realizes the most perfect form of life within the community one finds every thing which is necessary for life. This is even more the case within a bigger territory because of the common battle and the common help against the enemies. "(THOMAS AQUINAS, De regimine principum on Kingship I. book chapt 1)

Authority and Paradise

Contrary to AUGUSTINE and later LUTHER, who considered the state is finally a consequence of the Fall of Man corresponds the state for THOMAS independently of the original sin to the natural need of human beings. In paradise as well as after the area of paradise humans cannot based on their proper nature not exist without state. How however THOMAS AQUINAS could he explain that there exists also in the state of paradise coercive power or at least authority? As there needs to be a state as well in the status of paradise as after the paradise in the state of the original sin authority is a needed part of the human nature. However he distinguishes the two types of authority: From one point of view one can understand authority as opposite to slavery. One can consider the one who has subjugated a person as slave as the master. In a very general sense one can understand authority also as a relationship of a human being to its master to which he/she is somehow sub done. "Master" from this point of view is the one who is in a office with the responsibility to guide free peoples. In the first instance power of authority is excluded in a state of innocence. In the second sense however it can very well exist in the original status of human beings. To exert authority in this sense does mean that the power over other free human beings is aimed at the fulfilment of the welfare and the common good of its subjects. Such authority over human beings had also existed in the original status. The state as supra family form of community is needed because human beings are by their nature sociable beings. Authority of the "good" is necessary because it would be nonsense if somebody more capable with regard to its knowledge than the others would not use the capacity for the profit of every body in the sense of Peter: "Each one should use whatever gift he has received to serve others,…" (1 Peter 4:10) (TH. AQUIN, Summa Theologica, Question 96, Art. 4).

Common Good as Goal of the Authority

In the status of paradise authority is determined by the common good which everyone tries to achieve. Because human beings are burdened by the original sin that

is they are evil they need however also to tolerate authority which they would not accept in certain cases even slavery.

Who under these circumstances gives the ruler the right to rule others? “And therefore God guides the things in a way that he puts certain causes for the guidance of other causes; as the teacher doe not only turn its pupils to knowledgeable humans but also to teachers for others.” (TH. V. AQUIN, Summa Theologica, book I. Question 103. Frage, Art. 6).

The Authority by the Grace of God

The highest authority in world is God (Jesus Christ) the *kyros*. From him states and their rulers deduce their title to govern. This opinion will be often repeated and confirmed by the later catholic teaching. “Hence, it is divinely ordained that he should lead his life—be it family, or civil—with his fellow men, amongst whom alone his several wants can be adequately supplied. But, as no society can hold together unless some one be over all, directing all to strive earnestly for the common good, every body politic must have a ruling authority, and this authority, no less than society itself, has its source in nature, and has, consequently, God for its Author. Hence, it follows that all public power must proceed from God. For God alone is the true and supreme Lord of the world. Everything, without exception, must be subject to Him, and must serve him, so that whosoever holds the right to govern holds it from one sole and single source, namely, God, the sovereign Ruler of all. There is no power but from God."[“ (Encyclica On the Christian Constitution of States 1885 pope Leo XIII).

How ever the human nature has been regarded the state in the Christian world was a consequence of the rule of God over mankind. State power to use coercive force has been legitimized within the divine authority. Humans were created by God. And it was the will of God to submit human beings under the state authority. The ruler which had to achieve the common good (*bonum commune*) did fulfil the will of God on this earth and were Kings by the grace of God with the symbol of the sword which has been transferred to them by the pope. Law and legislation was wanted and prescribed by God. State authority was authority ordered by God. But also the law had its origin within the divine wisdom and will.

Sources of Liberalism?

With the secularization state and law however have been withdrawn from their divine origin. How was this possible? In principle Christianity of middle ages has itself mainly influenced by THOMAS AQUINAS prepared the later secularization and even influenced. The idea that humans are themselves subjects and as such opposite to their state is with regard to its core-content already taught by the scholastic and mainly by THOMAS AQUINAS. He required from the body politic that it gives to each individual what is his that is it with its decision it schould achieve the goals and prosperity of each individual. Thus he departs from the basic idea that humans are not mere objects of the will of god or of a political authority. They are proper subjects which have to be respected for their proper sake.

Nine Principles of the Theory of State of THOMAS AQUINAS

The key elements in the theory of THOMAS AQUINAS are:

1. The human being is as a rational animal wanted by God;
2. human persons bear their goals within themselves;
3. they are beings with their proper dignity;
4. by ist nature every human person is free, he/she does only exist because of themselves;
5. human persons are subjects and can as such not be given up fort he community;
6. the human person is not only a single individual and a subject but also by ist nature a social neighbour (zoon politikon with ARISTOTLE);
7. because the human person is by nature sociable it is also by nature a political animal;
8. the aim of politics that is of the state is to enable each individual to achieve ist proper goals;
9. the state builds up on the bases of the human being, who dos on ist part has ist ground and goal in God.

c) Reformation

1. MARTIN LUTHER (1483–1546)

Two Kingdoms

The view of AUGUSTINE has been developed and extended by MARTIN LUTHER in his essay “On Secular Authority”. He divides the world into kingdoms, the kingdom of God and the kingdom of the world: „Here we must divide Adam's children, all mankind, into two parts: the first belong to the kingdom of God, the second to the kingdom of the world. All those who truly believe in Christ belong to God's kingdom, for Christ is king and lord in God's kingdom, as the second Psalm [v. 6] and the whole of Scripture proclaims…Now: these people need neither secular [weltlich] Sword nor law. And if all the world [Welt] were true Christians, that is, if everyone truly believed, there would be neither need nor use for princes, kings, lords, the Sword or law. …. All those who are not Christians [in the above sense] belong to the kingdom of the world or [in other words] are under the law. There are few who believe, and even fewer who behave like Christians and refrain from doing evil [themselves], let alone not resisting evil [done to them]. And for the rest God has established another government, outside the Christian estate and the kingdom of God, and has cast them into subjection to the Sword. So that, however much they would like to do evil, they are unable to act in accordance with their inclinations, or, if they do, they cannot do so without fear, or enjoy peace and good fortune. In the same way, a wicked, fierce animal is chained and bound so that it cannot bite or tear, as its nature would prompt it to do, however much it wants to; whereas a tame, gentle animal needs nothing like chains or bonds and is

harmless even without them. If there were [no law and government], then seeing that all the world is evil and that scarcely one human being in a thousand is a true Christian, people would devour each other and no one would be able to support his wife and children, feed himself and serve God. The world [Welt] would become a desert. And so God has ordained the two governments, the spiritual [government] which fashions true Christians and just persons through the Holy Spirit under Christ, and the secular [weltlich] government which holds the Unchristian and wicked in check and forces them to keep the peace outwardly and be still, like it or not." (MARTIN LUTHER, on secular authority Nr. 3 and 4).

Civitas terrena

Christians would thus not need any laws. They behave correctly. Laws have only to be made for the non Christians. „Therefore care must be taken to keep these two governments distinct, and both must be allowed to continue [their work], the one to make [people] just, the other to create outward peace and prevent evildoing… 'It [the Sword] is not a terror to good works, but to the wicked.' And Peter says [1 Pet. 2:14]: 'It is given as a punishment on the wicked.' (M. LUTHER, On Secular Authority). But, because only few believers behave as real Christians and therefore there can not exist a Kingdom of only Christians every where the world authority has to be established that ist he kingdom of the world or in the words of Augustine the *civitas terrena*.

2. HULDRYCH ZWINGLI (1484–1531) and JEAN CALVIN (1509–1564)

The Parliament of Zurich and the Theology of the Alliance

With the reformation the first important turn towards the development of people's sovereignty has been initiated. The two reformers ZWINGLI and CALVIN have according to the theory of LUTHER of the two kingdoms and with regard to the biblical meaning of the old people of Israel which the Ark of the Covenant have concluded the alliance with god replaced the king and the pope by the grace of God with the people of the believers. World and spiritual authority found their bases, justification and origin within the alliance of the believing peoples with God. The ruler deduced its title to rule not any more from God but from the people which was entitled to decide on right or wrong based on the alliance with God. Institutionally these ideas have been put into effect with the parliament in Zurich proposed by ZWINGLI. The state philosopher JOHANNES ALTHUSIUS has transcended this view of theology into a concept of state.

III. Enlightment

From Christianity to „Modernity"

With these new ideas the power of the state authority was bound to the alliance of the people with its God. The rulers were accordingly not any more directly ac-

countable to their God, but to the people for their activities and measures. It could not any more escape its responsibility toward the people with the argument it is responsible alone to God and thus the subjects had no right to question its authority.

The next step was the total dissolution of the legitimacy of the authority and of the bases of all legal rights and obligations from the Almighty or any transcendental might. This step for a legitimacy fully detached from God however, was only possible with a general secularization of state and law. With this secularization law and justice should find their bases on an other fundament which was different from theology and transcendental ethics.

From Gods Sovereignty to Peoples Sovereignty

How could one however, justify that the people was entitled even without the alliance with god to become the origin, bases and starting point for the legal order. How could the people justify itself as "Big Bang"? Certainly the majority of the people cannot claim to have out of it self the right to decide validly for the minority. The German reunification e.g. has been legitimized by the majority of the voters. However had this majority also the legitimacy to decide for the minority? The minority can only be bound to the decision of the majority, if the following is undisputed:

1. that the German people is a unity in which the majority of the people can decide;
2. that this unity provides fort he legitimate legal bases which does legitimate the majority to enact a constitution and to enact binding legislation.

The first question will be dealt with in chapter eight. It has namely become actual and even explosive in the area of post-modernity. The second question however was mainly an issue of the enlightement and it will be treated within the following pages by exploring some different leading philosophical opinions of the enlightement period, which all did base their legitimacy concept on the their specific image of the human being.

a) War of All against All (Thomas Hobbes)

Cromwell, the Leviathan?

One can certainly pretend rightly that the real founder of modern constitutionalism is Thomas Hobbes (1588–1679). Hobbes has developed the theoretical bases for the justification of state and political authority with a concept which is in itself totally logical and consistent. At the same time it bans the transcendental Got nor out of morality but out of the law and thus also out of the bases for the legitimacy of the state and of the political authority. Probably impressed by the existential fear and insecurity of the peoples during the English civil war in the forties of the 17th century for him the need of human beings for security and possibility for survival was for him the highest possible value. Within this context in the year 1651 after the abolishment of the monarchy and the execution of Charles I in 1649 by

the Long Parliament and before the instalment of Lord Cromwell as Lord Protector and Head of state (1599–1658) by the rump parliament in 1653 he edited his main oeuvre the Leviathan. Within this philosophical master piece he did legitimate the subjects even to change the ruler in case he/she is not any more able to protect its subjects.

The „egocentric“ Human Being

„So that in the nature of man, we find three principal causes of quarrel. First, competition; secondly, diffidence; thirdly, glory The first maketh men invade for gain; the second, for safety; and the third, for reputation. The first use violence, to make themselves masters of other men's persons, wives, children, and cattle; the second, to defend them; the third, for trifles, as a word, a smile, a different opinion, and any other sign of undervalue, either direct in their persons or by reflection in their kindred, their friends, their nation, their profession, or their name. Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. For war consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known: and therefore the notion of time is to be considered in the nature of war, as it is in the nature of weather. “ (TH. HOBBES, Leviathan first part chapter13).

Social Contract in order to Pacify the War of All against All

“Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man.” (TH. HOBBES, first par chapter XIII) This war of each against each can only be levied by a strict coercive order which mediates the quarrels of the human beings. Because human beings fear most a violent death. Thus, for the reason of survival they are most interested to live in an order of peace. With laws alone however one can not establish a peaceful order “….And covenants, without the sword, are but words and of no strength to secure a man at all. Therefore, notwithstanding the laws of nature (which every one hath then kept, when he has the will to keep them, when he can do it safely), if there be no power erected, or not great enough for our security, every man will and may lawfully rely on his own strength and art for caution against all other men.” (Thomas Hobbes Leviathan Part II Chapter XVII)

For this reason laws need to be enforced with coercive power if necessary with arms. Peace can only be established if each individual transfers all his/her power and competences to one or more human beings. “The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such sort as that by their own industry and by the fruits of the earth they may nourish themselves and live contentedly, is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will: which is as much as to say, to appoint one man, or assembly of men, to bear their person; and every one to own and acknowledge himself to be author of

whatsoever he that so beareth their person shall act, or cause to be acted, in those things which concern the common peace and safety; and therein to submit their wills, every one to his will, and their judgements to his judgement."

This is only possible by a contract or coventant: „This is more than consent, or concord; it is a real unity of them all in one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man: I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up, thy right to him, and authorise all his actions in like manner. This done, the multitude so united in one person is called a COMMONWEALTH; in Latin, CIVITAS. This is the generation of that great LEVIATHAN, or rather, to speak more reverently, of that mortal god to which we owe, under the immortal God, our peace and defence." (TH. HOBBES, second part chapter 17)

Leviathan: The Commonwealth

"A COMMONWEALTH is said to be instituted when a multitude of men do agree, and covenant, every one with every one, that to whatsoever man, or assembly of men, shall be given by the major part the right to present the person of them all, that is to say, to be their representative; every one, as well he that voted for it as he that voted against it, shall authorize all the actions and judgements of that man, or assembly of men, in the same manner as if they were his own, to the end to live peaceably amongst themselves, and be protected against other men.

From this institution of a Commonwealth are derived all the rights and faculties of him, or them, on whom the sovereign power is conferred by the consent of the people assembled.

The representative of this state thus has all powers. Although HOBBES does not exclude other but monarchic governmental systems he still clearly prefers the monarchy. These superiors are entitled to all competences because the law emerges only out of the covenant which has made the state and the state authority.

„It is true that they that have sovereign power may commit iniquity, but not injustice or injury in the proper signification. Fifthly, and consequently to that which was said last, no man that hath sovereign power can justly be put to death, or otherwise in any manner by his subjects punished. For seeing every subject is author of the actions of his sovereign, he punisheth another for the actions committed by himself. (TH. HOBBES, second part chapter XIII).

Prometheus

With the construction of the social contract HOBBES has somehow similarly to Prometheus from the Greek legend stolen the "fire of sovereignty" from the gods. Because of this theft of fire by Prometheus human beings became more independent from nature. With the theory of the social contract HOBBES transferred sovereignty and thus also the final bases of validity of state and law to mankind and thus to the peoples of a secular world. He released the state and political authority from its legal (not moral) responsibility towards God. Rulers are morally bound to

pre-state justice, but this does not change the fact that the subjects are submitted to the legal orders of the ruler even though his/her acts may be immoral.

With the social contract human beings which exert state authority get legitimate not only to decide on their individual life but also on the fate of the polity and the human beings entrusted to this polity. The social contract turned into a fictive big bang out of which the state, political authority, justice and law have emerged.

The social contract may be limited to protect human beings and to sustain the inner peace. The state authority however is totally free to assess what is needed for this protection. Although peoples are protected by the Leviathan, who protects the peoples from the Leviathan? That also those who exert state sovereignty also may belong to the one dimensional view of the human being that is egoistic, despicable, cunning and brutal he doesn't exclude but he accepts it as price to be paid for the survival as the smaller evil. Would he also have made the same judgement after knowing the brutalities of the Nazi regime?

The „Big Bang“

The view of the power-greedy human being which can not be controlled only by laws but only by power and coercion does not only open the path to the secular justification of the state but also to the justification of the unlimited and absolute might of the state. Although the state is bound to morality but with regard to the law the state is its only origin.

The unique achievement of HOBBES is based on the fact that his theory of the social contract goes back to the view of the human being which considers humans as part of the species of the rational homo sapiens which is capable and willing to decide on its own fate and therefore also capable to construct with *reflection and choice* an artificial supra-family body politic. It is self evident that all those who belong to the polity have to be treated as equal citizens able to decide rationally and thus to have concluded and became members based on their insight into the necessity of the social contract.

Hereby however, we have to be aware that HOBBES contrary to LOCKE does not depart from the idea that in some ancient times of human beings in fact and in reality such a contract has been concluded. For HOBBES the social contract is a fictitious though pre-condition of the state. Without such pre-condition state and political authority are not thinkable. They are the immanent consequence to the nature of the human being without which mankind could not survive.

b) The Significance of the State Philosophy of HOBBES for our Modern Times

HOBBES and the later Legal Positivism

The idea of the social contract has changed theory and praxis of state and law fundamentally. From now on in theory the positivistic teachings, which would be unthinkable without social contract and the Leviathan of JOHN AUSTIN (1790–1859), HERBERT HART (1907–1992) and HANS KELSEN (1881–1973) have their funda-

ment within are gaining decisive importance. Now the secularized state, law and justice are exposed to the discretionary design of the ruling human beings. State and law can be altered and created according to the visions of the Leviathan. The status and the position of the individual within the hierarchy are not any more dependent on the verdict of God. With the fire of Prometheus men and woman became independent from nature with the secularized sovereignty from HOBBES the human society has achieved its independence from the Almighty.

State Absolutism of the European Continent

With his absolutistic theory of the Leviathan THOMAS HOBBES mainly influenced the thinking on the state on the European continent. The European nation states emerged after the French Revolution have been marked with the idea that human rights are not pre-state rights but rights granted by the state and the constitution. First the state needed to be done in order to grant with its constitution the Human Rights. The state according to this understanding is the only and unique fundament of law and constitution. Contrary to this understanding the later Anglos-Saxon and mainly American understanding has been mainly influenced by the ideas of JOHN LOCKE born half a century later.

States as Islands of sovereignty

The actual philosophy has led to a new interpretation with regard to the relationship between the state and the human being. Two starting points were essential:

– The science of the anthropology did become part of the state philosophy as a pre-condition.
– The state became based on is new function the indispensable factor to secure the life of the human being.

HOBBES whom one undoubtedly can consider the proper founder of modernity did construct the state as the only corrective to the war state of nature. With this understanding he reduced the “political” to only one possible polity, which disposes within its internal as external power of the monopoly to use coercive power and to decide on peace. The anarchic world community with centralistic states which behave as isolated islands of sovereignty thus is prepared in theory.

Therapy of the Insufficient Human Being by the State

The analyses of the nature of the human being, is according to HOBBES the indispensable starting point for the explanation and the justification of the state. Out of the nature of the human being he deduces the need for a state since without state mankind could not survive. The state turns into the instance which can lift the defect of the state of nature.

Humans are according to their nature at the same time natural beings but also beings which accoding to Hobbes are determined by a double nature:

a) They are as well natural as also
b) reasonable beings.

Since the human being by its nature needs to expand on the cost of other human being (bellum omnium contra omnes) the state alone can dam this impulse for power.

Nature and Significance of the Social Contract

As a reflexive and reasonable being humans are in addition capable to create with people like them a state. The foundation of the polity is based on a social contract in which the people submit to the polity. The emphasis of this act are:

a) The road to peace is pointed by the reason by the natural laws.
b) The content of contract with regard to liberty and freedom is ampty, that is it contains only two articles (articles of peace):
   ba) peace should be achieved,
   bb) how can peace be imposed.
c) The polity is thus the indispensable consequence of the necessity to establish peace within the society.
d) The state legislation needs to be implemented with the force of arms.
e) Peace can only be established when each individual transfers all its powers and forces to one or several humans (Leviathan).
f) This can only be achieved by a contract by which all are prepared to submit to the one and unique institution with the power to command. The contract is limited to the only protection of peoples and to the conservation of the inner peace.
g) Bearer of the authority is of this state is a Leviathan that is an artificial body politic replacing this authority. The sovereign (Leviathan) represents the will of those which did install it.
h) With the conclusion of the contract humans became citizens, out of the status of nature they entered into the the state fo the citizens (status civilis)
i) The sovereign is the bearer of the highest and unlimited power. Why? Because the law exists only out of the contract (positivism) and therefore the sovereign can do no wrong.

Positivism, decisionism and moralism are the main characteristics of the philosophy of state of HOBBES. He has finally secularized the political authority. Because the sovereign is bears the highest, absolute and unlimited power separation of powers is lately neither possible nor necessary.

c) The Reasonable Human Being within the Natural Law according to the Enlightment– JOHN LOCKE (1632–1704) and IMMANUEL KANT (1724–1804)

1. JOHN LOCKE

i. Social Contract fort he Protection of Inalienable Rights

State of Nature

Also JOHN LOCKE departs for his construction of thoughts from an assumed state of nature of the human being. "To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit…" (JOHN LOCKE, Second Treaties on Government Sect. 4) Such liberty they can only abandon by a social contract with the aim of a social contract: MEN being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it." (J. LOCKE, Second Treaties chapter VIII. section 95).

Different as with regard to HOBBES peoples to not transfer with this contract all their rights and powers to one institution or ruler but to the majority which decides on the lager fate of the community. They neither assign all rights to the community. When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest.(JOHN LOCKE, section 95)

They only empower the community with the powers necessary for the community: „But though men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative, as the good of the society shall require; yet it being only with an intention in every one the better to preserve himself, his liberty and property; (for no rational creature can be supposed to change his condition with an intention to be worse) the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good; but is obliged to secure every one's property, by providing against those three defects above mentioned, that made the state of nature so unsafe and uneasy. And so whoever has the legislative or supreme power of any common-wealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home, only in the execution of such laws, or abroad to prevent or redress foreign injuries,

and secure the community from inroads and invasion. And all this to be directed to no other end, but the peace, safety, and public good of the people. (J. LOCKE, Second Treaties chapter IX. section 131).

Necessity for General Laws

Contrary to HOBBES the state of nature for LOCKE is not a state of war. However the natural laws can neither be applied by men because they would be biased nor implemented in concrete cases. Therefore within the state of commonwealth there need to be established and known laws based on a common consensus to generally determine good and wrong. (J. LOCKE, Second Treaties chapter IX. Kap section 124). The content of these laws however should correspond to the natural law. Moreover the state is not to intervene within the per-state and inalienable rights and liberties of human beings, and in particular it should not intervene within the property understood as the general fundamental right as bases for all other individual liberties.

The state of nature which is characterized by the large freedom of individuals is only regulated by the natural law. However in order to be able to better protect humans and in order to punish those who violate natural laws a body politic is necessary. However this body politic established by a social contract on the based of a common consensus does transfer to the polity only limited powers contrary to the unlimited power of the Leviathan according to HOBBES.

Specialities of the Social Contract according to JOHN LOCKE

The content of the social contract distinguishes quite considerably from the social contract of HOBBES:

a) Not all rights are transferred but only the powers absolutely needed in order to protect and to maintain the inalienable rights;
b) the goal of state power is limited to the preservation and protection of the *property*. *Property* according to LOCKE are all those rights which refer to the existence of human beings namely is property of real estate, is life, liberty and autonomy (property equals life plus liberty plus estate);
c) the state can only exist on the bases of the consensus of ist citizens (*Government by consent*);
d) besides the positive law there exists a fundamental law which does also oblige the sovereign (*Government by law, Rule of Law*). Thus, sovereignty is not an absolute but limited power and therefore it can be limited and divided.

With JOHN LOCKE the law of nature detected by the enlightement starts its triumphal march. From now on the liberty of human beings is to be considered as an inalienable right. The positive should be the image of the natural laws to be recognized by reason. The aim of the state now will be to protect liberties and property rights of the individuals.

ii. Main differences between HOBBES and LOCKE

Main questions

The main question of THOMAS HOBBES can be formulated as following:
How can peoples be protected from the civil war enemy?

JOHN LOCKE has changed this question as follows:
How can the protected be protected from its protector?

State authority according to LOCKE is limited authority. The main goal of the constitution thus is to limit state powers. For HOBBES however the state authority is unlimited. The primary goal of the constitution accordingly must primarily be to empower the state in order to enable it to protect human beings from each other.

Right to Resistance

When the aim of the foundation of the state (protection of the rights granted by natural law) is not respected by the ruler the peoples, whose rights have been violated, have the vested right to resistance. State and ruler can commit injustices because the positive laws can contradict the natural laws. Accordingly the state cannot infringe withing the pre-state inalienable rights and liberties of the human beings (limited government). With this J. LOCKE has developed the bases for a constitution which must have as unique and essential goal the limitation of the powers of the government.

Secularization of the State

LOCKE has secularized state power even more than HOBBES: The government can according to LOCKE not any more dispose of the religion. The liberty requires the state rather to be tolerant with regard to all religions. In this sense LOCKE represents the early enlightement.

For HOBBES The sovereign is the bearer of the highest authority and as such also competent to decide of spiritual affairs. Withdrawn from the Leviathan is however only the individual believe which belongs to the inner personality and as such this inner privacy is withdrawn from politics because it belongs only to the human being.

Reality and Fiction

For HOBBES, in reality the peoples never concluded a contract. The conclusion of such a contract is a fiction but precondition for the state power. LOCKE however, is of the opinion that the peoples in reality did conclude at least by consensus such a social contract. We can speculate whether he was influenced by the concrete contract which the first settlers of the American colonies did sign in 1620 on the first boat to reach the cost of the later state of Boston in 1620 with the Mayflower. Indeed in this contract the committed to establish a government supported by all and to create the first colony of the United Kingdom in New England.

2. IMMANUEL KANT

Submission to the Law

KANT renounces to explore whether humans in their state of origin or nature have been in a permanent war with each other. Decisive for him is the fact that because of the contrasting interests of the different individuals fights and quarrels are normal and possible. For this reason there is a permanent threat of conflict in the eyes of KANT.

> *„It is not the experience which teaches us on the maxim of the violence of human beings and of their viciousness to make war with each other as long as they are not controlled by any external powerful legislation. It is thus not the fact which has happened which makes it necessary to have a public coercive force necessary, peoples may even be good and correct as one can imagine. But still with our reason we can recognize that such within such a state of nature (not regulated by law) that before a public legally regulated status is established some human beings, peoples or states can never be secure from violence towards each other because each one wants based on his rights, titles and claims not want to depend from the other. For this reason the first thing one has to decide, if one does not want to renounce to all notions of law, the principle must be: one has to exit from the state of nature in which each wants to pursue its goals according to its proper brain, and one has to unite with all Others (with which one can not avoid to have mutual contacts) and to submit to a public legal and external power. Thus one has to enter into a status in which each what is due to him is recognized by law and enforceable with enough power (which is not his but the external power). That is he shall namely enter into a civic status. (I. KANT Metaphyics of Moarls pur Jurispurdence Part II § 44)*
>
> *„A state (Civitas) ist he union of a mass of peoples under the law. (1. KANT, Metaphysik, § 45). However in praxis it is almost not possible to explore the real origine of the highest power.*

Origin is the People

> *„The origin of the highest power is fort the people which is submitted to it practically no exploarble: that is the subjects should not dispute on this origin in order to question their obedience and the legitimacy of the law.... – Whether originally a real contract of submission has been concluded (pactum subjetionis civilis) or whether the power has created in priority the law and the legislation has only followed the real power that should be tor the people which is already under the civil law without any sense but still endangering the state with such kind of senseless reasoning. (1. KANT, Metaphysics, § 49.)*

Although KANT accepts that there may be faulty state constitutions. But it remains the task of the sovereign not of the people to change them. A right to resistance is rejected by KANT. Only to assess the positive legislation is not sufficient fort he evaluation between right and wrong. This question can not be deduced from the practical reason, which contains also the maxims for the right and just behaviour and activities.

> *„Within its unification the state finds its salvation (salus rei publicae suprema lex est); by this one does not need to see the well being and the happiness of the citizens; because this well being can possibly, as is also pretended by ROUSSEAU be much more comfortable in the state of nature or even under a despotic regime; but the salvation of the state has to be considered as the status of the strongest consensus between constitution and legal principles a goal which we have to achieve according to the reason which does oblige us based on the categorical imperative (1 KANT Metaphysic § 49,).*

Categorical Imperative

> *„The categorical imperative only expresses generally what constitutes obligation. It may be rendered by the following formula: "Act according to a maxim which can be adopted at the same time as a universal law." Actions must therefore be considered, in the first place, according to their subjective principle; but whether this principle is also valid objectively can only be known by the criterion of the categorical imperative. For reason brings the principle or maxim of any action to the test, by calling upon the agent to think of himself in connection with it as at the same time laying down a universal law, and to consider whether his action is so qualified as to be fit for entering into such a universal legislation." (KANT, Metaphysics of Morales).*
>
> And in its essay *„To perpetual Peace "KANTW writes: „Having set aside everything empirical in the concept of civil or international law (such as the wickedness in human nature which necessitates coercion), we can call the following proposition the transcendental formula of public law: "All actions relating to the right of other men are unjust if their maxim is not consistent with publicity." (KANT, Perpetual Peace Appendix II).*

Thus, what can get general and published corresponds to the law. With this KANT creates the fundament for a formal theory of justice which has been substantially developed in the end of the last century by JOHN RAWLS.

WE are the People – we are ONE People

The state philosophy of the enlightement has prepared the bases for the people's sovereignty. The keyword of the enlightement was "*We* are the people". When the subjects of the DDR in 1989 protested against their regime they did fight with

these words for the achievement of their civil rights. However, as soon as they were freed from their yoke they had to face a new keyword: "We are *one* people" and based on this they were integrated within the German Federation. The explosive question of today how finally the people is determined which does unite within the consensus for a social contract has not been put and not been answered within the enlightement period. However, today it did become the real keyword, which has resurrected the nationalism and chauvinism of post-modernity to a new life.

3. Alienation and Return to the Relieved Human Being (KARL MARX, 1818–1883)

Who is the Bearer of the Authority?

For the liberal state theory only the "negative state" is a real and legitimate state. Therefore the state is only legitimate insofar as it guarantees individual freedom. For this reason state power needs to be limited. Who has been the bearer of state power is irrelevant for the scholar of the enlightement. Essential however is, that the bearer of the authority of state is limited within its powers. The bearer of the state authority can – and even should – regularly be replaced. For this reason question with regard to the bearer of the state authority has never been put and was never been explored by liberalism it was not considered to be a problem.

For MARX and his successors (Marxists) however the question to the bearer of the state authority has always remained within the centre of the state theory. The bearer of the political authority is according to its opinion also identical with a determined dominating social class. If this class dominates the state it excludes with the help of the state power the other classes. Therefore the dominating class uses the state as its instrument in order to discriminate the lower classes. For Marxism thus the central focus is on the question *who* is the ruler and not *how* does the ruler govern.

Emancipation of Human Beings

MARX himself has committed for a universal emancipation of the human being, that is for the emancipation of humans *as humans*. For him the working class was the decisive bearer who could initiate this emancipation as a subject by itself. As a consequence as he pointed out in the manifest the political power in its very sense is the organised power of a certain class, namely the bourgeoisie which misuses the power of the state in order to suppress the other class namely the class of the proletariat.

Transitional Character of the State

It would be to simplified to reduce the entire Marxist theory of state to this only starting point. These theories have namely been published for the first time within a political program, which has been elaborated by MARX with his friend and closest collaborator FRIEDRICH ENGELS (1820–1888) for the communist party in 1848. In the first years of his work MARX has principally analysed state and law. Within

these analyses he departed from the idea that state and law are in an epochal sense within a situation of transition. Based on this position MARX principally criticised the law as well as the state. In order to keep loyal to his proper concerns, that is the universal (not bound to state borders) liberation of the human being, MARX did neither develop nor was could he develop a theory for the justification of the state.

Nevertheless young MARX has in his oeuvres to the Jewish question and with regard to the critic of the state philosophy of HEGEL pointed at the fact that the state and the role will have a decisive role for the emancipation of the human being. He considered the best highest level with regard to the development of the human emancipation however to be achieved within the then existing order of the world. The liberal constitutional state of the modern times has thus achieved the highest level of human emancipation at least with regard to the then existing world order. To say it differently: MARX did recognize that the state develped as the liberal constitutional state has though an epochal relevance, but he also considered that this signifiance of the state is bound to the historical period of that time and thus as an only transitory character. Accordingly MARX recognizes democracy as a substantial material principal of the constution and understands the constitution as an expression of the sovereignty of the people.

The Economic Fundament of the State

For MARX the different liberal states correspond rather to the political design or to an external expression of the constitution which with regard to its own social economic fundament that with the market economy and its produced opposite of the classes is not in harmony but in clear contradiction. With regard to these economic fundamentals one has to find according to his opinion the real structural problems which mark the society and which find their shaping within the modern state of classes. These economic bases have been analysed by MARX in his later phases when he worked out the theory of the capital.

The Original Sin of the Economy

In order to prove that the economic bases of the irreconcilable contrasts of the classes did become the starting point of modern politics and of the liberal state and are thus a consequence of the actual image of the human being, MARX did secularize the idea of the original sin and took it out of the theology into the economical relationships. While HOBBES from the beginning starts with the sinful human being, MARX goes back for his theory to the status of paradise before the original sin. "The legend of the theological Fall of Man tells us though how the human being has been condemned to eat his bred by sweating with his face. The history of the economic Fall of Man reveals us however why there are people which do not have to do this at all. Any way! So it came that the first did accumulate wealth and the later didn't have anything to sell but their proper skin. And from this Fall of Man the poverty of great masses has started which still although there is work to do has nothing to sell but themselves. And the wealth of some few grows constantly although they have stopped working since a long time. (K. MARX, The Capital, vol. IV,).

Original Accumulation

This original accumulation was only possible because the worker has been separated from the of property of his working conditions. The so called original accumulation is nothing else then the historical process of separation of the producer and the means of production. Originally the hunters and pickers could live from their own labour and thus they could cover their direct needs. The agricultural worker, who cultivated the soil of an alien owner, did get a salary for his work, but did not work in order to cover his needs and thus to get the pay for what he needs but for the needs of his master and employer. Thus he got the wage which did not correspond to his needs but to the value for his work on the market.

Alienation between the Value of the Goods and the Value of the Work

This development has even increased according to MARX with the industrialisation. Starting point of his thinking is the fact that the price of goods to cover the needs is defined by the offer and the demand on the free market. The wage of the employee however is not determined according to the price received for the goods but only on the bases of the production costs of the working force. The values of the goods and the value of the work which is performed for the production of the good thus fall a part. Finally it is not the worker who profits from the added value but the employer or the capitalist. By taking this added value he exploits according to MARX the employee.

The Class State

Such a process does not remain without social consequences. Because the capitalists try at most to increase the added value and the workers are interested to increase their salaries and thus to diminish the added value, there will be continuous conflicts that is a continuous battle of the classes. The rich will do everything in order to preserve their conquered position.

„All earlier classes which did conquer authority tried always to secure their achieved living position and did submitt the entire society to the conditions of their acquisition. (K. MARX, Manifest). For these purposes the dominating classes also used the state so that the state as a consequence did become a state fort he dominating class.

Class State and Nation State

This principle of the class state which subjugates the entire society to the conditions of acquisition of the dominating class is connected to the processes of centralisation and nation building. "The Bourgeoisie repeals gradually the fragmentation of the means of production, the ownership and of the population… The logical consequence of this process was the political centralization. Independent only allied provinces with different interests, laws, governments and customs have been crowd together into one nation, one government, one law, one national class interest and one border line of customs (K. MARX Manifest)

The Transition to the Association of Free Human Beings

As already mentioned the historical philosophy of MARX departs from the idea that the modern state will not be the latest stage of the development of society and that the stage of a status without classes again can and will be achieved. In this final status there will be no political power in its proper sense. "The former and old bourgeois society with its classes and its class contrasts will be replaced by an association in which the free development of each individual will be the condition of the free development of all." (MARX-ENGELS, Manifest) Departing from such critical understanding of state and law, and influenced by the idea of human rights, namely the social democracy did in the end of the 19th and the beginning of the 20th century separate as a non orthodox wing, profile as an independent force and contribute to an approach between Liberalism and Marxism.

The Hidden Young MARX

The wing of the orthodox/communist Marxists on the other side did understandably by purpose dispel and hide the young MARX. What the orthodox needed was to establish an ideology which could and did justify the total communist rule without liberty. Thus the constitutional state based on democracy was a fiction for the communist Marxists. The state does only use the guaranty of liberty and equality as a pretext. In reality its only role and function is to hide the exploitation of the working class for the profit of the bourgeoisie. For the leader and the founder of the October revolution VLADIMIR ILJITSCH LENIN (1870–1924) the state was thus nothing but the product and the expression of the irreconcilable class contrasts. Thus it had to be fought with terror and violence.

Socialism (ROSA LUXEMBOURG and KARL KAUTZKI)

The first sharp critic of such a revision of the Marxist thinking has developed within Marxism namely by the social democratic wing lead by ROSA LUXEMBOURG (1871–1919) und KARL KAUTZKY (1854–1938). Both have as MARX been fully conscious of the emancipatory potential of the modern state. Thus they demanded that the proletariat should not fight for its interests with revolutionary destruction but carry through its interests within the existing constitutional state and in particular within the existing parliamentary institutions.

Communism and Authority of the Party

Did the communists once achieve power they did fully make use of the departing theses of MARX with regard to the class character of the liberal state in order to justify their totalitarian regime. Whether the accumulation of power and violence was legitimate depended according to the communist ruler only from the fact whether the ruler did commit to the universal liberation of the exploited and alienated human being. If power and violence are in the hands of the bourgeoisie they are per se bad and wrong. Once they are in the service of the communist party which can control and dominate the state then one can entrust to it without any hesitation unlimited power and violence because it will use it only for the universal interests of the working class.

The brutal history of suppression and the terror of the communist regimes from the October revolution until 1989 and the political and social "desert" which did result prove sufficiently where this "liberation" of human beings may lead us.

B. The Image of the State

I. Abut what will we deal?

The Collective of the Political Community

Are states part of the law, are they within the law or should the behaviour of the states be regulated by a proper legal system applicable only for the world of the states? Is the so called raison d'état a basic value which stands above all law and morality? Can one deduce out of the right to self-determination of nations a unlimited right of each nation to create unilaterally its proper state? Can minorities based on their right to self-determination declare to be sovereign and thus also be entitled to decide on human beings and other ethnic groups living within their controlled territory? Ethnic and nationalistic controversies reveal where such understanding of the state can lead us. The USA, Canada, New Zealand and Australia require for their immigrants from the native inhabitants the collective right of the political authority over the territory. On the other side the native inhabitants require their collective right on the territory which has been inhabited by them for centuries. A collective right however would require that one can consider the community to be of a higher value than only the sum of all its individuals. ROUSSEAU mentions in this context the inalienable right to sovereignty of the states.

Collective Rights

The core question which has to be put in this context can be formulated as follows: Do the human beings exist because of the state or does not rather the state has to serve human beings and thus exist because of the human beings? Cam the state require from human beings the highest and final sacrifice namely their life it this is necessary for the survival of the community? Is the abstract state as political corporation of citizens also the bearer of fundamental rights in the same sense as the single individuals? However when the state as collective unit can be bearer of fundamental rights how can it deny this right to all minorities which live within its territory and which consider and feel themselves also to be a unity? Should such collective rights be on equal footing to the individual human rights?

If there would be a clear and obvious answer to these questions the world would be much poorer of many bloody conflicts!

Is the state a Collective Human Being?

Humanising the state which sometimes is declared by the personification and identification with a hero of liberty are well known phenomena. The statute of liberty of the US, Jeanne d'Arc in France or Wilhelm Tell in Switzerland is but some examples of such personifications and symbols to produce identities. Very often such emotional connection to the state goes even much deeper. For the majority it becomes part of its individual identity and existence and with regard to the minority it turns the other way round into a negative legitimacy which justifies any violence against the absolute bad.

The preamble of the constitution of Croatia e.g. starts with the confession to its thousand of years identity. This shows which significance one can give to the state as a political unit and a fundament for the national development. Of course, this not only the case for ethnically homogeneous states, which became somehow the hostage of its ethnic unitary nation. In this case the state takes part of the individual existence of its single individuals. The nationals recognize within their state their language, history and existence. They are bound to the state and unable to escape this bondage.

Exclusive and Inclusive State

Many recognize themselves within their state also as a speciality with regard to human beings of other namely neighbouring states. They consider and distinguish the "WE" against the "OTHERS" who are different, strangers, adversaries or even enemies. The state degenerates to an instrument of a consequent and even inhuman isolation. The "WE" serves also to distinguish from the "OTHER" with regard to foreigners or other minorities who live within the same state. Out of the "WE" and the "OTHER" can easily develop a friend-enemy relation enlightened by the media.

Those who do not belong to a national identity and who have to live as an excluded minority within such a state will consider the state with its discriminating concept of citizenship and it tyranny of the democratic majority as the only cause for their exploitation and dehumanisation and they will fight against such a state. Because such minorities cannot identify with the state of the others and thus not with the political and with the legal system which has been imposed to them by force they lack of any feeling of security and identity indispensable for the survival of human beings. They do not feel as equal human beings with all rights because they cannot participate on the political decisions with the same possibilities and chances as the others. The friend-enemy image as bases for any nationalistic and chauvinistic feeling will be transferred to the inner-state opponents of the majority nation.

Human Beings need Identity

The human being has the obvious need to identify besides with his family also with the more abstract state polity. How could one otherwise explain the joy of a nation which did just win with its team the world championship or a Olympic title? Thus, the state is something more as a mere system of abstract norms. It

represents the emotional collective conscious of the members of the majority nation.

From the other point of view the state has often also to suffer for any disaster which did occur to its members. It wastes tax money, it is corrupt, it protects only the interests of the established wealthy, it is bureaucratic and centralistic. With such and many more reproaches states are accused. On the other side people are proud of the achievements of their state. In case a state is criticized by foreign medias or foreign politicians the entire people feels accused. Even though one may accuse an obvious tyrant in the foreign press the nation will consider such accusation as humiliation.

Symbol of the Crown

Within the former absolutistic monarchies in which the prerogatives of the crown have been reduced to the mere symbol representation of the state it has still kept the symbol of the state unity. The crown does integrate and radiates almost a sacred force. This symbol has namely also in multicultural states such as Spain of Belgium a certain integrative influence which may even today provide for the necessary connection among the different diversities.

Exclusive and Inclusive Political Values

If there is neither a national nor a monarchic unitary force then the states need to base their unity on other values which can enable the members of different cultures to identify with the unity of the state. States which have developed mainly by immigrants from Europe did find such values within the *American way of life* or within *Catholicism* in Latin America. Switzerland finds its national unit within the political values such as federalism and democracy. At the same time it sets as its proper goal to the strengthen the unity by enhancing its diversity.

The Unitary Function of Idealistic and Universal Values

France on the other side proclaims a constitution with universal values. The values of the French Revolution are universal and are valid for every human being. Who ever identifies with these values and at the same time lives within the French territory belongs to *us* the French. This however should not deceive that the French nation symbolised by the national character of the French and their French language still has exclusive effects and not at all an overall inclusive function. Some decades ago the ethic values proclaimed by the French Revolution had been considered of a universal character. Today this universality is questioned. The French state can not refer any more to this universality which had labelled and honoured with regard to all other states it in the 19th century. Indeed the draft of the constitution of 1791 contained a provision according to which foreigners which had domicile for more than one year in France hat a right to receive the French nationality and Citizenship. Today however, with regard to the area of migration however France can not any more stick to this openness. The continuously growing nationalistic tendencies also in France reveal that even in France “universality” has its limits. And by the way even the French constitution could not maintain the con-

cept of the equal citoyen in all territories under the French constitution. How could one otherwise justify the clear mentioning of the peoples d'outre mer as units with collectively equal rights within the preamble and in article 1 of the French constitution.

Antiquity

The state represents apparently a whole which is not to be seen as equal to the sum of its atomised parts. This phenomena of a whole which is superior to its individuals has led several philosophers to deduce the state not any more from the human being as single individual but to consider it as something which is superior to the individuals and thus a proper and independent unit with an added value which has its cause in it self and can thus only be explained out of it self.

„A social instinct is implanted in all men by nature, and yet he who first founded the state was the greatest of benefactors. For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all; since armed injustice is the more dangerous, and he is equipped at birth with arms, meant to be used by intelligence and virtue, which he may use for the worst ends. Wherefore, if he have not virtue, he is the most unholy and the most savage of animals, and the most full of lust and gluttony. But justice is the bond of men in states, for the administration of justice, which is the determination of what is just, is the principle of order in political society." (ARISTOTLE, book one).

Individualism of the Enlightement

Contrary to the individualistic theories of state of the 17th and 18th century which justified the state out of the individuals the state is for most thinkers of the antiquity a predefined reality which is superior to the individual person: „Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good." (ARISTOTELES, Politics Book 1). Also for PLATON (428–348 before Christ) the state is a predefined necessity (cp PLATON, book 11 369 b--e). Out of the sociall nature of human beings also CICERO (106–43 v. Chr.) and POLYBIOS (ca. 200–ca. 117 v. Chr.) deduce the state (cp. CICERO, book 1, 25; POLYBIOS, Vl. book, 5).

The contrast between the understanding of the state in the antiquity and in the period of the enlightment is thus obvious. „One has tried to explain the contrast between the understanding of the state in the antiquity and in modern times by the following sharp antitheses: within the antiquity the human being has been existing fort he sake of the state and in modern timest he state exists fort he sake of the individual persons. " (G. JELLINEK, p. 35).

The Multicultural Challenge of Post-Modernity

The question with regard to the state as a whole and a unity is namely fort he young and multicultural states a decisive challenge. When a young democracy

does not succeed to integrate the different multiple identities of its polity into a common "*WE"* it will not be able to survive. The question towards the state as a whole and as a unit has indeed become a crucial and fatal issue of the actual times.

II. The State as a Higher Being (HEGEL)

At the period of the enlightement we can already find in some writings of the theory of state influenced by HEGEL und ROUSSEAU the bases for a state theory which considers the state to be an independent unit from the sum of the individuals living in it. HEGEL makes out of the state something absolute and sets it off from all other being; for ROUSSEAU within the state the common good the so called common will (volonté générale) is represented as an absolute not any more questionable value.

Is the State more than the Sum of its Components?

Does the state stand above the human being, does it somehow represent a higher being or is only a coincidental stack of human components which has no higher value as the sum of its individual persons living on this territory? If the whole that is the state is not more than the sum of its components it is consequently not entitled to claim specific rights with regard to its components. The state has no bases with regard to its citizens on which he could base its authority. Did it represent on the other side a higher being its subjects are obliged to obey. In this case the state would not need a special title to enact laws with binding character out of the original social contract. In contrary it could justify this authority with the fact that it represents a higher being.

The State as the Peak of the Development of World History

This theory of the higher being as been developed by HEGEL. HEGEL understands the world history as the development of the spirit of the world towards always higher spirituality, morality, liberty, and rationality. On top of this development is the state which according to his thinking is the motor of history leading mankind to an always higher being. The state represents highest spirituality and rationality, because within the polity the community of men and women is united under the guide of their reason. The destiny of the body politic is not delivered to the blind fate but entrusted to the exponentiated domination of the reason of all its members. Out of the originally brutal and despotic state the Greek Polis did develop than the Roman state, the monarchy of the middle ages and finally the modern reasonable limited constitutional monarchy.

The Constitutional Liberal State is the highest accomplishment of the World Spirit

The development of the state thus is an expansion towards permanently growing liberty. This opinion of HEGEL however contains also the danger of an overevaluation of the modern statehood. "The state is the realized ethical idea or ethi-

cal spirit. It is the will which manifests itself, makes itself clear and visible, substantiates itself. It is the will which thinks and knows itself, and carries out what it knows, and in so far as it knows. The state finds in ethical custom its direct and unreflected existence, and its indirect and reflected existence in the self-consciousness of the individual and in his knowledge and activity. Self-consciousness in the form of social disposition has its substantive freedom in the state, as the essence, purpose, and product of its activity." (G.W.F. HEGEL, Philosophy of Right, § 257 translated by S.W.Dyde).

The State Represents Highest Reason and Morality

Within the state the history of world experiences ist highest and divine perfection. „This substantiality, when thoroughly permeated by education, is the spirit which knows and wills itself. Hence, what the state wills it knows, and knows it in its universality as that which is thought out. The state works and acts in obedience to conscious ends, known principles and laws, which are not merely implied, but expressly before its consciousness. So, too, it works with a definite knowledge of all the actual circumstances and relations, to which the acts refer."
. „...It must further be understood that all the worth which the human being possesses - all spiritual reality, he possesses only through the State. For his spiritual reality consists in this, that his own essence - Reason - is objectively present to him, that it possesses objective immediate existence for him." (G.W.F. HEGEL, Philosophic History § 41).

Within the state reason does come into reality. „The laws of morality are not accidental, but are the essentially Rational. It is the very object of the State that what is essential in the practical activity of men, and in their dispositions, should be duly recognised; that it should have a manifest existence, and maintain its position.... The State is the Divine Idea as it exists on Earth." (G.W.F. HEGEL, Philosophic History, § 40). The Constitution ist he developed and implemented rationality.

„Supra State" Constitution?

Contrary to HOBBES and LOCKE HEGEL does not question where from the states deduce their right to enforce constitutions and to impose single persons rights and obligations. The Question who should elaborate basic laws is the wrong question for HEGEL. This question does namely assume that only a stack of a atomised group of individuals can enact a constitution. Such atomised heap of individual however des not at all represent a state unity. Only a state can finally implement a constitution. But it is strictly essential that the constitution, though it is begotten in time, should not be contemplated as made. It is rather to be thought of as above and beyond what is made, as selfbegotten and self-centred, as divine and perpetual." (G.W.F. HEGEL, Philosophy of Right, § 273).

Free is, who Internalises the Spiritual Laws

Because the state is the objectivity of the divine spirit the human being as a subject is obliged to obey the laws. HEGEL has a corresponding understanding of the

liberty: The liberty of LOCKE namely to do and to make what ever one wants according to ones whim is rejected by him. In the empires of the old oriental tyrants the subjects were constrained and had to obey the discretionary power of their tyrants. Only within the Greek state of the polis a limited liberty of the house- and family father was possible. A real freedom and equality for every body could only develop in Christianity. And with regard to the Christian religion the reformation gave freedom an additional push.

What is now the specific understanding of liberty by HEGEL? According to his opinion humans are free when they obey the will of the law. “the universal and subjective Will; and the Universal is to be found in the State, in its laws, its universal and rational arrangements. ….. We have in it, therefore, the object of History in a more definite shape than before; that in which Freedom obtains objectivity, and lives in the enjoyment of this objectivity. For Law is the objectivity of Spirit; volition in its true form. Only that will which obeys law, is free; for it obeys itself - it is independent and so free. When the State or our country constitutes a community of existence; when the subjective will of man submits to laws, - the contradiction between Liberty and Necessity vanishes. (G.W.F. HEGEL, Philosophy of History,§ 41).

BLUNTSCHLI: The State as a Collective Human Being

Also a scholar representing the concept of the state as a higher being ist he Swiss JOHANN KASPAR BLUNTSCHLI (1808–1881). He belongs to the school of the so called organic theory of state. Accordingly the state is a proper and independent being like a human being with head (government) body, arms and legs. (J.K. BLUNTSCHLI, S. 14 p.).

Can the Legal Obligation deduce itself only out of the Higher Being of the State?

Undoubtedly human beings identify often with their state and consequently they make out of the polity an independent special unit which becomes not only legally but also naturally a person able to act. However it would be wrong to deduce from this small grain of truth to a special being independent from its citizens in order to sanction with this image the relationship between the subject obliged to obey and the state governing the peoples. On the other hand one can not deny that in some cases the private interests of specific persons have to stand back with regard to the common interests of the state. When the state has to care for education citizens have to pay corresponding taxes. In the interest of the defence of the country citizens can be obliged to do military service. Some mountain municipalities in Switzerland still apply compulsory labour known in middle ages in order to be obliged in cases of catastrophes, avalanches or floods to act and help in the higher interest of the municipality. The private interest of each person has thus in certain cases for the sake of justice to give priority to the more important public interest.

III. The State as Representation of the General Will (Volonté Générale) according to ROUSSEAU

Common Good and Individual Good

The common good is in general considered to be superior to the well being of a single person. How can such assumption be justified? We have noticed that the state is mandated to provide security and to guide citizens for the community developed out of the interdependence of human beings caused by the growing division of labour. It thus administers the common good: The protection and the promotion to the liberty of human beings as well as the guarantee of the existential and general needs of the social order determined by the division of labour. This task the single person cannot any more accomplish. Human Beings have given up part of their autonomy which now they can only exert on a limited level by participating within the local community or the state.

Robinson and Friday can perform better and more when they divide their labour tasks and each does what corresponds best to his capacities. In common they also dispose of greater knowledge than each on his own. In this respect the knowledge of each single individual is not added but exponentiated, because each doe profit from the knowledge of the other and thus can thus even get new findings. The community thus can know more then the sum of its components. This however does not mean that Robinson and Friday would have to become Slaves of this community of the two. The mutual interdependence of the common knowledge and of the division of labour should finally serve the better possibility for the personal development of each. The "common" can thus not be separated and made independent from the individual interest. The interdependence of human beings from the society must finally be guided by the state as well in the common interest of the whole as well as in the interest of each individual.

How does the „Common" emerge?

The common which is made by the living together of different peoples within a state can require priority with regard to individual interests only in cases it serves the common good. Would in this case individual interests enjoy priority the common would then logically lead to the oligarchic exploitation of the community by some few members. When a private owner can successfully sue the state against the expropriation of their estate for the construction of a road because he/she wants to construct in this area a private villa then the common interest of good traffic connections between two villages would have to stand back for the individual interest of the private owner. The dependence of those who depend on gut traffic connections would accordingly be misused. The inhabitants would have to pay for an expensive road around the villa and the drivers would have to pay the price for the higher risk of accidents and the traffic chaos.

The Common becomes independent

A far reaching independence of the so called “common” we can find with the general will or volonté générale in the theoretical and philosophical thinking of ROUSSEAU. Rousseau distinguishes between the will of all (“volonté de tous”), which corresponds only to the sum of all single interests and the general will in which all interests of the society converge.

> *THE first and most important deduction from the principles we have so far laid down is that the general will alone can direct the State according to the object for which it was instituted, i.e., the common good: for if the clashing of particular interests made the establishment of societies necessary, the agreement of these very interests made it possible. The common element in these different interests is what forms the social tie; and, were there no point of agreement between them all, no society could exist. It is solely on the basis of this common interest that every society should be governed. (J.-J. ROUSSEAU, II book 1. chapter 1)*
>
> *“IT follows from what has gone before that the general will is always right and tends to the public advantage; but it does not follow that the deliberations of the people are always equally correct. Our will is always for our own good, but we do not always see what that is; the people is never corrupted, but it is often deceived, and on such occasions only does it seem to will what is bad. There is often a great deal of difference between the will of all and the general will; the latter considers only the common interest, while the former takes private interest into account, and is no more than a sum of particular wills: but take away from these same wills the pluses and minuses that cancel one another,[7] and the general will remains as the sum of the differences. (J.-J. ROUSSEAU, II book 1. chapter 3)*

As HOBBES und LOCKE also ROUSSEAU goes back to the adopted state of nature of the human being. The oldest form of all natural society is the family. As soon as the children of the family are grown up they reach the age of independence. (J.-J. ROUSSEAU, book I chapt. 2). One of the main reasons why this state of nature can not be preserved without men and women succumbing is the steady increase of the population. Peoples need to unite into new communities. With HOBBES as we remember it is the bad character of humans and with LOCKE the need for security which leads peoples to come out of the natural status and to conclude a social contract in order to enter the status civilis.

> *„But, as the force and liberty of each man are the chief instruments of his self-preservation, how can he pledge them without harming his own interests, and neglecting the care he owes to himself? This difficulty, in its bearing on my present subject, may be stated in the following terms:*
> "The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still

> obey himself alone, and remain as free as before." *This is the fundamental problem of which the* Social Contract *provides the solution. "* *(J.-J. ROUSSEAU, 1. book ,chapter 6)*

The Social Contract Produces the Citzen (Citoyen)

With this social contract a new spiritual body of all members is created which is composed by members as citizens in the sense of the notion of citoyen according to ROUSSEAU. This new artificially constructed unit represents a comm. Ego which has its proper live and gets a special will. The social contract thus creates a new and higher unit. With the fact that the members of the people as citoyens participate on the state designed by the social contract they become associates of the new being of the state authority and thus national citizens. The human beings in the state of nature turn into a new status they convert into the citoyen as associate of the political.

> *„THE passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct, and giving his actions the morality they had formerly lacked…. Let us draw up the whole account in terms easily commensurable. What man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses…. We might, over and above all this, add, to what man acquires in the civil state, moral liberty, which alone makes him truly master of himself; for the mere impulse of appetite is slavery, while obedience to a law which we prescribe to ourselves is liberty.." (J.-J. ROUSSEAU, I. book, chapt 8).*

The Law is the Expression of the General Will (volonté générale)

Why now need according to ROUSSEAU the citizens obey the order of the state? The will of the state expresses itself in the form of the general will the *volonté générale*.

Der Wille des Staates äußert sich in der *volonté générale*, dem Allgemeinwillen.

> *„He, therefore, who draws up the laws has, or should have, no right of legislation, and the people cannot, even if it wishes, deprive itself of this incommunicable right, because, according to the fundamental compact, only the general will can bind the individuals, and there can be no assurance that a particular will is in conformity with the general will, until it has been put to the free vote of the people. (J.-J. ROUSSEAU, 11. book , chapter 7)*

This general will is to be distinguished from the sum of the single wills (volonté de tous). The sum of the single particular wills and interests does not serve the common good but only private interests of all or at least of those who represent the majority, the sum of those who have agreed to the decision. How can one

now prevent that the laws carry through the volonté de tous and not what they should do the general will? When parties influence the decision e.g. in a referendum then the decision looses its universal character. For this reason a decision making in order to formulate general will is only when the possibly highest number of opinions can be brought to the common denominator. This common denominator corresponds to the general will; it is not the sum of the wills but the exponentiation of all single interests.

> *„There is often a great deal of difference between the will of all and the general will; the latter considers only the common interest, while the former takes private interest into account, and is no more than a sum of particular wills.....If, when the people, being furnished with adequate information, held its deliberations, the citizens had no communication one with another, the grand total of the small differences would always give the general will, and the decision would always be good. But when factions arise, and partial associations are formed at the expense of the great association, the will of each of these associations becomes general in relation to its members, while it remains particular in relation to the State.....It is therefore essential, if the general will is to be able to express itself, that there should be no partial society within the State……But if there are partial societies, it is best to have as many as possible and to prevent them from being unequal, (J.-J. ROUSSEAU, 11. book chapter 3).*

ROUSSEAU and Democracy

However, ROUSSEAU recognizes that there are and have to be different types of government. Ideal for him are the old constitutions of the Greek small states of town as well as the constitution of the Roman empire where the laws have been approved in the open peoples assemblies. This however he proposes to consider can only be exerted within the small republics. The proper power to execute can not be exerted by the people. In this sense there was nowhere ever a full and genuine democracy.

> *„Were there a people of gods, their government would be democratic. So perfect a government is not for men." (J.-J. ROUSSEAU, IIIbook, chapter 4).*

The Tyranny of the General Will

If HEGEL makes out of the law an absolute in the sense of the highest realization of the moral idea, ROUSSEAU makes an absolute out of the general will of the citizens associated by the social contract. The general will is for him just like a higher being to which all are submitted. This absolute volonté generale did later become the fundament for the absolute and totalitarian regime of the communist parties. In many states with strong presidential powerst he president appears somehow as the

incarnation of the volonté générale which can and should never be questioned. However, one has to admit with regard to ROUSSEAU that this general will is bound to the decision of the people and it requires at least a democratic legitimacy.

Today's Reality of the Common

The common has not been created only by the social contract of by the constitution of the state. There are always some pre-state communalities based on common language, history, culture or religion. If within a multicultural state common political values can be found, they may develop (as e.g. the republic against the monarchy) gradually in order to become an effective connection in order to hold a multicultural society together. (cp. France, the USA, the Confederation of Switzerland). Common identities design the bases for the common. This however, develops today also based on the social and economic circumstances. The distribution of Radio and Television, the internet the common interdependency of raw-material and sources of energy but also the traffic lines – they create communalities between human beings. Economy and communication let borders fade away and indeed although they will remain, they also loose on importance.

Globalization of the Common?

Such communalities do not stop any more at the state territory. The internet creates new trans-national communalities. CNN and BBC have constructed a new world of information which produces globally supposed objectivities. The state has to care that the common and the interdependencies which have been produced by communalities are not misused. The globalised communalities should not totally dispel the political that is democracies within the national space.

Where ist he international General Will („volonté générale")?

As long as families and in particular extended families were autonomous they could themselves care for the old and ill members of the family. With the increasing industrialization however the dependency of the different members of the families did also increase. As a consequence the state was asked to expand its social activities in order to meet the challenge or these new dependencies. Today it is asked to preserve the social security system from the threat to be undermined by new economic and global dependencies. What use is with the best social security laws when they are emptied out with the new international labour and financial market? States but also peoples would need in many areas – from the area of criminality to the dependencies of drugs until the area of the social security a new international general will (volonté générale) which could build as the national on a democratic legitimacy.

The General Will does not belong to the Discretionary Power of the Nation State

The general or the common can thus not be made and unmade at the whim of the state. It is rather a concrete determination of the general interest which has grown

based on the new international development. States have to take it into account and to foster this general common interest. While state in earlier times were able to influence with political power the social development and the different interdependencies, they are today often bound by the globalised market economy. Thus they are to try to create with a new international decision making process new space for freedom for international politics of cooperation. Within the inner-state sphere they have to be contented to implement within the frame of their possibilities the limited volonté générale.

The Added Value of the Nation State

Also the state community is not a pure addition of its members. It rather represents a value which is more than only the sum of its components. However this higher value is limited to the factual social communalities and dependences and it does not legitimize the state totally to become independent from its citizens and to turn them into mere subjects. It should rather but its service within the common interest of the community and provide for guarantees that its activity promotes justice and liberty; other wise its measures and decisions are not justified and thus illegitimate. The general however is not any more limited to the state territory. It has to grow into an international communality. Only on the national bases one can today not any more legitimize domestic state politics.

The Citizen (Citoyen) of Rousseau: a Challenge fort the Today and Tomorrow

The theory of state of ROUSSEAU influences the state of modernity with far reaching consequences for democracy for totalitarian politics which may be influenced by the absolute legitimacy of the volonté générale as well as for the republican nation-state of the citizens (Citoyens). His theory of the transformation of the human being in the state of nature to a rational citoyen did become e.g. the fundament for the constitutionalism in France as well as in Turkey. When the human being in the state of nature acquires its higher being as a human as political citizen (citoyen) and becomes an associate of the political authority he/she becomes a political animal which doe only rationally with its reason participate on the design of the general will. The citoyen is interested on the political justice which will be designed by its democratic participation by a majority decision. It renounces within the political community to its given nature and the pre-state values such as culture, language, tradition, religion etc. Indeed the political citoyen is an a-cultural only rational “animal”. The state as incarnation of the rational and political is according to this opinion an association composed of political animals such as the citoyens but not compose of members belonging also to an other collectivity based on language or religion.

Reason asl only Legitimacy bases of the State Unity

With this ROUSSEAU has created the fundament for the republic which is legitimized by a political nation. Each individual is citoyen and each individual can become a citoyen when it is willing and interested e.g. to accept the values of the French or the Turkish constitution which as only been established within the con-

stitution. The fact that some still consider themselves as Kurds or Corsicans is not only politically irrelevant for this ideology it does also undermine the final ideological legitimacy of the state as such. The political is reduced to the polity to the rational and the just that is to the common good and to the liberty as well as to the rational respect of the legislation. This reduction of the political to the economic welfare, social justice and to the protection of individual liberty however, is challenged by the reality of many minorities which claim their proper autonomy in order to foster their culture, language and religion also within the political community they are embedded in. The "political" can not be defined with a final conclusion. It is determined by the tasks which are approved by the democratic majority. What is political this issue finally has to be determined within the general democratic discourse. Tasks which within one state are open to politics, to the public and to democratic decisions may be dispelled in other states into the sphere of the private.

Can one reduce the Human Being to the Rational Citoyen?

On the other hand one can not deny that even those states which confess to be Citoyen-States still hidden foster their proper culture – and be it only the promotion of the language interests of the majority nation –. Within the American melting pot e.g. one can detect by observing the emotional debates on the "English–Only movement" that even a state open for all cultures with regard to immigration has limited interests with regard to the integration of those cultures such as e.g. the Spanish language. The majority culture of the WASP still seems strongly influencing society and also politics. Integration and assimilation into the majority culture are goals to which every immigrant is finally exposed although not publicly but privately. If we also take into account the interest of the republican French state to foster internally (Académie Française) and externally the French language (Communauté Francophone) we may have some doubt with regard to the reality of a real citizen-state. If we would even explore the situation in Turkey which protects its Turkish citizens in Cypruss although according to the ideology they should not be part of Turkey.

C. The Justification of State Authority

I. The Problem

Justification – Sovereignty – Legitimacy

Who puts the question with regard to the justification of the state explores its legitimacy. Without sovereignty there would be no legitimate state. The issue of the legitimacy thus contains at the same time a question with regard to the sover-

eignty. The sovereignty substantiates the law and the power of the state to enforce its proper decisions. Legitimate however is the authority of enforcement only if it can also be justified. Subject of the justification thus is the so called imperium that is the authority to implement the law with coercive enforcement.

Who asks the question with regard to the justification of state power does not only expect a mere explanation of the sense in connection to this the function of the state. The question with regard to the sense and thus to the need of the state has first to be separated from the question with regard to the value of the state. The question thus is not "why should the state force be tolerated?" but rather "why does one want to tolerate state enforcement mechanisms and why does on obey to the state legislation?" Who asks the question of justification expects as answer what value the state has for the single individual which would justify that one accepts the concrete state enforcement procedure.

The Question with regard to the validity of the Law

Who wants to justify state force has to analyse the moral justification for state force which requires some times the highest possible sacrifice. (The war of Israel in Lebanon July – August 2006) Without clear separation of Just and Unjust the justification is not possible. Thus one is challenged to prove that there is a final moral ground for the state and with this we do not only refer to the coercive force of the state. Where is the validity and the legal force to be found for a law and legislation? The *Mafia* can threaten and enforce by *threatening* the people with violence. As soon as the threat disappears the power of the Mafia is fading away. The state has the force to enact obligations. These are even valid if they are not enforced. Thus the state has legitimacy when the peoples are convinced of its obligations.

There are different opinions with regard to the question whether this force of validity of the law lies within the monopoly of the state to use in final instance even violence for coercion. The state philosophers of the 19th century however did not make a distinction between the question toward the sense of the state (foundation of the state) and the question with regard to the value of the state (justification of state authority.

II. The Sate as Part of the Human Being

Where is the validity of state regulation based?

Why can human beings belonging to the democratic majority impose to the minority an order of obligations which can be enforced even against the will of this minority? Why can executives mandated by their parliament provide for legally binding ordinances and impose to the single individual obligations or even rights? Why can the ones dominate over the others? Why can citzens as members of state authorities in exerting state functions impose obligations to other people? Where does the judge get its title to condemn the guilty?

State and political decisions are legal orders which are binding and can or even must be enforced with coercive power of the state. Criminals are to be punished. To the political respective to the state one has to assign alls decisions, procedures, institutions, regulations and measures which if needed are enforceable with the state monopoly to use coercive violence and which can be traced back to the legitimacy of the state and thus to peoples sovereignty. The social sphere respectively the private sphere however are to be assigned mechanisms of decision making which would lead to contractual or statutory agreements and could be enforced based on social sanctions or on a judgement of the court and thus could be finally enforced with the power of the state. Their legitimacy is based on the fundamental agreement of the concerned as contractual partners or as associates of a association.

The State as Pre-Condition for a Human Order of Peace

If one can not accept that the power of the strongest should become legal, the society can only exist as an order of peace if the mutual interdependencies and the cooperation of the peoples is mainly founded by decision making mechanisms which are legitimized by contract or majority decision, or if they can be based on a judgement of the court which is enforced with legitimate political enforcement violence according to the principle of reasonableness or proportionality. Even the most liberal legal order however can only be maintained when people finally can trust that obligations and rights which are based on common agreements can in case of need also be enforced. The indispensable trust for the living together of human beings is thus on one side based on the integrity of the human being and on the other side on the certainty that in case trust is misused the law can also be implemented with coercive force. Only a legal order supported with force can finally establish trust and confidence for agreed justice among free associates.

III. The Nature of the Human Being

Not the Maliciousness but the Division of Labour presupposes an Order of Peace

Though the state is not at all a consequence of human hostilities according to the opinion of HOBBES. Certainly the danger exists that a complex and interconnected human society would dissolute without leadership, because hostilities may become to important. But even when this would not be immediately the case a superior form of authority which regulates human relationships, would still be needed in order to regulate inter human relationships and a certain frame of the division of labour in order to provide for the protection for the minimal supply for existence and to provide the supply for the normal living. The state is not a consequence of the homo homini lupus but of the increasing interdependency of people within the society and the growing interdependency, which itself is certainly a consequence of the increasing division of labour, of the increase of the population and of the

technical development and the strengthened capacity of professionals to organize as well as of the sociability of the human being.

One Dimensional Images of the Human

One dimensional views of the human being can lead to dangerous false conclusions of far reaching importance. Whoever observes human beings today has to recognize that aggressiveness is only one side of the human nature. There are also human beings prepared to sacrifice for others, to help, to be at disposal of others and to be consciousness of their proper duties. The reality of the human society is very diverse and can hardly be reduced to a one dimensional view of the human being. Besides the mother who cannot any more feed her children one may be confronted with a soldier who despairs because of his incapacity to help those hungry children. Or one can see a police officer who lets pay his helpless prisoners for his frustrations. Besides the stressed manager of a company one may see a secretary which consciously carries out her obligations but at the same time hopes for the near end of the working time because of the expected party in the evening. The one would want to earn a lot of money in his/her life, achieve high and powerful positions, the other is contented when he/she can feed the family and make its children happy. How wrong would it be with regard to this complex reality to build up a theory of the state only on a one dimensional view of the human being.

The State as the Result of History

State authority can not be reduced to either a fictive of factual happened original contract out of which all later titles for state authority could be deduced once and for all. In fact the contract as a legal institution does already presuppose the existence of a legal system with the basic principle that contracts should be maintained (pacta sund servanda). For this admittedly very formal argument the contract can neither serve as the big band for the establishment of a state legal order. In fact, the state did rather develop, mutate and adapt with the history of mankind. It is bound to the nature of human beings which cannot exist without interconnection within the society. However one can only justify state and political authority insofar it is committed to the wealth and the free development of all peoples

The Sociable Human Being depends on a Political Community

As a sociable animals human beings are dependent on the community. First he/she experiences this community within the family. The increasing density of the population and the need for social contacts each human being experiences first within the community of his/her family. The increasing density the sociable need for larger supra family communities and the economic interest to increase and diversify the division of labour lead to the construction of supra family political associations. These associations need first to be transferred functions and political tasks in in order to guarantee within the frame of division of labour some freedom, to protect the community from external enemies and to regulate internal conflicts. This administration becomes only then political when it has to make decisions within the rational democratic legitimacy with regard to values of universal values

or when it is asked to use its power of coercion in order to implement decisions with regard to the interest of the community.

Supra family states are legitimate only when they are installed for the common interest of the general wealth and when they are rationally administered. In this context the state appears only when the supra family communities did associate to a bigger political union, in order to exert authority in the interest of justice. Supra family domination is not only justified but it has also to be exerted within the interest of the community. Moreover the bearers of decisions need to be accountable to the corresponding institution of the community.

IV. Change of the "View of the State"

Because such political associations are a consequence of the development to a society increasingly marked by division of labour, state have always to be seen and assessed within their historical reality. States are not created by a unique act which occurred only once in history. (social contract). Rather one has to accept that states develop and change continuously during their historical development.

Human Beings become Interdependent because of external Circumstances

The explanation of the gradual building up of the states did show us the following: Types of authority and relationship of power emerge because human beings become more and more *interdependent* from each other usually because of external circumstances not to be influenced by themselves. Parents can decide on the fate of their child because it is dependent from them and because with such decisions they can best serve their and the long term interests of the child. They care for the better protection of the child, know its capacities and his/her interests. Does the family once loose on autonomy because of its increasing interconnection it has to hand in titles of authority to the community. The community however has only competences in so far as its right to exert general authority is made necessary because of the factual interdependence within the society. Politics have to care that the power produced by such new dependencies remains just and reasonable with regard to its goal to serve freedom and to strengthen inner peace.

Diverse State Conceptions

When state authority is deduced from the concrete social situation of a certain society it has to be differently designed according to its historical development and its concrete environment. If a state constrains itself to protect the community against external dangers and to mediate internal conflicts it will be differently designed than the state, which in a developed and complex industrial society has to guarantee the economical survival of the polity and to care for a far reaching autonomy of the polity within a globalised economy.

Structure and justification of state authority are closely interconnected to each other on one side and to the specific conditions of the concerned state on the other side depending on its stage of development, education and training of its profes-

sionals, tradition, history, character of the people, size and geography. Nobody would dare to pretend e.g. that the Chinese Republic would need to be organised according to the same principles as the small miniature state Andorra or Liechtenstein.

State against Misuse of Powers

Undoubtedly titles for political authority are constantly misused. Just as there are good and bad parents which exploit and maltreat their children, we also detect state regimes which exploit the dependent and powerless human being and misuse their subjects.

Misuse of power, mismanagement, exploitation and disregard of elementary human have their origins often in the fact that very few persons have been entrusted with much to much powers. There may have been no sentence in history with such universal wisdom to be considered by philosophers, political scientists lawyers and politicians as the guideline of LORD ACTON „*Power corrupts and absolute power corrupts absolutely*."

The Faulty Leviathan?

HOBBES wanted to bring permanent misuse of power to an end by entrusting absolute power to a monarch or to the head of state Cromwell. However how can one expect to bring misuse usurpation and the discretionary power to an end with an absolute Leviathan or tyrant? If one already recognizes that human beings are beings with possibility of faults and thus develops a theory of state embedded by this view of the human being one has to provide in this theory that institutions must be established in order to minimize at least the failures of the rulers. This however, is only possible when the ruler can always be made accountable for their activities within the government. If they have to give account for all their measures and if they are continuously are controlled misuse of power may be reasonable reduced. Only controlled power which is also accounted for is power in the political sense. Non controlled power degenerates becomes susceptible for corruption and is finally non democratic. It is finally against the interests of a democratic polity. Only with institutionalised and permanent controlled power can the state minimize possible failures of the rulers.

Constitution as the Instrument fort he Limitation of Powers

The 20th century has revealed in the most brutal way to what human beings are capable when they are given uncontrolled powers to exert without any accountability. Unfortunately the beginning of the 21st century is not at all reason for substantial hope that we will be freed for ever from the "un-state" and that the democratic states will all commit for a better anchorage of the human rights and their moral justification. Failures and insights of the passed however should not lead us to fall in the opposite extreme and to propose the anarchy as the vision of the future. Then in a situation of total anarchy the state and politics would loos any legitimacy. Much more important is to care for the constitutionally established institutions of the state and to look that the might is so clearly divided and assigned that

authorities and persons which are entrusted with power will only use them for the wealth of the peoples by controlling each other and by learning from each other.

For the state of the complex industrial society it is of utmost importance that humans can develop within a peaceful environment. Promotion of peace and liberty should in the end not lead to the fading away of the state and into an association of free humans (young MARX), but rather to the increasing complexity of the national and global interconnecting network of human cooperation. Liberties produced by law should soften dependencies which occur with this interconnection. When the law in the area of migration entrusts the power to the authorities to decide on the domicile, working place and finally also on the existence of human beings within the state it has also to provide procedures and institutions which should prevent that power and discretion of civil servants can be misused. If the social security system guarantees the social survival of handicapped peoples the employees of the state should not be able to misuse the any way humiliating dependencies of handicapped persons. It the constitution protects fundamental rights for minorities the majority legislature should not unpunished be able to cancel the constitution with its tyranny of the majority. Such tasks however can finally only be accomplished by a state with a wide spread supported legitimacy. Governments lacking legitimacy will open all doors for corruption and prepare the final fading away of all important institution for the protection of human rights. Only a legitimate state can care that the existing power will be rationally exerted and continuously controlled by an open and rational discourse in the democratic public. Such discourse will assess whether the power is used rationally and whether it fosters liberty and justice. It will have to look for a rationalisation of the power accountable to all citizens.

Legitimacy

How can one determine whether state authority has been exerted correctly, rightly and for the benefit of justice? The answer is finally clear: If the state authority is supported by the comprehensive acceptance of the great bulk of the population, one can assume that at least the most elementary conditions for justice and liberty are given. Thus one can certainly only consider a state to be within the rule of law with regard to its authority when it has achieved this acceptance within its population. Such acceptance however is only possible in a case that the population considers itself as a community which can be guided by common and general laws. (consider e.g. the explanation of the feeling of togetherness in IBN KHALDÛN). Thus if there are human beings which feel to be treated as second class citizens and thus can not identify with the state because they belong to the discriminated minority the state has not achieved the necessary legitimacy. Also minorities need to be convinced that the authority is finally exerted for the benefit of their wealth and this without any discrimination.

Such recognition however can not be achieved by a permanent even fictive original vote. It can only be detected that the population follows the laws not only because it fears sanctions and punishment, but also because it considers punish-

ment in case of violation of law as legal and justified and therefore it feels obliged to obey to the legal obligations.

Legitimacy according to MAX WEBER

The legitimacy of the authority in the sense of MAX WEBER (1864–1920) can have different reasons. He considers legitimacy *legal* when it is founded on a rational charter and accordingly exerted. It is *traditional* when it is founded within the believe of the holiness of the existing order and powers of the ruler. (patriarchal authority). It is *charismatic* when it depends on the emotional and affective devotion to the person of the ruler because of its magic capacities, its heroism or his spiritual power or the power of his speeches. The best legitimacy bases and in particular the most sustainable however is the *just exertion* of authority which is based on the rule of law. If utmost peoples are convinced of the reason and the justice of the ruler and his law the authority achieves the highest level of legitimacy. (M. WEBER, p. 475)

Always when existing social power is entrusted to the state it should be exerted in the common interest of the entire population. All powers need to be used for the goal of the state in order to promote the wealth of the community including the minorities. These activities need not only to be exerted they must also be made seen by the population. “Then all human institutions develop powers. But without assessment of the function which is specific for state power it can neither be distinguished from the power of a band of robbers, from a cartel of coal nor from a ninepin club. (H. HELLER, p. 203).

Who Controls the Watchers?

Closely connected to the issue of the exertion of powers in the interest of justice is the question who should be entitled to control the rulers. History does not know the example of a tyrant who did not pretend that his authority is totally for the benefit of his people. However all authoritarian rulers insist regularly to decide on their own what is in the public interest. Only they can decide what is in the interest of the common good and not the peoples. Thus James I. declared in his famous speech on march 21 in his parliament:

> *“I conclude then this point touching the power of kings with this axiom of divinity, That as to dispute what God may do is blasphemy... so is it sedition in subjects to dispute what a king may do in the height of his power. But just kings will ever be willing to declare what they will do, if they will not incur the curse of God. I will not be content that my power be disputed upon; but I shall ever be willing to make the reason appear of all my doings, and rule my actions according to my laws....”*

However even though the ruler may be controlled by parliament and courts, the question remains who watches the watchers because also the courts or the parliament can fail. In a country they did recently establish a most powerful prosecutor. In the end the prosecutor himself became corrupt. The only possibility to avoid such developments is a careful designed system of checks and balances in which

all powers can mutually control each other and their activities are part of the public discourse.

Condemnation of the Tyrant after his death?

Nevertheless in all times there were possibilities to provide for at least somehow limitations of the powers of an absolute monarch. HUGO GROTIUS (1583–1645) reports of the the old custom in egypt where the Kings could be accursed for violation of major governmental principles. Have they been declared guilty the judge denied them the official ceremony for the funeral. (H. GROTIUS, I. book, 3. chapter., XVI)

In the famous drama ANTIGONE of SOPHOKLES the new King of Theben denies ANTIGONE to burry the former King her brother because he was a tyrant. Antigone however has her divine family obligations to burry accordingly her brother. Family law against state law, different authors (IONESCO and BRECHT) did solve this eternal dilemma very differently. H. GROTIUS tells us the story of some ancient Kings which although had been entrusted unlimited powers. But when they would have misused the King prerogatives they would have been stoned.

Rule of Law and „Rechtsstaat"

Whether the rule of a King or of the democratic majority is exerted by the majority of the people, always one has to put the question whether the sovereign is superior to the law or whether it is also bound by the law. Certainly one can not determine the sovereign as an organ to execute the law having not other task than to execute the pre-given law. On the other hand the sovereign has no right to commit brutal injustice. Law, Justice and injustice are not – as HOBBES thinks – only produced by the state. *There are elementary basic legal principles which are recognized by all peoples which can neither be violated by the state and the sovereign.* The elementary principle of the Rule of Law is founded within the conviction that human beings should not be ruled by other human beings but by law.

The word "law" has a meaning which goes beyond the positive law. An action or decision is considered right or wrong not because it is just legal but rather in harmony with the basic legal principles or it violates those principles.

The Sovereign is within the Law

Accordingly also the sovereign does not stand above the law but within the law. It must though design creatively a big part of the legal system. But in doing so it has no power to violate basic legal principles. These principles correspond to the reasonably founded values with regard to the dignity of human beings and with regard to the credibility of procedures in which a independent judge decides finally on right and wrong. Even the formal majority of the citizens of a state can sometimes be misled in its emotions and violate elementary principles of human rights. In particular minorities or members of other races can not be protected only with the majoritarian democracy. The prosecution of the Jews and the Sinti and Roma in the third Reich as well as the discrimination of races in the apartheid regime of previous South Africa as well as the ethnic cleansing in the 20th century are most

cruel degenerations of the tyranny of the majority or in South Africa of the minority. Already JOHN STUART MILL (1806–1873) was aware of this danger:

> *Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant — society collectively over the separate individuals who compose it — its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates; and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development and, if possible, prevent the formation of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own. There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs as protection against political despotism. (Introduction on Liberty)*

For this reason it is not sufficient that the decisions of the sovereign take into account the generally legal principles recognized by the people – the sovereign needs moreover to respect legal principles which are in harmony to reasonable and universally justifiable arguments. Sovereignty is not the “big bang” out of which the whole legal order can be deduced according to HOBBES. Sovereignty is competence but also responsibility to care for the basic order of the wealth of the population within the borders of the territory entrusted to the state.

Reason of the Watchers

The state of modernity is based on the conviction hat human beings since the time of renaissance are able to say “no”. Who has the capacity to say no because with his/her reason he/she can assess the exertion of power must also be able to produce this no into an institutional and procedural design. If the state authority succeeds to convince the human beings by reason the no will be reduced to a tiny minority. Authoritative thus must be the *reason*. When the sovereign misuses its powers and disregards elementary principles of justice and reason, it looses its legitimacy. Without legitimacy there is no sovereignty. Based on the right to resistance human beings can thus establish a new state order in case they set the goal to establish a state with a new legitimacy. Human beings remain even though they

have been entrusted with power reasonable animals capable for learning and thus able to improve it they are under control. For this reason the limitation of powers within the state will principally lead to a better, more legitimate and more just system of government.

The Common Good as Essential Element of the State

The state is distinguished from the Mafia because it has to use and administer the power entrusted to the polity for the interest of the people living in this polity. It has to care for the general wealth of all peoples and has no power to privilege special interests of certain persons or power-holders. (J. RAWLS, p. 253). Where and when ever the state ort he ruler misuses ist entrusted power during a longer time, they had alwas in the end to give up the authority. Already in the 14th century the statesman of the ottoman Empire IBN KHALDÛN was of the opinion that each ruler will loose its authority when it only lives for his personal luxury and does not care any more for the common interest of its tribe. "When the natural tendencies of royal authority to claim all glory for itself and to acquire luxury and tranquillity have been firmly established the dynasty approaches senility. (IBN KHADÛN, p. 133)

Chapter 4 Human Rights

A. Introduction

Universal Cultural Heritage?

Human beings have rights and obligations towards each other; this is an ethical and moral basic principle which has its roots in all different cultures. The "golden rule of ethic reciprocity is to be found in almost all different cultures, such as the Jewish and Christian rule "Love your neighbor as yourself" (MOSES and JESUS); "do to others as you would have them do to you"; "treat others as you want to be treated"; "what you do not want others to do to you, do not do to others." (CONFUCIUS); "what is hateful to you, do not to your fellow man." (Jewish sage HILLEL). The decisive question however is not only whether human beings can claim rights towards one another but even more important who can determine the content of thes rights and obligations and who has the legitimacy in case of conflict to implement these rules. The rulers cannot autocratically decide on the content and implement it at their whim. It is not up to the rulers to decide which human rights are enforced with what kind of content and in which procedure they can be claimed. The peoples beings living within a state need rather to call in inalienable rights with regard to the state and its administration befor a independent professional body with the necessary jurisdiction.

„Justice must be seen to be done"

Government representatives traveling to China request the implementation of human rights. In Kosovo the international community and in Iraqu the US did intervene because they claimed the continuous and heavy violation of human rights justifies and even requires military intervention. And indeed the Kosovo intervention was the first military action of the NATO ond behalf of the UN with the main and only justification protect human rights of peoples. South Africa has a new constitution which which guarantees human rights and equality of all inhabitants independent of race, relition or language. In several states of the African continent rights of human beings are maltreated and their rights are openly violated because peoples suffer from ethnic conflicts, militariy dictatorship, state- and police terrorisem. In France French citizens with north-african roots claim to have suffered heavy discrimination with regard to other French citizens. In Germany polititians

require better protection for foreigners by police and in Switzerland asylum-seekers and refugees are exposed to social pressure hostile to foreigners and in particular refugees.

Human rights did become part of the political and strategic game of big nations. The council of Europe condemned Turky because of its hostile attitude towards the Kurd minority. Turky on its part accuses western states of Europe that they misuse the human rights policy in order to weaken the Turkish nation and even by supporting the Kurds to corrode the inner-state cohesion.

Islamic fundamentalist fight against the Human rights policy as a result of the enlightement philosophy of Christian origin and principally hostile to the Islamic religion. They claim that human rights can not be justified within a state which pursues religious goals. The most sacred mandate of this state is to fulfill the tasks ordered by God. Those who disregard this commandement have to be pursued. Whoever violates the laws of god can not claim any human right and there is no possibility to refer to any right of error.

International Protection by Organisations and Courts

International conferences are summoned in order to strengthen the protection of human rights. The OSCE convenes every year a conference of the member state governments in order to analyze possibilities which would enable the states to improve their procedures and institutions in order to give better protection to human rights. The UN request every year reports on the human rights situation within the different member states. In March 2006 the General Assembly has replaced the human rights committee with a human rights assembly in order to improve the UN engagement for better protection of human rights. The members of the council of Europe have already more than half a century ago established the Human rights Convention for the protection of some basic fundamental rights. According to this convention individuals of the member states can directly sue their states before the European Court of Human Rights.

Double Standars

The states however have an ambivalent relationship to the human rights. While the US Government accuses other states for violating human rights douzens of prisoner condemned for murder await the execution of their capital punishment which may occur sooner or in a uncertain future. These years of permanent uncertainty and fear of the candidates on the death row has been condemned according to a judgement ot the European Court of Human Rights as severe torture.

In several states the policy with regard to human rights and minorities is a means in order to support the members of minority ethnicities in opposition to the government of the neighbour state. In the Baltic states the minorities have to pay for the evils which the Sowjet-Union has committed to those peoples in the last 60 years. Human rights as individual rights are considered by the Chinese government as an instrument of ideology of western state used for the destruction of the communist authority within the state and for this reason the Chinese fight against this policy.

Human Rights: Hope and Disapointment

The history of mankind is in the end also a history of brutalities, slavery and violation of the elementary dignity of human beings. As in our days there were always rulers misusion their might and persuing their subjects with brutality. The secret police is not an invention of our times, it existed already in the ancient China and on other continents of the earth.

How cruel human dignity has been maltreated by torture and slavery – the hope and the engagement of many personalities for a juste and humane social order which guarantees the individual development of human beings has never been totally destroyed. The longing for an independent life within the family, the tribe or the municipality with relatives and friends, the search for closer or remote happines in this world ore hereafter has always been widespread as well as the desire to misuse the conquered power for the destruction of such liberties.

Human rights have reached the centre of the consciousness of our society. Thus they turned into a most important instrument of todays policies. With the claim for human rights protection governments, states and parties can be condemned before the world public. Within the media human rights have a predominant position within the news and documentation rports in particular for alarming the public in case of gross violation of human rights.

The Virtuous Human

Courage, intellgence, relgiousness, stamina, humility, love, honeour, loyalty are not only the vertues of ancient greek philosophers they are also virtues of African tribes since several thousand years (C. MUTWA, p. 141) or praised by the old chinese philosophy (KONFUZIUS, 551–479 b. Chr.).

Ideas of the good, just and careful ruler one can not only find with PLATON and ARISTOTELES, find them also in India (H. ZIMMER, S. 104 ff.) or in China where the famous sentence of the emperor Wen of Han (202 BC to 157 BC) is still known: "Early in the morning twighlight I get up! Only late in the night I go to sleep! All my forces are dedicated to the empire I care for the people and suffer" (translated from M. GRANET, p. 257) .

Written into the Soul of the Peoples

How widespread the main concepts on the just authority serving the common good of the people were the real birth of the idea of proper human rights as rights which can be enforced by an independent court even against the might of the state has its roots in the history of political ideas of Europe. Why? We have already explained the originally almost every ruler has based its might on supernatural forces and on Gods law. Also state law has originally been justified by its religious origin. It was the law enacted by God (according to the Chinese concept by Heaven) and thus irrevocable and also binding the ruler. The law was written into the souls of the people. Was it misused or bendt by the ruler his authority or the authority of his descendants was doomed to destruction. All law thus has been considered human right or human law. The idea that individuals would have special rights toward or against their rulers was within this context superfluous and unnecessary.

The Mature Person Can Say „No“

The European “modernity” starts with the capacity, the insight and the readiness of human beings to say “no”. Persons saying no need to be able e.g. to assess the quality of the government and the enacted laws. According to their assessment they must be able to evaluate whether they would still support the government. Those who want to assess the quality of the authority need to know what information are necessary in order to make a judgement, they need to be able to understand and evaluate the information and must be capable to consider possible alternatives. Persons able to say no must also decide which order of values should be authoritative and why it should be authoritative.

Only mature humans which have to have the same capacity for judgement as those ruling over these humans can say “no”. The conception of men which is based on the capacity of judgement of each individual person needs to recognize that all individuals belonging to the genus of the “homo sapiens” are principally equal and that nobody can claim to have based on the grace of God the legitimacy to rule other human beings. Only rulers which have been chosen by those to be ruled can achiebe legitimacy for their authority.

Capacity of Judgement of the Human

Within the Renaissance the human brain has been secularized and it replaced the religion with the ratio. In the next period the liberal modernity replaced the sovereignty of the ruler by the grace of God with the sovereignty of the ruler by the grace of the people. Without conception of men being equal based on the intelligence of the homo sapiens this secularization would not have taken place. The conception of men is built up on the dignity of the independently judging human and this was the pre-condition for the secularization.

Human Rights Limit the Might of the State

With the gradual secularization of state authority going back to the European Middle Ages the idea of human rights began to raise. As long as authority was legitimized by God, it was bound and limited by the supernatural law determined by God. As the secularized ruler sets its own law it need to have new and special barriers, which prevent him to misuse his powers and to use its authority for its personal interests. The state with the constitutionally guaranteed separation of powers needs to care that its institutions also respect the pre-constitutional human rights, which are constituted within the ratio. Whoever is convinced that human rights precede state sovereignty and that those rights are with regard to any state sovereignty inalienable can recognize the legitimacy of the state constitution only in case the primary target is to limit state power. Constitutions thus, should in future not only enable, install and legitimate but also limit the powers of the state.

With the secularization of worldly secularized authority the ratio turns into the authority to determine the scale to evaluation of justice and ethics. The brain recognizes natural law. The theory of natural law turns into the fundament for the knowledge of human rights.

Homo sapiens

With the secularization finally also the system of values according to the religions dropped. In stead of religious values which of course have often been misused for the sake of their absolute authority by the monarchs secular values had to be taken into account. Those values needed to get credibility and legitimacy an thus be acceptable independently from any religious belief. For this case it is obvious that the system of values of the religions has been replaced by the rationally justified idea of human rights. Human rights thus turned into the secular value system which is the bases for any state constitution. Human rights became the surveyor's wooden rot of a rational value system. Now human rights serve as the secularized rationally justified universally for mankind applicable ratio which is built up on the universal ethic. Logically many states claim that human rights have universal validity as they are born out of the brain of the universal genus homo sapiens. Based on this justification they derive the right and claim of the international community based on these universally valid human rights to intervene economically or with military forces within the sovereign rights of the states which grossly mistreat human rights.

Right of Resistance as the Peoples Right

A religion independent from the secularized ethic turns into a universal ethic applicable generally for all peoples. The law rooted in the natural law is inalienable and irrevocable. The original equality before God turns into the equality before the law. Out of the pre-state natural law humans become creators of the state. In short: The right to resistance becomes part of peoples sovereignty.

Secularization of Western State Ideas

Opponents of the secularized natural law which is recognized by ratio raise however a legitimate doubt pointing at the fact that the idea of human rights is of western origin. This origin has its roots in the western enlightement philosophy which itself goes back the individualistic Christian scholastic tradition. For this reason human rights can only – if at all – have a particular claim. For instance Chinese philosophy is grounded in the idea of harmony. Within such thinking individuality has much less importance than in the western philosophical tradition of Christianity, which is based on the ethic idea that the person is individually responsible before God for all his/her actions and decisions.

Human Rights and Minority Rights

Human rights should not only protect any individual they should also protect minorities. Only with the internationally condemnation of violations of human rights minorities discriminated by the tyranny of the majority can alarm the international community and internationalize their conflict with the majority. The historical experience reveals however that human rights are often only the pretext in oder to defend the interests of the minorities. As soon as minorities themselves are in power based on secession or granted autonomy they often do not care within their

territory on the new minorities and even less to protect human rights of all their subjects.

Undoubtedly, the need for a better protection of minorities did lead world-wide to a more general discourse on issues of human rights. Namely the western states with constitutions going back to the traditional constitutionalism of modernity claim that human rights enshrined with their constitutional documents must have universal validity and therefore have to be considered binding the whole world.

Asian Values?

States with Asian cultural tradition e.g. see their roots within the Confucianism of eastern Hinduism. The value system of these philosophies and religions focus much more on the collectivity and in particular on the family. Thus, there priorities differ substantially from the human rights catalogue of western countries. But also Islamic states and native peoples of North America and Australia refer to different values with regard to their culture and tradition (e.g. corporal punishment) and that those values somehow contradict to the classical western human rights catalogue.

Implementation of Human Rights with the Bretton Wood Insitutions

In the area of globalisation of the economy the enhancement of the idea of universal valid and binding human rights has been given a new focus and impulse by the World Bank and the IMF. These institutions require the states which depend on their credits to stick to their defined and determined principles of good governance. Part of this very vague notion of good governance are democratic legitimacy, accountability, transparency, decentralisation and in particular rule of law and human rights – as part of the Rule of Law principle. This close connection between the idea of human rights with the principle of the rule of law (*That men are governed by law not by men*) links the human rights principle e.g. with the principle of the separation of powers, the right do fair and due process, access to an independent and unbiased court, equality of arms of the parties and the precondition for a democratic control and legitimacy of the government. With this out of the idea that human beings need to be protected with regard to governments misusing their powers a new universal programme for governing people has been established which actually is used by the creditor countries in order to impose with the conditions of international banking credits the principles of good governance as a universal governance programme on the debtor countries. All countries depending on these credits will have to adapt their constitutional and governmental system to the universal standards of the international community. The main justification for these conditions are drawn from the conviction of many politicians that poverty is mainly a result of bad governance and that poverty can only be effectively overcome in countries with a system of good governance which is also attractive for foreign investors. However, one has also to be aware that many reasons for the governance problems of those countries are somehow inherited from colonial times.

Human Rights as Part of the Political Theory

The following questions have now to be answered:

1. To what extent are the actual human rights catalogues a result of the history of political ideas and tradition linked to Christianity and enlightement?
2. How die the institutional fundaments for the protection of human rights develop?
3. What is the content of the several different fundamental rights?
4. What is the significance of human rights with regard to the traditional state sovereignty?
5. What inner cohesion is to be found with regard to the human rights idea on one side and the different modern concepts of justice on the other side?

We consider human rights primarily to be supra-state rights which are to be developed out of the universally accepted ethical philosophy and which contain moral obligations with regard to the protection of humans and prevent any misuse of pressure or force in order to break the free will of a person. If in the following we use the notion fundamental rights we consider with this notion primarily the inner-state and constitutional design of human rights.

With regard to the recent developments one has seriously to ask the question whether the state of modernity designed as a ideal model of the English and French constitutionalism of the 17th and 18th century still has its reason with regard to the future of the globalised world. The human rights idea has concretely been born in the French and in the American revolution all somehow influenced by the former British glorious revolution. Human rights were the ferment for the creation of the nation state. Will human rights still have a decisive impact on the internationalisation of states? Are states which base their unity still somehow on nationalistic ideologies still states in the sense of modern constitutionalism? Facing globalised economy wouldn't be the only realistic concept the "World-State as the model to guide new political ideas which could replace today's nation state?

B. Development within States of the Western Constitutionalism

I. Development of the Legal Protection in England

Magna Charta

The most impressive and at the same time the most influential document with regard to the human rights development is undoubtedly the English Magna Charta of the year 1215. This Charter which is still valid in the UK has enshrined the principle of the liberty of the church but also the liberty of the free citizens: „It is accordingly our wish and command that the English Church shall be free, and that

men in our kingdom shall have and keep all these liberties, rights, and concessions, well and peaceably in their fullness and entirety for them and their heirs, of us and our heirs, in all things and all places for ever.“

With the Magna Charta the King confirmed within a document signed by the Crown the rights of the free men or citizens (the members of families, the slaves and all people without fortune were excluded). The Crown engaged itself to protect and even defend those freedoms. The Magna Charta did not only provide guarantees for substantial rights it mainly ruled also ton procedural right in particular the rights of the parties before the courts. The King did not only restrict himself to a ceremonial declaration to respect the liberties. He rather determined the institutions and the procedure which independent from the Crown had to decide on these rights. With this, those rights contained much more then a mere simple content of morality. In future the Crown could not without any justification disregard those right ore determine alone and without any council or court the content of those rights.

Rights were granted. At the same time it was decided who will have to protect them. Besides the English Magna Charta there were in the same period in different Kingdoms of Europe similar charters, which provided for rights of the free citizens. E.g. the golden Bull of Hungary of the year 1222 provided similar rights for the gentry and for the free men. In Sweden such rights were enshrined within the Codex of 1350. Also the Swiss declaration of independence of 1291 was part of such documents which enshrined the rights of the subjects with regard to their rulers. Contrary to most European charters of middle ages except the Swiss declaration of independence only the English Magna Charta could keep its validity and even develop its fundament with other charters and documents in the coming century. Indeed the Magna Charta has mainly influenced the court decisions in the coming century and has determined until today not only the jurisprudence but also political decisions until today. The Magna Charta is customary law and also of course part of the unwritten British constitution.

Petition of Rights

The next important step with regard to the protection of human rights was the Petition of Rights which has also been reclaimed from the crown in 1628. This new document has confirmed the principle that taxes can not be levied without approval of the parliament. (no taxation without representation). Besides this important decision the petition of rights did expressly guarantee the right of the subjects not to be put into prison without judgement of the court. Moreover the King had only exceptionally in case of war the power to refer to the emergency situation and thus claim absolute powers without parliament. Only twelve years later the long parliament started which abolished the Kingdom and removed the King from its power and executed Charles the first after having installed Oliver Cromwell as Lord protector.

Habeas Corpus

With the Habeas Corpus Act of 1679 the already since the Magna Charta enshrined right to be only imprisoned based on a decision of a judge solemnly attested. Ten years later the glorious revolution did confirm all these rights in the first Bill of Rights. The Habeas Corpus act did guarantee the right of the subjects to sue the servants of the crown before the court in case they violated their vested rights. The judges also have been nominated by the crown have been transferred in certain cases the power to decide in case of controversies between servants of the crown and subjects. When they determined that the servants of the crown acted beyond their legal powers (ultra vires) the court could protect individuals from illegitimate action of the state because it acted beyond its legally vested powers. The lord-chancellor was empowered to admit certain writs and with this to transfer to the courts the jurisdiction over the servants of the crown.

Habeas Corpus did develop within the common law system to the fundamental human right and it still is within the centre of the human rights concept within common law countries. It is interesting to note that contrary to this procedural right on the European continent a much more substantial right did develop as the core human right which is the right to human dignity. Of course one has to be aware that this right developed more than 100 years after the habeas corpus act has been enacted.

What ist he Content of the Fundamental Right of Habeas Corpus?

Habeas corpus gives every person, who has been deprived of its liberty because of imprisonment or for other reason such as delivery into a psychiatric clinic or imposing tutelage, the possibility to sue the responsible civil servant before the court for illegal deprivation of his/her liberty. The prisoners in custody for investigation the prisoners on the death row or the patient within a psychiatric clinic can with the writ of habeas corpus without special formalities require to be brought personally before an independent judge. In this case, the judge is required to assess whether the deprivation of liberty of the concerned person has been legal and is justified. While in early times the writ hat to be handed in at the Lord-Chancellors office who did decide on its own whim whether the court should be handed over the writ, today the writ of habeas corpus an independent writ to be decided directly by the court. It is a general right to sue the state based on a general human right which is now is withdrawn from the power of the Lord-Chancellor.

The judge deciding on the writ of Habeas Corpus has the power to order the civil servant, who has the defendant in custody e.g. the director of the prison to bring the prisoner to the court. In case the servant disobeys the order of the court, he will be guilty for contempt of court. Of course, the judge as well as the director of the prison are servants of the crown and committed to serve the same state. However, when the crown empowers the judge with specific competences he/she has the necessary jurisdiction to carry out the procedure provided by the writ of habeas corpus. This includes even specific order to the director of the prison. According to the habeas corpus procedure the defendant produces his proposals and justifications orally.

Indeed, the continental law ignored for long time totally the procedure and the rights granted with the habeas corpus. Even today, one has only the possibility to appeal against an administrative act, which in case of illegality will only be quashed by the instance of appeal but usually not amended. The possibility to sue the concerned civil servant before the court with the power of the court to issue direct orders for civil servants, is still excluded and in fact alien to the continental legal thinking.

In addition during the revolutionary 17th century some other important decisions of the courts have initiated a new consciousness of the law with substantial constitutional decisions which clearly proclaim that the law is superior to the crown which is also required to follow the obligations derived from the law.

Imposing Human Rights by the Courts

Human rights bind the might of the state and of its servants. However, when the courts are denied jurisdiction over the state institutions, human rights are finally worthless. The development within the Anglo-Saxon constitutional thinking, which occurred very early compared to the other European states reveals impressively that those, who were defending the rights of the subjects, had a clear insight into the wisdom that without a clear document which enshrines and confirms human rights on one side and a clear guideline for the jurisdiction of the courts, human rights are without real value.

The Revolutionary 17th Century

The 17th century of England was important for the democratic development of the state as well as for the secularisation of the legitimacy of the might of the state. Between the years 1640 to 1649 the English parliament has been installed itself as the *Long Parliament* and taken over the power of the government. In the end it removed King Charles I and condemned him to death for high treason. Oliver Cromwell then took over as Lord Protector the administration of the state. With these actions the subjects have the first time in the European history taken over the might of the state. It lasted an other 150 years when the revolution in France followed the model of the previous revolutionary parliament in England.

This revolution has been prepared by THOMAS HOBBES and his state philosophy developed within the Leviathan. He lived in London during the anarchic times of the Long Parliament. The attitude of peoples in this uncertain revolutionary times has certainly influenced his basic image of the human as a being prepared to fight with every one. Exposed in this society without law and order he became conscious of the fact that mankind can not survive when there is no clear order and when everyone depends only on his proper forces. Within the war of everyone against everyone nobody can finally survive. For this reason one has to assume that human beings are ready to transfer with the institution of a social contract all secular power to install and guarantee the order of the society to the state and thus to obey the order of the Leviathan. The state or the Leviathan has to ensure and impose law and order and to and the war of everyone against everyone.

In this English revolution the subjects for the first time did say “no” with regard to the state authority. They took their right to alter the state order and based on pre-state law to resist against the established state order. With this the political bases for the secular state legitimized by the peoples sovereignty was made.

Charles I. had good reasons to convene the parliament in 1640. He needed the approval of the representatives in order to levy new taxes necessary to fight the war against Scotland and to strengthen the Anglican Church against the Scottish Calvinistic Presbyterianism. The constitutional principle at the time already required that new taxes needed always the approval of the parliament: “no taxation without representation”.

When in addition during the long parliament a new rebellion broke out in Ireland, the leading members of the parliament feared that the army financed with their taxes fighting in Ireland could in the end be used against themselves. The real cause which led to the establishment of a secular state power was thus a conflict with other religions and cultures.

JOHN LOCKE

At the end of the 17th century the liberals Whigs mage a new revolution against the Stuart Kings which have been installed after the reign of Cromwell. They succeeded with the Glorious Revolution to enact in 1689 with the *Bill of Rights* a new document strengthening and even expanding the human rights. Besides the confirmation of the previous human rights guarantees the Bill of Rights expanded the right of elections and guaranteed the general right to free elections. This right should namely protect the members of the parliament against encroachments of the crown during elections. In principle the idea was to diminish the influence of the Crown for the elections of the Commons. A general and free right to vote however did only develop within the 19th century.

In addition, the Bill of rights expressly obliged the crown to obey the laws enacted by the parliament. If one keeps in mind that on the continent such obligations could be enforced much later and only against heavy resistance of the crown it is astonishing that it was possible to establish those rights in so early times.

The philosopher of the Lord Protector OLIVER CROMWELL was THOMAS HOBBES. But the philosopher of the Bill or Rights and of the Glorious Revolution was clearly JOHN LOCKE. His conviction that human rights are pre-state and pre-constitutional because they are inalienable and irrevocable and for this reason they also bind the state sovereign, this basic conviction is the fundament of the Bill of Rights.

Housefather –Liberalism

This development however, has to be assessed within the social context of that time. The bearer of rights, property and real estate were only the free men. Women, children and employees without property and fortune were almost lawless. Even the expression “free elections” should not be understood in the actual sense. The Bill of Rights served the parliament as an instrument for its fight against the crown. With the guarantee of free elections the parliament wanted to

secure that the King has no superiority with regard to the elections and that he should not misuse its influence. Therefore the Bill of Rights did not at all prevent the parties to misuse their position with regard to the voters. These “free” elections thus, were still not the expression of a real will of the people.

Development of the Legal Protection within the Common Law System

The development of the human rights idea as pre-state right goes parallel to the strengthening of the institutional and procedural protection of the fundamental rights of the subjects and their interest to have an effective tool which gives them the possibility to prevent misuse of state power by the servants of the crown. Who-ever wants to assert within the Common Law system its rights needs to have a writ at its disposal. Only with an available writ he/she can go to the court and claim the rights to be protected. The writ is the bases for the claim, the procedure and the jurisdiction of the court. Whenever a claim can not be embedded into a writ, there is no chance to have any court to go into the merit of the claim.

Contempt of Court

Within their jurisdiction courts however, dispose of far reaching powers. Thus they can give orders to the servants of the crown and impose those orders with the threat to be punished for contempt of court. Since the authority of the state is not represented as an abstract entity but by a concrete person in charge as servant of the crown, this person is also personally responsible to fulfil the orders of the court and finally to execute the final verdict.

Within the civil law system the courts have no power to enforce their orders or their judgement with regard to the administration. The accused body is the authority as an abstract entity which has no criminal responsibility. And even if there would be a civil servant he or she would be immune against a criminal punishment. Only if the immunity would be lifted the civil servant can be sued before a criminal court. This very different system is one of the main hidden differences between the Common Law and the Civil Law system. It enables common law courts to enforce human rights claims and to accommodate the private indidividuals much easier then the civil law system.

Public Law – Private Law

The English law has never made the doctrinal distinction between private law and public law. If writs against the administration were admitted, those courts provided for those writs had jurisdiction to decide on the case and to assess the legality of the action of the administration. If writs were admitted the question whether it was submitted by a private individual against the civil servant or vice-versa was not relevant at all.

Lord Chancellor

Traditional common law writs which were available against the servants of the crown however, were very rare and almost not available in the beginning of the common law development after the invasion of the Norman Kings. In order to

meet this important draw back and in particular in order to improve the legal protection of individuals against the servants of the crown the Lord Chancellor introduced in later periods additional special so called prerogative writs such as the writ of mandamus in order to empower the courts to order the servants some concrete actions or to prevent them from certain actions. The development of the legal protection against the might of the state was therefore within the power and the responsibility of the Lord Chancellor. Only the Lord Chancellor could introduce new writs and by this improve the legal protection of the subjects. If however an individual ad at its disposal a special writ it could impose its right before the court in an ordinary procedure. The civil servant representing the administration was the party defending the state on equal footing with equality of arms.

Ultra Vires

The court which assesses the legality of an action, measure or the failure of an action, or a decision has been usually guided by the following principles: As far as the civil servant are acting within the law they can not be sentenced by the court. They have acted within the law on behalf of the crown and everything is lawful. As far as their action however, is without legal ground or even against the clear law they can not any more refer to their position as servants of the crown. They act beyond there vested powers and thus ultra vires or beyond their competences. For this reason it is part of the jurisdiction of the court to review their actions as far as they are beyond the law. The crown and in particular its civil servants are submitted to the law as all other subjects. Nobody can refer to its position as servant of the crown, when it is not covered by the law the crown is also obliged to observe.

II. Development of the Legal Protection on the European Continent namely in France

The Monopoly of the Legislature as only Law-Making Institution according to the Continental European Legal System

Totally different has the rule of law idea developed on the European continent. The starting point is the French Revolution. According to article 3 of the Human Rights Declaration the bearer of the sovereignty is the nation. Besides the nation there is no state authority empowered to attract or to exercise competences. Only the Nation as the sovereign of the state has the legitimacy to exert authority within the state. Law and justice are only born within the nation.

New Law Brakes Old Law

Symbol and expression of the nation and its sovereignty is the national parliament the so called *Assemblée Nationale*. The parliament enacts the laws and produces by its legislation new law. The just state is the state in which laws are respected and implemented. The laws are the expression of justice (*état legal*). Only those

legal claims which can be deduced from a law which has been enacted by the national assembly are rights and part of the law and of justice. The law, which has namely been decided by court-precedents before the revolution, is extinguished. Old wisdom which has guided the courts in finding the good and just decision has lost its validity. From now on law is only what has been enacted, created or confirmed as a statute by the legislature that is the parliament. With this the revolution has detached the law from the legal tradition and from history. The revolution is the new revolutionary big-bang which is the only source for law and justice.

Stare decises within the Anglo-Saxon Jurisprudence

The fundamental and conceptional difference to the legal understanding of the Anglo-Saxon law is now fully appearing. Within the Common Law system the law has kept even today its diverse roots. It is the law grown by the jurisprudence of the old English courts during centuries. But it is also the law which the absolute sovereign the Westminster Parliament has produced. A break which would have been made in history by the cut of the French Revolution is unknown to the Anglo-Saxon law. The Common Law is a legal system which has been developed out of a diverse and various praxes of court decisions during centuries. In England each court has made its judgements based on the writs available and based on its precedents and thus has contributed with a new precedent for the legal development. The law to be respected and observed for each court were the precedents. Thus the law was handed over to the jurisdiction of the courts which did develop it according to their proper precedents and guiding principles.

Monopoly of Legislation

With the exclusive claim sovereignty the national assembly has put the law with the French Revolution only into the hands of the parliament as legislature. Thus the legislature became the monopoly to be the only legitimate law maker of the country. With this the law becomes part of a united, indivisible body emerged out of the sovereignty of the national assembly and always only to be led back to this unique national assembly. Court decisions lose their value, weight and importance for the development of the legal system; the case law of the courts is reduced to the simple “deduction” of the legislation enacted by the sovereign. Creative law-making is reduced to the discretionary power which the legislature left over within the frame of interpretation.

Impact on Human Rights

With the French Revolution and namely with Napoleon the French legal thinking has spread all over the continent. With this development the course of the development of the human rights on the continent has been set. Napoleon set the goal to change the feudal order of the society according to the liberal ideas of the French Revolution into a bourgeois society with equality for all citizens. He was of the opinion however, that this aim could only be achieved if he liberated the executive and the administration from the dependence of the courts. Administration and executive needed to have almost unlimited powers and competences in order to

achieve unimpeded all these goals. The conservative judges and the traditional courts blocked clearly this development; this was the conviction of Napoleon.

The Making of the New Public Law

How could the administration be liberated from these bonds? In order to "immunise" the administration from the jurisdiction of the traditional courts Napoleon decided to establish a independent and new so called "public law" applicable only for the administration. This public law should be excluded from the jurisdiction of the traditional courts in order to save the administration from any accountability to the courts. Thus, he created the *public law* only regulating legal relationships between the administration and the subjects. The traditional courts however, remained competent within their proper jurisdiction thus they still decided on relationship between private individuals. The public law thus has been withdrawn from their jurisdiction. With this it was not any more up to the traditional courts and judges to protect citizens against legal violations by the administration. The protection of human rights was withdrawn from traditional courts.

Conseil d'Etat as Administrative Court

In order to give the subjects still some possibilities to defend themselves against the misuse of state power by the administration Napoelon installe a so called council of the state (*Conseil d'Etat*). The Conseil d'Etat thus became the wailing wall of the nation. Among other namely legislative functions it was mandated to receive complains of the subjects against the administration and against the government. However, the council of the state had no final jurisdiction on these complains. He had only a consulting function. But even as an advisory body the council of the state could propose to the Government to change its decisions accordingly.

The council of the state however achieved during its period as mere advisory body high recognition because of its creative and guiding justifications of its advises. Consequently in the second half of the 19th century it did almost on its proper decision declare itself to a administrative court with proper jurisdiction (1874). Contrary to the theory that the legal development remains within the monopoly of the legislature the council of the state has developed basic principles for the administrative and public law which became part of the new theory of administrative law basically developed by precedents of the council of the state. This new system of administrative law became later influential not only for the public law of France but of almost all continental European legal systems which adopted the French concept of administrative law. Even today the most important principles of administrative law go back to the roots of the decisions of the French council of states in the 19th century.

German Theory of the so called treasura (Fiskus)

This however can be said only partially for the administrative law of Germany. Before administrative courts could protect individuals against the misuse of state powers the traditional private courts extended their jurisdiction on some relation-

ships between the prince and the private similar to the relationships between private persons and thus controlled by private law. In so far namely the prince and his servants committed damages controlled by private law to their subjects those damaged persons could require compensation within the private law and sue the servants or the prince at the traditional private law court according to the so called theory of the treasury (Fiskustheorie). However a real and comprehensive protection against legal violations by the administration with the general right to go to court has only been guaranteed by the basic German Law (Constitution) with its article 19 providing a constitutional right to access to justice also against the administration. Up to this time citizens were almost totally exposed to the authorities and remained without any effective protection by independent courts.

No independent Protection Against Human Rights Violations

For the protection of human rights on the European continent, however the fact remains decisive that contrary to Common Law for a long time no independent instance was available to assess complaints against the executive or the administration. The protection of human rights was under the direct or indirect influence of the authority which should be accountable for misuse of powers.

Later independent administrative courts have been installed. However, compared to the powers of the traditional private law courts the powers of the new administrative courts remained reduced. They were only competent to quash administrative acts. They had not power e.g. with contempt of court order servants special actions and to implement these orders with the threat of punishment. The system of the European Continent ignores the institution of contempt of court. Servants of the administration are only accountable to their bosses, which can use disciplinary measures in order to implement their orders. With regard to the independent judge however they enjoy principally immunity. Only the administration could levy this immunity.

Even the legal remedies available against the administration are limited for any person complaining for illegal activity of the administration. There is only one traditional remedy available which is the complaint against administrative acts. Even today there is almost no possibility to sue the administration before the court in order to require it to provide some measures or to become active with regard to certain aims to be achieved. In order to improve access to Justice the new Swiss law on administrative courts has no introduced the possibility to require from the administration a administrative decision on the question of its obligation to act.

Article 6 of the European Convention on Human Rights

On the European continent in 1950 access to the independent court and thus also the rule of have considerably been improved with article 6 of the European convention on the protection of human rights. Article 6 of the EHRC guarantees an independent an unbiased court for the final decision on the legality of limitations of so called civil rights. On the continent civil rights were long time understood as private rights. However the European Court of Justice has very quickly decided that civil rights are some how similar to the vested property rights and thus also to

be invoked in cases those property rights were at stake in cases of administrative decisions. This interpretation of Article 6 of the EHRC has had quite revolutionary impacts in countries like Switzerland which reduced the access to the court in most important issues of controversy with the administration. With this extensive interpretation article 6 EHRC became one of the core human rights applicable in all European States which ratified the convention.

III. Development of Human Rights in the USA

Mayflower

The development of the human rights idea within the US is of greatest interest. In fact it goes already back to the year 1620 when the first English settlers with the famous ship Mayflower berthed on the coast of today's Massachusetts. Those settlers elaborated and signed already on their trip to their new fate a document with the following content: „AND BY VIRTUE HEREOF DO ENACT, CONSTITUTE, AND FRAME, SUCH JUST AND EQUAL LAWS, ORDINANCES, ACTS, CONSTITUTIONS, AND OFFICERS, FROM TIME TO TIME, AS SHALL BE THOUGHT MOST MEET AND CONVENIENT FOR THE GENERAL GOOD OF THE COLONY; UNTO WHICH WE PROMISE ALL DUE SUBMISSION AND OBEDIENCE" (MAYFLOWER COMPACT, Agreement Between the Settlers of New Plymouth, 1620)

This "social contract" was some how similar to the idea of the secularized social contracts developed within the theories of HOBBES and LOCKE developed only later in this same century. Important however, is that those first settlers obliged themselves to enact laws and constitutions which should respect equal rights and that those laws should be adopted by a democratic procedure. With this obligation to equality and legality the settlers of the Mayflower did set the bases for the decisive development of the human rights idea within the USA. Consequently 150 years later a real catalogue of human rights has been established by the founding fathers of the first written Constitution of the American states as e.g. in Virginia.

First Contratictions with regard to the Multiculturality

The later development of human rights within the USA has always been and is still up today rather contradictory. It shows that the protection of human rights against misuse of state power is always on a quite shake ground even within a social order and culture which stresses so much individual rights. Even a country with a high constitutional culture is not safe from lynch-justice, ethnical cleansing of the native peoples, race discrimination, condemnation based on prejudices and even class-justice. For a long time the new settlers have mistreated the rights of the native peoples. Such discrimination has been justified by the most liberal first Chief Justice MARSHALL with the main argument for discrimination throughout all later times that native Americans are of course not member of the civilized nations but savages that is of less value than all other human beings. (cp. *Johnson and Graham's Lessee v. William Mc Intosh* US 1823 523 ff.).

Untermenschen / Sub-Man

Since MARSHALL discriminations, decimations, expulsion of other human beings have always been justified with the argument those humans are "only" underdeveloped human beings but not normal beings who would belong to the genus of the homo sapiens. They are less intelligent (Apartheid, Slaves), they belong to a minor race and have to be considered as sub-men (Untermenschen Holocaust) or they are human being which by nature are specially dangerous such as terrorists, communists, Islamists etc.. In fact the basic principle of human rights builds up on the equality of the homo sapiens which independent from gender, race, culture religion and language is able as a being with a brain to assess its actions according to its values and thus is able to act accordingly.

Declaration of Independence: A Right to Resistance

With the American Declaration of Independence the idea of human rights as reached a new and substantial level of the legal development of human rights. After it became clear that the American Colonies of the UK wanted to secede unilaterally from their colonial state the political leaders asked THOMAS JEFFERSON to propose a draft for the declaration of independence. In order to justify this unilateral secession from the colonial monarchy the Founding Fathers needed to justify this step towards the monarchical environment of Europe. JEFFERSON had to counter mainly two objections.

First he had to explain that the peoples and the human beings originally are vested with the inalienable right to resistance. This right empowers the peoples to decide their own system of government and to separate from a tyrannical government based on their right to self-determination. In order to prove that in the concrete case the American settlers would have the right to resistance with regard to the colonial power of the United Kingdom he needed to justify on a second level of argumentation that the inalienable rights have been violated by the colonial power and therefore the peoples of the confederate states had the right unilaterally to secede and to establish their own system of government.

Inalienable Rights

Without recognition of inalienable rights which belong to all human beings equally the American Declaration of Independence couldn't be written and of course not proclaimed. That humans have pre-state rights and that the state has the only mandate to protect these rights this was the philosophical bases of the declaration of independence. When those rights are violated humans have their original vested right to resistance against the maltreating state power. This right does also include the right to establish a new states which on its part is mandated to respect and protect inalienable rights.

Rights of the Slaves

Originally the draft of JEFFERSON included also the slaves as bearer of inalienable human rights. JEFFERSON however, was required to delete this mention from the previous draft. Apparently at this time nobody was prepared to draw the conse-

quences of a universal for everybody including the slaves applicable human right. With this double standard however the contradictions of the American human rights policy continued. And of course history has learned us that this severe draw back of the declaration of independence had its consequences 50 years later in the terrible civil war.

Constitutional Jurisdiction of the Supreme Court

The next impressive and at that time certainly exceptional but logical step was the famous sentence *Marbury v. Madison* of the Supreme Court under Chief Justice MARSHALL. In this case the Supreme Court did not apply a statute enacted by the Congress because it considered it to be unconstitutional. With this decision the American constitution did set the basic corner-stone in 1803 for the power of the court to control even legislation with regard to the conformity with the constitution. The totally new insight however has developed much later. In the end of the 19th century Norway was the first state to provide a certain competence of the court to review the constitution. Later it was the Austrian constitution drafted by the famous scholar Kelsen which provided the abstract constitutional review of legislation. This model has then been taken over by the influential Basic Law of Germany after the second world war. One should of course not forget that at least with regard to the legislation of the federal units the Swiss constitution already provided a constitutional review of the federal supreme court in 1848 and in particular in 1874. However a constitutional review of federal legislation has up to now always been rejected in Switzerland.

The legal principles guiding Justice MARSHALL with this decision was the historical general belief within the Common Law tradition with regard to the basic rule of law "*that men should be governed by law and not by men*". With this principle as well the legislature as also the constitution maker are submitted to the nature of men and to all universal rights to be deduced by the ratio from the nature of men. The guardian of these rights however is the court. This convincing and marking justification of JOHN MARSHALL should however deceive that underlying to this decision were besides the legal arguments also some clear political interests. With the new President namely the party of MARSHALL has lost the elections. With the introduction of the constitutional review the court could at least keep some kind of control over the new political majority in the legislature and in the presidency. The fact however that the argument of the court and with it also the precedent of the case MARBURY v. MADISON has never been successfully overruled but in contrary became the leading case for the later much more important constitutional review of legislation within the US legal system. This show Marshall has succeeded to establish with the case and with its argument a new culture of basic human rights protection not only against the executive but also against the tyranny of the majoritarian legislature.

Apartheid until Warren Court

Even the Supreme Court cannot fully ignore the social and political environment. It has to take to a certain degree also major political interests into account. Being

part of this social environment the Brethren can only partially be guided by only rational arguments depending on a geographically and historically universal justice. This of course is one of the reasons why the Supreme Court has followed the leading case of PLESSY V. FERGUSON in 1892 for several decades and thus approved the social discrimination of races with the famous principle as long as the races are treated equally among the selves the formula separate but equal is not violated and all discrimination of the entire race as such is not violating the equal protection clause.

It was only in 1954 that the Afro-American minority succeeded in BROWN V. BOARD of Eduction to convince the court that separated schools between coloured people and white people are not at all in conformity with the equal protection clause. De facto they discriminate the coloured children because they feel discriminated. For this reason the famous WARREN-Court under chief justice WARREN decided that this apartheid of the society legally supported heavily violates the equal protection clause because the apartheid as such deeply humiliates the discriminated minority. Children of minorities will be deeply disadvantaged with regard to their chances in an open market society. It is for this reason that the school system has to care for equal opportunities for all children independent of their race. These goals can only be achieved, if white and coloured children are educated together in common schools. With this decision, a new political area to abolish racial segregation has started in the US. One should of course not oversee that this development has also triggered heavy social unrest in many American cities. Namely the underprivileged members of the white society did fight for their lost social privileges.

A Specialty of the Common Law

With regard to this deep social conflict, one can however also observe an important strength of the system of Common Law. Already the claim to the court of the parties in *Brown v. Board of Education* would not have been possible according to the continental European administrative law system. Target of the claim was not a administrative act or a decision of the administration which would have been annulled. The plaintiffs required rather from the court to force the administration of the school to admit coloured children to the schools restricted to white children. This writ of injunction is not provided in the European continental legal system. A European court would not have at all the power to force the administration to provide specific measures or to abstain from a certain action. Moreover it would not even have the power to enforce the decision one it would have been made.

The Revolution of the WARREN Decision in Brown v. Board of Education

After the decision *Brown v. Board of Education* the Supreme Court has made some other most important judgements to strengthen and also enhance legally the discrimination and disadvantage of the Afro-American society. It has abolished private race discriminations for specific restaurants and parks always with the argument the state should not be misused to enforce with its police power discriminatory measures provided by private people such as park or restaurant owners.

(*State Action*). The state should not become the assistant for social discrimination was always the decisive argument. With this the Judiciary was able to contribute to a large extent to improve the social discrimination, a fundamental problem within a multicultural society.

Affirmative Action

With regard to the de facto social discrimination even more important have been decisions of the Court to enable *affirmative action* within legislation or administrative decisions. According to this praxis legal discrimination of the majority of the population e.g. quotas in favour of minorities in order to compensate their disadvantages are legally accepted and not rejected for reasons of unequal treatment of the white people. If one accepts that minorities are disadvantaged with regard to their opportunities within the society it is indispensable that state authorities provide for measures to enhance and improve the chances of the any way discriminated minority. Some bonus-systems for the disadvantaged are acceptable to a certain degree. Today the Supreme Court has limited possibilities of affirmative action and stresses again the principle of colour-blindness. I is doubtful that it would e.g. admit the general affirmative action policy adopted in South Africa against the white population in order to compensate the discriminated black society during the decades of discriminating apartheid policy.

Rights of the Accused (Miranda-Rule)

The American Supreme Court decisions are in addition also most important with regard to other Human Rights issues. On the European Continent, the law on criminal procedure has always been considered as a legal norm, which has to serve the substantial criminal law. On the other hand the Common Law with its principles of natural justice or due process has since the time of the Magna Charta considered all the issues of due process as central if not even more important with regard to the respect of human rights than the substantial criminal law. Thus, the American Constitution and later the Supreme Court have substantially strengthened the procedural rights and the impact of the habeas corpus. Priority in this respect has been given to the protection of the defendant in a criminal procedure. According to the old tradition the accused of a crime can never be asked for self-incrimination (Vth Amendment) or to be a witness in the procedure deciding on the facts against his or her crime. In one of the older leading cases *Miranda v. the State of Arizona 1966* the Court decided that the accused has the constitutional right to remain silent on any issue with regard to the crime he or she might become accused. This right has to be respected from the first minute of his or her arrest. Moreover, from the beginning of questioning the police, prosecutor or any other authority questioning has to inform the defendant of his or her constitutional right.(Miranda Ruling)

The Importance of the Jurors

The strong connection between the idea of human rights and the criminal procedure has also to be seen under the point of view of the special procedural rules in

the Anglo-Saxon system. Contrary to the European process which transfers to the state prosecutor the duty to defend at the same time public interests of the state as well as also those of the defendant, the Anglo-Saxon procedure provides for a clear procedure under the control of the parties that is the defendant and the plaintiff. It is the mandate of the parties in the process to prove to the jury the guilt or the innocence of the defendant. The members of the jury are chosen partially in accordance to the parties among a randomly chosen group of common people. The jurors are considered to be "blind" with regard to the facts of the case. They are expected to know only facts which have been established and proved during the procedure. Both parties dispose freely on the truth of the process. This leads to the power of the prosecutor to conclude a settlement with the defendant in which the prosecutor promises to accuse the defendant only for some limited crimes if he would be prepared to witness in other cases as crown witness (Plea Bargaining). On the other hand this power gives him or her also the possibility to threaten the defendant with a difficult and costly procedure in which he or she risks to loose. With such threat he can often get self-incriminating statements on facts which may not be true at all.

Representatives of the People

As the jurors are composed of randomly chosen citizens they somehow represent as a coincidental selection of different levels of the society the people. In the democratic elections it is easily possible to manipulate voters with promises, demagogic assertions or false accusations. Such manipulations with regard to the jurors are almost totally excluded because the group of peoples being part of possible jurors has bee chosen by lot and the choice of those acting in the process is jealously controlled by both parties. The precondition for this equality and openness of the process depends of course on good lawyers. Only defendants which can afford a good lawyer has really an open chance to win the case against the prosecutor.

This procedure before the jury composed of common peoples randomly chosen is considered in the Anglo-Saxon perception as the main pillar of the democratic tradition. For this reason one considers according to the Anglo-Saxon view the right to a process before the jury as a democratic right. This right to a trial by jury is explicitly guaranteed in VIIth amendment of the American constitution and Bill of Rights.

Democracy of Jurors versus Democracy of Voting

Impressive with regard to this context is to be seen when observing the relationship between the democracy of jurors and the voting democracy in the field of labour law in the 19th century. Congress democratically elected was under strong influence of economical interests and thus enacted labour law statutes which where very entrepreneur friendly. The courts depending on the jurors on the other side have often decided in favour of employees taking into account their often hopeless situation. Thus labour law courts did often decide against the bills or did interpret the bills with results the law-maker would never have expected. These two different positions of the two branches of government dependent on different democ-

ratic concepts led to a real social conflict. And, since the courts did of course have the competence to enforce their decisions with contempt of court even against governors of the states, even elected magistrates under the influence of economical interests did loose their cases before the jurors in the court.

Despite all improvements: The Protection of Human Rights is still unsatisfactory

Despite all these most encouraging developments we still can observe that historically as well as actually there are still with regard to the US some contradictions with regard to the human rights protection which are rarely understandable. On one side the courts did in a most impressive way strengthen the protection with regard to human rights against the misuse of state power. On the other side the United States still refuse the adoption of international human rights standards which today did almost become a common universal good of the international community. The most obvious contradiction still remains the application of the capital punishment in many states. Even the federal administration not only tolerates it in many cases it seems still to support the federal units to keep this system of punishment only justified by the idea of revenge. Revenge as aim of criminal punishment and not re-education is probably also the reason for the bad treatment of inmates in prisons. But also the refusal to provide habeas corpus to illegal immigrants, the discrimination of women as well as the refusal to accept the new international court of criminal justice or the rejection of the Geneva Convention for the prisoners in Guantanamo are other examples which point to those mentioned contradictions. Out of these reflections we can draw the following conclusions:

Human Rights are always in Danger

1. The development and the improvement of the protection of human rights never comes to a final end. Even if the human rights protection has reached the highest level heave draw backs can never be excluded.
2. Human rights should not only be a majour subject with regard to legal education. Human rights need to become embedded within the cultural heritage of the people and the nations. Specially within the USA the human rights discourse seems still to remain within the exclusive domain of legal education.
3. Human rights can not be isolated from the social and economical environment of a society.
4. The capital punishment within the USA has ist roots within a obsolete concept of criminal law. In earlier times the goal of the punishment was revenge and prevention. With regard to this aim, the capital punishment has lost its major justification.
5. Finally one has to consider that the obligation to respect the dignity of human beings is to be marked by the idea that human beings should have in any time of their age the possibility to change and to adapt to new convictions and new situations. When humans are executed, one takes them away any final chance to change their life and behaviour. In particular Gerade

from the point of view of the basic right of human dignity strongly supported within the European continental thinking the capital punishment undermines finally the fundament of the human rights idea. We can understand that because for the Anglo-Saxon thinking habeas corpus and natural justice or due process are in the focus of the human rights idea. If in the end a defendant has lost its case based on a fair trial he or she has had the human rights chance to defend his or her case. Thus the verdict should be accepted. However, all false judgements already known and the discrimination of poor defendants or of defendants belonging to a racial minority with bad and uninterested attorneys do not support the idea that all procedures end up finally in a just verdict.

6. Whoever finally departs - as many Americans do - from a Calvinistic approach to the law and the procedure that is that those who have success in this world including success in a case and economic success in order to afford a good lawyer for the defence will also have success in the other world, and that he/she has therefore to accept the result of processes which being part of a society with equal opportunities.
7. The human rights idea as basic protection against misuse of state power presupposes the secularization of the legitimacy of the state. It could finally only develop on the bases of a secular state legitimized by the social contract based on peoples sovereignty. This state is bound to the human rights and its power must be limited by human rights. Religions however prepare humans fort he other world. For this purpose the guardians of the religion were always permitted or even obliged to beat and punish peoples which did not fulfil their religious obligations. Those guardians and bearer of the religion in using state power are only accountable to their God and not to the people. They do not have any secular responsibility. The human rights idea however, departs basically from the idea that the bearer of state power must be finally accountable for its respect of inalienable rights to a secular instance which can only be an instance legitimized by the people.

Protection by the Judge is Utmost Important

Until today there is however no nation to be found which would be prepared by its great majority to respect unconditionally and integrally the fundamental rights also towards all human beings including foreigners and refugees. No nation would be prepared to renounce on short advantages (e.g. equal opportunities for foreigners and thus less chances for natives) for the sake of human rights. It is even more difficult to convince the population to accept some clear disadvantages (e.g. less feeling of security with regard to possible terrorists and therefore less rule of law in cases of supposed terrorists). All economically highly developed states, struggle with the problem of immigration of foreigners, with the tensions caused by multicultural societies and with the fear of new terrorist attacks. Most African and Asian states are still within a process of transition after colonisation (e.g. lack of legitimacy of state territory). Executive and parliament interested to be re-elected will rather not be prepared to fight for goals which are not supported by their vot-

ers. Who can win elections with human rights? For this reason one has always to count that human rights interests are often scarified to populist fears and emotions.

Finally human rights can only be implemented when judges dispose of the necessary constitutional competences and jurisdiction and when they are able based on their independence with regard to parliament and executive and to their professionalism to achieve the necessary recognition, trust and credibility. Based on such position they should be able to make judgements only committed to the rule of law and independent from any possible pressure of the society.

C. The Development of the Human Rights Idea within the Political Theory

The Idea of Equality

The idea of human rights has different roots. Human Rights as pre-state rights are rights which correspond to the nature of humans. They are according to the liberal constitutionalism pre-constitutional and pre-state. According to our view, human rights are also rights which need to be implemented against the authority of the state. States are obliged to respect human rights with their constitutions. When the rulers disregard human rights, when they misuse their power the individuals should have the right to resist against the state authority. In close connections to this right of resistance is the request already formulated by JOHN LOCKE that human rights are inalienable and irrevocable. Even some very few human beings can not renounce to their human rights. From the actual point of view one is astonished to discover that since the times of the Stoa philosophy of the old Greece and Rome centuries had to pass until the conviction that human beings are fundamentally equal could take place within the society. Moreover the equality of men and women and of different races did only become generally accepted as an undisputed principle long after the French revolution.

From the Claim to Justice to the Claim to the Right of Resistance

Within the European history of political ideas one can observe the following most important periods. Within the old Stoa the law maker was required to enact just laws. In middlge age Christianity the focus was on the view that humans are an image of God and that the individual is therefore are bearer of rights. It has thus the right to resist given by God against the tyrant. Within the philosophy of the Renaissance the reason of the individual gets into the centre of thinking. The individual can say “no” on the bases of his intellect. Based on its intellect the individual can rationally assert right and wrong and with this it can self determine the content of its right. The individual becomes sovereign.

I. From Stoa to Renaissance

The Idea of Justice

From the point of view of the history of political theory, the fundament of human rights has its roots within the concept of justice. The Greek an Roman philosophers of the Stoa-Philosophy did postulate that the rulers have to respect and comply with the principles of justice. Who rules just complies with the laws of nature. They ignored the difference between the laws of Nature, which can't be violated, and the laws regulating the behaviour of men. Justice for the philosophers of the Stoa was in harmony with the "legality" of the nature. The basic claim that men are fundamentally equal this idea as starting point was of course ignored within the environment, which considered slaves and the economy of slaves as uncontested normal objects owned by the housefather similar to animals without any individual rights. However already the Roman philosopher SENECA has developed some first ideas with regard to a principal equality of the human being as homo sapiens. He consequently requires that slaves have to be taken care humanely. However, until human beings were considered totally equal independent from race, gender, religion or language it lasted almost an other two thousand years.

Women are Inferior to Men

In a certain sense one can attest Christianity and the scholastic philosophy at least the claim to have based the anthropological fundament for the philosophical recognition of the principle equality of human beings. The Christian religion finds namely its roots on the basic conviction that humans are created as image of God. Thus, it is only logical that each human being must be given the claim of having its rights out of this perception of image of God. However even the scholastic philosophy was not consequent with regard to the principle of equality of gender. Famous in this context is the opinion of THOMAS AQUINAS that women are intellectually inferior to men and thus they can be treated differently because they are to considered as somehow unfinished men. As monstrous as such statement sounds today as great impact with heavy consequences it had at the later times and developments. Indeed, until our days one goes back to such philosophical background in order to justify serious discriminations of women as human beings which are to be considered as inferior to men as homo sapiens for physical, intellectual and even with regard to their character. Whenever discrimination of women or of races or of other communities based on their culture or ideology is to be justified this justification is always based on the assertion that those beings are essentially inferior to other human beings.

Humans as Images of God

The perception of the Christian scholastic philosophy of the human being as image of God however, had some additional and very substantial consequence with regard to the development of human rights. Those who can be the image of God need consequently to be given the capacity to make their proper decisions with re-

gard to their future. Images of God need to be responsible for their behaviour and activities as individual. They must in addition be bearer of rights and duties. With this the fundament for the further development of individual rights is laid. From now on human rights are not only to be understood ad obligations for the rulers to enact just laws. Each individual must now be considered as bearer of human rights which he or she can claim with regard to the ruler. Although the popes did later condemn the individualistic philosophy of liberalism the philosophical historical bases finds its fundament within the scholastic philosophy.

Rationality Determines Human Rights

Who puts questions on issues of human rights does not only have to do research with regard to the content of those rights and to the bearer of human rights. He/she needs in particular to answer the question *who* should determine the content of human rights. If one pretends to have the right to determine the content human rights with universal values, who are bearer of those rights and how those rights must be claimed before the court, he/she determines finally the proper fate of human rights. To a certain degree the scholastic philosophy of the middle ages has already answered this question with regard to the subject able to determine the content of human rights. Human rights are natural laws provided for humans by God. The homo sapiens however has also been given the capacity with its rationality to determine the content of those rights embedded within the nature of human beings. With this the scholastic has led the fundament for the triumphal march of rationality within renaissance and later in particular within the enlightement period of constitutional liberalism.

Loyalty of the Rulers towards their Vassals

The political ideas of middle ages have their bases not only within the Christian religion and within the Roman Law, they have also been inspired by the cultural values of the old Germanic tradition and culture. The idea of the obligation of the ruler to care for its vassals and on the other side the obligation of the vassals for loyalty towards their ruler goes indeed back to old Germanic thinking. This mutual obligations between ruler and ruled even includes the right to resistance in case the ruler has violated its obligation to protect its vassals or in case of misuse of his power.

II. Renaissance

Rationality as Instrument for Secularization

Two most important preconditions for the later development of the human rights idea did develop during the period of the renaissance: On one side the state continued its road towards secularization and on the other side the reason of the individual became also secularized. In middle ages politics had to serve the church. The pope had at its disposal the spiritual sword to decide on religion and it trans-

ferred to the emperor the temporal sword namely the right to rule over the subjects by the grace of god in order to provide for the temporal common good of its entrusted subjects. With this concept however, the separation between temporal political power and spiritual theological power was already prepared. Within the period of the renaissance, which somehow led into the reformation period, this separation of church and state between politics and religion has been implemented in a much more radical way. Political authority has been secularized. Religious authority had of course its undisputed legitimacy with the rule of God. In future political authority needed to be legitimized by the human beings subject of this authority. Now the bases for the later democratic revolution was settled.

Rulers which can not any more refer for their authority to the right transferred to them by God need to respect the law which correspond to human nature. They can not rule against the nature of men; the inalienable and irrevocable rights which belong to humans based on their nature cannot bee taken away by an authority legitimized by secular reason.

Universality

The European development of the idea of human rights is strongly linked to the Christian Jewish tradition. Without this tradition the human rights idea would probably not have been developed as it did. However if the idea of human rights is so strongly connected to the Christian religion how then can the claim for its universality be justified? Because as well the idea of the sovereignty of the rationality as the perception of political authority are of secular nature, but this concept has finally Christian tradition and Christian roots. An indeed one major objection against universality of the human rights idea is based on the fear that it might turn into a hidden instrument for modern colonizing of other cultures.

The Golden Rule of Ethics

On the other side, one however also observes that the ideas on the dignity of human beings, on the just political order and on misuse of powers of the rulers can be discovered in almost all different traditional cultures. The already mentioned golden rule *"what you do not want others to do to you, do not do to others"* is to be found in one or an other way in almost all cultures. It is this golden rule of ethics which should finally become the bases or the "bench-mark" for the content and justification of human rights. As far as human rights correspond to this golden rule or as far as they even can be deduced from this golden rule, such far they should legitimately claim universality.

Who is the Universalizer?

Decisive finally is not only to know how the content of human rights can be determined, decisive is also the answer to the question *who* can finally define human rights. One might not object to the universal validity of human rights. However, on the other hand the universalizer that is the mightiest state, which in the globalised world has alone the power to implement human rights and thus also to determine which state violates human rights, can not claim universal legitimacy.

III. The Area of the Liberal Constitutionalism

The Constitution Making Power (Branch)

Secular authority can only be legitimate is ruled based on the consensus of people which have to be ruled. Therefore it must be constituted by those who will be ruled. Political authority is the authority established, decided and finally also constituted by human beings. The idea that states are artificial construct established by reflection and choice, linked to a certain territory this idea emerged out of the area of the liberal constitutionalism. However, who wants to constitute authority out *of its proper law* who wants to be the *Big-Bang* of the law and of the state does not only need to set the fundament for later legitimacy of its authority he/she has also to decide whether its constitution making power is unlimited or whether it is bound to some basic rights which even limit the power of the constitution making power.

Nature of Human Beings

States and political authority of states can only be legitimized when human beings based on their nature pre-constitutionally depend by their nature on a artificial order beyond the natural order of the family. Two major different perception on the pre-constitutional nature of humans have first marked the English constitutionalism.

The Egocentric Human: Hobbes

THOMAS HOBBES was inspired by the believe that human beings are by their nature egocentric beings. If human beings are not integrated within a strict order they are doomed to disappear within anarchy and chaos. Human beings submit within their free will and in the interest for survival and for freedom to the authority of the Leviathan. They would simply not survive within the anarchy. The pre-state nature of human beings thus requires a form of authority which final goal is to guarantee freedom among the individuals. For this reason they have to accept the absolute order of the Leviathan. They don't have any more any choice then to submit to the order and authority and to accept any decision or measure as lawful and legitimate: "*Auctoritas not veritas facit legem*". This is the famous sentence of HOBBES which provides legitimacy for any decision of the Leviathan. The authority of the Leviathan does not principally exclude liberty. However, it remains within the responsibility of the Leviathan to provide so much freedom as the main goal of peace would permit. The main task of the constitution thus is to enable authority and legitimate power for the Leviathan. Finally it will be within the power of the constitution maker to decide how much freedom it will provide. Freedom is not pre-constitutional or pre-state but it is created by the state law.

Pre-State Rights with John Locke

A totally different view can be observed within the philosophy of JOHN LOCKE. He is of the opinion that human beings are bearer of inalienable pre-state and pre-

constitutional rights. Because in the state of nature the liberty as well as property worked out remains within the state of nature endangered. Pre-state thus is not the egocentric nature of human beings pre-state are rather their fundamental rights such as liberty and property. As a consequence the aim of the state order will have to be to protect these already existing pre-state rights such as liberty and property. This protection however is only possible when the state power is limited. The main goal of the constitution thus is to limit the power of the state. State power has to be limited and bound to the pre-state rights. The aim of the state has to be to protect those rights within the state order. Thus, decisive is not as - according to HOBBES - how one can protect one-self towards ones civil war. For LOCKE on the other side the question how one can protect one-self against the protector is the important issue.

Is the Law Created by the State or by the Law?

Is the goal of the state liberty or freedom? Has state power to be limited for the sake of the liberty of the individual? Is the fundament of the law embedded within the of pre-state nature of the human being? Are human rights only founded by the constitution or did they exist already before the state and the enactment of the constitution and therefore have mainly to be protected by these instruments? With his theory HOBBES did establish the fundament for the later positivistic concept of the state, which is also the only source of the entire law. State and sovereignty became the real big bang and thus the only bases for law and justice. For LOCKE on the other side the liberal law of nature of humans and their rationality are the bases for the liberal law of nature and of reason. Law which is based on the nature of human beings must be considered universal. With this philosophy he has already set the justification of the declaration of independence almost one hundred years later. The theory of the universally valid principle of rule of law and the development of constitutional review can also be traced back to his inspiration. „That men must be governed by law and not by men.“ This sentence could have been written by LOCKE.

Those following LOCKE will be committed to strengthen the protection of human rights by a constitutional court. Those following HOBBES will subordinate the protection of rights to the inner peace.

Liberty and Equality

Equality and liberty are basic for both founders of the new area of constitutionalism. Liberty in the end of the day is the goal of the state. It becomes the guiding principle of liberalism. Both are committed to defend universal liberty and as part of this liberty equality. Both values can only be guaranteed within a constituted state which is oriented according to values depending on the nature of human beings. Only with regard to the priority between liberty and/or freedom and with regard to the evaluation of the law and law of nature or law edited and set by state institutions they have different concepts. LOCKE defends liberty externally to the state, HOBBES liberty within the state order of peace.

Separation of State and Society

How can liberty be put into effect within the state? As already seen, with regard to LOCKE the state has now legitimacy to intervene within the liberty of the individual. As a consequence the must be a clear separation between the public and the private. State and society have to be separated from each other: The state is bound to the liberty of the society. HOBBES is of the opinion that liberty is only created by the state. Only within peace, liberty can exist and flourish.

While for LOCKE authority is legitimate, i fit is limted and if it respects human rights, for HOBBES authority is legitimate only based on its capacity to establish and keep peace.

Only the Ruled can Protect Human Rights

For ROUSSEAU this legitimacy of the authority is insufficient. For him the decisive question is not the "***How***" but the "***Who***". With regard to this question he sees to possible alternatives: Either the ruled are ruled by the rulers or the ruled rule over themselves. For the first time thus ROUSSEAU links human rights to democracy. He is not contented only to postulate liberty before, besides of even external to the state. ROUSSEAU claims rather Liberty *within* the state. This liberty can be put into effect if three conditions are fulfilled:

- The state must guarantee and protect equality of human beings.
- It must be ruled by the ruled. Only, when the ruled are able to guide the state they will finally find their freedom.
- It must aim at the achievement of the common good. The common good is not to be reduced to the local welfare. Public welfare according to Rousseau corresponds to the volonté générale to the general will; there is only one universal public welfare and only one universal justice.
- The simultaneous implementation of equality and liberty by direct democracy leads to the inner peace and is finally identical with the universal public welfare that ist he volonté générale.

IV. From Liberalism to the Social Democracy and to Communism

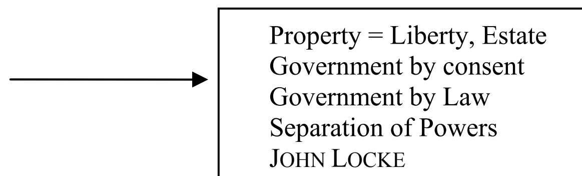
Visions of Liberalism

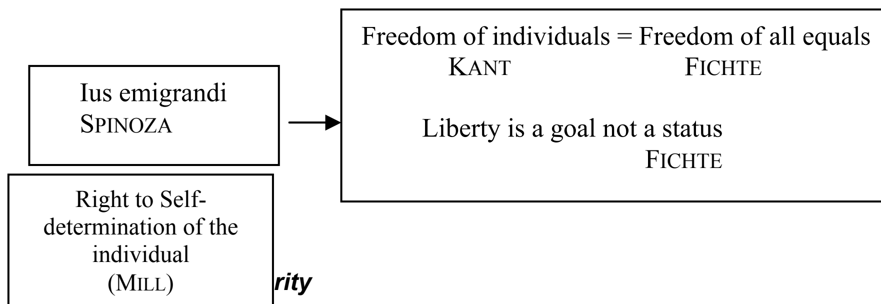
Liberalism puts the right to self-determination of each individual within the centre of justice (JOHN MILTON). The keywords of JOHN LOCKE were *Property, Life, Liberty and Estate.* The aim of authority was finally to achieve a *Government by consent*. For SPINOZA this vision is fulfilled with the realization of the principle no taxation without representation that is with the sovereignty of the parliament. *A Government by law* however, could only be established on the principle of separation of powers. For KANT the liberty of each individual as simultaneous the liberty of all equals and for JOHANN GOTTLIEB FICHTE (1762 – 1814) liberty was not a status but a goal.

Government by Law aber konnte sich nur auf der Grundlage der Gewaltenteilung entwickeln (J. LOCKE). Bei KANT war die Freiheit eines jeden gleichzeitig die Freiheit aller Gleichen und für JOHANN GOTTLIEB FICHTE (1762–1814) war Freiheit kein Zustand, sondern ein Ziel.

With regard to ROUSSEAU we the find the remarkable reflection:

> *"It is therefore one of the most important functions of government to prevent extreme inequality of fortunes; not by taking away wealth from its possessors, but by depriving all men of means to accumulate it; not by building hospitals for the poor, but by securing the citizens from becoming poor. J.J. ROUSSEAU, A Discourse on Politcal Economy"*





rity

From now on the discourse with regard to the philosophical-political dispute focuses on the following question: What should finally be the real goals of the political authority or of the state? Liberty, equality, inner peace and universal common welfare are of course all undisputed goals of the state.

Equality and Freedom

Disputed however are the priorities and in particular the content of equality. Within article one of the French Declaration of Human Rights of August 26 1789 it was still expressly mentioned:

> *"Article first.*
>
> *Men are born and remain free and equal in rights. Social distinctions may be based only on considerations of the common good. "*

Liberals and socialists did fight a common battle side by side. Only at the end of the 19th century they separated and followed different roads. The reason for this separation was the concept of freedom an equality according to Marx. He was of

the opinion that freedom and equality should be aims of politics, however he was also of the opinion that individuals within the actual society are not free but exploited. Humans who have been chased away out of the paradise is not a free individual but an exploited human being. Liberty thus is only possible if mankind would find back to the paradise in order to establish again the status of liberty. The goal of each political order therefore has to be to guide human beings to liberty and to emancipate the exploited individual. With this new perception the first big controversy between the traditional liberal concept on one side versus the emancipatory socialist view on the other side appears. Should the state recognize the status quo of liberty and only aim to strengthen the protection of liberty or should it have a emancipatory mandate in order to liberate men from exploitation and to create the conditions for better liberty?

Contrary to this Marxist perception, which in addition conceives only one party as legitimate to fulfil this emancipatory task within the state the social democratic parties accepted principally a pluralistic democracy. Based on this constitutional democratic state the social democrats aim to convince the majority of the people to transfer this emancipatory task to the state.

Minimal State

Reversed according to the neo-liberal view the political aim should be to guarantee or establish a minimal state with a minimal state authority. The only task of the state should be to provide for a fair competition with equal opportunities for every body. If the state steers the market with political means and if it intervenes within the competition with majorities the harmony of the invisible hand will be distorted. If the state is not restrictive and not contented only to guarantee equal opportunities without intervening within the result of the market politics will produce injustices and inequalities. The losers should not be allowed to enrich themselves by the performances of the winners. The only acceptable justice is the distribution of wealth as it results out of the fair market competition.

Status Activus?

The fundamental rights according to the strict liberal perception are only negative rights. They require the state to refrain from intervention and they protect against any state intervention. For this reason persons which are violated within these rights need always to have access to justice in order to defend their rights against illegal state intervention. Such institutional legal protection however is most difficult to realize when the court is not only asked to protect the individual against state intervention but to promote and support discriminated communities of persons. Mainly for this reason this status activus of fundamental rights is principally rejected by the classical liberal school of thinking.

Separation of Powers

As negative rights liberties according to the perception of JOHN LOCKE should namely also limit state power. The real goal of the rule of law and of the government by law and not by men can only be achieved if the state power is limited.

The most important constitutional principle which limits state power is however, the separation of powers. The separation of powers and with it namely the checks and balances of the branches of government are indispensable conditions for the effective implementation of the human rights within the state.

Equal Opportunities as Compromise

Between those two political controversies there have however also developed compromises which did partially also expand the content of human rights quite substantially. Thus, one had to improve equal opportunities of this part of the population which is discriminated and can not participate within the competition with equal opportunities for reasons it can not be blamed for. This equalization could be improved with social rights such as the right to education, to employment to housing to healthy environment and to health. Those social rights however, can principally not be implemented only by court decisions. They need to be concretised by the legislature. Moreover state politics need also to provide for good economic pre-conditions in order to enable the population to make use of the liberties and to participate with equal opportunities within the competition.

Social Rights

Contrary to the classical freedoms which serve as negative rights to prevent the state from intervention the social rights mandate politics to achieve certain goals which need usually the intervention of the legislature and can only rarely be implemented directly by the courts unlike the traditional negative rights. Thus, social rights usually mandate the legislature to enact laws and not the court to implement directly the right.

Affirmative Action

Within the Anglo-Saxon states the institution of the so called *affirmative action* has developed. Based on this principle individuals of discriminated communities, races of gender, which have been disadvantaged and humiliated during long periods, can be supported by state positive measures in order to eliminate the discrimination and enable them catch up for the future with the privileged society. Such positive discriminations of minorities may have on the other side discriminatory consequences of the majority e.g. with regard to their opportunities in education or to find jobs. As far as such positive discriminations are aimed at to restore justice for long time suffered injustices the majority has to accept the discriminatory consequences on its part. The principle of affirmative action allows for this reason some discrimination of the majority.

State Action and Effect of Fundamental Rights on Third Parties (Drittwirkung)

Besides the legislature, also constitutional courts have tried to eliminate inconvenient disadvantages even though they were caused by private persons using their social importance and power and misusing their liberty with regard to other discriminated private individuals because of their weak and underprivileged social

status. The American Supreme court has done this based on the state-action doctrine.

According to this principle the state can not be used by private persons in order to protect and implement their private claims when private persons ask the state to use its state power such as police forces in order to implement e.g. racial discrimination and to remove e.g. Afro-Americans from restaurants only reserved to people of white race.

In states with civil law systems the discourse is less on the question of state intervention but much more on a dogmatic doctrinal debate on the issue of the effect of fundamental rights. According to some courts and scholars fundamental rights should not only effect state administration but also private persons if those persons are in a socially powerful position and misuse this position with discriminatory effect. (Drittwirkung). The question thus is: Do individual liberties also have a horizontal effect towards other private persons?

HABERMAS: The Ethic of Communication and of the Discourse

A basically new theory which somehow goes back as well to liberalism as socialism has been developed by JÜRGEN HABERMAS (1929). For HABERMAS the fundament for the legitimacy of the state and the political authority is not the social contract. The basic legitimacy of state power is rather the continuous discourse of citizens. Based on the mutual dialogue common values emerge which become the fundament of the authority of the law. Peoples sovereignty thus turns into a real pre-state human right which enables the permanent discourse and thus the legitimacy of state authority. Citizens become the participants of the discourse in which they create law and follow the law. With this theory HABERMAS overcome the difficult concept so important for liberalism such as the separation between the state as protector of liberty and the society as the bases for individual free development. The state is replaced with the public of the political discourse. The public of course, has to respect privacy of the individual.

V. Communitarianism

Values of the Community

The new Communitarianism has tried to dissolve from traditional liberalism. It refers to the values of the community. The common welfare as value is opposed to the individual value and to the individual capitalism. Based on this new human rights emerge which are rooted within the principle of self-determination of the peoples and within collective rights of minorities and in general within the protection of minorities. Liberties are interpreted from the point of view of the community. Harmony of th community and not individual liberty becomes the main goal of the state. The controversy on the so called Asian values has also to be seen within this context.

Collective Rights

As a consequence of the idea of the social contract which did legitimate state authority all those cultural, linguistic and religious minorities, which will never be able to achieve a majority position within their state that with the introduction of collective minority rights they are granted the right to autonomy, protection of promotion of their identity. Those minority- and autonomy rights have up to now particularly granted within constitutions of Latin-American states specially with regard to their native population. On the European continent the Framework Convention for the Protection of National Minorities from February first 1995 provides for some collective rights of national minorities. Article 15 e.g. provides for the possibilities of national minorities to participate in public affairs. For the first time minorities have got some legal guarantees on the international level with some basic constitutional provision. Although the Framework convention does not provide any individual legal guarantee as the Human Rights Convention it is an important step forward with regard to the acceptance of collective rights of minorities.

Human Rights within a Globalised Market

The new development of globalisation has however, altered the situation totally. On one side human rights have been recognized a universal validity, on the other hand the states have lost important free space for their sovereignty. Thus, they have only limited possibilities to implement equality of chances within the area of education and social security. The sovereignty of the global market has limited substantially the sovereignty of the nation-state. State can finally only legitimize their authority with regard to their citizens by respecting the universality of human rights. They have to create the best possible conditions in order to enable their citizens to participate with best opportunities and to meet the difficult challenges of the global competition.

Legitimacy of the Universalizer?

Nation states legitimize by respecting universal human rights and by maintaining their capacity to participate successfully within the competitive global market. The main question however is: How does the sovereignty of the global market legitimize and how do thos forces legitimize which control the global market and finally also determine the content of the universal human rights? Where do the superpowers find their legitimacy when they have to decide that it is legitimate fighting terrorism to violate human rights?

Harmony as Human Right

Despite those developments we can not any more steel ourselves blue-eyed out of this reality that the world is finally split in two different camps: The socialist camp lead by China and the liberal camp leas by the superpower USA. China tries contrary to the previous Sowjet-Union to liberalise its economy it resist however determined against a comprehensive guarantee of liberal human rights in the western sense. The main argument, which is always brought on the table by China is based

on the idea of social equality and solidarity. A country with 1.4 billion people does have first to seek harmony. This harmony is only to be achieved by economical justice and strict implementation and execution of the laws. The right to social security and existence, it is objected, needs to have priority with regard to other liberties. A state which pays the prize of social poverty for establishing liberal freedoms would violate according to the Chinese opinion human rights much more drastically than a state which for the sake of social justice and social peace limits individual liberties.

D. The Types of Fundamental and Human Rights

I. Introduction

Criteria's of Distinction

Human rights can be assessed from three different points of view: In order to be at all effective and efficient they need efficient procedures for the effective implementation. Human rights however have also a special content, and according to the different content a different history and different consequences. When human rights build up on the nature of the human as homo sapiens they can finally not be reduced only as negative rights defending the integrity of human beings against possible state intervention. Who is capable to make an assessment on political decisions needs also to have the possibility to participate within the decision making political process and thus participate on the exercise of the authority of the state. Thus, human rights are also *political rights*, which guarantee the participation of citizens within their polity. Taking into account these different criteria's and types of human rights we shall first deal with the procedural human rights, then analyze the content of human rights as negative rights and then look into the political rights.

Protection against Predominance

The institutional development of human rights reveals that the legal anchorage of fundamental rights emerged out of a inner-state power struggle among the different branches of government and between the citizens and their executive authority. First the controversy and power struggle aimed at limiting the power of the monarch which has been succeeded today by the heard of the state and the executive branch. In preparing and expanding democratic forms of government recently also minorities try to expand the fundamental rights in order to protect minorities against the tyranny of the democratic majority.

Protection of Liberty – Guaranty for Emancipation

Today we can find in almost all democratic constitutions more or less comprehensive catalogues providing guarantees for fundamental rights and liberties. Differences can mainly be found with regard to content, implementation and interpretation of fundamental rights. While for some states the fundamental and human rights are considered to be the bases of the instrument for the struggle to establish a specific system such as e.g. the dictatorship of the proletariat, other states aim at limiting the power of with the guarantee of fundamental rights authorities. Some proclaim and celebrate fundamental and human rights in order to liberate humans with a collectivist order which finally would destroy individual liberty. For others fundamental rights are part of a system of rule of law which promotes the personal unfolding of the individual within the society. Some think that the concrete guarantee of liberties would lead to anarchy and destroy national aims because man or woman always tries to misuse his/her liberties in order to exploit the disadvantaged. For others collectivistic systems are per se enemies of fundamental rights because they reject any liberty to the individual person.

Constituted Rights?

While some states are contented to formulate fundamental rights as goals of their constitution, other renounce explicitly to enumerate those rights within the constitution. Instead they establish institutional guarantees to provide for an effective protection within their state system. For some fundamental rights are wonderful promises of a future paradise, others consider them as benchmarks of actual realities.

Undoubtedly fundamental and human rights did become the starting point for inner-state and international controversies on the system of government and on the issue of good governance. In the last century the organisation of state power and during the 19th century the issue of sovereignty was in the centre of state politics and political struggles. Today one can certainly consider the fundamental and human rights to be in the focus of any important political debate. States are not any more evaluated mainly with regard to the content and implementation of democracy. They are much more assessed according to their attitude towards a effective and efficient protection of human and fundamental rights.

In the following sections we shall des now mainly with the content and the importance of the different fundamental rights. First however, we have to analyze the different interpretation of fundamental rights.

Fundamental Rights Perception of the Homo Sapiens and Perception of the State

Who considers human beings as beings with rationality as did the enlightement philosophy would grant to such being the legitimate claim to self-determination and to development according to its proper rational planning of the future. The human being as the only creature which with its intellect can discern lawfulness from unlawfulness and which can decide what it want to do is its proper cause of its actions. (e.g. according to KANT). Such creature needs also to dispose of the

liberty to plan its proper life and to realize its plan into reality accordingly. Such view of the human being of the enlightement area did of course lead to a comprehensive justification of the right to liberty which is in close connection to the development of each individual person according to the general respect of human dignity. Priority within the European enlightement philosophy of liberty has therefore the development of the individual personality within the sense of human dignity.

China

Totally different ideas with regard to the development of the individual personality can be observed within the far east philosophies. The society reflects the hierarchical order within which every one has to integrate. Only within such integration one can find personal happiness. Prince Ging from Tsi asked master Kung on the Government. Master Kung answered: “The prince shall be prince; the servant shall be servant; the father shall be father; the son shall be son” The prince answered “Indeed so! If the prince is not prince and the servant not servant, the father not father and the son not son: Although I have my income, can I then still enjoy it?” (Confucius p. 125)

Such reflections seem to be quite strange within achievement meritocracy guided by cost benefits controlled by the principle of equal opportunities. Obviously within a meritocracy it must be possible to disregard given hierarchies and to climb from lower level to higher levels of the society. According to the far-east perception such aims would destroy the inner peace and calmness.

India

Even more absolute with this regard is the old Indian philosophy. According to this Indian thinking the person is to be considered as the mask from which human beings have to detach theme selves. Those who want to develop or unfold will rather have to find their way to the inner self. This is only possible for persons which can detach from their inner needs and interests. One has to live an ascetic life and thus to become independent from its person that is its own mask. The real inner self can only be found if one is able to detach from the external world and to internalize totally.

Christianity

These short highlights show how the understanding of freedom and liberty is influenced and depends from the philosophical and cultural background. The European influenced by the occidental Christian tradition wants to achieve its goal according to the order: “Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish in the sea and the birds in the sky and over every living creature that moves on the ground." (Genesis 1:22 TNIV Chapter) People educated according to this culture may have different views on self-determination, liberty and freedom than people from China, Africa, Japan or Latin-America.

State-Reason and Individual Rights

But even within those cultures and nations one can still sense substantial diversities. The Swiss understanding of freedom is traditionally strongly linked with its fate to the co-operative society of the municipality. Such concept leads to a understanding of liberty which is much more connected to the common democratic decision of the community than the individualistic Anglo-Saxon perception of liberty. This has impacts up to concrete single issues as the following example shows. For the sake of liberty of press within the English tradition one can even question the state or the government even in times utmost danger. Thus in the UK censorship of the press was considered illegal even in times of bombardment during the Second World War. Within Germany, Switzerland or France on the other side one would refer much earlier to the reason to the state and the public interest in order to limit individual liberty.

Core-Content

All these reflections cannot mean that fundamental rights are open for any possible relativity. There exists a core of elementary humanity which – independent from the philosophical, cultural, historical, religious and economical background – must have universal validity. To maintain human dignity and to respect principal equality of all human beings should be accepted as values, which would have to be implemented universally all over the world. The most difficult question however remains: What is the content of this core-element and who can define it?

II. Procedural Rights

Independent and Unbiased Courts

Procedural rights belong to the human rights of the so called *first generation*. They include fairness for all parties and a procedure before a independent and unbiased court. The court does not only need to proclaim a just verdict. The verdict must in particular be credible. *Justice must not only be done but also be seen to be done!* This includes first the right to have access to an independent court for all persons who believe to have been violated with regard to their fundamental rights. Then it must be secured that in all cases which lead to restrictions of human rights only the court decides or at least that the final decision of such restriction belongs to an independent court. The court needs to be politically and with regard to the parties independent and without any prejudice (unbiased). Independent is the court, when judges do not depend on political guidelines from other branches of government, when they cannot be removed from office because of any of their decisions, and in particular if they are not dependent from a political party. A political body may be competent to elect the members of the court such as the parliament in Switzerland or the President in the US with the approval of the Senate. However, if they are once elected the members of the court should neither be any more dependent from the legislature or from the executive. Within the US the members of the Supreme

Court are elected for life time. In addition the constitution guarantees that their salary should not be diminished during their stay of office.

Independence also means powerful. A court is only independent when it has full jurisdiction of the merits of the case with regard to the facts and to the legal issues. In addition it must be composed of educated judges with professional competences. In some countries judges may also be lay-judges elected by the people. But in this case they need assistance by educated professional clerks. Based on their character and their common sense they may very well be independent at least within courts on lower levels. The courts must have full control of the case and of the some times heavy and complex procedure. They must be capable to lead the procedure in order to achieve independence from the parties trying to fully exploit the procedural rights as plaintiffs or as defendants. One should further not oversee that the state has the obligation to compensate the judges with a salary which gives them enough social independence and dos not open their interest for corruption. Indeed corruption must be wiped out at the roots!

Audiatur et altera pars

In order to assess the relevant legal issues the court needs to decide on the facts, and to draw the correct legal conclusions out of those facts. The old principle *audiatur et altera pars* guarantees that parties must have all procedural rights in order to produce their view of the facts and to question the view of the opposite party. Equality of arms within the judicial procedure is only possible if the parties are also able to produce evidences and are in the position to state their position to those evidences. Equality of arms does not only guarantee fairness and credibility it is also conditional for an optimal fact finding. Experience teaches us that all human beings are often quickly contented with the produced facts based on their prejudices or to their idleness. But those facts may be far away from the truth. Only when all parties are able to participate on the procedure to find the facts on equal footing there is a certain chance that the facts determined by the court is not to far from what really has happened that is from the truth.

Competence to Determine the Facts

Decisive in addition is the question who has the power and the responsibility to determine the facts. In the administrative procedure according to the Swiss federal procedural law e.g. the administration has the power and the responsibility to determine the facts within an inquisitory procedure. According to this procedure there is no rule distributing the burden of proof as e.g. within the procedure for decisions in civil law cases. Accordingly the administration decides which evidences are sufficient in order to determine the truth. It is thus obvious that in such procedure the concerned parties have only limited possibilities to influence the fact finding by the administrative authority. Against the politically dependent administration or against prejudices for what ever reason of the civil servants parties are almost powerless. Even extended procedural rights can not restore equality of arms within the procedure. For this reason with regard to procedures, in which could the rights of the parties can easily be cut off, only a independent court can

finally decide as final instance. The administration may well decide just but it is never seen to be just.

With regard to the criminal procedure on the European continent the facts need also to be determined by the judge and not by a jury. However this procedure at least provides for a clear rule with regard to the burden of proof in favour of the defendant. If the plaintiff can not produce credible evidences the defendant must be acquitted for lack of evidences.

Relevant Facts and the Law

If the court can achieve a credible and independent fact finding it has to draw the legal relevant conclusions. The legal arguments for those conclusions must be transparent and comprehensible. Only when legal issues are clearly explained the concerned parties which lost the case have a fair chance to let those questions to be reviewed by the judge of a second instance.

Equality of the parties however is only guaranteed if the parties dispose of a professionally well trained, competent and motivated attorney. Within many states which provide for parties a legal claim for an unpaid lawyer they may be given such an attorney. But this attorney may be either incompetent of not motivated because of the bas compensation he will get out of such a case. The more this procedure depends on the parties as e.g. within the *adversary system* the bigger is the danger that a badly represented party depends on the whim of the prosecutor. In such cases the final verdict may not have credibility because of unequal arms of the parties within the procedure.

Jury Trial: Adversary System

Independent and unbiased is according to the Anglo-Saxon perception a court namely in case the facts are not determined by the judge but by a jury randomly chosen from the common people. Such jurors chosen by the lot and agreed upon by the parties can at best guarantee independence and neutrality (Vth amendment of the American Constitution). The right to a fair procedure before such a jury is considered within the Anglo-Saxon tradition as a democratic fundamental right.

The jurors are to determine the relevant facts based on the evidences produced by the parties. With regard to the rules of evidence the common law accepts different kinds of evidence depending on the burden of proof and on the law to be applied. In criminal law only the clear convincing evidence is allowed in other cases some kind of probability is also acceptable as evidence. From the request to produce evidence beyond any reasonable doubt to probability there is a big scale of different evidences required depending on case court and law to be applied.

Habeas Corpus

Access to an independent court includes also the right of all those who are restricted with regard to their liberty of movement because of arrest, delivery into a psychiatric clinic or imposed tutorship to require the decision of an independent judge who has to decide on the legality of the restriction of liberty (habeas corpus). By experience, one knows those peoples who arrested are exposed to the

highest risk to be tortured within the first 14 days after the arrest. Who-ever is under the unaccountable control of an other person and who is totally defenceless will have to count with exploitation, torture or other humiliation. Experience teaches us that humans having uncontrolled and unlimited power over other human beings very often cannot resist the temptation to misuse this power.

III. Human Rights According to the Content

a) Human Dignity

Homo sapiens

With regard to the content different human rights can almost all be traced back to the basic right of human dignity. The human being, which decides on its proper fate, which has the intellectual capacity to plan its life, which decides on basic ethical values, the religion but also determines concrete state policies and can obtain the necessary knowledge for such decisions needs to have the pre-conditions and the possibilities to use these substantial capacities. Human beings, which are capable to learn and adapt according to their reflection need further to inform and to exchange their opinions but also to share their convictions with the public.

Personal Freedom and Human Dignity

Humans as creatures which can dispose of their intellectual but also corporal identity need to be protected with regard to their full spiritual and corporal integrity. This dignity is irrevocable. Each restriction is a heavy violation of the fundamental right to human dignity. Each human must be capable to claim the right out of his/her free will to say yes or no. To say yes or no is however, only possible if one can build its opinion free and make an assessment free from fear of any possible danger and to communicate the decision and its justification.

Right to Live

Corporal integrity includes also the right to live and to human dignity in freedom and the right to be save from any torture or other degrading humiliation. For long time the capital punishment was not considered to be prohibited for the sake of human dignity. Today however many states consider the capital punishment for two reasons as a substantial violation of human rights: First there is no procedure which can protect human beings in each case from any possible miscarriage of justice. How then one can justify the execution of humans if there remains the slightest doubt on the correctness of the verdict?

Second, each human should be granted the possibility to change its life and according to its proper judgment and in particular to improve ones character. All those who for what ever reason at all are executed are deprived of this basic opportunity.

Protection of Data

In the area of unlimited global communication often the protection of personal freedom is of increased importance in particular with regard to the aspect of the protection of data. Each human must be able to protect its privacy and intimacy from any illegitimate interference either from other private persons or institutions and of course from any intervention of the public. Personal data which authorities obtain because of special knowledge acquired by the social security, school and other education, tax-procedure or even procedure for divorce shall never be handed over to any third person or institution. Wire-taping of telephone or emails should only be allowed if there are clear limits and if authorities authorized to tap are always strictly and independently controlled. As far as personal data are transferred to third persons or institutions the concerned persons have to be properly informed. Any person must have the possibility to control its data and if necessary to require corrections.

According to the content human rights can finally by categorised with regard to rights guaranteeing equality, protecting intellectual and spiritual liberty and those which are oriented to property and economy.

b) Equality

Treat Equals Equally

The most challenging problem in all periods was the definition of the content and the implementation of the principle treat equal equally. However, already here the difficult question arises which should be the relevant criteria's for the equal and the unequal treatment. For long time the one promoted the opinion that it is fully in compliance to treat women equally to men even though they are excluded from any political right. This point of view today absurd and vehemently rejected as justified with the social position of the women within the society and the family. Advocates of this unequal treatment stated that the women have a different function within the society and thus should participate in political affaires. This argument seems monstrous today, but nevertheless it was successfully set in the debate on women's right to vote. Actually it is meanwhile undisputed that the physiological inequality of both genders can neither be justified legally, politically nor socially.

Public Interest

The principle of equality is rooted within the perception of humans to be part of the genus homo sapiens. Having as only creature a proper intellect enabling proper judgements, communications, teachability all creatures belonging to this genus need to be treated equally. Unequal treatment is only acceptable when it is in the public interest of everybody. This is e.g. the justification which allows to consider the physical inequality of women and to provide for them special protection during their pregnancy.

Equal Opportunities – Equal Results

Challenging is also the issue of the aim and the subject of the state protection of equality. Should the state in priority focus on equal opportunities or should it also consider equality or inequality of results such as e.g. unequal fortunes which would have to be balanced by the tax or social security system? This challenge for the principle of equality is mainly seen with regard to the tax system. According to the liberal principle the state should only guarantee equality of opportunities. The social welfare-state however, would also include the results in order to guarantee for each individual at least the minimum standard for decent living.

Discrimination of Minorities

In international charters the guarantee of equality is mainly reduced to the prohibition of discrimination. Human beings should not be treated unequally because of their inherent characteristics such as gender, race, language, or religion. The prohibition of discrimination of women, of races but also discrimination of religious communities belongs to this category of basic human rights. However, with regard to all those discrimination of minorities the focus of the rights-guarantee is on the individual right. The individual and not the group or the community is in principally the bearer also of the minority rights. E.g. who has an other mother tongue should as individual not be discriminated. However, whether the language community as collective has proper vested right to defend its interest with regard to the majority, this principle is still disputed and certainly not commonly accepted.

The obligation for equal treatment rejects in principally unequal treatments namely when they are linked to characteristics which humans have obtained because of their birth or because of their identity. Such discrimination violate the equal protection principle in a totally illegitimate way. Gender and mother-tongue are inborn. Religion and footedness are part of the human identity. As corporal characteristics and disadvantages they should not be part of the expectation of the majority to be changed by personal choice and decisions.

Equality does not only mean the right to be equal as person with regard to other individuals. It does also mean that as a member of a community and of a collective body one should be treated on equal footing because the body although with less members being a minority has the same qualitative value than other bigger communities. For instance in Switzerland the members of the Romansh speaking minority should feel to have the same cultural value as the members of the German speaking majority although they are in numbers much less numerous.

c) Spiritual Liberties

1. Liberty of Religion

Liberty of Religions Since Ancient Times a Right of Minorities

The spiritual liberties have their historical roots within the religious liberties. Of course, a comprehensive concept of the liberty of believe and of conscious has

only been developed in our times. In the late antiquity FIRMIANUS LACTANTIUS (260–340 AC) also called the CICERO demanded "And still it is the religion, in which liberty primarily has taken its seat. Religion after all is prior to all other issues something voluntarily chosen. Thus, nobody can or should be forced to worship something he does not want." (F. LACTANTIUS, Epitome, 54). Liberty of religion has of course been promoted by the Christians as minority right as long as they were persecuted as minoirities. As soon however, that the pope and with him Christianity gained superiority one of the first Church Fathers and philosophical authority AUGUSTINUS has legitimized the Church to have the right to force any body to enter into the church (*compelle entrare*). THOMAS VON AQUIN distinughished later between those who are already believers and the renegades who became disloyal to their membership to the Church and its religion. Apostates can undoubtedly be forced by the spiritual and the political power to re-enter into the church and their previous believe. (TH. V. AQUIN, II. book, part II., question 39, art. 4). The question to what extent non-believers which did never belong to the church could be forced is left open by him. However he clearly condemns worhip to idols as obvious sin. (TH. V. AQUIN, II. book, part II. Teil, question 94, art. 2)

Principle of Territoriality: Ius emigrationis, the right to emigrate

After reformation of the 16th century within the western Christian church by the Protestant lead by different reformist (e.g. Luther, Zwingly, Calvin and Husserl) the political powers in western Europe followed the religious split among catholics and protestants and established also a territorial separation between territories belonging to a catholic and territories belonging to a protestant prince. Accordingly each prince determined the believe of his subjects (*Confessio Augustana, 1555*). In France the freedom of conscience has firsyt been declared within the commentary of the edict issued in January 1562 and later in the edict from Amboise in 1563). These proclamations mentioned the guaranty of the private cult as a right granted to the gentry. This liberty has later been limited to a restricted territory within the edict of Nantes (1598). But in those territories the liberty has even been strengthened. Later a first step towards a real liberty of believe and conscience was the right to emigrate ("ius emigrationis).

Principle of Tolerance

In England there was a different development. First the idea of the right of emigration could almost not be implemented on the Island itself such as among the different small principalities in particular within the German Empire). As is well known in the 16th century Henry VIII established the Anglican Church and unified the political with the spiritual power. In the 17th century the Protestants accordingly were granted the right to bear arms according to article 7 of the Bill of Rights. Catholics were denied such rights. However they were not as in many principalities on the continent forced to emigrate and therefore somehow tolerated. In 1829 they were finally integrated to a great extent with the Catholic Emancipation Act. Based on this document they were also granted political rights.

Freedom of Establishment

A unlimited freedom of conscience and of believe have been claimed by the Baptists. According to their believe the revelation is to be deduced out of the conscience. For this reason the requested a clear and strict separation between Church and state. The Baptists were mainly very influential within the American states. In the *Agreement of the People* (1647) for instance it was proclaimed that the political and mundane community has no jurisdiction to influence at all the believe and the conscience of individual persons. This famous agreement later influencing the freedom of establishment clause of the American Bill of Rights has been edited by the so called Levellers. This fundamental right is now explicitly granted in the I. Amedment of the American Constitution: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof*". Probably as reaction to the strong linkage between state and church within the British Kingdom the founding fathers of the American Constitution followed those principles already established by the levellers and did with this comprehensive right provide for an integral separation of church and state. A special provision prohibiting the state to prefer one religion was clearly rejected: "Congress shall make no law establishing one religious sect or society in preference to others". This rejected proposal reveals however the problem to be solved at this by the settlers. Should peace be guaranteed among the different religious community by promoting each of the religions and therefore the state be prohibited to advantage one religion, or should the state be generally prohibited to privilege some few religions with regard to the others.

This „*Freedom of Establishment Clause*" has been establish within the interest of a good cooperation among the different religious communities then already immigrated within the USA. Unlike the French secularization principle this clause can not be interpreted as hostile to one of the churches or religions. It rather wanted to establish peace among the different churches by preventing any political preferences. Secularization developed within the French revolution on the other hand was clearly hostile against the catholic Church and clergy which has collaborated strongly with the feudal aristocratic system to be overthrown by the revolution. Thus, separation between Church and State has always to be assessed differently according to the history and the social roots which did lead to some similar wordings but with totally different goals as can be seen by comparing the American and French tradition of secularization.

Liberty of Cult and Worship

On the European continent important philosophers during the different centuries such as SPINOZA, KANT, HEGEL, PESTALOZZI and FICHTE required strongly freedom of religion. The interest of FICHTE was namely oriented towards a comprehensive freedom of worship and cult. Each religion should have the possibility to carry out action of worship and cult according to its believe and tradition. Out of this right to worship within the private houses later the general freedom of religion developed.

However in many countries freedom of religion was first and mainly restricted to the Christian religion. Thus, e.g. article 44 of the first Swiss constitution of 1848 guaranteed only freedom of worship of the Christian religions. 1866 with the freedom of movement and settlement for non Christian has been established and only 1874 the general freedom of religion was granted to all namely also the Jewish religion.

2. Freedom of Opinion

Freedom of Ideology (Weltanschauung) – Freedom of Opinion

Today the general freedom of religion and conscience within the pluralistic state is understood as fundamental right which does not only guarantee religious freedom but freedom to believe and express any ideology. Each person shall believe what he/she wants, of what she/he is convinced and one should also be free to express, communicate and publish these thoughts. Freedom of opinion thus was a necessary consequence of the freedom of religion and conscience. However, it is much less in connection to this personal fundamental right although such right could also be deduced from the right to independent personal development. On the other side the freedom of opinion was later directly considered to be part of the political rights. This political right has first been introduced into the English Bill of Rights in the context of the right of members of parliament: "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament"

MILTON

Undisputed father of the liberty of press is JOHN MILTON (1608–1674), the secretary of OLIVER CROMWELL. In his famous speech in 1644 "Truth and understanding are not such wares as to be monopolized and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and licence it like our broadcloth and our woolpacks….." Truth is compared in Scripture to a streaming fountain; if her waters flow not in a perpetual progression, they sicken into a muddy pool of conformity and tradition. A man may be a heretic in the truth; and if he believe things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy.(J. MILTON, A speech for the liberty of unlicensed printing to the parliament of England 1644). With this famous speech MILTON created the bases for the realization of the comprehensive freedom of press within the Anglos Saxon state, which has never been implemented on the European continent with such unconditional and comprehensive content. European courts have never guaranteed the so called hate speech as being part of freedom of press and opinion, while e.g. American courts have even allowed the Ku-Klux-Klan to have marches of protest in the middle of traditional Jewish quarters.

Freedom of Opinion as Expression of Personal Freedom

The spiritual liberties are so substantially connected to each person that their loss and their illegitimate restriction would degrade and humiliate it. They guarantee that human beings can not turn into a simple object and match-ball of foreign powers but that they should have the possibility as subject and independent creature to meet the challenges and needs of other persons. Each of us should be able thanks to those freedom rights to build ones on opinion and accordingly to decide. Each person should be granted the right to design and plan its life according to its personal conviction.

Without freedom of opinion a independent development of the human brain but also of the knowledge of mankind is not possible as already MILTON has pointed out. Only when humans are able to express freely what they think they are able to check mutually their opinions to criticise and if necessary to amend. This are the basic pre-conditions of a democratic discourse which is the fundament of modern democracy. Even in times of threats of terrorism one should be aware of that a society which does not know freedom of opinion destroys its historical, cultural and spiritual roots. Truth according to our understanding is not to be declared and ordered; it is rather the cognition corresponds to the general view of the scientific community. Such knowledge however can only be developed within a society which all are prepared to learn from each other, to discusses, assesses critically judge and adapt and develop their convictions and cognition.

Democracy and Freedom of Opinion

As the historical experience reveals freedom of opinion is always to be seen in strong connection to the expansion of democratic political rights. It is the precondition for democratic control and the democratic decision-making processes. Finally democratic decision to comply with the common interest are only possible within a transparent public discourse which is open to all different opinions. Relevant democratic majority decisions are only possible it all alternatives are within the discussion and all arguments can be exchanged and critically assessed. Each participant must have a fair chance to bring into the decision making process his or her arguments and expose his or her opinion. This is valid as well for elections as for direct democratic decisions in a referendum.

With these arguments we do not at all want to suggest the idealistic dream that freedom of opinion alone would already guarantee a legitimate decision. Emotions demagogic statements mass-hysteria, prejudices corruption favouritism may still distort democratic decisions. However, a comprehensive guarantee of freedom of opinion can limit such distortion. In any way the published opinion in the media and in the internet still allow some hopes that falsified decisions may be importantly reduced. This of course will only be possible if the Media themselves are not put under state control. Freedom of opinion prevents extreme positions and extreme developments. The losers who were not able to convince with their arguments the majority may still have the possibility to bring their position and their arguments at a later time forcefully into the debate. In this case they may with better arguments convince the majority of the legitimacy of their concern. Freedom

of opinion is the fundament for the trust of all those which feel or are to be treated unjust by the majority. The freedom right gives them the hope to convince in some later times the majority of such injustices. Of course the majority is never allowed to suppress the minority other wise democracy becomes even more tyrannical than the moderate dictatorship. An precisely such tyranny is possible in a state split into different ethnicities. (see JOHN STUART MILL (1806–1873) and ALEXIS DE TOCQUEVILLE (1805–1859).

Prticipation of the Dominated

Freedom of opinion in this sense is also a guaranty of a stable social order which can adapt without violent revolution to the permanently changing social and economical changes. Thanks to the liberty of opinion minorities can make their arguments public in early times. Information on abuses, faulty developments can get early to the knowledge of the competent authorities. The free opinion enables the discourse between government and governed. It strengthens the capacity on both sides to learn and to regulate decisions according to unforeseen developments. Authorities which do not know or do not even have to know what the people thinks will sooner or later govern superior and detached from the people. They will become isolated and open a trench between the authorities and the people.

Freedom of Information

Freedom of opinion is however senseless without comprehensive information of the governed on government, administration and economy. The corresponding counterpart of the freedom of opinion is the freedom of information. This liberty needs further and comprehensive implementation. To what extent authorities or other leading social forces are prepared to inform is often a clear barometer indicating to what extent in reality within the concerned state liberty of press and of opinion is implemented and realized.

As part of the personal freedom individuals must have the right to obtain all information, necessary to build their proper opinion. On the other hand they must be able to distribute and publish information and opinion. Such publications needs to be guaranteed also within their mother tongue in which they can also express refined nuances. Freedom of information, of media and also liberty of language are to be seen as part of the freedom of media. Moreover liberty of arts, of research, teaching and learning as well as of communication with modern medias are part of the fundamental right of freedom of opinion.

d) Guarantee of Property and Freedom of Economy

Globalisation

Guarantee of property and liberty of economy are elementary conditions for a globalised market system. In times of middle ages not only the human dignity but also the property right was considered as a real core right for all other freedom rights. Who had ownership of property that is real-estate, could also validate other

rights. Property was as well dominium as also imperium. Owners had the right to use their property for their benefit and they could also dispose of it and sell their property. In middle ages the owners had also authority of their property and territory. That is they had full jurisdiction over the subjects living within their domain. On the other hand, those who were without property were to a great extent almost lawless and without any rights. Only after the 30ies of the 19th century those who had not property and no fortune were excluded to partipate in the political decision making process. – Only who had fortune was granted a limited right to elections.

1. Guarantee of Property

Core Right in Middle Age

In middle ages, the guarantee of property was in the centre of all fundamental rights and of course also of economic rights. In middle age this was more than a mere economic right; property right was the core right for many other freedoms. Somehow one can identify the guarantee of property to have had same importance as today the core right of human dignity. It included at that time much more than only the ownership of land. It provided for work, authority, autonomy and in certain cases even the right to dispose of the live of peoples living within its land.

i. JOHN LOCKE

With regard to the history of political ideas JOHN LOCKE has had a very far reaching influence on the views of property in western countries as he did build up his entire theory of the social contract on the theory of property. We can recall: LOCKE considers the – pre-state assumed – the original state of mankind as an optimist; he observers humans as rational and free – the state therefore is not allowed to limit freedom. According to the perception men in the original state all people are free and equal. How can LOCKE nevertheless justify inequality with regard to property and fortune in England of the 17th century?

Property and Labor

According to LOCKE humans in the original stage were without property. The hunters and collectors were owner together of the entire earth. Every thing was within the common property of every-one. Each had the right to acquire all what is necessary for his/her life. This appropriation was not identical to occupation by force an violence (as with GROTIUS). It is rather acquisition based on human labour. (cp. J. Locke Second Treatise on Government Chapter V). With its labour and concrete by ploughing settled individuals acquire real estate just as in earler times humans acquired by hunting and collecting meet and fruits. However, nobody should acquire more than he/she needs for the proper survival. One should not be allowed to collect fruits and then let them become bad.

Money: the Nuts in the Celler

This limitation however ended with the invention and introduction of the money. (J. LOCKE, Second Treatise, chapter 36). Money cannot become bad as fruits. With

money one can store job performances, without to ruin them. Just as nuts can be kept for much longer time than other fruits.

"And thus came in the use of money, some lasting thing that men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful, but perishable supports of life. (Sec. 47) "And as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them (Sec.48).

Pre-State Law

As all this according to LOCKE happens in the state of nature all possession acquired by labour in the state of nature is a pre-state right to property which can not be touched by the state. Property right thus is pre-state and not to be infringed by the state. The state has the mere task to protect property, but he can not infringe into the relationships of the owners.

Contrary to LOCKE, HOBBES did postulate that also with regard to the relationship to property it is the state based on its absolute right to create the property right. For him property of private individuals is also at the disposal of the absolute state sovereignty. As the guarantee has been created by the state it can also be denied or lifted by the state.

Protection of Owners

Undisputable the opinions of Locke have still today an extraordinary influence on the perception of the concept of property rights in western states.

"Property, whose original is from the right a man has to use any of the inferior creatures, for the subsistence and comfort of his life, is for the benefit and sole advantage of the proprietor, so that he may even destroy the thing, that he has property in by his use of it, where need requires: but government being for the preservation of every man's right and property, by preserving him from the violence or injury of others, is for the good of the governed: for the magistrate's sword being for a *terror to evil doers,* and by that terror to inforce men to observe the positive laws of the society, made conformable to the laws of nature, for the public good, *i. e.* the good of every particular member of that society, as far as by common rules it can be provided for; the sword is not given the magistrate for his own good alone." (J. LOCKE, First Treaties, Chapter VIII Section 92)

ii. Property and the Might of the State

Use of Territory

The development of first ideas of property has to be seen in strong connection to the gradual settlement of original nomads. As soon as tribes started to become settled, they needed to cultivate the soil and make it fertile. The jungle had to be cleared from trees, the soil needed to be ploughed and houses as well as castles needed to be protected from enemies with embankments and ditches. Real estate was first in the possession of the tribe which was to defend it against enemies. The tribe controlled and ruled over this territory. The single families was only attributed a certain area for working. They were accountable to the ruler of the tribe for

their use of the soil. They had no right to dispose of the land and to sell their real estate. Such ownership concepts existed until the end of the 20th century for instance in Ethiopia. (vgl. J. MARKAKIS, S. 118 ff.).

Fief's Rights

After a wile families which did belong to lower classes and could only cultivate very few land came under the control of bigger land-owners and thus remained in bondage. The vassals however, who have been given land by the king as a fief needed to give some taxes to the king and had to serve in the military. By using the soil they were also connected to the King based on their personal dependencies. These fief relationships have been impressively elaborated within the fief-right of European middle ages. The authority of the King and the property on land and soil that is empire and dominion on property was a unity. Real estate was not at the free disposal of people. Its use was connected to the fulfilment of specific obligations such as military service of the vassals or the services of people towards their master. The way how to use the soil was regulated such as e.g. the three field system.

Taxes and Democracy

The first major disputes between the King and his vassals focussed on the relationship between landowners and their obligation to pay taxes. The Vassals wanted to participate in the decision determining the level of the taxes. „*No Taxation without Representation*." This was the battle cry for democracy. Besides participation for the decision on taxes the Vassals also achieved some kind of separation between the empire and political authority on one side and their property rights and dominium on the other side. With this the rights of the owners of property were separated and with this the obligations for specific utilisation were deduced. At the same time the free right to dispose of the property was expanded. This development lead finally to a order of property of the civil law which provided for the individual owner the unlimited power to decide whether it wanted to dispose and how he wanted to use its soil and property. Only in specific cases state power could intervene in order to levy taxes or to expropriate in cases of overwhelming need of the state.

Market and Property

The emergence of this view of property has been strongly influenced with the developing commerce and linked with the commerce the market and money-economy. The performance of labour did not any more have to be paid with goods are social care of the fief ruler, it could be paid by money. The bondmen linked to the land became land-workers which received from their master a meagre salary. With this development all connections and relationships between work and soil were dissolved. Labour could from now on be transferred into capital and thus also real estate became a market good from the point of view of the money economy.

Property and State

The separation of property from the might of the state was also one of the causes for the separation on the continent between civil law controlling property and public law controlling authority. Property was considered a thing and object of the civil and private law which provided for the owner an almost unlimited right to dispose and use the thing. Property was not any more an object of the taxing power the state had only the right to intervene within the fortune of individuals. If the state or its ruler wanted to obtain property owned by privates he needed to either by it according to the civil law or to expropriate it and compensate private owners with a market price. (vgl. SAMUEL VON PUFENDORF).

Collectivization of Property

Distinctive for the following development of the property right within the welfare-state depending on the market system and division of labour as the increasing anonymization and collectivization of property within the share-holder societies on one side ant the state apparatus providing social security and finally not to forget the bank and credit business. The new institution of share-holder companies and trusteeships enabled a legal and de facto collectivization and independence of the capital which had as only connection to the share holder the privately owned shares. It is not any more the owner which decides how to use the capital it is the controlling body making such decisions. The bank and credit business enabled and incredible expansion of the capital namely with the new credit money. With the newly expanded state apparatus (school traffic, hospitals etc.) and with a system of socieal security a great part of the taxis or contribution paid by the normal citizen are bound to such institutions. The citizen turned into a participant of the welfare and social security state.

Social Bondages of the Property

Besides the collectivization of property in private companies new state legislation with regard to planning for housing and traffic required new limitations of rea-estate. By this private property on real-estate was gradually limited to the interest of the community with regard to environmental protection and a reasonable limited use of land for construction and housing. But also original bondages such as limitations of the freedom to dispose of property namely with regard to agricultural land and forest were expanded. In addition the increasing number of employees dependent on salaries who are participation on property by their labour but without any ownership led also to an increasing extension of democratic institutions within the state and to more participation rights of employees within private firms supported by the labour unions.

Participation – Rights

Men and women are not any more objects of state and society. They participate in the decision making process and thus became some how associates of the state and the society. In so far the personal development of the individual its liberty, life and protection are not any more linked to soil and land but to its possibility to find a

job to its income its apartment its education and to other performances of the state. Indeed the house-father liberalism as been replaced by the individualistic liberalism and led to the development of a social view of the society as a community within a polity. Once existence, freedom independence, life income and security of the housefather was guaranteed by the protection of its property of the land. Now the state needs to protect spiritual freedoms, privacy, social rights for housing, work, and education and social security. Individual do not have any more to pay alone for social risks such as accident, illness, unemployment, and age.

Social Bondages

Today the right to property became everybody's right. Fortune and property are detached from political rights. However, it would be an illusion to believe that property rights are fully detached from the community and from social bondages. Property is linked to the legally defined possibility for using and disposing of property. These legal boundaries are determined by state legislation in particular planning rules including protection of land against unlimited foreign investors. The value of a fortune depends on the economic development and conjuncture, it is open to the risk of inflation. On the other hand individuals have agreed with their social security systems to have a contract and thus obligation between generations including the possible future generation an obligation which has been formulated in the preamble of the Swiss constitution as follows: "Conscious of their common achievements and of their duty to take responsibility for future generations.."

iii. Freedom of Economy

Invisible Hand

Following the economic liberalism initiated by ADAM SMITH (1723–1790), which has been amplified by the social Darwinism of HERBERT SPENCER (1820–1903), supported by the Calvinistic achievement concern most recently a new liberty namely the right to personal development has been carried through. These liberties were primarily directed against state privileges such as protectionism and corporatism mainly of the towns ruled by corporations. The theoretical fundament for those liberties has been led by ADAM SMITH. He was of the opinion that the general economic welfare could be realized at best if every one could pursue freely its proper interests. In this case would every one act as homo oeconomicus that is according to its proper view of costs and benefits. He/she would accordingly by goods and accept salaries which would bring optimal benefit at lowest costs. With regard to the costs one should not reduce these to money costs. Costs and benefits can also be emotional subjectively according to each person. In this case however each individual would be at best motivated to work and to invest in order to have the best benefits. If each person enjoys this liberty the main aim that is the general welfare will be realized. Also the capitalist who is only interested on his or her personal welfare will be guided towards this end by the so called invisible hand. In this sense it is the invisible hand which guides the free market system in order to provide a just distribution of goods and capital within the society.

Social Darwinism

To liberal economy and to the open market principle based on free competition also the theory of the social Darwinism did contribute. As is well known the theory of evolution of CHARLES DARWINS (1809–1882) was deduced from the recognition that the evolution of the flora and fauna can be traced back to the process of selection of the fittest which provides that in the respective environment always the better, stronger higher developed and in particular the creature which has the best capacity to regenerate will be chosen. This concept of the selection of the fittest has been taken over namely by WILLIAM G. SUMNER (1840–1910) and SPENCER. Both theorists transferred this principle to the human social society. For SUMMER the social order is the result of a battle, in which each tries to realize his or her interests on the costs of the other. The best, the strongest, the fittest and the most ingenious fighters can meet this challenge. Therefore the result is also just and correct. It is the product of a natural selection. Therefore the free market order will automatically lead to a just distribution of goods.

Homo oeconomicus

Influenced by VILFRED PARETO (1848–1923) the advocates of the economical liberalism supported the idea, that activities carred out by the state, science and economy need to be legitimized under the point of view of costs and benefits. The aim of those activities is always optimizing the gains. However, as state activity is more costly then activity paid exerted by private economy namely because the state does or cannot provide for any incentives as much as possible activity mussed be carried out not by state administration but by private economy. This has to be applied on telephone, radio, television etc.

To the most extreme advocates of this liberal economy one has to make a similar reproach as to the extreme Marxist ideologies. Based on some reduced scientific hypotheses which reduce humans to one simple dimension (*here the homo oeconomicus*) they draw some political conclusions with regard to the goals a polity should achieve. In addition the liberals presuppose that every one can enter and then participate in the competition with equal opportunities and that nobody can achieve any position of monopoly and that each individual is able to recognize its proper and legitimate long term interests and able to act accordingly. This however, seem to me to be an unrealistic fiction.

Free Market

Moreover the polities are only communities to accommodate individual interests. They are also communities hold together by solidarity and thus the stand for a proper value. As it is mentioned in the preamble of the Swiss constitution the community can only survive if it is also prepared to protect the weakest member of the society: "Knowing that only those remain free who use their freedom, and that the strength of a community is measured by the well being of its weakest members…" Individual persons do not only want to optimize gains and minimise costs, they also stand for cultural, spiritual values without making permanently cost-benefit analyses.

As a fundamental right liberty of economy has mainly developed as a written constitutional right in the Swiss constitution between 1974 to 2000 with the label "Freedom of Trade and Industry". Based on this fundamental right the legislature and the court kept watching that state and private tasks were carefully separated and the free market system protected as a fundamental individual right. Of course, historically this guarantee goes back to the old constitution of the Helvetic imposed by the French invaders and thus to the then influential constitution of the French directory of 1795, which already marked this principle in article 355.

Right to Chose an Occupation

In Germany however the founding fathers embedded within the basic law of Bonn liberty of economy with a totally different label. Their focus was personal development of each individual (art. 12). The state shall be prohibited to determine the professional curriculum of the individual citizen. Each person should rather be able to plan and decide his or her career according to the capacities, personal preferences, and objective possibilities.

Most of the actual constitutions do not expressly guaranty the liberty of economy as such. However, in many fundamental regulations with regard to freedom rights one finds principles which are strongly connected with the liberty of economy such as the personal freedom to choose and also to exercise its profession, liberty of contract, liberty of association (labour unions) and property. Today property rights and economic freedom are de fact universally guaranteed based on the fundamental concept of the WTO treaty. According to this treaty states are only allowed to intervene within the free global market in the interest to protect life and health of the consumers.

2. Social Rights

Who wants to use its freedom needs to have the environment and the personal preconditions to make use of its liberty. Who would need during all of his or her life with all energy simply to survive, has certainly not a primary interest to be protected for liberties he or she can never use. To whom serves the liberty of press when the bib bulk of the population can neither read nor write? Without social welfare there is no real liberty. Within the social solidarity however individual liberty may also risk to suffocate. How can a judge protect the liberty of press when bad pen-pushers can require to quash a dismissal based on the write to labour? Indeed fundamental social rights can neither be totally denied nor can they be treated equally to classical negative freedom rights.

Mandate of the State

Contrary to the economical liberties as negative rights the social rights require from the state not to abstain from a intervention but in contrary to intervene for the benefit of those who have a right and who are illegitimately disadvantaged. The state must accordingly meet the challenge of those who are socially in need. Such activity can be based on constitutional rights such as e.g. the right to education, which should guarantee that also the socially disadvantaged children should have

equal opportunities in the field of education. The right for housing requires the administration to look for humane housing for all those who are underprivileged. Similar mandates may occur out of the right to labour or the right to environment or to health.

Content and importance of social rights have always been and are still disputed. Some are criticising that they conflict with traditional freedoms rights and would finally put in question the property right such as e.g. the right to housing or the economic freedom such as the right to labour. The right to labour can only by implemented if the state would intervene into the economy and oblige an firm to continue with an activity although this activity will cause important deficits.

Right or Mandat to the Legislature

Some adversaries of social rights also reproach that they can not be implemented just as classical negative rights by a court. The judges would be overstrained when he or she would be asked to provide for a small group of parents living in a municipality far away in the mountain to pay transport for the children in order to let the get the higher education provided in the town. The judge can not dispose of the financial means of the state and in particular in the continental system he has not power to require any concrete action from the administration. For this reason social right are not applicable for the courts. Thus, they only create false expectations of the citizens and thus undermine the credibility of the state.

For this reason social rights need to have a different constitutional position and standing with regard to the classical freedom rights. They have to be formulated as mandates to the legislature. It is up to the legislature to implement a social system which can provide for the greatest possible bulk of the society to enjoy those rights enshrined as social rights within the constitution. Thus, the legislature has of course also to take into account the economic and financial situation of the state and provide for the good balance between the different interests at stake.

Taken in this way there is no real contradiction between the social fundamental rights and the liberty rights. Social rights are mandatory to the legislature. Liberties are primarily mandatory to the court but also to the legislature. With regard to the social rights the legislature has to undertake all necessary measures in order to create a social environment in which citizens enjoy their freedom and are able to use their liberties based on their social conditions and on the social environment. In this sense there is no real conflict to the existing classical freedom rights.

3. Political Rights

Democracy and Human Rights

Democracy is the twin sister of human rights. Without democracy there are no real human rights. The basic idea of human rights builds up on the image of the human person which belongs to the genus of the homo sapiens. Accordingly all creatures belonging to this genus have the capacity to decide and to plan their future. As individual which should have with regard to its private space as much freedom as possible every human being needs necessarily also to have the possibility to influ-

ence decisions of the community and polity he or she is living in. The right of political participation in the decision making process for legislation which has always an impact on individual freedom is the indispensable counterpart to individual liberty. When human beings need to have the right of self-determination they need also to have the right to determine with others on their political fate and future. Shared rule for decisions of the polity is thus the counterpart to the individual self-rule of any single citizen.

This analyses however should not deceive that the democratic majority principle is always exposed to the tension between human rights and democracy. Majorities should never misuse their democratic rights in order to suppress minorities or to wipe out fundamental rights. Democracy is limited by human and minority rights.

Internet

The core of political rights is certainly the passive and active right of election that is the right to be a candidate and the right to choose the proper candidate in the elections. Within states with semi-direct democracy the political rights include also the right to ask with a certain amount of citizens for a referendum, to propose new legislation (initiative) and to participate in votes on such referenda, initiatives or on mandated referenda's. In the area of the new electronic medias sooner or later this right will be expanded based on the possibilities provided by the internet. Electronic polls may be one also supplemented by official votes. The new medias and namely those new possibilities have disclosed totally new dimensions of intercommunication, which will certainly effect somehow our democratic vision in the future. One can indeed foresee that in some future the representatives in the parliament will need to be supported by internet votes of the citizens namely with regard to politically crucial and disputed issues.

Equality of Arms within the Democracy

Besides the active and passive right to vote the claim to a fair democratic procedure with corresponding equal opportunities is part of the political rights. The right to information is just as fundamental like the access to all different parties interested on the result of the democratic process. Only if the peoples can build up a clear opinion on the issues at stake when each voter knows what consequences his or her vote might have and citizens are not deceived with faulty statements or distorted information, the vote will get legitimacy and credibility. If there is now equality of arms the result of the vote has no credibility because it may not at all correspond to the goals the majority of the voters did really want to achieve.

Procedural Democracy – Substantial Democracy

When in this context one uses the label democracy one means clearly procedural and not substantial democracy depending on the result and not on the procedure. The procedure determines the rules of the game. The main idea is that nobody can foresee in advance what will be the result coming out of the democratic procedure. This however is only possible when the rules of the game provide for a fair proce-

dure and all participants comply to those rules. Are the rules violated political rights are infringed and violated.

If equality of arms is guaranteed, the democratic procedure can make sure that the most possible and available knowledge and information on the issues at stake is in the process. Moreover the fair procedure will also influence the concerned parties to accept the result because the agreed to the rules of the game before and complied with them during the process.

4. Rights of National Minorities

Notion

A national minority is with regard to the majority a smaller group of individuals which based on their ethnic, language, religious or cultural communality fosters a special identity with regard to the rest of the dominant population of the state. Their identity is different from the rest of the population. Based on this identity and the common tradition the community has its own feeling of togetherness. With this solidarity it fosters tradition, culture, language and the special ethnicity.

The notion contains the following elements: *national minority, number, nationality or citizenship, a subjective element of choice and objective elements as ethnicity, religion, language and Tradition.*

The discourse on the question of the notion of a minority was always linked with the problem whether minorities should have collective group rights. Contrary to the individual rights collective rights are rights which are hold by the collective unit as the bearer of the right with the demand to call in those rights in case of possible violation.

Moreover the notion of national minority has become a legal-political issue with regard to the application of the Framework Convention on National Minorities of the Council of Europe. Generally accepted according to the praxis of the Expert Committee are traditional minorities which are living as special group since long tradition within the respective country. New minorities such as foreigners and new settled populations such as the Russian minority in the Baltic state are in principle also considered as minorities. However with regard to these minorities the Council of Europe follows a pragmatic approach taking into account article per article of the convention.

Minority Rights in International Law

The real target of the definition of minorities thus is the *legal bases of the minority protection*. By which legal rights should minorities be protected?

The generally accepted principles of minority protection according to the international standards are as follows (namely according to the framework concention of the protection of minorities of the council of Europe of 1995):

a) The prohibition of any discrimination that is the general application of human rights without any discrimination;
b) the right of minorities to use their mother tongue in public and in private;

c) the right of minorities to create and manage proper institutions and associations to foster their education, culture, religion and tradition.;
d) the right of minorities to have free mutual communication within their country and with their kin-nation in neighbour countries including all countries in which their people did emigrate;
e) the right of minorities to publish information in their mother tongue to obtain such information and to exechange thes information.

Right for a Special Status?

The principle of a special status (positive discrimination) of minorities including special privileges is the precondition that a minority feels to be on equal footing with the majority.

With regard to national and ethnic minorities the minority problem turns with regard to these issues often into a state question. These issues get critical when the nationalism turns into ethno-nationalism and chauvinism which usually is accompanied by secessionist requests which shall be dealt with in the next section.

5. Human Rights– Human Obligations

Article 53 of the actual Chinese constitution determines that inhabitants of the peoples Republic are obliged to obey the constitution and the laws, to keep state secrets, to protect public property, to work with discipline, and to protect the public order as well as to respect the social ethics. Such constitutional rule up to now has been frowned on in the liberal western tradition. But now there are also new proposals of high ranking experts which require that the charter of human rights should be balanced with a charter of human obligations as counterpart. The argument they put into the debate is based on the idea, that there are no rights without obligations.

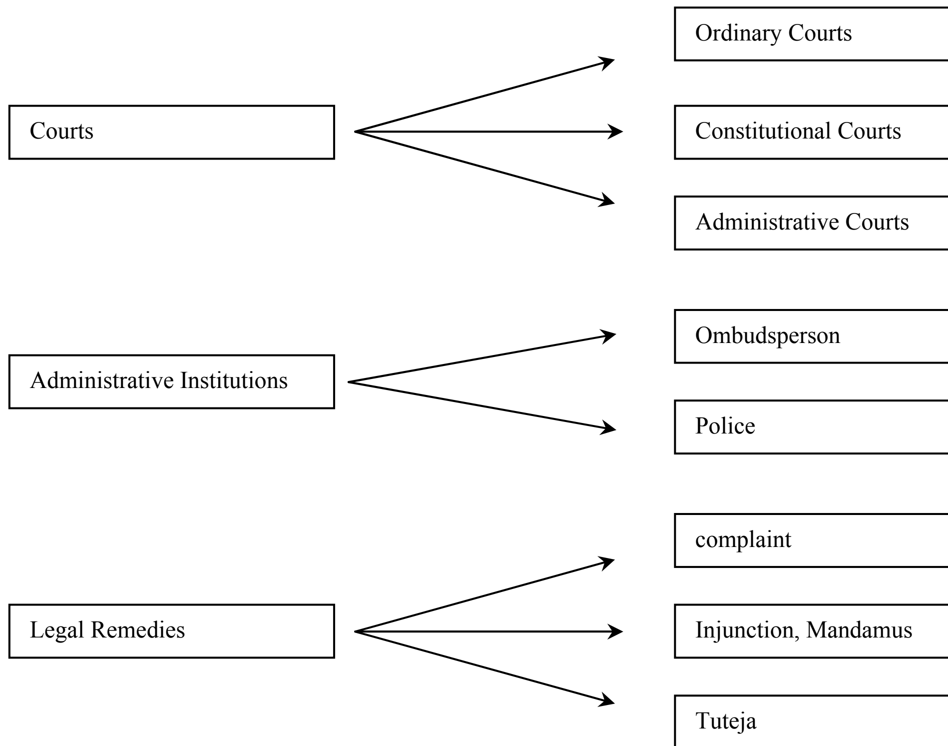
General Declaration of Human Responsibilities

One of those Charters is the declaration of human responsibilities of 1997 of the Interaction Council (http://www.interactioncouncil.org/)which is considered as counterpart to the general human rights charter. Some important private personalities have drafted this declaration as counterpart to the human rights declaration. Article 3 of this charter determines e.g.; “No person, no group or organization, no state, no army or police stands above good and evil; all are subject to ethical standards. Everyone has a responsibility to promote good and to avoid evil in all things”

Do there really exist with regard to human rights also human responsibilities? Human rights are claims which individual persons can demand with regard to the state order. The state legitimizes its state order out of the social contract. It exerts secular authority over human beings. This authority needs to be limted. Thea im of human rights is to limit state power and state authority. A similar catalogue as counterbalance of human responsibilities would not limit state authority but rather expand it, because such general obligations e.g. to avoid evil could be interpreted by the legislature or even by the court as a vague obligation which could even be

introduced into the criminal law with disastrous consequences in a state with far reaching powers of the administration.

E. Institutional Protection of Human Rights



I. Constitutional Courts

Catch 22: The Pre-Constitutional Validity of Human Rights

When we look back to the institutional development in the middle ages in England we always focused on the ordinary courts which were entrusted the protection of human rights namely the principle of habeas corpus. Indeed, within the Anglo-Saxon states it were always the courts which guaranteed the respect and the compliance with the constitutional rights. The Supreme Court in the USA did itself wit the famous case *Marbury v. Madison* 1803 create the fundament for the introduction of the constitutional review of legislation enacted by Congress. As is well known the Supreme Court was and has remained the highest court of the ordinary courts in the legal system of the USA. Since MARBURY constitutional review was

and remained a task which in all federal courts of the USA is part of their normal jurisdiction.

Totally different was the development on the European continent. The legal thinking on the continent is les influenced by the philosophy of LOCKE than rather by the philosophical background of HOBBES. Accordingly, the perception that fundamental liberties have no pre-constitutional standing but have only been created by the constitution is predominant. Moreover the courts are strictly restrained with regard to their jurisdiction, thus they have to stick only to the competences transferred expressly to the courts by the constitution. For this reason the constitutional review of legislation with regard to the protection of human rights could only develop after the law and in this case the legislature and the constitution maker did transfer this legitimacy and jurisdiction to the courts. Those courts were usually not ordinary courts but special courts reviewing cases within the public law system. Thus first it were the administrative court which could review violations of human rights by the administration. Later special constitutional courts have been created namely with the only jurisdiction to review constitutional issues including violations by the legislature. With regard to this development one can distinguish three different institutional developments. We will shortly focus on the main differences according to the historical development.

With regard to these developments one has to be aware that on the European level with the introduction of the Human Rights Court in Strassbourg a general review of any member state decisions with regard to violation of this convention is now possible on the European level. This has of course diminished drastically the impact of the resistance of European States against constitutional review. Indeed, the Strassbourg Court is a general guarantee for the compliance of European member States with the human rights provisions provided in the European Convention on Human Rights.

The Swiss Solution

One of the oldest institution having jurisdiction with regard to constitutional review is on the European continent certainly the Swiss Federal Court. Since 1874 this court has the constitutional mandate to review cantonal decisions including legislation with regard to their compliance with the federal constitution. It is interesting to note that the federal constitution did not install a special court mandated only to review constitutional issues but transferred this task to the ordinary court with the consequence that in principle all courts including cantonal courts in Switzerland were mandated also to look into constitutional issues as far as their decision could be subject to an appeal on the federal court.

The fundamental federal principle of the supremacy of federal law with regard to cantonal law has thus been installed with all consequences for the general jurisdiction of the courts. Each court has to apply the principle that cantonal law in contradiction to federal law is null and void. Moreover the legislature has introduced a special procedure called state recourse (staatsrechtliche Beschwerde) with regard to complaints for violations of the federal constitution by cantonal law. However one has to be aware of the clear restriction of the jurisdiction of the courts. Indeed, they have only jurisdiction with regard to cantonal law. Federal

law is not subject to this procedure. The main idea underlying this concept is the focus on the unity of federal law which clearly must have priority to cantonal democracies. On the federal level however the political majority has up to now always consequently denied all proposals to strengthen the constitutional review of the federal court with regard to federal legislation.

The Norwey-Austrian Solution

Norway however has created already at the end of the 19th century a specific constitutional court with a particular constitutional jurisdiction. As specific court it had the power and the obligation as the only competent institution to review violations of the constitution. This court with a specific and limited jurisdiction has been the model for the legal philosopher HANS KELSEN for his proposal to introduce into the new Austrian constitution after World War one a similar institution with similar jurisdiction as a constitutional guideline for the newly created young Austrian democracy. This solution of KELSEN served later as a model for the first famous German constitutional court established after World War II within the German constitution.

This type of a specific constitutional court has later also influenced the Spanish constitutional court and many other new constitutions of Eastern-European states after the fall of the Berlin wall. Within the system of checks and balances among the different branches of government it is the only professionally competent body which is authorised to decide on issues of constitutional application. If an other court is asked within a specific procedure to take position with regard to a constitutional issue the question needs to be addressed directly to the constitutional court which alone can finally decide on the dispute.

Constitional Court and General Will

A totally different system has developed in France. Traditionally courts in France were primarily created as advisory bodies which only later turned them selves into a real tribunal with mandatory power. This goes back even to Napoleon who installed the French council of the state as a body which should advise the executive and the administration on all issues concerning complaints of citizens against the administration, and to propose to the executive the way how to handle those complaints. Initially the council of the state was only a quasi-court with advisory function. Only later it emerged by itself into a real administrative court with the competence to decide on complaints against the administration.

The French constitution of 1958 installed also for the assessment of constitutional issues an advisory body, namely the council of the constitution (Conseil Constitutionnel). This constitutional council did much quicker mutate into a real constitutional court. However differently to Germany the constitutional court has no competence to review a law already in force. A law in force corresponds to the general will (volonté general) and thus cannot any more be challenged for possible violation of the constitution. The France wants carefully to avoid that the body belonging to the third branch would intervene within the legislative power of the

parliament. Therefore the constitutional council shall rather decide on the constitutional issue before it has been set into force by the Head of the State.

II. Administrative Law Courts

Position and Competences of Administrative Courts

Often one oversees that the protection of human rights is not only a task for constitutional courts but much more often of administrative law courts. With regard to the every day life in legal systems of the civil laws the competence of the administrative law courts is most important. Indeed, often administrative bodies infringe into the constitutional rights of individuals in many concrete issues. When human beings have to be protected from state encroachments they need first and for all to get help and protection from the administrative law courts. Constitutional courts protect individuals from violations of the legislature, administrative law courts protect against violations committed by the administration and the executive.

Administrative Court, a Body of the Third Branch

For a long time the states resisted against the introduction of the administrative law courts. They argued that the judiciary belonging to the third branch cannot for reasons of separation of powers intervene into the second branch. This argument oversees that the theory of separation of powers does not only guarantee the separation and independence but much more also the mutual check and control of the powers. The idea of MONTESQUIEU that the power must halt the power can only be implemented if the branches are not hermetically separated from each other, they need rather to cooperate in the American sense of the checks and balances in order to control them mutually. Important is that the function of rule making, judging and executing are clearly separated but that each function has also control within its proper e.g. judicial function to other branches and their functions.

German and French Solution

This dogmatic and mainly political restraint to limit the might of the executive branch was the main reason why the triumphal march of the administrative judiciary started in Europe first with the model of the French council of state in the end of the 19th century but only could really settle in Europe after the Second World War. It was in particular article 19 of the basic law of Germany which enabled in Germany a real break through of the administrative jurisdiction. This article mainly provides for a general right to have access to the court in all issues of possible violations of subjective rights of the citizens including violations committed by administrative authorities.

In France as already mentioned the administrative jurisdiction has much older roots. The decisions of the council of the state of 1874 to issue mandatory judgements out of its proper position (just at the beginning of the third republic and after the German-French war) was in fact a declaration of independence with regard

to the executive branch. But not only this decision was important for the development of administrative law on the European continent. While during the entire 19th century in Germany the administration dependent on the emperor by the Grace of God enjoyed an almost unlimited jurisdiction without and judicial control, the council of state in France developed within its case law during decades the most important administrative law principles as guidelines for administrative decisions. Those decisions were clear limitations of the power of the administration. Those principles of administrative law did not only influence the French administrative law system but to a great extent also the German administrative law as some important German scholars followed within their administrative law treaties the principles of the case law of the council of the state.

Remedies

Besides the position of the administrative courts, their independence and professional competence one has to be aware namely the remedies available for the single individual citizens determine the extent of the real protection against encroachment and violation of human rights of the administration. Indeed with the remedies the legislature decides in what cases access to the court is granted. Limiting access to the court with limed remedies means also limiting protection of human rights.

The Anglo-Saxon Writs

As is well known within the Anglo-Saxon jurisprudence there has never been developed a proper administrative judiciary as on the continent. The Anglo-Saxon law has no dogmatic separation between public and private law. Legal protection against the administration and the servants of the crown has slowly developed since middle ages in particular based on the introduction of new legal remedies providing special writs available to the individual for complaints against the administration. Today there is no measure or action of the administration which could not be challenged according to the Anglo-Saxon law at an ordinary court. The peoples ruled by the law have the possibility to challenge measures, planning, guidelines and failures. However in any case they must be in a position to claim the specific violation addressed by the writ.

Contempt of Court

In case the court comes to the conclusion that the administration did violate the rule of law it can contrary to the courts on the continent by the threat of contempt of court mandate the person against it has ruled the verdict to execute the order of the court and e.g. to provide concrete measures for the implementation of the verdict of the court. Thus, e.g. an American court has forced a school to provide equal treatment of gender and threatened that in case the school would not follow the judgement, the court would in stead of the school board take over the management and run the school itself. (OWEN FISS, Two Models of Adjudication in How Does Constitution Secure Rights, Washington 1985 s. 36ff).

Administrative Act

On the continent the courts dispose of much less possibilities to implement concrete mandated activities of the administration. This is already obvious with regard to the restricted possibility of access to the court. In most cases the almost only subject which can be brought to the court is the administrative act, which is a decision of the administration imposing rights and obligations to private individuals. In principle only this administrative act can be subject of a complaint to the court. Normal activities ore illegal failures of the administration can only be brought to the court in exceptional cases. This reveals that already the subject open for a legal dispute with the administration reduces considerably access to the court. Thus, if the institutional part of the legal protection with regard to human rights violations has to be taken care of within the continental legal system, one should mainly focus to expand legal remedies to all activities and failures of the administration in order to give general access to court with regard to all possible human rights violations.

The Tutelja in Columbia

An interesting institution in this context is the *tutelja* which has been developed in some Latin-American states. Tutelja is a legal remedy which is open to every body in order to have measures failures or all other possible activities of the administrtion to be reviewed with regard to possible human rights violations by the court. The complaint needs no special requirement and it can be handed in by each individual. The court is obliged to examine the complaint on the merits and to analyse with its proper initiative whether the complaint is justified.

Since the Columbian courts can also enforce decisions with the *contempt of court* and thus enforce orders to the administration to act, abstain, plan or issue decisions they would also have the power to intervene in the political fate of the country.

The recent experiences with constitutional or administrative courts which are given too much powers and a to far reaching jurisdiction have shown though that the courts are not able to change substantially the politics of their country. The can only advance small step by small step. Are they granted a to far reaching jurisdiction they get sooner or later into a new political dependence which will reduce their political space for manoeuvre considerably.

III. Institutions of the Administration

The protection of human rights cannot only be entrusted to the courts. Courts can only become active based on a writ or a complaint. With their judgements they can decide concrete single cases and to a limited extent by precedents indirectly also some later decisions of the administration. For this reason the state, which needs seriously to care for the implementation of human rights, will also have to look for additional institutions in order to strengthen the protection of human rights. High standard of professional training of the judiciary and the administration are necessary prerequisites for a state policy guided by human rights policies.

Ombudsperson

An old and well known institution is the Ombudsman of Swedish origin. The institution of the ombudsman is in Sweden almost as old as the constitutional review within the United States. It has first been introduced in Sweden at the beginning of the 19th century.

The ombudsperson is usually elected and accountable to the parliament. In most cases the institution is installed and in principle also designed by the constitution. The main function of this institution is to mediate between the administration on one side and the people on the other side. In order to assume this function the Ombudsperson has to look into all possible complaints of the citizens. In many cases the Ombudsperson has also the power to act on its proper initiative. According to the analyses of concrete problems between administration and the peoples it has the power to inform itself. The administration is obliged to provide the ombudsperson with all necessary information and documents. Based on this fact-finding the ombudsperson can propose to the administration to revoke its decision, to change generally its attitude or to build up the trust and confidence of the people into the administration in order to improve the relationship with the authorities.

The ombudsperson however, cannot lift decisions of the administration, it can not enforce any measures or actions. Thus, it has no power to issue binding decisions. On the other hand it can contribute to the credibility of the administration by mediation and with good arguments justifying its decision it can convince the administration to improve its relationship to the public.

Besides its convincing arguments the ombudsperson can use as only means of pressure to quote certain events in its annual report to the parliament which on its side can criticize the administration. Important is the fact that the ombudsperson can report to the parliament with the obligation of the legislature to take notice of his or her grievances. In some states the ombudsperson is also authorized to initiate a criminal complaint.

The efficiency of the ombudsperson thus depends to a great extent on its possibilities to become active on its proper initiative, whether it as unlimited access to all information and whether it is entitled in the extreme case to deposit criminal complains.

Police

In many states police is considered to be the instrument of the ministry of interior. In fact the police has the mandate to implement state laws and for this it serves the state. The position of the police reflects thus, the understanding of the state. Is the state mainly seen as an instrument to change the society according to certain ideological perception the police will be misused as an instrument which enables the state to impose its proper goals. Is the state however seen as an institution to provide and guarantee a peaceful order for the people, then police will be at first in the service of the peoples. For its common interests it has to contribute to a harmonious development of the polity. The traditional British police (Bobby) tries to correspond to the understanding of the police as an institution close to common

people with internal guidelines and training. If this aim is achieved the police can contribute substantially to improve a relationship of trust between state and citizen. When the police is able to take care of social problems and has the professional background to integrate excluded individuals such as foreigners it can create a positive climate for the respect of human rights.

IV. International Law

Selective „Justice“

The idea of universality of human rights of the 20th century has namely influenced the development of international law. Indeed, today states cannot any more refer to the international community to the state-reason and to their sovereignty when they are permanently accused of heavy violation of human rights. Internationalisation of human rights however did also lead to politicisation of the human rights idea.

Minorities which tend to separate from the state often address themselves to the international community. They reproach to “their” state violations of human rights in order to internationalize the conflict. While the state government often cuts off any movement of opposition with state terror also minorities recur to terrorism and heavy violations of human rights in order to provoke their governments to intimidate other individuals. This scenario of inner-state conflicts often lead to international interventions in recent years. With this one has to ask though, with which legitimacy the international community justifies military intervention. Who entitles the international community to expose innocent peoples to the risk of their lives by so called collateral damages? Once the territory is occupied by military forces international bodies are established and mandated to secure a new military and political order within this area. The powers of these bodies are often de facto unaccountable without any court control. The only institution they have to refer to is the security council which de facto has never been installed to exercise supervision over international bodies controlling a territory occupied by the international community.

What legitimacy would these bodies claim for when they enforce without any court control their political decisions to individuals living in this area? They have no constitutional ground for their power and there is no democratic control over those bodies exerting e.g. police force. Peoples sovereignty and checks and balances does not exist in such cases. For all these questions, international law has not at all provided an answer. As long as neither interventions for the protection of human rights will not be clearly regulated and defined, and as long as the international administration of a country which has violated human rights is not transparently accountable these international interventions will always remain disputed. Since already the criteria’s of the intervention are vague and unclear one will in the future will have count with selective interventions. Selective justice however, leads to an international politicisation of human rights a dangerous and in the interest of human rights certainly not desirable future.

Instruments of Protection Provided by International Law

Which instruments for the protection of human rights are already established by the international law? Known are already the multilateral treaties of international law which proclaim human rights and require the states to protect these values. Such treaties are on the global level the Universal Declaration of Human Rights of 1948 of the United Nations and the International Covenant on Economic, Social and Cultural Rights of 1966 which entered into force in 1977 and the International Covenant on Civil and Political Rights adopted also 1966 which entered into force in 1976. Since 2006 the United Nations adopted in addition a Human Rights Council with new competences in particular to "assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure;.."

On the regional level we know the Organisation for Security and Cooperation in Europe (OSCE) and namely the European Convention for Human Rights of 1950. An important function as a indirect protection of Human Rights are also exerted by the different conventions for the protection of refugees such as namely the Convention relating to the status of Refugees of 1951 entered into force in 1954. In article 33 this convention namely prohibits "*the expel or return ("refouler") of a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*." (Principle of Non-Refuoulement)

Bilateral Enforcement

Unsatisfactory is still the international enforcement of human rights. Primarily each state is according to its sovereignty competent on its own to require by the traditional diplomatic means and sanctions other states within the framework of its bilateral relationships to protect human rights with regard to its citizens. In general one can say that up to today almost no state has been prepared to risk its good relationship to other states for the sake of idealistic intervention for better protection of human rights. Intervention for human rights if they occur on the international level are almost always serving other economical political or strategic interests. Human rights reason almost always suffers for the sake of state-reason. Often however states provide the intervention for human rights as an alibi in order to hide more important strategic or economic interests. They accuse other states for the violation of human rights in order to get them obedient for other reasons.

Multilateral Accusations

The second possibility to execute internationally human rights are multilateral accusations against a state for its human rights violations. And indeed such multilateral accusation namely with the support of the Human Rights Council or with resolutions of the United Nations or of the OSCE may improve human rights situations within countries systematically violating human rights. However one should not oversee that states will always use all possible and available diplomatic

means and tool in order to prevent such international condemnations. Since these resolutions are finally not enforceable internationally and since the credibility of the international community can always be effectively undermined by political arguments even these resolutions may have only limited effects.

Operations of International Monitors

In some cases the international community did also mandate international monitors in order to give better human rights protection to the people. Such monitoring missions however need the consensus of the concerned state to accept the offer of the international community. Thus as well the OSCE as also the European Union did undertake such missions in order to prevent conflicts and to improve the human rights situation namely within the former Yugoslavia. These missions were of short periods and therefore one can not really evaluate their impact. However it is important to note that whenever such missions occur they need high professionally trained monitors with great experiences and skills. Such experts are often not available for these short missions in most difficult environments.

Human Rights Court

The internationally most effective institution within this context is certainly the establishment of a international court on human rights with the jurisdiction based on international treaty law to look into individual complaints and with the jurisdiction of decide on the merits of such a case in order to condemn the accused state and its authorities in case of clear violation of human rights. Victims of human rights violations thus can accuse their proper state in an international court. The only court which has the jurisdiction to make a final and mandatory judgement against the state violating human rights it the European Court for Human Rights. However the international law does not provide any instruments which would enable the court to enforce its verdict in case the state does not execute its mandate. Thus, it remains still within the power of a member-state to decide whether it provides the necessary instruments for the execution of such verdicts.

International Criminal Court

It may well be that the Statute of the Criminal Court adopted in Rome in 1998 may have a certain effect on some of the Heads of states and their thugs to prevent them from committing most serious crimes of international concern against their population and for instance to levy all protection of human rights with unproportional emergency acts. Some civil servants or soldiers may be afraid in such situations to commit crimes against humanity in order to avoid a judgement before such a court because they can not any more hide their attitude behind state reason and state sovereignty.

Inner-State Enforcement of Internationally Guaranteed Human Rights

Finally, one can however only provide efficient and effective procedures and institutions for the protection of human rights within the domestic jurisdiction of the member-states. The fact however, that human rights are internationally guaranteed

helps institutions such as parties and NGO's within the states to promote with higher legitimacy constitutional and legislative actions in order to improve the human rights situation within their proper state. In this context, the issue of the *monistic* or *dualistic* application of international law becomes most important. If states apply international law according to the monistic concept, the courts are directly obliged to implement international guarantees of Human rights with concrete norms considered self-executing by the national court. Judges do not need to await the legislator to incorporate within its state legislation a possibly disputed human rights convention.

Within states belonging (as most Common Law Countries) to the dualistic system the courts cannot apply within the domestic law international treaties ratified and thus binding the states according to international law. Courts are only bound to such treaties after the treaties have been incorporated within the domestic legal system by a special legislative act. For this reason e.g. the British courts could for a long time not apply the European Human Rights Convention. Only after the enactment of the Human Rights Act in 1998 by Westminster the courts were able to apply the European convention such as it has been enacted by the domestic legislature.

International Institutions fort he Protection of Human Rights

The international community has diverse institutions available for the protection of human rights. Some, as e.g. the Universal Declaration of Human rights are not directly binding and have a mere declaratory significance. Others such as e.g. the regional OSCE oblige merely the international multilateral diplomacy to care for the protection of human rights within the territories of the states belonging to the OSCE. Universal institutions such as the already mentioned two Covenants of the UN an economic and civil rights are universal institution. They are not limited to mere declaratory meaning but they are legally binding the member states. They even provide institutions for the protection of human rights if the states endorse such special international protection.

On the regional level with regard to Europe the focus is namely on the institutions of the Council of Europe. Of main importance with regard to the protection of human rights is by all means the European Convention on Human Rights which has substantially influenced the human rights development of many member states in western and now in particular in eastern Europe. This convention had almost a revolutionary effect on the Swiss system of administrative law! In this context one has also to mention other charters which do not provide individual complaints to the European Court of Human Rights but provide other mechanisms for the implementation. Thus, the Framework Convention on National Minorities (1004) provides for a independent expert committee which regularly visits member states in order to monitor the minority protection of those countries. These reports will have finally to be approved by the council of ministers. Similar provisions and mechanisms have been introduced within the Charter for regional and minority languages o 1992 or the charter for the protection of local autonomy and of social rights.

Besides the Council of Europe also the European Union has since December 2001 a bill of rights charter with a most impressive preamble:
"To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter. This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights. Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations."

F. Limits of Human Rights

Have Human Rights Unlimited Validit?

Can members of religious sects require that their children should not be operated even in case of emergency because their religion does not allow operations? Can religious communities based on their religion provide for corporal punishment or capital punishment and for the execution of such punishments? Can press based on liberty of press publicly defame peoples? Can a firm, which has a de facto economic monopoly, based on freedom of contract boycott other firms which also intend to enter into the competition? Can a mass-demonstration be incited to violence based on freedom of speech?

Everybody will agree that with regard to those examples the claim to freedom and liberty cannot apply without any limits. Even the exertion of human rights is bound to certain limits. How far however should those limits go? Can the state hush information of corruption which might uncover a scandal? Can a peaceful demonstration which wants to support proposals unpopular in the eyes of the government? Can slaughter of animals without anesthetization be prohibited for reason of animal protection within a country which at the same allows hunting? These few opposite examples reveal that one needs criteria's and procedures in order to decide credibly and convincingly such particular borderline cases with a universal justification.

Who Defines the Limits?

Can bearers of liberty of press have a legitimate claim in order to publish any assertion and insults within their media's? Does the freedom of religion entitle any exorcism? Can the state limit freedom of opinion or freedom of strike with regard to its civil servants? Does freedom of conscious authorize to refuse military ser-

vice? Is the state empowered to prohibit some specific political parties dangerous for the public order and security? Can the executive based on its fight against terrorism establish special military courts in Guantanamo?

These most actual and burning problems circle around the issue of limits of fundamental rights. Fundamental rights do not have any absolute and unlimited validity. Each liberty right is already limited by the freedom of the other. Fundamental rights do not entitle persons to threaten the public order or to violate public morality. However, who has the right to determine where liberty starts and were it ends?

Public Order and the Legislature

Article 11 of the European Human Rights Convention provides with regard to the liberty of assembly the following:

"*No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*

This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Constitutions of nation-states provide for similar regulations with regard to the limitation of fundamental rights such as e.g. the Swiss Constitution in its article 36.

Also the Legislature is Bound to Human Rights

Limitations are thus justified in so far that they are determined within a law enacted by the democratically accountable legislature. The legislature however, cannot itself decide on these limits in full freedom. It can only limit the freedom right when this is justified within the public interest such as for instance the security of public order or the prohibition of crimes, the protection of health and of public morality or for the protection of rights and freedoms of other persons. Any limitation which would serve a different goal or which would go beyond this aim would not be reasonable or proportional. The freedom right finds thus its limits on the overwhelming public interest of the state on one side and on the human dignity that is on the human rights of the others on the other side.

Emergency Right

Most delicate is the question whether the state is entitled to go beyond these limits in case of emergency or in case of self-defence.

Within the European Convention on Human Rights we can find an answer to this question. Accordingly the member states may provide further limitations in order to defend themselves within a situation of emergency.

There remains however a core content of human rights which can never be violated or limited by the states even in a war situation. This concerns the right to

live, the prohibition of torture, of slavery and the principle that nobody can be punished without the law. (art. 15 of the EHRC)

Even though it is undisputed that in emergency situations human rights may have to be limited one has still do answer the following important questions:

1. Who decides on the emergency situation?
2. Which limits will have to be respected in the emergency situation even by the executive?
3. What are the criteria's for an emergency situation?

Does the Battle against Terrorism Justify Emergency?

Many constitutions transfer the decision on emergency to the head of the state. However the accountability of the head of the state for such decision as well as the institution to which it would be accountable is often not or not clearly determined. Not definied are neither the criteria's of the emergency. After the terrorist attacks on the New York and Washington of September 11 2001 the USA have set up an alliance against terrorism. Can one consider the war against private terror organisations is also an emergency case? In this case there would not be any more any clear limits which would allow to distinguish clearly between the emergency and the normal situation. The sovereignty would be transferred to the whim of the state institution which is empowered to decide on emergency. This institution could then undermine totally democracy and human rights. (cp. the decision of the Supreme Court Hamden v. Rumsfield on June 29 2006)

I. Who is Allowed to Determine the Limits of Fundamental Rights?

Function of the Constitution

The limits of fundamental rights are often determined on the bases of the constitution. Thus e.g. already article 36 of the Swiss constitution determines:

„1. *Any limitation of a fundamental liberty requires a legal basis. Grave limitations must be expressly prescribed by a law. Exempt are cases of clear and present danger.*
2. *Any limitation of fundamental liberty must be justified by public interest or by the need to protect the fundamental liberties of others.*
3. *Limitations of fundamental liberties must be proportionate to the goal pursued.*
4. *The core of fundamental liberties is inviolable.*"

The constitution maker reserves the right to determine itself the limits of fundamental rights.

In general form article 19 of the fundamental law of Bonn provides also limitations of fundamental rights. According to this provision fundamental rights can

only be limited by legislation but in no case "the essence of a basic right" may be infringed.

The Core and the Pre-State Validity

Can the constitution maker at all infringe within the fundamental rights? This issue has to be seen within the close context to the problem of the pre-state validity of fundamental rights. According to the theory of the pre-state validity of fundamental rights also defended by LOCKE the constitution maker can not at its whim limit those rights. This conviction is also to be found in article 19 par. 2 of the fundamental law of Bonn. As mentioned this provision prohibits any infringement within the essence of a basic right. This guarantee of the essence of a basic right makes it impossible to eliminate the substance of fundamental rights. There remains however still a dispute with a wide range of opinions on the content and the significance of this absolute limitation.

When we accept that the state has as one of its task to defend in a certain social situation the human dignity and care for its development then also the constitution maker has to respect certain limitations when it aims at infringement of fundamental rights. The elementary humanity and human dignity will always have to be respected.

Moreover it will be within the jurisdiction of the constitution maker to determine the core and the essence of fundamental rights and also to determine who is entitled to decide on limitations of fundamental rights. Of course, the constitution maker may provide general rules for such limitations (article 36 of the Swiss constitution) or just determine for each fundamental right specific limitations as the European Human Rights Convention.

Majority Principle and Minority Protection

Who – besides the constitution maker – has competences to determine the limits of fundamental rights? A today still valid essential achievement of the liberal state was to take away from the monarch the only right to infringe within the liberty of the citizens. In future the monarch should be bound to the decisions of the *legislature*. The fundamental rights were thus in the 19th century largely within the power of the legislature. The administration could only intervene within the rights of an individual based on a legislative ground. The Anglos-Saxon principle "*no taxation without representation*" has been turned into the defence of all liberties of the citizens.

Self-Restraint of the Legislature

But also the legislature can violate fundamental rights. Thus, it can impose privileges of the majority on the minorities. Fundamental rights do not only protect individuals and society against state intervention, they also protect minorities against encroachment of the majority. This mandate however, the legislature is almost not able to fulfil since it decides according to the unlimited majority principle. Mainly for this reason besides the power of the legislature, the focus must be on the jurisdiction of the *constitutional court* which needs to be expanded. A

weak constitutional court will hardly be able to change the national discriminatory policy with regard to its minorities into a climate of open and equal opportunities. Of course, also the court reflects the political spectrum of the mainstream opinions of a nation. A comprehensive jurisdiction for the constitutional review within a country which has to overcome minority discrimination is of utmost importance. Therefore it is indispensable that also the democratic legislature imposes itself some limits and grants its minorities rights which will not be infringed even by the majority of the legislature. Without such *self-restraint of the legislature* the protection of minority rights will in the end be weak and ineffective.

II. Which are the Legitimate Limits of Fundamental Rights?

a) Legal Limits

Questions over Questions

Can a country which is threatened by its neighbour-state prohibit one of its press-publications which openly supports the hostile policy of this neighbour-state? Or: Peoples demonstrating require not only the right to protest with public banners on the street but also to block the traffic by sitting on the street. Can they claim for such endeavour the fundamental freedom of opinion? A big publishing company achieves a factual monopoly and displaces all other publisher within the region. Is such company entitled to refuse the publication of opinions within its own media because they do not fit to the policy of the head of the company? Or, can this company openly endorse only one political party? Are men of Islamic religion allowed to marry several women? Can members of a sect claiming their liberty of religion refuse military service in a country with mandatory service? Do Jewish parents have the right not to send their children on a Saturday to school? Can a canton provide censorship of films for the protection youngsters? Does a party which promotes the suppression of the liberty of opinion forfeit its proper liberty of opinion? Can the state provide prohibitive taxes for brothels? Can a chemical factory be prohibited to produce products damaging the environment? Can the state facing war on terror limit elementary rights of defendants guaranteeing a fair trial? – With regard to these and similar questions one has always to analyze the legitimate limits of fundamental rights.

Limits of the Courts

The court praxis in particular the jurisprudence of the federal tribunal of Switzerland has developed within the last hundred years the following limits of fundamental rights: Fundamental rights are limited in cases the state security or/and the constitutional order is at stake. The freedom of opinion e.g. cannot be invoked in order to promote a revolutionary violent alteration of the governmental system. Thus one is not allowed to invite somebody to commit an illegal action against the

state (e.g. propaganda for terrorist activities). This limit is determined by the constitutional order. An open constitution, which can be changed by democratic means without any limits will also have to allow party policies which propose a revolutionary alteration of the system such as the realization of a communist constitution if such goals are aimed with democratic means. If the constitution provides it-self as several constitutions do (cp. Germany fundamental law art. 20) limits for revision the freedom of opinion is also limited to these barriers. Parties and ideologies are not allowed to endorse policies which would totally repeal fundamental liberties, if the constitution it-self provides for barriers with regard to the revision of fundamental rights.

Tolerant Society?

A further barrier is given by the security of each individual and by the public order. Nobody is entitled to refer to the fundamental right of liberty of religion when he/she belongs to a religious community which requires from its members attitudes which might endanger the security of others. – Religious believes, which require psychological or corporal intervention into the integrity of persons such as e.g. exorcism cannot refer legitimately to a fundamental liberty. – In case demonstrating hooligans threaten important values such as life and corporal integrity such demonstrations may be prohibited. Obviously, also with regard to these cases the content and the scale of the fundamental right to be guaranteed may also depend on the concrete political climate and situation within a certain country. Within a irritated political climate in which the slightest spark may initiate a dangerous conflict the freedom of opinion will face more important limits than within a tolerant and open society.

Public Interest

The most disputed barrier for fundamental rights is the criteria of the public interest. As a general rule, the constitutional courts hold of the opinion that the legislature is entitled to limit the fundamental liberties of the individual when the public interest of the society is at stake. With regard to the concrete case they weigh up the interest of the public against the interest of the individual liberty. If they come to the conclusion that with regard to the principle of proportionality the scale clearly swings to the public interest they usually support the general interest against the private importance.

Principle of Legality and of Proportionality

These reflections are valid for limitations of fundamental rights which are of general nature and thus may be decided by the legislature. If fundamental rights will have to be limited with regard to a concrete and special case such barrier must have a legal ground within a explicit legislative act and the measure provided for the infringement of the right must be proportional. In particular the limitation can not overshoot the aim to be achieved. The religion of the Mormons e.g. can not be prohibited only because it supports polygamy. The state is only allowed to pro-

hibit to individuals belonging to this religion to conclude several marriages with several women.

b) Philsophical Limits

The philosophical grounds for barriers of liberty are disputed and can not easily be transcended into practical decisions. The departing point is in general the notion of liberty which of course is also differently used. When we use the notion in the context of the liberty of the Palestinian people we point at the right of self-determination of the Palestinian people. When we claim the liberty of a company we think of liberty from state compulsion. – In the context of the term *liberty of choice* we want to choose among different alternatives. Do humans seek their inner freedom they want to decide independently from inner and emotional constraints.

c) What Means Liberty?

Liberty as Freedom of Choice

Who analyses the barriers of freedom needs to know the content of the notion of liberty. Liberty can be understood as the space of chance at the disposal of peoples to choose different alternatives. We understand liberty in this sense positivistic as liberty of choice. Those who can choose among different alternatives are in the possession of a space of freedom.

Liberty as Conformity with the Law

Liberty can however also be understood quite differently. HEGEL e.g. is of the opinion that liberty is the possibility of human beings to be in harmony with the world spirit. Free are those who have the capacity to decide the right thing and who are able to act accordingly. For ROUSSEAU those are free who are able to follow and to subordinate themselves to the volonté générale. The realization of the volonté générale is liberty in its proper sense. If one understands liberty in the sense of HEGEL or ROUSSEAU the question with regard to the barriers is irrelevant. In this case namely the state decides with the law or with its volonté générale the content of the liberty. Whoever does not subordinate to the volonté générale can not refer either to legitimate or illegitimate barriers of liberty.

STUART MILL

The dispute on barriers of liberty thus is only possible if one understands this notion in the sense of STUART MILL positivistic as liberty of choice. In this sense those who are free are able to choose among different possibilities without having to decide which alternative is generally better or worse, good or bad. Liberty is not to be restricted to the notion of the right to choose the good; liberty contains also the right to decide for the bad or the worse.

Autonomy and Chance

How can such liberty of choice be understood? Liberty can only exist with regard to a relationship among two different human beings. When students decide during the classes to leave the room for a cup of coffee they dispose of a certain space of autonomy. This autonomy is limited by their fear possibly to be criticised for this attitude or even facing stronger criteria's in their exams. The larger their space of autonomy and inner independence the bigger is their inner autonomy and chance to choose freely among their alternatives.

Authority and Might

Who ever wants to influence the students and impede them from their coffee break exerts power. If this power is considered legitimate one labels it authority. With regard to this sphere of relationship one has to inquire the justification of the limits of liberty. With this regard we have to insist: up to now we have analyzed freedom as such that means each possible social freedom. Freedom with this regard is always to be seen as chance to act, not to act or to decide or not to decide within a specific social environment. Pre-condition for the bearer of such liberty of choice is the social environment. It is the society which provides for the necessary space of freedom which allows the individual to make a subjective free decision. These conditions depend from the concrete social situation and from the capacity of the individual to decide independently of the critic of the society.

However, most important as part of the social environment, is the political environment. The state can somehow limit liberty totally only by prosecuting and punishing specific actions or failures. In times that the refusal of military service was prohibited those who referred for their refusal to liberty of religion did still have to count with imprisonment. Contrary to the society the state has the monopoly politically to enforce its decisions with means of coercion.

The Political Freedom

When one invokes the liberty within the state one refers to the political freedom. From the point of view of the state people may be free to choose their religion. But this freedom can be influenced by family, tradition, language and culture. Those dependences however are not relevant with regard to this political context. We have only to deal with the question to what extent the state can limit the liberty of choice with regard to religion. This issue refers to the political freedom.

Under which circumstances can states limit the political liberty of choice? The state can establish dependences only when it is authorized to such action. Authority however requires legitimacy of the limitations determined by the state and their justification. In most cases as with regard to the obligation to pay taxes a formal legislative ground is sufficient in order to limit the liberty of the individual. As soon as the liberty is part of a human right such as the liberty of religion or of opinion a simple formal legislative act is not sufficient in order to limit freedom. In principle one has to recognize that the high value of fundamental liberties as part of human rights can only be restricted in cases where such restrictions serve a even higher value. As final consequence one can state that liberty can only be re-

stricted in the interest of liberty. As the state guarantees freedom it can also require that the freedom can be restricted in order to maintain the state order which itself aims only to guarantee freedom.

Liberty within a Network of Relationships

Political and social liberties exist only within a network of relationship among different peoples. If one assumes that someone is free, one cannot predict its concrete behaviour. The cause of the action is not determined by the exterior but rather by the proper subjectivity. (cp. BENN, p. 1 and R. S. PETERS, p. 199) An individual who has a weak character is more dependent from external circumstances and thus less free than a individual who is prepared to accept for its decision highest risks and consequences such as torture and even death.

If somebody has the "freedom" to influence the behaviour of others one considers this as power, if one evaluates this possibility or chance neutrally. Such power is considered authority if it is evaluated in a positive sense and considered as justified and legitimate.

The opposite of liberty is thus dependency. If individuals turn into objects and if they loose their subjectivity they become dependent of external social or political powers.

Free from Coercion

The freedom of an individual thus is always determined within the context of a specific society. Even though freedom needs always to be determined with regard to this relationship to the society this does not mean that the society or the polity alone established by the society can determine the content and the size of freedom. Not only those humans who behave in conformity to the law (G.W.F. HEGEL) or to the „volonté générale“ (J.-J. ROUSSEAU) are free. Free within the polity are rather those individuals which can decide without formal (legal requirements or state-bureaucratic requirements or without de facto social coercions with inner freedom. In its essence freedom is thus relative as it is already limited by the actual existing society. Individual freedom is already determined by the space of factual freedom of the polity and of its society. A people which has to struggle with famine is in its factual liberty as restricted as its single individuals. Opposite a rich and internationally independent state has the power to grant its individuals much more factual liberty than a state in which the population has to live on the minimal standard of surviving.

Formal and Real Freedom

When we address in the following liberty we mean only the political liberty. This political liberty is determined by the formal legislation enacted within the state and at the same time guaranteed by this polity. This political freedom reflects the social freedom. Even though the state has guaranteed in its constitution liberty of religion this factual and social liberty may still be denied when the majority of a small municipality discriminate and exclude all companions living in this area because they think and act differently. With this exclusiveness the other are factually

obliged either to leave the commune or to change their believe. Those who cannot find a job, who fear to be thrown out of their apartment or whose children are mistreated in school are just as much restricted within their liberty as those who may be forced by law and based on the state monopoly of force to accept a new religion.

An intolerant society can tyrannise the minority even though the political state may provide large formal guarantees of liberties. A tolerant and in the sense of KARL POPPER open society can provide within a liberal climate wide ranges of space for liberty even though the formal political liberty might be restraint considerably. (cp. Also J. ST. MILL; BENN, p. 1 and R. S. PETERS, p. 220).

Liberty as Absence from Coercion

The political and legal or formal liberty in the sense of LOCKE is given when each person is entitled to do what the law has allowed and also whatever the law has not forbidden. (J. LOCKE, Second Treatise, VI. chapter, 57). Liberty thus presupposes is in the negative sense the absence of external coercion exerted by the discretionary power of the state. From the positive point of view it provides the possibility to choose among different alternatives of behaviour. Liberty thus has as well a positive as also a negative aspect. It is useless when the state leaves every one in its freedom to choose its education, but nobody has the possibility to get education according to its capacities and desires.

Freiheit und Gleichheit

Wesentlich ist nun, dass die politische oder formale Freiheit jedermann in gleicher Weise zukommt (J. RAWLS). Die rechtliche Freiheit darf nicht auf eine kleine Minderheit beschränkt oder nur den Männern bzw. den Angehörigen einer bestimmten Rasse oder Religion vorbehalten sein. Der Grundsatz der Gleichheit erfordert gleiche Freiheit für jedermann. Wenn der Staat also die politische Freiheit einschränkt, ist sie für jedermann in gleicher Weise einzuschränken.

Freedem of the Other

What conditions must be given that the state can limit Freedom? "... all restraint, *quâ* restraint, is an evil… Such questions involve considerations of liberty, only in so far as leaving people to themselves is always better, *cæteris paribus,* than controlling them… . (J. ST. MILL, V. chapt., p. 239). Restrictions thus are always legitimate when they can be justified. According to BENN and PETERS this is a formal principle which the state obliges to justify each limitation of freedom because each limitation of freedom as such is principally an evil. Which however are now the valid or legitimate justifications for such limitation of freedoms? The only legitimate justification for MILL is the survival of the other or of the community. (J. ST. MILL, chap. V., p. 240 ff.) Restrictions of freedom thus are justified when they are needed in order to prevent damages to other persons. In other words: The liberty of each person is limited by the liberty of the other.

Liberty and State Solidarity

So far so good. The praxis of liberal states accepts however more justification in order to legitimize restrictions of freedom. Not only the security but also overwhelming public interests legitimize limitations of freedom. Thus, the state obliges the parents to send their children to school and the taxpayers to pay the necessary taxes also in order to run state hold schools. Both are limitations of the liberty of the single individual. Are the justified?

When the in the sense of LOCKE has only as task to protect property and liberty of individuals such limitations are not justifiable. The state has according to our view also to be considered as a community based on solidarity which has to care that individuals which based on the growing interdependency of the society become more and more dependent gain still some space for free development. Within the interest of a need for such development the state has to care for good education. Limitations of liberty of all human being (e.g. general obligation to go to school) are thus justified when in the end the enhance the space for liberty of choice. Indeed they are even necessary in case the liberty will not be even more restricted because of increased state bureaucracy with regard to mandatory education. When states e.g. use tax money for the support of handicapped persons, those persons however loose all there liberty of choice such an intervention has no justification. A general mandatory insurance which on one side limits the freedom of each individual and on the other side expands the freedom space of aged people because they feel more free based on the social security such liberal system must have priority.

Restrictions of Liberty as Means to Enhance Freedom

In the end, liberty can only be limited within the interest of liberty. Freedom however can not only be seen as an individual but also as a communal value. Of what us is e.g. the comprehensive state guaranteed liberty of economy it the great bulk of the economy of the state becomes dependent on other states or other foreign companies? – Of what use is a comprehensive guarantee of liberty of press when the big bulk of the population has no capacity to read or to write? Since liberty is always related to the community it should never be misused for antisocial behaviour. The liberty requires that it is used by each individual according to its full responsibility related to the community. Such responsible use of liberty can not be controlled nor prescribed by public means. It must be entrusted to the proper responsibility of each citizen. Without such bases of trust liberty can not be realized. If liberty however is generally and regularly misused new state limits will be necessarily enacted.

Limits and Image of the Human

The system of limits of freedom is thus very complex. Whether limits are legitimate can often not be decided on the abstract but only by knowing the concrete circumstances. The concrete decision however is clearly influenced by the image of the human being. Those who trust individual persons and those who believe in a liberal state, will propose more restraint to the state and less limitations of free-

dom than those who are convinced that human beings are bad beings which always tend to misuse their liberties.

G. Criteria's of Justice

Jacob Good owns a big garden, which needs regular care. Young Martin of the neighbour garden helps usually each Saturday afternoon to cut the lawn. Martin has a friend living in poor conditions. His mother is severely ill. On the request of Martin Jacob Good employs additionally Peter Poor, the friend of Martin. He promises to him a small salary as compensation for the work. He asks himself according to what criteria's he should determine the amount of the salary to be given to Peter Poor. Shall he pay him according to the achievement principle and thus pay him less than he pays to Martin who starts earlier to work? Should he take into account the needs of Peter and give him more than to Martin? Should he fist stick to the contract and promises given to Martin and decide freely on the compensation for Peter? In short, Jacob Good needs to decide on which criteria's of justice he will decide.

The Complex and Diverse Human Being

Human beings have diverse needs: religious developments, social prestige, economic and/or political power, commitment for ideal values, creativity and innovation, artist performance and security. These needs are taken care of in different communities such as church, state, family economy etc. The social relationship of humans has thus also diverse effects. It would thus be wrong to make out of this diversity a homogeneous and totalitarian melting pot, a state including all these different needs. The state as community of coercion can impossibly meet all the different needs of the homo socialis. The polity is only a part of these different communities. On the other side the state which cares for the social wealth of its population cannot without any reflection be accused as theft of the taxpayer. Human beings which live within a state are dependent on the solidarity of the polity. Rich and poor take profit from the community of solidarity. It can only survive when the polity takes care of all different layers of the population.

Justice within the Welfare State

While the advocates of liberal state solutions had to decide what is needed for the protection of human beings from the side of the state, today's generation has to decide what is *just* within a welfare state. In case the distribution of goods e.g. between Robinson and Friday is unjust the state needs to intervene. When it now provides for an other system of distribution according to its concept of just, one has to ask which principles should guide state policies with regard to this issue. Justice thus determines on one side the limit of free economic activity and on the other side the *direction* of such state steering measures.

I. When does the State need to Intervene?

Seeking an answer to the question which decisions of the state are just, we have first to depart from the fact that tasks of the state are principally determined by the dependency of human beings and that such dependency is caused by the growing interdependency of the social and political society.

Obligation for Social Care

We go back again to the example of Robinson and Friday: If we assume that Friday the older partner of Robinson gets old and that he is not any more able to work and earn enough. He cannot any more care himself for his proper living. Within a social order in which the care for elder members of the family is up to the extended family or the kinship group Friday can fearless enjoy his old age life. On can however also imagine that Friday could earn during his whole life enough in order to face fearless his old age days. Also in this case the state has no special obligation. In many states however such possibilities of preventive care for the old age do not any more exist for the great bulk of the society except for the tiny minority of the very rich. Within industrialized countries those previous family and kinship structures have been dissolved imposed by social developments but also based on legal changes. Also personal savings may shrink because of inflation or may not any more produce the expected interests because of economical changes so that living cannot any more be paid by these incomes. Thus, for Friday a personal retirement provision is not any more possible. He depends on the society. Facing these dependencies it would be utmost unjust if the state, for which one has paid the whole life taxes in order to contribute to its development, would not any more care for elder peoples.

This example shows only one aspect of justice: In case dependencies lead to consequences, which are not any more humane, a state intervention is needed. At which time and with what measures the state has to intervene, this question is decided by the fundamental values of the social and political order such as e.g. the human dignity. Justice in this case guarantees no more than the minimal standard. This applies by the way for all dependencies such as those of the tenant from its lessor or landlady in case of housing shortage, of the consumer dependent from a production company misusing its monopoly or from the employee from the employer.

Minimum of Existence

Can one also explore positive criteria's for such decisions? What precautions need the state to provide for the provisions of Friday? Does it have to guarantee for him the minimal standard of existence based on a general social security system? Or does it even have to finance him a enjoyable living in his old age? Should it only pay according to the previous insurance contributions of Friday or should it only be guided by the actual needs of Friday?

We can see, such question turn in the end around the old postulate known since ARISTOTELES "let each have its own". This *suum cuique* contains however an

empty formula as long as we do not know the criteria for just distribution. During history this question, what should legitimately be given to each human being has been answered differently. While some did advocate that each should be granted its vested rights, other interpret this principle in a way that each should be paid according to its performances. Others were of the opinion that justice is only implemented according to the distribution determined by the needs, if each gets what he/she needs.

Formal Justice

This apparently finally not solvable dispute did lead many philosophers to seek criteria's for the solution of this content of justice not with a material but with a formal criteria. Such formal criteria is certainly the categorical imperative of KANT. According to this principle, decisions are just, when they can be generalized. If one turns this principle to the opposite then it follows that whatever is general and for everybody acceptable must also be just. An innovative further development of this criteria we find in the writings of RAWLS. For him actions and decisions are just when they can be accepted by everybody under certain conditions. A most standalone answer to this question gives ROUSSEAU. Just for him is geh general will (*volonté générale*), which has to be distinguished from the sum of the wills of all (*volonté de tous*)

In the following we shall now further analyze those different criteria's of justice and explore their significance for political decisions.

II. Material Substantial Criteria's of Justice

For Everybody the Protection of His/Her rights (HUME)

For DAVID HUME (1711–1776) justice means respect and recognition of the rights and in particular the property rights of the other. (cp. D. MILLER, S. 157 ff.) HUME does not inquire whether the distribution of property has been made according to just criteria's and how it should be designed for the future. For him decisive is that rights which men did acquire by earning, ownership, heritage or work should be respected by every one. He admits that some may not use their rights for the common good. But this is not relevant. Rather relevant is that each respects the rights of the other and with this principle also the general peace is guaranteed. This concept of justice corresponds to the traditional feudal society. The state has the mandate to protect existing rights and to care that nobody can illegitimately acquire property of others or transfer it to others.

To Each according to its Performances (SPENCER)

This traditional theory of justice could not any more meet the requirements of the new social order in which the distribution of all wealth was at the disposal of the society. What could now be considered as just? An answer can be found by SPENCER. For him the principle each according to its own is fulfilled when all ac-

tivities are paid according to the performances of each. „Each individual ought to receive the benefits and the evils of his own nature and consequent of conduct" (H. SPENCER, Vol. 2, p. 17). The behavior of human beings is not to be judged subjectively according to its effort or commitment but according to the success that is the performance, which is evaluated by the exterior. How does this guarantee a just distribution of wealth? According to SPENCER the law of nature guarantees that the stronger should get more and the weaker gets less. He transformed the biological finding of DARWIN's survival of the fittest into the social life. (vgl. H. SPENCER, Bd. 2, S. 17). The human being which is able to adapt best to ist environment should also receive most of the goods available.

According to which criteria's should one measure the performances of the individual? SPENCER refuses objective criteria's, which would be determined according to fundamental values by political decision. In contrary, he advocates criteria's which can meet the free competition. Performances should not be measured by the state, they should rather prove one self within the free market (H. SPENCER, Bd. 2, S. 472). Accordingly the state interested into a just distribution of goods should guarantee for each individual equal chances and a competitive order determined by the performances of each. In particular the state should not be allowed to assess the performances of individual persons. Men and women should prove one self within the free economic battle of all against all. Each objective assessment would have according to SPENCER socialist or totalitarian consequences.

To Each According to its Needs (KROPOTKIN)

Life within the slums of big mega cities has already made clear within the recent decades has clearly revealed that the pure principle each according to its performances cannot lead to solutions which would meet the emotional commitment of human beings towards justice. Hard labour of women and children, misery and fame have now place within a just society. Thus already the first socialists guided by SAINT-SIMON (1760–1825) required a just distribution of goods according to objective evaluation of performances which are undertaken by each member for the benefit of the society. Salaries of employees should be calculated according to the capacities and responsibilities of the employee but not according to the market-price of this specific performance. Other socialists such as PIERRE-JOSEPH PROUDHON (1808–1865) required for each hour of work independent of its content and of ist performance the same salary.

For PETR A. KROPOTKIN (1842–1921) those demands were not radical enough. They did too much correspond to capitalistic ideas. He refused a distribution of goods according to the performances and required that goods are distributed according to the needs of each member of the society. Such distribution should however not be organised by the state. As anarchist KROPOTKIN was of the opinion that in small autonomous communes each could work according to the needs of the collectivity and produce corresponding goods. Each has its share on all goods and should therefore also receive a part which he or she needs. These autonomous communes are to be linked with each other within a federal system which however would not dispose of any political force with regard to these municipalities. (vgl. D. MILLER, S. 209 ff.)

III. Formal Criteria's

a) The General Will According to ROUSSEAU

General Will as Absolute Justice

For ROUSSEAU the general will (volonté générale) of the people corresponds and is the expression of justice. This general will contains first a formal element: The authority based on general laws. General however, does not mean an addition of all needs, interests or desires of each individual. It rather corresponds to the integral general denominator to which each individual can consent. Those laws should therefore in order to correspond to the general will also be elaborated and enacted within a procedure which enables the people to participate and to express its consent.

There is often a great deal of difference between the will of all and the general will; the latter considers only the common interest, while the former takes private interest into account, and is no more than a sum of particular wills: but take away from these same wills the pluses and minuses that cancel one another, and the general will remains as the sum of the differences.

If, when the people, being furnished with adequate information, held its deliberations, the citizens had no communication one with another, the grand total of the small differences would always give the general will, and the decision would always be good. But when factions arise, and partial associations are formed at the expense of the great association, the will of each of these associations becomes general in relation to its members, while it remains particular in relation to the State: it may then be said that there are no longer as many votes as there are men, but only as many as there are associations. The differences become less numerous and give a less general result. Lastly, when one of these associations is so great as to prevail over all the rest, the result is no longer a sum of small differences, but a single difference; in this case there is no longer a general will, and the opinion which prevails is purely particular.

It is therefore essential, if the general will is to be able to express itself, that there should be no partial society within the State, and that each citizen should think only his own thoughts: which was indeed the sublime and unique system established by the great Lycurgus. But if there are partial societies, it is best to have as many as possible and to prevent them from being unequal, as was done by Solon, Numa and Servius. These precautions are the only ones that can guarantee that the general will shall be always enlightened, and that the people shall in no way deceive itself. (J.-J. ROUSSEAU, Social Contract IInd Book Chapter 3).

Totalitarian General Will?

One has always reproached to ROUSSEAU that his idea of the general will contains in the end a totalitarian and collectivist element. But this does not correspond to his opinion he has published in his political economy. In this edition he namely explains to what content the general will has to correspond. "Look into the mo-

tives which have induced men, once united by their common needs in a general society, to unite themselves still more intimately by means of civil societies: you will find no other motive than that of assuring the property, life and liberty of each member by the protection of all." (cp. ROUSSEAU Political Economy). But already MARSILIUS VON PADUA has expressed similar ideas: „As the law is one eye out of many different eyes which means it is an observation which has been assessed by many observers. In order to avoid an error of a judicial verdict, it is more secure when those judgements are decided according to the general law made by many than according to the discretion of the judge. .. Therefore we let men only rule in conformity with the intellect that is with the legislation. (M. VON PADUA, Defensor of Peace First part chapter Xl, § 3–4).

The most noble obligation of the legislature according to ROUSSEAU is its task to let the laws guided by the general will. The general will corresponds to justice. "The body politic, therefore, is also a moral being possessed of a will; and this general will, which tends always to the preservation and welfare of the whole and of every part, and is the source of the laws, constitutes for all the members of the State, in their relations to one another and to it, the rule of what is just or unjust.." (J.-J. ROUSSEAU, Political Economy). The first commandment of justice is to rule the people according to the law. Which should be the content of the law? Laws need to wake the love of each citizen for the fatherland.

„The security of individuals is so intimately connected with the public confederation that, apart from the regard that must be paid to human weakness, that convention would in point of right be dissolved, if in the State a single citizen who might have been relieved were allowed to perish, or if one were wrongfully confined in prison, or if in one case an obviously unjust sentence were given." (J.-J. ROUSSEAU, Political Economy)

Welfare State and General Will

However, it is not enough if the state only cares for the protection of the single individuals. "In fact, does not the undertaking entered into by the whole body of the nation bind it to provide for the security of the least of its members with as much care as for that of all the rest? Is the welfare of a single citizen any less the common cause than that of the whole State? (J.-J. ROUSSEAU, Politische Economy)

„Let our country then show itself the common mother of her citizens; let the advantages they enjoy in their country endear it to them; let the government leave them enough share in the public administration to make them feel that they are at home; and let the laws be in their eyes only the guarantees of the common liberty. (J.-J. ROUSSEAU, Plitical Economy).

Not Re-Distribute but Prevent Poverty

How should the state behave with regard to the actual existing economic inequalities? Should it make the riches poor and the pores rich? "It is therefore one of the most important functions of government to prevent extreme inequality of fortunes; not by taking away wealth from its possessors, but by depriving all men of means to accumulate it; not by building hospitals for the poor, but by securing the citi-

zens from becoming poor. The unequal distribution of inhabitants over the territory, when men are crowded together in one place, while other places are depopulated; the encouragement of the arts that minister to luxury and of purely industrial arts at the expense of useful and laborious crafts; the sacrifice of agriculture to commerce; (J.-J. ROUSSEAU, Political Economy).

This task can only be realized by the state on the bases of the consensus of the voters. “That taxes cannot be legitimately established except by the consent of the people or its representatives, is a truth generally admitted by all philosophers and jurists of any repute on questions of public right, not even excepting Bodin.” (J.-J. ROUSSEAU, Political Economy).

According to ROUSSEAU the state is primarily required to protect property and freedom. „It should be remembered that the foundation of the social compact is property; and its first condition, that every one should be maintained in the peaceful possession of what belongs to him.“ (J.-J. ROUSSEAU, Political Economy). „There can be no patriotism without liberty, no liberty without virtue, no virtue without citizens;“ (J.-J. ROUSSEAU, Political Economy).

Solidarity and Order of Peace

The state according to ROUSSEAU is the mother to protect its citizens. This protection can only be realized within a just order of peace. This polity can only be sustained if it enacts just laws. Those laws need to be based on the common understanding that the state is also hold together as a community of solidarity which serves the well of all citizens. However, it can finally only exist if all are prepared to contribute their part for the common solidarity. Then it becomes possible to protect property and to implement freedom without totalitarian violence.

b) Justice as Principle of Fairness (RAWLS)

Veil of ignorance

For RAWLS justice is less a democratic institutionalized volonté générale but rather a decision acceptable by rational people because it can be generalized. justice corresponds to all those decisions which can find a consensus by all free and rational human beings which are committed to promote their proper interest. RAWLS assumes with this that those human beings would make their assessment and decisions in a state of origin. In this state they should have now knowledge with regard to their proper capacities, interests, ideas of the god and of the bad, neither should they knows what position and rank they would once achieve within the society as well as on the level of development the society they will belong to would have achieved. (cp. Critical H. A. HART, p. 132).

RAWLS is not contented with a formal so to speak procedural bases for the development of principles of justice. He rather tries to give a substantial content and this based on the principles of equality, inequality and openness. (J. RAWLS, p. 19).

Where and when has the Principle of Equality Authority?

The state needs namely to respect the unconditional equality with regard to the fundamental liberties and fundamental rights. Every body must be able to be protected in its liberties in the same way and to the same extent. Discriminatory application of liberties based on races, gender or nation is clearly illegitimate.

The liberty should however not only be protected with regard to the state organs. The state needs also to care for the free space of its society. Each member of the society must have equal opportunities to make use of its liberty. In case the freedom of development of each individual citizen needs to be restricted for instance with regard to the use of the land, such limitation must be replaced by a corresponding right to participate on the common design (e.g. political rights within the assembly of the municipality for zoning, right to appeal against zoning planes etc.)

The liberty finds its limits within the liberty of the other and of the capacity of the community to survive. The religious freedom is limited by the religious freedom of the other. – The state can not admit religions which predicate to destroy other religions. – The liberty of press cannot lead to the consequence that some very few printed press publications can prevent the editing and publishing of additional media and by this monopolize the political and social opinion of the population. In case the state requires military service for young males of the population it should respect the refusal for reasons of religion as long as such refusal does not impede the state to assume its main mandate of defense.

When can Inequality be Justified?

There is no state and no area in which the principle of equality could be fully and unconditionally be implemented. In particular it will always remain impossible to guarantee a equal distribution of goods. To what extent inequalities can be justified? Certainly they can only be justified as long as the poor can also profit from the advantages of the rich. The higher salary of the manager of a company should provide for a better management in order to guarantee the working places of the employees. With regard to this goal inequality is justified. (vgl. J. RAWLS, S. 258 ff.). A justification of horrendous salaries of highest managers only by the market would certainly not be considered as legitimate inequality by RAWLS. Feudal economy, heritage aristocracy and closed financial oligarchy can not be justified within a industrial state taking into account the dependency of the single individual with regard to the society. He/she will not profit from such inequality. However, we need also to be clear with regard to the fact that the actual state needs to count in future with a rising shortage of the resources and supplies. Such administration of the need will have to care for a proportional reduction and a just distribution of the needs. If electricity needs rationed one can not reduce the actual consumption equally. Such policy would reward the extravagant and punish the saver. When however unemployment has to be weighed against short time work the short time work may be more just than the dismissal of employees.

Such observation may have the following consequences for a state with market economy: It should guarantee the freedom of economy and thus the free distribu-

tion of goods as long as all can profit from such freedom. As soon however, as only some few profit with regard to the disadvantage of all the others (e.g. illness, age etc.) the state needs to intervene.

Principle of Openness

The principle of inequality needs to be completed by the *principle of openness*. A rigid and unequal order of the society can never be legitimate. Privileges need principally to be open and accessible for everybody. Namely the educational system needs to provide equal opportunities for all members of the society in particular for the disadvantaged layers of the society. Also the underprivileged need to have opportunities to raise within the society. Rigid financial oligarchies need to be broken up.

Openness does not only require social mobility. It has also to adapt permanently to the changing conditions of the social and political environment. The state needs to remain adjustable. Its organs and authorities should learn and be able to alter their policies and attitudes accordingly. They should not shut oneself to new knowledge and new needs and new constraints. The larger the capacity to learn the opener is the state and the more it keeps its capacity to find new and just solutions.

Repsonsibility and Solidarity

The principles of equality, inequality and openness of RAWLS remain in the end empty phrases when they will not be completed by the principle of responsibility and solidarity. The state order requires a minimum of solidarity and responsibility. Those who consider the state as a mere milk cow which has only to produce for ones proper interest without being fed, those who consider the state as a mere instrument which serves any unrestrained pursuit of profit contributes to decomposition of the state and finally to its total destruction.

Responsibility and solidarity engage also the authorities of the state to follow these principles. Civil servants should not misuse the power they have been entrusted. Their interest to raise to higher positions should not totally dispel their responsibility to stand up for the legitimate interests of the human beings seeking their help and support. The achievement principle within the state administration can only be partially carried through. In addition the consciousness of civil servants for solidarity should be strengthened in order to get a more creative and innovative public service. Responsibility and solidarity should contribute to enhance the eagerness to learn and to the curiosity to know of the authorities. Authorities which are not prepared to learn and have no curiosity to get new information will alienate the state from its citizens.

IV. Principles of Justice within the Reality of the Modern Liberal State Committed to the Social Market Economy

The reality of the modern state committed to liberty and welfare reveals that all different theories and concepts of justice are somehow implemented within the re-

ality of modern politics. The main difference among the modern state depends only on the different priorities to those principles which can be found in all our modern states.

Protection of Rights

The idea of HUME that the state has as priority task to protect the rights finds its expression within the guarantees of property and liberty. In addition the right to heritage the freedom of contract and the property rights are committed to this principle. The achievement principle of SPENCER finds its political reality with regard to the guarantee of the free competition. As far as performances cannot be assessed by the free market such as salaries for civil servant or public grants for the agriculture political authorities have to establish legitimate criteria's in order to evaluate those performances objectively based on a common consent.

To Everybody According to its Needs

But also the needs of the human beings are taken into account by the modern state. The basic principle of social insurance is rooted within the value that everybody should have a minimal claim to security of his or her existence. At least the minimal needs of each individual living within the territory of the state should be able to survive and this survival must be guaranteed by the state. This principle is taken into account within the bankruptcy laws which provides that those goods which are absolutely necessary for the survival can not be taken away. The guarantee of minimal salaries, of minimal prices of minimal holidays are also influenced by this principle just as the commitment of the states to provide for every child a minimal education.

Fair Procedures

The procedural guarantees developed by ROUSSEAU or RAWLS can finally be found within the principle of legality. The liberal state ruled by law can only be ruled on the bases of written and generally known legislation. Laws need to have the general consent of the citizens or of their representatives within the legislature. They need to be enacted after a transparent, fair and rational procedure accountable to the people and the media.

However, the modern states need today to solve problems which did not occur at all or at least not in such dimension in earlier times. One should only think to the shortage of resources and water to the ecological catastrophes and to the challenge of migration. Resources e.g. are only available to a limited extend. This constrains the state to take the needs of the citizens even more into account when it develops concepts for fixing quotas or to ration the goods available. Liberty may have to be restricted not only in the interest of the actual but rather also in the interest of future generations. Justice needs not only to take into account the needs of the living but also the needs of future generations.

Subsidiary

If one will have once found an answer to the question which tasks should be carried out by the political powers one will also have to decide to whom those tasks should be entrusted. An answer to this question can be given based on the criteria of subsidiary. According to this principle the superior community should only be mandated with tasks which cannot be undertaken be inferior communities or polities. If e.g. a family cannot take care any more for the education of its children this task should be taken on by the municipality. If the municipality is not big enough it should to carried out by the next higher level the district, province or the canton and so on. When banks cannot secure the stability of the value of the money such task must be conveyed to national or state banks. If the nation state is not able one has to mandate international organisations.

Side Effects

Besides the principle of subsidiary additional reflections need to be included within the decision making process: One has to take into account possible side effects which can be caused when tasks are entrusted to the higher level of polities. If e.g. the mandatory obligation for insurance is taken over by a state insurance such decision may have consequences to all other private insurance. – When centralistic solutions have to be made for the policy of housing, traffic and settlement the central authorities might have to face the danger that plans established in the ivory tower do not fit to the reality. Moreover one should not oversee the fact that the free market system often has the tendency to prefer centralistic solutions. The principle that the state should not intervene within the market but remain neutral requires e.g. that some measures limiting the free market for the interest of environmental protection applied equally to all economic activities may have different consequences in different regions. Often one has an interest to a general mandatory solution although many companies would be prepared to undertake measures for the environmental protection. As long as such companies have to count with the fact that their competitors refuse such measures and take profit out of the restrictive measures of their competitors also the willing companies refuse measures for better environmental protection. Such problems can only be overcome with a general obligatory and mandatory regulation in order to guarantee market neutrality.

Hardship Cases

The principle of subsidiary requires from this point of view often to undertake punctual interventions by the state authorities. Most families are e.g. able to take up their children. Thus a state intervention would be illegitimate. In certain cases parents however need to be taken away their mandate to care for their children because they are not able to fulfil such task. In some cases they may even mistreat their children. For such cases a punctual decision of the state or the judge is needed.

Implications on the Behaviour of the Affected Persons

In addition one has to inquire what might be the implication of state solutions with regard to the affected persons. Public grants e.g. for the production of milk lead to overproduction. Countermeasures of the state restricting the production may have side effects on the quality of the products.

All these examples show that in praxis the problem of new state tasks needs complex investigations and reflections. Solutions need to be found which are adapted to the task to be fulfilled. All those solutions need to take into account the different social and political structures. Public grants, inspections and controls with the support of private organisations the establishment of specific autonomous undertakings, institutions or companies are the result of such solutions adapted to the complexity of the tasks and of the social and political structure. Of course one needs to admit that such solutions adapted to the needs of a globalised economy and communication may be to complex and non-transparent and thus create new problems of accountability and democracy.

Chapter 5 Rule of Law

A. Development of the Rule of Law in the Major Western Legal Traditions

I. Introduction:

Rule of Law – Rules of Law

The label rule of law is used with rather different contents according to the legal and cultural tradition of the different languages. Thus, the French term "Etat de Droit" and the German notion of the "Rechtsstaat" are not identical with the traditional content of the rule of law used in the common law tradition. However, in this chapter we shall use the term Rule of Law according to the common law tradition. The obligation of the states to apply and to follow the principles of the rule of law can still be understood in quite different terms:

- In case one uses the term Rule of Laws one hints, that the different governmental branches are to follow different legal and ideological concepts. The notion rule of laws presupposes different "ideologies" or different natural laws understood as pre-positive binding principles binding positive law. (notion of the French état de droit)?
- in case one uses the term rules of law one sets the principle that state authorities have to obey the positive laws enacted by the legislature. (état légal in the French oder Rechtsstaat in the German sense)
- If one refers to the „rules of the laws" one accepts the principle that the authorities of different states are to follow the positive legislation which itself depends on different pre—state ideologies.
- However in case the Rule of Law as such is addressed, then one sets the universal requirement that there is are universally valid pre-positive legal principles which have to be followed by all state authorities. Such principles should be evenly valid for all actual states but also with regard to the vertical historical dimension to the different stats in the past. Those principles are deduced by reason and have therefore to be obeyed by all sover-

> eign states. They do not only bind state authorities but even the sovereign constitution or law maker. In this case one would only have to ask the question with regard to the mighty political institution, which would have the competence and the power to determine obligingly the content of the rule of law.

In the following paragraph we shall in principle stick to the general idea of a universally valid Rule of Law deduced by reason and universally valid for all human beings.

Rule of Law and „Rechtsstaat"

The principle that the positive binding legal order of a state has to be in accordance to the basic idea of law and justice has mainly been developed within the Anglo-Saxon legal tradition. The German notion of the "*Rechtsstaat"* finally only requires that all authorities installed by the constitution of the state have to follow the positive legal order. With the Anglo-Saxon notion of the Rule of Law however, one establishes the basic and fundamental principle according to which political might and power is always limited by the law and has to be controlled and accountable to the principles of the Rule of Law.

That men should not be ruled by men but by law this principle has along historical tradition. The Rule of Law has been generally regarded as immanent to the doctrine of - through law - limited and controlled political power. Under the formulation on "the empire of laws and not of men", the form of limited government ("Commonwealth")" was for the first time explicitly identified with the rule of law in the 17th century England, by a convinced republican James Harrington in his famous book Oceana. The idea as such is by far much older. Already the Greek political philosophy argued the supremacy of law against the voluntarism of individual will. However, it is the generally accepted West European medieval idea of a higher law limiting also the power of the King, and more in particular its developments in England, which have decisively contributed to the modern concept of the rule of law. Indeed, the historical background of the common law Europe, as opposed to that of the continental law Europe, was simply much more favourable to the ideas which during the 17th century reached its theoretical climax (J. Locke) in a concept of the *government by consent*, namely: that a power-holder can claim legitimacy for his rule only if he has the consent of the governed.

Preparedeness of the Common Law for the Development of the Rule of Law Principle

The legal system of the Common Law has continuously developed based on rational arguments before the courts and thus it could adapt to the new needs of the social developments according to the historic period. The Common Law system was thus much more flexible and adaptable than the system of the continental law which has been "frozen" by legislation and thus much less open for new developments. This may be one of the main reasons why the principle of the rule of law could be periodically improved in order to limit the power of the sovereign. This development has certainly not only been initiated by the courts but also by the basic political philosophy. In particular the legal thinking influenced by the theory

JOHN LOCKE on the legitimacy of governments. His request that governments needs to achieve legitimacy by acceptance and consensus (*government by consent*) and that the authority of the power-holders can only be legitimate when it is based on a continuous support by the subjects is finally deduced on the principle of the rule of law.

Those who ar curious to know of the emergence of the rule of law will thus primarily have to look into the historical development of the theory of the authority of the law within the English legal history and legal thinking. Then one has to follow the development of this principle on the continent basically in Germany and in France. Those continental developments as we shall see are however considerably different from the development in the United Kingdom.

II. The Rule of Law as Developed in the Common Law Tradition in England

a) Medieval Idea of the Supremacy of Law and its Effects on Modern Liberty

Again Magna Chartea

The modern concept of individual liberty would not have been possible if the feudal polity in Europe had not already embraced the idea of establishing legal limits for the arbitrary acts of the Crown. The XIII century Western Europe is well known for the charters which guaranteed property rights of the king's vassals and thus obliged the king to respect private rights of his subjects.

As already mentioned in the context of the development of the principles of human rights, one of the first among these documents will remain a milestone in the history of the human struggle for personal liberty and protection against the voluntary acts of power holders. The *Magna Charta Libertatum (*The Great Charter of Liberties*)* - which under the pressure of his peers the King John (1199-1215) was forced to proclaim in 1215 - can indeed be taken as the first written document to set the basis for the rule of law. After this charter, the English king is in legal terms absolute, but not any more arbitrary. *Monarchy by law* in England meant from that time on that the King's acts of power are legitimate as long as they remain within so established a legal framework. The old Anglo-Saxon idea of a *common free man* who was born with some inalienable rights(privileges) against the Crown received through this document legal relevance. This is how the medieval principle of the *supremacy of law* turned into *a* constituent element of the common law.

Needless to say, the supremacy of law idea was not backed up by any abstract theoretical concepts. It was deeply rooted in the nature of feudal polity, characterised through the pluralism and some kind of balance among different power centres. One can go even further and consequently argue that this specific tenet of the feudal policy (pluralism of centres of power) already at that point of time paved

the way for the *principle of checks and balances* and brought the latter immanently together with the rule of law.

A "myth" about Magna Charta as "the first constitutional document" in human history has first of all to do with the famous Article 39 (in the version of 1215) which provides as follows:

"*No free man shall be seized, or imprisoned, or dispossessed, or outlawed*, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, *excepting by the legal judgement of his peers, or by the laws of the land"*

Mother of the Modern State

The scholars have until today remained divided on the issue of a legal nature of this most famous feudal document in Western Europe. Some of them claim that *Magna Charta Libertatum*, like all feudal documents, simply confirmed customary law. Others, on the contrary, argue that in this case we can indeed talk of a "fundamental law" which against the feudal historical background laid down basic human rights and liberties, and therefore has to be taken as a constitutional act in the proper sense of the term. Regardless of these differences, however, one thing is indisputable: The blanket, catch-all terms in the Article 39 of the Charter, such as "no free man" and "by the laws of the land" made possible the interpretations which in the course of the long history did change the very feudal nature of this document (even today still making part of the legal system in UK) by significantly broadening and updating its meaning and by giving it a new, ever enlarging social basis. In this sense, one can indeed rightly take the *Magna Charta Libertatum* as the "mother" of modern liberty and constitutional government.

There are two, equally good reasons to back up such a far-reaching effect of the Great Charter: First, the formulation "no free man" grounds upon the equality principle, and as such could over centuries be re-interpreted to relate not any more to the estate of peers, but to all citizens. Second, since the common law as "a case by case judge made law" sets legal rules on the basis of precedents and by a logic of induction, it is much more flexible than the continental legal system of statues and other written rules and regulations, and as such open to case by case revision.

Für diese Beurteilung sprechen vor allem zwei Gründe:

1. First, the formulation "no free man" grounds upon the equality principle, and as such could over centuries be re-interpreted to relate not any more to the estate of peers, but to all citizens.
2. Second, since the common law as "a case by case judge made law" sets legal rules on the basis of precedents and by a logic of induction, it is much more flexible than the continental legal system of statues and other written rules and regulations, and as such open to case by case revision.

Petition of Rights

The *Petition of Right* from 1628, a statement of the objectives of the 1628 English legal reform movement that led to the Civil War and disposing of King Charles I in 1649, came back to this foundation of "liberties of England", and emphasised that private property and personal liberty represented fundamental human rights

inherent in common law. This is how the classical Habeas Corpus fundamental right of protection from voluntary imprisonment was announced:

> No man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited nor put to death without being brought to answer by due process of law" (Petition of Right, Section IV)

Habeas Corpus

The Habeas Corpus Act of 1679 added a procedural element to the protection of personal liberty in front of the court (writ of habeas corpus) and was further sustained by the Habeas Corpus Act of 1816, which extended the prohibition of arbitrary detention in criminal cases to other cases of unlawful and without time-limit custody.:

(More on those basic documents in L. Basta, Politika u granicama prava, Belgrad 1984, S. 20–40.)

From the Magna Charta to the Habeas Corpus

Last but not least, although it would be exaggerated to say that Article 39 of the Magna Charta Libertatum already contained the *due process of law clause*, its origins were nonetheless there and can be easily traced in the due process of clause as included in the Amendments V (1791) and XIV (1868) of the American Constitution.

Given the political framework and potentials in extensive interpretation of its major provisions, The Great Charter of Liberties was already in the same XIII century celebrated by Henry de Brecton as the constitution of liberty (*constitutio libertatis*). Inspired by the underlying philosophy of this document, the famous priest of the Cathedral in Exeter and judge formulated the maxim which until today figures as the most accurate formulation of the medieval supremacy of law doctrine: *Rex non debet esse sub homine, sed sub Deo et lege* (The king is not subject to man, but to God and law)

III. Major Constitutional Conflicts of the 17th Century

The Institution of the British Parliament

One of the major political and institutional developments in the medieval England, which influenced the rule of law was the emergence of the English Parliament in 1265 and a continuous growing of its political influence. The principle *no taxation without representation* was indeed already anchored in The Great Charter of Liberties, which provided in Article 12 that "no scutage nor aid shall be imposed in our kingdom, *unless by the common council of our kingdom"* (italics. L.B.) Nonetheless, it is only with the constitution of the Parliament that this first historical foundation of representative democracy became institutionalised. Furthermore, the road was paved for an epochal breakthrough to take place in the 17th century: le-

gally established limits for the power of the King were to be irreversibly enlarged by a political control of his acts by the Parliament.

Representation

The history of the English Parliament has no pendant on the Continent. In the period between the XIV and XIV century it turned into a representative (although not yet democratic!) body in a proper sense of the term. Formed once to support and enlarge a political basis of the power of the King, the Parliament ended as its strongest competitor and the most defying enemy. This is how the stage was prepared for the greatest constitutional conflicts in the English history taking place in the first decades of the 17th century and leading to Civil War(1642-1649) and Glorious Revolution (1688-1689). The Parliament came out as a winner and contributed a new milestone to the development of the rule of law: constitutional monarchy. The hitherto feudal balance between the two branches of power was to be superseded by the sovereignty of Parliament.

No Separation of Powers

In order to understand properly the critical issues dominating the great constitutional conflicts of the time, one has always to bear in mind that at the beginning of the 17th century the legislative, executive and judicial branches were not clearly profiled among themselves, either in terms of the organisation of powers, or in terms of the functional allocation of different powers. The King-in-Parliament had both the law-making and the law-enactment power, and at the same time sat as the High Court of Parliament. The (political) confrontation over the powers was unavoidable once the question emerged as to which body of power will prevail in the case of a conflict: the King or the Parliament and the courts of common law.

Crown Prerogatives

In constitutional terms the issue at stake were the royal prerogatives, i.e. those powers of the Crown that were established by the common law. The first of the two kings of the Stuart dynasty James I (1603 – 1625) and his Chancellor, the famous philosopher Francis Bacon (1561-1626), saw the King's prerogative above the positive law of England, i.e. above both statutory law (the acts of Parliament) and the common law. On the other side stood Sir Edward Coke (1552-1634), Chief Justice, first at the Court of Common Pleas and then at the Court of King's Bench, who in a number of well known cases and his *Reports* developed powerful arguments to support the supremacy of the common law not only over the royal prerogatives, but also over the acts of Parliament. This was possible not only because of his genious legal mind. "The common law, without at all losing its quality as positive law, was invested with a particular dignity, reflecting a widely shared conviction that it was the highest expression of natural reason developed and expounded by the collective wisdom of many generations".

The constitutional conflict over royal prerogatives could be in a nutshell described as the confrontation between the natural law and the common law arguments. However, it would be more precise to say that it was a juxtaposition of the

two political and legal traditions, at the time equally dominant in Europe: that of the continental countries, and that of England. James I tried to follow the pattern of the royal absolutism on the Continent (and at the time also in Scotland), which implied not only stronger prerogatives, but primarily the right of the King to remain out of control of the Parliament and the courts in the exercise of all of his powers, including law-making and judication. The classical, pre-modern natural law doctrine with its arguments about the King as a sovereign law-maker (*legibus solutus*) and divine royal rights, sustained by the Bodin's theory of the royal sovereignty, looked as a proper theoretical framework to provide such political ambitions with a "constitutional image". It indeed matched the major contemporary political and doctrinal trends on the Continent. However, England had already rejected absolute monarchy as a legitimate form of government and was irreversibly marching into the Modern Age. At the same time the epochal change in constitutional foundations was exercised in a way typical for the English common law tradition: by a conservative form of an appeal to "common reason" and "collective wisdom of the generations".

Legibus solutus

James I defended so vehemently his "divine rights" to unlimited decision-making under the royal prerogatives because he wanted to establish the basic principle of the absolute monarchy at the time – *that the king alone and unlimited takes political decisions*. This was precisely what the Parliament did not want to accept. In other words, the issues at stake were eminently those of politics, and this primarily "political war" was simply waged with constitutional arguments as weapons. Edward Coke and his partisans knew very well what was the basic challenge they were facing about: How to revise the very constitutional fundamentals in the relationship between the executive power on one side, and legislative and judicial, on the other, and at the same time to cultivate the fiction that in constitutional terms everything should remain the same! Those who read the debates in the English Parliament at that time remain impressed by the contrast between the political and constitutional relevance of the issues at stake, as opposed to the humbleness and co-operative spirit of the discourse.

Collective Wisdom Limits the Tyrant

It is precisely with such a historical context in mind that one can grasp the far-reaching impact of the court decisions on individual cases in which Edward Coke already advanced some of the most relevant elements of the rule of law as understood within the Anglo-American common law tradition in general

- That, unlike the continental law, the common law accepts only those general legal rules as valid that have been in concrete cases further developed and that have demonstrated their capacity to regulate the situations of every day life.
- That the acts of the executive power are legitimate only as long as they remain the acts of law.

- That the common law entails also some sort of fundamental law which guarantees as inviolable basic individual rights and therefore remains above the positive law.

Two major postulates resulted out of the last premise, and they have both equally defined the essence of the rule of law:

1. That the fundamental law should control positive law. Only some decades later this idea will be part and parcel of the most fundamental doctrinal and constitutional debate of the 17th and 18th century England, that of the sovereignty of Parliament and fundamental law, which again will directly lead to the modern concept of constitution as a written document to define and control all other legal acts within the legal system.^

„And it appears in our books, that in many cases, the common law will controul acs of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void". (Bonham's Case in Coke's Reports, Pt. VIII, 114, 1610, quoted in Hood-Phillips, op.cit.,). A great number of authors takes this Coke's statement as the origin of the judicial constitutional review (C.J. Friedrich, **Constitutional Government and Democracy**, pp. 251 –253.) Others, however, warn that this argument of Coke has to be directly related to the fact that for him the Parliament was primarily the supreme judicial instance in the state. (E. Corwin, **The Doctrine of Judicial Review**, Princeton 1914, p. 29). Gough rightly argues that, indeed, at the time when the case was decided it had primarily the nature of a civil suit, but that the constitutional consequences of such a position, leading also to conceptual aspects of rule of law"

2. That positive law, including constitution, is not the source but the consequence of human rights. In the coming Modern Age this will remain another fundamental difference between the common law and the continental law, the latter having been basically understood as "giving" and not merely "protecting" human rights. The difference directly led to a point of profound departure of the two legal traditions in understanding the very function of the state. During the two big modern revolutions, the French and the American ones, this difference became even more transparent and perhaps more than anything else influenced different modern developments of the rule of law in the major Western legal traditions.

Institutions Limitit the Power of the Crown

All of the above mentioned major issues of the great constitutional conflicts in England had one and the same thing in common: They aimed at *proper legal instruments to provide political limits for the major power-holders* of the time, in order to guarantee rights of the individuals. This is why the two great themes which dominated political and constitutional theory of the 17th and 18th century England, that on the relationship between the sovereignty of parliament and the fundamental law, and that on the system of powers as a form of checks and bal-

ances, owe a lot to the preceding constitutional debates. Namely, both themes have significantly contributed to the modern conceptions on the rule of law, since they have – from different points of view – addressed the very leitmotiv of the rule of law: How to constitute "the empire of laws and not of men".

IV. Sovereignty of Parliament and the Fundamental Law

How can Fundamental Rights Limit the Sovereignty of Parliament?

Almost every relevant writer in political philosophy and constitutional thinking in England of the time was engaged in the debate on the relationship between the sovereignty of Parliament and the fundamental law. In the timeframe of two centuries the majority of the great names, among them John Locke (1632-1704) and William Blackstone (1723-1780), argued that the idea of a (legally) unlimited lawmaker (sovereignty of Parliament), on one side, and that of a universal validity of the norms and values to guarantee rights of the individuals (fundamental law), are complementary to each other and only together guarantee limited government, i.e. government by law. However, among the smaller number of those who principally rejected any inherent relationship between the sovereignty of Parliament and the fundamental law were the two equally so great and influential philosophers, Thomas Hobbes (1588-1679) and Jeremy Bentham (1748-1832), and they both influenced analytical jurisprudence as a dominant legal theory of the 19th and 20th century in England.

The debate was running primarily under the umbrella of the modern, rational philosophy of natural rights and social contract. The indefeasible natural rights were to set, in form of law, political bounds for a legitimate sphere of power, by providing a qualification upon powers actually granted by the people consenting to the government which, in order to be legitimate, was not to step out of its own very purpose of being (telos) - that of the protection of the rights of individuals.

The Issue of Sovereign Power is on the Focus

The reason why this debate is so important for the modern developments of the rule of law lies in the fact that it developed ideas on the two until then not sufficiently tackled issues within the discourse on limited government:

- That the question on the nature of a sovereign power implies in itself the problem of the limits of the same sovereign power.
- That the rule of law can, in the long run, be interpreted as the rule of the positive law, i.e., as the rule of the laws (statutes).

While the latter problem will turn into one of the key-issues of the rule of law doctrines during the 19th and 20th century, the very nature of sovereign powers of a legislative body was indeed the focal point in the 17th and 18th century. With the exception of Hobbes and Bentham, who defended the extreme variant of the sovereignty of the Parliament as unlimited by any lawful rules, the answer to this problem was at the same time normatively clear and analytically inconsistent: In

order that the violation of human rights through individual or group arbitrariness be prevented, political power must have clearly set limits. What remains, however, unclear, is the very nature of these limits: Are they of positive law, of natural law, of moral character, or are they all that at the same time? The greater part of the natural law doctrine at the time still looked upon natural, positive and moral laws as one and the same entity. That was certainly the case with John Locke, whose rational philosophy of natural rights and ideas of limited government, i.e., government by consent marks the climax of the classical liberal constitutionalism in England, which will in the following century make the basis of the Founding Father's constitutional doctrine in America.

Mixed Government and Checks and Balances

On the other hand, the discourse on the problem of the sovereignty of parliament and its possible reconciliation with the fundamental law as limiting the same supreme power, actually addressed also the issue of the system of powers. What the classical common law doctrine defended under the sovereign Parliament which should nonetheless remain limited through the fundamental law, was the idea of a *corporate sovereignty.* It is the King-in-Parliament who is a supreme legislator. In other words, one could still talk of a functional symbiosis between the legislative and the executive (mixed government). This is why, understandably, the limits to set for the supreme legislator are *functional.* The Parliament is the supreme bearer of legislative, law-making powers, and *not* of political power as such (*sovereign power*). His sovereignty meant only his absolute liberty in exercising *legally defined* legislative powers. This idea was again most consequently developed by John Locke. Understandably, a step further to be made during the American and the French revolutions was to draw, although not grounded on the same arguments, the difference between the constitution-making and the law-making power. This is how the democratic idea of a people as the only political sovereign got its constitutional form: constituent power

V. Separation of Powers or better: Checks and Balances

Separation of Powers as Pre-Condition for the Implementation of the rule of Law

Why is the request of separation of powers necessarily linked to the claim of the Rule of Law? Because the political philosophy, which is the bases of the separation of powers is redesigning the political relationship between the branches of government and because such relationship has to be altered into a legal relationship. According to the theory of the the concept of the separation of powers mainly a liberal goal has to be achieved: *Political* freedom can only be implemented when it is also legally protected. In other words: One can interpret the separation of powers as materializing the Rule of Law, because it creates the institutional pre-conditions for the implementation of the law.

How can one now determine the different priorities which have been attributed during history to this theory?

- Originally separation of powers has been seen as a static concept of mixed government.
  a) As far as the two branches of government are independent from each other they automatically also limit each other. It would be premature to consider this in this context already as mutual control of powers.
  b) Only the activities of the Crown Nur jene Handlungen der Krone, which occur intra vires are valid as far as they are to be deduced from the traditional royal prerogatives. Decisions of measures ultra vires however are illegitimate and thus illegal.
- The constitutional conflict on the prerogatives of the crown which has been won by the parliament gave the legislature also the final control over the crown and ist prerogatives. With this the path from a static to a dynamic concept of mixed governments was initiated. From now on the focus was on the balance of the relationships among the different branches of government.
- Could the competence to control the other branches once be installed as major fundament of the system of separation of powers it became clear that the theory of the separation of powers could not be limited to the mere separation and division between the legislative and the executive branches and their functions (the judicial independence has already been guaranteed within the Act of Settlment). A real balance among the different governmental branches can of cours finally only be guaranteed when the powers are not totally separated and thus able to control themselves mutually (checks and balances).
- Ein eigentliches Gleichgewicht der verschiedenen Gewalten lässt sich nämlich nur dann sicherstellen, wenn die Gewalten nicht voll, sondern nur teilweise voneinander getrennt sind, sich aber gegenseitig kontrollieren können (checks and balances).

It is probably fort his reason that the real "founders" of the of the theory of separation of powers JOHN LOCKE and CHARLES-LOUIS DE SECONDAT MONTESQUIEU (1689–1755) did mainly refer in their writings to he mutual control and balance of the powers and less to the separation of those powers. Since this time however the theory of the separation including control and balance did bcome a basic element of the rule of Law.

In its Second Treaties of Citivil Government (1690) LOCKE starts with the clear message that there are not individual social liberties if the same power which enacts the statutes also is competent to decide on the application, implementation and interpretation (Chapter. XII, § 143). A better formula on the essence of this doctrine is not even thinkable. LOCKE combines the traditional concept of sovereignty of the parliament with the idea of a autonomous executive. By this he focuses on the dynamic balance of the two branches, which have to be partially separated and partially connected. His model of the relationship between legislature and executive has certainly strongly influenced the founding fathers of the

American Constitution when they designed the relationship between the legislature and the president as *Chief Executive*.

Il faut que le pouvoir arrête le pouvoir

MONTESQUIEU did describe the English constitution as an ideal concept of separation of powers. However, his description did not correspond to the real facts of the system functioning at that time. From an other point of view this analyses did lead to a clear request for the implementation of the principle of separation of powers. When misuse of political power shall be prevented, one needs to install a system of separation of powers which enable the powers to control each other mutually. „*Il faut que le pouvoir arrête le pouvoir*" (MONTESQUIEU, Esprit des Lois L. XI).

VI. Modern Developments

a) *The American Revolution and the French Revolution. Rule of Law and/or the Will of the People as (the only) Fundamental Law*

Allowed is what is not prohibited

The first modern constitutions brought the "inalienable natural rights" of life, liberty and property into the world of state law, thereby making them, principally, rights of *freedom from* public authority*:* everything is legal if not explicitly forbidden. With the first constitutions announcing the establishment of entirely new, social contract basis of modern polity, the individual ceased to be a mere object of domination. For the first time it is him alone who creates rules and institutions to apply to himself. Accordingly, all individuals become *qua* human beings equal and autonomous in their will and rational behaviour; they *all* are vested with rights and duties. This is how the principle of formal equality reduces justice to equal distribution of rights. The positivation of *universal* natural rights into negative fundamental civil and political rights in the American *Declaration of Independence* (1776) and in the first Bills of Rights, as well as in the French *Déclaration des droits de l'homme et du Citoyen* (1789), was the very means how the idea of popular sovereignty was related to natural rights and the consent of the governed.

In consequence, what both American and French revolutions had in common was the identical revolutionary task: To turn natural rights into those of positive law and to organise democratic government. In both cases the constitution was an act fulfilling such a revolutionary task. A particular constitution was regarded as an act by means of which procedural prerequisites for arriving at a rational, democratically grounded consensus were normatively laid down and given the force of positive law:.Human Rights and Government by Consent

State as Moderator – State as Engine

In consequence, what both American and French revolutions had in common was the identical revolutionary task: To turn natural rights into those of positive law and to organise democratic government. In both cases the constitution was an act fulfilling such a revolutionary task. A particular constitution was regarded as an act by means of which procedural prerequisites for arriving at a rational, democratically grounded consensus were normatively laid down and given the force of positive law.

It is here that the common features of the two great modern revolutions basically stop. The differences, caused by different historical backgrounds of the modern revolutions – as already mentioned on previous pages - cover first of all fundamentally different insights into the nature and the role of the state and accordingly its relation to civil society. This consequently implied significant two equally significant points of departure:

1. the very idea on the underlying principles of democracy as a governmental form of popular sovereignty; and
2. the nature and the role of the constitution with regard to human rights - in other words the critical issue of the relationship between the constitution and democratically grounded sovereignty.

b) USA

Fundamental rights versus Colonial Authority

The "revolutionary act" of the American colonies was aimed at removing the existing obstacles (British colonial rule) to the already existing basic human rights and enable the new actors of history to exercise the process of authentic, self-constitution into the state. Put it another way: The revolutionary situation in America was favourable to define the sovereign power as notwithstanding limited. This implied that from the very beginning democracy was seen as accommodating the liberal idea of inviolable human rights. The principle of popular sovereignty was practised through constitutional conventions as constitution-making bodies of sovereign people, which simply had to guarantee eminently pre-state and pre-constitutional human rights that should even remain out of the province of democratic decision-making. The direct linkage to the English common law tradition is here more than obvious. One of the leading political minds of the time in America Thomas Pain wrote on "government *out of society*". In other words, the idea that it is the society which produces the state logically meant a limited government by consent in a more than clear terms: a sovereign power of the people to pass the constitution remains nonetheless limited by the principles of a higher, fundamental law, i.e., by those governing basic human rights

Given that this clear split between human rights and democracy in the American liberal constitutionalism was a logical consequence of a sharp division between private and public sphere, i.e. between civil society and the state, the liberal underpinning has since then persisted in the still prevailing understanding of fun-

damental constitutional rights as primarily negative. Democracy, in consequence, is also defined by the respect for constitutional rights and liberties. Thus, a primary function of democratic rights is to safeguard other, more fundamental rights. “Democratic rights are justified in a given institutional setting just to the extent that they serve this function better than do alternative feasible arrangement.” A further reflection logically ends up by the position that human rights legitimate democratic systems. Democracy as state form receives the relevance of a fundamental human right.

Theoretically speaking, such a position could be consequently argued only if the sovereign is not understood as the supreme source of law, i.e., if law and a supreme political power do not share the same source of validity. This starting position was and remained crucial in understanding the major differences between the Anglo-American and continental conceptions of rule of law.

Private – Public Arena

The separation between human rights and democracy according to the appreciation of the American constitutionalism goes back to the clear separation between the private and the public sphere, namely between state and (civil) society. Logically liberalism could perceive human rights only as constitutionally negative rights with primarily a negative defensive content. Democracy is seen as a result and consequence of the existing constitutional rights and liberties. Accordingly democracy has primarily to protect those fundamental rights. If one follows this analyses to its logical end one has to perceive human rights finally as rights which legitimize the democratic authority of the state. Democracy is legitimate in so far as it protects and puts those rights into effect.

Such theories however, are only possible if one refuses to the sovereign the position of a absolute not any more deducible and perfect might which is the “big ban” and fountain of justice for all forthcoming rights and obligations. This again is only possible if once accepts that law and final instance have a different source of validity. Such thinking was and remained for a long time the essential difference between the American and continental perception with regard to human rights and thus also for the different understanding of the rule of law.

c) France

Human Rights need to Produce a new Society

In contrast to the American Revolution, the French revolution was facing the situation where it was necessary first to *produce* the conditions for the human rights to be protected and for the democratic government to be constituted, as against the arbitrary rule of absolute monarchy. Natural rights, in consequence, could be given the force of positive law only as *rights of a citoyen.* An individual can be free only as a member of political community; in other words: *within the state and not against the state*. This specific historical background of the French revolution and its replication in the fundamental political and legal concepts have

decisively marked the continental concept of state as such. Within the European constitutional tradition henceforth, unlike that of Anglo-American common law, it has been primarily the state itself which was expected to both enact individual rights and guarantee their inviolability.

The lines that follow do not oversee that the French revolution among its actors and theoreticians also had a strong constitutional-democratic wing. Notwithstanding, they rather focus on that stream of development in political and constitutional doctrine of France before, during and right after the Revolution, which gave the main tune to the French understanding of État de droit:

Sovereignty and Nation

First. It is true that already the *Déclaration des droits de l'homme et du Citoyen* of 1789 provided in its Art. 16 that " Any society in which the guarantee of rights is not secured or separation of powers not determined has no constitution at all". It is also true that Art. 8 of the Constitution of 1791 laid down that, in order to be legitimate and legal, any constitutional revision should run "under the form provided for by the Constitution itself". However, one should always keep in mind that the French idea of the supremacy of the constitution was directly related to the constitutional act as a result of the exercise of unlimited democratic sovereignty. The French understanding of the nation as a sovereign constitution-making power was developed in order to make of the people an absolute and unlimited source of both constitution-making and law making power. What Emanuel Sieyès (1748-1836) exactly did when he drew his well known difference between constitutent power (pouvoir constituant) and constituted power (pouvoir constitué) was in fact to secularise the divine *potestas constituens*, *creatio ex nihilo*, and transfer it from God to the people. Last but not least, his (failed!) idea to introduce a sort of constitutional review through a "constitutional jury" to examine complaints brought by citizens for alleged violations of the Constitution also proposed a body of representatives especially selected for this purpose. Here Sieyés, too, demonstrated traditional, deeply rooted, mistrust of the judicial power, as a result of negative experience with the royal courts before the Revolution, what remains another essential feature of the rule of law concept in France.

Second. Given that the role of the constitution is to provide the force of positive law for the people's absolute and unlimited, i.e. sovereign constitution-making powers, the sovereign will of the people cannot be lawfully limited, since this same will is and remains fundamental law. The constitution gives the form to the sovereign will but cannot influence its content, since there is no fundamental law higher than the will of the people.

Third. By being absolute and unlimited, people's sovereignty can be exercised only by the people and thus remains non-transferable. In other words, no system of separation of powers as a "division of sovereignty" would be acceptable.

Fourth. The idea of people as a sovereign law-maker has been given clear expression in the idea of the French nation: „The Nation is a body of associates living under the same law and represented in the same legislature", as Sieyès put it. Thus he replicated the well known radical democratic understanding of J.J. Rous-

seau (1712-1778) on the general will (volonté générale) as the source of law, since the general will decides what is just and what unjust.

Rule of Law(s)

Given the historical background and theoretical foundations, it is easy to understand why the rule of law doctrine in France basically remained faithful to a more restrictive principle of legality. Since the very concept of État de droit was introduced in the French doctrine after the I World War, the rule of the law has accordingly implied the *rule of the laws passed by the sovereign Assemblée Nationale.* Until recently. The breakthrough has been occurring under the general tendency within Western political and constitutional thinking in the last decades to reflect upon the international legal standards governing the supra-national nature of the protection of human rights. Re-defined major different concepts of the rule of law underscore the idea of constitutional democracy as the basis of the legitimacy of "constitutional justice". The indispensable role of constitutional judge to compel public authorities, including the elected representatives, to respect human rights and liberties may not be something "that will bring about the democracy dear to Jean-Jacques Rousseau, nor is it the opposite". A "renewed form of democracy" takes *the control of the constitutionality of laws as legitimate because it produces a definition of democracy that legitimates it*)

Rule of Law versus volonté générale

The different understanding of the Rule of Law underlines the necessity of a common concept of the constitutional democracy as bases for the legitimacy of the constitutional justice. According to this concept the judges must have the competence to make state authorities including democratically representatives of the people within the legislature accountable for unconstitutional activities and decisions. As a consequence they must be able to enforce their respect for fundamental liberties. This perception does not at all correspond to the basic ideas of democracy as they have been developed by JEAN-JACQUES ROUSSEAU. The request of a constitutional review of laws enacted by the legislature, however contradicts the concept of ROUSSEAU not explicitly. In contrary a renewed form of democracy presupposes the constitutionality of the law because according to the actual understanding o nly this constitutionality provides with certainty legitimacy for the democracy.

d) The German Concept of Rechtsstaat (State Rule Through Law)

The Idea of a Minimal State

Although sharing with the French État de droit the same continental law tradition, and in spite of the fact that the liberal political thinking of the beginning of the 19th century was strongly influenced by the ideas of the French Revoilution, the Rechtstaat remained an authentic blueprint of the German "mind and spirit" (Geist) and German history. On the other hand, especially in its initial phases, the concept was

significantly inspired also by the English rule of law. Namely, all three doctrines had in common a minimalist understanding of the rule of law as a juridical form of modern liberal state.

Law and State are not Autonomous

Already the very term chosen in German theory displays the far-reaching differences and the critical point of departure between the very doctrinal foundations of the rule of law and the Rechtsstaat. By all means, it was not a mere terminological preference that coined the term Rechtsstaat (state rule through law) as different from the rule of law. The major differences in understanding the nature and the role of the state between the Anglo-American and the continental traditions have nowhere been so transparently replicated as in the term "Rechtsstaat", which "puts together what immanently belongs together – the state and the law. As already pointed out, the historical development of Anglo-American rule law concept reflected instead an active and relatively self-standing common law system and, logically, postulated the non-existence of such an inherent relationship between the state and the law.

Prussia: The King Represents the State

The time when the concept of Rechtstaat was introduced in German philosophical writings and constitutional thinking, the first half of the 19th century, provided a historical background totally different to that in England, which had already had for more than a century a constitutional monarchy and was experiencing the first parliamentary debates on electoral reforms to enlarge (democratise) electoral body. On this side of the European continent, the enlighted absolutism of the Prussian monarchy was on its peek. That the state represented in King was sovereign in the relationship with its *subjects* (Untertan) - not yet citizens! - was taken for granted, both as a political fact and as a legal principle.

Two following major consequences resulted for the Rechtstaat concept:

Rule of Law and Principle of Legality

The early, constitutionalist phase of the Rechtstaat concept was exclusively focused on the legally established control of the administration.

The Rechtsstaat concept developed as inherently linked to legal and state positivism, which relies upon strict separation between the political and the legal. It is the legal form as such that matters, and it remains in principle neutral against any form of government. It was too early to relate the idea with the popular sovereignty and democratic government.

Accordingly, even the liberal political thinkers of the time embraced such a formal concept of the Rechtstaat. A philosophical contribution of Immanuel Kant (1724-1804) to the substantive concept of Rechtstaat as the very conditions for the state to exist at all did not significantly affect the major developments of this concept in the German political and constitutional thinking. As a convinced liberal (although with specific conservative views!), Kant demanded that the strict sepa-

ration between the public and the private sphere be legally guaranteed and laid particular emphasis on mixed government as the system of checks and balances.

Robert von Mohl

In order to be fair enough, one should not forget that in its beginning the Rechtsstaat concept was much closer to the Anglo-American idea of the rule of law than it may have seemed from the perspective of the end of the 19th century, when the formal concept of the Rechtsstaat reached its climax. Moreover, the theory as such emerged in Hannover which, thanks to its royal connections with England after the Glorious Revolution of 1689, had closer contacts with the English political and legal tradition than the rest of Germany. One of the founders of the Rechtsstaat concept, Robert von Mohl (1799-1875), studied the American constitutional system and was influenced by the major postulates of Anglo-American constitutionalism in general. Mohl puts individual liberty in the very centre of Rechtsstaat understood as a substantive principle. Nonetheless, even he accepted that liberty can be limited "by special rights of state authorities" and remained a convinced opponent to the separation of powers.

Positivism

The reason why in Germany the substantial content of the rule of law principle has gradually been lost may have its ground mainly in the revolution of 1848. The main liberal values and in particular the human rights and their constitutional protection have been sacrificed to the principle of legality. Limitations of liberties were considered legal in so far as those limits have been set in accordance to the positive law and thus corresponded to the principle of legality. The liberty of individuals has been handed over to the "grace" of the executive which has only partially been controlled by the parliament as legislature.

As Franz Neumann put it, the substantive concept of Rechtsstaat "got lost" due to the failure of the revolution in 1848. The basic liberal value, that of major importance of human rights and their constitutional protection was surrendered by the argument saying that the infringements upon human rights were in accordance with the principle of Rechtsstaat as long as they were given the form of positive law,. The liberty of individuals was left "at the mercy" of the executive which was only partially controlled by the legislative assembly.

By the end of the 19th century Franz Julius Stahl gave until today the best known definition of the Rectsstaat as a negative, purely formal concept that strictly separates the legal form of the state from its political structure. Rechtsstaat remains neutral against both the content and the aim of the state; it merely addresses the legal form needed to enact a given content and a given state objective, whatever they may be, and the protection of human rights has indeed nothing to do with so a defined concept of Rechtstaat.

A further conceptual reduction occurred also in the middle of the 19th century, in the extreme variant of Rectsstaats as as *state justice* (Justizstaat), implying judicial control of the legality of administration.

Weimar: Economic and Social Goals

The Weimar Republic of 1919 and its doctrinal supporters brought the renaissance of the substantive concept of Rechtsstaat. The Social-democratic constitutional doctrine during the Weimar era introduced a new constitutional concept, that of *institutional guarantees.* As opposed to subjective rights of individuals, institutional guarantees represented constitutionally laid down objective social institution and resulted out of a changing role of the modern state: The constitution should also establish particular social fields of action which enjoy the protection and, eventually, also the promotion of the state. The door was open for a new constitution paradigm. Social and economic rights started to question the two major pillars of the liberal thought: a/ the one on societal harmony which is due to the unhindered function of the market and the role of human rights as negatively limiting the competence of the public power; b/ the other on separation/opposition of state and society (as simple aggregation of the separate individuals) and on the explicit recognition that the basic danger for the individual's autonomy is the State.

Social Peace

The direct consequence for the doctrine of Rechsstaat was immediate. Herman Heller (1891-1933) re-enforces the constitutionalist principle for Rechtsstaat and additionally enriches the concept by introducing in it the very social conditions for liberty, equality before the law, and legal security (positive state). In 1930 he wrote that Rechtsstaat cannot exist without a consensus of all its citizens, and such a consensus can be reached only by means of *social democracy* underlying the *sozialer Rechtsstaat* (welfare state rule through law). After the II World War a substantive concept of Rechtsstaat was further endorsed by the Federal Constitutional Court of Germany. In some of its first decisions the Court even used the natural law arguments as a "supra-constitutional" principle to provide a basis for a permanent critique of positive law.

VII. Conclusions

The Nature of State and Law und their Relationship to Each Other

Of course we could not comprehensively address the historical development of the rule of law in the major Western legal traditions. What we aimed at, instead, was to trace the developments that directly or indirectly affected the key-issues of the rule of law today, as challenged by the undergoing processes of transformation both within the nation-state level and at the supra-national level. Indeed, most of the challenges confronting the rule of law at the beginning of the new millennium (including multiculturalism and globalisation) are at the same time those which were giving the main tune to the developments and doctrinal debates in the West throughout centuries.

Democracy and Rule of Law

In a nutshell, the historical and doctrinal origins, major trends and immanent limits of liberalism, as well as its relations to democracy have been displayed by the historical development of the rule of law as an indispensable part and parcel of the Western theory, ideology and institutions of constitutionalism and its demand for the politics under law.

The formal versus the substantial „Rechtsstaat“

The nature of state and law and their respective relation. –Here we have to do with the most fundamental problem of the legitimacy of both state and law. Although it may seem to be a primarily doctrinal problem, this is by no means the case. The understanding of the state as a *giver* of human rights, unlike that where the state cannot remain legitimate if violating fundamental human rights can have direct consequence on constitutional policy of human rights in a given state. If one reads new constitutions of the transiting countries of Central and Eastern Europe, one can easily "trace" this fundamental difference in setting the legitimacy of the state as the source or as a guarantor of human rights.

What in the Field of Human rights can be Universalised?

Democracy and the rule of law – The far reaching, fundamental impact that the understanding of the nature and the role of state and law has for the relationship between democracy and the rule of law is more than obvious. Somewhat schematically, this impact could summarised in the following dilemma: Does the basic value underlying the modern constitution, that of inviolability of human rights, also limit and control a democratic sovereign, or is it the other way around? Put the question even more radically: What if a conflict between legal and political sovereign occurs?

The formal as opposed to the substantive concept of the rule of law - The key-issue at stake here affects the very nature of a given form of government and its basic political underpinnings. In other words: Is the rule of law reduced to a mere (positive) legal form to communicate to the public otherwise independent political decision-making; or should the rule of law instead first of all provide legal instruments for a political control of power-holders?

Human rights as the cornerstone of the rule of law - All of the above referred open issues could be, in the final instance, brought under the umbrella of the human rights. However, the position alone - that the inviolability of basic human rights persists as immanent to the rule of law - leaves open and yet unanswered some of the major problems of this clear and of itself non-disputable principle, also recognised by international law. The answers that still wait to be given are not of a mere doctrinal relevance but indeed affect the core of the contemporary nation-state and the ongoing supra-national processes of globalisation:

What is "universalisable" in human rights? – The non-disputable values of human life, liberty and dignity, or also the global actors who claim the right to be "universally" legitimated to define "universality" in given cases at stake, including

almost world-wide celebrated unilateral "humanitarian interventions" in the last three-four years?

How is the basic liberal underpinning of the rule of law to be interpreted within a multicultural context? What remains "universalisible" and emancipatory in fundamental human rights from the multicultural perspective, if the human rights policy alone cannot address the demands that cultural diversity be (also politically!) accommodated? A democratic integration of multicultural societies as a new type of corporative societies, as a structural pre-condition for the viability of human rights policy, still remains without an adequate answer.

B. Development of the Rule of Law in the Different Legal Systems

I. Introduction

Accumulation of Powers within the Administration

Powers of state and administration with regard to citizens and subjects has enormously accumulated in the 20th century. This amassing of powers is mainly shown by the often non-transparent and highly complex activity of the administration. The might of the state did become to a great extent the power of the administration. The subjects and human beings depend with regard to their daily life increasingly on the anonymous bureaucracy. The administration guides openly but also often indirectly the daily life of the citizens. Who ever thus, today asks the question of the rule of law needs to know how the might of the administration and its servants can be limited.

In order to limit the powers of the administration several states have developed several instruments all designed to strengthen the rule of law with wider access to justice, more independence of the judiciary and strengthening the competence and to professionalize the courts. All those instruments aim at strengthening the protection of subjects against misuse of powers by the administration.

Whar Questions have to be asked?

Ifo ne wants to know how the principle of the rule of law is respected within the concrete administrative law one has to give an answer to the following questions:

1. What are the basic fundaments of Law and Justice?
2. What kind of courts do protect citizens against arbitrary measures of decitions by the executive?
3. What remedies are available to single individuals in order to have access to justice and the judiciary for their proper protection agains abuse of administrative powers?

4. What jurisdiction and competences do courts have in order to protect defendents agains misuse of powers by the administration?
5. What are the essential standards to be observed by court decisions?
6. What are the rights and obligations of the parties within the judicial procedure?

II. What are the essential bases of Law and Justice

Christian-Individualistic Conception of Men

The European legal systems are all marked by the Christian-individualistic conception of men. Human beings accountable according to the Christian doctrine individually to their God need also to be individually a bearer of rights and obligations. He/she is not embedded within the family or the tribe as e.g. within the Japanese Shintoism. He/she is not a negligible part of the professional or social estate as in confusionsim and he/she does need to find happiness within asceticism and in renunciation of his/her individualism as e.g. in Buddhism. Indeed, there is no other religion which has emphasized so much the importance of the individual standing alone to its responsibility as Christianity. Only within this doctrine human beings are confronted as equal persons and image of God to there creator to whom they are individually accountable.

Notwithstanding this legal European culture determined by the Christian idea of the dignity of human beings the European legal systems have split at latest after the French revolution into two highly different legal systems.

Hierarchy and Authority– Collegiality and Reason

The legal system on the European continent has strongly been influenced by the hierarchical thinking of the canonical law. Already in middle ages it has influenced the administration as servant of the King by the Grace of God to the privileged and hierarchical authoritarian rank. After the Revolution the King by the Grace of God has been replaced by the head of the state by the grace of the people, or by the reason of the state or the so called untouchable "volonté générale" and thus the authoritarian rank of the administration remained. Accordingly administration and courts are asked to apply the law determined by the majority with an absolute authority.

Common-Law: Citizens as Partners of the Administration

On the other hand the Common Law system finds its original roots in the medieval England and in particular later in the 17th century marked by the glorious revolution and JOHN LOCKE. The Aristocracy was able to establish itself after Long Parliament and Glorious Revolution as a partner to the King. Commons and Lords were a sort of a club of big landowners who administered somehow in common their estates. Besides the majority of the parliament which enacted the statutes the courts and the judges still kept their important competence as lawmaker by case

decisions based on a fair procedure aimed at finding justice. The majority of the landowner club had no possibilities to ignore or to disregard the legitimate interest of the members and to put them into the minority of losers. Unlike as in France the public interest could not raised to the rank of a sacred volonté general.

The Judge as Moderator

The judge had no hierarchical position with the parties as his subjects. He was rather considered as a "moderator" which stood in between the two parties. As judicial expert for the jury who had to determine the relevant facts the judge was the arbitrator who had to judge according to the precedents and to justice. The result of the mediation of the conflict, the judgement had thus even higher importance since in a conflict with equal parties competing on even position for success has somehow been decided by "*the invisible hand*" which had to look for a just result. Today it is namely in the US often the Calvinistic ethic of success which legitimizes the winner against the loser. The judge with his jurors randomly chosen from common people has its position between the parties. He/she has to look for a fair trial, equal opportunities and equality of arms. In particular according to the Anglo-Saxon conviction a just judgement is rather the result of a fair procedure than the result a good law.

Who has right, wins– versus – who wins has right

According to the continental European understanding of the law those who have right should win the trial. According to the common law mainly American understanding those who win the trial, have right. In the latter case due process, equality of arms between the parties is of course of highest importance. Only if he/she wins or losses in a trial which has guaranteed full fairness they can accept the verdict. The importance of the adversary procedure, the position of the parties and the weak authority of the judge with regard to the substance is certainly also marked by of a realistic image of the human being. Because judge, no civil servant no party is without fail the law has to look for good results even for human beings which are faulty.

Hierarchy of the World Order

The country of the civil law systems did take over the idea of the hierarchy of the authority already developed during absolutism and replaced the crown with the state administered by the majority of the people. The volonté générale from ROUSSEAU AND respectively the theories of HEGELS did serve as philosophical underpinning. This – to Anglo Saxon tradition strange thinking – and artificial superelevation of the state over the individual has decisively influenced the administrative law of the Civil Law countries.

Institutions need to be Installed for Faulty not for Holy Humans

Quite different is the fundament for the public law of the common law countries. Common law gives neither state reason nor public interests a super-position. It is rather based on the idea that all humans including authorities and justices are

faulty. Thus, only those institutions meet the necessary standards, which prove one self also with faulty humans. Did one base its perception of justice and procedure to mediate conflicts on this image of human beings one would have to give much higher values to the procedure than to the content of the Law. The law decided by the majority (decisionism) can not be considered as mere bases for the development of the law. Than, in the cumulated collective wisdom of generations developed through fair trials of equal parties and of jurors randomly chosen out of common peoples has at least just as much legitimacy as a political decision enacted by the majority of the legislature. The public office and the civil servants who are applying the laws and deciding on behalf of the executive do not have this outstanding prestige as within the continental law system. The German proverb "Who gets and office from God gets also the necessary intellect" has thus certainly no Anglo Saxon roots!

III. Common-Law – Civil-Law

Proactive State Concept

Countries of the continental law system are marked by a pro-active concept of the state. According to this concept the state authorities and institutions are responsible for social engineering of the society they have to achieve social political goals and are accountable to materialize those goals into the reality of the society. Countries with common law tradition on the other side are contented to consider their government as a mere arbitrator between the different conflicting social interests. The governmental branches as well as the administration have to keep the balance among the different social forces in order to prevent violent conflicts or to contribute to just solutions in the case of already burning conflicts.

Different Governmental Concept

This different state concept can be explained by the different judiciary which has differently developed during centuries. Within the common law systems the judge is primarily a independent arbitrator, who has to solve conflicts and to find the just equilibrium among the parties. For the civil law system the judge however is the prolonged arm of the legislature and of the state who with the sword in one hand and the scale in the other hand embedded within the hierarchy of the legal system has to find justice and to impose the law with regard to those seeking their rights before the court. The judge is thus hierarchically superior to the parties. The image of the blind judge fits to the common law judge but not to the civil law judge.

Thus, the judge has to play a much more active part then his common law counterpart during the trial and the procedure in almost all different and in particular in criminal and in administrative procedures. Parties are submitted to the judge. He/she has to find during the criminal trial and the administrative procedure the facts. The inquisitory procedure in criminal and administrative law gives the judge and often the civil servant the important competence to decide on the facts. There

are of course some fair trial remedies available to the parties but the final decision is given to the judge.

In the common law system the judge controls mainly the procedure. The verdict is the result of the procedure. He/she coordinates the dispute among the conflicting parties. The burden of proof is either decided by precedents or by law. The most difficult question to decide however is who will have to take the risk of insufficient evidences and what test those evidences have to pass either the "arbitrary and capricious test" or "the substantial evidence test".

With this one should not oversee that although the judge has less power with regard to the fact-finding of the parties. His factual authority as an impartial broker and his/her competences to implement equality of arms fairness of procedure etc are much more effective than those of a continental judge.

Influence of Canonical Law

One can explain those different functions of the judge according to the different systems with the fact that on the European continent since the 12th century the canonical law taught at the universities got an increasing importance. The law was not any more the law of the people but the law of a scientific and hierarchically elite separated from the people. The judges representing the crown and the hierarchy of the feudal system had to analyze the law scientifically for the parties seeking justice in their courts. Jurisprudence, interpretation of law and in particular the practice of the judiciary could not any more carried through by laymen but only by professionals and experts in the field of legal science.

Legal science and jurisprudence had to function in different ways. They had to bring the law into a system, analyse the law, summarize it, determine the relevant facts and to decide the case.

Die Jurisprudenz nahm verschiedene Funktionen wahr: Sie musste das Recht systematisieren, zusammenfassen, erkennen, den Sachverhalt danach beurteilen und dann am Ende der Sach- und Rechtsfindung über einen Streit entscheiden.

Hierarchy of Instances

The new development of a hierarchy of several instances having to review the lower instance decisions corresponded to this hew hierarchical thinking. The more important that is the higher and closer to the crown the experts and tribunals were the better was their decision. The verdict was not the result of a conflict argued before a jury but a scientific application of the law to a concrete case. The law become independent from the facts.

Authority of the Facts

Thus the judges did not only find the law to which the facts had to be applied. They were also asked to find the facts within an inquisitory procedure. Having the power to determine the facts they did in principle decide on the *truth*! Contrary to this development the law which was mainly administered by the Normanic Kings in England remained to a great extent linked to the jurors chosen from the common people. Those jurors had to decide with the help of the judge on the facts pre-

sented by the parties and to find a just verdict according to the criteria's of justice. The facts had to be established in a contradictory (*adversary*) procedure. Once established the just solution according to the determined facts had to be found. Law and facts were much more interconnected as in the European legal thinking, where law was given and the facts had to be found by the judge.

Road Map of the King: Procedure

This again did lead in the Common-Law countries to the importance of the procedure to establish the facts. All rules dealing with this procedures were given much more weight and value than the procedural rules on the European continent. For this reason in most procedures adopted in the Common Law the so calle adversary system has been given priority. Only based on the adversary system the facts most credibly closest to the truth can be found. Only in a contradictory procedure where the parties contradict on the facts the chances to find the good facts are optimal. Within the inquisitory system according to the European legal thinking the judge but also the administration are entrusted with the obligation but also with the power to establish the facts and thus the "truth". The long and often costly adversary system for the establishment of the facts did lead to the consequence that in the procedure with regard to administrative decisions judges only look into the legal issues and renounce or have to renounce to review also the facts. Only when the administration is sued with the remedy of the injunction the court is also required to establish the facts. However, also the administration is required to establish the relevant facts under the guidance of administrative tribunals which have to follow the principle of fair hearings. In this procedure rules of evidence and probability are applied as they have been established by the previous cases.

The Right to be „Heard": written

Interesting is by the way that with regard to a fair hearing in civil law countries the principle is reduced to the right of the parties to hand in their written statements in a written procedure although the German and the French word (rechtliches Gehör, droit d'être entendu) would suggest a oral procedure. In contrast to this concept of fairness in the Common Law countries the principle of natural justice or due process is only observed in cases the facts are established with the parties in a oral procedure before an independent judge. Within the USA administrative decisions (adjudicatory acts) enforceable as court judgements can only be issued within a procedure similar to a court procedure (trial procedure). Only based on such procedure and in an adversary procedure the facts can be established.

Administrative Law: Execution of Legislation

Administrative law of pro-active states (civil law countries) serves primarily to implement the public interest of the society determined by the legislature (MIRJIAN R. DAMASKA). The judicial review of administrative activities fulfils two different functions in these countries: On one side it has to secure that the public interest and the will of the democratic legislature is correctly implemented. On the other hand it serves the legal protection of the individuals, who seek to de-

fend their interests with regard to the state and the administration, in a similar way as the courts in common law countries.

Administrative Law is as such not existent

Administrative law of common law countries as spezial legal branch is practically inexistent in common law countries. With regard to the individuals the state apparatus of those countries does not enjoy the privileges as the administration of civil law countries. Legally individuals are not considered as subjects to follow the orders of the administration. The administration is asked within the frame of the legislation to conduct its tasks namely to guarantee the security and the public order. It deduces its competences from the legislation. If a civil servant acts beyond its competences he/she can be called to order just as any other private person acting illegally. Thus, the court which has to decide on the legality of acts or failures to act has only to control whether the administration did act within or beyond its legislative powers.

Position of Legislation

However legislation has not the same function fort the judge in common law tradition then for judges in civil law systems. As e.g. for the American courts the constitution is part of the highest applicable law of the land the American judges have much more possibilities when they review administrative activities. They can much more take card of the constitutional principles of fairness and justice then in the European continent. The court has thus to look that with regard to a conflict between an individual and the administration the decision is fair and just. Of course he/she has also to consider written legislation as one of the arguments for a good decision. But written legislation has not the same value as on the continent. Besides the legislation according to the principle of the rule of law all recognized principles and rules which limit the discretion of the administration have to be taken into account. On the continent thus, the judge is bound only to review the issue of an administrative decision can be deduced from written legislation.

Access to Justice

Without legal remdey there is no court protection. Thus, it is decisive for individuals that legislation is not only carefully implemented but that they have a guaranteed access to justice and the courts. With regard to the access to the court the common law tradition has weighed the importance of formal writs and remedies just has important as the careful design of jurisdiction and substantive administrative law. Legal remedies have been given almost the same importance as the continental legal systems gave to the fundamental rights. Thus, it may be understandable that scholars of the Common Law countries assess the rule of law principle of civil law countries which do not have a habeas corpus as having major draw backs. On the other hand the civil law scholars consider a state without written constitution such as New Zealand as principally suspect.

a) Common-Law

Ruled by Law not by Men

As already mentioned the common law builds up on the basic principle that men should not be ruled by men but by law. Law is not reduced to the mere positive legal rules enacted by the legislature. One has to be aware that also non written values are part of the legal order and those values are authoritative for institutions asked to implement law and justice. In particular they contain guidelines for judges deciding on cases and controversies.

Private Law– Public Law

Moreover one has to consider that contrary to the continental European law there is no clear separation between private and public law since the ordinary courts. Ordinary common law courts decide according to their jurisdiction which is not determined by private or public law courts as in the continent as well injunctions of private persons against private persons or private individuals against public administration.

b) Continental European Law

French Revolution

Legal systems of the countries on the continent find their roots in particular within the French revolution. According to the doctrine established by the revolution the national parliament called Assemblée Nationale is to be considered as well as the basic institution constituting the state and the constitution (pouvoir constituent) and of course also as the institution constituted with the power to amend the constitution and to enact legislation (pouvoir constitute). Thus the national assembly is the bearer of the absolute sovereignty. The law-maker is the sovereign and consequently the original and only source for law and justice. It decides and defines, determines and enacts the volonté générale. The French revolution did not only centralize the French territory but also the entire legal system. From now on right and wrong was basically dependent on legislation enacted by the national assembly. The judge was only asked to interpret and to apply the positive law made by the legislature. He/she had to deduce the abstract legislative norms to the concrete case. Rule of law is according to this understanding guaranteed in so far as all positive rules enacted by the legislature are correctly applied to this concrete case.

The State as Institution for Social Engineering

Napoleon considered all state institutions as his instruments installed with the goal to alter the hierarchical feudal society into a modern society of individuals enjoying equal rights. In order to achieve these goals he needed a strong and independent executive able to implement the will of the legislature facing a more or less reluctant society. He was of the opinion that this difficult task the administration

was only able to fulfil if it would become independent from the jurisdiction of the ordinary courts. He did not trust the conservative judges and thus he had to find a possibility to prevent any access of the courts to the administration. Jurisdiction of ordinary courts on decisions made by the administration should be prohibited. Thus Napoleon decided to install a new legal system proper to the administration but only applicable to the administration and excluded from any control or jurisdiction of the ordinary courts. The executive and its administration should be immune and thus independent from the traditional judiciary and this goal was achieved by creating the new public law which regulated state and administrative affairs and in particular the relationship among administration or state and private individuals. From now on it was the public law which regulated in France all legal relations between state and private persons.

Ideological Separation between Public and Privat Law

As a consequence with regard to this splitting between two different legal systems the administration and with it the entire legal relationship between subjects of the administration and administration have been regulated and controlled by the so called public law. The traditional courts with private law jurisdiction have lost any competence to deal with legal issues in which the public administration was involved. The public law was withdrawn from their jurisdiction. Controversies between private individuals and the administration on the other hand were only controlled by the public law. Neither the executive nor the administration had any kind of responsibility with regard to the classical traditional courts. In order to give individuals nevertheless some legal protection against misuse of public power by the administration it was part of the public law to provide some instruments, remedies and tools available to the private individuals which needed to have some legal protection against administrative measures violating their rights without legal ground.

Since the French revolution one could now observe a continuous battle between democracy and state administration with regard to the strengthening and expanding request for the jurisdiction of the administrative court. While in common law countries the traditional courts could based on their own jurisdiction expand their power with regard to the administration based on their case law and with new writs provided by the Lord Chancellor, on the continent only the legislature had the power and political responsibility to expand the jurisdiction of the administrative courts by new or amended statutory law. An indeed in the 19th and 20th century was marked by this permanent controversy for better legal protection of the private individuals against the administration on one hand and the need of the administration to have the necessary powers to carry through within the public interest its tasks requested by the law. By this the continental legislatures contrary to the common law countries needed first to install new administrative courts which could only later be provided by some limited jurisdiction.

IV. Principles of Jurisdiction over Administrative Cases

a) Notion

Administrative Courts with Jurisdiction over Public Law Statutes

Jurisdiction of administrative courts is a jurisdiction which is provided for administrative courts having the power to review decisions of the administration based on complaints brought to the court in principle by private individuals. Based on a special legal procedure the court can review the legality of the measures provided by the administration. In order to decide whether such decisions or measures are legal the court has to look into all rules provided by the so called public law.

This kind of jurisdiction has developed on the European continent already to a certain extent in the 19th century but mainly in the 20th century after world war two. Such kind of administrative law jurisdiction is only possible if the following conditions are fulfilled:

1. There is a special so called public law which regulates decisions and measures taken by the executive or the administration. (Authoritarian state Obrigkeitsstaat, Privileges provided for public office).
2. This public law empowers the administration to enact on behalf of the state and within the public interest unilaterally legal obligations and rights for individuals enforceable by the state.
3. It is recognized that although the executive and the administration enjoy immunity and thus some privileges of office thy may be faulty and therefore their decisions must come under the control of other institutions.
4. The rights and privileges of private individuals which must also be protected against the administration and the executive need also to be recognized. (Limits of the power of the executive, partnership of the state).
5. There is an oveall conviction that based on a judicial procedure with two more or less equal parties the optimal conditions are given in order to come to a just decision based on a optimal fact-finding.

„Immunity“ of the Administration

With the establishment of a new public law separated and independent from the private law a new up to now unknown autonomous legal system has been created. With this new law one could sue the administration in France when the administration has issued an administrative decision (administrative act). In this case the administrative act could be reviewed by the administrative institution or at an administrative tribunal having jurisdiction over the case. The institution with such jurisdiction could in case of illegality either quash or turn the decision back for new decision to the concerned administrative unit.

Administrative decisions issued by the administration impose to individuals legal obligations or rights. Those obligations and rights are enforceable as judicial verdicts issued by a court. The administrative institutions such as police or offices

to proceed in bankruptcy cases are required to enforce the decisions in case the individuals do not obey those administrative acts.

With this new public law the bases for the legitimacy of the modern authoritarian state has been made. The authority that is the executive and the administration represent somehow the general will in the sense of Rousseau's volonté générale. As the volonté general can not be reviewed there is in the beginning neither a judicial body which would be given the jurisdiction over the executive. Executive and administration as independent governmental branch should not be accountable to any judicial instance. The public law did relieve the Executive and the administration to be accountable to the traditional courts.

Faulty Administration?

Only gradually one became aware of the fact that the executive branch including the administration can commit failures and that the legislature has a vested interest to guarantee by court review the legal application and compliance of its statutes by the administration. This insight and need enabled the gradual development of the jurisdiction and powers of administrative courts. However the competences of administrative courts are still considerably limited even today. They can only review administrative acts. And those acts can only be quashed for the future not for the past. (ex nunc and not ex tunc). Moreover administrative faulty acts which are not appealed within the deadline provided will be healed from their faults because with the end of the deadline the faults will be healed as the acts cannot any more be brought to the court and thus become final. Thus the institutions required to enforce those faulty acts have to implement them because after the deadline is expired they can not any more be quashed by a court based on a normal legal remedy. Even enforcement measures used against the executive and the administration such as e.g. the hand out of documents cannot any more be required by the courts.

Immunity of the State?

The concept of the public law thus is always departing from the basic idea that administration and the executive are superior to individuals and citizens. Women and men are subject to the administration and the executive as holder of the office to implement the will of the legislature which is the will of the people.

More pragmatic is the Anglo Saxon concept. Of course also in the UK the crown can not be sued. However the crown is neither above the law nor is it subject to a specific public law excluded from traditional court jurisdiction. The reason why one can not sue the crown is to be seen in the fact that the judge is finally a servant of the crown and it decides in the name of the crown (ex re….). For this reason the crown can never be a party.

As long as the servants decide within their competences they are not accountable for any of such measure, decision or activity. Only when they act beyond their powers conferred by the legislature (ultra vires) they are subject to the ordinary jurisdiction of the traditional courts. The assessment whether they acted within their powers *intra vires* or beyond their powers *ultra vires* is part of the traditional jurisdiction of the courts. Actions beyond their powers (*ultra vires*) thus can

never be healed for reason of time or acceptance by the parties etc. nor can they be quashed only after decision of the court (ex nunc). As they were always beyond the law they had never and will never become any legal validity. They are null from the beginning of their existence.

In the Crown Proceeding Act of 1947 the parliament has decided that in tort cases where parties require financial compensation for damages suffered by the administration even a writ against the state id admitted and thus the courts can condemn the state to compensate the illegal damage caused by its servants.

Principle of Legality

The tremendous expansion of the administration during the recent decades has many different reasons and causes: The principle of legality developed in the last century, was aimed to limit the power of the administration but at the same time it increased its legitimacy. The reduction of the royal prerogatives did only partially empower the legislature in principle it expanded the power of the administration. The extension with gradually growing and expanding public services and state tasks based on the welfare concept added new agencies with vague and discretionary powers. The need of men and woman for security within a society threatened by new and unforeseen dangers empowered the state with additional means and powers to control the individual. The growing risks caused by high and dangerous technologies required additional functions of the administration to prevent huge catastrophes and the shrinking world combined with the great global mobility exposes all societies to invisible risks of the unforeseeable danger of world-wide pandemic diseases. This increasing responsibility of state administration required a constitutional response with the expansion of the judiciary controlling the administration. However this development was rather different in the UK in comparison to the European continent.

Development of the continental European Administrative Law

While according to the British tradition even a minister is subject with regard to its activities to the judicial control according to the Common Law tradition and therefore he/she can always be sued before a court, the continental European legislature has privileged the ministers and civil servants with regard to ordinary people since those ministers are ruled by the public law which provides a general immunity for those magistrates and servants. Only in case this immunity is levied by the required body the ministers and servants are accountable for criminal charges before a court. Without levying the immunity a minister can not be charged for criminal offences before a criminal court.

With regard to their public activities they have no personal responsibility for their measures and decisions. They always act as members of the authority or as office-holders. In case they violate the law only the office but not the office holder can be sued. For this reason any criminal charge or contempt of court is excluded because the office or authority as an abstract entity can never be criminally charged for any thing.

With regard to the possibility of citizens to complain against illegal decisions of authorities it was only the French Conseil d'Etat which in the seventies of the 19th century made a break through and introduced to the remedy to complain against the administration for action beyond its discretionary power. Based on this new emerging French administrative law this new legal branch developed up to the actual very complex and subtly differentiated administrative law.

Control of Administration

The control over the administration can be designed very differently and thus carried through by different bodies in different manners. Decisive in order to limit efficiently and effectively the power is the judicial control. The real extent of the jurisdiction of a independent judiciary over the administration reveals some how the field of tension between a state based on partnership on one side and the authoritarian state still controlling its subjects. This contrast reveals in a certain way also that Civil Law an Common Law are different legal concepts because they rely in a different view of men and women.

Privilege of the Executive

States which dispose of its proper judiciary independent from the traditional private law judiciary and thus only in control over administrative acts have their proper public law distinguished and separated from the private law. State and its executive have to be designed by their proper and independent public law in order to implement their legislative tasks and goals. This law privileges the executive since it empowers the executive and its administration with the competence to enact decisions which are equipped with similar forces as a judicial verdict. States however which as common law states do not dispose of their proper public law separated from the private law do not enjoy with regard to the judge – besides the immunity of the crown – special privileges. They are real partners to the citizens and need in case to enforce their tasks against the citizens after a proper judicial procedure with a judicial verdict.

Democracy

The concept of democracy is based on a individualistic view of the person (*one man/women, one vote, one value*). Accordingly the individual as member of the nation takes part on the nations sovereignty. Accordingly it can with the majority create new law, modify it, abolish it and change it. The king by the grace of god has been secularized. The majority of the people ("citotyen") replaces gods legitimacy and thus designs justice in the sense of the volonté générale. The French revolution has transferred to the national assembly and thus to the legislature the exclusive power to create and make new law. The second and the third branch of Government are given the task to enforce and implement the law enacted by the legislature. Courts cannot any more find their proper law based on reason and traditional, historic and collective wisdom. This break of the French Revolution has triggered a new legal period which was decisive for the development of the administrative law of the European continent.

Legal Protection of the Individual and the Will of the Legislature

Within this system the judiciary as comprehensive institution to control the administration principally has no function. In France it was only the Conseil d'Etat which could more than 70years after is institution by Napoleon establish some limited control over the administration. But this was only possible because this most famous institution has first only been considered as being part of the second branch of government and not of the judiciary.

According to those early judgements the conseil d'etat looked in case of complaints of the citizens against the administration and the executive primarily to the question of the correctness of the implement the will of the legislature and only occasionally for the protection of the citizen. The need for proper legal protection of the individual with regard to administrative misuses of powers could only be taken care of as part of the control of the public interest and the correctness of the implementation of the law. This has been in particular the case for the administrative law developed in France and in Switzerland.

The principle of legality and the idea that the administration can only impose obligations to the individual based on a clear statute have primarily seen to be in the interest of democracy that is of the will of the people to be correctly observed by the administration applying the law decided by the people or its representatives in parliament. Because the majority of the legislature wanted to limit the power of the administration, the courts had to control to what extent this will of the majority of the legislature is correctly applied.

Protection of the Pre-Constitutional Rights in the Common Law Tradition

Contrary to the continental law the legislature in the Common Law did never totally displace the judge as a law-maker. The parliament at least in the UK enjoys of course absolute sovereignty. As far however it does not enact statutes it is the judge according to common law to act as a law-maker. The court will have to assess the writ handed over by the plaintiff and examine to what extent his legal protection has been violated. But it has not in addition to examine whether the administration or the executive have a part from the plaintiffs rights implemented the statute in general correctly according to the public interest. It has only to control that the administration and the Government have not misused their powers and acted *ultra vires* and by this violated vested rights of the individual. Therfore the individual is a bearer of pre-constitutional laws which can only be limited or reduced by the parliament and therefore have to be protected by the judge against the administration as well as against the executive. With the America n Constitution, which is designed according to JOHN LOCKE's philosophy of inalienable rights the judge has not only the power with regard to the administration but moreover with regard to the legislature. He/she has to protect the individual also against the abuse made by the majority of the legislature. The individual is independent from the will of the majority bearer of proper and pre-constitutional rights. The American people does not depend on the grace of the legislature or the constitution maker that those bodies grant it fundamental rights and freedom.

Administrative Courts and „Etat légal“

The specialized administrative judiciary finds itself somehow in between the conflicting relationship between the principle of democracy and majority rule and the judicial control of the administration. And one has to be aware that also the democracy has expanded in recent years and centuries. On one side the administrative judiciary guarantees the legal application of the law and for this reason it supports the implementation of democratically adopted legislation and thus the realization of the democratic "will" of the legislature. On the other hand it limits the space or freedom of the executive and of the administration which are interested to realize the political will of the majority (volongé générale) and to carry out this task with the least necessary control mechanisms. In this sense the administrative judiciary fulfils a similar function as the constitutional review of states. The judicial control of the constitution protects the minority against the mighty law-giver under its majority rule. The judicial control of the administraton on the other side protects citizens against the misuse of powers by the almighty administration. Finally by guaranteeing the principle of legality it looks that the rights of the subjects to the law can only be limited and they can only be required to fulfil obligations in cases the statute has already decided and there is for such decision a legal ground adopted by the legislature.

Different Perception of Administrative Law

The idea of MONTESQUIEU pretending that freedom can only be guaranteed it the governmental branches are separated and able to control each other has led to too different concepts of the separation of powers. According to the American Constitution the focus is on the functional separation of the competences of the three different governmental branches. Accordingly all judicial functions can only be carried out by the judicial branch. In consequence the court cannot be controlled by fulfilling its judicial function to decide concrete cases and controversies of a legal dispute. However another consequence is that all legal disputes between the administration and the subjects will have finally to be decided by a court. An in the end this view will bring the principle of separation of powers to the consequence that adjudicative functions which are carried out by the administration can credibly only be exerted if the administration observes a procedure which is similar to a court procedure.

Thus, only courts can decide in final instance legal disputes including disputes with the administration. Within this concept of checks and balances the judge is the only legitimate instance to mediate and decide a legal controversy. However this also means as a logical consequence that the judiciary can intervene in the legislative and the executive power if it is asked to judge a legal dispute which requires also to review statutory law with regard to its constitutionality.

A total different understanding of the concept of separation of powers is to found in the French legal tradition. According to the French concept the different branches of government are independent from each other and need to be protected within this independence. The focus is not in checks and balances but on separation of powers. The authorities need to be independent from each other. The functions of the branches can easily be overlapping. Therefore the executive may well

be asked to carry out judicial functions and to decide finally on complaints against the administration (*minister juge*). If the administration adjudicates its independence from the judiciary must be guaranteed. Thus not the function is independent but the body or the authority which may exert as well legislative as also judicial functions. For this reason the judicial branch has no authority to intervene within the executive branch and decide in a judicial case on decisions enacted by the administration. Even if the administration exerts functions close to the judiciary it belongs to the second that is the executive branch not to be controlled by the ordinary judges.

However even within the second executive branch a certain judicial function could be established by the so called council of state (Conseil d'Etat), which based on a long historical tradition and on high professional expertise could develop to a real independent instance to decide on complaints of private persons against the administration. Thus according to the French understanding the administrative judge (Conseil d'Etat) has to mediate a controversy between the administration and the concerned private person (judicial function). At the same time its verdict has to be executed correctly and for this function it serves the executive branch.

Also Magistrates may be faulty

The different focus with regard to the separation of powers has its final roots as already mentioned in a different understanding of the human being. Those who believe that human beings remain faulty beings even though they are elected as magistrates will have to install and design institutions which prove one self even with faulty human beings. For this reason the founding fathers of the American Constitution stressed the limits of powers, the accountability and the mutual check among the different branches of government. Who ever however believes that each national decides in the sense of the "citoyen" as a citizen and is only committed to seek the volonté générale will give any elected magistrate all necessary credibility and thus provide the needed independence of authorities composed of citizens seeking the volonté générale. Each control of other branches of government will only burden and impede the correct and efficient functionally of the concerned branch of government. According to a German saying those who are given an office by God are also given the necessary intellect to carry through their responsibility. (Welm Gott ein Amt gibt, gibt er auch Verstand).

An effective protection of freedom and property according to the common law perception and tradition is only possible by limiting the power of all institutions and this aim can only by achieved by a good constitutional system of checks and balances among the branches of government and with procedures which are controlled by the principle of fairness. The only guarantee of vested constitutional rights without the necessara institutional and procedural design does in the end not guarantee freedom and property.

Human Rights

Two important differences between countries with common law tradition and countries with civil law tradition have to be focused on in particular with regard to

the human rights standards and traditions and in particular with regard to the request of legal protection against the misuse of powers. Within the Civil law countries fundamental rights are rights vested to the individual by the state and in particular by the constitution. There main content is to defend their freedom against encroachment by state power. Constitutional and administrative courts thus need to take up complaints of the plaintiffs, when they can prove that their subjective rights (property rights) have been violated. For a Anglo-Saxon judge however such rights are pre-constitutional. Administrative authorities can only intervene in freedom and property when they are expressly authorized to do this.

In tight connection to this understanding there is a second important difference to be mentioned: Civil Law countries usually focus on the guaranteeing of substantial freedom rights such as e.g. freedom of press, association and movement. On the other hand countries with common law tradition focus primarily on procedural rights. They guarantee fair procedures before an independent judge in order to protect unlawful intervention into property rights or constitutional liberties. The procedure is considered to provide for even better guarantee of rights than the substantial constitutional right of freedom and property enshrined in the constitution. These reflections assume a human being which legitimizes the judge to find justice if the parties can defend their rights with equality of arms and within a fair fact finding procedure. There is no necessary need for constitutional substantial rights enshrined in the constitution for finding of justice. In Civil Law countries the judge is bound to the will of the constitution maker and thus has much less freedom and competences in applying the constitutional rights to the concrete case.

Secularization of the State

The Christian conception of the world is marked by the idea that human beings have to serve two masters namely God and the Emperor. This basic idea has led to the separation of the spiritual and secular authority. Only based on this idea it became possible that the Kings by the grace of God close and sometimes even similar to God could be altered into Kings by the grace of the people. Only this change made it possible to secularize finally the state authority. The might of the state became thus secular and it has been loosened from its transcendental legitimacy. And of course, a secular power but dependent administration can be made much easier accountable to the judge than a state authority legitimate by the grace of God which looks after the common interest of its people on behalf of God.

While on the continent the secularization has been reduced to the decisions of the legislature the judge in the UK kept still its function to find and develop the pre-state wisdom of the law and to implement it in order to mediate the legal dispute.

Minimalizing Human Mistakes

An additional important element of European legal tradition which however has much more impact in the Anglo-Saxon sphere is to be found in the fundamental view that human beings are faulty as citizens but also as members of a govern-

mental branch. Humans are faulty as common citizens but also as judges, kings or members of parliament. Even though errors of faulty beings may be reduced by education, there is always a risk which remains. Even though judges and civil servants may have the best professional education, they will always be tempted to misuse their power. It is for this reason that the value of state institutions has to be assessed with the capacity of state institutions to minimize human errors or at least to limit the power of the different authorities.

Any constitution or statute would miss its goal if it transferred to the executive or to the civil servants uncontrollable might or even the monopoly to use violence. Also the civil servants acting on behalf of the state can commit as many errors as private persons. Therefore they should not have special powers just because they act on behalf of the state. The final consequence to be drawn out of this wisdom has only been taken by the Common Law. The continental European administrative law for instance separates between the office and the office-holder. In other words authorities do even then not act as private persons, when they are providing measures beyond their competences and beyond the law. This means that those persons acting on behalf of their office that is in fact the office acts detached from the persons who only assume personal but not state responsibility for those measures. The office as such decides on behalf of the state and enjoys very similar competences as a judge judging a concrete case. As not the civil servants but the office enacts administrative decisions those decisions are enforceable similar to a verdict of the court.

Adversary System

The various views into the human being as principally faulty, even as magistrate has not only influenced the different concepts of separation of powers but also the court procedures. In particular the criminal procedure at least historically has had totally different roots with regard to the common and the continental legal system. But also the administrative procedures in common law and civil law systems differ quite radically from each other. The adversary system departs from the idea that the truth with regard to the legally relevant facts can be established at best in a procedure in which both parties defend their position with equal arms and equal chances on equal footing. The judge or in most cases the jury is "blind" and has only to be informed on the facts by the parties during the procedure. Anything which could influence this fact finding without control of the parties or the judge has to be prevented in order to exclude any possible prejudice of those deciding finally on the relevant facts and truth. Facts have to be produced by evidences proposed by the parties. Witnesses, documents and other means may be used in order to re-establish a fact of the past. The parties are expected to fight for the truth before the "blind" jury or the "blind" judge.

This adversary system has been dispelled in the continental European legal system with regard to the criminal procedure as well as to the administrative procedures by the inquisitory system. In stead of an adversary procedure within the continent the procurator representing the state in the procedure was required himself to find the truth. His office had the obligation to examine all facts and to produce the conclusion to the court. The court was only required to verify this truth. Thus

the defendant in the procedure was given some procedural rights only to be able to question the facts produced by the procurator but not to bring his view of the facts with equal arms and chances. These two very different approaches did lead to quite different procedural systems including different positions of the judges and the jury in the process.

b) What are now the Essential Elements between the Continental European Legal Culture and the Anglos-Saxon Legal Culture?

Essential elements of the European culture of administrative law are undoubtedly the separation of powers, the different jurisdiction of the court, different procedural rules, different remedies with different consequences and different concepts with regard to the sources of the law as well as a quite different function of the judiciary with the jurisdiction to control the administration.

Similarity between the continental European and the Anglo-Saxon concept of the judicial control of the administration can be found in the design of the independent judicial or quasi judicial instance (Conseil d'Etat) in France which reviews decision of the administration based on complaints from private persons. Even with regard to this similarity we should not overlook that with regard to the question how independent the judicial instance should be quite important differences of opinion between continental and Anglo-Saxon lawyers exist.

Different regulations have however mainly been developed with regard to the subject for review and therefore the possible remedies, the independence of the court, the possibilities for appeal and the fact finding procedure.

Subject of the Controversy

What can be the subject of a legal controversy between the administration and the private individual? According to the French and Swiss legal system only administrative decisions (called administrative acts) can be subject for a court review. According to the German administrative law any possible legal controversy can be brought to the administrative court when it infringes in basic subjective constitutional rights. According to a new constitutional amendment the access to justice against administrative measures will be considerably enlarged, although the legislature up to now could not abstain from the restrictive doctrine that only administrative decisions can be brought to an administrative review by the court.

In the UK in turn the subject of the controversy is not at all the issue which determines the writ available. The system of the Common Law goes rather back to the Roman Law tradition of the different legal actions. Accordingly the remedies are determined by the writs available against the administration. The writs determine the goal of the action and thus the jurisdiction and finally the verdict to be issued and enforced by the court.

Independence of the Judiciary

The common law tradition is based on the principle that men are governed by law and not by men. Men are vested by inalienable rights not even to be changed or

modified by the constitution or the sovereign. Thus the courts are the trustees to guarantee those inalienable rights. The judges are the "priests" to enforce the individual rights in any concrete case. Thus there is no sovereign to control the interpretation of the rights by the judges.

According to the continental system the sovereign is the very holder and fountain of justice. He produces according to ROUSSEAU the volonté générale the general will. The courts are to apply the general will of the sovereign. Thus they have to be accountable by the public.

The question remains, whether this is the only way to guarantee independence and to install prevent or to prevent and/or prosecute corruption of the powerholders differently. In fact there are other means such as transparency

How independent are the courts or the administrative tribunals? In the Anglo-Saxon British or American legal system great part of legal controversies with the administration are decided before the ordinary courts. In Germany and from now on in Switzerland special administrative courts have jurisdiction on legal controversies with the administration. In France on the lower lever administrative tribunals are vested with the jurisdiction over the public law and in final instance it is the Conseil d'Etat to decide the case. This institution goes back to the French Revolution and can even be traced further to the old royal system of France. The Conseil d'Etat has close links to the executive in particular when it gives legislative councils. However as a administrative court it has developed a large de facto independence from the executive and even the prime-minister who formally may chair the sessions of this body.

Ministre Juge

Of greatest importance to be also considered analysing Civil Law systems is the fact that a legal dispute may not in the first instance bee appealed to a court but to the higher administrative body supervising its lower agency and thus competent to review and to alter the decision of its agency depending on its advise and orders. This concept called in the French system "minister juge" is unfamiliar within the Common Law tradtion, since the administration has now power to exert real or quasi judicial functions (functional separation of powers). However the common law countries have often installed some special administrative tribunals in charge to decide such kind of cases.

Fact-Finding

An important difference is also to be found with regard to the procedure available for fact-finding. As already mentioned fact-finding in common law countries is done within an adversary system among equal parties before an independent and unbiased broker. Civil law countries follow the inquisitory principle. Accordingly the administration has the mandate and the power to determine the truth that is the relevant facts. This determination can later be appealed to the administrative court. Already on the level of the administrative fact-finding the parties have some rights with regard to the procedure. They must be consulted (rechtliches Gehör) and can provide for evidences. However, it is the administration and later the judge to de-

cide which evidence is needed for the finding of the truth. As it is up to the administration to find the truth in contrary to the civil procedure there is no regulation with regard to the distribution of the burden of truth.

The obligation of the administration to find the true facts relevant for the decisions is obvious. Within the continental administrative law one has deduced from this evidence a legal obligation to determine the facts and at the same time one has transferred to the administration the necessary rights and obligations within the procedure provided for the fact-finding. For this reason administrative acts have the same status and validity as a verdict of the court, although the facts are not determined within a procedure providing equal arms and chances to the parties concerned.

Without expressly provided legal obligation also the British administration is of course obliged to clarify objectively the relevant facts. In case of a controversy the court looks into those fact-findings only on the bases of *error on face of the record* but it does not certify for the administration objectivity and truth with regard to its fact finding.

For all those cases however, for which the facts have to be established within a procedure provided for the parties, the adversary system will be the bases in order to guarantee a fair procedure for clarifying the facts. Such kind of procedures are often dealt with in the American system by a so called *hearing officer*.

Contempt of Court

Courts empowered by the Common Law tradition can enforce all decisions during the procedure with the so called *contempt of court*. Thus they can force private parties or public administration if it is a party to provide evidences and to witness in the case and of course also enforce the final verdict. Administrative courts of civil law countries do not dispose of this very efficient power to oblige any person to the order of the court. For this reason they can only quash a decision of the administration, but they can not enforce with contempt of court any measure or failure to act with regard to a civil servant and to imprison persons disregarding court orders. As a consequence with regard to the power of civil law administrative courts even though they may be empowered to require certain measures, failures or activities from the administration, they can not enforce it. Thus, the writ in Germany to require the administration to act or abstain from activity may not be enforced by the court although the complaint may get a corresponding verdict. If the administration is not willing to obey the court, it has no possibility to enforce its judgement.

c) Reasons for those Differences

The Special Status of the Administrative act or Decision

By creating the new public law excluded from the jurisdiction of the traditional private law courts Napoleon has led the bases for two separate court systems, two separate jurisdiction and two different procedures including different principles to

adjudicate private law and public law cases. He only handed over to the administration an institution, important for the execution of administrative decisions: the administrative act ("acte administrative"). Though this institution has already its predecessor before the revolution it became the central and decisive institute for the administrative law on the whole continent. Indeed it has been taken over with the reception of OTTO MAYR in the administrative law in Germany and thus been the bases for a special German doctrine of the administrative law until the enactement of the new statute on administrative procedures after the Second World War (Verwaltungsverfahrensgesetz). It finally has also been influencing decisively the Swiss administrative law with the reception of the German administrative law by FRITZ FLEINER and later its major development by MAX IMBODEN. Both scholars have mainly contributed to the fundament of the Swiss doctrine of the administrative law.

Function of the Administrative Act

The administrative act satisfies many different functions at the same time: It is the enforceable and binding order of the competent authority for the concerned persons with an effect close to a judicial judgement. The enactment of the administrative act has in general to be preceded by a specific procedure in which according to the inquisitory principle the relevant facts have to be established. In addition the administrative act provides legal security as it can only be revoked by the within a specific frame of rules. The act has credibility and creates trust among the concerned persons and authorities. As already mentioned several times the act can be enforced by enforcement agencies and by the police. If challenged with a complaint the act is first assumed to be correct and thus valid. Moreover as long as it is not challenged to the court the administrative act enjoys the privilege of the assumption of its validity. If the act is not appealed to the court or a higher administrative instance within the legal deadline its possible illegality is healed. Thus it has to be executed by the office or the police in charge for the execution even though originally it was faulty.

Similarity to the Judicial Verdict

With the institution of the administrative act or enforceable administrative decisions the administrations of the continental European countries were empowered to enact decisions which were directly enforceable with regard to the concerned individuals. The idea already developed in middle ages of a centralistic, hierarchically structured and logically scientifically funded legal system has thus been strengthened with the Napoleonic concept of an executive and administration additionally empowered with competences similar to judicial jurisdiction.

The Status of the Administration Similar to the Judiciary

The excessive focus on the power of the executive and its administration can also be seen in the doctrine of the formal and substantial legal validity (Formale und materielle Rechtskraft) of the administrative acts. Normally only judgements of the court when they become enforceable achieve this substantial validity. And this

credibility and legitimacy of those judgements depends on the independence of the judiciary, the unbiased judge and the fair procedures based on the equality of arms of the parties. The very fact that administrative acts become legally valid, enforceable and that they are assumed to be correct and only reviewed in case of a complaint, shows the fundamental importance of this institution for the continental European legal thinking and legal system.

Volonté générale

As long as the citizens (subjects?) renounce to complain against the administrative acts they have to endure the enforcement. Indeed administrative acts are considered as institutions to enforce the legislation and the administration is seen as the superior authority to implement the legislation. As it can implement legislation with the administrative act on its proper initiative and thus it can determine the relevant facts on its own decision in order to enact an administrative act as the concrete subsumption to the abstract norm to the concrete case. For this endeavour it enacts the enforceable order of the administration which if necessary can be executed with the police force or other administrative means available. Thus the doctrine of the administrative act is some how to seen in the close connection to the dependence of the citizens from volonté générale already developed by ROUSSEAU which will always to be privileged as being in the general interest of all contrary to any private interest.

No Superiority of the Administration

Totally different was the development of the power and the jurisdiction over the administration within the UK. Just as courts in other monarchies also the courts of the UK were courts of the crown which decided on behalf of the crown on legal disputes. Contrary to other monarchies the principle „*The king can do no wrong*“ had however only a procedural meaning. The king and its courts deciding on his directives were not above the law. The crown was not the only source of law as was the crown in the absolute French kingdom with the famous sentence of Louis IV: „*L'Etat, c'est moi*“. With this principle the French kings had the power to change and deflect the law any time to their proper interest.

For this reason the courts in the common law tradition could always apply the law against the servants of the crown whenever they acted beyond the law. Thus it could always control whether they acted intra or ultra vires.

Although servants of the crown have to act and decide on behalf of the crown for the common interest their decisions have no effect similar to a court verdict. Thus if they will have to be enforced against the will of the concerned subject they need an additional order of the court. Thus public obligations with regard to the administration are treated similarly to private obligations. It is most interesting though that the administrative law of the Common Law countries can easily function without the heavy construct of the administrative act.

The King can do no wrong

If an individual wants to sue a servant of the crown the Queen or the King have to renounce explicitly to their procedural privilege not to be sued in court. Some of such renunciations have been done already centuries ago by the British Kings. Only based on such renunciation the so called prerogative writs (complaints against the servants of the Crown) such as habeas corpus, writ of certiorari and writ of mandamus could be developed. In all those cases the King or its Lord Chancellor handed in to the courts the power to require the administration to justify imprisonment or generally confinement of freedom (habeas corpus), the decisions of the administration (certiorari) or to implement or prevent an activity or measure of the administration (mandamus or prohibition or prohibitory injunction).

V. The two types of Administrative Jurisdiction

As logical consequence two different types of administrative law and jurisdiction with important differences between to continent and the common law have been developed. Indeed the control of the executive and of the administration is differently designed although in the end with regard to the final result the differences may not be this important. The feeling of freedom and the protection against unlawful administration is probably not so differently felt by the people living on this or the other side of the canal.

Within the Common Law system the ordinary courts decide within the frame of their given competences and prerogatives disputes among private individuals as well as among private individuals and the administrative authorities. In countries with the continental legal system for such issues specific administrative courts (Verwaltungsgerichte Germany and Switzerland) or Council of States (Conseil d'Etat) respectively administrative tribunals (tribunaux administrative) have been installed.

Criteria's for Assessment

The common law courts assess activities of the administration principally according to the same legal norms as they assess actions of private individuals that is according to the common law. As consequence measures or decisions of the administration are to be considered then illegal when they are not covered either by case law or by statutes enacted by the parliament nor by King prerogative or by natural justice. If such action can not be justified by some these legal principles, precedents or statutes the administration did act ultra vires. Thus, the court does not intervene within the discretionary power of the administration. If it namely acts within its discretionary power the decision or the measure is considered to be lawful because it is within intra vires. As far as the court observes the statutes enacted by the parliament the criteria's for assessment correspond to a large extent those which on the continent in civil law countries are called reservation of the positive law or principal of legality (Gesetzesvorbehalt). As far as the court however refers to the common law to natural justice or to royal prerogatives they cannot be com-

pared to the civil law principle of reservation of the administration (Verwaltungsvorbehalt).

Remedies

Compared to civil law the most impressive differences are to be assessed with regard to the remedies available within the Common Law. The most important difference with regard to the remedies is to be seen in the fact that citizens do not have to wait until the administration issues a decision in order to appeal against this decision. According to the writ available they have in contrary the possibility to sue the administration before the court and either require the administration to provide a certain action or to prevent it from a certain planned activity.

Habeas Corpus

With the remedy of the habeas corpus those who have been deprived from their liberty and freedom because of imprisonment, delivery within a psychological clinic, imposed tutelage or order to leave the country can require to be brought before an independent judge who has to assess the justification for this limitation of liberty. Habeas corpus is one of the oldest prerogative writs going back to the middle ages.

Writ of Certiorari

With the writ of certiorari those who are concerned by a concrete decision of the administration can require that it is quashed by the court.

Mandamus

The writ of mandamus is available for those who want the administration to provide for a certain action in order to execute mandates provided by the law or the installation of a new line or the construction of a road.

Prohibitory Injunction

With the remedy of the prohibitory injunction the court can be required to prevent the administration from certain activity (rule making or measures, planning etc). Thus one can prevent the planning or even the construction of a street or an airport.

Injunction

Injunction was the ordinary common law remedy to require a certain activity of the administration. The corresponding remedy against the public administration was for long time the mandamus. Today most of those previous prerogative remedies have been united within the traditional injunction.

Recours pour excès de pouvoir

The recours pour excès de pouvoir ist the most important and traditional remedy of the French administrative law. It is only possible against an administrative act.

In Civil law countries an appeal is in principle only possible against an administrative act. The remedy to appeal against the administrative act is called in France the complaint for acting beyond the discretionary power.

If the administration as caused illegal damages for individuals one has in principle the possibility to sue the state for torts committed by the administration. In Switzerland individuals are usually required to demand a administrative act which accepts the responsibility of the state to compensate for the caused damages. Only when this decision is considered illegal, one can again appeal against it at the administrative court.

In case the administration did conclude a contract and is not willing to fulfil the obligations provided in the contract, one has the so called action de plein contentieux which is available in France. In Germany one followed first the concept of the administrative act but based on the guarantee to access to justice according to article 19 of the constitution one can now sue the other public party directly before the administrative court.

Standing

Standing to sue the administration before the court has been expanded in most of the countries in order to open access to justice against the administration. In earlier times only those who could claim the violation of subjective rights, legal rights or property rights could have access to the court. Today at least in civil law countries individuals who are illegally violated with regard to their vested interests can have access to justice. This is also the case in Switzerland which provides in its new article 29a of the constitution the right for every body to have access to justice if it has a legal controversy with the administration.

Function

In the UK and in Germany the function of administrative justice is mainly to protect individual interests against illegal actions or decisions of the administration. The courts are asked to protect those interests in case they have illegally been violated. Besides the protection of individual interests the court can also be asked to protect the interest of the legislature and with it the public interest. For this reason standing is sometimes expanded in order to provide better court review in cases public interest might be damaged. One important example is the right of NGO’s in the field of environmental protection to complain against administrative decisions e.g. licenses with regard to certain individuals because they violate main environmental interestes.

Chapter 6 The State as Legal Entity

A. The State as Legal Entity in the Area of Globalization

I. Introduction

Does „homo oeconomicus" replace the „homo politicus"?

The perception of the universal, modern nation state would have had to be reconsidered already a long time ago. Today this perception is even confronted with the post-modern challenge of globalisation. With this development, the decisive institutional character of modern democracy looses its decisive institutional fundament of a constitutional democracy and its only internal oriented legitimacy. Replacing the democratic legitimacy of the peoples external factors determine more and more even the inner identity of the democratic constitution of a state. The raising importance of the global market not only questions internal politics traditional oriented versus the nation state, it even requires scholars and practitioners to put the most fundamental question of a privatization of the state. The global *„homo oecomomicus"* will have to meet the challenge of the critical responsibility to decide on political, social and economical questions. Based on the generally recognized identity of the global consumer the homo oeconomicus as actor on the global market will have to take over the function and responsibility of the global "citoyen"!

Collective Identity?

However, one will also have to admit that human rights which identify the global and universal „Citoyen" belong to the most fundamental and most important values which did finally legitimize the local nation-state. Humand rights limit within their universal significance are still limiting based on their universal recognition and significance the space of freedom of the powerholders of the nation-state. Those universal rights enter from now on carried by the magic word of globalisation the arena of the supranational world. Paradoxically the global *homo oeconomicus* and the local *homo politicus* exclude each other. The first seeks the "sovereignty "of the global market the latter finds its roots in the nation state. However in the last ten or fifteen years the homo politicus did begun to question

the liberal fundament of the nation state. One should admit and request that besides the individual identity taking into account the importance of multi-ethnicity also collective identities of different cultural and religious communities should be recognized as a political and collective value.

Undoubtedly, globalization on one side and multi-ethnicity on the other side have become the real and actual structural challenge of politics of the modern age. Diversity based on multi-ethnicity did as well as globalization put in question although from contrasting perspectives the traditional liberal nation-state and with it the democracy founded by the constitution as the proper institutional fundament and legitimacy.

II. Constitutionalism by a changing Perspective

Fundamental Values of Constitutionalism

The constitutionalism of modernity is rooted in the basic values of liberty, which has to limit the power of the state with the constitution. The primary goal of a constitution is to limit governments and their power. The constitution of the basic law of the state will have to be a constitution of liberty (Constitutio libertatis). Liberty of the individual has to be thee aim of the liberal state, and such liberty can only be protected within a political system constituted with limited governmental authority. Although the state of modernity has considerably changed with regard to its ideational basis one can still subscribe and accept its original and basic values to be determined as follows: A liberal and open society is community in which each single individual person enjoys a recognized and protected sphere of free space for individual movement and development. This free space has clearly to be distinguished from the public sphere in which the private have to obey only to such rules which are valid with regard to all individuals in the same way. (cp. HAYEK, Constitution of Liberty, London 1960 S. 207f)

The normative liberalism wants to regulate power, limit might and protect liberty by law. Those goals should be united on the same fundament of a legal frame and at the same time they should enable and promote an efficient and protecting state authority (Separation of powers, Checks and balances and protection of fundamental rights). The legal order has to transcend the political into the legal and the legitimacy into the legality. Constitutionalism is thus the answer on the question how liberalism can be perceived within a legal system.

Constitution as Process

Constitutionalism determines the relationship between Government and governed within the frame of the Rule of Law not regarding its substance and content. In this sense, the principles of due process, equal rights and general validity of the law are immanent to the frame and constitution. These principles have to be applied by all human beings and have to be observed for any establishment of new rights and obligations. Thus, one can conceive the Constitution valid and providing for the fundamental rules for a certain state as the basic act which constitutes

the pre-conditions for the process which enables the political society of the stat to reach a democratic and rational consensus. An ideology that is rooted in a process-oriented perception of justice however did never consider it value-blind. None of these principles committed to the fundamental values as human rights, universalism, liberalism, rationalism and contractual liberty can be understood as part of a neutral and unbiased positivistic system of values. In contrary: all these values contain a basic substance that is they aim at the liberal goal of individual freedom. They are the result of a substantially politically and ideologically decision, which is incompatible with authoritarian and discriminatory ideologies of government.

Democracy and Human Rights

From a subtly differentiated point of view, the democratic majority principle can also be understood as a tool, which limits the might of the state. It can however also be misused as a means to constitute the tyranny of the majority. Constitutionalism prevents the majoritarian democracy to run amok. Indeed the people within a constitutional democracy are the constitution making power (pouvoir constituent). However, this power can only serve liberal goals if its might is also bound to the elementary fundamental rights. Constitutionalism establishes the constituted democracy not as pure power of the majority, which can create Law, but also as a democracy, which is bound to the constitutional rights. In priority, democracy will have to enhance and better protect fundamental rights. Democracy is legitimate because it can better than any other process serve to protect human rights. In final consequence of such analyzes one has also to conceive human rights as a legitimacy bases for a democratic system. Democracy as governmental system of people's sovereignty thus is only legitimate as it is embedded and it implements human rights.

Democracy seen from a Rousseau perspective can on the other hand also be seen as a tool, which as such guarantees freedom. With the democratic adoption of laws binding and limiting individual freedom the people can democratically decide to what extent the law will bind it. This perspective understands democracy as a means to provide as much as possible self-determination of the individual. Each individual can determine by the democratic process to what extent it will accept new obligations provided by legislation. Thus within a small community on a local level individuals will have more democratic input than on the central national level. Seen from this point of view democracy aims not at a small majority, but much more at a comprehensive consensus of the people, which would legitimize additional limitations of freedom.

End of History

After the break down of communism and of the Berlin wall at the end of the 20eth century many where of the provocative and well known opinion that mankind has reached the end of history and thus proposed the beginning of a new area of constitutionalism. Such simplifying and unhistorical argument of the end of history has even been transcended on constitutionalism in order to argue that the western liberal democracy has reached the peak of its development and with it also the end

of history. In consequence, democratic constitutionalism will be immune against any other changes and developments. In this view, constitutional democracy has irrevocably conquered as final solution ("Endlösung") any despotic governmental system. Constitutionalism has thus become a common good, which finally should not any more be questioned or analyzed. Therefore, only the tension between norm and reality that is the implementation and interpretation of certain notions can be subject of the post-modern discourse.

With this, the structural challenges of the nation state however and in particular the political design of the international cooperation of the states within the European Union are ignored. They do not consider the real fundament of constitutionalism such as legitimacy and its results, the political design of the nation state. However, precisely on these issues modern constitutionalism has to open the scientific discourse.

From Procedure to Substance

If one attempts to enhance the constitutional and dogmatic fundament of the modern state, one has critically to question and analyze in particular the reduction of the former constitutionalism to only procedural principles on one side and its concept of fundamental liberties understood only as rights to protect the individual from state intervention (negative rights). Actual constitutionalism should besides procedural principles give more attention to substantial values and moreover to reconsider the contradiction between state and society as well as between individual and collective rights. However, it should analyze more carefully positive rights with regard to their legitimacy. In this context peace and human dignity can turn into universal values.

The Dilemma of Constitutionalism

The dilemma of modern and post-modern constitutionalims can be divided into the following themes:

- The relationship between rule of law and the welfare state;
- the multicultural challenge opposite to the a-cultural „citoyen";
- the emergence of a supranational constitutionalism without demos and the function of national constitutions with regard to regionalism;
- the structural obstacles and the inconsistancies facing strengthening of democratic constitutions within pos-communist states;
- the internationalisation of constitution making by the international community;
- the concept of good governance as a pre-condition for financial support by the Breton Wood institutions.

B. Challenges of Globalization

The actual globalization has its effects on the internationally ruled economy, communication and the ever-raising might of the international actors of global institutions regulations including the global network of non-governmental organisations. Thus, one should not reduce the process of globalization only to the economy. And even with regard to the economy one has to be aware of the fact, that the labour-market did not turn into globalization, it is still local and not global. Indeed one has to assess the process of globalisation at the same time with regard to two different points of view:

The End of History or the Change of the Nation-State?

1. With regard to the aspect of economy: According to this end-of-history-view the not only the economy has reached the final stage but also the political community as such. Seen under this aspect the neo-liberal ideas on globalisation of the economy contradict to a certain extent to the very original concepts of the political liberalism. The traditional constitutional liberalism namely is linked essentially to the idea of the nation-state. With regard to this connection neo-liberal ideas of globalization contradict to the classical liberal concept of the nation-state.
2. Moreover one can observe globalisation from the point of view of a new differentiated form of internationalization. Additionally one can consider this environment as the starting point to a development which will lead to a more comprehensive supra-nationalisation. Accordingly national as well as inter-national and supranational structures such as e.g. the European Union as a federal-like association of states will only be able to survive within a global environment.

Chances fort the Nation-State

In a similar sense globalisation can be seen as chance in order to re-define on one side the substance of the political and on the other side the notion of the nation-state. By this they can be embedded in the new complex reality of trans-nationalism, internationalism and supra-nationalism. Undoubtedly globalization will diminish the space of political freedom of the nation-state. Instead however, it will compensate this loss to a certain extent with a new but different sovereignty. It is precisely for this reason that the nation-state will keep its central role within the game of the different forces of international development of might and authority. In particular, the nation-state will remain, the decisive source where-from national valid, and enforceable law will be deduced. As contradictory those two point of views may seem, as much they rely on the same concept of values: Both have the same concept of the political and both are based on the idea that the nation-state in the stage of globalization which will strengthen individualism can only survive if it is additionally able to recognize trans-territorial and regional values.

Back to the Personal Law of the Middel-Ages?

How-ever one understands globalization and what-ever one expects of it, the phenomenon of a territory which is dissolving more and more and which is linked to a return to the personal laws of the middle ages can not be ignored. Territory will always remain a constitutive principle of the modern nation-state. Even ROUSSEAU who has de-mystified the close connection of territory and human rights did relativize the territorial ties to the nation-state. The monopoly of politics based on territory and the community lined up only to the nation-state irrevocably belong to the passed. The external frame of the nation-state and its identity have thus to be questioned. At the same time the territorial state will generate new and stronger identities by the increasing inner decentralization and regionalization and by this it will gain a stronger inner legitimacy but also more complex identity. Globalization and regionalisation seem to drift apart. It will remain the task of the nation-state to re-balance those drifting forces and to maintain a common identity in order to be able to act flexible and effective within the international community.

Relevance of the Territorial Frontier

In principle one should not forget that already the emergence of the sovereign territorial state is going back to the peace of Westfalia. There the then international community decided ("globally") that state borders should be respected and made sure by international bilateral treaties. Although culture and space are not insolubly interweaved and interdependent and although the human rights are universally protected territorial border lines are still controlled by the nation-state. The nation-state controls which persons with what kind of products are allowed to enter the state. And in the worst case it is the nation-state which expels those it does not want to stay within its territory. Thus it is again the nation-state which decides on its territory who receives and keeps the nationality and citizenship and who can profit from social benefits of the welfare-state. Even the so called cosmopolitan will be cached up sooner or later by its nation-state determined by the coincidence of his birth.

Fundament of the Constitutional Democracy

Globalisation has brought us undoubtedly a new dialectic of territoriality, which earlier did belong only to the nation-state. As traditional territoriality is challenged by the nation-state, also the theoretical fundament of the constitutional democracy as well as sovereignty, human rights and the social welfare-state will have to be reconsidered. Once all those state elements have been determined by territoriality, now that territoriality is dissolving also those basic state-elements have to be reconsidered.

I. Sovereignty

Common sovereignty

The nation-state in common with the international and supranational structures carries out the classical state function of legislation, execution, and implementation of human rights. In earlier times, all those tasks were substantially connected with the nation-state sovereignty. Even though the nation-state may gradually lose some of those traditional tasks, this will not lead automatically and necessarily to a total dissolution of the nation-state. The states of our planet may not any more claim their own right to decide on war and intervention as basic fundament and pre-condition of their sovereignty, they still decide on nationality and on the possibility of human beings to live on their territory.

One can just not reduce sovereignty to the mere external sovereignty. Sovereignty has also to be perceived as inner sovereignty of the state and this as well from the point of view of its claim to authority as well as to legitimacy. The inner state sovereignty fulfils itself as democratic sovereignty of the nation and this in particular based on its competence to enact and implement legislation.

Change by transnational Networking

Certainly, one can not deny that globalization as worldwide process of transition and transformation will lead to new international and trans-national networks of the nation-state. This will substantially change the character and the functions of the nation-state. This will of course also change the perception of people on the notion and content of what can be understood as politics, as political effectiveness, what should belong to democracy and what can legitimize the democratic system of the nation-state.

Can the Political be Global?

If one however is willing to come to a new understanding of the “political”, one will necessarily have to ask the following at least just as significant question: Is a global society as a political community at all thinkable? In addition, if this is so, one will have to ask the following question: to what kind of democratic participation will this lead in a world in which the states are internally regionalised and externally globalised? In the past, the nation-state was automatically particular in a universal world because of its sovereignty, today its particularity becomes relevant precisely based on the universality.

II. Democracy

Demos as Source of the Nation

In the stage of globalization democracy faces new challenges for two reasons: On one side one has to reconsider the notion of the legitimacy of the nation in the

sense of the demos as source of sovereignty. Moreover, the governmental system as such and its decision making process as well as the democratic responsibility with regard to the people within a new world have to prove themselves. Taking these considerations into account the additional fundamental question must be raised: Can democracy as such and at all be de-nationalised? Can democracy become alienated from its proper origin, namely the nation?

The advocates of an economically ruled globalisation would of course affirm this question. By this however, they ignore two essential bases of modernity: Modernity of the state emerged out of the principle of the nation and based on this out of an inner homogeneity of its members and participants. By definition the nation-state of modernity goes back to the constitutional interdependence and interaction between democracy and the Rule of Law. And, indeed only based on this union despotism and tyranny can be prevented. Such interdependent conditioning of democracy and rule of law can only be guaranteed by territorial nation-state procedures.

A Global Democracy would not be Viable

Structurally a globalised constitutional democracy cannot be viable. Why? The procedural conditions necessary to put into effect constitutional liberty can not be implemented globally. They are linked to the nation. In the end, only the nation can legitimize democracy. If one takes the heterogeneity and the deep diversity of the global world society serious a new world war would necessarily be the consequence of any attempt to establish a world state.

Globalization without Legitimacy

Globalization would transcend the political decision making process into new structures which would lack democratic legitimacy. Moreover those structure would not be able to establish a more robust legitimacy. The political decision making process cannot be separated from the democratic legitimacy. The area of todays international and supranational "Realpolitik" is drifted into a non-transparent unclear political structures which according to the actual standards cannot at all claim political legitimacy. Traditional politics is gradually disappearing and it is going to be replaced by "un-politics", which rules the political. In other words: Politics which moves humans of a certain nation-state disappears gradually has lost its direct connection to the political and democratically legitimate office bearer within the nation-state.

The Quasi government rules the state without constitution as there can not be a viable world government. On the other hand all those who are interested in the global market have also a strong interest for a legitimate rule of world economy. It may be that world economy can be ruled, but only the nation-state can effectively participate on the international governmental activity.

Democracy without Demos?

Without demos there is no democracy. The demos however, can only emerge out of the people. This people is made by the nation-state and not simply by mankind.

Trans-national activism of certain persons is not on the same level as democratic civism. Out of humanitarian activism a global and at the same time critical public can not emerge. Globalization has undoubtedly developed to a certain extent a new civil society. But this new world-wide civil society does let a new citizenship to be detected with a newly born global "citoyen". Out of activism for humanity no critical global public can develop.

Cosmo political Democracy?

The most interesting arguments in favor of a de-nationalized democracy thus are at the same time rooted in a rather dangerous ambivalence. The first tempting argument postulates a Cosmo political democracy (DAVID HELD, Democracy and Global Order, From the Modern State to Cosmopolitan Governance Cambridge 1995). Correct is certainly that the political democracy has to be reconsidered. Correct is also that the real problem is to be found in the nature of representation and in the people to be represented on one side and in the size of the rights of participation of the citizens. By pointing at the problem one can however not without difficulty conclude that the only reasonable solution has to be found in the globalised democracy. Although the political community is at its appearance changing, but it transforms not automatically into a global political world community in reality internationalization, trans-nationalization and regionalization are interdependently connected.

Open versus Closed Democracy

Even the argument of ANTHONY GIDDENS (Beyond Left and Right, the Future of Radical Politics Cambridge 1994): Democratisation of Democracy cannot finally convince. He detects the same basic political problems; his thoughts however are based on the same modern political paradigm, that namely the democracy by dialogue has to find its result within the autonomy and that this aim can not be achieved with the traditional democracy of today. The idea of a world constitution as well as the postulate of a open democracy versus a closed democracy transform the idea of democratisation of the democracy only on the formal level of constitution making without explaining how democratisation of democracy can be achieved.

III. Rule of Law and Protection of Human Rights

The Citoyen as Symbol of Universal Values

Within their constitutions the modern western nation-state confess their approval and implementation of human and fundamental rights as well as political rights into positive legal documents. With this they have assigned the sovereignty of the King by the Grace of God to the people and thus established a state ruled by democratic legitimacy. The state society exists by its members, the citizens or the citoyen which did become the symbol of the universal values of human rights and of

the democratic political community. Reversed the citizen also symbolizes the particular frame of a certain nation-state. Nobody requires that also the border-lines of the nation-state are to become universal. Nobody would neither require the political community to be or become universal. In this context rather the differences such as diversity and particularity are to be highlighted. Enhancing the rights of the citizen with its nationality is finally determined by the nation-state.

No Monopoly fort he Implementation of Human Rights

Today however, the same nation-state which at the time proclaimed universal validity of human rights seems not any more to be in a situation to guarantee all those rights within its own state borders. International law has in between taken over those rights and guarantees human rights by international procedures which should enable citizens of a state to sue their proper state before a international forum. In the end this "globalization" of the constitutional law does not mean something else than a "trans-nationalization" of the constitutional law which manifests itself in particular in the area of human rights. Even though a international court with large competences such as the European Court on Human Rights depends finally on the willingness of the sentenced state to implement and execute its decision internally.

Nation-States take over the International Standards of Human Rights

The nationally guaranteed constitutional human rights take over international standards of human rights guarantees, which will have the following consequences:

- Internationally guaranteed human rights receive more and more within the internal structure of particular nation-states a directly executable constitutional protection.
- in some states the constitutionally guaranteed human rights are interpreted in agreement to the stare decises practice of international courts. Internal courts are constitutionally obliged to take into account or even to observe with regard to their decisions the decisions of international forums and courts.
- Globalization is also revealed by the fact that the horizontal comparative approach receives greater importance as method for the rezeption of foreign decisions within its inner and proper state and constitutional law. This method is also used as an incentive for the further creative development of the proper national law.

Global Transformation of Human Rights

In the end a new and fundamental dilemma appears: Can namely human and political rights, which have developed within the territory of a nation-state still autonomously be guaranteed by the territory of the nation-state in which they have been born? – Can those rights effectively be transformed into global human rights? Globalisation has let the nation-states to accept that certain political rights

of citizens are to be protected within the frame of a global or at least regional international law such as e.g. the European Community law.

Universal Credibility – Universal Protection

The basic question of globalisation with regard to human rights can be put as follows:

- To what extent globalization of human rights which does manifest itself by ist positivistic implementation in international treaties will have to be in order to achieve credibility to be complemented by an effective and efficient international protection?
- As already mentioned the value of human rights is universal. Their anchorage and protaction however is particular. Can human rights still be effecticly protected on the global level facing the growing ditch between the world cultures?

Economic Sanctions of the United Nations

From the point of view of human rights we are facing an additional challenge, which reveals itself by the contradiction between national constitutionalism and globalisation. We point at the function and the position of the United Nations and their claim to have the monopoly of violence as only world government even for the execution of human rights. Here the deficit of democracy of the United Nations becomes brutally manifest. Indeed within the security council some very few states can make decisions with highest importance and consequence without democratic legitimacy. This can lead to a basic constitutional problem for instance when economic sanctions are imposed which affect directly innocent people and may in the end even violate their proper human rights. Does one not have realistically to recognize that by the internationalisation the internal constitutional protection of human rights looses on substance?

No Legal Remedy with regard to the International Actors

Moreover, the new developments of the international guarantee of peace and peace-enforcement reveal that peace-enforcement can only be carried out by some very few nations. Those nations get an incredible preponderance as international actors with regard to all other nations, as they claim to be the real holders of the monopoly of force and violence of the United Nations and thus usurp the monopoly of force of the United Nations. Indeed, they became the real holders of international peace making and peace-enforcing without being accountable for their measures and decisions. Only if the international Criminal Court becomes successful at least to impose criminal responsibility on the forces responsible to secure and enforce peace it can at least provide some protection for major violations of basic human rights and to provide sanctions for obvious and brutal actions against humanity. With the criminal law however only human rights violations can be punished. Still the international protectorates such as e.g. UNMIK in Kosovo do not allow any individual claims for persons which feel to be violated within their proper human rights. As far as we are not able to extent the legal protection

also with regard to the international actors the international rule of law and with it the legitimacy of the international community will remain in jeopardy.

International Monetary Fund and World- Bank

The problem becomes even more serious when the international actors are not only states but institutes which assess the human rights situation within specific states. In those cases we lack as well procedures for decision making as also remedies for protection against actors which should become accountable before a independent judiciary. Those global actors act external to the international protection of human rights and are not accountable for their activity and decisions to any independent judicial control. Thus, globalisation has already today not been able to cope with the challenge to protect effectively human beings with regard to the actors of international institutions.

Do Goals Justify Means?

How credible remains in this context the demand that the Rule of Law should be observed universally? Universality is justified because it is deduced from reason and therefore to be implemented for each human being having a fundamental claim to justice! With the example of the war in Iraq the contradiction of the phenomenon of trans-national intervention becomes apparent. Is it allowed to violate international law in order to execute morally undisputed justice deduced from reason? Moreover one has always also to ask the question whether the reason for intervention is not so much to combat the evil and to restore universal justice but much more to promote national interests. For the intervention in Afghanistan probably naked national interests as well as the moral horror of Americans were necessary in order to motivate the international intervention and to bring reason and justice to victory. HEGEL would have probably mentioned in this context the cunning of reason. (U.K. PREUSS Verbrechen, Blasphemie zum Wandel bewaffneter Gewalt, Berlin 2002 S. 82)

IV. Welfare State

Integrative Concept of Human Rights

With the demand for social and economic rights the two pillars of the liberal state have been undermined. Can the inner peace and harmony of a society only be secured, implemented, and developed on a free market system based on the negative function of liberties? Can one build up a polity based on the ideological separation of the state and a society of autonomous individuals? Can such concept also justify and legitimize the liberal authority of the state? Today we are convinced that besides the second generation of human rights even a third generation is necessary in order to legitimize the first generation. With regard to domestic law as well as to international law we are confronted with demands which aim at the integration of all these different human rights concepts into a comprehensive concept taking

into account all dimensions of the human beings. The phenomenon to functionalize the social and economic rights with regard to their relation to the classical liberties is leading in the end to a constitutional policy of the welfare state, which cannot any more understand human rights as mere negative rights. Human rights must have today as well besides the status negativus also a status positivus as well as a status activus. This must become the integrative concept of human rights (Status unus or status solus)

Emancipation of the Society of Competition

These new developments of the relationship of human beings to the state, which is marked by the increasing influence of the welfare state will blur the classical contradictions between social rights and liberties and it will lead to stronger claims of the individuals for more emancipation. At the same time new dependencies between the institutions of the state and its particular individuals well develop as the different individuals will develop a new understanding as clients of the state administration. The citizens will namely be confronted with two potentials for emancipation: On one side they will be freed from the classical mechanisms of control and thus receive new free space for individual development and autonomy within the social life. On the other side they will consider themselves to be much more integrated into the society in which individual success and individual need will even collide more harshly.

Freedom and Social Security

JÜRGEN HABERMAS rightly warns that as global effect the internationally regulated economy could break down by the compromise of the welfare state. And indeed the structural change of economy will put into question the welfare state ruled by endless ever changing regulations. This welfare state could only be built up on a successful combination of the principles of the nation-state and of the values of the welfare-state. (HABERMAS, Jenseits des Nationalstaates, Munich 1998 P. 73). This most efficient combination of social security and individual liberty can not any more be guaranteed by the nation-state. The particular individual states are not any more able to guarantee social justice with a corresponding proper economical and social policy. Neither can they guarantee or achieve to implement social rights. Supranational organisations and the globalisation has radically reduced the autonomy of nation-states in the area of economic policy.

Nation-State as Partner of Social Policy

However, the nation-state remains still the partner accountable for claims of the realization of social policy. As already mentioned the labour market has up to now hardly been globalised. It is still strongly linked to the local nation-state. The people will finally always make the government of its nation-state accountable for any economic deficiencies.

This is an other example which reveals the paradox of globalisation of the welfare state: On one side it is embedded in the economical and social policy of the nation-state and for this it is legitimized by the respective citizens. On the other

side the nation-state can not any more fulfil the expectations of its sovereign and realize the social policy required by its demos. With this again a new dialectic of the reconstruction of the welfare-state is appearing which under the pressure of globalisation provides for the ground for the deconstruction of the welfare-state.

Social Rights

Social and economic rights did lead based on the need of society for inner social harmony irrevocably to the increasing welfare of the classical liberal state. Globalisation has brought the structural dilemma of a pure negative interpretation of human rights to a new dimension. Does this contribute to the mainstream conviction that one will still consider poverty and inadequate health care as a violation of human rights? Even the claims for those rights will have to be raised on the political level of the international community and there they will have to be called for. In this sense the draft for a charter of the European Union with its confession to solidarity contains a impressive catalogue of social and economic rights such as e.g. the right to human dignity (art.1), the right of the family to social protection (art. 13 par. 2), the right for education (art 16), the rights of children (art. 23), social rights (art.31), the right to holidays (art.35), the right to health protectin (art. 42) etc.. In a similar sense also the new draft for a constitution of the European Union contains social rights (art. II 6ff). Although those documents have up to now not passed the approval of all member states one can assume with almost 100 percent certainty that any deepening of the political structures of the European Union will contain some of those already enshrined rights.

C. Elements of the State

I. Significance of the Notion of the State

a) The Development of the Notion of the State in Modernity

From Hierachical Heudalism to Popular Sovereignty

Within the feudal structure of the middle ages might was to a great extent still "privatized". It did mean personal dependence from a landowner or master. This dependence was similar to the dependence of the landowner with regard to its count or prince for whom they were asked to be loyal and to serve as soldiers in the military. For these obligations the ruler died compensated them by protection of their property and power. The masters in the towns were connected by their guilds which did administer the monopoly of the guild and distribute to each of them its part and contingent. The totality of the guilds administered the town,

which has often been under the special protection of the prince or directly of the empire.

The centralisation of the ruling power in the authority of the prince did break up those strongly structured dependences. The numerous personal dependences changed the relationship of the subjects into a gradually direct and undivided underling relationship of the subject to the prince or the crown. The might of the King did not any more depend on personal dependencies such as property, marriage, purchase or sale but on its military powers. Later the ruler did not any more represent the lower level of hierarchy such as princes or counts but much more the interests of the entire people subject to his authority.

From the „stato" of MACHIAVELLI to the Sovereign State

For the unity of the tightly ruled people's unit one had to find a name e.g. Venice or France. How could those dependencies of persons with regard to their prince which were linked only to its military might but not to family, property or tradition be labelled? MACHIAVELLI labelled this unit with the Italian word "lo stato" (status). With this label he referred to the old Greek town states and to the „status rei publicae romanae" of the roman Empire. While the label and with it the notion of the state started to determine the new undivided relationship between the King and its people, the function and the task of the state has been determined in relation to the Greek word "polis" that is the political.

People, Sovereignty, Territory

As the new relationship between the King and its subjects united by the people could neither be legitimized by religion nor by tradition one had to seek a new secularized legitimacy of the power of the Crown. This legitimacy some saw in the fiction of the "social contract" or in the symbol of the notion "sovereignty". A state is considered to be sovereign, when the domestic unity between the King and its people is wanted and if this unit is externally independent and thus able to conclude international treaties and to fulfil obligations determined by international law.

Now we can already detect the constitutive elements of the state of modernity: The modern state is the unit, which is determined domestically by the people and the territory within which it can exercise territorially centralized rational political power as sovereign and if it can implement independently this power externally with regard to the other states as subjects of the international law. The dispute however on the notion of those elements of modern state-hood has remained one of the major causes of most disputed rational political or violent military battles.

b) People, Nation and State within the Charter of the United Nations

State – Nation – People

Within the preamble of the Charter of the United Nations the “peoples” of the United “nations” engage themselves to maintain peace and to prevent wars in the future. To our astonishment we detect that in article 3 and the following regulations of the Charter only the States but neither peoples nor nations can be or become members of the united nations. Those notions are used without determining what specific significances those different labels may or should have. In the solemn declaration of the preamble however one would not find the abstract notion “*state*” but rather *peoples* which solemnly swear peace. On the other hand we don’t use the expression united peoples nor united states but only *united nations* an mean with this as well the member states as may be also the peoples and human beings living within those states.

Uncertainty exists by answering the question to which territory and to which people state-hood is of respectively when state and people are identical and when they fall apart. Who e.g. can claim to be the bearer of the right of self-determination? Which are the member states of the United Nations: peoples living within a state the nationals of the state, or the inhabitants or the peoples belonging cross-borderline to two or ‚more several states which? There are many ethnic minorities which claim for them-selves statehood and which based on this claim require a unilateral right of secession. Each break up of a big empire such as the Ottoman empire, the colonies, the UDSSR or the Austria-Hungarian Monarchy did lead to new borderlines or at least was one of the main causes of inner-state and or cross-border conflicts. The collapse of those multi-ethnic empires has always been caused by the claim to self-determination and with this to the vested right of having an own state for its own community hold together by culture, language, religion or other political and cultural tradition.

c) The Notion of the State according to the General Theory of States

Need States to have a Pre-determined size?

The label state, including the notion of the state is often seen as a pre-existing reality. Only seldom one is inclined to analyse this reality and to explore the origins of it. The legal order and with it the constitution deduce the legitimacy to create the law from the sovereignty of the state. Sovereignty and state are so to speak seen al the big bang of the law enacted by the state, its justice, its monopoly to maintain order if necessary with violence and even the real existence of the nation such as the French nation is considered as having been created by the state. International law perceives it-self as a legal entity which has been made by the subjects of the international law but which is only binding those subjects (states) as law ruling the inter-state relationship. The notion of the state as pre-determined for ever fixed

quantity or quality is by the way not a speciality of the legal scientific disciplines. State-philosophy, state-sociology and national economy and political science all presuppose a certain notion and a certain perception of the state.

Significance of the Notion o the State

The general theory of the state has got to elaborate a notion of the state which is practical for today's time. This task is however not limited to a pure scientific goal for its own. Rather such analyses with the constitutive elements of the state, has concrete practical consequences even for the existence of states and of the relationship of human beings to the state. Whether such or such people or territory will have the right to proclaim itself as a state and / or to enforce unity is fatal for the future of this quasi-state and for its neighbours. The question e.g. whether the entire Island of Cyprus is one state with a part of the territory illegally occupied or whether there are two states is not at all only for academic interest. Why did e.g. the international community celebrate the uniting two German peoples when the Berlin wall did fall down and 70 years earlier, the same international community has explicitly prohibited the unification of Germany and Austria in the Peace of St. Germain? What effect has the nationality of a British citizens living in northern Ireland while the Irish constitution claims the whole Island to belong to Ireland? Those questions are as shown with the examples of most explosive nature. We have not the intention to offer final solutions in the following discourse but rather to explain the basic fundamental issues from the point of view of state-philosophy.

The three Elements of the State

Since the emergence of the liberal nation-state in the 19th century the mainly German and French oriented theory of the state has mainly focused on the three elements as essential for a state: The nation or the people of the state, the territory and sovereignty. A state without men and women is unthinkable. However, which human beings belong to the people or the nation of the state (Staatsvolk) is a most controversial issue of definition. The state of modernity needs a territory ruled exclusively and with unlimited value by its own legislation. In addition the state needs domestically and internationally to be recognized as sovereign unit. In other words it must have the capacity and power to enforce its laws within its proper territory. If it has no force to execute the laws and to guarantee public order or if he can not anymore legitimise or justify its might its existence is put in question, it is considered to be a failed state (c.f. Somalia in the beginning of the 21st century). The denial of statehood should not be made arbitrarily. Thus e.g. the aribtration committee composed of the presidents of the constitutional courts of the member states of the European Union under the presidency of the French Badinter has decided, that a federation is in a process of dissolution when its different governmental bodies are in a permanent conflict and in a stalemate unable to make decisions. In such a situation the federal state does legally not any more exist. This non-existence of the federation creates a original right of the former federal units to establish their own state out of their proper right of self-determination. This decision can not be considered as a proper unilateral secession but rather as a right of origi-

nal sef-determination to create a state out of "nothing"! This decision has de facto de-classified federal states to second class states. As a consequence many states tempted to look for federal solutions in order to keep their conflicting multi-ethnic societies together or to solve their minority conflicts shrink back from any federal solution considered a the first step of a final dissolution of their state.

II. The State-Nation

a) *The Tension between Nation – People and Stat*

Does there Exist a State without People?

It is self-evident that there cannot exist any state without human beings. Moreover without state-nation what ever that means does not exist any state. While many peoples cannot build up a state unity (e.g. Tibet, Tamils, Armenians, Kurds, Palestinians) or while some of them are only partially united in one stat (e.g. Germany, Hungary and Albania) there are immigration countries, which are composed by immigrated persons belonging originally do a multitude of peoples. Facing this heterogeneous composition one should still not forget, that the territory has once been the home-land of native people's which at best today are somehow recognized as minorities and in the worst case are excluded to reservats. Finally there are states such as France or Turkey, which have created their nation as a civic nation only with the constitution. In these cases the nation follows the state (civic principle) and not the state the people (ethnic principle). In states ruled by a civic nation every person living within a specific territory and who accepts the universal values of the republican constitution is considered as an individual cotioyen belonging to the nation.

Citizens and Foreigners

In addition states distinguish between with regard to nationality between citizens who enjoy all rights and freedoms and the foreigner who are in some instances discriminated as they have only limited political rights. Who examines the different legislations providing the possibility for foreigners to achieve the nationality of the country in which they are living, working, and paying taxes will detect quite important differences between the states according to their perception of the people or the nation making the state. Some states allow e.g. double or even multiple citizenship. Some prohibit double nationality as human beings can only be loyal towards one single state. Some states relate the citizenship to the belonging to a certain ethnicity or ethnic culture. Germans without German nationality who have been living since middle ages in Rumania are considered to be part of the German people and are thus privileged in getting German nationality. (Fundamental Law of Germany art. 116). On the other hand Turks which have served since years as foreign workers and taxpayers in Germany get enormous difficulties to be incor-

porated into the German people and nationality. States which have borderlines not identical to the borderlines of the majority ethnicity consider themselves often as responsible for the representation of the needs of the population living in a neighbour state but treated as a specific minority. Those states engage often for the defence of the interests of “their” minority living within the territory of the neighbour-state. Influenced by such policy Hungaria recently enacted a legislation giving minorities direct claims to their kin-people in the neighbour-states.

Chosen People

There are however people’s which perceive themselves as chosen by God. The Jewish nation but also Japanese and Singhalese from Sri Lanka have somehow this perception. This particularity has of course also an influence of those peoples to their relationship with the state. The idea for a state of Israel has been developed by Zionist ideology. Zionists have been influenced by the nation-state idea of HERZL of the 19th century. They wanted similar to their brother-nations in Europe establish a state for the Jewish people. Orthodoxe Jews however reject Zionism as idea, because it is only up to the expected Messias to establish a state for the chosen Jewish people. This is by the way one of the reasons why the state of Israel is still lacking a formal constitution, although the Knesset has passed several laws which in fact have constitutional standing.

French Nation and German People

What relationship does in fact exist between the people and its state? According to the French perception the people that is the nation is created by the state. The state has given itself a revolutionary democratic constitution and the people living in this state loyal to those universal values are considered to be part of the French nation. Reversed Germany considers the German people a pre-constitutional entity which has based on its cultural homogeneity created the German state. This perception is not based on the tie to the nationality – the German people had for a long time not a proper nation state -, the Germans based this concept on a per-state developed already existing people which should create the German unity. Although this perception is still disputed because the preamble of the fundamental German law declares the different Länder as constitutive. However the decisive sentence is the sentence before which declares: “the German People have adopted, by virtue of their constituent power, this Constitution”. By pointing at the constitutive power of the German people the fundamental law refers clearly to the pre-constitutional unit of the ethnicity.

Immigration countries finally count to the people who has decided by immigration to belong to the territory of the respective state and who can identify with its constitutional goals. The famous sentence of the preamble of the American constitution „We the people of the United States” declares everybody living in the territory as belonging to “we the people”. We know of course that this sentence somehow discriminates the first nations which were living in the territory before immigrants came to the US.

Perception of the State and the People in the Balkan

The people's ruled in earlier times by the Austria-Hungarian and by the Ottoman empire did set up their proper self-perception of state and nation in South-Eastern Europe after they achieved their independence. This perception was mainly characterized by the idea of a pre-constitutional unity of the people. This self-perception of the ethno-nation has been built up in opposition to the multi-ethnic states which were often felt as "multi-ethnic prison". According to this perception of the state and the nation in principle each ethno-nation has its vested right to build up one state but not more states. Persons belonging to a ethno-nation living in an other state are there to be considered as a special minority that is a nationality but not as a nation. Departing from this self-understanding e.g. the Kosovo Albanians from former Yugoslavia would not be able to create a new state because the Albanian mother-nation has already built up its own nation. In order to establish an own state they would have to establish a specific nation different from the other Albanian. In former Yugoslavia the different ethno-nation were so strongly mixed throughout the territory that the international community in order to avoid endless wars on self-determination decided after the first world war to set up one state for all different southern Slavic nations. With the break up of communism in former Yugoslavia however almost all ethno-nations claimed their right to establish their own state. This had to lead almost necessarily to deep conflicts. Those belonging once to one of the six state-making nations being all of a sudden in the new state of their neighbour-nation turned within one night into a discriminated minority that is to second-class citizens.

b) The Different Perception of the Nation and the People in History

MANZINI: „Now we have to create the Italian!“

In the area of globalisation, of the world wide migration and of the raising violence and threat of conflicts within multi-ethnic states one cannot seriously label the nation building as a sociological-historical factor legitimizing secession or self-determination for the establishment of one's own state. Still in the end of the 19th century the revolutionary founders of states were convinced that with a revolutionary state one can also create a revolutionary nation. Significant with regard to this perception is the famous sentence of MANZINI: "We have made Italy, let us now create the Italian!" In other words: Each state has to find solutions that all human beings living in this state have the possibility to consider this state as their home-land where they can live and develop themselves. This can not any more be done by creating a new ideological nation as proposed by MANZINI but only by concepts which take multi-ethnicity serious. The ethnically enshrined perception of the people and its right to establish its own state, which is still the cause to many conflicts, excludes with such ethno-nationalism all other minorities from the state, the nation and a harmonious integration. In the area of globalisation a theory of the state is challenged to seek a new understanding of the nation, which enables all people in the respective territory to identify with their state.

1. Excluding Perception of the Nation

Historical Community of Tribes

The beginning of authoritarian structures holding together several extended families has been has its origin in the dependence of the tribe-community. Originally the members of the tribes did also consider themselves as belonging together because of their kinship and common origin. All members of the same tribe recognized or at least believed to be related to each other because of the common original ancestor that is their common original father or mother. Thus e.g. the Zulus in South Africa are convinced to have the same and common ancestor of their tribe. Such common descent was the indispensable condition for the establishment of common concepts of hierarchy and authority over a bigger community. The communal spirit, the feeling of solidarity and the common historical fate have promoted such common feeling of comprehensive social communities.

Community hold together by Common Defence and Fights

A real lasting feeling of belonging together can be developed by a negative and permanent exclusion of the “others”. Famous is the historical justification of the Chancler of the German Empire Bismarck who in 1870 has made the first big German-French war in order to weld together the German nation. In order to bring Germany to a national unity he had to wage war against the French. This war could only be justified by creating the negative perception by all Germans of their enemies as barbarian. Such creation of the “we” against the others was and unfortunately is still the proved but highly problematic political tool to unify the people behind a common interest of defence. Lately even the Swiss nation based on the common will of the exclusion of neighbouring monarchies during centuries has such origins. Actually all those monarchies have become democracies which has induced many Swiss to find the inclusive unity in the myth of the “Swiss Sonderfall” in order to exclude the other Europeans.

A significant connecting element among different members of the same tribe, was and has remained a part from common origin the same language, culture. Common culture, religion, language, and descent are the elements, which can hold or even bring together a community and the feeling of solidarity as an important pre-condition for a state order.

Common History Community of Fate

However such a feeling of togetherness is not necessarily depending only on the community of a tribe. Common glorious history or common suffering in the passed (community of fate), common political beliefs, common “way of life” or common religion can contribute to the building up of a community in a similar way as common descent.

2. Inclusive Perception of an "open" Nation

Community of Values

An open nation which includes different human beings and which is composed of different peoples and culture's can only be built up by common values which create the common will of the great bulk of the society to identify with and to commit for. The fundament of the French Nation was the Declaration of Human Rights as universal value which enabled all persons living in France to identify with. Consequently the constitution of 1791 enshrined the principle that each person living for one year in France should receive automatically the French citizenship.

In the present multicultural states cannot any more settle to merely declare universal values in order to hold or to bring a nation together. The states face rather the challenge to pursue values which are good for all in the respective state living individuals but which correspond also to all in the state living peoples with their language, cultural and religious particularities. The treaties of the European union e.g. oblige the European Community to enhance the different cultures of Europe to look after the common respect for the existing diversity and to commit for the maintenance of the common cultural heritage.

c) Solidarity as Prerequisite of the state Community

No State without Legitimacy

A state can finally only exist when people are prepared to sacrifice some of their proper interests for the benefit of all and of the community. Each state community can only be built up on the readiness of its member to common solidarity. Indeed without such solidarity of the citizens to pay 20 to 70% of their income as taxes and contribution for social security a state community will not be able to sustainably survive. The state community however requires even harder sacrifices from its member such as e.g. military service which requires the solders in certain circumstances to risk their life for the sake of the defence of their state community. People however only agree to such readiness when the get back as compensation a national or state value with which they can identify, be proud for and feel well. States, which can not build on a pre-state people's unity, will have consequently to establish values which cause this indispensable preparedness to common solidarity.

People which do not let themselves to be integrated cannon on the long run not be forced by violence to integrate and to solidarity. The history of the last 200 years demonstrates impressively what explosive energies may sleep within a people which has had for long time no autonomy and which did build up for centuries among its members the frustration of permanent discrimination. (cp. e.g. Kurds)

Solidarity and Nationalism

The recognition and the significance of the feeling of togetherness for a real state solidarity should however not be mixed up with the ethno-nationalism. The ethno-

nationalism identifys the state in a pure and one sided way. It is based on the hypothesis that only a homogeneous nation, which excludes or even evacuates all others nations from its territory can build up a state. A community hold together by solidarity which is composed of different nations with all the common experienced and / or suffered history and fates or with a common "way of life" rejects ethno-nationalism as a nation building factor.

Community and Geborgenheit

The finding of ARISTOTELES that the human being is essentially a being which is dependent and related to the community is certainly revealing and correct. Humans seek obviously security within the community. Don't they find it, they will never be prepared to integrate in such society. But not only the single individual needs security, also people and minorities are looking for safety and security in order to provide for their members security with regard to their cultural development. If one denies security and autonomy to cultural communities to find their own way of development they will defend them-selves against their state and finally consider the alien state as their enemy and cause for all suffering and exploitation.

Indeed the tradition theory of state has often not paid enough credit to the important issue of state building based on a national feeling of togetherness. The treaties on the theory of state have of course paid great attention to the differences between the notion of people, nation and race, the most decisive however, that is the feeling of togetherness – which has already been stressed by IBN KHALDÛN has often been neglected or even omitted. The state is just not only a rationally wanted community, its unity depends on a historically developed and by common fate connected unity. For this reason the state community creates a space in which human beings feel at home and safe for their development and with this constitutes the fundament of common solidarity.

1. State-Nation and Social Contract

Who belongs to the state?

The theories of the social contract even today assume that the unity of the people which concludes either fictively or in reality a social contract or a contract to establish public authority is finally not determines by the contract itself. Those state-philosophers do not answer the question who would conclude the contract that is what parties are part of the contract. They rather leave open the issue whether this needed unity is a pre-determined unity, is historically developed or discretionary (e.g. by war) established unit. Since the English people lived on a island the issue was not so apparent for the invention of the theory of the philosophers of the period the enlightement and of the beginning of modern constitutionalism who were staying on this island (HOBBES und LOCKE). On the British Island it was somehow evident (besides the Welsh or the Scottish) who did belong to the people concluding the contract. In contradiction to them the borders of other European people were not so clearly geographically pre-determined.

Based on what unity (Territory, culture or language) what kind of community thus could conclude what kind of contract for the establishment of public authority and thus establish a proper state? As this question has not been solved by the theories of social many scholars on state theory believed the state can be build up by any arbitrarily chosen community. The main and only question to be decided ans solved was the territory and not the question of the people or the nation. The borderlines were to be determined by territory not by culture. This was of course a fatal mistake. It seduced many statesman from Europe and North-America to determine for their colonies or after big wars (Balkan after World-War one) to draw state border-lines with a pen-stroke. And by this to destroy, divide or unite nations and peoples.

Atonomy and Peoples

The positivism and absolutism of HOBBES are one of the most important reasons that the state has over-estimated its proper possibilities. Certainly one can integrate different communities of different peoples if one respects some basic conditions. Switzerland is one example for this. Such attempt however, is only possible if the different communities are transferred enough autonomy and if a common fundament is found which ideologically can hold those different communities together such as federalism, direct democracy, neutrality etc.. Only such communalities and common values can produce the necessary feeling of togetherness and of solidarity.**Error! Reference source not found.**

2. The Status of the Foreigners

Discrimination

The modern constitutional law of almost all states is absolutely valid for everybody. However it is not on the same level for the foreigners with regard to the native citizens. Foreigners or trans-national citizens are only partially bearer of fundamental rights such as of the political rights or of economical rights. Some fundamental rights are only applicable to them for the duration of their license to have a domicile in the state. As soon as they need to prolong this license they can hardly count on elementary respect of the rule of law with regard to this procedure of renewal of their permit to stay in the respective country. It is often part of the discretionary power of the administration to decide whether it will expel a trans-national citizen, or to prolong or to renew its permit to stay. Such decisions may have terrible consequences and change the whole life for somebody already integrated into the state society with its wife and children.

As soon as citizens of a certain state feel aggressed, harassed and discriminated by the presence of the high number of foreigners on “their” territory they will try to protect their interests with political means which may have strong discriminatory effects on the foreigners. For the sake of their own security citizens are often prepared to pay such price and to burden the foreigners with the problem of “foreign infiltration”. The social discrimination of foreign workers in states of western Europe is an eloquent example.

From the Foreign National to the Trans-national Citizen

In the area of globalisation and of the universal validity of human rights such discrimination are not any more justified. In particular with regard to the protection of the rule of law, that is independence of judiciary and habeas corpus the administrative body should not be equipped with decision making powers which are unaccountable. The principle that each state authority and state power needs always to be accountable to an other state body must also be observed when it concerns the foreigners Globalisation should not be limited to the internationalization of the market. In other words the principle of responsive government and of accountability requires that Governments and their administrative agencies need to justify their decisions with regard to individuals before an independent court and that they must respond to the parliament with regard to their human rights policy taking also into account trans-nationals citizens.

Also, state citizen-rights have to achieve international that is trans-national acceptance when humans should not be discriminated personally and with regard to their products and services. Human dignity requires generally a better respect with regard to services provided by all humans not taking into account their nationality. Negative discrimination of trans-nationals is in any case inadmissible.

Who appreciates the application of human rights universally and globally will consequently also consider the strict separation between nationals and non-nationals as totally out-dated. Although foreigners are not national citizens of the respective state they are trans-national “citoyens” which have a vested right to be respected with regard to their human rights and treated un-discriminatory and equally in all different states. The social contract which constitutes sustainable public authority is not limited only to nationals as “partners of the contract” but to all authorities which are responsible for the well-being of all humans living in the respective state. Trans-national citizens belong to the people which is the bearer of peoples sovereignty. In this sense one has to interpret the European Union which requires its member-states to introduce and establish a union-citizenship on local level.

3. The Status of Ethnic or Racial Minorities

Self-determination and Minorities

States can not be constantly and arbitrarily divided and re-established. They need – if they want to achieve sustainability – to grow and to found their legitimacy on historically developed nation but also ethnic communities and should never destroy any ethnic minority. Members of minorities need to have chances and opportunities to develop autonomously. They should not be treated and excluded as second-class citizens by the majority. If minorities require secession based on the right of self-determination the claimed “right” to proper state-hood can almost never solve definitely the minority problem. In almost any case besides some very few exceptions ethnic homogeneity is re-installed after secession. In most cases the already existing minorities will be enlarged by new minorities. Often those new minorities are re-created by citizens who belonged in the former state to the

majority and turned with the secession into a new minority living now outside the border of their former mother-state.

One can hardly expect from those minorities that they would show to their new state respect and loyalty. Based on the implemented right of secession for the former minority which in the new state turned into a new majority the newly created minority will now again require from its new smaller state the right of self-determination and secession. If there would exist a universal right of secession for minorities what legal argument would have legitimacy in order to limit the right of secession based on the geographic size or the population size of a state? The principalities of Liechtenstein or Andorra have less than 100’000 people! Therefore any internationally recognized right of secession would create a permanent legitimacy crises in zones of wide spread multi-ethnic composition of human beings.

To jeopardy continuously the state and its border is the ideal breeding ground for constant movements of secession. The violent dissolution of former Yugoslavia is an impressive example for this fatal dynamic. The right of self-determination should not be reduced to the mere right for a new state with new borderlines. If one puts a content into this formal right it has to provide for the members of minorities the possibility to have an equal and autonomous opportunity to social, economical, and cultural development. Would the right of self-determination be within the service of the welfare of the members of minorities one should instead of looking for secession find more sophisticated solutions in the sense of autonomy and participation in the decision making process of the majority. With such solution one has and can respond to the legitimate claims of the minorities.

The Right of Self-Determination in International Law

Even if the notion of the *members of a people* is not identical with the *nationals of the member-states* of the United Nations one can and should not deny the right to the member-states from the point of view of international law to govern with and this means finally also over their proper minorities. The right of self-determination enshrined in the charter of the United Nations does not substantiate the right to secession and revolution with which state sovereignty can be dissolved.

Already the Charter of the United Nations clearly proclaims how the membber states can find an enshrined fundament for the right of self-determination of their peoples. If however, they do not respect nor recognize nor undertake any action to integrate gradually their minorities within their power-structures they will sooner or later be confronted with a violent explosion of a minority conflict. This principle of self-determination of the peoples will have to be respected in particular, when new states are to be founded. If the United Nations intend to contribute to the constitution of new states, they have to be let by the principle of self-determination and to base their policy on the ground that each people within the respective territory according to history should be given a constitutive influence and power by the creation of the new state.

Legitimacy of the States

The states will have to find the requirements absolutely to be realized in order to integrate their minorities and to avoid a break up of the state community. Decisive with regard to this process is legitimacy. A state which is only hold together by its majority and which oppresses its minorities or attempts to assimilate the minorities to the majority will in the long run not be able to survive without heavy internal violent conflicts. Its policy will also have to be oriented to achieve legitimacy with regard to its minorities in order to establish a public authority also accepted by its minorities. With regard to the minorities the democratic majority will only be able to legitimize the majority rule when its minorities not only are tolerated with the values of human rights but only if they are also recognized as a essential political force which has to be integrated into the political decision making process. Only with common institutions also accountable to minorities a permanent peaceful conflict management will be possible.

4. State – People – Nation

The Nation Constituted by the State (Demos)

In which relationship people, nation and state are to be connected with each other? If one understands the people as a pre-state entity which is only constituted as a unity by the state (France and Turkey) identity between state and nation or people is permanently guaranteed. In this case the people is the legal notion which determines the unity of all humans ruled by state power and authority.

The classical French Revolution constituted this unit of nation and state based on its state-theory. The Fathers and Mothers of the French revolutionary constitutions wanted to proclaim with this that the new bourgeois state was a logical consequence of the revolutionary self-consciousness of the nation. Thus they were much less concerned to distinguish between the sociological notion of the nation and the philosophical or legal notion of the state. Their main concern was to unite the people within its combat against the feudal authority of the French aristocracy. (vgl. C. DE MALBERG, p. 13)

The Pre-State People (Ethnos)

A different opinion can be found in the theory of state established by the famous German author JELLINEK. Based on the notion of the nation he is of the opinion that the nation is a sociological pre-state given unity which of course is also determined and influenced by the state. (G. JELLINEK, p. 116 ff.) Who understands the nation as a sociological unit, will have to admit that there are several state which embrace several nations (Great Britain) and at the same time that there are nation which embrace several state (Arabic states).

Who wants to analyze the problems of minorities and the causes of inner-state and international conflicts will have to notice that the notions people and nation doe not allow to be reduced to the sovereignty and the territorial limitation of today's different states.

With this however one has to ask immediately the question how the people or the nation can be determined as a unit defined by the constitution of the state. Rightly it is not possible to determine the nation only by language as JELLINEK points out. According to his understanding the nation is rather a historical social unit (G. JELLINEK, p. 117). This unit is determined by several elements such as history, culture and / or religion. As additional essential element one has to join common identity and solidarity as well as the will to constitute a political unit.

However, if we start to distinguish the nation or the people as a unit independent from the state we have to answer to the question whether and to what extent these units would have proper vested rights with regard to the state such as e.g. the right of self-determination.

Geneva Conventions

Originally the claim for self-determination has also be recognized in the new Geneva conventions regulating the behaviour of solders in a war situation. In this sense article one of the first additional protocol of the 1949 Geneva Conventions prescribes that inner-state conflicts have to observe the rules of international conflicts if the conflict is determined by the following conditions. It must be a conflict in which one part of the population uses its right to self-determination and fights against a racist and / or by foreign power occupied colonial tyrannical power. In these cases the civil war has to be considered as a international war. This international and universal regulation and application of the right of self-determination reveals that this right is only recognized as right given by international law in cases a population fights for its independence against a colonial power. One can easily see the strong relationship to the war of independence of the United States against the British colonial ruler at the time.

With regard to all other cases of minority insurrection the Geneva Protocols do not consider the conflict as international but as an internal civil war for which of course according to Protocol II also some basic rules of the law on war have to be observed. Based on this distinction between the fight for independence against a colonial power and a traditional minority conflict the African states have agreed among themselves to reject any attempt which would endanger the territorial sovereignty of the artificially created African states by conflicts among different tribes. (Organisation of African Unity [OAU] Charter of 1967)

The dilemma is apparent: Who-ever bases its notion of the people or the nation on a sociological unit and who-ever combines this notion with the right of self-determination undermines the existing sovereignty of the states. Who reject this notion leaves all freedom to the states to oppress their minorities. How this dilemma can be solved?

The War of Independence of the United States (Secession from the UK)

In the document of declaration of independence of July 4 1776 the American settler justified their right of independence with regard to the British Government with the fact that the British Rule was a tyrannical rule oppressing freedom and welfare. For this reason they could not any longer recognize the colonial power as

the legitimate government. Having been given the inalienable rights by God the settlers had a legitimate claim for independence because with their independence they would be willing and able to restore again freedom and welfare for their people.

Secession of the South?

One should however not forget that eighty years later the southern states required with the same claim the right for secession and separation from the north. However, this secession has been fought under the same symbol of the inalienable rights, which did justify according to THOMAS JEFFERSON the independence of the United States from Britain. Indeed president Lincoln wanted to establish equal rights for all people including the slaves and these inalienable rights were rejected by the south which by this rejection denied inalienable rights to the slaves.

Has the justification of JEFFERSON which did legitimize at the time the separation of the US from the UK still some actual validity? Each Government has the mandate to recognize and integrate minorities. The rights of those minorities with regard to language, culture and religion can not be oppressed nor can they be ignored or destroyed by assimilation. They can only be taken serious if those minorities are given some autonomous rights to foster their proper identity. If they are oppressed the sovereign state will loose its legitimacy with regard to those minorities. If the result is a violent conflict the relationship of the parties is ruled by the international law of conflicts that is additional protocol II of the Geneva convention.

III. Territory

Globalisation and Territory

Territory and state borderlines are an additional essential element of the state of modernity. Without territory, there is no state. For this reason states, peoples and minorities fight for territory with grim and all determination. After the fall of the Berlin wall as a symbol of a territorial limitation of the Communist rule, the former DDR and the split between the capitalistic and the communist world not only a state was dissolved but also the power of the communist parties in almost all former communist states. Despite of globalisation territorial borders have kept and maintained their symbolic value.

Reversed precisely in the period of globalisation the territory has lost on importance and value. With the increasing mobility, the internationalisation of the market of finance, products and services with communication by internet and television communication over satellites territory is gradually loosing on significance. Within the USA e.g. courts are dealing with claims against banks in Switzerland. According to the American understanding of law a court in the USA has jurisdiction in a case, when a person has a strong connection to the American territory although the case may mainly have consequences for defendants not under the authority of American territory. Indeed the common law which has much older

tradition than the continental European law has any way much less connection to a territorial understanding of the jurisdiction of the court than its continental counterpart. Recently the former dictator of Chile Mr. Pinochet came under the jurisdiction of British courts although they had to investigate violations committed by the dictator in Chile. And recently, even Belgium has enacted a new law which gave courts jurisdiction with regard to war-crimes in whatever territory of this planet they have been committed.

Limitations of freedom of press and opinion can any way not any more be prosecuted with the same perfection within the territorial range of the authority of the state constitution. Hate speech published in the internet and thus readable in any European country which is however protected according to the freedom of speech concept of United States can not be prosecuted by European courts. If a state wants to limit internet access and freedom of opinion it would have to block telephone lines. China was only able to limit access of Google because google has accepted the limited access to its service. Also American internet providers accept Chinese rules in order to have access to the Chinese market. But in principle and for any professional computer freak even these limitations may be passed over.

Territory as Symbol of Sovereignty

On the other hand territory has an essential value and significance for states and human beings. For many common people mobility is still not reality. We can observe still man consulates in different countries which are under the pressure of long lines of people waiting for a visa in order to get the permit for working in an other state or to visit their relatives in this state. The visa may be their dream in order to develop their life and without permit their liberty is heavily restricted. Today state territories exclude still many human beings. Still, remains the territory the symbol of state sovereignty. Who knows of the conflict on the undividable sovereignty of Jerusalm knows of the terrible human fates which are connected with this conflict.

Territory and Constitution

The territory decides on the legal order and on the constitution by which humans are ruled. According to the territory the currency may change and territory can determine what food, what medicaments etc. can be bought by the consumer. When Croatia became independent from former Yugoslavia over night the Serbs living in creation turned into foreigners and foreign workers. Yugoslav soldiers in military barracks in Croatia became enemy soldiers over night. Territory determines still the fate of many people.

Accordingly, we have to analyze the following questions:

– Why and to what extent is territory decisive for state-building?
– Which legal consequences does the territory have on state sovereignty?

a) The Development of the State determined by Territory

The need for territorial borders has developed only in the later stages of the gradual settlement of tribes in the middle ages. Agriculture, clearing of forest, fostering of pasture-land, city walls, castle moats and regions of jurisdiction all these elements did contribute to the development of a territorial relationship between soil and ground and public authority.

Authority on Persons and not on Territories as Original Governmental Principle

Originally, the interdependence between kinship group and tribes were based on personal relationship and not on territory. The kinship group was a unit hold together by personal ties, connections, and dependencies. It is true though that already in these times some territorial concepts of authority did emerge. The existence of the roman limes e.g. reveals clearly that the roman empire already has somehow been a geographical state in which power, authority and jurisdiction were connected to territory and also exercised over territory. However in the period of European Middle Ages the Romans were already settled in these areas since centuries. The Germanic tribes on the other hand have not at all been territorially settled at the time of the migration of the peoples. Thus, the personal ties were rather based on blood relationship which was also the tie connecting Arabic nomadic tribes together (IBN KHALDÛN, p. 98 ff.).

National borderlines were unknown in the period of the European middle age. The Sacrum Imperium Romanum, the Holy Roman Empire considered it-self as a Reich which ruled over the entire world. The pope was the holder of the spiritual sword and by handing in the worldly "sword", he assigned the emperor to rule the empire in world affairs. Originally, the empire of Charles the Great was divided pipin his empire (806) in three independent parts by Ludg. and assigned the three sons with the jurisdiction over one of these three parts. However, this division has, at least been partially revoked with the coronation of his successor. Because of this coronation the tension between the emperor as successor of Charles the Great with his kings was hidden in the beginning of Lothars empire.

Only later, the kings of France (Charles the Bald) and Louis the German required to be recognized with equal rights on the same level with the emperor. It was in this sense that AEGIDIUS ROMANUS (1247–1316) the educator of Philip the beautiful in his writing "De Regimine Principum" did consider the Empire not any more to be the final imperium but rather the "regnum" as the final political entity.

Later, in 1302 John of Paris has considered the European occident in his publication „Tractatus de regia potestate et papali" as a continent divided into several nation-states. Although the continent is politically divided with regard to the spiritual religious world however unity still exists. (vgl. CH. F. MENGER, p. 11 und H. MITTEIS, p. 208 ff.).

Separation of the "Imperium" from the "Dominium"

After the tribes and kinship groups were settled the soil has been cultivated as a common good. The kinship was the owner of the land while the usufruct for pro-

duction and housing was divided among the different families. Since those families depended on the usufruct of their soil but the power to decide on the usufruct itself and to the disposal of the property still remained on the level of the tribe or kinship group, the particular families still remained dependent on their tribe.

Decisive for the further development of the European territorial state has then been the gradual separation of the sovereign power to rule on the territory on one side and the property right to dispose and to use the soil on the other side. Gradually those who were using the soil and did cultivate it were considered also to have the right to dispose of it. The extensive clearing of forest has certainly contributed to this gradual change of property rights. Since the one who is clearing the forest and preparing the soil for agricultural production, requires also to be considered as owner of the land he is clearing and cultivating.

With this development, also the dependence of the kinship group did change. The kinship group took over the task and responsibility to protect its members – it got the function of a "patron-protector" (Schirmherr). In return the members of the group were required to provide for services for military defence, for protection with regard to damaging natural phenomena and to pay annually the tithe.

After a while the authority over the kinship was transferred to the King or the duke. Those rulers acquired gradually more authority and royal rights over their subjects. In the late middle ages these royalties were even open for sale on the market.

Centralism and Decentralism as a Consequence of the Development to the Centralized Territorial State

This gradual development towards a territorial "surface-state" has as already mentioned, influenced decisively the state development. The network of personal dependencies diminishes as instrument to hold different families and individuals together by politic. Instead, the factual and legal position of the patron-protector over the people and the territory becomes increasingly important. Indeed power and might is applicable much easier and more efficient over people living within and determined by territory then over a more or less loose association hold together by personal relationship.

With the emerging territorial perception of public authority and jurisdiction also the discourse and conflict between centralisation and decentralization is raising. From the originally united Holy Christian and Roman Empire of the Middle Ages France and England develop as independent nation states. After Maximilian I. renounced to the coronation as emperor by the Pope also the legal authority with regard to France and England have been given up. In 1486 the law of the Empire labels for the first time the Holy Roman Empire of the German Nation. 1499 the confederates of Switzerland did dissolve themselves for the first time formally from the Empire in the peace of Bale. Finally, only in the peace of Westphalia in 1648 the territorial division of Western Europe was sealed legally by international law.

Inter-State Authority of the Kings by the Grace of God

The German Empire has been divided into some big and many small principalities. The patrons of those territories had an almost absolute and not at all accountable governmental power based on the legitimacy by the grace of God. The need to end the permanent violent battles between some territories let finally to a mutual recognition of the assets of the different patrons. The feudal rulers were able to let the bundle of the different privately, by feudal law inherited, acquired and some times in brutal battles won vested rights appear as Rights transferred to them by the grace of god. By this they were able to legitimize also their authority by the grace of God.

On the English Island, though the Lords failed to impose an absolute unaccountable might over their Boroughs and thus gain total independence from the Crown. But as on the other hand the power of the King was also limited by the Lords and later the Commons an unreserved jurisdiction over the territory could not be established contrary to what was possible on the Continent. In France e.g. the King successfully imposed its claim to authority on the originally feudal rulers. Those feudal rulers of France had to finance their life-style at the French Court in Versaille. These taxes however could only be collected with harsh measures against the farmers. For such pressure against their peasants the feudal rulers needed the support of the King and based on this dependence the King gradually enlarged its powers with regard to the feudal aristocracy. Thus the necessary conditions for a centralistic French absolutism were realized.

The English Lords on the other side gained their income form the products of their estates and in particular from the wool they took from their sheep's and which they processed in early pre-industrial production-centers.

The Dispute between Church and State

Besides the struggle against the feudal rulers for a centralistic unitary state, the development to a territorial state in Europe goes also back to the harsh dispute between the worldly state – power and the spiritual church – power. This conflict appeared namely in the battle for sovereignty between the emperor and the pope. But already on the lower level that is on the level of district jurisdiction of lower courts the different dukes tried to impose within their territorial unit the unity of the law also with regard to some traditional church jurisdiction. Necessarily such dispute ended in a important battle between Church and State. The state imposed the estates belonging to the Church as inalienable according to canon law with a obligation to pay taxes and required a right to participate in the election or nomination of church dignitaries such as e.g. Bishops. Moreover, it required the authority to visit the convents and to exert a certain right to inspection.

b) The Meaning of the Principle of Territoriality

Uniform Application of the Law within the Territory

The development to the territorial state enabled the governments to look for a uniform application and implementation of the law throughout and within the entire territory of their jurisdiction. Before the establishment of this territorial rule the members of the tribes were subject to their law of the tribe independent from the place they were living. Only gradually, they became subject to the law which could be carried through over the territory and in particular on the towns they were staying independently from proper law of different nations and tribes. The law was not any more bound on the person but on the territory. Consequently judiciary was bound to the territory and thus structured according to the territorial structure such as municipality, district, county and town court.

This division of course let to territorially different legal applications and consequently different legal systems. Since however, humans could not only be bound to the territory they were living on, one had to decide to what extent a state which obliged people living in an other state could bind his proper nationals and how such legal obligations could or should be recognized by the other state. The answer to this most difficult questions is today found in the so called international private law. If e.g. a couple marries legally in Switzerland and then settles to Germany it has not any more to marry in Germany. The marriage in Switzerland has to be recognized by the German courts. However, the states make some reservations with regard to such recognition based on the principle of the so called "ordre public" which does allow the state not to recognize other legal decisions which would be clearly against the basic legal standards and values of the state of domicile. Thus, the marriage of a Sheikh with several women, which have been concluded in an Arabic state may be recognized; but it would violate the principle of ordre public if they could require to conclude an additional marriage in Switzerland. Switzerland is even allowed to refuse this additional marriage although the Swiss rules of international private law would in principle require to respect in such a case the Arabian law. A medical doctor educated in Tunisia can not in any case exert its profession on Switzerland. The principle of freedom of movement persons, products and services recognized by the European Union and the rules of the World Trade Organisation (WTO) with regard to freedom of products and to a certain extent also services however limit increasingly the exclusive uniform application of the law within the territory by the respective state. Thus also with regard to these rules the principle of territoriality is loosing of its significance.

One has to be aware however that this territorial development takes mainly place in Europe. Within other continents power, might, and jurisdiction of the state has developed according to different principles. For this reason, the modern territorial concepts cannot be implied without reservations to other legal systems such as for instance the systems which have emerged out of the legal history of the ottoman Empire.

International Law as Law between the Sovereign States

The uniform application of the law within the territory of the state developed in middle ages of Europe did also lead to a new legal system which did not bind individuals but did connect different sovereign states. This law was then called international public law. In the Middle Ages the canon law contained basically the applicable legal norms for the conflict-solution of disputes among different states. But as soon as the states became independent from the church this law could not any more serve as instrument for conflict-solution among different states. For this reason it was necessary to establish a new legal system applicable for rights and obligations among the states and between the states. In the peace of Westphalia which ended the religious wars in 1648 the agreement of the sovereign states was based an the new international public law to be applied on the sovereign states as the Subjects and the Objects of these new legal norms and obligations.

Domestic Law and Public International Law

This newly founded international public law was in principle only valid for the states which were the only subjects legally bound to its norms and principles. Based on its sovereignty and on the principle of territoriality each state decided high-handed and based on its own reason of state (Raison d'Etat) to what extent he wanted to implement international legal obligations within its domestic law. This clear division among the international and the domestic law however caused in the passed and causes mainly actually problems difficult to solve. In many cases such as e.g. the obligations of the international law protecting the environment, international criminal law and international guarantees of human rights contain legal norms which should not regulate the behaviour of states but also of individuals and in particular companies. In addition international law should not only bind the states as public entities but also federal units that is states within federations. Also this public entities should be in capable to implement high handed international law. But since they are not recognized as sovereign subjects of the international law they can neither sue other states or federal units for breach of this law nor can they be sued and taken to a international court by other states or international organizations. Legally accountable according to the international law is only the sovereign entity as such, that is the federation which is responsible for its jurisdiction within its territory notwithstanding internal territorial structures.

Validity of the Principle of Personal Application

Actually, within the legal system the principle of territoriality has been generally realized. Based on this principle the state which has jurisdiction over the territory is only competent to decide and apply legal norms with regard to people staying in its territory. The principle of personal application of legal norms is only of limited scope. Thus the states rule e.g. on the law of nationality which applies also to their nationals living in other states. Based on such rules they can oblige their nationals to serve in the military or to require some financial contributions or other services. States may also invite their nationals living abroad to participate in elections and other votes on referendums.

One has however to be aware that the states cannot implement legal obligations with regard to their nationals living abroad. As they states have no possibility to execute legal obligations in an other country their legal authority is not recognized within an other country by the courts or the administration in charge to execute legal obligations. In such cases states depend on the support of the state having jurisdiction over the respective territory.

As direct consequence of the principle of territoriality the states conclude international treaties on legal aid in order to get the support of the partner state to execute with force criminal sanctions or to extradite persons within their country to their state of nationality. Accordingly the states engage in those treaties to provide for legal aid to the other state and to extradite persons accused for violating criminal law or to interrogate on behalf of them witnesses in criminal cases.

c) Limits of the Principle of Territoriality

European Union

With globalisation the principle of territoriality is about to corrode increasingly. This is even more the case with regard to the member states of the European Union. About two thirds of the legislation valid in theses states depends or is a direct implementation of the directives and ordinances of the European Union. Though the member states of the European Union are still responsible to convert European Union Law into domestic law and to execute those prescriptions within their proper territory. The territory of the EU however has in many instances with regard for instance to persons crossing border-lines (Schengen) replaced its territory to the territory of the member states.

World Trade Organisation (GATT and WTO)

Even more important are probably the regulation of the World Trade Organisation (WTO). The basic philosophy of the WTO is based on the idea of a global free market system. In order to guarantee a world wide free-market of products and services the member-states are prohibited to enact rules provided for the protection of their proper economy. Member states are allowed though to enact rules which aim at security and protect the consumer and the population from any dangerous product or dangerously composed project (police regulations). But they are prohibited to prevent the import of products and services with the only aim to protect their companies with their costly production from competitive products produced abroad with lower salaries. Even though the public administration mandates or bys from private firms it is obliged to conclude its contracts for mandates after a transparent, open, and public procedure, which invites all possible competitors including foreigners to submit their offers. All offers should be assessed according to market criteria's. Only social dumping has to be avoided. Foreign firms are not allowed to offer lower prices based on discriminatory working conditions for their workers (Anti-Dumping Agreement).

Big-Power Policy and WTO

The provisions of the WTO do however not take into account the specific historical, social and economic particularities of the member states. Historically rooted structures with regard to agriculture e.g. are related to the culture, landscape and to the society of a country. If there would be a totally open market for agricultural products on the entire world according to the same rules this might result in many countries to big social problems. In the open market the strongest participant will win. When the powerful misuses its power and does monopolise its products, when in addition it can influence the policy of the most powerful country of the world other national economies are without any chances and opportunities. The pre-conditions for a genuine free competition would then not be fulfilled. Big groups of companies which regulate world-wide the production of goods are profit-oriented and only politically dependent from the country where they have their seat and domicile. From this place they decide on investments or closure of a firm in a totally foreign country. Such decisions may result in far reaching conflicts. The risk of social conflicts in a country far away from the centre of the company, which decides to close the firm, is indeed quite small. Thus any cost-risk analyses will be in favour for closing a firm in a country far away. While such cost-risk analyses for a firm confronted with such a conflict in its own country my come to quite different results.

Social Peace is Local and not in the Short Term Interest of Global Share-Holders

For the economic development of any country social peace is an indispensable value and therefore also in the long range interest of the private economy of the respective country. But, this interest is local, for the development of the world wide economy the social peace of a nation-state may be of quite low interest. Of course, also world-economy has an interest for social peace and political stability in all countries of our planet. The central management of a group is accountable for an optimal profit with regard to the shareholders. Investments of long range interest and in particular for social peace within a country far away from the seat of the group shareholders are often not prepared to pay for. This again challenges seriously the government of a territorially limited nation-state accountable not to shareholders but to its citizens, since it is not able to influence the strategy of the management of a group of companies in a country far away from the negative effect of its economic decisions.

Act Locally but Think Globally

Global thinking and local acting are for example indispensable in the field of environmental protection. The environmental policy of a state has direct or indirect effects on the territory and also the human beings of neighbour states (for instance atomic power-plants) on the geographic region (water-pollution of big rivers and lakes) and on the continent or even the entire planet (energy resources and CO_2 emissions). The environmental policy but also the increasing threat of international criminality and terrorism are impressive examples to underline the interna-

tional and inter-state effect of inner-state policies. This is why internal politics need not only to be accountable to the proper citizens of the state. One has also to find possibilities in order to make internal politics of nation-states also internationally accountable.

On the other hand those big powers which act internationally have also most important local effects on other states and their territory. The refusal of the US to ratify in the area of environment the Kyoto protocol has direct effects on many other countries. The incredible growth of economy in China and India effects the entire energy market on the world. The patriote act in the US has direct effects on the global use of internet, emails and telephone communication. Those challenges require a new vision and view of state constitution and in particular on the issue of accountability of foreign policy of a state. For a long time foreign policy and in particular the power of the sword was considered to be in the only hand of the Head of the State. Foreign policy of states is often some-how excluded from the system of checks and balances. Thus the foreign policy of big powers not accountable becomes a real international threat which needs to be diminished by new means to make foreign policy accountable and integrate it into the basic system of limited government.

On the European continent the increasing dependency of all states with each other strengthens the Inner-European cooperation, interdependency and the network tied up by international law this control and in particular checks and balances is a factual reality based on the diverging interests of the different states. The main problem has to be seen with regard to the USA which tries more and more to exert its world-wide power-politics as a "Planet-Leviathan".

Indeed the view of the anarchic society of THOMAS HOBBES which he has designed in the forties of the seventeenth century has shifted to the international community. However while the European states have been let rather by the perception of the absolute power to the Leviathan of HOBBES the USA did rather follow the view of limited government of LOCKE. Since this time the worldwide power - relationship has radically changed. And also the view of the world (Weltanschauung) of Europeans has radically changed with regard to the view of the Americans. So one can indeed pretend that the powerful USA is mainly let in its world foreign policy by the view of HOBBES while Europeans are now much more inclined to the influence of the philosophy of JOHN LOCKE and IMMANUEL KANT.

Development of the Law regulating relationship of Neighbours

The principle of territoriality cannot even if it is rigorously applied avoid all legal conflicts. Where for instance should the owner of a firm pay its taxes when he or she is head of a firm in Germany but makes its income in Switzerland? Those neighbour country conflicts are mostly regulated in treaties on double taxation which should eliminate all differences with regard to the law to be applied. But, how should states behave, when their neighbour exports cattle or food which may endanger the health of its citizens? The challenges of such threats can not only be met by bilateral treaties. New international and in particular regional organisations are required which can provide for rules not only in the interest of one state but of an entire community of states. Regionalisation and globalisation will result in the

creation of a new regional and or global public interest which however because of the democratic deficit remains a in the area of diplomatic power-play among the different states. Also with regard to these new challenges a trans-national shift of state and law perception is required. The territory of single nation-states can not be isolated by law nor by power-politics. Only those states which are ready to open their territory and cooperate trans-nationally to national and international networking, ruling and development of trans-national public interest can effectively enable our societies to meet the factual threat of globalisation.

International Water

One area, which has never been totally under control of the principle of territoriality is the control on international waters. The rules regulating the traffic of ships on rivers such as the Rhine or the Danube the cooperation riparian states on inland waters such as the lake of Constance or the rules on the rights of access, navigation and the use of the see are still object of disputes, which can not at all be solved only on the basis of the principal of territoriality. With regard to lakes with several riparian states some pretend that the borderline among the riparian states is to drawn within the middle of the lake or the river. Others are of the opinion that the entire water belongs as common property to the riparian state. Such a dispute e.g. takes place between Germany, Austria, and Switzerland with regard to the borderline on the lake of Constance. Who ever looks into the question which country is allowed to fish in the river Doubts along the border line between France and Switzerland will recognize amused that the principle of territoriality - applied rigorously – can have absurd consequences. Thus, the borderline between France and Switzerland follows sometimes the middle of the river and sometimes a long the Swiss sometimes along the French shore. The fishes however, do not belong to the neighbour states according to the line of the state borders and neither does the competence and responsibility of control.

The See

The disputes on the geographic range of control and authority of the riparian state on the sea are well known. The mining rights, the right to fish, the customs and the territory under the police control are the most important competences to exert public authority and they are often subject of elementary disputes. It is the task of international law, of the United Nations and in particular of the International Court in the Hague to develop principles which would lead all nations to reasonable and acceptable solutions. Those principles will have to consider the fact, that on the high sea international waters belong to every body and has to be considered as common good ((*res communis omnium*, H. GROTIUS, Vom Recht des Krieges und des Friedens, II. Book , 3. chapter., IX). As consequence everyone must have access to those waters. This by FRANCISCO DE VITTORIA (ca. 1490–1546), GABRIEL VASQUEZ (1549–1604) and GROTIUS (*Mare liberum*, published 1608) developed principle is to be implemented in a time in which the high sea is economically exploited with regard to all the treasures to be found (Oil, plankton etc.). Moreover one should not forget that the sea is also misused as garbage dump of the world.

That finally the coastal states are not allowed to prevent the inland states such as Switzerland to have access and to use the sea is finally self-evident.

Coast and High Sea

One has to distinguish between High Sea which belongs to all (communis omnium) and which has to be accessible for navigation by all states and the utilisation in particular the exploitation of goods in the sea and mining under the Sea. The mineral resources are of the heritage of the entire humanity: common heritage of mankind. Therefore it must be guaranteed that all peoples can profit from the exploitation of this heritage. Such goal can however only be achieved when the United Nations are transferring different states the license to exploit some parts of the soil of the ocean with the condition that the rights for particular exploitation is distributed according to a just distribution key. This authority of the United Nations over the soil of the oceans is limited to the principle of the 200 sea-miles area belonging to the respective coastal state. Up to this distance the mining right belongs to the respective coastal state.

When the distance to control the high sea had to be determined the states based their demands on the size of the coastal waters according to the military possibility to control with their proper forces on land the distance. (*Imperium terrae finitor obi finitor armorum potestas*, H. GROTIUS, From the Right of War and Peace II. Book, chapter 3 in particulare XIII). But these military possibilities were very different according to the arms available and the development of different guns. (Three mile zone respective 12 mile zone). Actually in the period of modern rocket technique and the possibility to use in particular the almost unlimited space such criteria's of measurement are not of use any more. The range of arms cannot any more be the criteria for the determination of the size of the coastal area to be under authority of the coastal state. Important is in other words that this authority extends to a distance which is mutually recognized by the coastal states.

The Universe

Had one at the time of the development of the territorial state imagined the possibilities of mankind not only to control the oceans but also the universe one would of course also have established some principles ruling the "navigation" and the use of the universe. The regulation of the air-space over the territory has remained an obligation of the 20th century. But also with regard to the air-space one has to recognize that the states respect mutually their territory with regard to the height within which the states can usually control navigation and the use of the space by aircrafts or rockets. The universe however which extends above the space of the planet covered by air belongs to mankind as the waters of the high sea. Thus, neither states nor private enterprises will have the competence to acquire e.g. a peace of the moon. Those rights however are regulated in international treaties.

The international borders of a state can thus neither be imagined as a simple line nor as a square space but as a three-dimensional cube which with regard to its third dimension continues from the line of the border on to the enforceable authority above the surface of the soil and under this surface.

Military occupation and territorial sovereignty

Can states integrate new territories within their territorial borders and sovereignty? Answering this question one has to distinguish between territories which are stateless and territories which are occupied by existing states. In the area of colonialism the states have proclaimed up to the 16th century the theory that land which belongs to nobody as well as land which is inhabited by non-European native inhabitants can be rightly acquired by occupation that is by long lasting sustainable and factual military and public control. Based on this right to occupation the Europeans have conquered the colonies and cleansed or expelled e.g. in North-America the native Americans and put the into the reservates.

Charter of the UN and Geneva Convention

What legal solution can be found for territories which are militarily occupied and thus under the jurisdiction of a existing territorial state? Since the Charter expressly prohibits the aggression against an other state any acquisition of a territory under jurisdiction of a sovereign state and member of the UN is illegal according to the international law. Such acquisition may be somehow legally possible based on a contractual agreement (Peace-Agreement). Areas which have been occupied by military forces based on a intervention by war are under the rule of the IV. Geneva Convention of 1949 on the right of civilians within occupied territories. This convention determines the obligations and the legal powers of the occupying forces with regard to the civil population. Israel however, denies formally the application of the IVth Geneva Convention within the territories occupied after the six-day war because these territories have never been under the sovereign authority of any party of the Geneva Convention. This fact reveals that even this issue can be disputed in our times.

By the way the way the IV. Geneva Convention takes legal consequences out of a factual reality. According to article 6 of the Geneva Convention only some few prescriptions of this convention are applicable if the occupying forces controls the territory for more than one year after the end of the hostilities. But if the territory is annexed by a unilateral decision of the victorious state it is a illegal annex. However, today's reality demonstrates based on several wars of the recent passed that one still has to count with such unilateral belligerent acts.

Treaties on State Borders

The course of the effective border is possibly always regulated in international and bilateral treaties. If such treaties do not exist the states have to rely on customary law. However, this customary law is vague and open for different and controversial interpretation. Such interpretation often lead to controversial territorial claims among neighbour states such as Russia and China, India and China or Chile and Argentina.

D. Sovereignty

I. The Significance of Sovereignty

From the Natural Human Being to the Sovereign State Society

The development of the notion of the state and the theory of sovereignty within the history of European thoughts on state and legal philosophy can undoubtedly be considered as a particular and unique performance of the European culture. Even though, one may rightly criticize this tradition as problematic, it will have for a long time important effects on the development of states. Thus today we can distinguish between three important and essential different phases of the development of humans.

In the first phase humans depended totally from nature. They have been objects of nature. Nature was considered somehow to by their Goddess.

In the second phase the different individuals and groups became independent from nature by the fire they were able to switch on. They somehow created with the fire a sort of individual independence. The myth of the eternal punishment of the Greek God Prometheus tells us of the importance of the fire for such individual independence. As it is well known Prometheus has been punished for eternity because he has stolen the fire from the Gods and given it to the humans.

To a certain extent one can describe as third phase the phase of sovereignty. With the notion of sovereignty human beings have “stolen” from the Gods the fire of Law and Justice and established in place of the Gods their proper secular authority. With this secular sovereignty in future not any more the religion did decide on wrong and just but the state. The state turned into the source for Law and Justice. The almighty secular Leviathan has been born out of the sovereignty.

Robinson and Friday

Let us quickly remember the famous story of Robinson and Friday. Both are living on a isolated and lost lonesome island in the middle of the ocean. Both come from different countries, cultures and religions. Both have different perception of law and justice and both feel their loyalty with regard to their proper homeland. Robinson follows the laws of his proper country. What he has learned in childhood to be just and wrong, he considers it also on the island as just and wrong. The same is the case for Friday. Also Friday distinguishes between just and wrong or unjust just as he has learned it from his tribe.

According to the former public international law of Europe Robinson has a vested right occupy the Island and to colonize the territory if he can consider himself to be a representative of his state of origin. Based on this claim he overwhelms Friday and obliges him to follow the laws of Robinsons people. If he does not kill him he has the right to use him as a slave. The same rights belong to Friday if he has more might as Robinson.

The theory of sovereignty and state developed since middle ages provides for the two of them a third possibility. They can for instance agree either in common or under the authority of Robinson or Friday to subdue the inhabitants of the Island and thus decide what should in future be right and wrong on this island. They can agree to enact besides or in place of old traditional law new legislation. In this case they decide not only on their proper future fate but also on the fate of all humans inhabiting or migrating to this island. All those individuals and communities which inhabit or enter the island have to follow the rules of good and bad, just and unjust, right and wrong.

Based on this development of their consciousness one can observe the development of a order of the community which is more independent and individual because it is not based on a backward traditional value-system but on values founded by the "founding fathers". With this a new rational state is emerging, in which laws are not any more detected based on a more or less transparent prehistory but on rational decisions enacted by the legislature.

Demos

The theory of sovereignty however is much more far-reaching. Robinson and Friday which belongs to totally different cultures are able rationally to decide in common to establish a new community. This community does not depend on language, religion or given history of their tribes. They start to call this new community "state". Their state is not a gradually emerged community out of history. Would their relatives enter the island they would first have to be considered in this community as foreigners which may be "nationalised" later. The law would decide who belongs to the community and not their blood nor their origin or language. In other words the state is a wilful and rational wanted order based on the demos (the people) created by this order.

Where from do now Robinson and Friday develop the values which will determine their new law on the island? On what reason they would accept to abolish previous legal perceptions of just and unjust in order to establish a new legal order? And the even more difficult question to be answered will be: Where do they take the right to establish a new state-community which is equal in rights to other states? Why does their will and their decisions all of a sudden have stronger validity than the traditional law?

Magic Word Sovereignty

The key to the answer to that entire most pertinent question is labelled "sovereignty." The sovereignty is somehow the "Big-Bang" out of which the state, the law and the secular justice have emerged. Out of the sovereignty the state deduces its vested right to organise itself and to set the valid law for its "proper" population. As soon as Robinson and Friday consider themselves sovereign as community, they can govern over the island; the right to rule on the island they deduce it from the magic word "sovereignty."

Absolute – Limited Sovereignty

What could be shown with the story of Robinson and Friday applied to our particular needs, and its significance for the notion of sovereignty is certainly a somehow shortened explanation. Taking into account the historical developments, the self-confidence of state communities has not been adapted abruptly. Since the beginning of the development of the theory of sovereignty, there have as we have already seen in the chapter on the rule of law substantial legal and philosophical objections mainly pretending that the autonomy of the state with regard to law making is basically limited. This opinion is shared namely by all those scholars who represent the natural law theories following the concepts of LOCKE's theory of the inalienable rights. According to this theory the state including state sovereignty are limited by the inalienable rights. Sovereignty itself is limited by those inalienable rights. The opposite position is namely defended by the followers of the theories of HOBBES. According to this theory all rights are transferred to the Leviathan state by the social contract. The social contract is the Big-Bang of the law at all since law can only be deduced by the state as holder of the sovereignty.

Notwithstanding some reservations one can quite justifiably pretend that the theory of sovereignty has namely been decisive for the development of state and political communities, because it gave to those entities the necessary self-confidence. Only this self-confidence enabled those autonomous organisations to lead and direct humans living under their authority.

II. The Dispute between State and Church as Pre-Condition fort he Development of the Claim to Sovereignty

How could the theory of sovereignty develop? Why did it emerge mainly on the European continent? Decisive for the development of the theory of sovereignty is undoubtedly the dispute between Church and State in the Middle Ages respectively between the French and English King as well as the Emperor of the holy roman empire on one side and the pope on the other side.

Unity of Religion, Morality, Law and State Authority

We have seen that primarily all governmental relationships have somehow a religious background and justification. The rulers tried to establish, enshrine, and legitimize their conquered power within the religion and to deduce it with divine law. But one did not only attribute all rights and powers of the ruler to a sacred origin. The entire law as such was considered to be part of the religion. For this reason it could not easily be altered by the political ruler. Political authority, law and religion formed a unity. Within the former Roman Empire for instance the priests served the state. As one of the greatest scholars MOMMSEN (TH. MOMMSEN, p. 70) puts it:" Even from a personal point of view priest-ship and political leader-ship were identical. The political career was in all different stages of the empire regularly parallel. The based on the later contradiction between state and church developed double-aristocracy of the middle ages has been totally unknown in ancient times. In those times, the Gods were always within and not be-

sides the state. A similar connection between religion and state can be found in the Jewish and Islamic state. The Caliph is at the same time the head of the church as also the head of the political union (IBN KHALDÛN, p. 160 f.). The concept of the chosen people of the Israeli has religious origin. A religious origin of authority can also be found in African cultures (C. MUTWA, S. 102) as well as in the Japanese tradition ruled by the Shinto Religion.

Give the Cesar what is due to the Cesar

Very different did the development between Christian religion and states develop. Christianity has already emerged during the roman state. This state relied on different religions and different Gods. However since the Christians did not recognize several Gods the Romans considered this religion as a threat to their state authority. For this reason the Christian religion has been at its very beginning forced to develop a self-understanding, which provided for it within the frame of the state authority of the Romans the right to existence even under the rule of the existing Cesar. With the bible word "Give the Cesar what is due to him and God what is due to God, this tension between state authority and the transcendental authority of God over humans should be somehow solved. The conflict however, remained. Should humans obey in priority to God or to other human beings? Which order prevails in case of contradiction: the order of the Cesar or the order of God?

The Theory of the two Swords

In this sense, the dispute between church and state has already started at the time of the foundation of Christianity. Contrary to the other religions, which served to establish and legitimize political authority Christianity has challenged since its foundation the political authority as far as it claimed even the right to decide on the religion of humans. Though this conflict later has been covered up, since the Christian religion became for opportunistic reasons the official state religion. The germ for later disputes and conflicts among the political and religious authority has not been eliminated definitely. It even started again to merge in the middle ages. With the theory of the two swords one thought to have invented a new at least temporary solution. According to this theory the Emperor holds the sword of the world and is the highest political authority and the pope holds the spiritual sword and is thus final instance on church and religious matters (since approximately 1050). Accordingly Pope Gregor VII pretended that the Pope as Gods deputy holds both swords on this planet. But with the coronation of the Emperor he lends the world sword with the political authority to the Emperor.

Gradual Emerging Independence of the Political Authority

With regard to the later history the Christian states (of the western non orthodox European Christianity) the consolidation of the position of the Pope became crucial. Indeed within this western part of the Christianity the pope was able to extend its religious power and to centralize the western church next to the development of the political power. In the beginning of its comprehensive authority in Western Europe the church was able to exert decisive political influence on the

emperor. The Archbishops participated in the election of the emperor. The pope anointed the Emperor. Nevertheless, the fundament for the separation was already prepared. Both powers did compete with each other face to face.

The following conflict between the church and the political power was unavoidable. The political power of the state defended its independence and resisted any interference of the church. By granting church institutions immunity as a first step the church authority was separated from the state authority. In the so called Investiture conflict Church and State disputed on the power to appoint the bishops and to submit them to the emperor. In the Pfaff letter of the early Swiss confederation the small cantons resisted successfully too extensive interference of the church. Already 1112 the citizens of Cologne imposed the decision of their corporation against the archbishop. This is only one of the many examples, which demonstrate that the political power of the state emerged gradually as independent power with regard to the church.

The Inner-State Absolutism

The feudal structure relied on a traditional hierarchical order which distributed limited fief-rights to different holders of fiefs. The master had not unlimited rights with regard to his subjects. He had only the power which he needed in order to exert its responsibility to protect his subjects. The most powerful dukes however, tried continuously to decompose those limits and to extend their competences with regard to their subjects. They intended not only to get independent externally with regard to the pope but also to establish internal sovereignty with regard to their subjects.

The French King succeeded to establish such sovereignty without any restriction. After centuries he was able to establish as absolute King. In England however, the King was bound to the Magna Charta and to the decisions of the upper and lower house. As sovereign even limited by the rule of law he was only recognized as "King in Parliament" that is together with the Parliament. Also, the German Emperor failed to impose his power to his dukes. He could not centralize its sovereign power and submit all his dukes under his centralized administration. Thus, Germany remained an area of small competing principalities. The way the sovereign power of the state in Europe developed very differently from state to state. It depended on the different disputes between the dukes, the empire, the estates and the controversy between the political rulers with the Pope as spiritual ruler of Europe.

III. The Theory of Sovereignty of JEAN BODIN

Sovereignty ist the Absolute and Continuous Power to Command of the State

The French philosoph JEAN BODIN contributed with his theory on sovereignty to these conflicts in order to legitimize the independence of the political authority from the church authority. „*We have said that a commonwealth is the rightly ordered government of a number of families and of those matters which are their*

common concern, by a sovereign power.“ (J. BODIN, Ist book, chapter 1). According to BODIN the notion „sovereignty“ implies that only institutions, which can exert permanently highest authority of command which is uncontested can be considered and labelled sovereign. „*SOVEREIGNTY is that absolute and perpetual power vested in a commonwealth which in Latin is termed majestas ...”* (J. BODIN, chapter VIII). This highest authority of command is according to BODIN realized in the hereditary monarchy on one side or when the elected monarch is appointed for lifetime. In both cases the Kings are not accountable to any secular instance. If the ruler is elected only for a certain period the head of the state is not sovereign because he is accountable. He is in the words of BODIN only a magistrate and holder of an office. In this case the real holder of sovereignty would be the aristocracy or the people according to what institution is given the power to elect and to vote out the ruler.

No Right to Resistance against the King by the Grace of God

According to BODIN the sovereign is not accountable for his action, measures and decisions to any human institution but still towards God. Any secular institution however is not legitimized to judge over the King. In consequence, BODIN declines any right of the people to resistance or even the murder of the tyrant.

According to custom in pre-historic Egypt and Israel the people could judge on the reign of the King after his death and thus refuse a ritual state-funeral when his power management has degenerated into a tyranny. Apparently this custom was unknown to BODIN. Not explicitly mentioned but quietly implied this theory of sovereignty of BODIN was clearly directed against the power of the church and the Pope, since the sovereign could not be made accountable neither by the pope. BODIN did not consider the monarch as a holder of a fief with the sword to rule the secular world. His concept of sovereignty was to consider the sovereign monarch as the Governor of God on earth who is directly accountable to God. With this concept the theory of the King by the Grace of God was born.

Discretionary Power of the Royal Legislature

“If we insist however that absolute power means exemption from all law whatsoever, there is no prince in the world who can be regarded as sovereign, since all the princess of the earth are subject to the laws of God and of nature, and even to certain human laws common to all nations” (J. BODIN, Ist book chapter 8). BODIN thus does not advocate an absolute power which is not at all bound to superior law. On the other hand the sovereign is not even bound to the law he has himself decided and enacted. He can sign his laws with the famous French formula: “*car tel est notre plaisir”* (if such is our good pleasure) a formula which was used by the French Kings to sign their orders.

This perception of BODIN with regard to the law which can be changed any time was a clear breach with the traditional perception of the law in the middle ages. Even unjust laws needed to be obeyed to, because they had the source within the sovereignty of the crown. Positive law enacted by the sovereign is even

stronger than seemingly justice unless it is plainly directed against divine and natural law.

According to the legal tradition in the middle ages the source of the law was not the state but God as the creator of the Earth. For this reason courts and judges followed in this period a principle which today would be considered totally outdateed namely that *older law breaches younger law*. The theory of sovereignty of BODIN was also in this sense the starting point for a "revolutionary" conception of the law: Tha law is only valid because it relies on the sovereignty of the state and not because it corresponds to the traditional custom. The cumulated wisdom of history has been eradicated.

Preparation of the Final Secularization of the State Authority

Based on the theory of BODIN the state has now the competence and the authority to enact new law, which breaches old law and thus is stronger than custom and tradition. With this theory the fundament for a positivistic theory of law and state has been put. However one has to admit that BODIN still counts to the philosophers advocating to the theory of natural law, since he did not the second important step which would be the total secularization of state authority, namely the legitimacy by the people.

„BECAUSE there are none on earth, after God, greater than sovereign princes, whom God establishes as His lieutenants to command the rest of mankind, we must enquire carefully into their estate, that we may respect and revere their majesty in all due obedience, speak and think of them with all due honour. He who contemns his sovereign prince, contemns God whose image he is. ... (J. BODIN, Ist. Book, Chapter 10). The removal of state power from the authority of God has only been made by the philosophers of the social contract theory and in particular by HOBBES. BODIN has left the promethean fire or at least the burning ash of the sovereignty at the Gods. He's theory of sovereignty prepared the total secularization of sovereignty with the theory emerging hundred years later with the idea of the social contract. Based on this idea sovereignty was created by the contract of the people. This contract turned into the Big-Bang for state, law, and justice.

Although BODIN has continuously always tried to rely the superior authority on the authority of God, we can still also find in his writings some attempts to recognize sovereignty as the formal superior and last instance authority: "If a sovereign magistrate is given office for one year, or for any other predetermined period, and continues to exercise the authority bestowed on him after the conclusion of his term, he does so either by consent or by force and violence. If he does so by force, it is manifest tyranny. The tyrant is a true sovereign for all that. The robber's possession by violence is true and natural possession although contrary to the law, for those who were formerly in possession have been disseized." (Chapter 10)

Sovereignty of the Organ of the State

An additional incoherence of the theory of sovereignty of BODIN is to be found in the separation of the sovereignty of the state and of the office holder or the organ of the state. When we ask for the sovereignty of the organ we want to know which

organ or institution within the state community has sovereignty with regard to other organs or institutions. On the other hand, if we analyze the sovereignty of the state we want to examine whether the community as such is internally and externally sovereign.

For BODIN clearly the sovereignty of the organ that is the sovereignty of the King has priority; and this is particular the case with the sovereign power of the prince with regard to his subjects and the estates. Of course BODIN knows very well, that the King does not hold unlimited power and that he has in certain cases even to consult the parliament. Thus he can not impose unlimited taxes on the people. In the case of an emergency however he does not depend on the approval of his estates. “But if any necessity should arise of imposing or withdrawing a tax, it can only be done by him who has sovereign authority ...” Thus, it becomes clear that the sovereignty of the prince or the King presupposes the sovereignty of the state.

Law and Might

In the writings of BODIN the relationship between Law and Might remains unclear. Does he consider sovereign each holder of absolute power also to be the legitimate sovereign by the grace of God? Is everyone sovereign who is able to enforce his commands within the state community? Or does might also need some legitimacy? Although the explanation of BODIN with regard to the sovereignty of the tyrant could lead us to the conclusion, that for him the competence to enact laws is a mere emergence of the absolute might which does not need any further legitimacy, he at the same time pretends that this Right should not be misused. Nevertheless he denies that any one would have a legitimate claim to judge decisions, actions, and measures by the sovereign King.

Consequently BODIN rejects any possibility to divide sovereignty into different parts. “The prince can not share his sovereignty with an second prince. If the prince can only make law with the consent of a superior he is a subject; if of an equal he shares his sovereignty; if of an inferior, whether it be a council of magnates or the people, it is not he who is sovereign” (J. BODIN, Ist book chapter 10)

Content of Sovereignty

Almost statesman like vision can be seen in the consideration of BODIN with regard to the content of sovereignty. Which competences and powers must a sovereign ruler be able to control? Part of the sovereignty is in priority the right of the sovereign to enact laws which are binding each subject and individual. This power includes also the competence to abolish existing customary law and to provide for new privileges. Thus the force of both statutes and customary law derives from the authorization of the prince ... Included in the power of making and unmaking law is that of promulgating it and amending it when it is obscure, or when the magistrates find contradictions and absurdities..” (J. BODIN, Ist book chapter 10). Additional attributes fort he sovereignty ist he right to declare war and conclude peace to appoint the highest holders of office and to decide as highest and final judge any dispute among the peoples and among his officers and the people. The sover-

eign receives oaths of loyalty of his subjects and vassals, the right to pardon, to make coins to decide on measures and weight.

IV. Sovereignty Prerequisite for Statehood

The State as Entity and Order for Peace

According to the theory of BODIN the state is a indivisible entity which is externally independent. This entity has no competence to enact valid law for any external power. On the other hand, it is only the state to decide which organ can legislate and enact legal norms valid for everybody. This power to organise itself internally belongs according to BODIN to the prince. The theory of the social contract which developed almost 150 years later did not transfer sovereignty to the prince only accountable to God but to the people. With this new concept of peoples sovereignty the decisive step for a final secularization of the legitimacy of the state has been made.

This description of the state a uniform order for peace becomes the fundament of the legitimacy for the final authority of the state and for the justification of the domestic validity of the law. Its significance is not at all only descriptive but much more normative. The prince needs to acquire not only externally with regard to the church and to other states independence but also internally. All power-centres need to respect its independence and shall never intervene in internal affairs of the respective state.

Sovereignty and State-Hood

The normative significance of the theory of sovereignty however, does not only limit itself to the mere recognition of sovereignty. A state is only and becomes only state when it is sovereign and recognized within its sovereignty. Sovereignty thus, is not only the consequence but much more the prerequisite of state-hood. Only territorially limited communities which internally and externally are recognized as sovereign can be considered as state in the proper sense of this notion. This of course leads also to the acceptance of the fact, that one can dispose on statehood. One can change it repeal it or achieve it by conquest, annexation or occupation. When a unit achieves sovereignty over a particular territory it becomes the Sovereign. Thus, state unites can be lifted, changed or newly founded. With this one has founded the theoretical fundament for the justification of later colonies of the European powers. But also annexation of enemy territories by military occupation is possible and based on a "just war" legal. Statehood is given to those who are in the position to conquer sovereignty over a certain territory.

Monopoly of the Power to Enforce

Finally, according to the theory of sovereignty the state is also to be considered as the unit, which claims to look for and to enforce law and order centrally within the entire territory. Only the state disposes of the legal right to use force and violence

for the enforcement of the state-law. Only the princes have the power and the task finally to mediate and pacify disputes. Private feuds, revenge of kin-groups, lynch-justice are unlawful. Only the state has the power and the right to use force that is to punish criminals or to wage wars. Although, actually the states are all confronted with the treat of private terrorisms, this assertion does not diminish its validity. What has changed is the structure of the enemy who has turned from a state-army into private terrorists. The nature of the war has change not the monopoly of the state to be the only legitimized body to use armed forces for its defence.

Law follows Might

The absolute and uncontested position of the prince depends under the prerequisite that he as achieved sovereignty on a certain territory and that he can rule the peoples in this territory without any foreign intervention. His factual and political power transfers to him also legality. But does it also transfer legitimacy?

Indeed the successors of BODIN did continue these reflections and expressly considered effective power as the only fundament of the law. Therefore, those who are the effective power-holders are also entitled to enact legislation. With this however not only the state but also the prince can be replaced by other power-holders. Is the prince thrown from his throne and did a new tyrant achieve sovereign power he will also be entitled to create justice and to enact laws.

Sovereignty understood in this way entitles to even much farther reaching actions: Who enacts law is also entitled to declare former unlawfulness as legal and vice-versa. The justification and the pre-requisite for a state which can change society fundamentally and revolutionary are thus given!

Prince, Feudal Hierarchy and People

By legitimizing the prince as the sovereign by the grace of God one does of course install a somehow secularized authority as the prince is separated from the Pope. But this authority remains still supernatural and transcendental with regard to its subjects. The peoples do not only have to obey the authority because it has the power to enforce but also because it represents the holy royalty on earth.

The sovereignty of the prince is balanced by the duty of the people to obey. However, we have seen, that the hierarchically structured feudal order of the society of the middle ages is in contrast to this concept. Only the idea that the prince does not only have to meet the interests of his vassals but the interests of his entire people composed of individuals enabled later on the centralization and with this also the rationalisation of the state-power.

Peoples Sovereignty

With the theory of the social contract one could finally carry through the idea of a secularized people sovereignty against the sovereignty of the prince by the grace of God. With this new concept of state legitimacy the process of secularization of the state comes to an end. Does the prince legitimize its sovereignty out of its entitlement by God and thus by the law of God – as prince he is also required to follow the laws of God – with the new theory of the social contract a new secular le-

gitimacy of state power is installed. HOBBES proposes with his view of the social contract that the people transmits at once all its rights to the monarch. According to the view of PUFENDORF the people on the other hand empowers first the state only with the second contract called contract of authority it empowers the sovereign to subjugate the people. Those different views are finally irrelevant with regard to the question of the final secularization of state authority.

Ratio Replaces God

By the social contract sovereignty is dissolved from its transcendental liaison and thus submitted to the disposal of the nation. In future only humans legitimize sovereignty not God. The only tie of authority in future is reason or the "ratio". Thus, it is not at all astonishing that the theory of sovereignty has started its triumphal march with the triumph of the ratio which funded the sovereignty of the individual.

While the laws of the prince by the Grace of God were binding, legal and legitimate because of his entitlement by God the laws of the King by the Grace of the people have to meet the common interest of the people. With the shift of the state authority from God to the people also the notion of the general interest shifted into new concepts. Indeed out of the old view of the general interest labelled labelled bonum commune by the scholastic philosophy emerged a new concept labelled volonté générale (general Will) developed by ROUSSEAU.

Limited Peoples Sovereignty

Of course not all scholars advocating the theory of peoples sovereignty endorsed also the justification of a absolute, uniform and centralistic state authority. According to the idea of LOCKE e.g. there are pre-state rights, which are inalienable and nobody can renounce on these rights.

Also the corporative Swiss peoples sovereignty does not consider itself to be absolute. The claim e.g. of the people in the open democratic assembly of the people has only been focused on the judiciary that is on the power to decide on the facts and on the law, but not on the power to enact and create new laws. The people considered the law as a given order not to be changed at the whim of the "sovereign". The earlier rebellion against the princes has only been oriented against foreign judges. The peoples assembly claimed to have the power to decide on all disputes based on its own sovereignty within the "thing" as has been called the court of the open assembly of the peoples. That it did not consider itself as the origin of the law one can see it still in the preambles of the different cantonal constitutions as well as in the preamble of the federal constitution. By proclaiming God as their protector the people underlines that it does not consider peoples sovereignty as final and absolute instance to make law and justice. However, one has to admit that there is no final secular instance which would be competent to review the decision of the people or even quash it because it is assumed to violate the laws of God.

V. Problems of State Sovereignty

Legal Fundament of Sovereignty

A state, which has plenary and unrestricted power over its territory and its people can be considered as sovereign. The relationship between state – law – and power is therefore obvious: Is power without law or is it lawless? Does the validity of law depend on its enforceability? Alternatively, can any law exist, which is binding and obligatory but not enforceable? Is the factual exercise of power always also lawful or can it be unlawful? In the next section, we shall deal with these most difficult problems of the state and legal philosophy and try to examine those issues further.

Whoever claims to be entitled to make law presupposes that there exists a law, which transfers this law and entitlements to the lawmaker. If sovereignty is legal notion, it presupposes logically and consequently a superior law.

This dilemma of a sovereignty without any prerequisite the theory of state has not overcome up to day. Already HEGEL recognised that even the theory of the social contract presupposes a legal system, which determines the content and the validity of a contract. The contract is a creature of the legal order and cannot be imagined as a legal document without the presupposed law. Only within a legal and according to a legal system one can conclude and enforce contracts. As logical consequence one can assume that the theory of sovereignty becomes part of the fundamental dispute between those who advocate a legal order which is superior to state sovereignty (natural law) and those who deduce the law only out of the sovereignty (TH. HOBBES, JOHN AUSTIN (1790–1859) and H. KELSEN).

Different notions of sovereignty

Different authors use the notion sovereignty often with significantly different meanings. Some pretend to consider the concept of sovereignty only as a political notion some see it as a legal concept. Some consider that only absolute and unrestricted might can be considered as sovereign, some accept a relative sovereignty, which can even be divided and shared by different institutions or persons. First we shall examine those different notions in order to develop later the different fundamental issues of sovereignty.

The explanations of the theory of sovereignty of BODIN did already reveal us, that sovereignty has to be examined taking into account different points of view. E.g. one has to distinguish between sovereignty as entitlement for competences or as the epitome of perfect and absolute might. Sovereignty as entitlement of competences to enact legal norms binding other people is part of the legal system and thus a legal notion. On the other hand sovereignty as concept of an almighty power is a political notion, which reduces sovereignty to the power to command without questioning the legal content of such commands.

Inner- and External Sovereignty

Moreover, one has also to distinguish between the inner and the external sovereignty of a state. From the external point of view, one can call a state externally sovereign, which is addressee that is subject and object of the international law. As subject of the international law, the state is directly under the international law and has the power as equal partner to conclude treaties as part of the international law and thus it can create bilaterally or multilaterally new international law. Based on its external sovereignty, the state can declare war or conclude peace. Finally it is and can become the bearer of obligations of the international law.

However, its is certainly permitted to ask the question whether taking into account the raising international interdependency by trans-national co-operations this exclusive concept of external sovereignty can still be maintained. If one examines for instance only the international relationships of federal units as part of their federal states, often they are required and responsible to implement based on their proper competence and responsibility to implement international treaties into the respective domestic law. Should they not consequently also be considered as legally responsible bodies which can be accused for not implementing correctly treaty law but which should also be able to sue other subjects of international law for not applying international treaties. They should also become passive and active parties of a international court with regard to their proper responsibilities imposed to them by international law.

With regard to the domestic view of sovereignty, the question needs to be examined whether a state can govern internally without external interference. When the state is considered to be the final instance in legal matters with regard to its citizens which is uncontested and incontestable the state is internally sovereign.

Sovereignty of a State Organ

Within the context of the inner sovereignty one is required to ask which organ or which branch of government enjoys highest and absolute might with regard to the citizens. BODIN sees the sovereignty of the state concentrated at the level of the prince or monarch. In modern democracies however the quality of sovereignty is assigned to the organ which can finally decide to change the constitution and thus has the power to make the constitution. (pouvoir constituant constitué). However, the procedure provided for constitutional amendments as e.g. in the United States or for changing the treaty of the EU are often so complex and elaborate that one can often consider de facto those organs to be sovereign which have the power to decide on the application and interpretation of the constitution or the treaty. That is in many cases the legislature or the court, which has the power to interpret as final instance the constitution. In many states (such as e.g. France) the head of the state decides on the emergency situation of the state. In cases of emergency the head of the state is given the power to invalidate existing laws and thus exert de facto unaccountable authority. CARL SCHMITT pretended that the sovereignty is concentrated in the organ which can decide on the emergency of the state. (CARL SCHMITT supported as scholar of political philosophy the NAZI regime, see in this

context Izhak Englard, Nazi Criticism against the Normativist Theory of Hans Kelsen, Israel Law Review 1999)

Relative and Absolute Sovereignty

Different views on sovereignty are also to be found with regard to the content of sovereignty. For some sovereignty is considered as the highest competence which is original and can not be derived of any other power or competence competence-competence). This understanding of sovereignty contains also the element of exclusiveness. No other state and no other international organisation can decide on behalf or instead of the sovereign state. Such concept of sovereignty, which excludes all other bearer of competences, obviously does not any more fit to the actual reality of a interdependent globalised world order. Others consider sovereignty not as the final and absolute power to make legal decisions. Sovereignty according to their view contains normally all those competences, which are usually needed for a state in order to function normally. These contain defence, police, legislation, judiciary, economy, and inner organisation. Some consider sovereignty as the summary of all competences which are given to the polity (cp. e.g. article 3 of the Swiss Constitution).

VI. External Sovereignty

a) *Development and Function of the External Sovereignty*

The Law of Inter-State Relations

The states which started mutual communication, exchanged ambassadors, concluded treaties but also waged wars with each other needed to establish for their mutual relationships a legal order regulating their mutual rights and obligations. The great Dutch scholar of the 17th century HUGO GROTIUS developed the basic principles for this new international law which he deduced from natural law principles. His theory on the just war and on the difference between the private law and the law of the state as wall as the famous principle *pacta sunt servanda* are all assuming that there must exist a legal order, which regulates relations between the states.

Sovereign states are bound to respect with regard to their relations the international law, which in principle is only applicable to the states and not directly to the individual citizens. International law is the law which is valid for the states and their relations. Domestic law is the law valid for all individuals living in the respective state. Based on international law the states are empowered to conclude with each others treaties and based on the same law they are obliged to fulfil the obligations agreed upon in those treaties. According to GROTIUS international law does also legitimate the states to declare war to an other state and to occupy foreign countries as well as to take the individuals waging war for the enemy as pris-

oners of war. All those acts committed during the war are also limited by the law of wars (ius in bello).

The rights and entitlements enshrined in the international law do only belong to the states as legal subjects to those laws. According to this international law, only international treaties concluded by the states according to the procedures and principles provided by the international law can create new legal obligations and competences.

With this new legal system the theory of sovereignty did receive a new dimension, which however has not been revealed in this clarity already by GROTIUS. Also BODIN who mentions explicitly the *ius gentium* did not consider the specificity of the international law. Indeed, he considered the *ius gentium* as a legal order which is the common order valid for all states with regard to their domestic law as well as between the states. Therefore he did not analyse the international law in the modern sense. The reason is probably that at that time one can suppose that at this diem a general consensus was considered to regulate the inter-state relations within the European oriental Christian world. In middle ages, relations to Non-Christian-States were forbidden and thus there was no need for a law to regulate those relations (cp. H. QUARITSCH, p. 370).

Equality of States

Theory and praxis could only establish legal principles regulating the relationship between states and their power to create new international law after having accepted the principle of equality of the states. Indeed, only on the bases of equality states were able to communicate and to establish relations to each other and to conclude treaties with equal binding character for equal parties and partners. This basic principle of equality of states has namely been developed by the representative of a small mini-state the citizen of Neuchâtel EMER DE VATTEL (1714–1767).

This principle of equality has indeed got sodden in the modern world states. In particular in international organisations the real differences of the states with regard to their geographic size but also with regard to the size of their population and military forces has somehow been de facto recognized with regard to the factual influence of the superpowers. Even with regard to legal privileges of big states such as the permanent members of the Security Council or by the weight of the votes of different states within the European communities equality is not any more fully implemented. Nevertheless the recognition of the sovereignty of states as equal subjects to international law has formally never put into question. (cp. Art. 2 of the Charter of the United Nations).

The Function of the External Sovereignty

Subject to the international law in its proper sense are only sovereign states. International law however recognizes also other institutions as subject of international law such as the International Committee of the Red Cross, the Vatican or solders when the international law on wars is to be applied. The states however, are not only passive bearer of rights and obligations of the international law, they can also with the agreement to bilateral or multilateral treaties create new international law

binding the parties of the agreement. Thus, states are passive bearer of rights and obligations of international law, but they are also makers of new international law and thus subjects of international legal norms. This power is some times also given to organisations such as the European Union. However, in these cases the treaty making power is strongly restricted. In fact, every important treaty of the European Union needs final ratification of all member states in order to get validity according to international law.

Strongly connected with the notion of legal subject of international law is the principle of state-equality. The states are all on equal footing because they are all considered sovereign. Externally they are all subjects of international law, internally they decide autonomously on their policy and legal system.

Sovereignty – Immediacy to International Law – State Equality

Nobody not even BODIN has considered sovereignty to be a prerequisite for a polity to be recognized as a state in the sense that a state has to be the final instance and needs to have absolute independent power in order to be the exclusive authority for its people. Supreme power (*suprema potestas*) according to BODIN means only that the prince needs to be with regard to his subjects internally the only, exclusively and supreme instance; this instance however is bound to the law of God and to the law created between the states. Thus, when we today use the label sovereignty we preferably endorse the notion developed by VATTEL as external independence and external equality with regard to the other states. According to this understanding external sovereignty describes the states as the addressees of international law, the subjects of international law, their equality before international law and their power to be the only accountable instance to apply and to implement international law into their domestic legal system.

The understanding of external sovereignty as immediacy to international law corresponds also mainly to the actual perception of this notion in today's theory and praxis. The International Court of Justice has however started to distinguish in this context between the political and legal sovereignty. Accordingly political sovereignty is the factual independence of the state, which of course is different according to its economic and military force. Legal sovereignty however means that each state has the equal right to decide on the membership of an international organisation. It can based on this principle even discontinue its membership in an international organisation according to the principles of the *clausula rebus sic stantibus* even though the organisation such as the European Union has no specific clause for withdrawal.

Immediacy to International Law of Federal States

International law, still remains loyal to the old tradition, that states are impermeable, uniform, and unitary monarchies. Those units finally, can only be legally represented by the head of the state. However, since the 17th century the world and the states have radically changed. In the new area of globalisation nation states had to decentralise their original monopoly of external policy at least partially to regions. Today we witness a worldwide connection not only of states but also of

regions and even towns and cities. Moreover federal units of the actually existing 25 federal states with 45% of the world population become important actors on the field of international networking and co-operation. This development is actually totally unaccounted by the actual order of international law. As since ever, all obligations based on international law – even those, which have been formally agreed to by the federal units of a nation-state – have to be accounted for by the nation state and not by its federal units only internally accountable for domestic implementation, although those obligations have de facto not been explicitly agreed by the nation-state itself. Internationally federal units, which agreed to certain international obligations are not accountable to the international community neither for its application nor for its implementation within their proper domestic law.

Moreover, federal units of nation-states, which members of important supranational organisations often de facto the immediate addressees and thus the inner-state units responsible with regard to their inner-state competences to implement the law of the international organisation with regard to the citizens. For correct application of these legal obligations, the nation-states remain the units legally responsible to the international organisation. They are either as plaintiffs or as defendant implied into an international procedure and accountable to implement the judgements of international courts within their internal domestic law although this responsibility remains competence of the respective federal unit. Although the internally empowered polities, the federal units are neither able to defend their case as defendants nor to enforce non compliance of international law by other federal units as plaintiffs.

This may have dramatic consequences. Thus, the United States did renounce to enforce the decision of the international Court of Justice in the LaGrand case (Germany v. United States International Court of Justice 27. Juni 2001). As consequence the death sentence was executed and the condemned had to pay the price for this legal deficiency by his death.

Right to Wage War

Immediacy to international law of the states contained already at the times of THOMAS VON AQUIN and even before GROTIUS the right of states respectively princes to wage war although not private war. Military interventions of states according to GROTIUS are required to be "just" that is they need to correspond to the law of war (ius in bello). Even this "right to wage a just war" has been reduced by the Charter of the United Nations of 1945 to the right of self-defence. Article to of the UN Charter prohibits the states generally from any use of military force in order to pursue their proper interests. Military force is only allowed for self-defence (article 51). It is obvious though that such general prohibition of military force and war has not at all banished the war from politics and world reality. The prohibition of military force did only influence the states to justify their wars with unconvincing arguments of proper self-defence or of the self-defence of their kinship group threatened as second class minority in their neighbour state. Or the states claim their right of self-defence in order to combat and prosecute terrorists all over the world where they are assumed to hide. International intervention is also justified

based on a extensive interpretation of aggression and threat to peace. A international threat to peace was considered to be justifying the intervention in case of obvious and general violation of human rights. In the beginning of the war against Iraq the US justified the war with the possible threat of mass destruction arms. Now as it has become evident, that there was no real threat, the Bush administration die justify the war with the general violation of human rights by Saddam Hussein.

Until the 20th century military conflicts had the purpose to gain new territories. Gain of territory was also the main target of diplomatic disputes. Already in the beginning of this century and throughout this period the world of states, was much more facing ideological wars waged by states representing one of the two ideological blocks lead by the superpowers. Since the fall of the Berlin wall, the priority of international conflicts has shifted into internal civil wars between ethnic communities. The international community considers to bear the responsibility to intervene in order to defend threatened communities and to prevent ethnical cleansing.

The growing tensions between north and south, between industrialized states and developing states will cause new conflicts on distribution of products, water, mineral resources, environmental protection, social costs, migration, and human resources. No state will fight with the goal to colonise foreign territories. But the North will fight in order to maintain its economic and strategic interests, and the South is involved in destructive conflicts on political, tribal and ethnic uncertain borders inherited from the former colonial states. In order to overcome the nightmare of the colonial rule it has to find new grounds for a sustainable legitimate polity.

b) The Relationship between International Law and Domestic Law

Dualism

The development of a new theory of sovereignty linked to the development of the international law valid for sovereign states did lead to a new problem which is dependent on the question how and whether this inter-state law should also have effect within the domestic law of the states. Would in consequence only the state be bound to respect the bilateral treaties on settlement or could respective foreigners directly require authorities to respect their rights enshrined in the international treaty? Principally the states followed two different lines in answering this question. Some upheld the position that sovereignty is an impermeable skin, which separates totally the two legal systems – international law and domestic law. International law and domestic law are conceptually with regard to the creation, implementation and enforcement totally different systems that they can never be connected with each other. Thus, as far as international law should have internal effects and validity it would have primarily be introduced into the domestic law by an additional legislative act of the parliament. This theory of transformation of international law into domestic law will lead in practice of several states to a dualistic system. International treaty law is not applied by the national courts as long as

it is not transformed by the legislature into the domestic law. Courts are not bound to respect international treaty law which is not transformed by the legislature. International treaty law cannot create immediate rights and obligations with regard to the individual citizens. This dualistic practice is traditionally also applied by common law states (except United States) in which only international customary law needs not to be transformed into internal domestic law. It is for this reason that the European Human Rights Convention for a long time could not be applied by British courts because it has only been integrated into the domestic law with the Human Rights Act of 1998.

Monism

Totally contrary to the dualistic concept is the monistic position. States implementing the monistic concept of relationship between international and domestic law refuse the view that sovereignty has the function to totally separate the two legal systems. Consequently, the courts, administrative bodies or even federal units of states advocating monism have to apply and implement international treaties without any intervention of the legislature. Only those norms of international law which are considered to be non-self-executing need further materializing by the legislature.

The Competences of the Institutions provided by Domestic Law and International Law are Relevant.

Many scholars of international law think rightly that this dispute on those two opposite theories between the monistic or dualistic relationship of international law and domestic law does not meet the real problem. According to their perception the main problem of the implementation of international law is caused by the fact that different institutions and organs are applying international law and that in particular domestic institutions have according to their position within the domestic constitutional system different positions. Is international law e.g. applied by an international court, this international court will of course only decide based on international law. If on the other side international law has to be implemented by a domestic court, this court is bound to decide according to the jurisdiction and procedure provided by the domestic law. Therefore, it has to apply international law by respecting also national law. With this respect, it is in many cases desirable that the national legal system obliges at the same time the courts to apply and implement international law and even to give international law supremacy over the domestic law.

The fact that states are the immediate and primary addressees of international law does not necessarily lead to the consequence that domestic law is to be separated from international law. International law only has a different area of validity. This difference however, does not require a total separation of the two legal disciplines.

The dispute is thus much less theoretical than practical. The question is which domestic institution should be given the competence to decide on the application of international law: the legislature or the courts. This question depends again on the internal order of checks and balances with regard to the ratification for treaties.

If treaties are finally ratified by the same state organ, which is also competent to enact law, then it is normal that treaties should have internally the same effect as domestic legislation.

United States

The United States pursued a different concept with regard to the transformation of international law into domestic law. At the time of the founding fathers, the former British Colony was a weak state dependent totally on the respect of the rule of law and in particular of the respect of international rules by the big powers and monarchies to be followed by the great powers. This may have been the main reason, why the founders of the Constitution provided a special rule with regard to international law different from the common law tradition. According to article VI of the Constitution, international treaties are namely part of the supreme law of the land. Thus, the Constitution adopted in principle the monistic concept. However, contrary to most states practising the monistic way of implementation of international law it is in principle up to the judge to assess whether a norm of an international treaty is plain enough and thus self-executing or to vague and non-self-executing and thus needs to be primarily materialized by the national legislature. In the United States however, it is not the judge to decide whether a norm has self-executing character, this decision is to be made by the Senate when it decides on the approval of the treaty. Consequently, the factual power of the Senate to approve the treaty goes far beyond, since it does at the same time decide on the internal validity of its particular norms. With this power the Senate has the possibility factually to undermine the monistic requirement enshrined in the Constitution.

The Monistic Theory of KELSEN

Law is not a substance, which can be separated into sugared and salted water and thus be kept in to different pots. The law is a solid unit and thus valid with regard to the states as well as with regard to the individual. This validity does not depend on the legal system the norm is integrated but much more on the norm and the goal of the norm itself. Justice as source of the judicial system is the same notwithstanding the origin of the norm. For this reason the law which flows out of this source needs to be the same. Salt does not turn into sugar when it is poured in a different pot by the states. A murder is not to be justified just because it has been committed based on the reason of the State (Staatsraison)

KELSEN however, advocates for different forma reasons the monistic theory. Similar to AUSTIN also KELSEN is of the opinion that the legal order is a normative order of the *must*. Legal norms prescribe the behaviour; they command somebody to do, to refrain from, or to endure some thing. They grant autonomy or transfer competences to prescribe behaviour for others. Those rules regulating behaviour are embedded within the order of the “*must*” as well as the human being is part of the order of the “*be*”. Norms are to be deduced from the supreme “must”, which does not contain any substance: It is without content just as humans are part of the order of the “be” which for itself is without any content or substance. The leads to a simply formal or pure understanding of the law as a universal grammar of nor-

mative thinking, which is empted out from any substantive content. Law is only dependent from the supreme basic norm without material content which only contains the substance that there exists a must.

How can KELSEN harmonise the notion of sovereignty with this pure theory of law? The legal order understood as order of the must is considered to be a solid unit. Each norm can therefore be deduced from the basic norm valid for all legal norms. This basic norm is principally identical with the sovereignty. „Sovereignty in this sense is not of a perceptible or other wise to be objectively detectable quality, it is but a prerequisite that is the prerequisite of the normative order as the supreme order which can with regard to its validity not be deduced from any other higher order..” (cp. H. KELSEN, Souveränität sowie die „Wiener rechtstheoretische Schule“, p. 2272 translated from German by the author).

KELSEN does logically not support a dualistic but a monistic perception of the relationship between International and domestic law. Contrary to BODIN he empties out the notion of sovereignty from its content. He rather follows the understanding of JELLINEK and considers the notion only as a formal legal notion. Logical to his monistic conception he endorses two different constructions of theories: Either is international law sovereign and therefore the domestic law has to be deduced from international law with recognized supremacy; or the domestic law is considered sovereign, and therefore international law depends finally on the domestic law and has to be in accordance with this law.

The monistic explanation oo KELSEN is with regard to this issue convincing. The dualistic theses of two different circles of legal systems independent from each other is in contradiction to the principle that the law according to its fundamental meaning finally has to be considered as a uniform whole. However, the theory of sovereignty of KELSEN as mere formal notion which is emptied out from any content is finally not convincing. Sovereignty understood as supreme not deducible basic norm is an empty formula without any practical or theoretical meaning.

E. Sovereignty and Might

I. Might and Force

a) *Mapping the Issues*

Fear from Compulsion

Whoever receives an order to pay its taxes from the taxation office has no alternative but to pay its taxes if he/she does not want to be pursued by the state. Who is threatened by a criminal with the pistol on his back, has neither an alternative but

to give in and to hand him out the money. What is the difference between the payment of the bill for the taxes and the handing out of his money to the criminal?

The usual answer to this question is: Those who have to pay their taxes comply to a valid law and obligation. The money one hands in to the criminal is given to him because one cannot escape his threat and therefore his actual power over ones life. This answer cannot fully satisfy, because finally also the taxpayer fears the execution of his obligation by force. The decisive difference ha to be found within the definition of the “legal obligation”.

The Legal Obligation

What is a legal obligation? A legal obligation then to be assumed, when it can be deduced from a law e.g. a tax-law, which is a law, enacted by the legislature or a precedent of a court decision. But still we have to ask the question what is a tax-law and what is its difference with regard to the rule issued by the mafia gang e.g. that all restaurant belonging to its controlled territory of the town need to hand in to the mafia 30% of the income? The usual answer to this question again would be: The law is *valid,* the mafia-rule has no validity. What then does mean legal validity?

Law of Nature and Laws of Mankind

Does a criminal law e.g. has the same kind of validity as a law of nature? If one let fall a stone out of ones hand, every body expects that according to the law of gravity the stone falls on the ground. How do we detect the law of nature? The law of nature was empirically detected. Because all objects behave the same way, one can conclude that there must be a law, which makes them behave the same way. This law was then detected and labelled as law of gravity. And the gravity law has its cause in the gravitation force of the earth. This gravity force itself has its deeper cause in the nature of matter (Materie).

Based on the normal behaviour of humans one may deduce some sociological “laws of behaviour” but no legal norms with legal validity. In contrary, the law wants exactly to influence the behaviour of humans. Either it aims to declare some behaviour as legal obligation or it aims to change the behaviour of man (e.g. environmental legislation). The legal order has its source in the general conviction that men recognize their legal obligations and that based on such conviction they can decide whether they want to follow or not their legal obligation. The stone falls and has no possibility to decide whether it wants to fall or not.

Why are Laws Valid? Three Scientific Answers

Let us imagine that extraterrestrial scientist are given the mandate to find out, why cars are driving left in some areas of our planet and right in other areas of this planet. Those scientists dispose now on three different methods in order to fulfil this mandate:

The sociologist:

> One of those scientists will examine on our planet empirically the behaviour of car-drivers. He/she detects that the car-drivers are driving left in

some areas and right in other areas. Why this is so, he/she will not find out. Based on this empirical investigation he/she will not find out. Based on his empirical findings he/she establishes the law of nature that e.g. in the UK one drives left and in Germany one drives right.

The positivist:

If he/she follows a different method, he/she will ask humans, why they are driving right or left. Humans living on our planet will point at the traffic rules they are following. Now, he/she knows that the behaviour of human beings is regulated by positive legal norms.

The philosopher:

However, he/she will still have to investigate why the laws do regulate the behaviour in this way and not in an other. In particular the scholar has up to now not answered the question, why in some areas cars are following this law and in other areas they are following an other law. It he/she wants to find an answer to this question, he/she has to question the origin of laws and he/she will find this origin within the concept of state-sovereignty as it has been established by AUSTIN.

Legal Realism

If he/she is not satisfied with the first empirical method, he follows the theory of the legal realists. Does he/she follows the second method he/she follows the positivistic school of KELSEN. Does he/she however follow the third method, he she belongs to the followers of the philosophy of HOBBES, AUSTIN and HART. What do we mean, when we pretend that a legal norm is enforceable ant therefore valid? This question can be answered differently. The legal school of Uppsala (A. ROSS etc.) departs from the hypotheses that only those laws are valid, which according to highest probability are also adopted. According to this theory the validity of a law depends therefore on the forecast of the probability of its effective application. Such forecasts can however also be made by analyzing the rules of the mafia. One can of course also imagine that those victims threatened to be murdered will even be more reliable payers than the tax-payers.

Finally the school of Uppsala can't give us a answer to the question why the judge at least the judge of the final supreme instance does apply the law. At least the question of the probability of the application of the law can for him/her not by the relevant answer. Relevant for the application of the law can not be his/her own prognoses, because he/she has himself/herself whether the forecast which has been made by the lawyers to the question whether the law will be given validity by the court is correct or not. Could a judge for instance refuse to punish a paedophile, because of the high number of unrecorded cases in this area of criminal law and because therefore criminal law is very badly enforced?

Positivism

For KELSEN on the other hand the law is valid, because it is enacted, regularly within the procedure provided for the enactment of laws and because it is in conformity with the superior law e.g. the Constitution of the international law. With

this the relevant question shifts to the "validity of the supreme law" that may be the constitution as basic law. Why according to KELSEN the constitution is to be considered as "valid"? Because according to him the constitution can be deduced from a fictive imagined preconditioned basic norm (Grundnorm). This basic norm however, is without substance and prescribes only, that there are normative obligations that is norms which prescribe a must. This order of the must exists besides the order of the "be". Each positive law is finally embedded in this order of the must just as each concrete fact is part of the abstract category of the order of the "be". Since the must can not be deduced from the be the content and substance of the must that is of norms can not be rationally determined. Based on the idea of what is a human being one can not deduce any obligation to respect the dignity of human beings.

If in consequence the mafia has established a procedure for the "enactment" of directives those directives are to be considered as law, as far as they are not contradictory to a given legal system for this territory. This would however, not be the case in a state ruled by the mafia. Thus one can only based on the legal positivism deduce a difference between the legal obligation to pay the taxes from the constraint to pay the money to the mafia, as long as mafia does not rule a state.

AUSTIN'S State Philosophy

A third answer on the question with regard to the validity of a legal obligation can be found within the theory of AUSTIN. According to AUSTIN legal obligations an laws are valid, because they can be deduced out of the sovereignty of the state and thus can be enforced by state power. According to AUSTIN there is a inner relationship between the validity of the law and the sovereignty of the state as well as with the power to enforce the law.

This inner relationship between law and might which enforces the law is obvious. For this reason we shall now deal with the relationship between might and sovereignty as basic phenomenon of the legal order.

Rational Legitimacy

However, and this will already be anticipated this relationship will reveal that the might of the state is only partially dependent on its military and/or police power. A big part of the might of the state depends on the rational legitimacy. For this reason we will have to distinguish between the might and authority of the state and its power to enforce the law with its military and police forces.

The employee of a bank hands in the money to the criminal because he/she is forced to act according to the threat. Taxpayers feel not only threatened by the state enforcement to pay their taxes they consider themselves also to be obliged to act according to their legal obligations. They do not only act because they fear the punishment but also because the recognize their legal obligation. They recognize the legitimacy of the law, which does engage them to pay, based on the rationality of the law.

When state sovereignty does not only depend on the enforcement power of the state but also on its inner legitimacy then one has to accept that there is also en-

forcement power of the state which does not enforce justice but injustice. The holocaust or the brutal killing of the population in Cambodia by the read Khmer are only very historic examples for such injustice committed by state authorities. How should however behave humans with regard to such unjust state? Do they have a right or even an obligation for passive or even active resistance? This question of the right of resistance will be examined in the end of this chapter.

a) Identity of Might and Law

What is the relationship between law and might? Does the one who governs the state has the right to do this because he/she has the power to do it? It is well known that BODIN has legitimized the one who has the supreme power within the state with the aura of sovereignty. Has he thus created the notion of sovereignty in order to justify factual might?

Obedience Creates Sovereignty

AUSTIN is the philosopher who has most consequently advocated this theory: „If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society political and independent“ (J. AUSTIN, p. 194).

Sovereignty thus is determined by the loyalty of the followers or by the obedience of the great bulk of the society which is given to the governmental branches. How obedience is enforced whether with the whip or the carrot or with conviction and information or with threat and prison is not relevant. The only relevance which is decisive is the fact that the people are obedient. (Oboedientia facit imperantem)

However who can now be called sovereign? According to AUSTIN the one is sovereign how disposes of supreme power and who is independent and does not have to be obedient towards an other government. If a government is obliged to observe obedience with regard to a superior government, this supreme government is considered to be sovereign. The majority of the people have to be permanently obedient towards their sovereign. If e.g. a country is occupied by foreign forces for a limited time, according to AUSTIN sovereignty is not transferred to this occupying state. „A given society therefore is not a society political unless the generality of its members be in a habit of obedience to a determinate and common superior“ (J. AUSTIN, p. 196).

Legal Mandates Start out from the Sovereign

AUSTIN derives the positive written law from the sovereignty. Legal obligations are commands. How can a legal command be distinguished from the command of a thief who puts the pistol on the breast of the banker to hand him the money? The decisive distinction is to be seen in the fact, that legal commands can be lead back to the sovereign, contrary to the command of the thief. „But every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sov-

ereign number in the character of political superior: that is to say, a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. And being a *command* (and therefore flowing from a *determinate* source), every positive law is a law proper, or a law properly so called" (J. AUSTIN, p. 134).

With these explanations which AUSTIN has made already in 1832 he has developed the legal positivism already introduced by HOBBES. AUSTIN does not deny the existence of the law of God. In contrary, AUSTIN is a strong believer of transcendent law and moralist. This natural law of God however, has to be distinguished from the positivistic law which is derived from the sovereign just as the norms of morality which overlap some times with the positive law but which are at least partially lacking enforcement because they can not be lead back to the sovereign.

The Secular Law Distinguishes from the Morality of God

With this view the secularization of the law has finally taken place. The law of the antiquity had a divine origin. Since BODIN it has been derived from the sovereign. But this sovereign has been given legitimacy by God and was bound to the divine law. AUSTIN on the other hand separates definitely the positive from the divine law. He derives the positive law only out of the sovereignty of the state; and this sovereignty is not dependent on God but on the obedience of the people that is it is dependent on the voluntary or enforced recognition by the people.

Acceptance or Legal Obligation: HART

The modern positivistic theories are without any ground without the theory of sovereignty of AUSTIN on one side and the theory of the social contract of HOBBES on the other side. Those theories however, have been elaborated in the 20th century with regard to different points of view. The strongest connection to AUSTIN can certainly be found by HART. Sovereignty according to HART cannot only be reduced to obedience, habit and commands. Also the sovereign has to follow specific rules, when it enacts new laws. It must respect certain rules of procedure. This is in particular to be observed by a democracy in which different organs participate on the state sovereignty. However, it is also to be applied for a state, which is ruled by a dictator. Moreover, all sovereign states are bound to observe the international law. The law itself cannot be deduced to a simple command. Law presupposes liability. Such liability does not only depend on power and fear from punishment. It is also dependent on respect, conviction, and correctness.

c) Might alone is not enough

Bases of the Validity of Law

With the request that law can only be valid if it has inner liability HART discloses a new horizon for the theory of law and of sovereignty. Robinson can order some actions to Friday. Is the ordered convinced that the commands are incorrect, he

will only submit to the commands if he is forced to. The inner liability in this case is lacking. Therefore not those can be called sovereign who have the supreme power but those who within the frame of the prescribed rules enact legal norms as far as those norms are regularly considered by the people as valid. The more the totalitarian rule is cruel the less it has legitimacy and legality and the more insecure is also its sustainability. Sovereignty contains thus, not absolute power which would empower the sovereign to enact laws at its whim. Sovereignty does only empower to enact laws which are recognized by the people as valid. If the dictator orders certain behaviour which is considered as incorrect or even unjust he/she can only enforce the "law", with terror and fear. He/she is not superior to the law and therefore he/she can never shift at his/her discretion the conviction of the people into what is considered as lawful and unlawful. In this sense his/her might is limited. If he/she disregards the sensibility of justice of its people he/she will be forced to implement its decisions with a high risk ob secret police and state terror.

Limits of Liability

A rubbery of the bank turns not into a legal expropriation because it has been ordered by the dictator nor if he/she has committed the rubbery itself. There are some elementary principles which have to be observed even by the sovereign. He/she cannot just change the nature of human beings and for instance order that humans have to arrive flying to their working place. Neither can he/she force the parents to kill their children or Christians to turn into Muslims or vice-versa.

While the first (flying to the working place) is physical impossible, the second contradicts the elementary natural feeling of humans that they should be able based on their human dignity to decide on their proper relationship to God. Humans cannot be obliged to violate natural principles and human rights. The law and this is also valid for the sovereign is bound to observe and to respect the physical possibilities of humans as well as their generally recognized psychological natural behaviour. Formal sovereignty does not legitimize each state command.

Limit of Sovereignty

From this assumption, one cannot deduce that the state would not need any more any power of enforcement. Even less one could argue that any law which needs to be implemented with force is per se "unjust" law. Secularisation and written enactment of positive law which has been introduced with the theory of sovereignty of BODIN should however not mislead the states to overestimate their possibilities. Although they might be able to enact law within a very broad frame, they are bound on some limits of humanity and of the human nature as such, which cannot be overrun without any consequences.

d) The Sociological Relationship between Law and Might

Civil War

If within a state a minority fights against the might of the state, if it claims sovereignty over a limited territory controlled by its proper rebellion forces, and if moreover it requires the right for unilateral secession, this has for all humans living in these territories unforeseeable legal consequences, not to mention the terrible damages any civil war causes namely to civilians. The minority will based on its right to self-determination call in for the respect and acceptance of its sovereignty with regard to all people living with its controlled territory. To whom then citizens will have to pay taxes. Who has legitimacy? – The minority which calls in for nationalism with regard to its members or the mother-state which requires acceptance of its legal obligations based on rationality, history and legal security? With what kind of consequences young men will have to count, when they will be required to serve in the army, which might even require them to fight their proper relatives which not long ago were even co-citizens. Now all of a sudden they have turned into enemies fighting in a army which is considered as enemy-army. Both parties claim their sovereign right over the same territory. The mother-state refers to history and the valid actual law. The minority claims from its point of view pre-constitutional unity of the people and based on the pre-constitutional unity the right for self-determination and unilateral secession based on a pre-state sovereignty. In reality the territory controlled by its forces belongs already to the new state by self-declaration. (Self-declared Turkish republic of Northern Cyprus).

Legal Security

Human beings need to know that the law will be implemented by state authority and in case of resistance even by the state forces against their proper will. If some times the conviction takes place, that the state would renounce to collect the unpaid taxes, nobody would any more pay any taxes. Every body would assume that its neighbour would also not any more pay its taxes. If on the other side the taxpayers know that the taxes will be collected even by force with regard to all taxpayers they will jealously control that every taxpayer will stick to its obligation in order to prevent that nobody can profit out of some negligence of the tax-authority. The law needs for its implementation state force. Often however, it is only important that one knows, that the state will in case of necessity use force inorder to collect the taxes and to implement obligation with regard to the great bulk of the society without any force and violence.

Corruption

Reversed the first indication of a corrupted state administration can have disastrous consequences. Each taxpayer would then try to bribe civil servants for his/her proper interests. The state authority would then fade away. Law will loose its credibility. Is once corruption wide spread the law will only be enforced with regard to the economically weak part of the population. This marks the beginning of a state ruled by the upper class and a judiciary dependent on the interest of the

riches. Law will only be in the service of the riches. The marginalised poor will always and to be wrong.

Might as Chance for Enforcement

Logically one has to ask the question: What has to be understood by might of the state? A member of parliament has power, when he/she is in the position to convince other members of parliament who are of different opinion, that their position is wrong and therefore they have to follow the better arguments. If we now try to measure or to define the power of this member of parliament we can observe the following: If one wants to measure the power of this respective member of parliament one has to know how big the probability or the chance is that the other members of parliament would share the opinion of the first member. ROBERT DAHL (1915) defines the power „as the difference between the probability of an event given certain actions by A and the probability of the event given no such action by A" (DAHL, Sp 214).

Factors of Power

Power is determined by different factors. Of course power can also be caused by the possibilities to implement commands by fore. Power as the chance to influence others however depends in priority from the competence to convince with better arguments and from the confidence as wall as from the specific interest position a opinion-leader is trying to influence others. Is the one to be changed in his of her mind economically weak and dependent on a higher incomre, is he/she not prepared to take a certain risk, is he/she in the habit to be rather guided by others or to obey, then the one, who wants to use its power to change the other-ones conviction, will have an easy chance to gain the opponent for his/her position. Is the opponent however, of an independent mind, competent and economically and psychologically strong and is he/she prepared to take some risks, the opinion leader shall hardly be able to change its mind.

As one can determine the power of the member of parliament one can also determine the power of the state which depends on different factors. The taxpayers pay their taxes because the are afraid to a certain extent from the enforcement apparatus and form the respective procedure. Thus, they fear the force of the state which stays behind the law. Partially however they have also a inner conviction, that they have to pay their taxes because they believe that the positive law is correct. It has been enacted in a correct and just procedure and it contains prescriptions considered as just. The competence to enact such laws are given to the legislature because it has been given to it by the people which recognizes and legitimizes the authority of the law-maker because the tradition, its charisma or its rationality (M. WEBER).

State Force and State Authority

The might of the state can be distinguished between the proper *state-force* and the *state-authority*. Let us first examine the *state-force*. Force is the use of physical means to force somebody to a certain behaviour. The state does not dispose of the

monopoly of power but the monopoly to use force. This monopoly distinguishes the modern state with regard to previous states. The previous right of the master of the house to beat its servants and slaves is abolished. Force can only be applied by the organs of the state, and those organs are only allowed to use this force in a proportional manner in order to implement the law as last legal mean. "ultima ratio".

Accountability

State force is however relentless. Humans are permanently exposed to it. Who ever violates law can be punished when he/she falls into the hands of the prosecutor. For this reason one has to provide guarantees that the authorities which are competent to use state force are also controlled. State force can only be used within the frame of the law. State force has to be limited. State organs to use and control this force need to be accountable. Human beings who can use force without accountability will become monsters. „Power corrupts and absolute power corrupts absolutely" (LORD ACTON). In one of its recent judgements the Israeli Supreme Court has declared torture as illegal although many argued that it is often the only way to prevent further killing of innocent civilians with the following arguments: "*Deciding these applications weighed heavy on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. Our apprehension is that this decision will hamper the ability to properly deal with terrorists and terrorism, disturbs us. We are, however, judges. Our bretheren require us to act according to the law. This is equally the standard that we set for ourselves. When we sit to judge, we are being judged. Therefore, we must act according to our purest conscience when we decide the law."*(Decision of the Supreme Court of Israel as High court of Justice on September 9 1999)

The application of force used in the name of a state authority may be justified. When however privates would lock in a person, they violate the law. The prosecuting authorities of the state in stead have the competence to lock a condemned based on the judgement of the court into a prison. This competence however requires control and limitation.

We have however, to be aware that the state uses in the fewest cases force. Even in totalitarian states the threat of force is often enough in order to implement state obligations. Every body fears state discretion and state terror. In liberal states however, the state can implement its state authority with convincing arguments with regard to an opposing citizen.

MAX WEBER

What is now the content of state authority? MAX WEBER distinguishes three different types of legitimate authority: Legal authority, traditional authority and charismatic authority (M. WEBER, p. 475.). On our opinion the state authority is based on the trust the citizens have with regard to state organs. This trust depends on the

rationality of their decisions (M. KRIELE, Recht und praktische Vernunft, p. 117), on the decision making procedure, on the tradition and to a certain extent for certain states also on the charisma.

Economy

Power presupposes always a relationship between two or more persons. It is based on the strength and superiority of one person and at the same time on the – relative – dependence and weakness of the other side. Decisive with regard to the factor of power is therefore the economic dependence. Within state in which economy is centralized and nationalized state authorities may also use besides the state force and state authority also the economic dependence of some persons in order to implement state decisions. Who in such state is looking for a working place, a apartment or a place to study in a university will behave conform and good because he/she does other wise face important disadvantages which he/she is not able to bear. Similar situations may occur in liberal states, when persons depend on state grants, scholarships or other benefits in case of handicapped people.

It is important that the economic power of the state depends on a similar control as the application of state force. It has to be applied according to the principles of legality and equality with regard to every body in the same way. The student should not be refused a scholarship because he/she is member of the "wrong" party. The financial assistance with regard to old people should not be shortened simply because the entitled to the benefit has some committed days a crime. The law-maker has the important and difficult task to look that the economic dependence of certain citizens can not be misused by the administration. Such dependences should not cause new bondages.

Law and Might

How do now the power of enforcement, economic dependence state authority and Law relate to each other? The close connection between those different means for enforcement can most easily be explained vividly:

The artificial light is on, when the lamp functions and is connected to the electric power. State might and economic power are in a similar relationship to the electric power. Electric power can only generate light with a working lamp. The light respectively the law results only if the lamp respectively state-authority functions. Though without state legitimacy one can use force, but one can not make law with it. Is state authority of high quality it can with only little state force govern. A economic and good lamp needs little electric power in order to generate light. If however, the state authority is week it need much power in order to produce light or law. With no state authority even the best power does not generate law.

Trust

Dsi Gung asked its master "what is good governance?" The master answered: "To look for enough food, enough military force and for the trust of the people to its ruler." Dsi Gung continued: "But if one has no choice but to renounce on one of

those three pre-conditions, from which-one one could rather abstain?" The master answered "To the military force". Again Dsi Gung not giving up asked: "If one would have no choic but to renounce on one of the remaining two pre-conditions, from which-one one could rather abstain?" The master answered: "To the food. Since ages all people have to die. But when the people has no faith, one can not establish any government." (KUNGFUTSE, p. 123)

This old Chinese wisdom says more on the relationship between law and might than many sophisticated long scientific treatise. The military forces stay for the enforcement power of the state, the food for its economic might and the trust for the state authority. For the idealistic KUNGFUTSE the inner legitimacy has absolute priority; for MACHIAVELLI on the other side it has a lower value. However sustainability of any state authority can not be established without such inner legitimacy. Sooner or later each ruler is required to seek this inner legitimacy in order to run its country and the peoples living in this territory.

The law can only develop and flourish within a state which is militarily and economically powerful but which enjoys the trust of its people. Sovereignty can not sit on the bayonets. The bases of sovereignty must therefore be the trust of the people into the reasonable justification of the laws and the governmental behaviour.

II. Sovereignty and Legitimacy of the Law

Who would five the state and the law its inner authority? The concerned citizens, the people – seen as *Demos* or as *Ethnos*? Authority grows with the inner acceptance by the people. The quality of statehood depends on the question whether only state organs under democratic control can use state force within the common interest defined by the legislature. Each authority needs to build up its power to govern on the respect of the people. The real origin of statehood that is the sovereignty is embedded in the people. Without people one can use physical force but no authority. The sovereignty as fundament of the legitimacy of state authority emerges in the end out of the people. How was such major turn of the concept of the theory of sovereignty possible?

a) *From the Sovereignty of the Monarch to the People's Sovereignty*

Vox Populi, Vox Dei

The theories on sovereignty have strongly developed after BODIN. BODIN has declared the prince by the grace of God as sovereign. The theory of the social contract concluded fictively or in reality by the people has made the people to the bearer of the sovereignty. This development has been influenced and did influence at the same time also the democratic development. ROUSSEAU has finally brought the power of the monarch to the people. According to his concept of the social contract sovereignty is the expression of the "*volonté générale*" that is of the gen-

eral will and therefore always right and just. The idea of the general will embodies the symbol of the common interest of the people, but at the same time it contains also the danger of a absolutistic totalitarian democracy in which the dictator declares himself as the real bearer of the general will. Nevertheless one has to admit that ROUSSEAU has been lead with his ideal of a democracy by a small group which can be overlooked by each citizen as member of this group. ROUSSEAU has never been an advocate of a centralistic and bureaucratic large democracy.

Secularization and Sovereignty

Important however is the fact that with the shift from the sovereignty of the monarch to the sovereignty of the people also the connections of the monarch to the divine law have been dissolved. Thus, with the justification of the secularized people's sovereignty the transcendental relation between law and state has been lost. This shift die lead to statements such as: The people is always right. *Vox populi – vox dei* – the decision of the people is to be taken as decision or judgement of God. The interest of the people have always priority; the people or the state can not commit any injustice. The democratic majority decides represented by its members of parliament or in the procedure of direct democracy as final instance on all important issues which decision is to be considered within the interest of the nation. Fascist and communist or other totalitarian regimes did lead with such statements the idea of an absolute and unlimited sovereignty of the people to the absurd.

Who is he People?

Who belongs to the people? Until today this question is not solved at all. In contrary it did become the most difficult and crucial question. Since the people did become the substitute for the transcendental and unlimited legitimacy of God it did receive a symbolic and almost sacral myth. Whoever can decide, which people within which territory is empowered to execute people's sovereignty decides on the economic existence of many human beings not to speak of the fate of generations and of the power-relationships of different peoples. Thus, it is not astonishing that minorities claim their right to sovereignty as a symbolic demand in order to establish an original authority in order to build up their proper sovereign state and to undermine the sovereignty of the existing state ruled by the majority.

The dispute on the issue who belongs to the people has turned into a fatal question of many states and peoples. As up to now there is no clear, just and true answer to this question we are facing almost unsolvable conflicts. As in the old Greek tragedies the contradicting "right" of the adversaries and enemies gives birth to cruel injustice for many humans.

Abstract Notion of the People

The sovereignty of the prince is hardly to be compared to the peoples sovereignty for a different reason. With regard to the sovereignty of the prince it is somehow easy to determine who is the bearer of the legal and political sovereignty and thus, who is the real power-holder. On the other hand the people is a abstract quantity.

What has earlier been within the power of the prince, when it is transferred to the people's sovereignty will not be distributed equally to each voter or citizen although each vote counts equally. The innumerable dependencies of citizens within the modern state, the complex and inscrutable power structures of the state, the dissipated power-centres often result into total uncertainty of the citizens which do not consider themselves as being part of the sovereign but rather the game-ball of a in transparent power construction.

Pluralism and Power

Law and might appear today often separated. Legally the people are competent in many areas. But, de facto the peoples feel often covered up. The people is not convinced that the executive is handling matters within its interest. It considers things rather the other way round, that the people is within the interest of the executive. The many scandals of corruption in recent years have undermined radically the credibility of good governance of many democratic states.

Even within the small direct democracies run by the open assemble of the citizens (Landsgemeinde) the sovereignty of the people cannot be compared to the sovereignty of the prince. Even in those small open assembles majorities and minorities may constantly change. The same citizens do control the majority for a longer period. Thus, can we consequently conclude that it is time to give up the outdated notion of sovereignty?

Competence – Competence

There is no doubt that sovereignty understood as perfection of supremacy of power is in modern democracies in reality distributed to different national as well as international bodies and even in certain cases to private non-governmental organisations or economic companies. Such dissection of sovereignty would have been unthinkable for BODIN. None of these organisation however can claim to have the monopoly of the supreme power and authority. State power and state competences are rather distributed to different state bodies and local authorityes such as municipalities or regions within the unitary state as well as to federal units in federations. This division of sovereignty may tempt analysts to assign sovereignty to the body which is finally competent to distribute to other bodies competences, which in other words is the holder of the so called *competence-competence*. With such analyses however the dispute on the notion of sovereignty will be reduced to the only legal dimension and thus be dissolved from the notion of supremacy of power.

Indeed the sovereignty of the modern state is, as we have already mentioned in the introduction to this chapter, decisively limited. The economic, political and technical possibilities are enormously reduced. But also with regard to the internal politics the state cannot totally disregard the history and basic convictions of its people. Moreover it has to prepare decisions respecting procedures in which the different power-centres can take part and exert their influence. The "sovereign" is not any more the only master of its decision making process. Constitution, legislation, economy, environment, external relations, tradition and culture draw impor-

tant limits to its liberty of action. From the previous idea of BODIN that is of the absolute sovereignty of the prince who is the supreme superior over its people almost nothing has remained.

Legitimacy by Democracy

If we draw again attention to the question, what finally was the real origin of the theory of sovereignty of BODIN, we will notice that he was primarily concerned to legitimize the state respectively monarchic authority. With the notion of sovereignty of the prince BODIN wanted to justify that the prince does not only have the power but that he is also entitled to govern the people. Who enjoys the supremacy of power, who is supreme and final instance within a country, and who has the perfection of power is also legally legitimized to rule its people. The perfection of power transfers to the monarch the title to enact new laws, to abolish customary law and to order or prohibit its subjects any possible action. It is its power, which does legitimate him/her.

Contrary to the monarch the people does not have any more such need to legitimate its authority within a democratic state. The people does not have to legitimate is supreme competence as a sovereign. It does not deduce its legitimacy out of its sovereignty but out of the principle of democracy and majority. The majority is indeed entitled to decide over the minority. It is not only entitled to govern because it has the power but because the majority has the competence to decide over the minority.

Wherefrom however can the judge deduce its competence to condemn the guilty person? Of course from the law which entitles him/her to judge. Wherefrom has the law-maker the title to condemn certain behaviour of men and to mandate the judge to decide on the guilt of the defendant? The answer is granted from the constitution. But wherefrom ist he constitution maker entitled to transfer those competences to the law-maker? The constitution-maker gets its legitimacy out of the democratic right of self-determination of the people and not out of its sovereignty.

Moreover: Also the Power of the Legitimate Authority is Limited

The great weight which is given to the notion of sovereignty and how it has been understood has tempted the states often to overestimate their power of authority. The rulers did believe to be able to rule and steer the human society at their whim; and to such power they are competent based on their sovereignty. However, humans can only be steered within a limited range. The states have rather the mandate within these remaining possibilities to explore the path for decisions and measures within the frame of justice and common interest. For such task they need bodies which can enact decisions with valid legal obligations and in addition they need state-force in order to execute those decisions if necessary. Those bodies to start with the legislature up to the supreme judge are all required to justify their actions. Such legitimacy of state activity relies on the peoples and their constitutionally elected members of parliament but not on the sovereignty. As soon as the bodies do not respect the limits determined by the people this legitimacy is fading

away. However, also the decision of the majority have no unlimited legitimacy. The constitution, which determines the procedures and the competences of the parliament, does for itself not only need a legitimacy from the majority of the people but also from its minority. Discretionary discrimination of minorities and the violation of elementary human rights will keep minorities excluded from any possibility to identify as part of this state. Only, when the state is also seeking legitimacy with regard to its minority the majority can and shall the qualified majority with its constitution making power distribute competences to different state bodies.

If one understands legitimacy by the people in this sense one is also prevented from a totalitarian understanding of the principle of self-determination. Indeed, the people cannot govern over itself with daily governmental measures and decisions. But it can legitimize and limit the government and its daily activities.

b) Sovereign ist he Body which can legitimize Power and the Use of the Power

People's Sovereignty: Fiction or Reality?

BODIN did legitimate the power of the prince by declaring him as deputy of God with regard to secular affairs. The final secularization of the might of the state occurred finally by HOBBES; he used the theory of the social contract concluded fictively by the people. As a consequence this social contract theory started its triumphal march through the following centuries. With the renouncement to the moral-religious ties of the power of the state to the might of God a counterweight with regard to the exertion of power has been removed. In consequence only very few means remained within the hands of the people in order to stand up against the misuse of power. Indeed, the sovereignty of the people was in the best case just a symbol. With the social contract according to HOBBES the transfer of sovereignty to the state and with this indirectly also to a dictator became final and irrevocable.

Secularisation and Legitimacy of Power

As soon as state power has been secularized the need to legitimize power with secular arguments was raising. The social contract provided such compensation of legitimacy. With the legitimacy based on the social contract however, also the content of the might did change. As long as state power was tied to a divine legitimacy it had also within its contend to conform to the divine laws. Since the social contract justified might as such, it did not regulate its content. The Leviathan, the totalitarian dictator, the prince by the grace of the people all those rulers and power-holders were not bound on specific directives with regard to their application of the might of the state. According to HOBBES the practice of the final assignment of power was not limited. According to LOCKE the might of the state was limited by the inalienable natural rights of men. Only within this frame the state or the majority is not bound to any special content.

Solidarity and Unity of the People

The legitimacy of authority based on the social contract did in addition result into two additional essential problems which remain still explosive up to our days: On one side the notion of the people is lacking and with this also the legitimacy of a determined people to rule a other minority people.

How can the people be defined and who belongs to the people? Is the people determined by the territory or is it a unit to be determined by history and sociology? From our point of view all those people living within a determined territory unit are part of the people. Those peoples belong to the polity on one side because of the legitimacy of the majority and on the other side because those peoples are also characterized because they are prepared to have some solidarity with regard to the minorities.

When a people wants discriminate and to exterminate totally a religious community or a race such as the Jews the people has lost any claim to legitimacy with regard to this community. The "Aryans" would not have been able to legitimize the holocaust even based on a unanimous support for this horrific systematic killing of innocent people. If ethnic or other minorities are facing no readiness at all of the majority to invest any solidarity this majority population cannot be considered as a people in this sense. Such people hasn't any claim to legitimacy with regard to its minorities. The same is the case if as we have faced in the apartheid regime in South Africa if a minority terrorises the majority. Precisely in multicultural states such attitude causes a fundamental legitimacy-crises, which will sooner or later lead to the decay of the state with horrible consequences for thousands of innocent peoples.

The State as Enemy of the People

With the decline of the Ottoman Empire and the Austrian-Hungarian Monarchy in the beginning of the 20th century, with the decolonization in the middle of this century and with the implosion of the Sowjet Empire states are facing a new fundamental challenge. Many peoples exploited under the authority of a colonial state consider any state and polity as a symbol for suppression and lawless heteronomy. This fundamental opposition to the state and the law enacted by its supporters has remained even after the decline of those multi people empires. Thus, the minorities within the newly established nation-states, which succeeded the former colonial rulers, consider those successor states as the successor of the previous oppressing colonial power. The refusal of any legitimate authority of the majority people by the minorities has among other reasons been the cause that self-determination has been understood as a claim *against* the state and not within the state. For this reason, it is not astonishing that these peoples, once liberated from the alien yoke, are seeking their proper means in order to establish their own state and their own authority according to their proper identity. All possible symbols of the former colonial rule, must be destroyed and replaced by the proper symbol of common tradition, history, culture, language and/or religion.

Does the Right of Self-determination Legitimize?

Besides the issue of the definition of people and nation one has to face in relation to the social contract the second question with regard to the legitimacy. Who legitimizes power with the authority of a transcendental authority superior to mankind does not have to legitimize any more this divine authority: God does not need any legitimacy! Who ever supports its might by the people and does legitimize it by a secular body will always have to answer the question, why the people respectively the majority people has the right to legitimize legal authority and state power. Finally one can only legitimize this claim of nations out of a not any more justifiable right self-determination of peoples not to be deduced from any other legitimacy bases. The right of self-determination of the peoples however is for itself not without any limits. Thus, e.g. the traditional peoples sovereignty of the Swiss nation always been conceived as a limited sovereignty which is finally tied to God (cp. the preamble of the Swiss constitution as well as of different cantonal constitutions). Therefore according to our opinion also the right to self-determination cannot be considered as an absolute and unlimited right.

c) The State as Source of the Law

1. The „Feasability“ of the Law

Auctoritas non veritas facit legem

The secularized understanding of sovereignty did lead to a different conception of the law: Law became “feasible” and logically always changeable. Was the law originally traditional handed over and pre-given it could according to BODIN with the procedure of legislation be cancelled, amended or new enacted by the sovereign. According to HOBBES right and wrong emerge only out of the social contract; only the state is the source of the law.

With this assumption HOBBES has established the pre-conditions for the legal positivism. Accordingly AUSTIN leads the law back to the sovereign. Logically he recognizes only norms as legal which are derivable from the sovereign. Undoubtedly AUSTIN is right that only the state is entitled to use state force in order to implement the law. Only the state can execute the law with force. Does it moreover also have the competence to arbitrarily change, cancel or amend existing law? Does law only come into being by the state? Can one deduce from the monopoly of the state to enforce the law also its monopoly to make the law?

Law and Might are not Identical

Legal obligations exist, even though they cannot be enforced. The offender who escapes the prosecutor and thus escapes the area of power of the state has committed a crime although he/she is not punished. The law is tied to the might of the state but not identical with it and not a arbitrarily to be alterable authority.

Since the law can only be enforced by the state, the state becomes the most important but not the only source of the law. It has to adapt and to change the law

according to the conditions of the time, the needs of the people, their character, the geography, the conditions of the power structure, and according to the given basic values on freedom and justice. It however, it cannot dispose arbitrarily of the law. Rude injustice does not turn into law even though it might have been enacted by the state. State force is not overall and any time and for the enforcement of any command legitimate. The state is bound to the limits of humanity.

In this context we may remind us to a historical lesson which should be kept in mid for all future: When Thomas Jefferson was asked to make a draft for the American declaration of independence he considered also the slaves as being part of the American people. However, the convention asked him to delete this mention. We all know that this major failure with regard to equal rights and to discriminate humans from their basic rights ended up half a century later into a terrible civil war. Had Jefferson insisted based on his conviction (although he had himself slaves in his home) to require independence based on equal rights of all humans a terrible civil war may have later been avoided. We all should learn from this historic lesson!

Where are the Limits of the Sovereignty?

There remains still however the question, how the boundaries of sovereignty that is of the feasibility can be assessed. Which are the inalienable norms of humanity?

The legal science, which certainly would be competent and responsible to give an answer to this burning question has to long been tempted to be led by the criteria's of the empirical research of natural science although it belongs finally to the disciplines of social sciences. Thus, it has only recognized as a valid answer those analyses, which can be *provable* with final clarity and insight. But, so "pure" legal findings can only be if legal science renounces to make statements on substantial and essential contents of law and justice.

Rehabilitation of Practical Reason

1979 MARTIN KRIELE requires a rehabilitation of the practical reason the „prudentia“ with regard to the pure science the „scientia“(M. KRIELE, p. 17 ff.). If one would also recognize the findings of the practical reason as scientific findings, the jurisprudence would become able to formulate substantial requests with regard to positive legal orders. At least one could derive from jurisprudence what has to be considered as injustice and what would remain unjust even though it is enacted by a positive state "un-order". Indeed one cannot see how and why the systematic killing of nations, torture and the maltreatment of defenceless prisoners and ethnic cleansing can be considered as "legal obligations". These are clearly unjust and inhuman acts against humanity, which are in open contradiction to the basic human values, which can be deduced by the practical reason from the ethic and morality.

What Can be Generalised in the open Discours

For sure not every positive legal norm can be deduced out of the nature of humans such as has been partially postulated by the natural law theory of the enlightement.

On the other side, state competences have some limits, which can be recognized by the practical reason, because crossing those limits would clearly violate the basic principles of morality. The methods with which such limits of sovereignty can be detected have already been developed by the principle of generalization developed by KANT. Such generalization is best possible in an open discourse of equal partners which exchange arguments and counter-arguments without any prejudice (M. KRIELE, p. 30 ff.). When those principles are examined and checked with regard to their feasibility and realism, when they are open to the public and acceptable they can stand up.

The Discretion of the State

The practical reason does not determine each particular decision of the state. Based on the practical reason one can only deduce the limits of the freedom of decision of the state. Law is created by the state within the frame of the limits recognizable by the practical reason. Those limits leave to the state a big space of discretion. Because the state lends with its power to enforce the law a with regard to the morality higher legitimacy it bears a great and proper responsibility when it makes new law. It has to enact new laws within its limited space of freedom based on its responsibility to respect the conditions, the sensitivity of the people, the possibilities and the enforceability by the state authorities. Thus, the state needs to dispose of a great space of proper competences to make new law.

Principles of International Law

Besides the obvious insights of the practical reason also the norms of the international law have to be recognized as origin and source of the law which is limiting state sovereignty and the feasibility of the law. When sovereign states are competent internally to enact law they have to recognize the law which they consider valid as sovereign states also as superior law to the domestic law.

2. The Right to Resistance

When we assume that the state sovereignty has limits, one has to question, to what extent men and women are entitled to resist against the state force which enacts unjust and wrong law instead of right and correct law. With this question of the right of resistance we take up one of the most difficult questions of the theory of state. As with all other similarly difficult questions there are logically also with regard to this issue deep controversies among the different scholars, periods of the state theory and its exponents.

Right to Resistance in Middle-Ages

The state philosophy of the Middle-Ages was determined by the divine and supranational authority of the prince. The prince was obliged to implement the divine laws. How should subjects behave with regard to a King who supposedly did violate the laws of God? To this question the theories of the middle-ages and traditions give different answers. THOMAS VON AQUIN rejects the murder of the tyrannical hereditary monarch. In most cases – the hereditary monarch would according

to THOMAS VON AQUIN be replaced by an even more cruel and unjust tyrant. Or the acting tyrant would be challenged by the resistance to be even more cruel and unjust. If however, the monarch is elected by the people he has only a limited and delegated competence („potestas concessa“), then the right of resistance is valid. In case such a monarch misuses its competences the people is entitled to remove him from office. (vgl. TH. VON AQUIN, I. book, chapter 6., p. 24). Contrary to THOMAS VON AQUIN argues JOHANNES OF SALISBURY, the supporter of the theory of the two swords in his „*Polycratius*“: the murder of any tyrant is allowed if the tyrant violates divine law.

Right of Resistance and Social Contract

With the theory of the social contract the point of view changes substantially. Some as for instance HOBBES are of the opinion, that all rights are transferred to the Leviathan or to the Monarch with the social contract, others such as LOCKE endorse the idea of inalienable rights. If according to HOBBES the state would be competent to dispose on all liberties and human rights it could not at all enact injustice as justice and law comes only into being by the state. A *right* to resistance must therefore be excluded. Resistance against the forces of the state may be a moral but not a legal issue.

Contrary to HOBBES the supporters of the inalienable rights deal with the right of resistance. They are of the opinion that the social contract transfers to the state only limited competences. The inalienable rights of human beings cannot be transferred to the state. Therefore neither the state and of course not the tyrant can violate those rights. Logically LOCKE as founder of the limited social contract requires a right to resistance at least in the most extreme situation of emergency. KANT on the other side rejects a real right to resistance.

THOREAU: Passive Disobedience

In its essay „The Resistence to Civil Government“, which has been published in 1849 HENRY DAVID THOREAU (1817–1862) advocated a very far reaching right to resistance against the state violating basic rights. The individual according to his theory is even morally obliged to resist and not to obey state obligations which would require him/her to violate basic rights. The individual will have to resist against the based on his conscience legitimized by the principles of justice and e.g. refuse to pay the taxes (H. D. THOREAU, S. 15 ff.). This philosophy of a non violent but illegal resistance has influenced many political movements of the 20th century. MAHATMA GANDHIS (1869–1948) non violent resistance against the British colonial rule in India was nurished by this philosophy as well as the political movement of the amrican youth against the American war against Vietnam.

Catholic and Protestant Church

Based on the enlightment theory several states which were partially influenced by antireligious ideas (France in certain periods) has lead in particular the catholic church in the 19th century to endorse a general and comprehensive right to resistance. The Pope LEO XIII has declared in his Encyclica “Venerabile Fratres”

1881: “When the Laws of a state are in obvious contradictions to the laws of God, when they commit injustice against the church or when they prohibit religious obligations or violate the authority of Jesus Christ in his high priest the resistance is obligation and obedience a sin. And such behaviour is even in the long range interest of the state, which will suffer the damages for what it has damaged the religion. Similar statements one can find in the Encyclica „Redemptor hominis“ of Pope Paul II: “This common good which serves the authority of the state is only fully implemented, when all citizens have their rights secured. Other wise the society will in the end either in its collapse, or in the resistance of the citizens against the authority, or in a situation of total suppression, fear, threat, violence and terror. The different totalitarian regimes of our century have given us for such consequences many examples.”

Much less inclined to advocate the right of resistance is the protestant church. LUTHER was of the opinion that one has even to obey a unjust state if it would at least permit the people to exert their religious believes. The state as empire of the earth is an evil which we have to suffer for.

Right to Resistance and International Criminal Law

The experiences with totalitarian states of the 20th century and the increasing violation of elementary human rights with torture, despotic punishments, and concentration camps did lead to a new assessment of the right to resistance. On the bases of the natural law theory, the judges in the Nurnberg and the Tokyo trial sentenced the leaders of the Nazi and Fascist regimes. The defendant were refused to claim that the laws they had been commanded to execute have been enacted in a legal and correct procedure. As no state is entitled to command its subjects and servants to commit a crime, one is in certain circumstances even obliged to resist.

The installation of the two international Criminal Courts in the Hague and in Arusha, which are asked to punish the war crimes and the crimes against humanity in the wars of the former Yugoslavia and Ruanda, and in particular the new International Criminal Court, which is in function since July 2002 and which has a general jurisdiction to prosecute war crimes, the basic philosophical views on the right to resistance have substantially changed. Indeed those courts are based on the conviction that the sovereignty of the states is limited. In future states can only make laws within their limited competences. If they violate some basic principles of morality the dictators but also their thugs have to count to be sentenced by those courts. The principle of universality of human rights did not only limit state sovereignty theoretically but also practically. Who is not prepared to resist at least passively against criminal commands of a state will have to fear international condemnation. The right to resistance somehow entered by the backdoor of the international law within the domestic law.

Principles of the Practical Reason

An advocate of the principle for a right to resistance against those who rudely violate the principles of the practical reason is also KRIELE (M. KRIELE, S. 111 ff.). As one can deduce out of the practical reason directives for positive laws, this

positive legal order is justified only if it is in conformity with such directives. If it violates those principles, the individual has the pre-constitutional and pre-positive right within the frame of the detectable practical reason to deduce its right to resistance. After the second world war the criminals of the Nazi Regimes have been punished. Where did this court deduce its right to condemn the criminals of the Nazi regime, which based their crimes on the positive legal laws of the legal order of Hitler Germany? Such punishment could only be justified, when one considered the positive legal order as null, void and invalid, because it did violate law supreme to the positive law of the state. But even this assumption did not satisfy the judges. The court based its legitimacy even on the conviction, that the criminals of the Nazi regimes would have been obliged to resist passively against the commands given in application of the positive law. Thus, the Nurnberg Court required the existence of a right to resistance as a pre-condition to the positive law.

Dilemma of the Right to Resistance

The dilemma, which is embedded with regard to the assumption of a right to resistance, is obvious. It could lead to a total anarchy. Assuming a general right to resistance each citizens could then refuse any obedience to the state authority by claiming its right to resistance. When each citizen can undermine the state authority and question the justification of any legal obligation, the states will become ungovernable. The danger of anarchy however, is not reason enough to expel the *right* to resistance into the realm of morality. Because also this assumption would lead to absurd and illogical results just as the acceptance of a general right to resistance.

Right to Resistance and Right to Use Violence

Resistance is certainly only justified against extremist injustice. State authority will always have to prove one self to the challenge of critical contradiction. When the people keeps this critical spirit with regard to state authority the danger of misuse of power by state authorities is low because the people can early enough use peaceful means in order to defend its basic rights and interest.

In general, the right to resistance excludes the use of force and violence. When the state places itself into the injustice by using force in general the resistance with force is not legitimate. Many examples of recent revolutions and putsches have by the way revealed that in most cases the old regime of terror has been replaced by new state terror. The old wisdom that revolutions eat their children has remained since the Girondistes in the French Revolution have been overthrown by the … Only, if one can assure that the violent overthrow of the tyrant can be guaranteed without big losses of lives of innocents and that a new regime with a recognized authorty by the people can be established can in the extremist case violence be justified.

Contraditions with Regard to the Right of Resistance of Minorities

The increasing ethnic conflicts and bloody civil wars require a new assessment of the right of resistance. Up to now the right of resistance has first and foremost

been claimed against the unjust regimes and tyrants (Antigone). Now we are facing the claim of the right to resistance of ethnic minorities against a democratic majority. Certainly nobody would seriously question that at the time of the Nazi regime the Jews in Hitler Germany would have been legitimate to resist passively and also with violence against the terror of the SS. In his judgement with regard to the dissolution of former Yugoslavia also the arbitration court under president Badinter has legitimized the resistance of the Republics against the socialist federation. To what extent one can however legitimize the resistance of the Corsicans against France of the ETA against Spain, the IRA against Northern Ireland or of the Palestinians against Israel? Recently the international community has declared the Tamil Tigers (LTTE) resisting the government in Sri Lanka to be a terror organisation.

Why was resistance against Yugoslavia or resistance of the American Settlers against the United Kingdom justified but not the resistance of the American South against the liberal North or the resistance of the Corsicans against France? When is an ethnic minority entitled to resist violently against the majority?

GANDHI – MANDELA

Two movements of resistance of the 20th century may give us at least a partial answer to this burning question: In the middle of the 20th century MAHATMA GANDHI has successfully but without violence resisted against the colonial rule of Great Britain. NELSON MANDELA has, as leader of a previously prohibited African National Congress not only passively but also actively and with violence resisted against the regime of apartheid of South Africa. Also this regime did not at all renounce to violence and terror against its opponents. In his biography one can read that NELSON MANDELA justifies violence as a means for self-defence against an oppressive regime using itself indiscriminate violence in order to defend its power-position. Once, the power of the regime was fading away MANDELA changed its strategy into a policy of reconciliation and appeasement of the races, previously separated by a cruel apartheid policy. MANDELA has been awarded by the Nobel Price for peace after he has been elected president of the state by the first democratic non-racist elections in 1994!

From the Murder of the Tyrant to the international Right to Self-determination

The aim of the murder of the tyrant was to replace a arbitrary despot by a better ruler of the country. In the time of the revolutions the aim was to change the order of the society (French revolution Spanish Civil War). Not only the ruler was considered to by a tyrant but in particular the ideology which was imposed by the ruling party of the state. The right to resistance was claimed in order to overthrow the government or the social system.

The actual movements for secession claimed by ethnic communities however, do not aim at changing the state structure or state-society. They rather claim to be entitled to rule independently and sovereign a certain part of the territory of the respective state. They do not require the right of resistance against the entire state but only against a part of its territory. They rather require based on the right of

self-determination proper statehood over part of the existing state territory. Those rebellion movements consider themselves already as forces which in the name of the later to be founded state by themselves fight a liberation war against a unjust colonial regime. As soon as the states friendly to these liberation movements start to recognize their forcefully controlled territory as a state the conflict will necessarily turn international. With such recognition by the big part of the international community any intervention of the original state to restore its original territory will be considered as an aggression according to article seven of the Charter of the United Nations. With this international guarantee the intervention is prohibited and the Security Council is empowered to protect and defend the aggressed secessionist territories against the previous military forces of the original legitimate state. With such developments the international community will be involved into the conflict as soon as the state-hood of the resistance movement is internationally recognized.

Geneva Conventions

Our recent history has revealed the cruel and brutal conflicts caused by such rebellion movements. They use all possible means to terrorise the population and by this to internationalise the conflict in order to turn a domestic civil war into an international war controlled by the Security Council. There aim is to turn the civil war into a legitimate war of self-defence against the aggressive state of their origin. As soon as the domestic conflict has been internationalized it is controlled by international law. Rebellion "soldiers" cannot be condemned as criminal terrorists but as prisoners of war protected by the Geneva Conventions.

Gut already within the grey zone between an international war and an domestic conflict some of the prescriptions of the first and second additional protocol of the Geneva conventions are applicable to the conflict. The first additional protocol does already internationalize a domestic civil war when the movement of resistance is defending its territory against a foreign occupier or against a racist regime. The second additional protocol applies to domestic civil wars which are not controlled by the first additional protocol. In the interest of a comprehensive and universal application of humanitarian rights those additional protocols haft indirectly internationalised the right of resistance of such movements. Instead to limit the conflict this has lead to the not at all wanted effect, that namely the resistance movements undertake every possible action in order to internationalize their conflict and by this to get international recognition and legitimization. In reality the ethnic resistance and the terror of the state trying to suppress this resistance are brutalised. The states threatened by those movements try themselves every thing in order to criminalize and to brand the movement of resistance as a criminal international terror organisation.

Integrating and Excluding Nationalism

Are there still some pre-conditions which would legitimize violent resistance of a secessionist movement? Secessionist movements which legitimize their policy with the nationalism of the minority are often the answer to a chauvinistic nation-

alism of the majority which discriminates its minorities. A nationalism however, which fosters its proper values and culture as fundament of its history and identity will have to respect and even foster other nations and cultures. Such policy is based on the value of diversity which is in the end even within the interest of the proper nation and its self-consciousness. National identity thus is not per se negative. However, an excluding nationalism must be rejected because it will lead to discriminatory and discretionary treatment of other ethnicities and races. For this reason an excluding nationalism can never be a legitimate bases for a secessionist movement. The resistance or the 13 colonies in Northern America against its motherland was not based on a excluding nationalism. The founding fathers of the movement of independence did legitimize their resistance against the British colony by their will to establish a state, which should have its legitimacy derived on pre-state human rights. At the same time they did condemn the suppression of the British colonial rule and deduced out of this injustice their right to violent resistance.

International Intervention fort he Protection of Minorities

Today's movements of secession legitimize their actions almost always based on a excluding nationalism which reflects the nationalism and ethnicifized policy of the majority nation. Based on such grounds no right to resistance can be deduced. Even the international recognition and the international intervention does not seem to be justified in the light of the Charter of the United Nations. An international intervention can only be justified it is only within the interest of human rights and minority protection and not a cover for a chauvinistic nationalism of a certain minority.
Selbst die internationale Anerkennung und die internationale Intervention scheint weder im Lichte der Charta der Vereinten Nationen noch unter Berücksichtigung der Grundsätze des Widerstandsrechts gerechtfertigt, denn eine internationale Intervention im Dienste der Menschenrechte ist nur dann und soweit gerechtfertigt, als sie allein im Dienste der Menschenrechte und des Minderheitenschutzes steht.

Chapter 7 Theoretical Aspects of the Organisation of Government

I. Introduction

To empower Governments to limit the power of governments?

The state embodies political power. By organising the governmental branches the Constitution can either concentrate the state power to one single person or it can divide it in order to provide counterbalancing checks among the different governmental branches and thus limit their political power. In fact the Constitution can even provide a stalemate among the different branches and thus paralyse the different state authorities. The political power of the state meets the basic need of human nature to be protected in its liberties and to be able to pursue common happiness. If the branches established by the Constitution are not able to administer the power assigned to the government, society will degenerate into anarchy. Then the most powerful will fill out the vacuum. Thus political power needs to be properly „constituted". In order to constitute state power two different models have been developed:

According to the American conception the Constitution primarily has to limit state power. The aim of the Constitution is to restrict state power. According to the continental European view the constitution has first to enable and provide political power and then it has to restrain it according to the constitutional order.

Good Governance

Based on this liberal constitutionalism some basic principles have been elaborated to which the states should be committed. In fact the international community is following those principles which are considered as mandatory for countries in need of credits in particular of World Bank and International Monetary fund. Those principles are namely acceptance, transparency, participation, accountability, decentralisation, non discrimination of race, religion and gender with regard to resources and welfare, rule of law and security. In order to implement those aims there are different models of state organisation possible. On the other hand there are clear structures of organisation of authoritarian regimes, which do not compy with those aims of a liberal concept of the state.

Democracy determines the rules of the game

Today no state would declare not to belong to the family of democratic states. Each state professes to have legitimacy of the people and to implement the principles of democracy. But what does embrace the label of a democratic type of state? Democracy presupposes people's sovereignty. People's sovereignty for ist part presupposes a people or a nation, which is composed of citizens. A people which aims to dominate other peoples or disregards the rights of minorities can not claim to be a „Demos", that is a people, which has implemented Democracy in the real sense of its meaning. Democracy enables all citizens to participate on equal terms on the procedure. It is essential, that the procedure is an open procedure. That means, that the rules of the game are determined by democracy. The result of this procedure must be open. Thus one cannot foresee the result of the procedure. Of course one can forecast the result based on surveys. Those predictions can be mistaken. However when a nation is fragmented by two or more ethnic communities, if a important part of the population such as foreigners is excluded from the process or if parties or powerful institutions can change the rules of the game during the procedure democracy may degenerate into a tyranny of the majority.

Constituted Democracy

Democracy must be constituted, that democracy presupposes a Constitution. Without written or unwritten Constitution true democracy does not exist. The Constitution decides on the basic principles of the rule of the game. It guarantees the possibilities of the citizens to participate in the decision making process. The constitution also binds the democratic majority to the vested human rights and to the rule of law. Only based on the Constitution open procedures can be regulates. The Constitution can ensure, that no incompetent authority can change or falsify the rules of the game can. All institutions participating in the decision making process have to observe the constitutional order. The result is not foreseeable, but the rules of the procedure need to be known in advance.

Open and informative democracy

Democracy presupposes that one can determine the will of the people, that is what the people wants. This however is only possible, if the citizens can discern and evaluate the consequences of their decisions or their vote. Citizens must decide freely. They must have the opportunity to get information on all possibilities. If they get bias information, if information is falsified, if they are cheated and manipulated, they can not decide freely. Thus the authorities provided by the Constitution must be able to guarantee and implement the rules of the game and enable citizens to inform themselves on all possible alternatives and their consequences. Decisions of the citizens are only free, if the political discourse its open but the ballot is secret. Nobody should fear any damage for his of her vote. Only then the true and free will of the people becomes visible. Parties must be guaranteed equal opportunities, they must be on equal footing and have equal chances to convince the citizens of the benefit of their policy and the disadvantages of policies of their adversaries.

Participation of the citizen

What are the basic elements of a political community constituted democratically, which has as self-understanding to be a modern political society? A democratically constituted society is a society constitutes a political community which is finally determined by the political citizen. It is a society in which persons enjoy a active status (status activus) and are able to determine with their political power as voters the major policy of their society. Their active status is the determining factor of politics. A democratic constituted political community is a civic society. A civic society is only achieved, when all passive subjects enjoy at the same time also the role of active citizen.

The active status transfers to the individual ist share of the political power (status of the civic society). Citizens must be able to rely on the fact, that they have the opportunity to influence political decisions by the democratic procedure. The society must be constituted in such way, that with regard to each social conflict democracy will replace as a rational procedure solutions achieved by violence. Democracy has to force out totally violence or corruption as surrogate for decisions.

Within the representative democracy the mass of the citizens is only participation through elections by their franchise within de procedure of democracy. The open and transparent parliamentary procedure and the possibility to influence in the next elections the result, gives the people the competence to influence decisively the basic lines of the state politic.

Civic Society

The civic society is the modern form of the political society. It embraces all members of the society as far as they influence politics within their limited role as citizens and voters. It presupposes a separation between the public sector determined by politic and the private sector, a sphere in which political power may not intrude. In fact the democratic society requires a sphere from which political competence is excluded, which is strange to politics.

The French Revolution did proclaim the Rights of men and citizen as a fundament or a political egalitarian society based on equality, which cannot be corrupted by any feudal barriers or privileges. The notion of this egalitarian civic society of individuals was the Nation. Than to is active status the citizen grows into the Creator of the democratic consensus behind the society. This consensus is the result of a pluralistic political process.

The basic roots of the organization of modern States

The modern state organisation has been developed out of the interdependence of three decisive forces: - The political, economical sociological and cultural development of different nations; the discourses controversies among different previous state organs such as for example the dispute between the parliament with previous adversary functions and the Monarch representing the state executive. This is the battle on hierarchy among state organs. Finally the increasing need on one side to

legitimate state power to limit it, to make it accountable and to bind it on the will of the people.

II. The sociological roots

a) Historic influences

Economic and social situations

As long a people could survive with their own force and means for instance as hunter gatherers. Thus they did not need to live together in communities. Each of them could survive by its own means. Communities did not have to defend themselves against other communities. They did not need to organize themselves on structures able keep different families together. Thus one can assume, that some weak oligarchic structures for instance of a council of the council of the oldest or even some democratic forms may have been built only in the first period of establishment of some political communities. As soon as the nomads did come together as tribes, they needed a tighter order and discipline to bring and hold different people together in order to protect them from external and internal conflicts.

Nomad tribes

Nomad tribes have a strong sense to belong together and to form a unity. This unity has its legitimacy on one side based on the common kinship and on the other side by the quality of the leadership. A charismatic leader such as Dschinigs Kan can lead only if he/she outmatches everybody of the community. A bureaucratic terror of secret police is not thinkable in such society.

On the other hand the leader needs to have comprehensive competencies in order to be able to meet the dangers of the environment and of other settled tribes. The monocratic government based on the personal qualities of the leader combined with a strong will to remain together, is probably the most common form of government of these nomadic tribes.

States with big territories

As soon as tribes did settle, the conditions of the political organisation of the government changed radically. Did they settle in big and open areas, they had to provide big and strong armies in order to defend their territory. If one also imagines the big difficulties of transport and communication communities of big territories could only be hold together with a tight organisation and a tough leadership. In such organisation one can often already observe the beginning of a bureaucracy and the establishment of some kind of police forces. Japan for instance which as an Island did not have big needs for defence against foreigners did not have for a long time contrary to china a independent bureaucracy.

In principle each family had to survive at its own means. However men who have been asked to join the army, could not any more look after their family. In order to look for them and for their families the King had to provide taxes. The taxes were not collected by civil servants but by the big land-owners who could keep part of their tax-income for their own needs and had only to pass to their King a specific portion of their collected taxes. In return they had to protect the subjects and to provide assistance. These were the fundamental elements of the feudal system characterised by a vertically structured social order.

Often the feudal lords attempted to misuse their dominion and to exploit their subjects. Thus they needed protection from the central government which by protecting the land-lords could again increase the central power. This was the main reason for the development for bureaucracy and in the worst case into a absolute tyranny. The protection by hereditary monarchy of land-lords against their subjects was one of the main reason the absolute tyranny could with the support of the feudal aristocracy upheld is power for centuries.

Small territories

Did the tribes settle in smaller geographically strongly fragmented areas and self-contained regions, they could protect themselves at lower costs and efforts. (e.g. Geece and the old Israel) Thus these societies developed often differently. The smaller societies formed first state organisations with oligarchic and sometimes even democratic features. These societies did not have to collect high taxes for army and protection of the territory. The little risk of foreign invasion and the strong geographic protection allowed already very early a division of labour among different families which liberated them from slavery work and provided more freedom not only to work for the survival but also to strengthen their social contacts and by this to provide even a more sophisticated system of labour division. This division of labour is strongly connected to the idea of quid pro quo only possible on the bases of a contract idea. This again enhanced the principle of quality and the conviction, that the comprehensive society binding different tribes and families together can only be ruled by common by mutual consensus and acceptance of the majority.

Taking into account those different conditions of the different emergence of those societies one is not astonished to observe that the cultural and spiritual efforts of early democratic and oligarchic societies have more focused on the embodiment of a just political order acceptable for all. On the other hand states with big and open territories obviously focused their achievements mainly to impressive cultural achievements (such as the pyramids, the Chinese wall)

Slaves

In later time the free citizens living in defended towns were to afford to use most of their spare time to rule the state and the society by the slaves who had to work for their survival. This may have been the reason why in the old Roman Empire a somehow democratic development has been possible at least to a certain extent. The right to participate in the political process however in early democracies was

not for everyone but was restricted to a some chosen citizens. ARISTOTELES: „For the best material of democracy is an agricultural population; there is no difficulty in forming a democracy where the mass of the people live by agriculture or tending of cattle. Being poor, they have no leisure, and therefore do not often attend the assembly, and not having the necessaries of life they are always at work, and do not covet the property of others. Indeed, they find their employment pleasanter than the cares of government or office where no great gains can be made out of them, for the many are more desirous of gain than of honour. A proof is that even the ancient tyrannies were patiently endured by them, as they still endure oligarchies, if they are allowed to work and are not deprived of their property; for some of them grow quickly rich and the others are well enough off. Moreover, they have the power of electing the magistrates and calling them to account; their ambition, if they have any, is thus satisfied; and in some democracies, although they do not all share in the appointment of offices, except through representatives elected in turn out of the whole people, as at Mantinea; yet, if they have the power of deliberating, the many are contented. Even this form of government may be regarded as a democracy, and was such at Mantinea..... We have thus explained how the first and best form of democracy should be constituted; it is clear that the other or inferior sorts will deviate in a regular order, and the population which is excluded will at each stage be of a lower kind." (ARISTOTELES, VI. book, 1319 a)

From the Feudal State to the Industrial State

What are now the typical models of the organisation of a modern industrial state? According to BARRINGTON MOORE the organisation of the modern industrial states have developed according to three different concepts. Originally there was a close relationship between the feudal lords and its peasants. The land which was owned by the feudal lord hat to be cultivated by his farmers. For this service the lord hat to protect the farmers and to judge over their controversies. The farmers were even allowed to cultivate a portion of his land for their own supply. A third part mostly forest, water and pastureland has been used commonly.

After a wile the lord forced his subjects to produce more either to finance the court of the King and his army by higher taxes or to profit from the goods he could sell on the market in the town.

Did the big landlords care themselves of there estate, the farmer became more and more dependent. They turned into farm workers and to de facto enslaved. (e.g. East-Prussia) Were the landowners on the other hand permanently absent for their services at the kings court, they had to give more rights to their farmers. They received the right to exploit their domain. (France)

In countries with widespread agricultural economy this feudal hierarchy could be maintained for a very long time. In countries with significant industrial and commercial development the changing social order in the towns had also its impact on the population in the countryside.

Mercantile Gentry

Things developed differently in England. In the 15th century the population as been strongly decimated by the plague. The lack of labour force forced the landowners to focus their work on sheep breeding. Thus the lords could not cover their costs and needs with taxes collected from the farmers. They could only raise their fortune by selling the goods that is the wool produced by their sheep. This is the reason we can observe in England already in very early times the development of a nobility depending on its commerce. This gentry tried to be free and independent from the crown and in particular from high taxes. In addition the great amount of wool produced needed to be processed into textile goods. Thus some first textile factories had to be built. It was the early beginning of the new age of industrialization.

The commercialisation of the agriculture has contributed to the democratic development in England as the up and coming commerce and industrialization in the towns. In order to cover its needs the nobility was much more to earn through the free market and not to be dependent from the crown. Thus they gained power and independence from the crown and could counterbalance already in early times the crown.

Suppression of Peasants and Workers

The other two big feudal systems (France and Russia) did lead up to a full exploitation of the farmers. However they did distinguish themselves substantially. The French farmers got important independence because the nobility was absent from its dominion and had to serve at the court in Paris, contrary e.g. to the gentry in East Prussia. This partial independence of the farmers may have been decisive for the early bourgeois revolution in France.

The more the farmers had to be exploited the more power the central government needed to execute the interest of its nobility and to protect life and property of its gentry. The nobility lost its power and independence. Thus the development of a middleclass society which could have democratically influenced the country after a revolution was not possible.

The states which turned their peasants into de facto slaves provided a breeding ground to revolutionary developments. However often the transition to a new order was so abrupt that it did lead to a new form of slavery. The centralistic and totalitarian tyranny of the communist parties could therefore namely develop in countries which changed from the feudal system into a modern state without having a large segment of independent minded citizens active in commerce or industrial production.

Importance of Tradition

However the transition did not always develop according to the above mentioned cases from the feudal society into a modern society. In India for example after the reign of Dschingis Khan the government of the Mogul Kings impoverished the population. People became almost slaves of the Mogul. The farmers did not only have to feed the King and its aristocracy but also the army. Nonetheless it was

possible to establish after the British Colonial government a democratic federation which has struggled through innumerable conflicts internal and external conflicts up to the beginning of the 21st century and always upheld the very principles of the rule of law. It may be that the caste system did guarantee a structured society which remained loyal to history and tradition and which prevented communication between the casts and thus impeded the foundation of a big revolutionary party. Such party would require solidarity and loyalty of its members independent of their affiliation to their caste. Successful on the other hand was the revolution of non-violence of Mahatma Ghandi. This revolution had its roots in the Indian philosophy of life (Weltanschauung), which required of the human being to seek its happiness by abandoning from its needs and superficial wishes. This spiritual and independent person cannot easily be seduced by revolutionary ideologies promulgating material happiness.

In many African states the feudal system developed also differently. The strong inner loyalty of the tribes did not allow the establishment of a feudal system. Of course also the different African societies were fragmented by aristocrates, burgess and slaves. The tight group connection and the consciousness of the tribes was stronger then the class feeling necessary for a class-war according to the Marxist ideology. Magic traditions and charismatic leaders which represented strong African self-esteem did rather favour strong presidential governmental systems.

Four Revolutions

Somehow almost all of the states today have their roots going back to the English revolution of the 17th Century continued by the American declaration of independence and the French revolution which came to its peak in the different communist revolutions of the 20th century. These revolution did destroy or radically change the old political (not always social) structures of the feudal state. The former political structures were replaced by somehow rationally legitimised forms of modern governmental powers. Indeed only a rational theory or ideology as able to make the break through the traditional structures of the former feudal state. The predefined traditional social order could only be replaced by a rational political agenda. The different modern ideologies are a consequence of those in the various states sates very differently evolved governmental systems. In the 20th century those developments did lead to the two big blocks of the capitalist and socialist camps. In those two camps the governmental system, democracy and state organisation was somehow frozen and stiffened.

Mobilizing the Masses

A other may be decisive turn has been caused by the modern communication systems. The reformation of the catholic society by Luther was only possible by the first print media enabled in Europe (in China printing was invented in the first millenary) by Gutenberg. Also the French revolutionary movement could only bring together of poor and hungry peasants and workers by the print media. Since then also totalitarian Regimes have been able to use or misuse the mass-media for their

purposes. However the internet-revolution at the end of the 20th century might give opposition parties new possibilities for organising their opposition against governmental paternalism.

In the modern industrial state with its almost total mass-communication – whether or not manipulated is not relevant – one has to count with the fact that in any crises the masses of the discontented can easily be mobilised and be induced for an overturn of the government. Thus the governmental branches of a state are constantly facing the challenge to integrate an motivate the population and to legitimate its own policy

The successful theoretician and practitioner to mobilise masses as by no doubts MAO TSE TUNG. „Our heaven are the masses of the Chinese People. When they arise with us to take down two mountains, how should this not be possible!" (MAO TSE TUNG, quoted and translated from: TSIEN TCHE-HAO, S. 243). One has to bring the many ideas of the masses together, they need to be classified and assigned, then one has to present them again to the masses, that they will observe them and act accordingly; only when the masses are moving and acting one can evaluate, whether they pursue fair ideas. (MAO TSE TUNG on June 1st 1943, quot. and translated from : TSIEN TCHE-HAO, S. 245). "Each authoritarian leadership of labour is a mistake, as it violates the consciousness of the masses and the freedom….. Our comrades should not believe, that all what they understand, will be understood in a similar way by the masses. Only an analyses made with the masses will show, whether they have understood this or that idea and whether they are prepared to action. …But our comrades should not believe, that the masses did not grasp, what they themselves do still not comprehend. Often the masses are far in advance …" (MAO TSE TUNG on 24th of April 1945, quoted and translated from : TSIEN TCHE-HAO, S. 245).

The 20th century has well enough demonstrated what outraged masses are able to carry out. Emotions can increase multiple in the collective. The responsibility of the individual decays, the masses do not have a conscience. They can destroy in short moments what has been built up for centuries. Who is capable to move the masses can subjugate or even destroy entire ethnicities. To paint in black and white, the loss of any proportions, emotional fragmentation into friend and enemy, to seek the guilty responsible for every disaster. There is not state and no democracy which can claim to be immune against those risks.

11th of September 2001

September 11th and the sub sequent war in Afghanistan was a totally new signal for the coming disputes of the 21st century. From now on the confrontation is not any more primarily lead and disputed by states and regional blocks but by "private" organisations and groupings. In fact private terrorists threaten the states, democracy and the very legitimacy of the state organisation. The states are facing a invisible enemy, who basically questions and fights the rational legitimacy of the state organisation. Thus replacing the invisible enemy those states are combated based on the right of self-defence which are assumed to harbour terrorists. Thus we face a new age, where not any-more two ideological blocs are questioning each others good governance and legitimacy, but one block based on constitutional le-

gitimacy versus a terrorist organisation, which basically questions the rationality and legitimacy of the traditional state power.

b) Foreign Influences in a Globalised Environment

Economy and International Cooperation

Modern trade, economy and industry need extensive space for distribution and market. This may lead to economical concentration, which threatens in particular the autonomy of small states. Governments have in principle two possibilities to encounter this threat. Do they nationalise their private economy the state government will receive a total and unaccountable power. Is the government still willing to guarantee some liberty of its citizens, it has to design its state organisation in order to force the governmental branches to use their power directly in the interest of the liberty of the citizens.

If however the state is not willing to intervene in the private economy, it has to build up vis à vis the powerful economy a effective counterbalance. If it fails or if it is not possible, it has to establish the legal environment in order to decentralize the economy and to guarantee the balance by a state order enabling fair competition of the different economical powers.

The factual space of autonomy the states still enjoy however is considerably reduced. Sovereignty of the nation state is marginalized. This is an other reason the states have to seek bigger space of autonomy through international cooperation and networking. The need for a strengthened international cooperation affects considerably the organisation of the states. Governments can only maintain their credibility as partners in international organisations, when they are able, to enforce within the domestic law their international treaty obligations. Could one imagine e.g. that a country can achieve membership in the EU, which is (e.g. because undemocratic, confederal without efficient central institutions to implement the European law and neglecting it human rights commitments) unable to apply the European Law within its legislation, which in most European States encompasses today almost half of the total legislation of member countries?

Sozial Partners (Management and Employees)

An additional feature of the structure and organisation of modern industrial states is their disputes among employers and employees represented by their labour unions. Industries in the beginning of the industrial revolution needed numerous employees. As the individual employee was to feeble, to enforce its interest with regard to its management, the workers founded labour unions to strengthen their power with regard to the employers. As counter-measure the patrons on their side founded employers-associations. Subsequently the labour-unions enlarged their power by creating general labour unions all over the country. Thus both partners elaborated common agreements in order to determine the frames of the rates and to influence state policy with regard to economy and labour regulations.

Majoritarian democracy versus contract-democracy of the social partners

The rules regulating labour and social security, as we know, are to be established in parliament. The conflicts between employers and employees however are decided outside parliament and thus can not be solved by majority decision as can legislative disputes. Are they unable to reach consensus, they use offensive measures such as strike and lockout. Such offensive measures are only possible if the labour unions have the power to counterbalance credibly the employers power. Do they fail to implement their interests through negotiation with their partners, they have to try it by convincing the majority of the legislature. The consequence is, that in democratic states the regulations on labour and social security are established either by the legislature or by the negotiation of the social partners. The legislation in general is confined establish the frame conditions to guarantee the order of the free market. Important issues such as tariffs, holidays and working hours are often negotiated by the social partners by treaties among the partners but with force to oblige also agreements between employers and employees within all respective branches . The democratic state reduces itself to be only the arbiter and facilitator overcome unsolvable disputes within the common interest.

Global Market of products and financial services local labour-market

However also the labor unions are forced to accept the new pressures of the global market. Indeed products and services are offered globally, but the labor-market is still regulated locally. In consequence of this disparity although the nation states are autonomous to regulate labor, they need to respect the interest of the globalised economy. The loss of sovereignty of the states affects also the free space of the labor unions. Facing international competition and the threat of unemployment they are obliged to submit within the disputes of social partners to almost unbearable demands.

The development of the mass-medias

Beside the far-reaching economical alterations the triumphal march of the mass-media contributed certainly substantially to the development of the modern state organisation. In the 15th century letter-press printing has been invented in Europe (one thousand years earlier in China) and enabled communication of ideas and ideologies on a broad scale. It enabled the reformation of Luther. In the 20th century radio and television, cinema and broadcast with satellites enabled peoples to get important information on the spot. The consciousness of being and belonging together, the substantial notion of public opinion did get a new dimension. States, which are democratically organised, are able to reach with the mass-media a much greater public than in previous times. On the other hand the media will also inform the governments on issues of the people, which they have to take into account in their decision making process.

Internet

The internet provides for the states new up to now barely thinkable possibilities to keep in touch with the population by permanent and interactive communication. In

future governments do not depend any more on private firms in order to be informed by public opinion polls. One can imagine, that by internet it will become possible to organize permanently votes of the citizens. This may lead in the near or far future to new concepts of representation and to induce states to an extension of direct democratic tools within their decision making process.

Who watches the watchers?

The interaction between governments and mass-media is often very particular. On one hand one has to admit, that the mass-media may be used and misused by the governments to misinform, manipulate or falsify information in order to manipulate the population. On the other hand governments in states, which guarantee some liberty of mass-media are often under the pressure of the media. Thus one can observe how seriously most politicians react to critical opinions published in the media with regard to their behavior. Indeed although the mass-media do not represent the public opinion as such, they represent the published opinion of the people, which frightens and thus is highly respected by the politicians. It is but understandable, that form all parts the question is raised: *who watches the watchers?* That is the media, which are not under any political control. As long as they can not be controlled by civil servants, they are able of limit substantially the power of elected members of parliament, of judges and of executives. If the mass-media are under control of some very few multinational firms they enable those firms to use their economic power for their political purposes with undemocratic means. If those firms are themselves under control of politicians (cf. BERLUSCONI) or presidents, they can basically threaten the very democracy of a country. The way to a authoritarian regime is opened.

The mass-media provide for quick and comprehensive information of the people. This does level out information. Superficial and information on marginal issues can mislead the population. On the other hand the need to know better and to get substantial background information on in-transparent processes in administration government, parliament and economy will strengthen. Those who are in power and have power will have to justify their decisions with much more convincing arguments than in earlier times.

The Media in the Service of Governments

Human beings have always submitted to dependencies when they got in return some equivalent services. The feudal barons of the middle-ages and the dictators of the present could and can always fake simulated returns. Or they can make a fuss out of unimportant successes. They can also intimidate and frighten the population. Publicity has become a factor for politicians which has to be and can be calculated within their propaganda. In countries with free-speech guarantees the Media on the other had are able to evaluate services and counter-services of governments, they can make transparent, and dispute information which may have been falsified by the governments. If the population is convinced that there is no equivalent return from the government, it can with its political tools show to assert its power and influence.

The very fact, that in countries with free press governments are permanently accountable by the mass-media for their benefits and services in return has modified the winner takes all democracy into a "contract-democracy" among the political elite. This contract-character of democratic government can only be achieved, if a great bulk of the elite society can comprehensively be informed on costs and benefits and if institutions are installed, which effectively can make all power holders accountable.

World Bank and International Monetary Fund

In the age of globalization important international credit-institutions such as the Worldbank and the Monetary Fund influence directly or indirectly the organization of states. Both institutions have developed the principle of "Good Governance), which includes transparency, acceptance, accountability, democratic control, rule of law, human rights and decentralization. States depending on these credits have at least to prove on the surface, that they meet the standards required by those institutions. They enact a legislative system based on a constitution, which at least appears to adopt a rule of law habit and provides for accountability of governments. As these organizations are almost only under the control of the developed states, those states controlling the international community dispose on their part of a almost unlimited and unaccountable power to influence these organizations. The United States and the EU which are also the most important creditors use their influence also through bilateral cooperation.

Council of Europe

Unlike in previous times states who want to join the council of Europe have to ratify the human rights convention including the additional protocols. Moreover the have to provide evidence, that their domestic legal system is in accordance with the minimal standards of the Human Rights Convention. A commission composed of Experts (Venise Commission) close to their governments checks the power balance of the governmental branches in order to guarantee, that the democratic conditions of the respective candidate are fulfilled and that it can be adopted as new member state.

Non governmental organizations

The influence of non governmental organizations (NGO's) on the organization of states in week position under the argus-eiyed control of the international community should not be underestimated. Those privately organized but by their states supported NGO's provide subtle analyzes on the legal situation of a specific state. Based on these unaccounted analyzes they can influence based on their expertise and on knowledge exchange the basic structure of a state. At the same time they do not have to bear the negative consequences of possible bad advises.

Corruption and international Terror

Underneath each state-organisation is today confronted with the permanent pathology of corruption. Corruption threatens to undermine the credibility of all state

institutions. In spite of transparency, and checks and balances almost no government has been able up today to encounter efficiently the evil of corruption. Who considers that the international arms and drug trade have an annual turnover, which exceeds considerably the entire world-wide production on Oil, has to recognise, that there are barely organisations and states, which can claim to be immune from this pathology. In spite of globalisation the international community did not succeed to tackle the problem on its roots, that is to really stem the consume of drugs and the production of arms. The developed countries want the containment of the production of drogues, because they are threatened by the trade, the developing countries demand the reduction of the production of arms, because they are threatened by the permanent danger of new civil wars. No state was however ready up to now to start and to reduce the production.

Venality of Politics

If states want to protect themselves against corruption, they should rather be reminded to the famous wisdom of LORD ACTON: „*power corrupts and absolute power corrupts absolutely*." Transferred to the threat of corruption one has to depart from the experience, that human beings are in principle venal and that the venality raises the more human beings depend on additional income or it raises according to the economical advantages, they can achieve by selling their public power to private interests. If the ordinary income of a judge is hardly sufficient to nourish its family, one has to expect, that financially powerful parties in the trial will buy the judges. If managers of private firms are immensely better of than politicians one should not be astonished that the latter will more often be ready to buy illegal advantages with doubtful measures.

Human Rights after 9/11

We could and can observe that the war against terror fought by the US after 9/11 will have a considerably effect the state organization. Indeed one has to worry, that the fear of terror will bring us to an important draw back with regard to the laborious and lengthy effort to improve the human rights protection. Authoritarian police actions and authoritarian regimes will enjoy again major understanding and support, when they credibly can sell their policies to serve the war against terror. Who ever – because of its nationality, age, gender, way of life or of his personal network – becomes suspicious will have to count with major discrimination and will barely have the chance to get the appropriate legal protection. Governments hide behind the populist argument and can convince the majority with their politics of fear.

III. The Theory of the Type of States

The theory of the types of state is as old as the theory of the state itself. Three questions are to be asked in this context: What should be the criteria's to distinguish and categorize the different types of state? Should the theory of the type of states be limited to examine only the question, who is or are the power holders?

Can one deduce from the type of state on the value of the state and decide that the value of state is dependend on the type which has been choused. Thus either Monarchies, Oligarchies or Democracies are the best and most valuable states.

The Typology of ARISTOTLE

Having determined these points, we have next to consider how many forms of government there are, and what they are; and in the first place what are the true forms, for when they are determined the perversions of them will at once be apparent. The words constitution and government have the same meaning, and the government, which is the supreme authority in states, must be in the hands of one, or of a few, or of the many. The true forms of government, therefore, are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest, whether of the one or of the few, or of the many, are perversions. (ARISTOTLE, Politics Book III translation Benjamin Jovett)

This statement of ARISTOTLE is since two thousand years in the center of the theory of the types of state. Accordingly states can be distinguished as democracies, when the majority of the people governs in the common interest, or in degenerated democracies or in mob governments, when the masses are misused to govern for the interest of some few. One classifies types of states into aristocracies, when a small number governs in the common interest. Those aristocracies degenerate into oligarchies, when the small minority governs only for the sake of some few. Monarchies are governed by one person, if this monarch is seeking the common interest. He or she turns into a tyrant when he/she only governs in its personal interest. ARISTOTLE does not consider the question who governs the state that is the very type of government to be decisive but much more the question how people are governed. One has not to analyze who governs in order to classify a state but whether the measures the government takes are in the common interest and if the decisions taken are just and fair. In contradiction to other authors such as the big philosopher of the Middle Age THOMAS AQUINAS consider the value of the state to be dependend from the question who governs the state. For THOMAS AQUINAS for instance the Monarchy is the best type of state, because only one person governs and the leadership is rooted in one person. Democracies and Oligarchies on the other hand lead to controversies in which each is only seeking its personal interest. (TH. AQUINAS, On Kingship , 1st book , 2nd. Chap.).

KELSEN

I agree answers KELSEN 700 years later if the question, what has to be socially proper, what is the good, what is the best can be answered objectively and finally in a way which obliges everybody and which is lucid for all. In this case democracy as such would be impossible and even evil. However those who know, that human knowledge can only recognize values which are relative can only justify the power and violence which may be necessary for their implementation, if he/she has the legitimacy and the acceptance not of all but of the great bulk to the

enforceable obligations or at least the majority of the society. To seek the approval of all would mean anarchy. That is the principle of democracy. It enables the largest possible freedom and it seeks decisions which achieve the lowest possible contradiction between the volonté générale, that is the content of the state order and the volonté de tous, that is the will of each individual subject to this order. (H. KELSEN, p. 66 ss. translated by the author).

Is ARISTOTLE overruled?

Are we still able to assess the variety of the actual almost 190 nation states by applying the typology of ARISTOTLE? A part from some very few exceptions almost every state claims to be democratic. At the same time however the different states reproach each other to violate continuously the very principles of democracy. China reproaches the western democracies, to rule in the interest of oligarchic economy monopoles, which exploit the socially week and breach the social rights. Western nations on their part pretend China to be a totalitarian pseudo-democracy which violates minority and human rights. Some such as LENIN and MAO want to mobilize the masses for their democracy, some require rational discourses and solutions based on reflection and choice. Others observe democracy as a tool to implement and justify the tyranny of the majority. "A majority taken collectively is only an individual, whose opinions, and frequently whose interests, are opposed to those of another individual, who is styled a minority. If it be admitted that a man possessing absolute power may misuse that power by wronging his adversaries, why should not a majority be liable to the same reproach? Men do not change their characters by uniting with one another; nor does their patience in the presence of obstacles increase with their strength." (A. DE TOCQUEVILLE on Democracy in America)

Different Criteria's of the Typology of States

For the classification of modern states into different types one can use very different criteria's and distinguish between stable - not stable states, flexible - non flexible, reliable - reliable states, states, which are more or less respecting the rule of law, liberal - liberal states, centralized - non centralized states, failed - not failed states, totalitarian - non totalitarian or states with powerful and non powerful political institutions.

Age and Tradition of the Constitution

An additional criteria may be the age of a constitution. The Japanese imperial family although today without political power reigns since 1500 years. Most actual states do not exist for more than 100 years. Some states can accommodate without problems to new developments. The Scandinavian states for instance are considered very flexible. Other states such as for instance Switzerland take time to adapt to new situations. Strongly committed to history and tradition are states which are linked to religion. Saudi Arabia for instance is still strongly embedded in its religion and history. Finally there are also democracies in which some very few powerful, traditional and rich families are able to control political power.

Geography

One can also distinguish between states with established and big bureaucracies and those which try to contain as much as possible their bureaucracy. ROUSSEAU and MONTESQUIEU based their decisive criteria on the size of the territory and of the population. A state with 1.3 billion inhabitants as China or one billion as India can not be governed according to the same principles as a state, which counts more than hundred times less inhabitants such as Switzerland. Of course one can also claim, that the climate and the geographic conditions may have important influence on the way a state is ruled. The simple statement that the UK and Japan are islands may have bigger impact on state-theory, then one might imagine at first glance.

Centralist - Federalist

States can also be classified according to their inner structure. Today 25 states with 40% of the world population have a federal structure, other states are Unitarian. But also within the federal states and within the unitary states a great variety of more or less centralization is imaginable.

IV. Criteria's of State Organisation

Basic Consensus as Precondition

Imagine that we are on the isolated Island with only two persons Robinson and Friday. Imagine also that a part from those to human beings an other three shipwrecked persons would have stranded on the island. Those five persons have now to decide, how they should organize their community. First they would wonder what should be decided in common and thus be mandatory for all and what should be left to the decision of each individual. With regard to the decisions in the common interest they would have to decide how and by whom those decisions should be taken. Thus they would have to determine the procedure.

This example teaches us, that the question of how a state should be organized can only be asked it there is a basic consensus of the people to create a common community. Precondition is the basic consensus to manage in common the future. The basic consensus legitimizes the community to establish and install on its institutions and procedures. Also a state organization presupposes such basic consensus.

Input- oriented criteria's

According to what criteria's should a new community organize and establish its governmental system? The five inhabitants of the island can give an answer to this question from two totally opposite points of vie. They can propose to organize the state in a manner to give each of them the right and the possibility to defend its interest based on one person one vote. The organization according to their view is ideal, when each inhabitant is given the broadest possible power to influence the

community according to his/her interest. Decisive to assess the value of an organization is not the result and its achievement (output) but the political possibilities of each of them according to the equal right to vote to have an impact on the results of the decision.

Output-Oriented Criteria's

The inhabitants however may have an opposite standpoint. They may pretend, that the organization of the community and its value does not depend on the input but on its output. Does one assess an organization according to this criteria one has to ask the question, how one should install a organization in order to achieve the best results. To what extend is it efficient enough to guarantee the implementation of the common good or common interest. This point of departure was determinative for several theories. PLATON believed that the common good is then best implemented, when the state is run by philosophers. THOMAS VON AQUIN was of the opinion, the common good can only be materialized by a King, who is above the personal and private interest and does not seek for himself particular interests; ROUSSEAUs small republic is based on the conviction, that only a small is able to realize the will of the people in the sense of the volonté générale.

Separation of State and Society

A part from these in- and output theories one can find a couple of additional concepts, which in particular assess the value of a specific state organization on the criteria of its protection of individual liberty. In consequence the best governmental organization is the one, which leaves as much as possible liberty to the individual and which gives as little as possible power to the government.

Good or Democratic Governance

The Worldbank and IMF criteria's were first the achievement of good governance and thus based on the output and input or on the result of state decisions. Thos criteria's are as already mentioned transparency input, accountability input, rule of law (output), decentralization (input) acceptance (input), human rights (out put). Now it seems that the international community and in particular the UNDP they have changed basically to input oriented criteria's such as "democratic governance".

Tools to Manage Conflicts

A n other criteria is based on the institutional and procedural possibilities of states to solve or manage peacefully internal conflicts of the society. Those conflicts can be suppressed by the most powerful and thus postponed for a time the minority has acquired enough power and confidence to defend its interest directly or indirectly through terrorist acts. They can also be managed by the rational discourse and the wisdom of the rulers may they belong to the democratic elite or to the actual responsible rulers.

Protection of Minorities

Often one oversees the million-dollar question": How do you deal with your minorities?" According to the already mentioned criteria's this issue gets little attention. The protection of minorities, their rights and autonomy (input), but also their inclusion and their possibilities to participate in the power-sharing of the state (output) have however to be assessed according to a special criteria.

Capability to Learn and to Adapt

Those of the scientists who are influenced by cybernetic arguments evaluate finally state organization by their capability to learn and to adapt their organization and decision to the information the new developments and necessities. Are they flexible and can they adapt fast to new societal needs, then they are well organized. If they have difficulties and prove to be inefficient not governable and rigid, their governmental organization will have according to cybernetics to be modified.

Power-Sharing

Who analyzes the governmental system of a specific country will also have to look into the voting right of the citizens. This issue does not depend on the question of just results (output) but on the question, whether the distribution of the rights citizens to participate in the power-sharing process is equal, just and fair. Is the principle one person, one vote, one value respected? Does every citizen has the same opportunity to achieve a governmental post? Can foreigners be excluded from the right to vote? These are questions, which have to be assessed when the governmental system has to be analyzed under the value of justice.

Minimize Human Mistakes

Who ever respects Lord ACTONs sentence: „Power corrupts and absolute power corrupts absolutely" will prefer such governmental system, which is most apt to minimize misguided policies and human mistakes. Human beings have the capability to learn. Thus, when they exercise political responsibility, they can constantly improve their mistakes if they are under permanent control. As soon as they feel independent and without supervision, they tend to misuse their entrusted power. For this reason the different types of State organizations need best realized checks of the different governmental branches including their subordinate administration. As one can to create the perfect human being, one can not create the perfect and ideal state. The theory of the types of systems of government should thus less ask, what form of government is ideal, but much more seek to detect state organizations which can at best minimize human mistakes and misbehavior. Churchill has stated the known sentence, that democracy is the worst form of government except for all others. Obviously he was convinced that in democratic states human mistakes may be at best avoided, but that this form of government does not at all provide the guarantees of a excellent government.

V. The Idea of Democracy

a) Basic Theories for Democracy

Democracy of Equals: ARISTOTLE

Of forms of democracy first comes that which is said to be based strictly on equality. In such a democracy the law says that it is just for the poor to have no more advantage than the rich; and that neither should be masters, but both equal. For if liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost. And since the people are the majority, and the opinion of the majority is decisive, such a government must necessarily be a democracy (ARISTOTLE, IV. book).

Since ARISTOTLE one has always disputed the issue, whether democracies giving the people the power to govern are the best form of governments. Even the firmest representative of the popular sovereignty ROUSSEAU is with regard to this form of government quit skeptical. It is according to him only possible in a small territory, if the people are able to assemble continuously. In addition this type of government is only made for a people which is made of Gods (cp. J.-J. ROUSSEAU, 111. book , 4. chap., S. 74 ss). However we have to keep in mind, that this statement is only meant for the executive. ROUSSEAU advocates the participation of the people in the legislative process and in making the social contract.

Undisputed Democracy

In 1949 UNESCO has made a survey on the issue of democracy among scientists of different member-states o the United Nations. No answer gave a negative assessment of democracy. Each advocated democracy as the only and the best form of government of today. (cp. BENN and R. S. PETERS, S. 332). Unanimous however were all proponent of democracy that the perception of what is democracy and of its content and notion did differ largely. This hasn't changed up to now a days.

The principle of self-determination

The main focus with regard to democratic development is by no doubt the demand of self-determination, that is the liberty of each member of the community to decide autonomously on its obligations. The acceptance of the majority rule could probably only evolve, after people detected, that by self-determination of each member, each of them would be given a veto-right over all others. Such veto-position with regard to the others becomes then intolerable when the majority becomes dependent on a common solution and that only the minority vetoing the majority proposal will be privileged by the veto. In the very beginning of the early Swiss assemblies of the people one had to insist, that the minority will have

to obey the majority. A proof, that the right of the majority to impose the decision on the minority did only gradually evolve.

Consensus Driven Democracy

De facto democracy today in Switzerland is still led by the idea, that one has to seek as much as possible consensus in order to come close to a unanimous decision. The bigger the majority, the more important is the result of the vote and the more the executive and the parliament will follow the result of the decision. Although many small council composed of pair members can decide on a majority bases, they always are anxious to have a unanimous result. The federal structure on its part enables a far reaching participation of citizens in particular in small cantons and in the municipalities. But also the proportional system, which should include as many as possible different layers of the population to be represented in parliament as well as the necessity of a double majority for constitutional amendments (majority of the people and of the peoples of the cantons), are clear signals, that the pure majority principle has been softened in favour of a best possible representation of minorities.

MARSILUS OF PADUA: Majority Decision to facilitate the search for truth

Does the majority decision enable a more just, conclusive, truthful, correct result that would the decision of one individual or a minority? In order to convince democratically a majority, disputes, rational controversies and persuasiveness are needed. The arguments, which will be accepted by the majority are in principle supposed to be more convincing. Can one assume that for that reason one has to accept them for the sake of better justice or better correctness? “The totality of the Citizens or their majority – which both can be considered as the same – are more capable to approve or disapprove a proposal, than each particular part separated from them… as all or the great bulk has a sane brain, reason and the eagerness of pursuit of the state and all, what is necessary for its existence. … If the crowd is not substandard, each individual may be a bad judge, but all together will be better or at least not worse.” (M. VON PADUA, 1. part , Chapt.. XIII, § 2, 3, 4). If the discourse is carried out on a rational level the decision will be well balanced and better, because more opinions and views can improve the information and the ruling will have to be tested by rational arguments.

Emotional Democracy?

One should not oversee, that the controversies are often not carried out on a rational bases. Personal political interests, prestigious or pure egoistic motives bearing envious motives can as well as rational arguments influence the decision. In addition one has to admit that the precondition of a rational discourse is a minimum on solidarity. The participants have to be convinced, that they will based on a common and fair dispute achieve a better result. They have also to be prepared to submit to the result and to accept that finally all interests of the participants have to be considered. If these overall conditions are not fulfilled, the majority will not be able to achieve a decision which is more fair and more just.

Short-sightedness

Moreover it is quite difficult to defend long-term interests in a democratic vote on concrete issues. This makes governance in particular facing the actual complexity or controversies in our societies more difficult. Deciding on issues connected to energy or environmental protection for example one has to decide on long-term interests taking into account future generations. Obviously it is most difficult to visualize possible future evils and to make them so evident, that people are prepared to sacrifice short-term interests for the sake of their long-term future. The need to have more foot roads and walkways. The small interests of the petty bourgeois play repeatedly nasty tricks to direct democracy.

The Majority Decision as Possibility for Mastering Conflicts

For a long time conflicts between different communities of a society have been "mastered" with arms and violence. Those who had more, better and stronger arms, those who were prepared to take bigger risks, those who were superior in strategies and tactics did win the battle. The Rights were with the superior. With its task to pacify society the King or the Emperor could gradually impose its authority as highest judge. In this function he achieved the capacity to solve actual conflicts with his power and his arguments. In this way could be developed the alternative to master conflicts more or less rationally before the court.

But all conflicts could not be overcome by this procedure. In particular controversies within the nobility were often off hands of the King. Such controversies there could and can not be peacefully solved in a country which is ruled only by one monarch or dictator. Single power-holders can only try to suppress conflicts, to remove them selves or to let a part or the territory secede. Democratic disputes however enable to master much heavier conflicts to a much broader scale. Basic social conflicts of interests can be mastered in a democratic discourse. This way of conflict-management though presupposes that the parties can enter in the dispute with equal chances and with the same arms. If one party can compete with unlimited financial means and the other is almost not able to finance a poor poster and thus can not take the arguments to the citizens, it will barely accept the decision of the majority.

The Iron Law of Oligarchy

In any democracy some groups will be more and some less powerful. Even in big assemblies one or several spokesman will be more influential than common participants. Those spokesman may be able to catch and even modify the emotions dominating the meeting and thus to affect the final decision. In the end the assembly may ratify or reject a proposal. However the multitude of diverse opinion have to be focused on one but not more then two alternatives.

Democracy thus is controlled by the iron law of oligarchy. Those who are able to influence decisively the ballot hold respectively more powers than the back-benchers. Even in the House of Lords one can find the spokesman, which are more important than the back-benchers. Although one has to admit that, the upper

chamber of the UK is apparently the only known council, which has been able over centuries to organize a discourse without institutionalized moderator.

Power of Experts

If the different influential groups and their interests are transparent and thus accountable by the people, democracy is not in danger. However often not transparent is, who belongs to the circle of oligarchy and how one will be admitted to this inner circle. Is the oligarchy of the power holders restricted to some few economical monopolies, the political autonomy of the state is fading away. Often the members of the oligarchy represent conflicting interests (e.g. Employers v. Employees, Consumers v. Producers etc.) so that political organs may get the role of independent moderators or arbiters assessing the different interests within a very limited space.

One observe more and more postulates, even to integrate scientific as members of the councils in the decision making process. Expert committees get for instance the mandate, to elaborate long-term concepts e.g. with regard to the development of traffic, energy or mass media. in order to enable politicians to take the necessary conclusions out of the expertise. The power of the experts must however be clearly confined. In general the expert does no bear the responsibility of the decision. His/her view is limited to a limited area. Thus the politician can not be discharged of his/her responsibility. Of course the expert can contribute substantially to a better information of the politician. As he has by the structure of his/her defined mandate a limited horizon, he cannot take off the responsibility of the politician, who should have a comprehensive information of all areas and who should be able to evaluate positive or negative synergies of a decision in a specific area. Thus democracy presupposes substantially that oligarchies are open for every body. Does each person have the possibility to be admitted within the oligarchy of power according to his/her performances, scientific achievements, the economical knowledge and/or the respect with regard to his/her pairs in labor unions the state is to be classified as democracy. Is the oligarchy closed by secret clubs, associations or alliances the reputation of the democracy is rightly bad.

Democracy and Legitimacy of State Power

The triumphal march or democracy was only possible in the 20th century. In the 19th century one did still seriously argue, whether the Kingdom by the grace of God was not to be the preferable form of government than democracy. Today this battle is by all means over. However the question how to set up and to arrange democracy remains an open issue and we shall try to examine this question more in-depth. Democracy is the type of government, which includes the people at least in some way as the organ to participate in establishing the will of the state. This participation can be very diverse. There are types of government, which restrict the importance of the people only to legitimize the bases of the state-power in the sense of peoples sovereignty. Then there are those, which grant the people the possibility to vote. And finally one has consider those systems, which provide the possibility of the people to decide by voting on concrete issues determined by the

constitution, the legislation or even on expenditures. In the following we shall deal with these different forms of participation.

The Principle of People's Sovereignty

Those who abolished the Crown by the Grace of God as legitimacy bases had to find a new bases to legitimize the state-power. The only possible alternative to the legitimacy by God was the people. The different theories of the social contract depart from the fact, that the people originally factually made an agreement with the King in order to entrust him the power to govern the people. For others the social contract is a mere fiction. RAWLS pretends, in order to legitimize the state-power one need not to refer to a factual past, nor does one has to recourse to fiction; authority is already legitimized on a contractual bases, when it is to be assumed that it could have happened in such way, that the people has agreed to a social contract. The people as legitimacy bases is mentioned explicitly in many constitutions. The interaction between theory of peoples sovereignty and these constitutional avowals is obvious. When it replaced the power of the Crown the French Revolution had indeed no other alternative than to legitimize state-power by the people. The self-determination of the people is in itself inherent in the idea of peoples sovereignty.

People's Sovereignty alone is not sufficient

With the only confession to the principle of people's sovereignty democracy does not gain much. Robespierre, one of the most important actors and power-holder of the French Revolution has shown with his interpretation of the principle of people's sovereignty determined by ROUSSEAU where it can lead: to despotic tyranny. Once elected by the people all decisions of the government which are declared to be part of the "volonté générale" are to be taken just, true, fair and for the common interest of the people. Thus they can not any more be questioned before a constitutional tribunal or a referendum of the people. As a religious legitimacy also a legitimacy by the "grace of the people" can end up in a tyranny. The question however, whether only the majority of the voters is necessary for the legitimacy or whether a unanimous approval is needed, is still open. ROUSSEAU for instance suggests, that there is only one law, which according to its nature requires unanimity: the Social Contract, because the civic association is the most voluntarily decision in the world (J.-J. ROUSSEAU, IV. book . 2nd chap.).

Restriction of the Principle of Majority

Democratic government of a majority over a minority can not be understood in a way which would enable the same majority always to decide over the same minority and thus to impose for all times its interests on the loosing minority. Democracy can only flourish if not the same partition is always in the minority. The more it is possible to switch between majorities and minorities, the more democracy will be legitimate for all members of the society. The majority principle does not empower the majority to tyrannize the minority. Obviously this alternation from

minority to majority is only possible, if votes and/or decisions on issues are periodically organized.
For the most basic decision however, that is the decision on the decision to establish a new state based on the right of self-determination, there is only one and a almost final decision possible. Can at least in this cases the majority disregard the minority? Most constitutions provide a qualified majority for most important decisions such as constitutional amendments. A simple majority is not sufficient. For basic decisions a majority closer to unanimity is required. The requirement of unanimity would not be realistic, because it would give to one isolated member a veto-power and thus empower it to impose its will on the great bulk of its community. This can not be the sense of democracy. For this reason those who cannot accept the basic decision should be granted the right to emigrate. If they cannot agree to the most basic fundament of their state, they have either to accept the preponderant majority they can only decide either to submit to the majority or to move out of the country. In addition federalism and solutions to decentralize the decision making process might be an other tool to relativise the majority principle. In a federal country e.g. the majority of the people on the federal level is limited by the autonomy of the federal units. Those units can on their own implement basic issues within their federal autonomy.

b) Semi-direct democracy

Legitimacy by the People

According to MARSILIUS VON PADUA the participation of the people in the legislative procedure is indispensable. Only the majority of the citizens can according to him ensure that the law corresponds complies to the general need. If the majority of the people accept their laws and statutes, they also will be prepared to obey those regulations. Only a statute, which has the approval of the citizens prevents laws, which would promote special interests of particular groups. “Thus the totality of the citizens or at least its majority must have the power to legislate… Because the law has to classify all citizens proportionally to their circumstances and because no one would voluntarily harm its own interests or would want to implement unjust laws, therefore all or at leas most of the citizens want only to approve law, which conform to the general interest of all citizens.” (M. FROM PADUA, I. part. chap. XII, § 8). Besides MARSILIUS FROM PADUA in particular the theory of the social contract contributed substantially to the democratisation of the state.

Representation and Will of the People

The people is not satisfied to be only the bases for the legitimacy of the government. It will also have an influence on concrete state policies. Without advocate the idea of the identity of government and governed (C. SCHMITT) – even according to ROUSSEAU this is only possible for a people of “Gods” – still the power of the people to influence the fate of its state can be extend far beyond the only legitimacy bases. Through its periodic election of its representatives in parliament or

through its periodic election of the executive, the citizens can influence at least periodically governmental policies. Of course one has the right to question, whether this corresponds to the very ideal type of democracy. ROUSSEAU for instance would deny this categorically. "Each law, which the people has not confirmed expressly, is null and void; it is not law. The English people imagines to be free. It deceives itself considerably; only during the period of the election of the members of parliament it is fee; once they are elected, it continues to live in slavery." (J.-J. ROUSSEAU, III. book, chap. 15.) This categorical rejection of the principle of representative democracy may have been the reason for the enrichment of representative democracy with different forms of referendum, which enable the people in particular in Switzerland but also in some of the States of the US and of Germany not to mention Italy, Austria, Australia to reject parliamentary decisions on concrete issues of legislation, expenditures etc. After the fall of the Berlin Wall also some of the new Countries in Transition in Eastern Europe introduced at least for the constitution making some referendum possibilities.

Direct versus semi-direct Democracy

Does one has to reject the analyses of ROUSSEAU because direct democracy can never consistent and comprehensively be realized in a state? Let us compare the differences between a state with a state with Westminster type democracy, that is a cabinet chosen by the lower chamber representing the people with two or three big parties on one side and a semi-direct democracy on the other side. In a system with representative democracy the people decides on the governing party with the election of the MP's proposed by their party. This governing party gets the mandate to rule the country for a certain period. With its majority in the parliament the party can enact, amend and abolish statutes according to its program or even without program according to its own interests. It rules the country, elects new civil servants and manages the administration. The head of the party is usually the prime-minister. He/she decides based on his/her popularity on all major issues as the elected members of the party depend on his/her reelection and popularity. Bases on its legislative activity the party can influence the courts even though in some countries judges are elected for their life. But the judges are required to apply the legislation.

In the semi-direct democracy the position of the party is much weaker. It can only propose statutes, which will finally be approved by the people. It can not manage the popularity of the executive through legislative activity, as the people can always intervene through a referendum. In the open democratic discourse during the debates before the referendum all weak points of any legislation will be attacked. Thus a law which meets only the interest of one party has no chance to pass the referendum. Only legislation which convincingly promotes public interests in the sense of the volonté générale has chances to get the final approval of the people. The Swiss experience also shows that the people is well able to distinguish between populist proposals hiding particular interests from proposals in the common interests. The often used argument that the people can not evaluate the real values of legislation has no evidence. The very fact, that the people have to bear the con-

sequences of their votes requires the controversial parties to make the consequences of any legislation evident and plain.
Even the fact, that often only 50% or less citizens go to the polls can not be used as an argument against the right of the citizen to participate in the legislative process. First any quota requirement violates the very principles of the secret of vote as any citizen, who does for what ever reason does not vote can be known. In addition the very right to vote includes also the right not to participate for what ever reason.

Constraint of the Parties to Consensus

Depending much more on the approval of the people the parties are forced continuously to convince the people in order to get its consensus. This relationship prevents legislative activity according to a comprehensive and visionary party program. Impetus and ideas are often not introduced in party-programs but by constitutional initiatives for specific constitutional amendments. Even though these initiatives often are rejected in a referendum, they still influence to a great extent the legislative activity. The power of the parties and even of the executive is comparatively low. The executive has not to submit to a party-program, it is rather bound to seek the consensus of the parliament and of the people when it elaborates new policies or new legislation which can pass the referendum. In reality all political influential groups are forced continuously t look for a consensus within the political elite of the country. One reproaches the consensus driven democracy that the interested groups often hide their conflicts and exclude the public from the discourse because they are scared to include the public into their dispute because this may damage their image and their chances for re-election. Thus the citizens cannot anymore recognize the real interests behind the negotiated compromise. Thus the dispute of different interests is withhold from the democratic process. In the struggle to win the citizens support the people cannot decide on real alternatives. Thus it is forced to accept either a compromise or to face a pile of broken pieces as consequence of a negative vote. Indeed the permanent search for compromise compels all authorities including the executive and the parliament to a continuous leveling of their policy. The pressure to respect each party, each language, each religion on all levels is heavy: All authorities endowed with political power have to mirror the diversity of the people. The idea of a plain majority rule is unfamiliar to the semi-direct democracy. With the permanent search for a just and fair compromise the executive wants to achieve a decision, which comes as close as possible to unanimity. Compromise however is not as such reprehensible. Often interests only seem to be contradictory. In this case the political institutions which have to find the common denominator have to distinguish between the true needs of the different groups, which can be realized without substantial draw backs. One has to avoid though that powerful economic groups are thanks to their economic power over-represented and are given more weight than they would achieve in a open public dispute on the polls. Thus in contrast to the simple Majoritarian democracy within the semi-direct consensus driven democracy a new political culture was able to settle, in which the compromise is considered as asset and as strength and not as weakness.

The Value of Preliminary Legislative Procedures

Is democracy not better off, when the citizens are asked to vote only four years on different party-programs or on different candidates for presidency then when all state authorities on all levels always are seeking the consensus of the people? Obviously both systems have their advantages and disadvantages. Within the semi-direct democracy the executive is forced to elaborate legislative proposals, which have the chances to be approved by the people on a comprehensive consensus. In Switzerland already in the regulated procedure to prepare a legislative proposal one has to clarify whether among cantons, parties, economic groups, labor unions etc. a compromise can be achieved. This so called consulting procedure (Vernehmlassungsverfahren) is often criticized, because it enables groups which are directly interested to influence the content of the legislation already in the procedures preliminary to the parliamentary dispute and thus to assert their particular interests. On the other hand this preliminary procedure gives the authorities the possibility to profit from experiences and practical knowledge of concerned circles which will have to implement the legislation on the "front". Legislative proposals are often drafted in the ivory tower far from life and reality. They have first to pass the key test of political reality. Teachers will verify, whether a statute on education really meets the needs of the children, parents and teachers, the civil servants of a local authority may test, whether a regulation to protect the environment is also enforceable in a modern industrial municipality, the labor unions and employers associations will check, to what extent their interests are taken care of in a law on social security and the consumers will finally evaluate the effectiveness of the protection against unfair publicity of salesmen provided by the legislation to protect the consumers.

Equalizing Seemingly Contradictions of Interests

Certainly, in the preliminary legislative process contradictory interests collide. Often those contradiction only seem to contradict. In this case the authorities are obliged to analyze demands which only seem to contradict and to reduce them to their inner hard core. In practical legislation one can often observe, that the verbal proclamation of a political demand often outreaches the inner core of legitimate concerns. This inner core of a concern can often be brought in line with other also seemingly contradictory demands. This is often possible without degrading the very substance of all requests. Often one can detect out in a oral discussion misunderstandings. It is much more difficult however to find the common denominator in order to accommodate all interests when the requests are really contradictory. However it is only very seldom, that one has to elaborate a compromise which does corrode or flatten out pithy posits.

The Need for Just Solutions

The executive and the parliament, which defend a proposal before the people have to justify, that the proposals accommodates the three essential values: Need, Liberty and Justice. Thus they have to find solutions, which in the light of those values can be provable. If they cannot convince the people, the proposal almost no

chance to be approved, as any opposing party will try to emphasize the weak points of the proposal and to defeat the bill in the vote. Only very carefully prepared proposals will have a real chance to get the approval of the people.

Plain Legislative Language

The fact, that legislative proposals are defeated in the polls, requires the editors of a bill to use a simple, understandable and plain language, which will be understood by the common citizens. Statutes which will only be understood by the implementing civil servant normally have no chance to be accepted by the people. When the very addressees of a legislation, that are all the citizens do not feel appealed, they will reject the bill.

Protection against Particular Interests

The tedious rational legislative procedure however prevents, that particular interests contradictory to the common interest but nevertheless legitimate are hastily and superficially taken into account. Also demands for social justice often encounter resistance. Thus on one hand specific groups or parties will have difficulties to get obviously particular interests accepted, on the other hand the executive will also find heavy resistance when it proposes legitimate interests of socially disadvantaged classes, as the people only approves, when the majority of the voters are convinced, that their interests will be realized with the new legislation.

Danger of Populism

This explanation should not deceive, that in a poll irrational and emotional arguments may be listened to faster and easier than complicated explanations of a complex proposal. Disaffection from the state, unholy alliances of contradicting parties may be the adversary of a balanced proposal because for some it goes to far and for some it is far not enough. Not reconciled contrasts between town and rural areas, between language or religious regions, the struggle for prestige, opposition against bureaucracy and lots of other defense reactions hidden within the citizens minds can easy be misused by the adversary and end in a important defeat of a proposal.

As in the open assembly of the people an speaker may be able to stir up hidden emotions an to turn the mood from one moment to the other against a proposal, may a agile tribune mobilize the citizens in the media and thus emotionally charge the atmosphere against the official submission.

Parsimonious Legislation

These difficulties lead the executive and the parliament to think over several times a new proposal, until they submit it to the official legislative process. Although one often complains inflation of laws in Switzerland, comparing however the Swiss legislation with other countries one will come to the conclusion, that Switzerland has much less laws in quantity of words. The tedious legislative process and the reluctance of the people to approve legislation are the most important cause for the parsimonious production of legislation in Switzerland. Thus it may

often happen, that important issues are regulated by internal instructions (e.g. instruction on the use of weapons by the police) or by ordinances, which lack clear delegation by a law or for which the legislative bases is doubtful. In addition several interests of politically week minorities have often difficulties to get acceptance by the ruling majority and thus are deliberately ignored.

In countries with a Westminster system the cabinet as executive has also the power to decide on the legislative programme as well as on the content of each bill to be decided by the parliament, that is the legislature. In these systems the administration and the executive will elaborate a proposal, which fits to the party programme developed in order to convince the voter at the time of the election of the members of parliament. Thus the majority will much less focus to propose a balanced bill or a bill which will be implemented in reality. The proposed bill will be assessed by the members or parliament, to what extent it will give the majority a chance in the next parliamentary election to regain the majority. Obviously particular interests which may in the eyes of the party give it a better chance for reelection will easier be implemented in legislation than common interests, which would not bi in the interest of only one party.

No Tyranny of the Majority

In countries with semi-direct democracy one may often get the impression, that policies proposed by politicians are without strategy and often volatile. In states with Westminster system the executive can implement its political activity according to a political vision and strategy. It is not forced continuously to adapt its political agenda to new demands, which may be brought in the political arena by parliament or by constitutional amendments. On the other hat political fractions, which do not fit into a party-program will have much more chances to get their substantial posits to be seriously considered by the political elite if this elite can be convinced that they may be supported by the majority of the people. There is also no doubt, that conflicts of the society may much easier be solved in direct democracy. A popular vote on the concrete issue of the conflict can often (not always) have a purifying effect. When the conflict is solved by a popular vote and if the voters have made a clear choice, the loosing minority will rather accept the verdict, than the decision of a parliamentary majority. Does the minority only loose with a small margin, the loosing minority does not have to resort to violence. Large minorities can always hope for an other chance in a later popular vote.

Moreover in Switzerland traditionally the concerns of the minority, which has lost in a popular vote are often at least partially included in the coming legislation. As the complexity of issues may often deter the citizens not grasping the consequences of a decision to participate actively in the vote, it is legitimate after votes with almost even results also to include aspects of the loosing minority into the legislation.

This complexity of issues seduces often the adversaries fighting for the support of the voters to reduce the issue on simple but sharp contrasts and to drive out nuances and complexities of the issues. Either "one" supports or one rejects universities, centralistic zoning, agriculture or public health etc., although the choices to be made by the voters deal in reality not with such basic issues. Nonetheless the

battle to win the voters degenerates often into a real question of trust for one of the opponents.

A balanced proposal may also be defeated because it contains a regulation marginal to the entire proposal, which brings on the scene an important opposing political group precisely opposed to such regulation. If this group is able to require a referendum it may bring other opposing groups in the arena, which may only get involved in the debate in order to avoid that one minority group can after it did win the referendum influence the whole bill to be amended in the parliament. Lots of small adversaries may thus cause the defeat of important legislative proposals.

Participation in Voting

We have already touched the problem of the growing percentage of absentees at the polls. indeed, ff the debate on a proposal becomes emotional and if it divides the people into two deeply opposed camps, between 50 to 70% of citizens may be prepared to go to the polls. If the proposal is not heavily disputed, not more than 30 to 40% of the citizens will go to the polls. If participation is low, smaller groups may have an easier job to defeat a proposal, then when 80% of the voters are prepared to participate. New surveys have shown, that active participation on voting depends also an the level of education, of wealth, age etc. Workers usually are less eager to participate actively on the political life than voters belonging to the middle class. It is more difficult to convince younger citizens to do an effort with voting than older people. Some surveys also showed that some of the voters do not even understand the question, they are asked to decide upon. And thus they often vote against their proper interest and conviction.

Information of the Voters

The increasing augmentation of ballots aggravates the possibility of give the voters a comprehensive information on all issues they have to decide; and it is even more difficult when they have to decide at the same time on several federal, cantonal and municipal issues. In addition the decision making process of the semi-direct democracy is limited as the people can only be asked to decide at the same time on some very few issues including the counterproposals.

The questions thus will have to focus on some very few substantial opposite positions. This gives those who oppose new changes and reject any improvement different possibilities to defeat a new proposition. They can e.g. submit a counter-proposal and thus split the majority interested for improvements into two camps and thus diminish the chances of the proposal with regard to those dismissing any new development. Several cantons try to overcome this problem by introducing the possibility of two different votes on the same issue. First the choice of the different alternative, if the voters have made their choice with regard to their preferred alternative, they have finally to decide, whether they would accept the chosen alternative with regard to the status quo. This complex procedure however often confuses the voters who would prefer to decide on two alternatives in one vote.

Safeguard against bad statutes but no guarantee for ideal legislation

All these analyses indicate, that though it is difficult to get a good proposal to be passed by the majority, but that on the other hand a proposal with unjust regulations has no chances to be accepted by the people. Direct democracy thus leads in the sense of ARISTOTELES to more liberty with less state infringements. The state sometimes be misused for the implementation of particular interests, but often it can not protect legitimate interests of minorities if the necessary majority can not be convinced for.

c) Representative Democracy

1. Issues of Representation

Where do the Members of Parliament get the Legitimacy and thus the Right to decide on the People?

When the executive e.g. with regard to the open assembly of a municipality the president of the council or in open cantonal assembly the president of the cantonal executive is directly accountable to the peoples assembly they can with skillful agitation misuse the people for their proper interests, especially these assemblies often can be manipulated with populist arguments. This plebiscite character of the semi-direct democracy can substantially be reduced with the rational debate within the parliament. Thus countries with semi-direct democracy as well as with representative democracy have to question, where the members of parliament get their legitimacy to decide for but also over the people. What are the relationships between the people and its parliament? Can members of parliament, which are supposed to decide in the common interest of the whole state, also represent particular private interests?

Which interests of the people are represented by the members of Parliament?

Does the deputy of member of parliament represent the interests of the entire people, of his/her constituency, party, a interest of a specific group or simply the common interest? This is not only a theoretical problem, the decision upon such issue has important practical consequences. Thus one has to ask whether a constitution, which would oblige the deputies to represent the interests of the entire people is realistic and how one has to assess the rule, that the parties are not allowed to impose their majority decision on their members in parliament and that each parliamentarian should rather vote according to his/her proper conscience.

Relationship between System of Election and Principle of Representation

The relationship between the people and the members of parliament is strongly influenced by the system of election. If the deputy represents the entire people he/she should be also elected by the entire people. Does he/she represent a specific economical interest group, he/she should also be elected by this group. However

this would again lead to a parliament composed according to the importance of different classes in the state. Would he/she on the other side represent the majority interests of a specific territorial district he/she should be elected according to the system in the UK and US by small constituencies or boroughs represented each by one member of parliament.

Should the parliament be a mirror of the diverse views of the people, he/she should be elected by a proportional system, as this system alone would allow that the diversity of the people is mirrored in the parliament and enables in particular minorities to get an appropriate representation. If one would beside of mirroring the people's diversity also favor the election of outstanding independent personalities one would have to seek a combination of majority principle with the proportional system according to the German model.

Whipping system versus independence of deputies?

Are deputies obliged to implement the common interest, one has to let the free to decide according to their conscience. Should on the other side the different conflicting interests of the people integrated by a compromise within the parliament, one has to ask, whether in this case the deputies should not rather be bound to follow the will or their voters and that they should only be free as far as they have to interpret their voters will. The whipping system, that is to require the deputies to vote along their party line would rather be acceptable in the second case.

The question of representation may also have substantial consequences for the very identity of each member of parliament. Are they allowed to accept a proposal based on their proper conviction that it serves the common good even though they have to assume that their voters would reject it. Are they required to contact their constituency in order to let them be influenced by their voters or do they have a leadership function with regard to their voters and thus have to try to change the political mind of the citizens of their constituency?

One barely guess, that these controversial questions which have been asked since the invention of the system of representation, will be solved for one and for ever. We shall only try to explain those issues in the general context of the theory of Government.

2. The Development of the Idea of Repressntation

i. The Significance of the Development of the Parliament of the UK for the Democracy

The Concept of the Representation

Already when he has first summoned his parliament (which was the successor parliament of the first convoked parliament by SIMON DE MONFORT) the King Eduard I. renounced to chose its "advisers" according to the different estates. The "advisors" have rather been considered as "representatives" of the entire borough. They were asked to represent their territorial district and not a specific estate. This has almost not been compatible with the very principle of a state structured according to the strict feudal principle. This basic principle of territorial representa-

tion not limited by the feudal structures promoted somehow the gradual break up of the feudal state in favor of a government representing the interest of the whole state.

The idea of a general representation lead also to a substantially different view of what is considered to be the "public or the state interest." In the feudal state the interest of the feudal lord was confronted with the interests of its subjects to be protected. The lord hat to care for his subjects. The subjects on the other hand were obliged to be loyal to their lord and had to look for his comfortable living. The lords and barons again were subjects of a higher lord and had to be loyal to their baron in order to be protected by him. The King thus had only to care for his direct subjects but not for the interest of the entire people. The deputies of King Eduard the first however were to defend the interest of their borough with regard to the King. All of a sudden the state authority became responsible for the whole public and it had to defend and promote the entire public good. Thus the contrast between the preponderant public and the private interests was about to appear. HEGELS melted this contrast by making the public interest into an absolute. The contrast between public and private interests prepared the basic precondition for a democratic development according to which the people or at least a representation of the people decides, what is in the public interest.

The Parliament as Lawmaker

The medieval notion, that the law is something given which in its core cannot be changed lead first to a limited function of the parliament, which had only the task to assist the King in its function as judge. The parliament had to explain what the law is, it was however not allowed to create new law. With the installation of new important religious competences in 1529 under Henry VIII the parliament has first made an important autonomous political decisions and made itself with the King to the highest instance, which can even decide on religious mattes. A very legislative function and activity has been performed in particular during the "Long Parliament" (1640-49). Finally the King in Parliament has been mad into an absolute sovereign power which from now on did not only solve conflicts but could even change the Religion and moral values of the society. In consequence the "long parliament" acquired even the competence to abolish in a special act the Kingdom of England and to replace it with a Procurator.

Majority Rule

The early development of two parties enabled to promote in the awareness of the people that democracy is always to be seen under the relationship and tension between majority and minority. The understanding of democracy of ROUSSEAU with the importance of the "volonté générale", which forbids party interests and excludes minorities is not familiar to the British understanding of democracy. The clear separation of majority and minority indeed was the necessary pre-condition for a government to exert sovereignty with a organ composed of more than 600 deputies. The periodic elections enabled it to govern the country during a limited time. The majority party knew always that it could not represent all interests of the

people. Thus the path to a totalitarian democracy was obstructed. The system of the unlimited dominion of the majority party during its election period made it necessary still somehow to include the different interests of the population during the reign of the party and this in particular, when it wanted to regain the majority in the next election. Thus it will have to consider interests, which are not the interests of its party but still important for reelection. Both parties are aware of the fact, that the interests of the people can not be reduced to the simple interests of the two parties representing majority and minority. The parties may cover only some important tendencies and thus need to be informed and to consider the real interests of the during the time they hold the majority.

The Parliament as a Collegial Council

Parliaments are oligarchic organs, though they exert no dictatorial power. As collegial organs they are not made for a totalitarian regime. The British history is strong evidence for this finding. Although the long parliament has sentenced to death in a revolutionary act Charles I. The very dictatorship a has been exerted though by Oliver Cromwell, who dissolved the parliament. As long as parliaments exert effective sovereignty, they will always be able to resist totalitarian tendencies. The debate in parliament requires dispute on arguments and counterarguments and thus evades one-sidedness. Even in the age of the mass-media, in which deputies are often seduced to argue for and before their constituency than with their pairs and rather to mobilize their masses then to convince the council, one still can not establish a dictatorship without excluding the parliament. Even Hitler who has been given in 1933 all unlimited powers had then first to eliminate the parliament in order to install its absolute totalitarian dictatorship. The limitations of a collegial council with more than hundred members are in themselves so efficient, that a one-sided exertion of power is finally unthinkable. An other question however is to what extent the parliament can be misused by a president and produced as a alibi to legitimize a make-believe democracy.

Self-Government of the People?

In the representative democracy the right of the people is limited to control those who govern. The periodic repetition of elections enables the electors to vote out the majority and its executive in power and to replace it with the previous opposition, which is conveyed a new mandate. In consequence the majority party can implement during its period of election a program which may again be accepted by the people in the next elections. This enables the electors to control periodically their government. This system prevents in general extreme developments. Minority parties and majority parties will have to try to make their program attractive to the voters. The alternation between the two parties is usually only possible with electors, which are not extremists at the edge but in the middle of the different political opinions. Majority and minority party have thus to try to convince electors in the middle not extremists.

Thus one has still to admit, that this limited possibility to make governments accountable by election does not enable the people to govern itself, but it enables

the people to legitimize the activity of the governing branches. The continuous consideration on interests of minorities and majorities as well as the control of the opposition give a certain guarantee, the consensus between the majority of the electors and the government is not only limited to the very day of election but also within the period of election.

„One Person, One Vote, One Value“ as Precondition for the Change of the Function of the State

Great Britain has also contributed to a great extent to the development of the principle one person, one vote, one value with the important changes of the election system in 1832. One has of course to admit though that this major change in the election system was a consequence of the revolutionary development in the 1830 in France. And even the change of 1832 was only the beginning of the development towards one person, one vote one value, which needed almost an other century to become fully rooted in the British constitutional system.

Until 1832 “Democracy” was limited to a very small circle of wealthy citizens, which in addition were under a strong influence of the Lords. This small class of executives active in commerce and industry did fight since the beginning of the development of the lower chamber of parliament for its rights independence and at the same time for the equal electoral rights of the wealthy citizens. With the comprehensive changes of the right of vote, which took place in the 19th and 20th century also the possibilities of middle class people to defend their interests in parliament changed radically. The deputies which represented the interests of the workers and did belong to the labor party tried of course to defend their interests within and through the parliament. As the labor party because of the changes of the electoral system continuously enlarged its amount of representatives within the parliament it was more and more able to implement the interests of workers in the official legislation. Distribution of income by tax progression and through systems of social security, expansion of the educational system, protection of workers etc. have slowly bee developed based on the growing power of the workers represented in parliament.

ii. The Parliament in the Welfare-State

Social Conflicts become Conflicts of the Legislature

Contrary to the feudal state which had to protect and defend the interests of the barons with regard to the lower classes, the state became an instrument to defend the interests of the employees. The changes of the majorities caused by the enlargement of the voting rights produced also the change from the feudal to the liberal and then to the welfare-state. Fearing for their new dependence caused by these developments the bourgeois saw them again forced to fight for their liberty against a state, which started to infringe in their rights by economic and social legislation. They considered themselves deceived for their liberty they gained from the feudal state now endangered by the welfare state. These social conflicts of the 19th and 20th century were only possible because of the new consciousness of the sovereignty of the state social injustices were not any more considered as a indis-

pensable fate, but as something to be changed by state legislation. The farmers, the peasants and the workers did not have any more a status determined by destiny. Their wrong could rather be changed by human decision in particular through political influence. Thus with the enlargement of the voting rights social conflicts became part of the democratic dispute.

New State Obligations

The sovereign parliament withdraw from its function as a judge among conflicting parties and started to decide according to its majority to defend the interests of the employees or the employers. Although many social conflicts among social partners as disputes on tariffs and salaries etc. remained to be solved within the society without intervention of the legislature, the tendency was clear to enlarge the involvement of the state in particular its social welfare legislation and to restrict the autonomy of negotiation by the social partners. It is not just by chance, that the legislation of labor law has decisively been enlarged in these two centuries. It is obvious that with these new tasks conveyed to the state the state bureaucracy has been growing considerably. The redistribution could not be implanted directly between the different classes. The state was needed to collect the taxes and to redistribute welfare-rights to the citizens. Thus some part of this income had to be used to finance this growing bureaucracy. This growing bureaucracy is an additional phenomena of modern democracy, which will need further analyses.

3. Dogmatic Justification of the Principle of Representation

Only Parliament knows, what is good for the People: Justification of Representation with Sieyès

How can one deduce the authority of some few deputies from peoples sovereignty? This trick has been performed by EMMANUEL SIEYES (1748–1836) before, during and after the French revolution. As ROUSSEAU also SIEYES distinguished between volonté générale (general will) and volonté de tous (will of all). SIEYES was of the opinion that the empiric will of the people never could be consistent with the general will (volonté générale). The common good could never be detected by the people itself. In contrary only the parliament and its members representing the people was able to care for the common good and to rule in the very interest of the people. The distinction between the empiric addition of everybody’s will (volonté de tous) and of the general will (volonté générale) leads inevitably to the question, who is able and in what procedure to recognize the general will and to implement it. If the general will is not identical with everybody’s will then an other body than the assembly of the people will have to determine the content of the general will. What ever body this is, it does get its legitimacy from a fictive peoples sovereignty and will have the power to exert unlimited and absolute power.

ROUSSEAU was of the opinion, that the general will could never be detected by the representation of the people through parliament. This stand point has been totally rejected by SIEYES. He defended the idea that only those representing the people in the parliament are able and have the political but also intellectual com-

petence to put the general will into effect. With the fiction of peoples sovereignty one could thus legitimize a totalitarian power of the parliament. In order to avoid, that everybody's will (volonté de tous) could influence the activity of the national assembly one had to provide every guarantee to isolate the parliament representing the people from the empirical will of the people. The dissolution of the historical provinces in France and the introduction of the system of "deconcentration" to territorial departments a symbol of the unitary centralized state of France on one side and by dissolving totally the representation of the estates, the total ban of parties and a prohibition to dissolve the parliament were necessary consequences of such analyses. They ended up finally in the notion of "representative despotism" invented by ROBESPIERRE.

EDMUND BURKE

While the states on the European continent primarily were concerned to abolish the principle of representation of the estates and to replace it with a general representation of the people, this issue has been overcome in the United Kingdom since it introduced the representation of the territorial Boroughs in the model-parliament of 1295. The general representation of the people's of the boroughs was an undisputed principle since centuries. The deputy did not represent his estate but the people of his constituency. EDMUND BURKE (1729–1797) as "whip of the Whig Party" already in the 18th century did build his theory on the principle, that deputies are considered to represent the entire people, not only the people of their constituency. According to BURKE the deputy did not only have a mandate from the district of his/her constituency he/she had to defend the interest of the entire people. although he/she has only been elected by the constituency of one borough. But also BURKE was of the opinion, the member of parliament should not represent direct mandates of the people, rather he/she should have the capacity to detect the common good and to contribute for its implementation. It is this noble task, which gives parliament final legitimacy.

Empirical Will of the People

In Germany of the 19th century members of parliament considered themselves as having primarily the task, to limit the power of the King, who deduced its legitimacy from God. As the revolutionary notion of peoples sovereignty was never mentioned, it was thus easier to accept the dominion of the parliament as being more democratic than the only power of the King or emperor. The people respected the members of parliament as their direct representatives. Their concern was to link the power of the King with the interest of the people. This task however they could only fulfill, it they were in permanent contact with the people. For this reason the fundamental dilemma or the dialectic between the representation of a empirical will of the people on one side and the obligation only to decide according to the general will did arise as an issue much later in Germany compared to other states.

Plebiscite an Representation

One can thus understand that in particular the political left wing parties in the 19th century already required a strong link of the deputies to the real will of the people and thus proposed the introduction of elements of plebiscites and direct democracy in order to limit parliamentary independence. In the program of Eisenach of the 8th of August 1869 the social democrats for instance required the insertion of direct legislation of the people. Also in the Gothaer program (1875) as wll as in the program of Efurt (1891) the right of the people to participate directly in the legislative process has been requested.

CARL SCHMITT: The Parliament Represents a Higher Being of the People (Höheres Sein)

This ligament of the parliament to the will of the people was opposed by the bourgeoisie, which defended the pure representation of the common will of the people by the parliament. The state philosopher (C. SCHMITT) thus invented the idea that with a parliament the state becomes a higher status. The parliament thus represents a higher being of the state and the people. This new body created by the higher being of the state must have the power to decide independent from the people, because it represents a higher value. "It thus is against the very principle of representation and can only be explained by the already existing decline of representation, when a parliament in what ever procedure wants to be informed by the people and when it decides accordingly or when it is allowed to repress the will of the parliament by the will of the people." (C. SCHMITT) One has to know however, that this philosopher later became a defendant of the "Leader-State" (Führer-Staat) of Hitler being the real incarnation of the volonté générale.

Fiction of Unity: Hostility of Representative Democracy to Parties

The bourgeoisie of the 19th century wanted to abolish totally the principle of the representation of the estates and replace it with the principle of totally independent deputies, who should only be committed in parliament to follow their reason. As finally the identity between people and its members of government is impossible, because it would require a permanent assembly of the citizens. Thus one has to create a new body, which represents the unity of the people. Originally this body representing the unity of the people was the monarch. With the democratic constitution of Weimar the fiction of the unity of a divided democracy had to find its counterpart the president of the empire, which became a president by the grace of the people.

This fiction of a unity contradicted the reality of the division of the fractions of parliament by the parties. Their fragmentation of the state was seen as an alien element in the state and thus endangering the independence of the deputies. In the state order the notion of "party" has no place. (G. JELLINEK)

Legitimacy of Majority and Opposition of Parties

The new disputes on the issue of representation are influenced by the factual division of the parliament in a governing majority and opposing minority. This split

of the parliament into majority and minority seems on one side to be justified as both parties in general accept the constitution and thus the unit of the state. On the other side, one the recognise, that the very acceptance of the party a new democratic plebiscite element has been introduced in the concept of representation, because each member of the party can influence the party opinion from the grassroot of his/her party.

Federalist Papers

More pragmatic views have been developed in the federalist papers. Apparently the founding Fathers of the American Constitution had no fundamental theoretical problems with the issue of representation. In federalist No 10 JAMES MADISON asked himself, how the people would decide, when it had to determine, whether the native handicraft should be protected from foreign competition. Farmers and craftsmen would probably be divided in answering this question. But neither farmers nor craftsmen could make a decision, which would be acceptable as just and fair for the whole people. If the people would decide directly it would be split into different interest groups. But neither majority nor minority would detect the rueful interest of the people. (volonté générale). „Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.“

The Deputies Representing the People are the fair Arbiters over Different Particular Interests

Only the deputies representing the people can decide as fair and just arbiters for the public good among the different interests of the people. Whoever however wants to be the good arbiter over the different interests of the people is not allowed to disconnect from the people and thus from its constituency. He/she has to inform him/herself on the different existing interests and opinions. Deputies need thus to be constantly connected to their constituency. If not, they are not able to decide fair and just. Of course they are not ambassadors of their district. They have to decide by their proper responsibility and as independent as possible. The general will is not something given or already existing, which only has to be found by parliament and which may also be found and ordained by a monarch or a president. It is rather the common denominator which includes all different interests and with which all those interest should be able to identify. An independent parliament thus is mandated to find and to design this denominator, that is the volonté générale. The Anglo-Saxon utilitarianism, according to which the just solution is the optimal for all different interest may have considerably contributed to this understanding.

Build-Down of the Legitimacy of Representation by Expanding Direct Democracy in Switzerland

The federal Constitution of 1848 has been strongly influenced by the concept of a strong representation principally hostile to fragmentation by parties. Only by a

general initiative to revise the constitution the people had the power to participate on the constitution making power. Since 1848 new elements of direct democracy have continuously expanded the right of the citizens to decide on concrete constitutional and legislative issues. 1874 has been introduced the legislative referendum, that is the right of 50’000 voters to require, that a legislative proposal adopted by the parliament be submitted to the vote of the people. In 1891 the Constitution has been amended by a provision, which gives 50’000 now 1000’000 voters the right to elaborate a concrete constitutional amendment, which then has to submitted to the constitutional referendum of the people. (Constitutional Initiative). In 1921 and 1977 the right of the people to participate in the procedure to approve international treaties has been introduced. Since 1949 the parliament can not any more enact urgent legislation without the possibility of the people to participate by referendum. On the other hand the male citizens were shamefully long reluctant expand democratic rights in order to let women participate in the voting. And finally in 2003 the people adopted a new possibility to initiate legislative or constitutional amendments and enlarged democratic participation with new procedures for the adoption of counterproposals.

Volonté générale and empirical will of the people in semi-direct democracy

Is this bond of the parliament to the empirical will of the people detrimental to justice in the sense of the volonté générale? Whoever has the chance to experience with active participation politics in Switzerland, will recognize that many magistrates and deputies make believe the way they the see themselves as servants for the interests of the people. Of course they do not understand those statements as mere electoral propaganda. They at least would not see themselves as to serve a volonté générale interpreted by themselves and determined authoritatively. They understand the will of the people empirically. Legislative proposals thus have to accommodate the interest of the people. The deputies and the member of the Federal Council have to deflect to the will of the people, they have to elaborate proposals which will find the “mercy” of the people (the sovereign). This understanding of representation is far away from the “soviet-” council-system, which gives the people the power to give mandatory directives for the deputies.

The Parliament has Look for the Will of the People

Swiss members of parliament are asked to defend a proposal, which is not only acceptable within their constituency but which will get the approval of the majority of the entire people. Does this lead to a one-sided preferential treatment of a specific interest-group? Is MADISONS right when he states, that in this way one cannot realize justice? Will the proposals be elaborated directly by peoples assembly, such danger could not barely be avoided. As proposals are debated under the auspices of the public with more or less rational arguments and in a procedure, which makes deputies accountable for their behavior and as only the finally approved compromise by parliament is submitted to the people, the danger of populist legislation is minor. This holds of course only if the entire procedure to draft and to enact legislation is public and transparent.

Complex Parallelogram of Interests

Moreover the exact analyses of different interests reveals, that very seldom interests can be simply cut into a clear majority and minority interest. Even mentioned example of MADISONS, which is based on the contradictory interests of farmers and handcrafts, does not divulge the entire situation of all different interests in the case. It overlooks e.g. that as well the craftsman as the peasant are also consumers and that as consumers both are interested to get cheap and products with high quality. It misses also the fact, that e.g. the son of the farmer could also be craftsmen, that the brother may produce cheese, what might again influence the interest situation of the farmer. In rural areas the craftsmen may also be interested to support agriculture, while in cities they would more support consumer interests. Protectionist measures may be expanded to agricultural products, but they provide stronger state intervention and thus more power of the bureaucracy. Even among the different craftsmen the interests may be different. Some branches may profit more some less from such interventions; moreover protectionist measures may influence more concentration and less competition among different produces. Finally one can not overlook that craftsmen do not alone produce. Even in the beginning of the 18th century they had employees, which as workers might even vote against the interests of their employers. This long list of the diversity of interests could any old be prolonged. She only makes evident, that the more or less theoretical contradiction can in the much more diverse complexity of the every day life of politics often be pragmatically evened out. Even at the time of drafting a proposal those contradictions are often not recognizable and many times one can not foresee which themes will determine the political debate during a vote on a referendum.

Parliament as "last but one" Instance

This is the very reason, that parliament is legally and de facto asked to make a independent decision, which it can assume however will get the approval of the majority of the people. Experience proves that proposals will only have the chance to get the approval of the voters, if it is acceptable under the principle of justice and if the procedures during its elaboration have been fair. All different arguments need to be expressed and evaluated. In such procedure the probability, that a solution of a parliament controlled by the referendum of the people does more accommodate the volonté générale, than the majority decision of a parliament controlled by the governing party in a Westminster system, which only has to look for reelection and not for approval in any referendum. The dependence of the empirical will of the people does in fact not limit the space of decision of a deputy as one might believe, because at the time of the parliamentary debate the empirical will of the people is often still not disclosed, as it reveals itself only during the debate on the referendum. The link to the will of the people avoids on the other side the misuse of parliamentary power or of the power of a ruling majority party. The deputy executes in this sense delegated power of the people. The parliament is the last but one instance, over which the people will finally pronounce its judgment. Does the people reject the proposal, it will not have consequences for the personal

standing of the deputy or deputies neither for the member of the federal council in charge of this legislation. Indeed the public opinion would dislike a withdrawal of any magistrate from office because he/she has lost a referendum. One may veritably put the question, whether such procedure does not rather produce better results which are more just, than the procedure in a system with representative democracy, in which many proposals are submitted with the major focus to win the next elections and in which the minority opposes the proposals with the same focus.

VI. Separation of Powers

a) Development of the Theory of Separation of Powers

Idealistic Postulation for the „Good" and „Ideal" Ruler

Most theoreticians on Government have assessed the organization of the state not primarily based on their institutions but much more on the character of the leader of the state. PLATON required, that leaders of the state should be philosophers. ARISTOTELES related the good and the degenerated system of state with the character of the ruler. Did they rule the state in their personal interest, then States degenerate: The monarchy into a tyranny, the aristocracy into oligarchy.

This greed tradition has been followed in the 8th, 9th and 10th century in particular in the theory of government of the Arabic-Islamic tradition. So in the 9th century Ibn ABI R-RABI required the leader should be the best and the most powerful personality in the country. He should keep his promises, should exercise mercy and provide for everybody his share. However he does not only develop the required good character of the ruler, he also determines who would be a good judge: Judges have to be god-fearing, reasonable and be familiar with the legal literature. They should have an upright character and pronounce their judgments as soon as all evidence are known. They should not fear right or wrong, should not receive any gifts or listen to any recommendations, they should not discuss in private with the parties, should smile seldom and be preferably silent. They should not demand any benefits from the parties and protect the property of orphans. Similar thoughts can be found in the works of FARABI (850–970), who by the way already 800 years before HOBBES and 1000 years before AUSTIN has anticipated the theory of the social contract and of sovereignty. (HROON KHAN SHERWANI, Political Thought and Administration, 3. Ed. Philadelphia 1963 p. 72). The idealistic tradition has been continues by GHAZZALI (1058–1111) and the probably greatest theoretician ot the Arabic world IBN KHALDÛN.

Institutional Concepts in Old China

Similar reflections on the relationship on the organization of the state and the personality of the ruler can be found in the even much older tradition of Chinese philosophers on the theory of the state. In particular the Confucianism tries to guaran-

tee good dominion by the requirement on the character of the emperor. LAO TSE classifies the rulers into the following categories: The best rulers are those who are not at all known by their subjects. The second best are leaders, which are praised and applauded by their subjects. The third best are to be feared by their subjects and rulers which are hated and despised belong to the lowest category, because they do not believe to the people and thus the people will become disloyal. Performances of the best leader the people will consider those to be accomplished by itself.

HAN FEI

This idealistic concepts however are later strongly disputed by HAN FEI (died 234 a. Chr.). Duke Lu asked: How can one well dominate a town? CONFUCIUS answered: Only with virtuous civil servants". The other day the duke of Chi put the same question and CONFUCIUS answered: The expenditures of the state and the income should not be to low. – What CONFUCIUS has answered will lead to the ruin says HAN FEI. He sees, that state in general are not ruled by supermen. Thus he tries to develop a theory of the state, which is based on the average human being and takes more into account the possible human failures as he acknowledges that princes are usually ordinary human beings.

He proposes a system of different function and departments controlling each other in order to prevent the prince to be foxed. If the prince wants to remain in power he has to divide the competences and guarantee that his inferiors to control each other. Non of them should be given a super-department not that he can acquire to much power with regard to the prince. As human beings are evil by nature, the prince should not trust his servants to much. For the first time we can observe that HAN FEI creates a state-organization installed with institutional precautions as the division of power and the mutual control of powers. He aims to serve his prince and to protect him from misuse of power.

Division of Function with ARISTOTLE

Even hundred years before HAN FEI ARISTOTLE did develop in Greece the basic principles of the state theory, which later influenced basically the Arab and later the European philosophy. "All constitutions have three elements, concerning which the good lawgiver has to regard what is expedient for each constitution. When they are well-ordered, the constitution is well-ordered, and as they differ from one another, constitutions differ. There is (1) one element which deliberates about public affairs; secondly (2) that concerned with the magistrates- the question being, what they should be, over what they should exercise authority, and what should be the mode of electing to them; and thirdly (3) that which has judicial power." (ARISTOTLE, Book IV)

ARISTOTLE anticipates the later division into a legislative (deliberating), executive and judicial power. But his aim is rather a reasonable division in order to have a good and efficient government, but not so much the mutual control as with HAN FEI.

b) Separation of Powers According to LOCKE and MONTESQUIEU

LOCKE

After ARISTOTLE and HAN FEI more than 1500 years passed until in England for the first time JOHN LOCKE proposed a division of the different powers of the state. He distinguished among the legislative, the executive and the federal (external) power. The reason for this division be LOCKE is also primarily a division of functions. „But because the laws, that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or an attendance thereunto; therefore it is necessary there should be a power always in being, which should see to the execution of the laws that are made, and remain in force. And thus the legislative and executive power come often to be separated." (J. LOCKE, Second Treaties 144).

MONTESQUIEU

Shortly after LOCKE the anglophile MONTESQUIEU who described the British Constitution came to the conviction, that the separation powers would not only be in the interest of division of function, but moreover to guarantee the liberty of the citizens in general. He thus assessed the value of the state contrary to his predecessors not according to the character of the rulers but on the structure of the different institutions.

Not men but Institutions Guarantee Freedom

What are the decisive thoughts of MONTESQUIEU? MONTESQUIEU presumes, that the system of government does not by its very notion guarantee the liberty of citizens. "Democracy and Aristocracy are not free states by nature. The political freedom is only possible under governments which are moderate. However even in moderate states liberty may only be guaranteed, it power can not be misused. A eternal experience teaches, that each human being, who has power, is driven to misuse it. He continues permanently until he encounters the limits. Who would have thought it: Even virtue needs boundaries. That power can not be misused it is indispensable that power brakes power. A state can be constructed in a way, that nobody can be forced to execute, what he is not obliged by law to do, and nobody can be demanded to refrain form actions, the law does allow. (MONTESQUIEU, XI. book, 4th chap.) In the end of his famous 11th book of the spirit of the law MONTESQUIEU comes to the conclusion, that the liberty of citizens has to be measured according to the separation of powers of the respective state. The concept of separation of powers in the sense of checks and balances becomes thus the central request for a liberal conceived constitution. Separation of powers is not only described as division of functions and competences in the sense of ARISTOTLE. And it is not only seen as a institutional guarantee to upheld the power of the prince (HAN FEI). It becomes the bases and the precondition of a liberal State and Constitution including the development of any state.

c) States Constituted by Separation of Powers

Separation of Powers as Ancient Constitutional Principle

The claim of MONTESQUIEU has not been ignored. The French Revolution introduced the principle of separation of powers in Art. 16 of the declaration of Rights of Man and of the Citizen it provided: "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all." And Article 3 of the Constitution of the unitary Swiss (helvetic) state of 1800 imposed by Napoleon prescribed: The legislative, judicial and executive power can never be united."

Checks and Balances: MADISON

The most serious followers of the idea of JOHN LOCKE and MONTESQUIEU were the founding fathers of the American Constitution and in particular the authors of the federalist papers. MADISON for instance made a thorough analyses of the principle of separation of powers in No 47 of the Federalist Papers. In this chapter he disputed the new constitutional principles with its adversaries, who reproached the new constitution not to be consistent with regard to the principle of separation of powers as the three function of the state are not clearly separated from each other and that in particular the executive is given legislative and judicial competences. MADISON however was as most of the proponents of the principle of separation of powers convinced that a accumulation of legislative, executive and judicial competences necessarily would lead to a tyranny. Thus if the American Constitution does not follow word by word the recipe of MONTESQUIEU it still meets the very purpose of the principle of separation of powers, because it avoids misuse of power and guarantees freedom. This aim can only be put into effect, if the powers are not totally separated from each other. Mutual checks and balances of the powers is only possible, if each of the powers participates also partially on the other powers and each is given the possibility to control and influence the other power. MADISON was fervently opposed against dogmatic and rigid understanding of the theory of separation of powers developed by MONTESQUIEU. He refused any total isolation of the three different branches of government. Even the Constitution of the UK, which seem to be the model for MONTESQUIEU has not implemented a total separation of the three powers. The executive e.g. has a veto-power in the legislative process, the legislature has the power to remove the executive from office by impeachment. In addition the executive is given the only competence to ratify treaties with foreign powers and to nominate the judges. The judges on their part participate on the legislative power with their possibility to contribute in the legislative process with their advisory opinions. (Federalist papers No 47)

Dismantling the Rigid Theory of Separation of Powers

MADISON and with him the founding fathers of the American Constitution thus have never understood the dogma of separation of powers by MONTESQUIEU rigid and without exception. In fact they dismantled the rigid theory and looked at the branches of government as well from the point of view of the institutions to be set

up as well as of the persons to perform the different governmental functions. The power of the state has to be distributed to different persons as well as to different bodies. Those have to control each other and thus participate on the competences of the other branch. And also they need to have competences independent and on their own. Thus the president has the power to nominate the members of his/her cabinet and the highest civil servants, but the senate has to ratify the nomination. Congress can with a impeachment procedure remove the president and the justices of the Supreme Court from office. On the other hand the president can with his/her veto-power hamper the legislature and the Supreme Court can declare statutes enacted by the Congress unconstitutional.

Separation of Powers and Indivisible Sovereignty

It was mainly the French Revolution which did dogmatise the principle of separation of powers. According to this theory the three powers are all to be deduced from the indivisible sovereignty. The indivisible sovereignty is to be divided ant to be delegated to the three branches of government. From this follows that the three powers have to be separated totally and need not have any mutual relationship. To dogmatise the principle up to this rigid concept deprives the principle of its very core, namely to enable mutual control op power in order to guarantee the freedom of the citizens. If each branch of government is totally independent in exerting its competences and thus should not be controlled by an other branch, people will be totally dependent on the administration and exposed to the whim of the civil servants, as there would be not court having jurisdiction over the administration no parliamentary power to protect citizens from the administrative despotism of the executive. Apart from some very few exceptions one recognizes today, that the three functions and branches of government cannot be totally isolated from each other, but that they have to control each other mutually according to the principal of checks and balances.

Separation of Powers and Westminster System with the Cabinet exerting the Function of the Executive

The exposition of the different systems of government of the states has made it clear, that the states try to implement the idea of separation of powers differently. The least realized it is in states following the Westminster system. Although some basic concepts which caused the later development of the system have already been performed in the UK at the time of MONTESQUIEU he did not recognize the close relationship between the executive and the legislature. A cabinet which depends totally on the parliamentary majority leads in fact to a total merger of the executive and the parliamentary majority. There may however be division or separation it is rather between the majority and the parliamentary minority representing the opposition. Not included into the theory of separation was at the time the jurisdiction of the courts to review the constitutionality of statutes enacted by the legislature nor the administrative jurisdiction to protect citizens against arbitrariness of the administration as neither jurisdiction existed at the time of MONTESQUIEU. One has however to admit, that the civil servants of the British Crown already were at least some how accountable before the common law courts, when

they acted ultra vires and damaged unlawfully private citizens. The King however was not accountable to any judge.

Much more consistent has been with regard to the principle of separation of powers at least in the sense of checks and balances the construction of the American governmental system. As the founding Fathers did not have to deal with the issue of absolute sovereignty delegating the power of the governmental branches, they did not have to prove to what extent the separation was consistent with the principle of absolute sovereignty. In consequence they could install three independent branches with original powers, which could only be checked by the other branch. None of the three branches is superior or inferior to the other branch. State sovereignty is rooted concurrently rooted in each branch. As already pointed out, the Americans have however renounced to implement a complete separation. Thus each branch has competences to contribute to the executive, judicial and legislative function.

The major adversaries of the principle of separation of powers are the socialist states. It is true of course that also in socialist constitutions provide for three branches of government. But in fact they are not independent from each other. The reason for this is, that the legal and factual sovereignty of the state is conveyed to the party which controls each of the branches. Separation of powers according to the Marxist believe is a bourgeois invention. As party is the only body to determine and to realize the volonté générale it has to control that all branches are acting within the volonté générale. Protection against despotism is only necessary in a bourgeois state. In the communist state, which emancipates the society with the proletariat and its party, the leaders of the proletariat by definition are not able to misuse power.

Adminsitration as Fourth Branch

In his paper on MONTESQUIEU FRANZ NEUMANN achieves the following interesting finding: „MONTESQUIEU had changed his conception after a study of English political institutions. He would equally have changed it after a study of a mass democracy in action“ (F. NEUMANN, p. 143). Indeed we might ask, to what extent MONTESQUIEU would have changed its concept analyzing the modern pluralistic mass-democracy. NEUMANN is convinced, that those who only focus on the separation of powers as basic principle of constitutional theory neglect the reality of the power of the administration and bureaucracy as a basic element of the social change in recent years (vgl. F. NEUMANN, p. 142). In fact most theories overlook the fact, that a part from the politically accountable governmental branches a administrative body has been installed, which exerts an existence independent from effective control and that this administration restricts the liberty of citizens through welfare contributions by soft and weak measures.

Power of the Administration

Because of the growing powers of the administration in the welfare-state citizens will become more dependent and will have to rely on the contributions of the administration. The power of the civil servants deciding on those contributions will

raise accordingly. They decide on the whether, the what, the how and with what conditions persons depending on welfare contributions will get. The expanding information of the administration based on modern data processing entangle people in a network of invisible mirrors, from which there is no escape. He/she feels continuously observed and at the mercy of the bureaucracy. The modern administration can indeed implement good conduct with promises and carrots. It does much less need to turn to criminal sanctions for the implementation of public order. It disposes of much more sophisticated and effective means in order to guide people to correctness. If it wants to create problems in the field of public Health, education, taxes, social security pensions, public grants, scholarships, admission to the driving tests, to distribute licenses for certain jobs, to get social aid for housing etc. the administration could ruin the very existence of a person without violating the law and without involvement of a court. Does the concerned aim to defend themselves, they will have difficulties to find causes for their suit or they will have to submit to nerve-jarring and costly procedures, with open and not at all evident result.

Is the Administration „Evil"?

A former Swiss magistrate made some time ago the statement, that administration is always evil, but each individual civil servant is in most cases gentle and helpful. Wherein can the core of the truth of this sentence be found? Civil servants, who expect to be promoted in their function, have to follow the directives of their bosses, they have to show effective and efficient efforts and demonstrate, that they fulfill their obligations at the satisfaction of their superior, who will praise them and recommend them to their superior. They have to conform to the expectations of a correct, hard working and righteous civil servant, who is loyal to the state and its government. Seldom government employees are qualified according to what they deliver to the citizens. Who for instance has ever heard of a qualification which would read as follows: "Is interested to implement the common good", "cares for the people asking his help"; "Is receptive for fair and just decisions" "Has common sense" etc. Decisive is not the relationship to the outside world but much more the internal relation within the administration. Bureaucrats often even believe they could exist without the people for whom they should care.

For the citizens on the other side the administration acts anonymously. They do not have contact to a certain person, but to a authority. They are lucky if they can find during the procedure a competent professional, who is prepared to assist them with competent information and human understanding for their concern. The final decision on their proposal is usually not made or signed by the competent professional but by his/her superior competent in the hierarchy to represent the administrative authority. As those persons did seldom have contact with the concerned, they rely on the judgment of their professional. But this judgment is not assessed according to their human understanding, but according to the efficiency of the machinery of the administration, which should never be hampered by a precedent.

New Public Management

With the new ideas of public management following the model of private management one tries to break up the anonymous bureaucracy and in particular to introduce the idea that citizens should not be considered as subjects but as clients of the administration. This new concept should introduce into the administration a new culture of "consumer" oriented administration. With global budgets and mandates to achieve determined outputs the administration should not any more be guided as to how it should achieve certain results, but what results it should achieve. It will be up to the administration to determine the how, that is the means, measures etc. which of course should be in accordance to the interests of the clients, which in future should give full support to the administration.

Separation of Powers within the Administration

The rigid hierarchy, the autonomy of the administration, the input oriented criteria's for evaluation and technicalities which are more important than values makes the appearance of the administrative bureaucracy anonymous and dismissive. In states, in which the executive is not identical with the majority party of the parliament, new systems of parliamentary control of the administration could develop. This expanding structure of outside control has also enabled better protection of the citizens. In states with a parliamentary cabinet, the ombudsperson as institution to mediate between the administration and the citizens, has gained importance. The federal division of state power did also contribute to diminish uncontrolled administrative power by decentralization of the administration, which often gives it a more human face. If for instance in a small Swiss municipality a committee composed of non professional citizens of the municipality has to decide on licenses for construction, they will proceed in different ways than a central bureaucratic body, far away from the reality of this municipality not at all familiar with the concrete problems and conflicts of the members of this community.

By no means also the important expansion of the judicial control of the administration has contributed and strengthened the protection of the citizens. Although this control has been expanded very differently according to the legal system of the states (common law v. civil law), these new developments were major achievements in order to improve modern administration. The consolidation of the jurisdiction of the courts has the same aim in all states: It wants to give better protection of the human beings against the misuse of power of the administration.

But all these tools are not sufficient enough with regard to the growing power of the national and more and more international administration in a mass-democracy. The proper idea of a separation of powers will probably have to be introduced within the administration itself. The vertical division of competences by delegation to lower bodies leads finally to a limitation of power, but enables direct contact with the people for which the lower body is accountable. This however will only work, if the citizens of lower territorial districts can participate in the decision making process and namely by the financial contribution based on the taxing power of this local authority.

In Switzerland citizens have to be consulted when new ordinances are prepared. What would be the consequences if the citizens could with their evaluation of the behavior also influence decisions of promotion of public employees? In private economy the performances such as the turnover decides on the promotion of a employee. His/her performance depends on the consumers. How much more cheerful would public employees become, if the concerned could influence their promotion? Essential however would be that the administration is qualified according to other criteria's. It does not have to follow the system of the old Greek Republic, which provided that the employees are random employed for one year according to a decision by lottery. After this year they had to step down and become ordinary citizens again. The idea of a professional civil servant employed for his/her life time can not be the final solution however. The experiment of the assembly of the council of Europe for instance to describe rights and obligations of the police of a democratic society can have positive results and may improve police activity within the interest of the people. Such initiative should be extended to other branches of the administration.

From the Civil Servant to the Employee

The concept of new public management has led to a new thinking in the administration. The position of the civil servant originally can historically be traced back to the professional soldier in the end of the 18th century. Civil servants were in fact considered as civil soldiers with a similar social status. With the development to the modern welfare state the military status of the civil servants was replaced with the status of a civil professional still highly considered in the civil society. Today one is about to change also this status of a civil servant into a public employee, who has with regard to a private employee still some privileges with regard to his/her salary and contract but less privileged than the former civil servant. Modern statutes in fact provide a relationship of a employee, engaged on public law provision but still with similar conditions to the private employee. The basic idea of this new development is based on the idea of partnership between government and employees. The very idea that the civil servant is employed by a authority above the normal society is fading away. The only reason, why in Switzerland the contract is still controlled by public law is to give the state employees a better guarantee for dismissal than to the employees engaged by private contract.

Does Separation of Power Weaken the State?

Finally we have to ask ourselves whether the ideology of separation of powers does and in particular the principle of checks and balances not in fact weaken the state. This of course could further be detrimental for public interests only promoted by the state, which now is exposed from the outside to much stronger economical and international forces. The federal vertical division of powers enables small groups to misuse weak municipalities or even cantons for their proper interests. Powerful international companies may be able even to control the executive, legislative and even judicial power of a state for the implementation of their private interests easier if powers are already weakened because separated. In particu-

lar the autonomy of small municipalities can be misused by powerful companies for their proper interests.

However it would be erroneous to believe, that the separation of powers would in any case debilitate the state. The contrary is often the case. If namely a private company tries to engage the state for its proper commercial interests, it is not sufficient, only to deal with one of the governmental branches, it has in order to be efficient to engage all separated governmental branches and in cases of a federal system on the federal state of the federal, state and local level as each of these powers is independent. This phenomenon, which will split up the forces of those who want to bring the state under their control is even more obvious with regard to the intra-organ control in collegial bodies. Who for instance wants to influence in Switzerland the executive, that is the federal council would need to control not only one person but at least the majority of four members of the council. Did it succeed, it will have in addition to convince the majorities of the two chambers of the parliament and in the end in case of a referendum even the people. The complex network of the divided state does not only split up the state power, it neither can easily penetrate the sophisticated balanced system of public powers.

Of course one can see the separation of powers also as a break shoe. If for the sake of justice and public welfare urgent public interests require improvement of the welfare state, the environmental protection or measures to diminish expenditures, the system of separation of powers leads to tedious procedures. This lacking efficiency of public activity finally protects the freedom of citizens against ill-considered interventions. In fact a system of separation of powers properly balanced re-enforces finally state authority. Authority is based on obedience. This obedience can be enforced by violent police activity. But such behavior of police is not possible in a state with separation of powers. Thus obedience in a liberal democratic state is based on trust into the authorities and on the force of state bodies to convince the public.

Minimalize Human Draw-Backs

In the end we should not overlook, that separation of powers is a essential instrument to avoid or at least minimalize human failures of authorities and state employees, who are supposed to act with state powers in the public interest. The mutual control of the different governmental branches will motivate the members of the authorities to try to do their best. Human weaknesses can at best be met and the capacity of human beings to learn be promoted.

The growing cancerous ulcer of corruption finally can only be combated, if the different powers have efficient and effective mutual control

VII. The Tie to the Law

a) Development of the Notion of Legislation

Antiquity

The notion of the law, statute or bill has changed during the different centuries considerably. In the old Greece antiquity the philosophers focused on the content of the laws (nomoi). The ideal state of PLATON for instance is run by philosophers, thus it does not need laws. Only cities, which were not able to establish the ideal state need laws. For ARISTOTLE laws are already constituted, binding norms, which express the will of the legislature but at the same time have to correspond morals and custom.

In ancient Rome the priority has been given to the procedure. From its content each order can be considered to be a law. According to the procedure however one has to distinguish between the "lex data", that is the law which has been given by the monarch (e.g. Roman Tabular Law Lex duodecim tabulorum) and the "lex rogata", the law agreed with the magistrate. According to GAIUS (117 – 180 a.Chr.) the law is the "lex" adopted by the citizenry on a proposal of the magistrate. „Lex est, quod populus iubet atque constituit" (GAIUS, I, 3). Finally also the decision made by the plebs has been called plebiscitum.

German Middle-Age

Does one analyze the history of the German legislation, one can find three basic forms of legislation:

- the not enacted law as traditional wisdom
- the statute agreed by the law comrades
- the commanded law by the monarch, the legal order

Looking at these historic concepts one can still today observe and explain the tension which is inherent in the notion of the law. The wisdom is the tradition of the cases decided by the courts, which find their rules and principles in the given wisdom, the lex aeterna or the lex naturalis according to Thomas of Aquinas. The law thus has to correspond to this traditional wisdom. This is the determination of the content of the law.

MONTESQUIEU

In later centuries one began to question, to what extent the law can ever be removed from the given and traditional wisdom. MONTESQUIEU for instance proposed, that laws have to correspond to the specificities of a people, of the climate of the country, of the language, the history and of the culture, but it still has to be consistent with the predefined reason. "Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. (CH.-L. MONTESQUIEU, 1. Buch, 3. Kap.)

What was the reason for MONTESQUIEU for THOMAS OF AQUINAS it was the eternal divine order, lex aeterna. From this divine order also the given order for human beings according to their specificities has to be deduced (les naturalis). The positive law, made by the people he labels lex humana. These positive laws have to be consistent with the lex aeterna but also with the lex naturalis. (vgl. THOMAS VON AQUIN, 11. book, Part 91. Question, Art. 1–5). Finally we find in the works of THOMAS OF AQUINAS also the definition of the notion of law: "The law is nothing but the order of the reason with regard to the common good enacted and promulgated for the public from the one, who cares over the community. (TH. VON AQUIN, 11. book, 1. part, 90. question, Art. 4)

The Voluntaristic Notion of Law

The crossover to positivistic theories has been introduced by JOHANNES DUNS SCOTUS (1126–1308) and OCCAM (1285 – 1349). For both the law is not the given divine order, but it is the expression of the will of good. Laws thus can be wanted, their content is not given by the order to the being, the content is desired. With this the pre-conditions for a voluntaristic view of the law are established.

Law by Reason

In the beginning of the secularization of the state MARSILIUS VON PADUA (1270 – 1442), NIKOLAUS VON CUES (1401 – 1464) and others a new concept of legislation based on recognizable reason to be traced back to public power is developed. The people's have to obey the laws, which are enacted by the political sovereign. The sovereign has the obligation to enact laws, which correspond to the will of God (J. BODIN). The total breakaway from a supernatural tie performs HOBBES. For him the Law is the decision of the highest commander of the state: "Which considered, I define civil law in this manner. Civil law is to every subject those rules which the Commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of for the distinction of right and wrong; that is to say, of that is contrary and what is not contrary to the rule. (TH. HOBBES, II. Part, 26. Chap.) With this standpoint the final dissolution of ties to natural law is mate. Laws are expressions or orders of the will of the sovereign.

b) Positivism – Natural Law Theory– Legal Realism

Decisionism

Since a grim battle between those representing a given order to be respected by the laws (Natural Law Theories) and those representing positivistic concepts has erupted. The positivists propose deny that laws depend on a given order, they are independent from this order and can only be analyzed with regard to other positive laws but not with their consistency to a given order. (KELSEN)

A consequence of the Decisionism of the 19th century is that one has drafted and established in public offices as in the ivory tower many laws without relationship to reality. One did believe that the sovereign is almighty and that he can make

possible the impossible. Unworldly laws, which partly never could be implemented have been enacted. Today one is convinced that the lawgiver can not only rely on his will, but that he has to take into account the given realities: the facts. Social factors, organizational limits, personal, financial and political conditions impose considerable limitations to the legislature. One of the tasks of sociology of law is to detect those general social conditions, which have to be considered by the legislature and to indicate within what framework he may draft a new law which will be realistic and can be implemented. Thus based on practical experiences of legislation one did come to the conviction, that law can not only be deduced from the will of the sovereign (Decisionism and Voluntarism). The arrogance of the Decisionism of the 19th century had to give in to a more realistic view of the law.

c) Law and Separation of Powers

Who is the Lawgiver?

A part from the question with regard to the content of the law one has to ask the more difficult and important political question, who is or should be competent to enact laws: The judge the authority or the people. Indeed all three elements are to be included in the actual notion of the law. Undoubtedly first it was the judge, who based on concrete cases taking into account the precedents, custom and morals as well as given principles relevant for his sentence had to find or determine the law. The principles and traditional wisdoms have solely changed into concrete prospective prescriptions. Who ever wanted to behave correctly had to act in conformity to the wisdom considered as mandatory by the judges. What could be considered more obvious, then to give the authority, which was moderating the procedure and the high jurisdiction the power to enact those wisdoms and principles prescribing the ordered good conduct to be followed by the subjects and according to which they would also decide the cases.

Contract-Laws

Legal obligations have not only been established by cases and orders of the authority. They developed also on the bases of agreements. In fact new norms have been enacted by agreements binding the contractual parties and the authority. Those agreed norms had the same effect as the laws enacted by the authority. On the European continent the judge made law has been more and more replaced by the ordered law. The reception of the old roman law be legislation has certainly also contributed to this development. The total new area in this field of legislation made by the assembly representing the people has been introduced by the French Revolution. Today however we can also observe in the common law countries the growing importance of the legislation made by the legislature and not any more by the judge as lawgiver.

Legislation as Expression of the Volonté Générale

The disputes between the authorities and the people were heavy and intense. In the age of absolutism the political rights of the people were almost totally denied. The right to establish and enact laws war within the power of the sovereign. The power holder of the sovereignty of the state did consult the assemblies of the estates according to his power and according to the tradition of the principalty. With the French Revolution the counterpoint is set. Article 6 of the French Declaration of Human Rights proclaims: “Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.“

Those in favor of the political right of the people were still facing almost indissoluble problem: Did they want to give to the executive the power and competence to execute the laws, they had to find criteria’s which would delimit enacting and establishing laws on one side from implementing and executing them on the other side. Who is competent to enact laws, needs to know what laws are. Only a clear notion of the law enables a reasonable division of competences between the legislative and the executing branch. Three different solutions have been developed at the time:

General Validity

Already the notion of “volonté générale” contains the idea of the *general* or *universal*. Thus laws are such orders, which apply for everybody in the same way, they are generally valid (for instance smoking prohibited) contrary to the concrete order, which is addressed to a concrete and determined person and which prescribes this person a certain behavior or omission as for instance: Mr. Smith has to pay the first of October 2007 10’000 Euro taxes. The idea that orders are reasonable and consistent to the general moral principles as soon as they can be generalized has already been developed by KANT with the categorical imperative. For the today’s understanding JOHN RAWLS can be consulted, who proposed that laws have to have a content, which is acceptable for everybody.

Only Interventions in Liberty and Property need a Legislative Rationale

In cases the democratic assemblies succeeded to impose their power, to participate on all decisions of general nature (e.g. Kurhessen, Saxony and Prussia after 1815), the achieved a considerable restriction of the power of the executive. However the powerful princes did not allow easily such far-reaching restriction of their power. They tried on their side to limit their right to say at least to those laws, which would limit the liberty of personas and intervene in their property rights. (e.g. Bavaria). Consequently one had to ask, whether a part from these laws, the prince would have a original prerogative power to legislate. This power of the prince or the Crown to legislate has been later transformed to the prerogative of the executive to issue ordinances.

Laws have to Regulate only Principle Generalities

KARL SALOMO ZACHARIÄ (1769 - 1843) proposed a less formal but much more political notion of the law. He required that the legislature needs to regulate the principle issues and leave to the executive to implement the generalities. According to ROBERT VON MOHL (1799 - 1875) the law is the ordering norm, which has been promulgated by the competent authority of the state in order to be observed by the addressees.

Substantive and Formal Laws (Materielle und formelle Gesetze)

A way out of this confusion of different notions of the law, which was finally caused by the battle of competences between the representatives in parliament and the prince, has been found by the German constitutionalist LABAND. LABAND proposed in fact a dualistic notion of the law. Her distinguished between the substantive and the formal law. The notion of the substantive law is determined by the content of the laws. Accordingly each general norm fits to the notion of law. The formal notion however is determined by the procedure. Formal laws are all decisions, which have been enacted according to the given legislative procedure. Thus legislature and executive can issue substantive norms. Formal laws however can only be decided by the constitutional legislature, which has enacted them according to the legislative procedure provided for the decision of the laws. With this solution LABAND has somehow withdrawn the political dispute between the Prince and its Assembly. At the same time he did not solve the question, whether based on the concept of separation of powers some issues have to be decided with regard to their substance by the formal legislature. Thus one did still observe basically the principle thet the legislature has to decide all norms, which limit freedom and property. (G. ANSCHÜTZ, R. THOMA, G. JELLINEK, P. LABAND)

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VIII. The Organization of the Sovereign Power as Relevant Criteria to Categorize State Systems

Is the Criteria ARISTOTLE sufficient?

According to what criteria the different types of State systems should be categorized? Are we settled with the criteria of the number of those who hold the power of the state? The political reality ARISTOTLE was facing was the diverse organized state community of Greece. Democratically organized cities neighbored tyrannies and political orders depending on monarchs.

Sovereignty of the individual Reason

The modern human being is different from his primordial ancestors because he/she is not a mere object submitted to nature and environment, but that it can influence and even arrange his/her environment as a subject according to his/her will. Human beings of modernity can say "no". The middle-age society accepted

the political power of the state or monarch as a fate, given by God. The monarch did not have to enact special laws for the people's, he was only asked to implement the divine law on earth and within the territory he controlled. He was the Justice who had to condemn the lawbreaker. Only very few monarch came to the idea, to design with their proper laws the state organization and the society of their state. The state and the order of the society was something given and handed down.

In the secularized state with complete and unlimited sovereignty the power holder did not only have the power to sentence human beings but also to "make" the state and the society of its subjects according to his proper will. The power of the state centralized in the hands of the "almighty" was unlimited and undivided. The old feudal structure with the divided sovereignty has been replaced with the centralized absolutism.

Sovereignty Concentrated in one Governmental Branch

The concept of a unlimited sovereignty was totally strange at the time ARISTOTLE did write his "politics" and there developed the different criteria's do categorize the organization of states. According to him the laws were namely orders prescribing the behavior, that is criminal laws which had to implement justice. His "Polis" was organized and structured by the tribes. The idea of a unlimited comprehensive state power was unknown.

Some modern states entrust to one single state body the unlimited and undivided political power. This power can be concentrated in the parliament (parliamentary democracy), in a Party (communist states or states with one party) or the army (some Latin American states until recently)

Undivided v. divided Sovereignty

On the other hand we can analyze states, which up to now have not made the path to the absolute state power concentrated in one branch. The United States of America for instance have inherited the Constitution of the UK developed after the time of the Glorious Revolution. Thus they installed a balance of power among the president (elected King) and the Congress (parliament). Also in Switzerland the absolute state power could not prevail. Of course the despotic dominion of some cantonal aristocracies were known. But even in these cantons the people was able to defend its rights in the extremist case. The federally organized Confederation of Switzerland thus did not fit into the scheme of the state of modernity with a uniform, absolute and undividable sovereignty.

Let us distinguish therefore the actual states according to the way they organize their sovereign power. If we follow this council, we come first to the following conclusion: On one side we will have states, which have followed the absolutistic development and entrusted one governmental branch with the entire sovereignty of the state. On the other side we will find states, which still have a concept of dividable sovereignty and thus did structure and entrust sovereignty to different branches.

Mixed Governmental Systems

ARISTOTLE was with regard to the democratic constitution of the opinion, that the people could in fact govern over a small self-sufficient autarchic polis. Indeed the people at this time did decide many issues directly and autonomously in the assemblies. Moreover one aimed to avoid the establishment of a oligarchic ruling class by providing the selection of civil servants randomly by the lot for each new year. The modern states compared to the Polis of ARISTOTLE are however much bigger and much more complex. They cannot be governed by open assemblies of the people. They would much more be considered by ARISTOTLE as *mixed governmental* systems. The people elects regularly the parliament and/or the Executive (Democracy), the parliament enacts the laws (Oligarchy). The executive, which legally or only de facto is run by a chief of government corresponds in the tendency to the constitutional design of a monarchy.

However also this view does not allow us to come to some universal acceptable assessments of the different actual democratic forms of government. Decisive is the original question ARISTOTLE has asked previously, namely the organization of the *hierarchically highest power* of the state. Thus if we want to analyze today the different types of states, we have to know, which governmental branch is entrusted with sovereignty and how it is organized.

Sovereignty Carried out by one State Body or by Several State Bodies

When we know, how this body is elected and how it is composed we shall be able to evaluate the type and the degree of democracy the respective state has implemented. Viewed from this standpoint we can categorize the states as follows:

First we have to distinguish between states, which entrust the execution of sovereignty into one highest state body and those which would distribute the sovereign powers to several branches. The first ones are states with a parliamentary and presidential democracy. The United States and some Federal States belong to the States with sovereignty divided and thus distributed to the different branches and levels of government .

External Sovereignty

One should finally not forget the states, which entrust the factual sovereignty to institutions such as a party or a religion, which can not be considered as a constituted state branch. The communist states as well as states determined by religious traditions belong to this category. In these states it is not a constituted state branch which holds sovereignty. It is rather an institution external to the state and thus not accountable to any of the constituted branches is the absolute power holder. The state is de facto a Para-state and the constitution has only pseudo functions.

B. The Organization of Modern States

I. Sovereignty centralized in Parliament

a) England

1. Early history of the Parliament of the UK

Lessons from the History of the UK Parliament

Many western democracies and actually also some of the countries of the South and of Eastern Europe have developed different forms of the parliamentary democracy which is based on the idea of parliamentary sovereignty. This parliamentary sovereignty is strongly linked to the history of the Parliament of the UK. While the United States of America modeled their governmental system according to the constitutional reality of the UK of the 17th century, the parliamentary democracies of Europe, Australia, Asia and Africa have their roots in the system of the Parliament of the UK as it developed in the 19th and 20th century. For this reason it is indispensable to give a short overview of the most exciting and inspiring history of the development of the Parliament in the UK. By understanding these historical developments, one will also get a better understanding of the very principles of democracy.

The British parliamentary history is interesting and significant because of for different reasons. Contrary to the parliamentary bodies on the European continent, the British parliament was able during its entire history to establish itself as a independent branch and counterpart of the Crown, which for long time was the decisive branch with almost all important prerogatives. With this position it was able later to diminish step by step the prerogatives of the Crown.

The Cabinet according to the Westminster Model

Parallel to the growing empowerment of the Parliament the system of a cabinet as part of the parliament entrusted with executive powers could develop. It is this system of cabinet which later has seduced many states as the system guaranteeing most democratic rights to the people.

Early Model of Representation

The early Parliaments were originally representing the estates of the feudal structure of the society. However in the old English Parliament, the idea of a general representation not based on the estates but on the territory including all persons living in this territory could take place. Thus the modern theory of representation ties closely to this early English history of the development of Parliament. The elections of the members of the Commons at the beginning were a farce at least

according to the actual notion of election. Indeed the idea of free, fair and independent elections based on one person, one vote one value developed only in the 19th century. But with these developments of the system of elections and of growing political rights of the people the modern party system could develop. Thus also the party system is linked to the development of the modern parliament.

King in Parliament

Sovereign in the legal sense is historically since 1295 the triangle with the Crown, in common with the upper and the lower house. De facto this legal sovereignty has considerably shifted during the times. For centuries the Crown was de facto the only holder of the sovereignty, then it shifted to the upper and later to the lower house. A well balanced partition of the powers emerged in the 17th century. Today the lower house is de facto the holder of the sovereignty. Based on his sovereign power, the King decided in early times at his whim, to summon the Parliament and to ask the chambers for advises he considered necessary. Today the Queen has to summon the parliament after the election, she has to sign all laws decided by the parliament without possibility to veto any legal provision and she has now power to chose her executive Cabinet but to ask the majority leader to form the new government. These factual changes of the political power did not change however the legal bases of the sovereignty, which for 700 years is shared between the two houses and the Crown. How did this parliamentary tradition emerge?

Assembly of the Wises (Witenagemot)

Already before the Normans invaded the Island, the Anglo-Saxons have known according to the German traditions some rights of the people to participate when the local barons took their decision. This right to participate has namely been respected to decisions on war and peace. Superior to these local assemblies was the assembly of the wises with their King called Witenagemot. This Witenagemot ratified treaties and gave advise to the King, when he allotted the estates of the "state", when he elected barons or lords. Finally the Witenagemot had the power to elect the King. However the assembly did not enact any legislation as legislation according to today's understanding did not exist any way. The assembly did neither decide on taxes as the king at this time did not need additional income by taxes.

But similar to other original Germanic advisory bodies the assembly had the power and the obligation to assist the King in his court function as a judge. The assembly was summoned by the king. And it was the King to decide who should be summoned as a participant. The people was allowed to follow the debates and either to demonstrate satisfaction or disapproval.

Magna Charta and the first assemblies of the King

With the invasion of the Normans this early democratic function has been canceled. England under the yoke of a foreign conqueror, who took over the whole territory of the Island as his property based on the right of the conquest. As new owner he distributed the land to his own barons and bishops. Replacing the

Witenagemot he summoned a assembly, composed of his subject to assist him with advise. Unlike the Witenagemot it was not any more a mixed assembly composed of different representatives of the people but an assembly composed only of direct subordinated dukes. Thus it was a traditional body of the feudal society of the middle-ages.

This feudal body has stipulated for the gentry in the year 1215 with the Magna Charta the first basic liberties. However the Magna Charta had no influence on the development of the Parliament which took only place in 1265. At this time the rebel Simon de Montfort, who did lead the opposition against Henry I, summoned a national assembly, to which he asked to only dukes to participate but also representatives of different districts (Boroughs). With this historic decision Simon de Montfort initiated the beginning of the development of the parliament, which took over the earlier existing tradition of the Witenagemot. Similar assemblies did meet in 1275 and 1290 until King Edward I. summoned the first very parliament. Members of this parliament were not representatives chosen by the people of the Boroughs. They were chosen by the King however with the task to represent the people of their Borough. With this prerogative to chose the members of parliament the king could save his influence on the parliament, which has only be restricted by the Bill of Rights in the end of the 17th century. Nonetheless the members of this parliament were considered to defend the interest of the territory of their entire district and not of a special state.

Say in Taxation

The decisive competence, which Edward I. vested into his Parliament, was the power to participate in his decisions to levy taxes. „No taxation without representation“ became since the battle cry of all parliamentarians in the Anglo-Saxon world. In particular in later times the say for decisions to levy taxes became a important instrument in order to influence the policy of the King. In the beginning however the power did cut both ways as the representatives were only asked to assist the King, when he wanted to levy new taxes.

Petitions

A part from the right to participate on decisions to levy taxes, the parliament had the power to decide on all different complaints of the most general nature and on petitions. With this function the parliament continued the old judicial task of the previous Witenagemots.

Constituting and Expansion of the Powers of the Parliament

Already in 1322 the powers of the parliament have been enshrined in the statue of York: “but that matters which are to be determined with regard to the estate of our lord the king and of his heirs, or with regard to the estate of the kingdom and of the people, shall be considered, granted, and established in parliament by our lord the king and with the consent of the prelates, earls, and barons, and of the community of the kingdom, as has been accustomed in times past.” (http://www.constitution.org/sech/sech_058.txt). Later the Parliament could ex-

pand its powers, because King Edward II. and in particular his successor Edward III. were dependend on new taxes. Thus the parliament required the power to participate for the nomination of the royal advisors and in particular at the appointment of the new King.

Two Chambers

In the old England the Lords and the Prelates were sitting together in one Chamber. Contrary to the European and in particular the French development, where the King summoned the three estates of the spirituals, the gentry and the common citizens, the English parliament was from the very beginning only composed of the Lords including the spirituals and the Commons.

When exactly Lords and Commons separated in two different chambers is not assured. Probably the need to have a simultaneous but locally separated debate did lead to the development of two separated chambers. It may also be, that the Lords have never debated jointly with the Commons. Important for the further development of the Parliament was the fact, that the big land-lords did sit together with the other free citizens representing the Boroughs. Thus a class of land-lords separated from and exploiting the free citizens did not develop.

Comparable Developments on the Continent

Advisory assemblies, as we can observe in England of the 13th and 14th century have been established in almost all other European Kingdoms. In France the Kapetinger did establish the tradition of the "curia Regis" (the Kings Court). In Poland it the Szlachta, which in the Magna Charta of Poland stipulated the privilege to participate in taxation; and in 1493 the "Sejm" under Piotrkov enacted for the first time statutes for the entire country. In Sweden King Magnus was forced because of the powerful gentry and the free citizens to accept a first timid beginning of the Swedish parliament called "Riksdag". This parliament was composed of representatives of Cities and of the spirituals as well as of Barons. In the Swedish empire the state parliaments (Landtag) had a certain political significance. Their members did however not as in England represent the people of an entire district but rather their estate. The four estates (Spirituals, Lords, Knighthood and the cities (citizenry) had to deliberate separately. As in most cases they disagreed, the sovereign had the powerful task to reconciliate and thus to strengthen his power.

In the old Swiss Cantons the Landamann (Governor) took over the power, which originally was held by the people. He did sit in judgment in common with the people; in the Canton of Schwyz already in 1294 the people assembled in a common body. (Landsgemeinde)

2. The Reformation Parliament of Henry VIII

Absolute Sovereignty of the Parliament

As in all other European states also the English Parliament lost on importance during the age of absolutism. However contrary to the French representation of the

three estates, it did not only regain very early its lost competences but it could extend its powers. What may be the reason for this development? When King Henry VIII entered in his conflict with the pope in Rome and thus had to find a new legitimacy without the pope. He had to find the fundament, which gave him legitimacy as King by the grace of God not only to rule temporal but also spiritual issues. This legitimacy he could only get by his parliament.

Thus in the “reformation parliament” in 1529 with the supremacy act of 1534 the final separation from the roman catholic church has been performed. “Albeit the king's majesty justly and rightfully is and ought to be the supreme head of the Church of England, ….(http://www.constitution.org/sech/sech_074.txt). While the Parliament up to this time mainly decided on cases and executed judicial functions a part from taxation and some exceptional statutes when deciding to separate from the church it did establish itself up as the supreme authority implementing sovereign powers. Without sovereignty provided, it would not have been able to make such decision.

The Parliament Bound by Divine Law

Herewith a new and important dispute on the issue of the obligation of parliament to observe the divine law is emerging. CHRISTOPHER SAINT GERMAN (1460 - 1540) and THOMAS MORUS denied the Parliament to have full and unlimited sovereignty including to violate divine law. Although Thomas Morus did go quite far in is case saying: „I must needs confess that, if the act of Parliament be lawful, then the indictment is good enough“ (TH. MORUS, zit. in: G. R. ELTON, S. 239).

Constitution Making

The final path towards full sovereignty has been made by THOMAS CROMWELL, when he stated the position with regard to Bishop FISHER, that the Parliament has without any doubt the power to abolish or to amend the church law. In consequence FRANCIS BACON (1561–1626) could declare: „For a supreme and absolute power cannot conclude itself neither can that which is in nature revocable be made fixed;…“. The later established theory of secular sovereignty by HOBBES has thus already been practice before. Although the Parliament vested with the reformation a absolute power to the King, it did at the same time establish itself as the body able to constitute such important changes of power. Thus with this development it began to expand its ruling by statutes. The Parliament did not any more restrict itself to interpret the law, but also to constitute the law. It became in common with the Crown the source or the fountain of the law. Law was from now on not any more simply given, it became an instrument in the hand of the legislature to make justice and to rule the society.

Thus looking into the historic development of the British parliament it is not astonishing, that at the time of the age of European absolutism, the British Kings did summon the parliament several times. Under the 37 year reign of Henry the VIII the parliament was in function for 183 weeks. Even under Elisabeth I. who ruled for 45 years it debated during 140 weeks.

3. The Parliament in the 17th Century

King, Lords and Commons

The status and the composition of the Parliament during the 16th and 17th century is important, because the later American constitution took over essential elements of the British Constitution of this period. As we could already see, the sovereignty was at this time vested into the three bodies: King, Lords and Commons. Only acting in common these three branches could issue a statute. As sovereign branch in the country they did not have to share the power of the Commonwealth with any other power. Each other power was delegated and dependend and delegated from the sovereign, that is the King in Parliament.

Lords and Commons could defend this position, because in the period of raising commerce and the expanding industrialization they did not depend on the income of the court and the king but of the market. Unlike their European counterparts who depended with their income from the court and thus needed to exploit the farmers in order to levy the taxes for the King. The requirements for a bourgeois development of a industrial and commercial state were given. Moreover through the colonization the Crown was able to raise its income without having to levy burdensome taxes on the farmers as elswere.

From the Long Parliament to Cromwell

It was not by accident, that in the period of 1640 to 1649 during reign of the "long Parliament" exactly the high taxes were the one of the main reasons for the fall of Charles I and for the revolution. The Commons supported by the people were able to run the country for a limited time. In the act to abolishing the Kingdom of March 17 1649 they declared that the Kingdom and the Power used by one man is unnecessary and that it can endanger liberty and security and the common interest of the people. „And whereas by the abolition of the kingly office provided for on this Act a most happy way is made for this nation to return to its just and ancient right of being governed by its own Representatives or National Meetings in Council, from time to time chosen and entrusted for that purpose by the people". (http://www.constitution.org/sech/sech_106.txt).

Already after a short period the wisdom often to be observed in the future that revolutions eat their proper children became evident. Cromwell did abolish with military power the Rump Parliament and declared himself as the only leader of the country as lord procurator. „That the supreme legislative authority of the Commonwealth of England… shall be and reside in one person, and the people assembled in parliament; the style of which person shall be, The Lord Protector of England, Scotland and Ireland". However he did not want to renounce totally to the Parliament. The long tradition prevented him to abolish totally the parliament. Thus he tried during his reign to summon a Parliament, which executed his orders. Shortly after Cromwell passed away (1658) ended in the whole history of the UK the very few years without legitimacy of the Crown.

Glorious Revolution: Guarantee of „Free“ Elections

Charles II. who then wanted to establish the old regime, has however been replaced in 1688 by James II. With the Glorious Revolution and the Bill of Rights (1689) the previous powers of the Parliament have again been recognized and enshrined in a constitutional document. Since this time the power of the King and in particular the power of the House of Lord started to decrease. Already with the Bill of Rights the Parliament did proclaim the guarantee, that “elections shall be free”. A really general right of all citizens to vote and to have guaranteed the freedom of vote in the modern sense has not been established. The request of the Parliament for free elections did relate to the fact, that the King could decide on the elections of the Lords and through his agents influence the elections of the Commons. With free elections the Parliament wanted to reserve its possibilities on its own to influence the election of the members of the Commons in order to maintain power of the party or to restore the lost influence in the Commons. Thus the issue was not free elections for all citizens. Until the reform act of 1832 only 5% of the citizens more than 20 years old had the right to participate on the elections.

4. The development to a cabinet executive

From the Privy Council to the Cabinet

During the 15th to the 17th century the most disputed constitutional issue was to gain and upheld the balance between the Parliament and the Crown. In end of the 17th century and in particular in the 18th century the parliament began to fight for its superiority over the Crown. The key issue of this battle was the development of a parliamentary governmental system. How did it evolve?

Already for a long time the King appointed a committee of advisers (around 20), who did assist the Crown in the its responsibility to govern the country. This Curia Regis has developed into the privy council. Originally the King decided alone, who should become a member of the privy council. At the end of the 17th century however and in particular in the 18th century when the power of the Parliament was raising it also influenced the choice of the King. A commission of the privy council was called the cabinet. The cabinet had from the very beginning the most important function of a council to assist the King and later to decide independently on governmental issues. Thus also the importance of this cabinet under the rule of the Prime-Minister did continuously raise. With its growing importance the commons required that the members of the cabinet an in particular the Prime-Minister needed to have the support at least of the majority of the commons. At the end of the 18th century the Commons succeeded to enforce their will on the King and to require him to remove the Prime Minister with his cabinet, who has lost the confidence and thus the support of the House.

Cabinet and Crown

With the support of the Commons the cabinet thus extended its power with regard to the King, who could not any more decide on his own on basic policy issues and govern the country without support of the cabinet.

Parties

Parallel to this development the Parties gained on importance. Originally the British Parliament was split into two opposing parties: The Tories (conservatives which defended the old regime and the Whigs (liberals), which initiated all important reforms. According to the strength of the party the cabinet was only composed of Tories or of Whigs. Indeed the cabinet and the majority party merged to a almost inseparable political unit. Thus the separation of powers between parliament and executive was replaced by the separation of powers between the opposition and the majority, which had according to the winner takes all system all powers to run and legislate for the country. The Prime Minister in fact was the decisive head of the cabinet and of the majority party. According to his/her personality he had the power and possibility to establish a one man show and to rule the country as the de facto sovereign for a limited time. As the members of the commons did not have to fear new elections for a determined period. However as soon as the Prime-Minister would have lost the confidence of the House, they had to face the risk of new elections. Thus in particular the members of the majority party followed their Prime-Minister not to face new elections.

Generalized Right to Vote

The very development to a modern democracy of the state was only initiated in the 20th century. The Reform Act of 1832 initiated the reform development. Up to this time the election of the members of the commons was often a farce because of corruption and intimidation. The territorial boundaries of the constituencies (boroughs) were designed (gerrymandering in the US) in order to guarantee the election of some specific representatives (rotten boroughs). In addition the right to vote was limited to a small circle belonging to the wealthy gentry. The reform act of 1832 provided a new repartition of the boroughs, it expanded the right to vote to some less wealthy men and removed the power of the Lords to bias the elections of the member of the commons. This latest provision may have been most decisive for the fact, that the political power of the upper house since did continuously decline. Although the reform act initiated the development of modern democracy of the UK, it did not install at all a comprehensive democratic system in the UK. Even after the Reform Act only 7.1% of the male population had the right to vote. It needed some additional seven new reforms up to 1948 until 95 percent of the men and women over 20 were given the right to go to the polls. (1867 16,4%, 1884 28,5%, 1928 96,9%, 1948 95%)

Two Party System

The stability of the actual British governmental system is certainly mainly due to the two party system. A Westminster-Type government with several small parties, of which none reaches a clear majority will necessarily lead to continuous crises of government. The century old tradition of two parties in the UK, who share their function as governmental majority party and as minority party opposing the government is one of the reason for this stability. But also the pragmatism of the British voter, who only wants to give the party his/her vote, who may have a chance to

win and thus will run the country has largely contributed to this long lasting stability. Finally one should not underestimate the majority principle of the elections which gives the candidate the win, who gains only a relative majority in his/her borough. Thus only in 1906 the two traditional parties disputing for democracy and old regime have got the socialist party as new competitor. Indeed much later than on the European continent the socialist gained in 1906 50 seats in the commons. But already 1922 they defeated the liberals and the became the second party in the commons. In 1924 and 1929 they even gained the majority in the house and were asked to form a minority government as the most powerful party among the three competitors. In 1945 they gained for the first time the absolute majority in the house. Since this date, they mutually alternate the governmental power with the Tories. The liberals became the smallest party, which up to now was not able to have its share in the governmental power.

From the sovereignty of the Crown to the sovereignty of the Commons

To sum up after this short and necessary incomplete overview of the constitutional development of the main branches of government in the UK one can observe the following: The relationship and the political strength of the different branches within the triangle King – Lords and Commons can be divided into three different periods. It is during these periods that the powers have considerably shifted from one to the other branch. In all those periods the power of the Crown did diminish for the sake of the power of either house.

First the members of Parliament are the councilors of the King. They are asked to assist him with their advise and in particular to help him to levy the necessary taxes. The members of the Commons have to get empowered in the kings mandate from their Boroughs. Important for the further development of the Parliament is the fact, that the members of the Parliament do not only represent their estates. In particular the members of the Commons represent their Boroughs. The have to represent all the inhabitants of the territory of their Boroughs although they have been elected only by a minority.

In the second phase the former councilors of the King extend their proper prerogatives. They participate by the constitutional triangle on the sovereignty of the state and enact as part of the sovereign statutes, which need not any more to be justified as in compliance with the divine law. The state and his parliament become self-conscious and they start to take the fate of the society and the state in their proper hands. This concept of balanced power among the three branches sovereign as King in Parliament will later become the model for the American Constitution and the important power of the American president. This model still influences many different governmental systems.

In the third phase the Commons are able to expand their power with regard to the Crown and to the upper house. Today the power of the King and of the upper house became apart from its symbolic importance almost meaningless. This development is initiated through the growing influence on the Cabinet which finally ends up in a merger of the power of the majority party with the executive branch. Based on the democratization of the elections and their legitimacy the power of the Upper House is fading away . Today the Commons are the very holder of sov-

ereignty of the UK. And for the period in between the elections, the sovereignty is in the hands of the majority party, which depends almost totally on the Prime-Minister.

Westminster Model

This third phase of the parliamentary governmental system is often called as the Westminster-System, with the pure majority principle or the winner takes all system. It became the example which influenced many governmental systems of the actual states of the Commonwealth and for many other constitution in Europe, Africa, Asia and in Eastern Europe. However one has to keep in mind, that all these states have somehow deviated essentially from the original British system. In particular states without crown had to replace the King with a president which has been given more (e.g. Weimar) or less powers. (Italy and Israel). Many states, which took over the Westminster Model had to accommodate the model to the reality of several parties none of them able to gain a clear majority. Thus permanent crises as consequence required major amendments as e.g. France which under De Gaulle in 1958 changed from the Westminster to a special type of presidential model. In the Weimar Republic it was Hitler who could profit from the crises of the system. He took over the power as Prime-Minister and merged the executive with the head of the state when the president Hindenburg died.

b) Germany

1. Differences to the British Development

Centralizing and Decentralizing Federal Elements

Contrary to Great Britain the governmental System of the actual Federal Republic of Germany can not traced back for a unbroken history of parliamentary development. The heterogeneous structures of the former empire and the weak powers of the representation of the estates have prevented the parliament to become the central political power of the state as it was in Great Britain. Even today it has not the same sovereign powers as the British Parliament and it is under the permanent control of the constitutional review of its statutes and decisions by the constitutional court. On the other hand it is bound to the federal powers of the parliaments in the Länder and on the power of the upper house depending on the governments and thus political majorities of the Länder.

In the following pages we shall try based on the German example explain, how a parliamentary democratic system could evolve out of a totally different historical development. This will show as the effect the mistrust of a state with regard to parliamentary power on the level of the constitution may have. One may even be right to ask, whether the Federal Republic should not be classified as a federal state with divided sovereignty. Certainly Germany does not belong to those states, which have centralized all powers into the governmental branches. The elements uniting sovereignty into the central states in particular the competence of the Ger-

man Parliament to change with both chambers the constitution except for some core principles (human rights and federalism) are to our mind so strong, that one rather classifies Germany as a state with centralized sovereignty and not with a divided sovereignty, although it is a federal state with some competences divided between the Länder and the central Government.

Decentralization of the Power of the Empire

A comparison with the development of the state institutions in Germany and in the UK manifests some essential differences. Contrary to the British Island Germany was always an empire, which could be assaulted from almost all sides of its territory and thus had to defend itself permanently. The early decision of Charles the Great, that the different dukes of the empire should defend their territory with their proper means, had an essential influence on the structure of the German empire. It lead to a strong decentralization of the power of the empire to all the very differently shaped dukedom and free cities. The German emperor, elected by the princes was without any power to build up a central state-power. He could not levy taxes and did not dispose of an army. Already in the year 1500 one could say, that the emperor did neither have a feet of land neither peoples, nor a country to be ruled in his name, which would have given him the his necessary income.

Decentralized Absolutism

The feudal masters on the other side could not rely as in France on the central power to solve their problems and to overcome for instance of the problems of the reformation and the wars of the peasants supported by the insecurity of the Reformation. Each of them established thus its own absolutistic dominion and thus undermined the general feudal system, which with the general reception of the Roman Law already has lost some of its most important roots. At the end of the thirty ears war, the former big empire did mire in the misery. The competences vested to the Länder in the peace of Westphalia in 1648 to make treaties with other powers, as long as they are not directed against the emperor was the final element which did the rest to deprive the emperor of his power. The rest of his power remaining was bound since 1663 to the German Reichstag, which had to approve the statutes and the taxes of the emperor.

Representation of the Estates in the Reichstag

While in the UK the members of the commons represented the entire constituency, the members of the Reichstag have never represented a territorial constituency. They only represented the interests of the German estates (Reichsstände) with regard to the emperor. Member of the Reichstag were only those which were direct submitted to the empire. So until the 16th century even some states of Switzerland did belong to the Reichtsag. The knights and the inhabitants of the free villages of the empire have not been represented. The Reichstag was divided into three different collegial councils: The royal electors, the council of the Princes and the Cities. The right to vote of the cities as however for a long period been disputed. The three Curia's did deliberate separately. If they disagreed they had to to

find a agreement in most difficult negotiations. None of the chambers could be overruled by the two other chambers. The decisions have been enacted in the form of a treaty between the emperor and the estates of the empire.

2. Historical Influences

Week Judiciary

The court of the empire (Reichskammergericht) was given the responsibility to maintain the eternal peace within the land (Landfrieden). It was with regard to the emperor and to his own court (Hofgericht) independent. It decided according to the Roman Law as a first instant court with regard to all self-governing units under the emperor and if the prince of the Land did allow, it could decide as appellate court on domestic issues within the Land. The procedure was enduring and circuitous. Already 1521 about 3000 cases have been undecided. 1772 there were already 61233 cases not decided. Some exceptional procedures lasted for more than 100 years!

1'800 Dukedoms and Principalities

The empire itself was fragmented into some 1'800 dukedoms, principalities and free cities. 1475 dukes ruled in average over 500'000 inhabitants in the South West of Germany. But many dukedoms counted not more than 300 inhabitants. The dominion over such small territories corresponded still to the old patriarchic system. It is obvious that those patrician families have not been represented in the Reichstag. 51 free cities have in general been governed by patrician families, which often ruled their cities for their proper interests. 63 Lands were under the regime of a prince bishop, who has been elected by a council (Kapitel) and it ruled its Land - often badly - in common with this council.

170 to 200 principalities and earldoms have been ruled by a family. The earl or the prince new most of the inhabitants of their small shire personally. He hold often a expensive court and ruled the country with an outnumber of servants, which had to be paid with excessive and burdensome taxes. Only in the southeast of Germany we can find big principalities with a special administration and a parliament divided according to the estates. In the bigger Lands the aristocratic and big landowners were most influential. The cities requested the right to approve statutes and taxes.

Thirty Years war and French Revolution

After the thirty years war the princes managed to push back the influence of the estates. The administration of these big Lands was much more efficient and effective than in the small dwarf dukedoms. They could also establish a good and functioning judiciary. Thus the conditions either to secede from the empire or to assume the leadership through the hegemony of the empire were thus given. Timid attempts to liberalize the state power have been destroyed by conservative kings and in particular by the war against Napoleon.

The rule of the general Prussian Land-Law of 1794 (Allgemeines Preussisches Landrecht) however could be maintained. It was the most progressive at the time. Under the leadership of Metternich and as reaction against the liberal endeavors initiated by the French Revolution a loose federal alliance called “der Deutsch Bund” has been agreed upon. The assembly of the estates has been composed of the plenipotentiaries representing the Lands. However it had no real powers to enact decisions, which were directly binding the citizens. They could only negotiate agreements binding the Lands as members of the alliance. The assembly was divided into two councils, which did meet in Frankfurt. The plenum was composed of the originally 40 then 33 ambassadors of the member states. Those member states were given from 1 to four votes according to their size. The smaller and closer council was a committee of the plenum. In this small council the eleven big member states had each one vote the other together 6 votes. The presidency in both councils had Austria with its presidential might. The alliance was a confederation, which in principle did not infringe into the sovereignty of its member states. Decisions of the assembly (Bundestag) were of international law valid for the member states but not within the domestic law of these states. The Deutsche Bund however was a closer alliance of the members than the former empire. However the activity of the alliance was commanded by the two hegemony of the two contrasting poles Prussia and Austria.

Timid Attempts to Liberalize

In some middle and small Lands such as Baden and Württemberg a comprehensive system of representation based on a constitution has been established. Attempts to liberalize however have been stopped by press-censorship and by infringement into the liberty of teaching at the universities. So for instance the most famous German Poet Goethe (1749-1832) advised in the year 1815 his great duke Charles August on the question, whether one should prohibit a publication of an editor criticizing the prince, with the following council: One should not punish the editor for his attacks toward the prince, as the editor could misuse the trial against him with his sharp pen and impudent tongue and he continued: “Just now I am informed of a extensive well thought paper on the future institution of censorship, which confirms me in my conviction in this circuitous way of explaining . Then it follows, that the press-anarchy will be replaced by the press-despotism and that a wise and forceful dictatorship has to counter such mischief and to stop it until a legal censorship is reinstalled. But in order to conform to the request of his master, some lines before he proposes: I return to my already expressed measure in the following way: one has to ignore the editor totally, but one has to make the book printer responsible and to prohibit him with direct obligation to print this leaf. The prince has not to fear any offensive statement as he is much more devoted to the prince than the editor.

St. Paul’s Church

The July Revolution of 1830 in France as the then following development in Switzerland and in Belgium gave the liberal forces in Germany new considerable

strength. In Saxony, Kurhessen, Hanover and New Brunswick liberal constitutions following the model of southern Germany have been adopted. However in 1847 the attempt of a parliamentary assembly composed of representatives of the Prussian districts, to establish a constitution failed. Still the liberal princes of several small and middle principalities promised to the liberal intellectuals the enactment of a new constitution and to underline this promises they nominated liberal ministers as head of their executive government. Following these developments also the conservative Prussian King Frederic Wilhelm complied to the election of a new parliament. On may 18th 1848 the national assembly met in Frankfurt and started its discussions. It adopted a liberal constitution for the empire with a extensive catalogue an fundamental rights and liberties, which partially can even be found in the actual basic law of Germany. It elected as a provisional central government a Lord Protector of the empire, who however could never execute his function. To the Prussian King the parliament offered the crown of the emperor. But he refused to be given the dignity of the emperor by a assembly elected by the people. He could only derive its sovereign powers by the grace of god.

National Unity prior to Liberalization

In the following events the hopes to implement a democratic organization of the state had to be – at least for the time being – buried. In a period at which in the UK the Parliament already could repute its absolute sovereignty and in which it was busy to implement the principal of general voting rights, Germany mainly was fighting for its national unity, the abolishment of feudal structures, the implementation of liberal fundamental rights and the installation of a real parliament, which would be given effective political powers. It is obvious that not everything could be realized at the same time. Thus first one was concerned to establish national unity. Under the leadership of Bismarck a now alliance of states under the hegemony of Prussia could be created: It was called The northern German alliance (Norddeutscher Bund). Bismarck achieved to conclude an agreement with the liberals and to induce them to renounce to their requests for a sovereign parliament for the sake of national unity.

The Constitution of the German Alliance in 1871

On April 1867 the constitution of the northern German alliance has been adopted. This constitution was to be extended to the other Lands of the empire four years later. The constitution provided for a general representation of the people in the Reichstag. But it prevented the establishment of a executive dependend on the parliament until the adoption of the constitution of Weimar after the first World war. The Chancellor of the empire was de facto not accountable for his activity to the parliament and thus could not be removed by the parliament, when it lost confidence of the majority. The parliament itself was composed of a chamber of the alliance (Bundesrat) and a national chamber (Reichstag). In the chamber of the alliance the votes of the Lands were weighed differently according to their size and importance. The hegemony of Prussia has been accepted and enshrined. This up-

per chamber was the highest organ of the empire and had to agree to all statutes. With 14 votes it could prevent a constitutional amendment; Prussia had 17 votes!

Reichstag

Though the Reichstag has been elected by the people, the right to vote was still restricted according to the census principle. Based on this restriction a proportional representation of the social democrats has been prevented. Nevertheless the Reichstag was able to strengthen its political power and thus to gain political profile. 1912 the Social Democrats became the strongest fraction in the Reichstag. At the end of the first World War on the 28th of October 1918 the Constitution has been amended with the decisive provisions: ",,,,,The chancellor of the empire needs the confidence of the Reichstag." With this provision the last step for the implementation of a parliamentary constitutional monarchy has been made, which existed in Britain already since centuries. However it lasted not even one month. Already on the 9th of November the emperor abdicated.

Executive with Two Heads in the Constitution of Weimar

Thus a new Constitution had to be elaborated. It has been adopted in Weimar. How could a parliamentary system with parliamentary sovereignty but without a monarch be realized? The answer was clear. Instead of a monarch as head of the state one hade to establish a presidency with a elected president of the empire. This president had been delegated comprehensive competences. He (not the parliament) appointed the Chancellor of the empire, he concluded treaties with foreign powers, was the commander in chief of the army, could submit statutes to the referendum of the people, was given the power to dissolve the Reichstag and was responsible to maintain and guarantee law and order. He decided on the case of emergency and was allowed to abolish in this case constitutional rights.

The president was elected for seven years and could be reelected. The founding fathers (e.g. Hugo Preuss) wanted to balance the power of the parliament with a powerful executive composed of the president elected by the people and of the chancellor of the empire elected by the parliament on proposal of the president. The executive was a collegial organ. Each minister of the empire managed his department autonomously. For his activity he was directly accountable to the Reichstag. The chancellor of the empire was the primus inter pares, he moderated the meetings and was given the power to decide the major directives of the policy. The power of the Reichstag was considerably impeded by the great number of parties. No party was able to achieve a absolute majority. In consequence the state was facing several crises of government, as the Chancellor and his cabinet needed the support and the confidence of the Reichstag. A part from the Reichstag a Reichsrat (upper chamber) was composed of the representatives of the governments of the Lands. This upper chamber was mainly asked to advise the government, but it had also to ratify statutes which have been adopted by the Reichstag. Did it reject such statute, the Reichstag could overrule the decision with a two-third majority. For advise on economical issues a council for economy has been

installed with a advisory function. It represented the German people based ont its professional groups.

The National-Socialist Minority Party abolishes the Constitution

The constitutional Monarchy has been replaced with the double executive of the Weimar Constitution. In this system the parliament still has not reached full parliamentary sovereignty according to the Westminster model. The self-consciousness of a parliamentary democracy according to the British model was still lacking and it was not able to meet the raising power of the president of the empire. Moreover it has been weakened by the disputes of the radical parties, that the national socialists as minority party led by the chancellor Hitler and after the death of President Hindenburg was able to get rid of the young parliamentary democracy and to establish the totalitarian despotism of the Führer.

National-Socialism

The new chancellor Hitler, who has been appointed 1933 by Hindenburg had an easy game, when he implemented his known proposed program to abolish the parliament. Based his competence of emergency the president of the empire Hindenburg promulgated after the Fire of the Reichstag on the 28th February 1933 the ordinance for the protection of the people and the state, which did allow the government to prosecute all political opponents. On March 24 1933 the Reichstag adopted a statute to remedying the hardship of people and empire, this statute which delegated all powers to the executive provided in article 1: Statutes of the empire can …. also be decided by the executive." Art. 2 determined: "The statutes which are adopted by the executive can derogate from the constitution of the empire." With this statute the Parliament did abolish itself.

Deprivation of Powers of the President of the Federationin the Basic Law

After the second World War Germany has been divided. The German Democratic Republic (DDR) – gave itself a communist constitution, the Federal Republic of Germany a parliamentary democracy according to the western type of democracies. What are the main differences to the parliamentary constitution of the Weimar Republic? The main issue is the expansion of the sovereignty of the Parliament ,the deprivation of the President of the Federation and the strengthening of the power of the chancellor accountable to the parliament. The president is restricted to the symbolic position to represent the country as head of the state. He is not any more elected by the people but by a special body composed of the lower chamber and delegates of the parliaments of the Laender. The dualism of two institutions responsible for the executive has been abolished. Several competences of the former president of the empire have been abolished and conveyed to the chancellor. He is the commander in chief of the army in case of defense of the country, in peace times the minister of defense is the commander in chief. The parliament can not be eliminated in an emergency (defense) case. In such situation a parliamentary committee will carry out the competences of the parliament.

Constructive Vote of Confidence and the Power of the Parliament

A new invention is the so called constructive non confidence vote. According to this system the Parliament cannot any more remove a cabinet with a simple vote of non confidence and by this evoke a governmental crises. The chancellor can only be removed from office with his cabinet by a constructive non-confidence-vote, that is, it has to vote for an other successor as chancellor. Only it the new one gets the necessary majority, the old is removed from office. With this new procedure long during governmental crises and vacancies as in the Weimar Republic should be avoided.

The constitution called basic law has its fundament on a almost pure principle o representative democracy. The people periodically elects the parliament and exerts almost all sovereign powers. Statutes can not be submitted to a referendum except a new territorial repartition of the Länder. This of course leads to a enhanced importance of the elections of the members of the Bundestag (national chamber), which take place every four years. With the election of the Bundestag the voter decides indirectly on the cabinet and thus determines the executive for the next four years as the winter party automatically will with or without coalition with an other party form the new executive branch of the country. With the election the voter also decides on the political program, which receives by this procedure also e most important significance.

Even the re-union with eastern Germany has not been ratified by a referendum but only by the new election of the new re-united Bundestag. The only fact, that the people in eastern Germany voted for the parties of western Germany was considered approval enough for the new state and government.

The very fact, that for the election to a new Bundestag in general over 80% of the voters can be mobilized (in Switzerland its around 50%), is a strong evidence for the seriousness and importance those elections are taken by the citizens.

Limits of Parliamentary Power

The constitution has on the other hand introduced some important provisions limiting the power of the Parliament. Thus the parliament has no power even with a constitutional amendment to abolish the substantial core of fundamental rights (art. 19 par. 2 Basic Law). In addition it is one of the very few constitution which gives even the right to resistance against authorities or private persons, who question the constitutional order.(art. 20 par 4 Basic Law)

Constitutional Court

The most important limit of the sovereign powers of the Parliament is to be found in the strong expansion of the competences of the constitutional court (Bundesverfassungsgericht). The German constitutional court can contrary to the limited power of the American Supreme Court not only quash a unconstitutional decision but also review a abstract statute or norm under the terms of the constitution and abolish it as such, if is it considers it to be unconstitutional. European predecessors of the new concept of a constitutional court have been the constitutional court of Norway of the second half of the 19th century and in particular the Austrian consti-

tutional court, which has been established in the Austrian constitution drafted by KELSEN after the First World War. This new concept is based on a legal theory, which departs from the idea that the legal system is a unity and that this unity is hierarchically built up as a pyramid from lower norms the highest constitutional norm. Thus a specific constitutional court is required to examine, whether lower norms correspond to the higher norm in particular to the constitution.

This comprehensive competence to review abstract statutes gives the constitutional court a political counterweight to the Parliament. In particular the power of the opposition to submit in certain cases a proposed statute in particular cases to the constitutional court requires this court somehow to decide as a judge not only on the constitutionality but also as an arbiter between governmental majority and its opposing minority. As all courts also the German constitutional court, will only be able to maintain its legitimacy if it exerts its powers with wise restraint. The record of the experiences made manifest clearly, that the court has succeeded to maintain this legitimacy with regard to people, parliament and executive, although it exerts much more constitutional power than its American counterpart.

Its no accident, that precisely in Germany a country in which the consciousness of law and legality has been growing over centuries in particular with regard to the judiciary of the empire the power has been conveyed to a constitutional court to limit parliamentary sovereignty and to guarantee that the political games of different powers can develop within a constituted order without degenerating. At all events the Court has contributed considerably for the maintenance of the inner balance of political powers and it was able to stick to its constitutional function without being taken by the distracted disputes of the parties.

Limits of the Sovereignty of the Federation by the Länder

A additional limit of parliamentary sovereignty is given by the federal structure of the Federal Republic. The repartition of competences between the Federation and the Länder and their power to participate in the upper chamber the Bundesrat seriously hampers the sovereign power and the liberty of action of the Bundestag. This is namely the case, when the political composition of the Bundesrat differs from the majority of the Bundestag. And this is regularly the case, as during the term of office of a cabinet the voters of the Länder often prefer in the election of the Parliament of their Land the party which is opposing the cabinet on the federal level.

Nevertheless the federal structure of Germany does not change the fact, that finally the Federal Republic has de facto still to be seen as a unitary federal state, which of course needs to coordinate its activity by cooperation between the federation and the Länder. This federal flexibility is also expressed by article 29 of the basic law, which regulates the procedure for the rearrangement of the territories of the federal units. According to this article the territory of the federation can be redistributed taking into account the historical and cultural traditions one side and the size and competitiveness of the Länder. In Switzerland as neighboring federation, such provision would not be conceivable because of the inner solidity of the Cantons.

Re-Unification

Although the German re-unification has led to some substantial changes of the Basic Law, which are connected to the fact, that with this re-unification the final peace agreement with the former allies was possible and enabled Germany to re-install its unlimited sovereignty over the whole territory. A fundamental change of the governmental system however did not take place, although there were several repeatedly proposed requests in particular to expand the direct democratic political rights of the citizens.

From the point of view of democratic rights one has also to note, that the re-unification itself was not a reason to totally change the Basic Law nor to ratify the unification by a referendum either in the former DDR and/or in the entire territory of the new state. The basic legal ground for the unification was the treaty on the re-unification , which itself has not been submitted to a referendum. On the other hand in almost all other countries in transition at latest the adoption of a new constitution has been submitted to the referendum of the people and thus been democratically legitimized. The only legitimacy derived from the people of the re-unification is based on the participation of the voters of eastern Germany to elect their members into the new/old Parliament.

Finally one can note in comparison to the United Kingdom, that in Germany as well as in Britain the parliament as representation of the people is the central institution to build up the political legitimacy of state power. But the connection to the upper chamber in Germany and with this to the governments of the Länder has changed considerably the political culture from a winner takes all democracy to a much more consensus driven democracy.

c) France

1. The Revolutionary History

Meaningless Parliament at the Time of the Monarchy

During almost one thousand years France was a society run by a monarchy. Contrary to the United Kingdom the role of the “parliament” was almost insignificant. It hat very few influence and was always given only an advisory function without any powers to take final decisions. Moreover it was divided into three chambers: Aristocracy, Spirituals and the common free citizens represented in the third estate. Thus it almost never could reach a consensus. In addition the Crown has almost never summoned the parliament. From 1614 on the chambers did not meet for 175 years.

From the Three Chambers to the Reovlutionary Assemblée Nationale as the Constitution Making Power

Only Louis XVI decided after almost two centuries to summon the three estates to meet in 1789. On may 5th the inaugural meeting of the three estates meeting (Ettas Généraux) took place under the auspices of Louis XVI. and Marie Antoinette.

With this common meeting merged into one chamber the new Assemblée Nationale initiated the new age of the French state. For the first time as many members of the third estate have been elected as there were members of the Gentry and the Spirituals together. Although the third estates did not have a absolute majority over the two other estates, they still did overrule the other chambers as a liberal minority of the Gentry and of the Spirituals supported the bourgeois ideas.

On June 17th 1789 the third estates considered itself to have the real legitimacy to represent the nation with a representation of 95% of the people. Thus it proclaimed a new national assembly. Although the king tried to resist this initiative and ordered the estates to meet from now on in different places it had to give in and to submit to the will of the bourgeois estate and again to order the gentry and the spirituals to join the bourgeois national assembly. On July 9th 1789 the National Assembly adopted its own regulations. With this decision the originally advisory body composed of the three estates merged into one unique chamber, the national assembly with substantial decision making powers. In fact it turned into the very "pouvoir constituant". The new Parliament did not want any more to accept the marginal function of advising the king. It gave itself the power, to enact according to its own given legitimacy statutes and even a constitution. The model of the long parliament 150 years before in Britain did become a historical precedent.

Declaration of Human Rights

Already on August 26 1789 the new National Assembly proclaimed the Declaration of Human Rights. (Déclaration des Droits de l'Homme et du Citoyen"). This declaration of Human Rights has achieve almost 200 years later again new positive legal validity with the famous decision of the Constitutional Council on July 16 1971. As namely the actual French Constitution of 1958 does not provide for any explicit catalogue of fundamental rights, the constitutional council had to find an other constitutional guarantee for human rights. It decided thus in a "revolutionary" decision of July 1971, that the Declaration of Human Rights of 1789 still are positive and thus valid law. The judges argued that the preamble of the Constitution of 1948 refers to its previous predecessor the Constitution of 1946 and that this Constitution did explicitly refer to the Declaration of Human Rights as valid law and thus must also today be considered as the constitutional guarantee of fundamental rights. With this decision the constitutional council did not only interpret very creatively the constitution of 1958, it established itself also with this decision as a very constitutional court, which is not restricted only to advise but also to decide on constitutional issues.

Revolutionary Centuries

Since the turbulent months of the new National Assembly, which initiated the French Revolution France was facing until 1875

- 15 different regimes,
- four revolutions,
- two coup d'état and

– three foreign interventions.

The moderate Girondist and later the radical Jacobins did give themselves with the a new social system for the society, but France has not found the appropriate system of government for this new society. In fact the permanent revolutionary instability continued until the 20th century. Several reasons can be accounted for this volatile situation. In particular the French society had no consensus on the following three fundaments of the state:

> Disagreement on the *fundament of the legitimacy* of the Government, disagreement on the *hierarchy of the branches of government* and disagreement on the relationship between *Church and State*.

During almost thousand years France was ruled by a Monarch, who by the Grace of God had was considered to have authority to rule the people. He derived his legitimacy from God. With the French Revolution this legitimacy has been sweeped away and the legitimacy of the state power replaced by the legitimacy given by the nation. The nation constituted by the state (not the pre-constitutional people according to the German concept) claimed to have the sovereign power to decide on the form of government on the concept of the society as well as on the government itself.

In consequence during 75 years Republic and Monarchy switched permanently. In the Constitution of the Constitutional Monarchy of 1791, which only was in force for six years the state proclaimed in title III article 1: “The sovereignty is indivisible and inviolable. It is part of the Nation.” The power to govern the nation how ever was still vested in the King. Article 4 provided: “The Government is a monarchy, the governmental power is conveyed to the King, that his ministers and servants can execute the delegated competences in the frame of the following provisions in the name of the King.”

Long Parliament in France?

A thousand year Monarchy is not compatible with the limited constitutionally “vested” powers and competences. Already on September 21-22 1792 the National Assembly again followed the Long Parliament of London and decided: “The National Convention declares with unanimity, that the Monarchy in France is abolished.”

Legitimacy of the Monarchy versus Legitimacy of Dictatorship

From now on France has been up to the fall of Napoleon and the re-establishment of the Monarchy constantly shifting between dictatorship and the popular rule. Who does legitimize whom? The emperor of the Monarch by the Grace of God or the Parliament or is the Parliament the Parliament the Government by the Grace of the people? Only this question was often reason enough for violent fights. The Constitution of May 1804 e.g. declared in article 1: “The Government of the Republic is vested to the Emperor, who has given himself the title “Emperor of the Republic”. Justice is done by the servants of the emperor in his name.” In consequence Napoleon has been proclaimed as Emperor with the right of hereditary

succession. After the fall of Napoleon on April 1814 a new Constitutional Monarchy was established, which gave the King "only" the dignity of a King by the Grace of the People.

With this formula the King was not contented. Already two months lager he gave himself with a new constitutional charter abolishing the constitution of June 14th the legitimacy as King by the Grace of God by the effect of the divine providence.

Revolution of July 1830

With the Revolution of July 1830 the monarchic principle has been somewhat softened. Louis Philip changed his label and called himself from now on not any more "*King of France*" but *"King of the French".* With this new label he accepted in principle the legitimacy coming from the people. It was an important step toward the principle recognition of the peoples sovereignty. One might also observe, that two years later the British Reform Act initiated the democratization of the elections in the UK. Moreover the Constitution obliged the King to observe the laws – even in emergency times -. The fact that from now on also the sovereign was bound by the rule of law was of course of highest value for the further development of the rule of law principle. A part from these absolutely basic changes, the monarchic has principally been maintained.

Revolution of 1848

Only with the Constitution of the II. Republic of 1848 as result of the revolution of 1848 the people's sovereignty has unambiguously again been proclaimed: "The sovereignty has its roots in the totality of the French citizens."

Coup d'état of Napoleon III and 100 years later Petain

Of course one should not overlook, that three years later the establishment of a new dictatorship this time under Napoleon III took place. Article two of the Constitution of 1852 has thus consequently provided: "The Government of the French Republic will be vested for 10 years to the Prince Louis Napoleon Bonaparte, the actual President of the Republic." Almost a hundred years later on July the 10th 1949 marshal Pétain gave himself with the constitutional Law the same powers: The law consisted of only one article: "The National assembly conveys the complete sovereign power of the Republic to the government of the Republic, which exerts this power under the Highness of Marshal Pétain and with his signature in order to give the French state with one or several acts a new Constitution." Thus Marshal Pétain even claimed to be the holder not only of the constituted power but of the power to constitute.

Republican, democratic Legitimacy

Is France or are the French under the rule of the National Assembly or of a President as Head of the state? With the issue of the democratic legitimacy one has also to ask who stands next to the sovereignty of the nation: The assembly elected by the people or the executive which has to ensures the implementation of the volonté

générale. The dispute, who should have this legitimacy and who should be given superiority – the Parliament, the Executive of the Head of the State – will in future dominate each dispute of the assembly, which has established itself to the pouvoir constituant, the constitution making power.

Republican

Based on the transformation into a constitution making assembly by act of self-rule the general estates (Etats Généraux) did levy themselves into a sovereign government. However as already mentioned the Constitution 0f 1791 still respected the Monarchy by vesting the executive power only to the King. With the abolishment of the Monarchy in September 22 1792 the National Assembly required to submit the new Constitution to the Referendum of the people. Almost exactly one year later on the 24th of September the constitution has been submitted to the referendum of the people. Since however it has not been enforced.

On September 21st of 1792 the National Assembly declared the year One of the Republic. But this Republic lasted only 7 years up to 1799. A short time after the declaration of the Republic the committee for the common good (comitée du Salut Public) has been installed. This committee has namely under Robespierre dictatorially dominated the assembly with unlimited totalitarian power.

Democratic

The Constitution of the 24th of September 1793, which has never been enforced provided a real reign of the people in the sense of ROUSSEAU. The legislative assembly has been given unlimited powers to legislate with the reservation of the right of the people for a referendum. Thus the National Assembly was the holder of the sovereignty superior to all other branches. The members of Parliament were to bee elected for one year only. The statutes had to be executed by a executive council composed of 24 members. Moreover the constitution introduced a comprehensive right of the people to submit all statute to the referendum. Although this constitution had nor direct impact on the constitutional development in France. It had a direct impact on the development in Switzerland with regard to its semi-democratic regime introduced in the second half of the 19th century.

Separation of Powers

The directorial constitution of august 22nd 1795 (the first valid and enforced constitution of the first Republic) established for the first time a governmental system based on a combination of a collegial executive combined with a two chamber legislature. This governmental system of the year III of the first Republic has also for the first time introduced a real concept of separation of powers. On the other side the constitution limited the democratic rights of the people and provided only a system of representation of elected members of parliament, whereas the right to vote was according to a census principle only given to owners of real estate and to the tenants. Only with such a system one was able to end the pressure of the street. Both chambers were considered as two councils: The council of the 500 and the council of the elderly people. Both chambers had similar powers. The council of

the 500 did propose new statutes. These statutes could only be enforced if the council of the oldies did approve them.

Directorate

The executive power was vested to a directorate of five members. These five members had to be elected by both chambers on the bases of a proposal of the council of the 500. The constitution required strict observance of the principle of separation of powers. The directorate nominated the ministers but it was not directly accountable to the legislative assembly. On the other hand it had no power to intervene in the legislative process by veto-power with regard to the enactment of new statutes. From the very beginning this new governmental system has been threatened from two sides: The royalists wanted to abolish the directorate and replace it with a monarch. The Jacobins were still dreaming of a absolute and undisputed undivided sovereign National Assembly, which they wanted to return to.

Influence of the Directorate on Switzerland

The governmental system of the constitution of the directorate of 1795 has later been taken over for the Swiss Helvetian constitution imposed by the French occupiers in 1799. But 50 years later the founding fathers of the first federal Constitution of 1848 took the directorate as a reference system for the installation of the new federal executive the federal council also composed as a collegial executive similar to the directorate system of the first French Republic. However some substantial improvements have been provided with regard to the French directorate. As for instance in Switzerland each member of the federal council (directorate executive) is elected individually it is also replaced individually. As a consequence because all members of the Swiss executive have never stepped down altogether each individual member stepping down has been replaced be an other. Thus the directorate has for 150 years never been renewed in total. The remaining members have always handed over the experiences of the old council to the new members. Thus the system guaranteed a unbroken continuity of the executive since 1848. With this continuity it has essentially contributed to the political stability of the country. The model of a collegial directorate has apart from a short period in Uruguay never been successfully taken over by an other state. Indeed a directorate without important powers of the people by referendum has not chance to endure for long time. Without referendum the parliament is the only counter-power to the executive. Thus it will sooner or later modify the executive into a cabinet dependend on the majority of the parliament. In Switzerland the function of the opposition is in fact exerted by the people. But if the function of the opposition is restricted only to the parliamentary opposition. This opposition will as soon as it achieves the majority take over the entire executive branch. Because the people in Switzerland has the function of a real opposition, the parliament is interested into a executive composed with members, which have the credibility and the political power to convince the people in a referendum.

Monarchic

Even in France, the country which invented the system it lasted only for a short period. Already in 1799 the constitution of the directorate has been replaced by a dictatorial executive represented by the consul Napoleon. This consular constitution vested the entire sovereign power to the first consul Napoleon. The two other co-consuls had de facto only advisory capacity. The first consul appointed the ministers and the civil servants, he had the far-reaching power to enact ordinances. Proposals for new legislation have been prepared by the council of the state (Conseil d'Etat the later most important body, which became the most creative and inventive administrative tribunal in France. The "Tribunal" gave its opinion to those laws and the assembly decided by a secrete vote without deliberating on the statute. The Senate did review it under the constitutionality. There was no council of ministers. The basic ideas for this new constitution are to be found in the theory of Sieyès: "The trust comes bottom up, the authority top down.

Second Republic

After the first Republic ended in 1799 1848 has been established the second Republic. But this second republic lasted even shorter than the first as it ended three years later with the dictatorship of Napoleon IIII. The Constitution installed a presidential system with a general right to vote. One Chamber composed of 750 representatives did function as legislature. The members of the Parliament have been elected by the people for three years. The president was elected for four years. If none of the candidates got the absolute majority of the people, the National Assembly had to elect the president. The president could not dissolve the parliament, and he was not accountable to the parliament.

2. Dictatorship of Napoleon III.

This system has been designed in the interest of the later dictator Napoleon III (nephew of Napoleon), who has been elected in 1848 as first president of this second Republic. Thus three years later he established by a coup d'état the second dictatorial constitution of a member of the Bonaparte family.

The Commune of Paris

1870 after the fall of Sedan in the German French war a third Republic has been installed on September 4th. On the 8th February the people elected the members of the national assembly and on the 17th the new president. With its first election it levied the royalist Thiers on the "throne". Not even two months later on March 26th the commune of Paris resisted the National Assembly. Mac Mahon rolled over this revolutionary movement and the national assembly could again take over its activity. Although the royalists were in the majority they failed to re-install the monarchy. They were to much at odds with themselves, that the time of the monarchy has finally come to an end.

Constitutional Law of 1875

1873 a new president had to be elected and again a royalist in the person of Mac Maho got the necessary and the grace of the majority of the voters. On January 30th 1875 the National Assembly adopted a new constitutional law, which proclaimed expressly the state as a Republic. Thus the president turned de facto into a "republican monarch". He had to execute the statutes, to ratify the international treaties, had the power to dissolve the national assembly but was not accountable neither to any of the two chambers. In addition he nominated by his own the ministers.

The Assembly Withstands the President

As the left did win the elections for the National Assembly Mac Maho entrusted Jules Simon as Prime Minister with the function as President of the Ministers. Simon was a moderate candidate from the center, but in the eyes of Mac Mahon finally to moderate. Thus he replaced Simon later with Broglie. The national assembly condemned the president for this procedure. In consequence he dissolved the national assembly. The new Assembly however was again under the majority of republicans and thus forced Broglie to resign. With this forced resignation the National Assembly was able to impel the President the right to enforce the dismissal of the executive and to replace it with an other cabinet. For this power it did not anymore renounce until the establishment of the V. Republic.

The executive Government appointed by the president was from now on accountable to the parliament and depended on the confidence of the political majority.

IV. Republic

With this power-struggle the constitutional fundament has been laid on one side to establish the mutual dependence of the constitutional powers in the sense of checks an balances. On the other hand it has also established the superiority of the National Assembly in the hierarchy of powers of the IIII. Republic. With this new balance the Republic could maintain itself until Marshal Pétain took over the power in a coup d'état in 1940. After the Second World War the IV. Republic has been founded.

Cabinet and Multipartite State

The Constitution of the IV. Republic was constructed very similar to its predecessor the III. Republic. The powers of the president with regard to the appointment of the cabinet however have not only been regulated by customary law, but regulated by positive law and at the same time also limited. The Prime-Minister has been made principally dependend from the political majority of the National Assembly as the national assembly did not only give its consensus to the appointment of the prime-minister but also to the ministers. Moreover the president has lost its power to enact ordinances. Because of the multipartite state in consequence the national assembly continuously withdrawn the confidence. Thus permanently

the cabinet as executive had to change because unlike the UK in France it was not possible to establish a stable two party system.

3. The Presidential System of the V. Republic

Expansion of the Power of the President

The instability of the governmental system was particularly dangerous in times of emergencies and crises as namely during the war in Algeria. Thus combined with the external crises permanent the governmental crises led to a fundamental constitutional crises. In the urgent need the former savor of France in the second world war the General De Gaulle has been mandated to propose a new constitution. As consequence De Gaulle with his concept of the V. Republic has established a constitution which on the surface seems to establish a balance between the presidential and the parliamentary system. In fact it conveys to the President, who is elected by the people (since 1962) for seven years (since 2002 five years) the most comprehensive powers, which at this time could have been vested into the Head of a state in a parliamentary system. Today however the might of the Russian president is considerably wider as he embraces the power of the French president (power to appoint the cabinet and the power to enact ordinances) as well as of the American President (e.g. Veto-Power with regard to the legislature)

As well in the III. as in the IV. Republic the constitutional principle of legality was undisputed. According to this principle all legislation had to be adopted by the parliament as legislature. One has to admit though, that already at this time in practice statutes enacted by decree adopted only by the executive have been introduced. With these decrees the executive could promulgate norms which had the same status and validity as any other formal legislation. It was even possible to modify with these decrees valid statutes. However those decrees became invalid, if they have not been approved by the Parliament within a certain delay. This practice has been enshrined by article 38 of the new constitution.

A part from the statutes not to be submitted to a referendum there are on a lower level of the constitution the so called organic statutes (“loi organiques” constitutional statutes), which complement the constitution and for this reason are considered to have the same position as ordinary norms of the constitution. These constitutional statutes can only by signed and thus enforced by the President after having been reviewed on their constitutionality by the Constitutional Council (Art. 46)

Limited Competence to Legislate of the Parliament

The legislative power of the Parliament is regulated in article 34 of the Constitution. Based on this provision the Parliament has the power to legislate. For all other area’s not explicitly mentioned in article 34 the constitution provides the more simpler form of a regulation which can also be issued by the executive. Thus in these cases the principle of legality, that is priority of the rules being regulated by a statute is abolished. The constitution thus strengthens the power of the executive and diminishes the traditional prerogative of the legislature. Head of the ex-

ecutive is not as the written text of the constitution might suggest the Prime-Minister, but the President. And as the President has moreover the power to submit some specific statute to a referendum (Art. 11) his position with regard to the parliament and also to the council of ministers is considerably amplified.

With the limited competence of the Parliament according to article 34 only to issue statutes in area's which are expressly mentioned the constitution establishes a assumption of competence for regulations enacted by decrees. Everything which is not regulated according to article 34 can be regulated by a ordinance. The competence however to adopt ordinances is vested with respect to the importance of the ordinance to the different bodies of the executive. The regulation is a decree of the president, if it is adopted on the base of a discussion in the council of Ministers. It is a decree of the Prime-Minister if it could be issued according to his/her competence. Finally there are also decrees issued on the level of Ministers or even prefects. But only the President and the Prime-Minister have a general power to issue regulations in the form of decrees.

President as Holder of the Volonté Générale

Article 5 of the constitution decides: "(1) The President of the Republic shall see that the Constitution is observed. He shall ensure, by his arbitration, both the proper functioning of the governmental authorities and the continuity of the State." Based on this provision since De Gaulle the presidents have stipulated their right, to decide on all major issues concerning the interests of the state. They interpreted the competence similar to a general competence to decide. Accordingly the executive disposes only of the power, which the President leaves to the cabinet although a literal interpretation of the Constitution requires the cabinet to decide in harmony with the president.

Since 1962 the president is elected by the people for seven years and since 2002 for five years. He is not accountable to the parliament. Moreover he decides according to article 16 on the case of emergency. In these cases he has the power to suspend the constitution. Somehow the power of the president is based on the idea, that the president is finally the "incarnation" of the general will according to the notion of the volonté general. He decides on the emergency case, can invalidate laws and is generally competent– although with the approval of the Prime-Minister to enact ordinances. Finally he can submit specific statutes to the referendum, appoints the cabinet and has the power to dissolve the National Assembly.

Prime-Minister and Cabinet

Article 21 of the constitution determines: "The Prime Minister shall direct the conduct of government affairs." In fact he has to rule the cabinet according to the policy decided by the President as the Prime-Minister as well as the member of his cabinet and their collaborators the states-secretaries are all appointed by the President. According to the practice of the V. Republic the Prime-Ministers had also to step down from their office or to remain in office, following the orders of the President with the only exception of Prime-Minister Chirac, who did step down on august 25 1976 by his own decision. And of course the president can also force a

minister to resign. Accordingly the President can distribute the different government mandates among the ministers and even reshuffle the cabinet.

Contrary to the ordinary prerogative of most cabinets the Ministers can not be members of the Parliament. This symbol of separation of powers indicates, that there was a clear tendency to set up a real presidential system, where of course the executive is separated from the legislature. On the other hand the Prime-Minister as well as the council of Ministers as well as of course the Parliament can ask for a vote of confidence. Is the confidence refused the cabinet is according to article 50 required to propose to the President its resignation. However it is in the power of the President to decide, whether he will accept this offer. Thus De Gaulle has reinstalled Mr. Pompidou as Prime-Minister although he has lost confidence in the parliament.

In some cases the president has the power to decide on his/her own. In other cases he needs the counter-signature (“contreseing”) of the Prime-Minister. The Prime-Minister directs as the authority directly subordinated to the President the executive and the governmental activities. In this function he/she also decides on issues of the army, although the president is the commander in chief of the army, who finally has the only power to decide on the use of the atomic weapon.

Cohabitation

This presidential system designed by De Gaulle is shaped for a president, who has disposes also of the majority in the Parliament. Is he not supported by the parliamentary majority, he has to govern with the Prime-Minister, who can resist the president with support of the parliamentary majority. Are President and Prime-Minister not willing to cooperate (Cohabitation) they have to manage separately in the “same house “ a constitutionally not separable budget. This necessarily will lead to a not solvable constitutional crises. The different governments of Cohabitation under Mitteran and Chirac have nevertheless shown, that France is absolutely capable to live with this confrontation of the two executive bodies the President and the Prime-Minister.

Parliament

The Parliament is composed of two chambers: the National Assembly (Assemblée Nationale) and the Senate. The upper chamber could indeed in France strengthen its position with the Constitution of the V. Republic. It has regained a far-reaching legitimacy after attempts in 1969 have failed to merge the two chambers. While the people elects the member of the National Assembly according to the principle of absolute majority in each district, the senators are elected in the departments according to a indirect election. They are elected for nine years. The President cannot dissolve the senate. The chamber is renewed all three years with a third of its members. With this continuity the upper chamber contributes to the stability of the country. In particular it is the upper chamber to protect the individual and fundamental rights of the citizens with regard to a often overzealous lower chamber.

Constitutional and Administraticve Courts

A part from the president and the Parliament the constitution provides as additional bodies the constitutional council (Conseil Constitutionnel), the State Council (Conseil d'Etat) and the Economique and Social Council (Conseil Economique et Social).
The State Council is one of the oldest bodies in the constitutional history of France. Today it acts as highest and last instance tribunal on cases dealing with administrative law. In addition it is also the most important advisory body for the administration in particular with regard to drafting legislation. In the very beginning under Napoleon the Council of the state, was only a advisory body without any decision making power. Based on its undisputed legitimacy as advisor on administrative law disputes the conseil d'Etat was able in 1874 to start on its own finally to decide cases in administrative law brought to his authority. Since this first decision it established for the entire continental legal system some basic principles guiding administrative law decisions.
As previously the council of state also the constitutional council was first designed as a advisory body. But also the constitutional council was able to emerge as a body with decision making powers. For the Constitutional council the leading case has been decided in 1971. Since this time it can protect even against the infringements of the legislature fundamental rights. Originally he had was only supposed to protect the executive from infringements of the legislature. But since 1971 it has established itself as a proper constitutional court. It reviews the constitutionality of statutes before they are signed and promulgated by the president. Unlike the German Constitutional Court the French constitutional council has no power to invalidate statutes as unconstitutional if they are already in force. The very principle of Rousseau's volonté générale does not allow to question a statute as the statute is considered to be the very expression of the undisputable volonté générale. Article 6 of the still valid Declaration on Human Rights provides: "Law is the expression of the general will."
The council for economic and social issues it the advisory body in all social and economical issues. But this body up to now has not gained at all the same weight as the two other previously also advisory bodies.

d) The Westminster Type Government in Other States

The Westminster type government has initiated its triumphal march in the 20th century first in Europe in particular in the Scandinavian Countries, in France, Belgium, the Netherlands, Italy and Greece. But it has also been successful in states of other continents such as for instance Australia, New Zealand, India, Nigeria, Ghana (all member-states of the common wealth) but also non former Colonies such as Japan with the Constitution imposed by the US after the Second World war and Israel with strong intellectual connections to the Common Law and to Great Britain.

Japan

In many states the Westminster type government was in particular successful for the following reason. As countries were fragmented by disputing parties it seemed impossible to find a elected president able to integrate the country and to provide a common policy all would the great bulk of the society could agree to. The Westminster system offers a solution, which reduces the head of the state to a symbol for integration without real political power. As a symbol the head of the state is still able to provide at least a symbolic unity while the political dispute can be periodically solved with a parliament split into majority and minority. Countries with traditional monarchies had of course the advantage, that the Head of the State had the historical charisma and thus was not disputed by any party. Reducing the Monarch to a symbol and providing a political competitive system according to the Westminster type was thus the best solution for old monarchies.

This may have been one reason, why the American occupying forces in Japan decided for a Westminster type system. The Westminster system allows in addition to continue at least symbolically the monarchy without abolishing the symbol of history and at the same time build up a very democratic system. To abolish the symbol of the Emperor (Tenno), who in Japan is not only considered to have legitimacy by the Grace of God, but has a direct divine relationship as being part of good would have destroyed the total legitimacy of the occupying forces. With the Westminster system one could leave the symbol of unity and at the same time establish a democratic system.

Indeed the Family of the Japanese emperor goes back for 2000 years. Since this ancient historical time the family did rule over the Island. With the defeat after the second World War the emperor has of course been totally deprived of his power. However he still remained and still is the most important symbol integrating national unity. In the Constitution of 1890, which has been labeled as a liberal Constitution provided by a revolution from the top the emperor declared himself in article 4 and 5 as the sovereign power, who can exert all rights. The emperor was given the power to enact statutes; although with the consensus of the Parliament.

Today Article I of the Japanese Constitution of May 3 1947 proclaims: “The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.” According to the Constitution the Emperor has no political power at all. And to avoid, that the emperor as the traditional commander in Chief of the army, could use again the army to regain is power, Article 9 of the constitution provides: “(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained.”

The Emperor ratifies the international treaties as does the British Queen. based on the decision of the Parliament. The Parliament also decides on the person of the Prime Minister to be appointed by the Emperor as well as the Chief Justice of the Supreme Court. For all his activities the Emperor has to ask Parliament for approval (article 3).

As many states with a Westminster System also Japan has a upper and a lower chamber. 486 representatives are elected by the voters of 123 districts by majority according to the principle one person, one value, one vote. (two to three per district). For the 250 members of the second chamber two different systems of vote are provided: 150 are elected in local districts and 100 by the whole nation. The lower house has with regard to the upper house more powers. For the approval of a new statute the consensus of both chambers is needed. But it they disagree the lower chamber can overrule the upper chamber with a two-third majority. The Budget is only decided in the lower chamber if a common committee does not find an agreement acceptable for both chambers. (article 59 and 60). The Election of the Prime-Minister has to be approved by both chambers. If they disagree, the lower chamber decides.

The strong position of the two big traditional parties as well as the respect the old (wise) leaders still enjoy in the traditional Japanese society and the strong community feeling have certainly contributed to the stability of the Japanese governmental system after the end of the second world war and to the relatively harmonious development of the old feudal society into a democratic civil society.

Analyzing the Japanese governmental system one imposed by the American occupying forces one can recognize the influence of the British Westminster system. Looking at the competences of the Supreme Court one sees still the influence of the United States. The court can review the constitutionality of statutes if they violate fundamental rights.

India: The Executive Superior to the People

Very differently designed is the governmental system of India. As great Britain also the Japanese Island has been saved through history from foreign occupation. However there may be almost no country and population in the world as the Indians, which since the last four thousand years had to suffer so much from foreign interventions, occupations and exploitations. The Chinese, the Greeks (Alexander the Great), Arabs and finally the British have did leave their mark's on the country and its people and thus have in particular influenced the centralization of powers by a central colonial government. However these foreign occupiers did not basically change the Indian society. The caste system and the importance of local communities on the level of the municipalities were somehow the response of an enslaved people with regard to its oppressors. Castes and local communes enabled a strong cohesion necessary to master and surmount the suffered injustice. In consequence the castes contained themselves more and more. They established a judiciary with limited jurisdiction only for the case. These strong structures of a society fragmented by hundreds of different casts led the central government to be almost totally isolated from the people. Even with its cruel reign and even though the Islamic moguls tried to convert the entire population to the Islamic religion the foreign occupiers remained isolated. They did not rule the people but over the people.

This may also be one of the reasons, why the parliamentary governmental system of India could be maintained since 1949 although the country had to face big internal and external crises. Contrary to Japan the Indian Constitution of 1949

could not rely on a old tradition of a emperor-family. Thus it provides for a president, who is given as in the Weimar Republic considerable powers. The president appoints the Prime-Minister, he assures for the respect of the constitution and decides on the emergency case. However the long lasting predominance of the Congress party enabled the president also de facto to exert its power according to the constitution. He was not helpless as the president in the Weimar Republic, who was hampered by the strongly fragmented political parties. Moreover this factual political situation enabled also the Prime-Minister to exert its given constitutional central power although the longest constitution of the world (more than 300 articles) contains only two articles on the Prime-Minister.

The Parliament of the Union of India is composed of the national chamber and the chamber of the member states. The Prime-Minister is accountable to the national chamber and needs the confidence to this lower chamber. Based on this political importance this chamber has a privileged position with regard to the chamber of the member states. This also counts for the legislative process, although the legislative competences of both chambers are due to the Indian federalism and to the competences of the states quite limited. The Indian constitution unlike constitutions of other federal states enumerates not only the federal powers or the powers of the federal units, it exhaustively enumerates the tasks of the Union and those of the member States.

One has in addition to take into account, that a part from the president also the supreme court is mandated to assure and guarantee the constitutionality of the law. India has not taken over the entire concept of the absolute sovereignty of the British Parliament. It has rather a part from the sovereignty of the member states also vested substantial powers into the constitutional court. The factual weight of the judiciary is related to the strong consciousness of law rooted in the Indian society, which has already been developed in the cast system. The courts enjoy in India a similar respect, they enjoy for instance in the United States.

The Westminster Type government was not so successful in all other states outside Europe as in India and in Japan. In particular in Africa where the consciousness of the community is still strongly linked to the former tribe system the strong presidential systems gained in importance with regard to the previous development of Westminster type systems. This of course is also due to the fact, many African states were former French, Belgium and Portugese Colonies. Thus those states copied sometimes one to one the governmental system of their previous colonial power. A presidential system enabled often strong presidents to impose their charismatic leadership and to establish a more or less totalitarian presidential rule.

The President and the Parliament

In the Federal Republic of Germany, in India and in Japan the sovereignty of the parliament is limited by the power of the constitutional court. In Germany and in India the lower national chamber is doomed to cooperate with the member-states of the federation and the upper chamber. In states however which give the president as head of the state substantial powers with regard to the parliament, the parliament is often loosing even its limited powers for the sake of a strong and authoritarian president. In those states the parliament degenerates legally (in some

Latin-American states) or factually to a advisory body of the president, who is able if necessary even to overrule the parliament. This may also be the case in presidential systems with a doubled executive: Prime-Minister and President.

States in Latin-America

Already MONTESQUIEU has detected, that the statutes and also the constitutions have to correspond to the character, tradition, culture and the local realities and necessities of a specific nation. (cp. CH.-L. MONTESQUIEU, I. book, 3. chap.) The development of the presidential systems of Latin-American, African and also Asiatic states makes clearly evident that Constitutions cannot simply be copied from other countries.

Almost all Latin-American States have been influenced when drafting their constitution from the American Presidential system and its concept of separation of powers. Contrary to the United States the aspired balance between the three branches of Government led in those state to a factual supremacy of the President. Parliament and Courts, Cabinets and Ministers are often factually submitted to the president. This development may have different causes. The Latin-American People are used from the history of the colonial powers Spain and Portugal to a strong central government with a vice-king ruling the colony without being accountable to any other governmental branch. The vice-king has been replaced at the time the country became independent with a sovereign Caudillo. The Caudillo often was the leader of a patriarchal regime, which often was according to the personality of the Caudillo more or less cruel. Was the Caudillo interested to get a more progressive image he installed a parliament totally dependent on him with a more or less democratic constitution, which in reality often has not even been enforced. This tradition of a double legality between formal law and reality goes also back to the time of the Spanish colonial rule, when some idealistic theologians were asked to draft the legislation, which however has been implemented by lawyers dependent on the vice-king.

Since some years there are important attempts to modify the constitutions into a genuine basic law and to abolish the function to serve as an alibi. The development in Chile of the 70ies however indicate clearly, that even a constitutional tradition going back to 1925 with a parliamentary system and a limited presidential power was enough strongly rooted, that it could be wiped out by General Pinochet with a pen-stroke. A part from the colonial history the economic situation of many Latin-American states is crucial and has an important impact on the structure, the organization and its reality of a specific state. As in some of the European feudal systems there is a very small elite, which depends from the state power and which uses this power again for its proper interests. The middle-class bourgeoisie precondition for a democratic development is often totally missing.

While Japan was able to keep its the Emperor as a symbol and integrating personality and for this reason probably could easier manage the shift to a modern democracy the young Nations of the post-colonial period had first to find their integrating symbol. It is obvious that such patriarchal systems often give unlimited powers to the president. He is asked as Father of the nation to respond to the expectations of the people. Thus he feels to have the legitimacy to govern without

need for conciliation of a cabinet or a parliament. He is not accountable to any-one and can not be removed by the parliament. The possibility of the Impeachment procedure well developed in the US and to remove the president for high treasure has remained as far as it has at all been provided a dead letter. Contrary to a hereditary monarchy the president at least has been once elected by the people. As the term of office in the Latin-American states is almost always limited, the president can at least not be re-elected for the next term. Even this important limitation did not prevent some powerful presidents to change the constitution and to abolish this provision following somehow the example of Napoleon III. The system which prevented a acting president to be eligible for reelection has been taken over by the Constitution of Mexico. It has for the first time been introduced in the constitution of 1917 after the long revolution (1910 to 1917). According to the Constitution the president is elected for six years and not eligible for reelection after the term of office. This should prevent a unlimited reign of the president. However this provision is also reproached to be undemocratic because it limits the choices of the voters. If the voters would want to reelect the same president for the next period, they are prevented to do so by the constitution. The fear from presidents misusing their power did induce many constitution-givers of Latin-American States to give up this well proven system.

As in the United States the president is at the same time also commander in chief of the army. He decides on the emergency and is able according to some constitutions to submit concrete issues to a referendum if his proposals are not approved by the parliament. Moreover he has the power to veto decisions taken by parliament. Historically and actually important is the relationship of the President to its army. The Presidents have the power to appoint the Generals and to decide on the size of the army. This creates a mutual dependence from the president to its generals. The President can only implement emergency law with the army. The officers of the army depend on their side on a favorable president. This is the very reason, why the Latin-American armies always had a strong influence on the policy of the president. For this reason armies often could be misused to overthrow a president if he did not rule in the interest of the officers and thus the officers were opposed to the president. In fact the establishment of a professional army linked to a president as commander in chief did often lead to totalitarian developments.

II. States with divided Sovereignty

Rational Bases of the State Power

Most states of the western world legitimized the power of their governmental branches with rational concepts, which enabled a comprehensive political participation of the population. A rational concept of legitimacy also required often to fragment political structures into different functions. Only with such concepts one argues can human beings design and construct their social environment with reason. This promethean liberation of men from its fate and from its divine destiny has been made possible with the theory of THOMAS HOBBES and its concept of a

social contract establishing a secular concept of sovereignty and legitimizing a secular political community with its political legitimate ruler. The legislature was asked to arrange for a reasonable state organization. „In both its religious and its secular versions, in FILMER as well as in HOBBES, the impact of the new doctrine of sovereignty was the subject's absolute duty of obedience to his king. Both doctrines helped political modernization by legitimising the concentration of authority and the breakdown of the medieval pluralistic political order" (S. HUNTINGTON, S. 102).

United States and Switzerland

There are two states, which did not fully comply to this concept of absolute and secularized sovereignty: The United States and the Swiss Confederation. While in most other states the reign of the monarch with his central bureaucracy has been destroyed with revolutionary methods (In the UK in the 17th, in France in the 18th and 19th century and in Germany in the 19th and 20th century.) one can find in the USA and in Switzerland political and social structures, which somehow could be modified since the middle-age rural and town democracy without being destroyed by a forceful revolution.

USA: JOHN LOCKE

The American settlers did not accept to be ruled according to the divine law of a king. They did not recognize an absolute sovereignty in the sense of THOMAS HOBBES and they did not know unlimited parliamentary sovereignty. They considered HOBBES as irrelevant, but they believed much more in JOHN LOCKE. When they started to build up their state order, they did not want thus to vest into any state body a supreme state power. As the state sovereignty was any way limited they could without any problems conceive several state-functions which would be vested with different functions of the state and being sovereign within their proper political function. In addition they also could easily accept the division of sovereignty not only to different state functions but also between a federal power and a state power. The American settlers did design a modern state without modern theory of sovereignty. „Americans may be defined, ... as that part of the English-speaking world which instinctively revolted against the doctrine of the sovereignty of the state" (S. HUNTINGTON, S. 105).

Switzerland: People's without Monarchy

Similar can be said for the development of the Swiss Confederation. Indeed analyzing the history of Switzerland and its cantons one has to admit, that except for the very special case of the Canton of Neuchâtel, there was not one canton ruled by a monarch who would have derived its power and legitimacy by the grace of god. Even the oligarchic forms of government ruling mainly aristocratic cantons have finally always somehow linked to the legitimacy they had to derive from the people. And indeed an oligarchy can not replace God on earth!

Thus in Switzerland a modern state without absolute sovereignty in the sense of HOBBES could be developed. And this specific concept can today still be seen in

the relationship of the Confederation with its cantons: The Confederation has been developed out of the Cantons, its sovereignty is limited, because the residuary power has remained in the cantons, where the people exerts their genuine sovereign rights.

Because of the different developments of the states of the USA and Switzerland we will also have to examine their state-organization from the point of view of the divisibility of sovereignty. We shall first examine the American Federation and then deal with the bases of the Swiss democracy.

a) The United States of America

1. The Influence of the Constitution of the UK of the 17th Century

Separation of Powers

The first settler emigrated in 1606 to America. This was during the reign of James I. The UK at this time was still dominated by the middle-age conceived Tudor Constitution. The Parliament had not at all achieved the peak of its absolute power. The powers of the state was still distributed to the several state institutions as the Crown, the Lords and the Commons. „The government of Tudor England was a government of fused powers (i.e. functions), that is, Parliament, Crown, and other institutions each performed many functions“ (vgl. S. HUNTINGTON, S. 109).

The Parliament had judicial, legislative and executive functions. Even the Crown was not limited to the executive function, but in common with the Parliament with legislative and judicial functions. The separation of powers at that time was not at all functional but much more personal. Each institution exerted similar functions but it disposed of specific competences so that the different bodies could control each others.

British Constitution of the 17th century

This British Constitution of the 17th century became the model not only for the constitution of the American Federation but also for the American States, which have followed the model of the first written Constitution of the State of Virginia. In the UK the different competences have been gradually distributed to different branches (legislative, executive and judicial function) and the very center of the power has been concentrated in the House of Commons, the American concepts on the organization of the governmental system remained on the level of the British Constitution of the 17th century. „The constitutional convention of 1787 is supposed to have created a government of separated powers (i.e. functions). It did nothing of the sort. Rather it created a government of separated institutions sharing powers (i.e. functions)“ (cp. R. E. NEUSTADT, Presidential Power, The Politics of Leadership, New York 1960 p. 33)

Checks and Balances: The Judiciary

This may correspond to a pure Anglo-Saxon point of view. However if one compares the concept of separation of Powers of the USA with the constitutional systems on the European Continent, important differences appear. From the point of view of checks and balances each branch can influence the other branch. The Courts can declare statutes to be unconstitutional, the parliament can remove judges from office with an impeachment procedure and it can in particular regulate by statutes the function and the tasks of the supreme court. The president can appoint the judges and the judges can control, that the president does not misuse its presidential executive prerogatives.

Checks and Balances: the President

Finally the President has the power as already mentioned, to veto legislation and thus can influence considerably the content of the statutes. Except for his yearly massage of the state of the Union the president has no access to the Congress. Only the vice-president is formally also the president of the Senate. Nevertheless the president can and does initiate legislative proposals into the congress by the deputies of his party.

Checks and Balances: Congress

The parliament that is the Congress has important competences to influence the executive and in particular the administration. The senate has the power to ratify international treaties and exerts with this power important influence on the foreign policy of the president. The senate approves the appointment of high civil servants and of the judges by the president. Certainly the most important power of the Congress is its competence to decide on the Budget. The Anglos-Saxon democratic battle cry “no taxation without representation“ has given the Congress the almost sovereign power to decide on income and on expenditures. With this financial competence and the right to legislate the Parliament disposes of a far-reaching power to control and to influence the activity of the executive and in particular of the president. Because based on these powers the Congress can always require activities of the administration and of the president to be controlled by special parliamentary committees, as the parliament needs to know, whether the president has made appropriate use of the expenditures provided in the budget or of the legislation imposing him specific responsibilities.

While for instance in Switzerland the administrative control of the Executive has for a long time been disputed because it violates the principle of separation of powers and is an infringement of the legislative power into the executive power, there is no doctrine in the USA, which would limit the power of the parliament to control all administrative activities of the executive.

Sovereignty of the Branches of Government

The counterweight to these checks is the doctrine which the supreme court has several times confirmed. That is that each governmental branch remains within its own function sovereign. This means, that for instance only the legislature is finally

competent to issue statutes. Only the Court can judge on controversies in concrete cases. For this reason it can review the constitutionality of statutes for a specific case, but it can not quash any abstract norm enacted by the legislature. For such decision only congress is competent. The administration on her side – contrary to the Swiss administrative law – can not issue decisions similar to judicial sentences and to be executed as a judicial order. Any decision which is similar to a sentence has to be issued by a court.

Executive

On the other hand the president is sovereign with regard to all executive powers. What belongs to the executive has finally to be decided only by the president. The Court can though review, whether the president has acted ultra vires and exceeded its executive prerogative. But it has no power to judge on the use of the genuine presidential power. The "political question doctrine" of the supreme court has its roots finally in the doctrine of separation of powers, as it limits the court according to its self-restraint to its proper competences with regard to the control of the executive and/or legislative power. Disputed however is still whether the war power act of the congress adopted during the war in Vietnam on November 7 1973 is constitutional. According to this statute the President is required to consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances. The Presidents did always argue, that this is an infringement into the very executive power of the presidency and thus Congress has not right to interfere into the very executive competences.

As much as the powers are overlapping, the functions are clearly separated from each other and each function is in this sense exerting sovereign state powers as each branch within its proper function is not submitted to any other branch. The court decides sovereign as final instance on concrete cases and controversies, the president is sovereign with regard to the executive function and the legislature in the area of legislation.

Limited Sovereignty and Natural Law in the Declaration of Independence

Nowhere the firm conviction of the American Settlers is more transparent, that all state power must be limited, than in the American declaration of Independence of July 1776:

IN CONGRESS, JULY 4, 1776. THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA.

WHEN, in the Course of human Events,

it becomes necessary for one People to dissolve the Political Bands, which have connected them with another, and to assume, among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's GOD entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the Causes which impel them to the Separation.

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed, by their CREATOR, with certain unalienable Rights, that among these

are Life, Liberty, and the Pursuit of Happiness.—

That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate, that Governments long established, should not be changed for light and transient Causes; and accordingly all Experience hath shown, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security. Such has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of Government. The History of the present King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World.

HE has refused his Assent to Laws, the most wholesome and necessary for the public Good.

HE has forbidden his Governors to pass Laws of immediate and pressing Importance, unless suspended in their Operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

HE has refused to pass other Laws for the Accommodations of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyranny only.

HE has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures.

HE has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.

HE has refused for a long Time, after such Dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining, in the mean Time, exposed to all the Dangers of Invasion from without, and Convulsions within.

HE has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.

HE has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

HE has made Judges dependent on his Will alone; for the Tenure of their Offices, and the Amount and Payment of their Salaries.

HE has erected a Multitude of new Offices, and sent hither Swarms of Officers to

harrass our People, and eat out their Substance.

HE has kept among us, in Times of Peace, Standing Armies, without the Consent of our Legislatures.

HE has affected to render the Military independent of and superior to the Civil Power.

HE has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation:

FOR quartering large Bodies of Armed Troops among us:

FOR protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

FOR cutting off our Trade with all Parts of the World:

FOR imposing Taxes on us without our Consent:

FOR depriving us, in many Cases, of the Benefits of Trial by Jury:

FOR transporting us beyond Seas to be tried for pretended Offences:

FOR abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rule into these Colonies:

FOR taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

FOR suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all Cases whatsoever.

HE has abdicated Government here, by declaring us out of his Protection, and waging War against us.

HE has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People.

HE is, at this Time, transporting large Armies of foreign Mercenaries to complete the Works of Death, Desolation, and Tyranny, already begun with Circumstances of Cruelty and Perfidy, scarcely paralleled in the most barbarous Ages, and totally unworthy the Head of a civilized Nation.

HE has constrained our Fellow-Citizens, taken Captive on the high Seas, to bear Arms against their Country, to become the Executioners of their Friends and Brethren, or to fall themselves by their Hands.

HE has excited domestic Insurrection amongst us, and has endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes, and Conditions.

IN every Stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury. A Prince, whose Character is thus marked by every Act which may define a Tyrant, is unfit to be the Ruler of a free People.

NOR have we been wanting in Attentions to our British Brethren. We have warned them, from Time to Time, of Attempts by their Legislature to extend an unwarrantable Jurisdiction over us. We have reminded them of the Circumstances of our Emigration and Settlement here. We have appealed to their native Justice and Magnanim-

ity, and we have conjured them by the Ties of our common Kindred to disavow these Usurpations, which would inevitably interrupt our Connexions and Correspondence. They too have been deaf to the Voice of Justice and of Consanguinity. We must, therefore, acquiesce in the Necessity, which denounces our Separation, and hold them, as we hold the Rest of Mankind, Enemies in War, in Peace Friends.

WE, therefore, the Representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS Assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all Allegiance to the British Crown, and that all political Connexion between them and the State of Great-Britain, is, and ought to be, totally dissolved; and that as FREE AND INDEPENDENT STATES, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of Right do. And for the Support of this Declaration, with a firm Reliance on the Protection of DIVINE PROVIDENCE, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honour.

In fact when asked to draft this declaration Thomas Jefferson was facing three major issues: First he had to justify the right of resistance of the American Colonies and the settlers, second he had to prove that the British Colonial power has so heavily violated the rights of the settlers, that the Colonies could use their right of resistance and third he had to legitimise the new right of self-determination and the new power of the states to establish a original and secular sovereignty. The only theory, which could assist him for this task, was the philosophy of JOHN LOCKE. In his Treatise of Government he proposed a limited sovereignty of the states with the only purpose to protect the inalienable rights of the citizens. Thus as every human being has vested inalienable rights, the political power, which violates these rights, will loose its legitimacy. That is what Jefferson for the British Colonial Power claimed in the declaration of independence. Based on its natural rights the citizens have a right to resistance against the political power misusing its limited sovereignty. Those peoples who use their right of resistance have a inherent right of self-determination in order to establish a new political order, which will better protect their inalienable rights. This new political order will have a limited sovereignty based only to protect the individual rights. It will have to derive its governmental power from the consent of the people to be governed.

This is also the document, which will finally lead to constitutional review of the statutes, as it is only the court, which is able to decide, whether the political power has violated fundamental constitutional rights. Those natural rights can only be protected by the court not by the legislature or the executive. In 1804 almost 30 years later, Chief Justice Marsahll will in his famous case Marbury v. Madisan proclaim the very principle of judicial review based on this theory, that men should be governed by law not by men.

Isolated State Committed to the Rule of Law

This impressive historical development of the idea of the Rule of Law in the United states had also its important draw backs in particular since the United

States are not any more on the side of the powerless states against European Monarchies but became the Leader-State of the international community controlling the political development of the states all over the globe. Thus they have not only refused to ratify the statute of the International Criminal Court (ICC) but tried with all possible political means and pressures to impede the establishment of this court. They do not want to let any international body to review their aggression on Yugoslavia, Afghanistan and Iraq. And the detainees (calling them illegal combatants in order to exclude the protection according to the Geneva Convention on Prisoners) have been excluded from the protection of international law and for several years from the American Habeas Corpus protection until the Supreme Court has granted the some basic constitutional right in Rasul v. Bush (http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=03-334) By pointing at their sovereign right to self-defense and emergency-right they intend to escape any external rule of law control by invoking the reason of state as the final not to any body accountable instance.

Impeachment

If sovereignty is not absolute, it can also be apportioned not only between the different branches of Government but also between the federal and the state governments. This is contrary to the European concept of state. For the European view of absolute sovereignty under the influence of Hobbes only one state branch for instance the constitution making body or the body deciding on emergency can be the very last to nobody accountable holder of the sovereignty of the state. The much softer and flexible American concept of sovereignty enables to vest sovereign powers to all three different branches of Government, to the President, the Congress and the Supreme Court, to make those branches independent and sovereign with regard to their very function and to make them accountable for all actions ultra vires.

The power and position of the American President, who is elected by the majority of the votes of the electors is comparable to the position of the King of the UK of the 17th century. He can veto decisions of the Congress, but this veto can be overruled with a two third majority of both houses. On the other hand the Parliament can not withdraw the confidence from the president. It can only be impeached in common with the Supreme court and independent proceedings in both houses, is it has been done by the long parliament in the forties of the 17th century. According to ALEXANDER HAMILTON (1757–1804) the power to impeach the president vested into Congress weakens the power of the president with regard to the English King. (Federalist Papers No. 70). The Impeachment-Procedure has only been brought to a final decisions against Andrew Johnson in 1868 and against Bill Clinton in 1999. In both cases the Senate in its final decision acquitted. For Andrew Johnson Impeachment failed with one vote short of the two third majority. Bill Clinton was acquitted with 45 to 55 for the first and with 50 to 50 for the second charge.

The impeachment against Richard Nixon in 1974 could not be brought to an end, because after the judiciary committee of the House voted for three charges against president Nixon. But he resigned even before the house voted on this pro-

posal. Since this Watergate crises the integrity and credibility of the office of the president has suffered considerably. Congress indeed feels responsible and committed make also the president accountable for his activities. For this reason Congress was ready to impeach Bill Clinton. With regard to the War in Iraq the Congress opened far reaching hearings in order to clarify the position of the president with regard to the misinformation on the fact, the Sadam Hussein did not dispose of weapons of mass-destruction although these charges were the legal justification for a war against Iraq. The power of the Congress to initiate a impeachment procedure has a preventive impact and contributes substantially to the balance among the different branches of Government.

Independence of the President and the Party

As at the 17th century the English King had the power to chose his cabinet, also the American president chooses his/her cabinet. However as the English King at the time he needs the approval of the Senate. While in the UK this power of the Senate shifted to the Commons and it "mutated" from a mere ratification into the power to remove the Cabinet from office, the Constitution in the US has never changed and thus the Cabinet remains still only accountable to the president. Thus the neither the president nor his cabinet depend directly on a majority of the parliament. As a consequence also the Congress is independent from the president and even more the party he belongs to. Executive and legislature do not depend on each other as in States with Westminster type Governments. The independence of the party from the Presidency and its executive power enables moreover the members of the party to take decisions without being forced to join constantly the party vote, as the party vote has not direct implication on the fate of the executive. Parties and party groups in the parliament are much more independent from the executive than in a parliamentary system. In consequence membership in a specific party is not so strongly linked to the ideological policy of it. Therefore democrats as well as republicans have members in parliament with very diverse political opinions. The parties are not focused to implement a specific governmental program - this is the responsibility of the President -, but to win the next elections for the Congress. Thus the parties are much more to be considered as centers for the education and promotion of political personalities than as parties of specific political policy programs in the European sense.

2. Divided sovereignty between the Federation and the States

Constitutional Limits of Federal Competencies

The new and first federal Constitution in history did not only divide horizontally among the federal governmental branches but also between the new federation and its member states. The founding fathers thus tried for the first time in history to establish a new and proper balance between the powers of the new federal alliance and the powers of its members. „The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite... The powers reserved to the

several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State" (Federalist Papers No. 45). This perception of a divided sovereignty enabled the founding fathers of the American Constitution to build up a federation, which could implement constitutionally defined competencies independent from its member states.

Implementation of Federal Law and the Administration of the Federation

Contrary to the later European concept of federalism, which is based on the idea that federal legislation is administered and implemented by the member-states the federal government in the US has the power and the duty to administer its own legislation with its own agencies accountable to the president and/or to the Congress. Thus the federal system in the US provides a two parallel legal systems with independent administrative and court implementation. The federal laws are implemented by federal agencies and this implementation is controlled by a federal court system. State laws are implemented by state administrative agencies and controlled by the state court system. In the Continental federal system federal laws are administered by the member states and controlled by the same courts controlling federal and member-state administration. Thus in the US the three branches of government are separated on the federal and state level. In Europe it is mainly the legislative branch which is divided into a federal and member-state legislative branch.
This new structure of a new federal state concept based on a vertical division of powers which has for the first time been invented with the new American Constitution has since then influenced more constitutions of the world then the American system of the presidency. However only very few constitutions did follow the basic idea of a full division of all governmental powers. Many states were of the erroneous opinion, that the idea of a absolute indivisible state sovereignty could be combined with the American federalism concept.

b) The Swiss Confederation (Eidgenossenschaft)

1. Basic Concept of the Governmental System

Democracy Multiculturalism as Pre-Constitutional structure

The Swiss Confederation which is called in German Eidgenossenschaft meaning a co-operative society allied by a common oath is a part from its strongly decentralized federal structure governed a world wide unique governmental system. This system is determined by the democratic history and the multicultural reality of the country. The federation does not have a monocratic head of the state. It is rather governed by a collegial executive called federal council, elected for a fixed term period of four years by the united chambers of parliament. Neither the federal council as a collegium nor its single members can be removed from office during their term of office. After 4 years they can be re-elected without any restriction of

a determined number of re-election. Since more than 150 years in only very few exceptional cases a former member of the council who was proposed as candidate for re-election has not been re-elected. In the 20th century it did not happen once. Only in 2003 a proposed member for re-election has been voted out, as her party has lost considerable popular support in the previous parliamentary elections. Thus one can still pretend that as general rule the members of the federal council are not voted out.

The body to elect the members of the federal council is the united parliamentary assembly of the two chambers of parliament called the federal assembly. Since 1959 the federal assembly has elected the members of the federal council according to the so called magic formula. This magic formula has become a non written constitutional rule according to which, parties should be proportionally represented in the federal according to the percentage of their size in the two chambers of parliament. Since 2003 the federal council is composed of two radicals (liberal party), two socialists, two democratic union (right-wing party) and one Christian democrat. In choosing the members of the federal council, the parliament has the constitutional obligation to take the interests of the different regions of Switzerland into account. Thus minorities of the Latin-speaking population (French, Italian and Romontsch), the two major religions (Protestant and Catholic), the women, the employees and employers etc. should be represented according to a reasonable concept of proportionality. Thus the Latin-speaking minority with 20% of the population has often three members that is 40% representation in the federal council and some times two (28%).

In fact the reality of the semi-direct democracy requires, that already the executive body takes into account the different cultural traditions and opinions of the country. It must be composed of members able to find the necessary compromise, which alone will have a chance to get the approval in case of a referendum. An alternation between opposition and governing majority according to the winner-takes all principle would without a chance, as such system would disregard the will of the people which in fact represents the very opposition in the Swiss system.

The Executive the „Small Council“

The executive has often been called namely on the cantonal level as the small council with regard to the parliament which is in fact the big council. As small council it acts somehow similar to a first instance which submits the first drafts for legislation and on expenditures to the big council, the parliament. The two chambers of parliament will examine those proposals and their final decision (except budget) may be subject to a referendum of the people, which symbolizes the very sovereign of the country.

Mirror of the People

A parliament composed and controlled of a majority party identical with the cabinet according to the Westminster system would have no chance to get approval in a referendum. In fact in the beginning of its existence in the second half of the 19th century the federal council was composed of only one and later two parties and the

members of parliament have been elected according to a Majoritarian system. As a consequence the people (sovereign) rejected regularly important legislative endeavors. Thus the system had to be adapted to this reality and to change the electoral system from elections based on the majority to a proportional system which enabled the representation of the people in the parliament in order to reflect the reality of the social diversity. The parliament needed the support of the great bulk of the people. Accordingly the collegial executive as the "small council" needed also to be adapted to this proportional concept of representation. It hat to reflect the existing diversity of the society and to take into account the different power-centers, cultures, traditions etc. of the society. This broad representation allowed the federal council to promote policies supported by consensus of the people but were conceived more or less independent from the party policies the members of the federal council did belong to. The power restraint imposed by the constitution was thus no only the checks and balances between parliament and executive even more the checks and balances among the different equal members of the executive. The need to find a consensus among the members of the Federal Council and in addition among the higher and the lower chamber of parliament is probably more effectively limiting political power than the traditional checks and balances.

The People as Opposition

The Swiss governmental system although since 1848 formally unchanged has been considerably influenced by the development of the direct participation of the citizens in the decision making process through referendum and initiative. This new development started 15 years later with the first important votes on constitutional amendments and has since been continuously expanded with only few steps back in the end of the 19th and during the 20th century. The right of the voters to require a referendum on a legislative proposal by the parliament introduced in 1874 for instance enabled the social forces in particular economy and labor unions, which had the financial and human resources to require and to manage the campaign to defend their position in the referendum to enlarge considerably their political influence. The parties on the other hand, which in general were lacking financial resources for a referendum campaign lost substantial influence and did change into mere organizations to influence the general staff policy of the federation and the candidates for political offices but lost part of their possibility to participate in the policy making process.

Constitution as Program

On the other hand the different votes of the people and in particular its participation in the constitution decision-making process did substantially influence the constitutional policy of the Confederation. Although only very few constitutional initiatives launched by the people reached a approval of the majority of the people and the cantons in the final vote, even the non successful initiatives had considerably influence in long term and every day political decisions. Thus to prepare the constitutional vote of the people a broad discussion on the issue has to be launched already on the parliamentary debate and then during the campaign for

the final decision of the voters. The parliament has with regard to any initiative three options: It can propose to the people to approve it in the final vote, it can reject it without any political consequences or with amendments on the legislative level or it can draft a counterproposal which will submitted for the people's vote as alternative decisions. Often those counterproposals containing usually less extreme proposals than the initiative have then finally been adopted by the people and the cantons. But even though the people has rejected the initiative some basic ideas of the initiative have remained on the agenda and been taken up successfully by some of the parties or some times even by the administration and thus had an impact on the over all policy of Switzerland. The Swiss Constitution thus became an instrument, which on one side at the same time enables and limits state power and on the other substantially determines the essential policy of the state. It has thus mutated into a document containing a important programmatic character for long term and every day politics.

Now we shall turn to the most important historical developments, which did lead to such system.

2. History

Common Pasture Field in Middle Age

History however developed rather different in rural or city-cantons. The three primordial rural cantons Uri, Schwyz and Unterwalden formed in 1291 an alliance for the self-defense of their rights given to them by the emperor in their freedom Charter against the protectors (Vogt) installed by the members of the House of Habsburg . Within the corporations formed by the two valleys of Uri and Schwyz the earl was given the jurisdiction which he exerted in the open assembly of all inhabitants of the valley. Public authority thus was already linked to the open assembly of the people. The farmers of Schwyz were real-estate owner and freemen, united by the corporation of their territory. The peasants of Uri were enslaved, but they were united by the pasture field they were allowed to use in common. The people's living in Unterwalden were united in corporations formed by the municipalities. When they got the charter to be directly dependent on the empire the corporations formed to use common ground for their cattle and the corporations united in order to sit in judgment upon concrete cases merged together and established themselves into an alliance with private interests (common use of land) and public jurisdiction of the people lead by a headmen of the land or of the valley.

Rural and City Alliances

Particularly fortunate for the further development of the young corporation of Switzerland was the fact that those corporations already in very early times die seek to ally not only among only rural or only city corporations but with city- and rural corporations such as Zuric, Lucerne and Bern. The towns themselves did also merge out of municipal corporations (Lucerne) or out of alliances among different small areas (Zurich) or they have been founded for military defense purposes

(Berne and Fribourg by the Zähringer Family. According to each specific tradition the democratic institutions did develop differently.

Power of the Guilds in the Cities

The mercantile and trading towns were given the right to be a market or trading place and to protect themselves with a proper wall. Originally Zurich has been ruled by old families allied with Habsburg. Those family exerted their power with a oligarchic small council. With the first revolution led by Rudolf Brun the old council has been replaced by a new council, which included a part from the old families (Konstafel) also craftsmen. As these reforms did not suit the Habsburg family. In order to defend its autonomy Zurich had to look for support among the primordial alliance of the rural corporations of Uri, Schwyz and Unterwalden. Thus it did enter into this alliance with the town of Lucerne. However a first real democratic constitution has only been introduced with the so called Waldmann Constitution. With this Constitution the privilege of the aristocracy the Konstafel has finally been abandoned and the corporation has been equalized to all the other existing guilds. From now on the council was elected by the guilds. It became the highest authority of the town, which was exerted under the control of the mayor.

Aristocracy

Contrary to the towns ruled by the guilds, Bern has been founded for military purposes. Craftsmen and merchants never had a special social and political status as in Zurich or in Lucerne. The town was ruled by a mayor and a small council composed of twelfe members and a assemply of the town, which did elect every year the mayor and the twelf members of the council representing the nights and other gentry families. 1294 a new institution called the council (Institute) of the sixteen has been installed. The members of this council did elect the member of the big council of the two hundred. The craftsmen were admitted as well as to the sixteen(er) as to the council of the 200. But to become a member of the small council, that is the executive one could not be a craftsmen and in 1373 the guilds of the were even prohibited. It is one of the important particularities of the town of Bern, that the craftsmen never had a political influence. Untl 1798 they never became selectable for a governmental position and thus never participated in any governmental branch of the town. Ruling the town remained a prerogative of the aristocracy and of the old bourgeois families of the town.

Charter of Stand: First Document Produced by a Compromise

While in the rural cantons the executive, the headmen of the rural state (monocratic) was more linked to the people because of its election by the periodical people’s assembly, the small councils (collegial system) in the towns were more induced to govern over the people in particular the people of the rural area dependend on the respective town. This even today sensitive contrast between urban and rural interests broke up for the first time after the wars with Charles the Bolt of Burgundy. The tows established their proper alliance in order to rule the population of their rural areas. This rural population on the other side got support

by the rural members of the young Swiss corporation. The conflict has been solved in the so called Charter of Stans in 1481 (Stanser Verkommnis). In this charter the states promised to help each other in particular against the revolutionary subjects. The rural cantons renounced to stir up the rural population against their masters. Elsewhere the Lords looked for support of their kings, the Swiss got the support by their common assistance. This assistance however was only possible to a limited extend. Thus the ambassadors of the rural cantons had to mediate after the execution of the mayor Waldmann in the conflict between town and countryside.

Essential Elements of the Early State Structure

From the first developments of the Swiss Alliance one can already explain some major elements of the Swiss understanding of state and political power.

1. The consciousness to form an autonomous political community has first been emerged out of small, local communities organized as corporations, which in the 13th century could extract from the emperor their charters of liberty.
2. Each challenge of political independence form part of the empire but also from part of the people is not met by centralizing power, but by strengthening the common alliance and cooperation of the concerned communities in order to maintain local autonomy. The political center remains at the local corporations. But they assure each other mutual support, as soon as their domestic political order is threatened from external or internal challenges. (Stanser Verkommnis).
3. The need of the small communities to grant individual liberty is relatively minor as the several members of the communities (free farmers or citizens) can largely influence the political decisions of the communities. Liberty is considered to be liberty of the corporation, but not individual liberty.
4. The people's assembly e.g. of the valleys or of the towns can be traced back to judicial activities and to the common administration of the use of the land. A separation between state and society in these small communities has not been visible.
5. From the self-government of the people in the sense of ROUSSEAU one can not talk, as the rural states are governed by a governor and the urban states are ruled by a small council or a mayor. In cases of conflicts often the people had by asked as supreme authority and final instance.
6. The separation between worldly and spiritual affairs was carried out by a gradual detachment of the spiritual jurisdiction (Paffenbriefe). By this the interference of the church in domestic political affairs could be forced back.

Secession of the Empire

At the end of the 15th century the confederates have been spiritually and politically separated from the empire, that the formal secession became only a question of time. Until the so called Swabian wars they had though still to pay taxes to the

empire, render military service and to submit to the higher jurisdiction of the empire.

When the emperor with the reform of Worms again tried to re-unite the strongly fragmented empire, the confederates refused to accept those reforms as the court or the taxes of the empire. With the Swabian wars and the following peace of Basel on the 22nd of September 1499 they achieved the independence of the empire, which however formally has only been confirmed in the peace of Westphalia in 1648 after the thirty years war.

Reformation

The secession of the empire has been achieved shortly before the reformation. This reformation had far reaching consequences on the confederation. It lead to a repartition of Switzerland between the catholic and the protestant states which lasted several centuries. Contrary to Germany the new reformation carried out under the leaders ULRICH ZWINGLI (1484 - 1531) in Zurich and JEAN CALVIN (1509 - 1564) in Geneva did not only result in a new spiritual conception of the religion but also similar in this point to the UK to an new concept of the state. The state has been linked to the church (Geneva) or the Church has been subordinated to the political structure of the state (Zurich). Later this did cause more democratic (Zurich) or to more oligarchic structures (Geneva) of the church. Later these new political structure has been strengthened with the foundation of the national church of the canton. This new self-confidence of Reformed cantons has not been shared by the catholic cantons. Those died not accept the idea of a absolute state sovereignty over worldly and spiritual church affairs. This different perception between originally Reformed and Catholic Cantons which results in a different concept of the state can even be felt in our times.

Absolutistic Influences in the 18th century

Reformation, religious wars between the cantons, the first social peasants' revolts and attempts to establish absolutistic rulings gave first effects to fundamental changes also in Switzerland. The Reformation primarily had democratic aims, but it did also lead to a new political union between church and state and caused thus to a concept of a absolute and indivisible unaccountable and unquestionable sovereign state power. The influence of absolutistic monarchies of neighbouring countries on these developments can not be denied. The neighbouring monarchies were influential in particular because many Swiss, for which the Swiss legionaries did military service. The high amount of payments they got in these foreign services enabled some to accumulate important fortune. Those few families based on their economic powers established oligarchic political structures and ruled increasingly over and not with the people. The gap between the people and those ruling families increased. The citizens rights were continuously limited to property and lineage. Thus isolated guilds and aristocratic families excluded more and more inhabitants from the democratic rights.

Separation of Powers under the Sovereign?

Most important is the fact, that contrary e.g. to the UK of the 17th century one cannot consider that there has been any attempt or original development for a separation of powers concept. The governmental functions as well as the political power was always united in one body. This body however did practice its competences with different branches and instances. The peoples assembly as highest authority carried out judicial, legislative and executive functions. It elected the governor (Landamann), which could also be voted out. The governor itself performed its mandate in the name of the people's assembly, which it had to submit important issues for final approval. Thus a real separation of powers between people's assembly and governor can not be detected. It is however more correct to assess this relationship as the channel of instances. Conflicts which could not be solved by the governor had to be decided by the people's assembly. Interesting though is for instance the people's assembly of the state Schwyz in 1655. This assembly simply refused to accept to implement legislation issued by the confederation, because it does not recognize to obey to any sovereign other sovereign but to God! Similar channels of instances can be detected in the urban cantons. However contrary to the monocratic governor in the rural cantons the first collegial bodies emerge as small and great council.

Accountability: The Case of a People's Assembly in the Canton of Schwyz

Did the subjects in earlier times have to be asked in important issues with the referendum the so called "Volksanfragen", those rights have been later gradually restricted. Exceptionally however they remained in some cantons even throughout the 18th century. One can as example refer to a people's assembly in the canton of Schwyz in 1763. This assembly condemned the wife of the general von Reding, who was serving for the French king to pay a pound to each member of the assembly, because her husband continued to recruit new soldiers for the French services although such recruitment has been explicitly forbidden by the earlier people's assembly. One can read in the minutes that after long discussion and many advises given, that one should delegate the issue to a small council or postpone the decision to the month of may, or whether his wife should be condemned to pay half a pound to each participant, the assembly decided, that the wife of the General should pay one pound to each member of the assembly. (cp. Landsgemeindebuch (Protokolle der Landsgemeinde des alten Landes Schwyz p. 826, 820 rot) Landsgemeinde vom St. Thomas Tag, den 21. Christmonat 1763).

France and Napoleon

At the end of the 18th century the strife-torn Swiss Confederation weakened by the intrigues of foreign powers was not any more able to resist the attack of the French revolutionary armies. With the reign of Napoleon a new area of political institutions started, which after the long confusion and disputes supplemented the traditional political opinions of the cantons with new ideas.

The estranged Confederation was run down at the end of the 18th century by the French soldiers and was given on the 12th of April 1798 a new republican Consti-

tution. This new constitution of the new state called Helvetik made out of the very loose and divers confederation without any ifs and buts a unitary state. (Art. 1:" The Helvetik Republic as one and indivisible."

This monotony stew was with regard to this Confederation fragmented by those many various local units from its beginning bound to lose. Very soon after this first Constitution new drafts have been made until Napoleon in 1803 released a new constitution called Mediation-Constitution. This constitution established partially some autonomy of the cantons. After the exit of Napoleon the dream of a unitary Confederation however was over once and for all. On August 1815 the 22 sovereign Cantons ratified a renewed alliance in order to re-establish the confederation. The swore to defend and protect commonly their liberty as well the rights of the cantons against any external and internal aggressor. Based on this new alliance the former governing families of different cantons were again in position to establish their lost power and authority.

July Revolution of 1830 and Regeneration

Only after the French July Revolution of 1830 in Switzerland the idea of a liberal state with separation of powers was able to gain acceptance in some cantons (in particular Zurich). The liberal and democratic movements (called regeneration) solicited the implementation of liberty and democracy within the whole Switzerland. They proposed to put those ideas into effect also in conservative cantons with the power of a unitary state. They succeeded however only partially in the new federal constitution adopted by the people and the cantons in 1848. In fact by this Constitution the Confederation did not become a unitary but a real federal state according to the then only existing model of the United States. In this Constitution of 1848 as well as in the later Constitution of 1874 article 1 starts with the formula: "Together, the peoples of the 22 (since 1979 23 with the Canton of Jura) sovereign Cantons of Switzerland united by the present alliance, to wit: Zurich, Berne, Lucerne, …., form the Swiss Confederation."

Separation of Powers on the Federal Level

Since the idea of a divided sovereignty divided between the Federal and Cantonal level could not be carried through, the idea of a divided sovereignty among the federal governmental branches could also be implemented only partially contrary to the model constitution of the United States. On the other hand one can compare the assignment of the same competences to the two chambers (national chamber and chamber of the states with to the American system of power sharing among the two houses, a concept which had as model the English Constitution of the 17th and early 18th century. Unlike the somehow asymmetric assignment of some competences in the US (e.g. foreign affairs and budget) the Swiss provided for both chambers absolute similar competences. Indeed the national chamber and the chamber of the cantonal representatives have the same function and thus the same powers. Thus they share and control each others powers.

The organization of the federal power however has been influenced by the American but also by the short-lived Helvetik Constitution of 1798. This Constitu-

tion was committed to the separation of powers model of MONTESQUIEU. According to this model the branches of government are to be separated functionally according to the legislation, judicial and executive function. (cp. Art. 3 of the draft for a new Helvetik constitution: "The legislative, judicial and executive powers are never to be united")

According to this model the three branches are not only to be functionally but also personally separated. Contrary to the parliamentary governmental system the executive in Switzerland for instance can never be removed from its function by the parliament by a vote of non confidence. The federal assembly (the united two chambers) has only the power to decide after the term of office on the re-election of the members of the executive. While in the US the executive power is given to the President as one person, the Federal Constitution of Switzerland adopted the system of the collegial directory of the French revolutionary constitution of 1795 – 1799. Although this system had no chance to survive in France it could well be integrated into the traditional system of the collegial councils already previously existing in some governments of urban cantons. The system thus did well accommodate the political culture and the federal diversity of Switzerland. All experiments to establish however a presidential system on the federal level similar to the governmental systems of rural cantons with one governor (Landamann) would have failed for the very reason that with regard to the multicultural diversity of Switzerland no minority culture would have accepted to be ruled by only one person belonging to the majority culture. The cantons could not allow to hand in a comprehensive executive power to a Swiss Governor (Landammann). They wanted not only to influence the legislature with the second chamber but also the executive with a restricted representation of the diversity of cantonal tradition within a collegial executive. They required – although not similar to the legislative and thus with restricted influence – still to be represented in the executive. Moreover they argued, that the model of a collegial government has already been installed in the urban cantons with the small town council led by the mayor.

3. Foreign Influences on the Governmental System

Influence of the French Revolution

Article 132 of the Constitution of the year III (22nd of August 1795) provided at the time of the French Revolution:

> *„The executive power is assigned to a directory of five members."*

Article 71 of the first Helvetik Constitution imposed by the French revolutionary troops read literally similar as follows:

> *„The executive power is assigned to a directory of five members."*

Article 174 of the actual Constitution of 1999 reads:

> *„The Federal Council is the highest governing authority and the supreme executive authority of the Confederation."*

Germany

Article 62 of the Basic Law of on the other hand determines:

> *„The Government consists of the Chancellor and the Ministers.“*

And Article 59 provides that the president of the federation represents Germany in its international relations.

France

The French Constitution of 1958 describes the different governmental functions as follows:

Art. 5 regulates the functions of the President as Head of the state and determines:

> *„The President of the Republic shall see that the Constitution is observed. He shall ensure, by his arbitration, both the proper functioning of the governmental authorities and the continuity of the State.*
>
> *He shall be the guarantor of national independence, the integrity of the territory and observance of Community agreements, and of treaties.“*

Art. 20:

> *„(1) The Government shall determine and conduct the policy of the nation.*
>
> *(2) It shall have at its disposal the administration and the armed forces.*
>
> *(3) It shall be responsible to Parliament under the conditions and in accordance with the procedures stipulated in Articles 49 and 50.*

Art. 21:

> *„The Prime Minister shall direct the conduct of government affairs. He shall be responsible for national defense...*

The Federal Council corresponds to the directory of the first French Republic

Indeed the constitutional texts, which paraphrase the function of the directory of the French Revolution and of the Helvetik are very similar if not identical and thus differ considerably from the texts of constitutions, which describe the position and the function of the executive and the head of state of parliamentary respective presidential systems. This distinction is evident as the parliamentary and presidential systems have to determine the function of the head of the state, the prime minister, the cabinet and the ministers. On the other hand the directory includes all those different function in one collegial body: the directory.

The comparison of the actual Swiss Constitution with the French revolutionary Constitution on one side and with other modern constitutions on the other hand shows clearly, how much the Swiss Governmental system corresponds to the old

revolutionary model and thus can not be compared to a constitution with a executive split among the Head of the State, the Prime Minister and the Cabinet.

The governmental system of the unitary Helvetik state lasted only for a short while. Although the isolated governmental system might have been aproporate, the unitary state structure did not at all correspond to the traditional culture nor special need of a Swiss Constitution. Only the liberal Cantons could in the time of the Regeneration enact liberal constitutions after 1830. They then adopted partially the model of the directorial system, which corresponded as mentioned to some traditional collegial councils of some Cantons.

Directory and Swiss Tradition

The deep rooted mistrust of the people, which is not at all prepared to entrust any body to much power and even less to a single person, the tradition of federalism and the already experienced collegial system in the urban cantons were probably the most decisive historical roots, which induced the founding fathers to provide for the federal level a governmental system based on the principle of collegiality. They could only assign the responsibility to rule this emerging young country having been burdened by revolutions and civil war to a collegial body.

In France the directorial Constitution lasted only for three years. The Swiss governmental system first installed in 1848 however lasted and is still lasting for more than 140 years. It survived the German-French War of 1870, two world wars, the French and the Russian Revolution of 1870 respectively 1918, the third Reich, several economical crises and even the new world order after 1989 and 9/11 2001. In France the first strong man, named Napoleon was able to bring down the system. In Switzerland neither a General as Commander in Chief nor an other strong personality within the federal council was able to get rid of it.

Swiss System of Government as Special Type

In this sense one can classify the Swiss governmental system as third type of government of democratic states, which since the glorious revolution of 1689 has emerged and could be maintained within the two centuries, although only within one country. The first model, that is the American Presidential system has adopted the British Constitution of the 17th century with a republican monarch as a President elected for a fixed term of office. The second model is the system of the parliamentary cabinet. It corresponds to the British Constitution of the 19th century and had most widespread influence.

The directorial system is the only governmental system, which re-unites the function of the head of the state, the prime-minister and the cabinet in one only collegial body decentralizing some functions simultaneously to the seven members being on equal terms with each other. For this reason Switzerland is not familiar with some of the problems, constitutions have to solve, which are dividing the competences among the head of the state, the prime-minister and the cabinet.

Just as little as this problem could one imagine a dictator to bee established according to the model of some Latin-American states. On the contrary, the directorial constitution enables the respective parliamentary majority of different parties

without being bound to a coalition program to chose and elect different personalities for governmental functions without granting the parties to much influence on the specific activity of the executive.

Incarnation of the Volonté Générale

Indeed the several members belonging to the Federal Council consider themselves not to be primarily members of the party, who are supposed to defend their party interests within the federal council. For this reason, they are rather in a position to reach with other members of the council common aims and solutions, which are closer to the ideal of the volonté générale, than pure party interests. And by the way the members of the federal council have not been chosen and elected, because of a coalition program agreed upon by the majority parties. They are rather asked to elaborate the government program based on a consensus of the members of the Federal Council, which includes the different programs of the parties represented in the government. The necessary consensus for this program is not reached by negotiations of the parties but by a open discourse of the federal council based on proposals submitted by the administration. Finally the members of the federal council will have to defend their common program within the parliament and if necessary also in open discussions at the occasion of a popular vote on a referendum. As there is no majority party, which in common with the executive has to pursue policies which enables it to win the next elections and which will assess the activity of the executive, only with regard to the chances to be the next winner, there is also no party or coalition majority, which would consider itself responsible, to rush laws through. As each federal councilor will have to seek its own majority in parliament and in the referendum decided by the people and since no party gains considerably more votes then one fifth of the voters he or she can not only seek the support of his/her party.

No Separation Between Head of the State and Executive

In general almost all traditional monarchies have in some way adopted in principle the Westminster model. In taking over this model they maintained either the monarch as Head of the state or they replaced the monarchy with a elected president of the state with the respective functions. However only with the American presidential system it was finally possible to keep the competences of the former British monarch and to replace him/her with a elected president. Those monarchies following the Westminster model had to hand over important executive functions of the Monarch to the prime-minister and to its cabinet. Only in the United states thus the Head of the state is still identical with the holder of the comprehensive executive power.

In principle all modern governmental systems have thus been influenced either by the American presidential system or by the Westminster model. Only Switzerland has adapted the directorial system of the French revolution to the traditional Swiss conditions.

Federal Council: independent Take Over of the French Model

The Swiss Constitution though has supplemented and changed considerably the French model with regard to some crucial issues. Contrary to the French Directory the Swiss Federal Council is composed of seven and not only of five members. Originally one has also planned a Federal Council with five members. But in particular the medium sized and smaller Cantons requested an enlargement of the council to seven. They feared that they would otherwise never bee represented in the Federal Council.

Bottom Instance

The members of the directory are elected for a fixed term office of four years (previously only tree years) by the united federal assembly (both chambers voting as one assembly on the bases of the majority of all members). The federal assembly elects each member individually. It respects and takes of course into account the proportional representation of all different regions of the country as well as of the different important parties. The Federal Council however is no coalition government, which based on an agreement of the party is appointed. There are and have been members of the federal council, which have been elected in order to take a specific party into account, but which have not been explicitly proposed as candidates by the respective party. Because of direct democracy the power of a majority coalition in parliament is considerably restricted. Because the people and not a minority party considers itself to be the opposition to the executive and the parliament. Thus there is no unity between the Federal Council and its majority in parliament. In the legislative procedure one has rather to perceive the Federal Council as bottom instance proposing to its higher authority legislative proposals which will decide with the reservation of the power of the highest authority to decide finally in case of a referendum.

Stability

The members of the Federal Council, who after their term of office again did run for re-election have been in the last 100 years also been re-elected. The first time a Federal Council candidate for re-election has not been re-elected was in 2003, after the representation of the traditional parties in the parliament has substantially shifted because of the previous election.

Moreover since the Federal Council has never retired in total, the parliament did since 1848 always only replace each vacancy the council individually with new elections. Thus Switzerland may be actually the only country in the world which has with regard to its executive body an unbroken continuity since 1848, since never all members of the Federal council did retire all at once.

Executive and Administration

The French directory was considered as the replacement of the Crown. Thus id was assigned the task of a Head of the State and of a Prime-Minister. The daily work of administration and the implementation of the decisions of the directory was transferred to a general director accountable to the directory. Contrary to this

former French system the Federal Council has no general director to implement its decision. Decisions of the Federal Council are implemented by one of the seven departments. Each of those departments is managed by one member of the council. Thus each Federal Councilor has in fact two functions. As member of the council he/she is responsible for all decisions of this body. At the same time as head of a department he/she has to implement the decisions of the council and to submit to the meetings of the council propositions of his/her department. Thus each department is managed by one of the seven members of the executive body.

4. Substantial Elements of the Swiss People's Sovereignty

Expansion of the Votin Rights and of the Proportional System

After the Constitution of 1848 the governmental system was to a great extent designed on the principle of a representative democracy with the important exception of people's approval of the constitution and of constitutional amendments. However first on the cantonal level new elements of direct democracy have been introduced. In 1874 with the new constitution the legislative facultative referendum was introduced. In 1891 the right of the voters to initiate a partial revision of the Constitution was enshrined as new important democratic right in the constitution. In 1918 the referendum for international treaties (expanded and modified in 1977 and in 2003). Most influential was then the introduction of the proportional system for the elections of the members of the national chamber. This basic concept of proportionality of representation has later been run throughout the whole political culture of Switzerland. Today it is taken into account with regard to the composition of the executive, of the courts, of the administration and of all authorities or advisory committees. It is somehow in contradiction to the pure Majoritarian system, which imposes decisions on minorities. The proportional representation has to make sure, that compromises are to be found in all authorities, which take into account the largest possible amount of diverse interests and which would enable all different tendencies of the society to influence the decisions. Thus the principle of proportionality expresses the perception, that democracy in Switzerland is not considered to be at first a tyranny of the majority but as a possibility to enable the largest possible self-determination of those participating in a decision making process. Based on this principle all bodies and authorities are seeking to have a decision adopted with a large majority as close as possible to unanimity.

This tendency to expand direct democracy can also be seen with regard to specific issues as for instance the right to referendum with regard to urgent legislation. Based on the right of the people to modify the constitution, the majority of voters and of voters of the cantons also stopped the installation of new atomic power plants. Interesting is finally to note, that since the introduction of a direct income tax, the power of the federal government to raise income taxes has always been limited in the constitution for a certain time. Thus periodically the people and the cantons have to re-approve the power of the federation to raise income taxes.

Not Too Much Democracy

Although one can observe within more than a century in principle a gradual expansion of direct democratic voting rights, one has also to recognize, that some initiatives requiring too large participation of the people in the decision making process have constantly been rejected by the people, when they were considered to go too far. Thus for instance the right of the people to elect directly the members of the federal council as well a the financial referendum on the federal level just as the right to initiate legislation have been rejected by the majority of the voters. (In 2003 the right of the voters to initiate a general proposal which might only be implemented by legislation has been adopted)

Checks and Balances

What can be considered as the substantial elements of the Swiss governmental system? Contrary to all other parliamentary democracies the parliament has no unlimited sovereignty. This is certainly the most decisive factor. Although article 148 of the constitution provides the parliament as highest authority but with the decisive reservation of the right of the people. Thus the highest authority and final instance in all important issues are the voters of the nation and of the cantons who have to be asked for every modification of the constitution and which can initiate new amendments to be voted on in a constitutional referendum.

Right to participate of the Executive in the Chambers

Contrary to the governmental systems designed after the Westminster model the parliament and in particular the parliamentary groups, which are represented in the executive are not embedded within the activity of the executive and can thus not be made politically accountable for executive measures. As the executive including all individual federal councilors can not be removed during their term of office they also feel to be rather independent in their activity from their proper party and parliamentary group. Contrary to the president of the United States the individual federal councilors are entitled to propose and defend decisions of the federal council directly in the parliament. They have all rights to participate in the debate of both chambers and of their committees with the only exception to participate in voting procedures. Thus they do not - as the American President - depend on a member of Parliament to initiate and defend executive proposals in the parliament.

Thus the executive can submit and defend in both chambers including within their committees legislative and budgetary proposals. In case based on a decision of the committee or of the parliament however they can not amend or adjust their proposals without prior consent of the federal council. As the federal councilors can only participate in the debate but not in the vote, the parliament and in particular its members are free to decide on proposals of the executive. Contrary to most other states all legislative proposals are not previously decided by the governing coalition of the parliament. They are proposed to the parliament and then often considerably amended in the parliamentary committees and in the plenary of both chambers. Switzerland has no system which requires the parliamentary majority to

flog through with the party-discipline proposals of the executive in the plenary of the parliament.

Highest authority?

The united federal chambers of Switzerland are according to the constitution and with the reservation of the people the highest constitutional authority. Based on this provision the federal parliament is entitled to control the federal council and the federal tribunal. One has to be aware though, that the executive resisted for a long time to far reaching control powers of the parliament. In particular it has constantly defended its constitutional authority against parliamentary investigations. Based on the formal concept of separation of powers it denied any title of the parliament to exert its control over the executive activity. The parliament however invoked the principle of Checks of powers as complementary to the separation of powers and did finally carry through its view of the accountability of the executive and the administration to the parliament. Contrary to the Westminster models however the power to investigate is not conceived as a minority right of the opposition. The competence to investigate in specific matters is part of the ordinary power checks entrusted to the parliament.

Constituency of the Federal Magistrates

The united federal chambers of parliament is also the constituency of the members of the federal tribunal. The federal judges are elected for a fixed term of office for six years. They can be reelected after their term of office until they reach the age of 70. This re-election is normally routine. However it can happen, that the parliament is focusing on certain decisions of certain federal judges. Thus members of the parliament may propose a motion not to re-elect a certain judge because of certain decisions proposed by him or her. Thus the re-election may be infringe the independence of the judiciary, which is not totally protected from political influence.

Political Rights of the Citizens

A part from the division of the executive and legislative power one has to focus primarily also to the political rights of the citizens, which change considerably the balance and the relationship of the three governmental branches. While in other systems the voters include in their vote not only the person but the party program the candidate is proposing with his/her party, the Swiss only elect the persons and decide within the democratic vote on the concrete mandate of the government. Often such mandate is included in a constitutional amendment approved by the majority of the people and of the peoples of the cantons.

The People as Highest Authority but not as a Governmental Branch

The governmental system of Switzerland does not correspond to the principle of the pure popular rule. Switzerland is ruled by the three governmental branches but not by the people. The people as such does not rule the country. However the people is the highest and last instance. As in earlier times the court composed of the

citizens united in a open assembly or the open assembly of the citizens to issue regulations, to approve or reject proposals of the executive on expenditures respectively to elect members of government also today the people is given certain competences to decide on certain issues according to a procedure regulated by the constitution and by the statutes. Thus all different bodies are somehow participating in ruling the country: The People, the Parliament, the Federal Council and the Federal Tribunal. According to this legitimacy approved by the people the executive gets broad support from the population when it is implementing the laws approved by the citizens. This enhanced legitimacy makes it easier to govern the country.

Constitutional Mandate for Parliament and Executive

The right of the citizens to participate on concrete issues and decisions has important implications on the position of the political parties. The parties are not – contrary to the parliamentary democracy – holders of a specific mandate to govern the country. Political parties are groups determined by social and ideological communalities, which exert a limited legislative power within the framework of the constitution approved by the people. They do not only decide in order to get reelected but they will also take into account a possible referendum and thus the will of the people. They inform and support the executive to find the necessary majority in a referendum and as opposition party not represented in the executive they indicate discontent within the population. The executive thus is not embedded in a coalition of parties or of the parliamentary majority, it is accountable to execute the constitutional, legislative and budgetary mandate.

No Parliamentary Opposition

A division between the governing parliamentary majority coalition and the parliamentary opposition in the sense of a parliamentary democracy would not make sense in Switzerland, since the executive can always take into account proposals and suggestions of the parties not represented in the executive. Thus even the parties not represented in the government contribute to the political acceptance by the population of governmental measures. In addition the “opposition” does not have to force new elections, it can impose new political strategies with the instruments of direct democracy. In the Westminster system such political policies are denied to the minority parties. Does the majority of the people refuse proposals of the opposition, the respective parties will have lost the political ground with regard to these specific proposals. The legitimacy given by the voting citizens is irrevocable for a certain period. Minority parties will have to seek new areas in order to realize their concerns. Opposition against the will of the people is not realistic and certainly not successful.

Decline of the Power of the Parties

The regular use of the instruments of direct democracy thus leads to a decline of the power of the parties. Contrary to other political systems thus the political parties concentrate more on the choice and support of good politicians than on con-

crete political issues. If citizens wish to influence issues, they do not have to rely on parties. They can rather influence Swiss policies with the instrument of referendum and initiative. Thus they can set up committees for a referendum or they can try to win non-party, business, economical associations or NGO's for their causes and thus get substantial support for their referendum or initiative.

Separation of Powers between People, Parliament and Executive

The division of sovereignty between People, Parliament and Executive meets the classical tradition of the Swiss constitutional philosophy. On the other hand it was more difficult to implement the horizontal separation of powers between the branches of government among the legislature, the executive and the judiciary. In particular the people as last instance did not want to abandon its right to decide in all issues as highest authority and last instance to legitimize a specific policy.

Integrative Function of the Executive

The broad representation of the different popular political tendencies and thus the broad support of the members of the executive within the population conveys the executive important powers and responsibilities of integration. Often the people have even a patriarchal relationship towards the different members of the executive and in particular towards those members they consider as their special representatives within the executive. The cantonal executives as well as the federal executive is expected to be above the mere controversies of the different parties. They are to implement the interest of the common good. This special position of the executive is even more important, because the legitimacy of the executive has contrary to all other European states never been deduced from the grace of God. The legitimacy of oligarchic domination had always its foundation within the people, which of course was aware in particular in catholic cantons of its sovereignty limited by God. This special foundation of its legitimacy enabled the establishment of a sophisticated and structured political power and it prevented at the same time the centralization of the state sovereignty within one governmental branch.

Taxation and Participation of the People

Today this people's sovereignty or legitimacy can be noticed in particular in questions of taxation. On the level of the federation and within most of the cantons new taxes and in particular the raising of the burden of taxes depend on the approval of the people. The taxing power which in other countries is only conveyed to the executive and to the parliament, in Switzerland it is entrusted to the people. As a consequence the executive and the parliament have to justify their performance in order to get the popular support in the respective referendum. The members of parliament can not isolate from the people and decide new revenues in order to support their interests. Also parliaments are accountable as is the executive. State services have bring a marked benefit to the citizens. It the executive wants to get approval for taxes or expenditures, it must make sure, , that be citizens can recognize the benefit of its achievements.

Four-fifth democracy

However one should not oversee also the deficit of the Swiss perception of peoples sovereignty. Today some 20% people living in Switzerland are foreigners. Those foreigners have with some very few exceptions on cantonal and municipal level now political rights. How can one today in a globalised wiorld legitimize a state based on the democratic peoples sovereignty, by denying to 20% of the population the right to participate?

III. Sovereignty of Powers not Accountable to the Constituted State

The State as Facade

In most modern revolutionary states one can almost not recognize, who is the real sovereign power-holder of the state. The constitutionally installed government often is not able to decide as final instance. The members of parliament are controlled by powers external to parliament and voters and the so called independent courts have in reality to serve powers constitutionally neither recognizable nor accountable. The constitutionally established organs are only facades, which have to feign legitimacy and rational state power. The actual sovereignty is withdrawn from them, it is exerted by powers external to the constitution.

As ideological and theoretical bases for this conception of a state one looks often into the Marxist-Leninist doctrine. Accordingly the state is a product of the class struggle and of the domination of the bourgeois class. It has thus to be replaced by a classless society. However such goals can only be achieved by violence under the guidance of the communist party. During the transition phase from the exploiting bourgeois state to the classless society the communist party has to install a constitution as an alibi. This constitution has to install the classical constitutional branches of Government, that those organs can serve as legitimacy to the facade serving actually to the party, which uses the old instruments of the class-state to transform it into the classless society.

Powers external to the constitution are not only established in socialist countries as real power-holders of sovereignty, theocratic state systems often also use façade constitutional powers as facades to implement their policies not accountable to the people.

a) Communist Constitutions

Sovereignty of the Party

The communist have got lessons from the French Revolution. The young MARX for instance was strongly influenced by the ideas of ROUSSEAU. In particular the spiritual leader LENIN has seen from the beginning, that the Russian revolution could only be implemented by the unconditional realization of the dictatorship of

the proletariat guided by the communist party. On the dictatorship of the proletarian he wrote already in 1906: “Dictatorship .. means the unconditional power, which does not depend on the law” (W. I. LENIN, Vol. 10). LENIN was decisively of the opinion, the proletariat can not liberate itself without destroying the state apparatus of the bourgeoisie. The final goal, the fading away of the state will only be realized after a period of transition. In contradiction to the anarchists (z.B. MICHAEL BAKUNIN, 1814 -1876) LENIN is believing that the transition to a actual democratic society und communist rule, can only be achieved with a powerful state ruled by a dictator.

Dictatorship of the Proletariat

In order to meet the resistance of the exploiters one needs a transition period (not knowing for how long) of dictatorship of the proletariat. This dictatorship however will be different to all known governmental systems up to now: It will be a dictatorship of the great bulk of the society over the remaining classes still having ownership. Who will be leading and representing this majority has not been of first interest to LENIN. Only later he insisted that the proletariat has to be guided by the party and that the dictatorship of the proletariat has to be a dictatorship of the party. “But the dictatorship of the proletariat can not be implemented by an organization, which encompasses the whole proletariat of the society...the dictatorship can only by realized by the avant-garde, which has internalized the revolutionary energy of the class. (W. I. LENIN on the labor unions and the actual situation and the failures of TROTZKI, 1921, Vol. 32,)

Liberty Serving the Revolution

Have the communist ideologists such as MARX, BAKUNIN, PROUDHON, LASSALLE but also LENIN and LEO TROTZKI (1879 - 1940) at least in times they were minorities always defended the ideals of a liberal state – MARX has written in early times against the German laws providing censorship, they changed on the spot after the revolution and after they have got hold of the state-power. “Already in early times we have declared, that we shall prohibit the bourgeois newspapers, as soon as we shall take over the power. Would we tolerate such news papers, we would give up to be socialists.” (W. I. LENIN on the 17.11.1917, vol. 26,). „..that wes hall not be mislead by thos nice proposals such as liberty, equality and will of the majority… Who would at the moment, when the situation is prepared to overthrow the power of the capital in the whole world operate with the word liberty as such, who opposes in the name of this liberty the dictatorship of the proletariat, is only supporting the exploiters nothing else. He is their followers, because liberty is, when it does not serve the interest of liberation from the yoke of the capital, fraud. (W. I. LENIN, speech of 19.5.1919, vol. 29.) Separation of powers has now reason and justification in a communist state. Laws, decretes and judgments are to seve the proletariat. The court has not to eliminate terror but to install it principally and to give it a legal ground without any false and make up. (W. I. LENIN, letter to D. I. KURSKI, Bd. 33).

TROTZKI

As LENIN also TROTZKI supported firmly the dictatorship of tyranny, following the principle if it has to be war, than be it war. According to him the commune of Paris has lost, because it founded on a sentimental humanism. "…. that the dictatorship of the Sowjets has only been possible with the help of the dictatorship of the party." Contrary to LENIN TROTZKI has answered the unavoidable question, which is the good party, which should implement dictatorship: „This argument is dictated by a liberal perception of the process of revolution. At a time, when all contradictions are transparent and the political battle transcends quickly into civil war, the leading party disposes of enough criteria's to examine its direction. Noske beats the communists, but they grow. We have subjugated the Menschewiki and the social revolutionary and they became without substance. This criteria meets our expectation. A part from this fundamentalist tendency of communism, one can also find representatives which support a more humane communism.

Transition to Anarchy

As a consequent adversary of any political state structure BAKUNIN stands up for the fading away of the state and the fulfillment of the end-goal, that is anarchy without a state or period of transition. A society which is liberated from state and privileges will not only be better: it is the only status which is in accordance to human nature and the general laws of life which is spontaneous and creative. Anarchy is not only an ideal, it is also the fulfillment of the natural destiny of human beings.

However this ideal should not be imposed on the people. It has already to sleep in its sole; the people does not need teachers, which create the ideal for it but revolutionaries, which wake it up from its hypersomnia. The abolishment of the state does not lead according to him, to the abolishment of all cooperation of human beings and of all other forms of organization. It will only lead to a process of total autonomous communes where all decisions are made bottom up and each will have total liberty.

Dictatorship of Workers and Peasants according to the Chinese Constitution

In the early constitutions of China the leading position of the party was explicitly prescribed. The president of the central committee of the communist party is commander in chief of the army of the peoples republic of China. Article 16 of the constitution of 1975, which determined the competences of the peoples national congress began with the words: "The national peoples congress is the highest authority of state power. It is submitted to the communist party.

Transition to a more pluralistic Democracy

This explicit submission of the parliament to the party has been deleted in the new constitution. Contrary to the previous constitution of the UDSSR the communist party of China has no constitutional claim to propose candidates for elections into the national peoples congress. The members are elected by the peoples congresses of the provinces in secret ballots.

Virtue of Patriotism

According to article I of the actual constitution the Peoples Republic of China is a socialist State under the dictatorship of the workers and peasants, which is ruled by the working class and based on the alliance of workers and peasants. Did the previous constitution install the communist party as the leading organ of the entire people of China: "The communist party is the leading core of the entire Chinese people. The working class leads the state by its advance guard the communist Party of China. Today this leading position of the party can not any more be deduced from the actual constitution. According to article 24 however the main function of the state still remains the same, that is to educate human beings to communism.

Art. 24 „(2) The state advocates the civic virtues of love of the motherland, of the people, of labor, of science, and of socialism; it educates the people in patriotism, collectivism, internationalism, and communism and in dialectical and historical materialism; it combats capitalist, feudal, and other decadent ideas."

a) The Sovereignty of the Koran

The Koran as legal code

The constitution of Tunisia of June 1959 starts with the preamble "In the name of God, the Compassionate and Merciful, We, the representatives of the Tunisian people, meeting as members of the National Constituent Assembly, Proclaim the will of this people, set free from foreign domination thanks to its powerful cohesion and to its struggle against tyranny, exploitation, and regression;
- to consolidate national unity and to remain faithful to human values which constitute the common heritage of peoples attached to human dignity, justice, and liberty, and working for peace, progress, and free cooperation between nations;
- to remain faithful to the teachings of Islam, to the unity of the Greater Maghreb, to its membership of the Arab family, to cooperation with the African peoples in building a better future, and with all peoples who are struggling for justice and liberty;.. In article 1 it declares: Tunisia is a free State, independent and sovereign; its religion is the Islam, its language is Arabic, and its form is the Republic. Also Morocco adheres according to its preamble to the principle of a Islamic state. This declared belief can be found in almost all constitutions with Islamic majority. Whether republican, monarchic or socialist, the Muslim state deduces its legitimacy from God, from the Islam and in concrete from the Koran. God is considered to be the real legislature. As Moses and Jesus have proclaimed the laws also Mohammed proclaimed the inalienable established rules of God, binding every one. Mohammed has been sent not to make new laws, which should be applicable for such or such people or part of humanity, but in order to confirm the original truth and authenticity of the previous proclamations and at the same time to promulgate to humanity the true and universal final law, which has been determined by God for mankind, the Islam. This prophetic proclamation is written down in the

Koran. This code of the laws does not only contain prescription with regard to the private life of men but also regulations of human communities.

Sunnah – Jma

These rules have been developed and elaborated by the Sunah. The Sunnah contains all rules which can be ascribed to the tradition of the prophet, since each word is considered to have somehow its origin within God. A part from the Sunnah and the Koran there is an other source of law which is called the Jma. The Jma is the expression of the consensus of the Islamic community which is edited by the most capable members of this community. If some unforeseen cases have to be decided, those cases have to be judged by the whole community, that is by those knowledgeable members of the community which have enough knowledge of the Koran and are considered to be most capable in order to interpret the holy texts. Can such principle be considered as the starting point with the potential of a democratic understanding of the community? Could all these knowledgeable personalities be united in a open assembly or could they even be elected as the members of parliament in a constituted democracy? One did recognize this problem in very early times and one did agree, that the Jma could only be developed by some very few scholars but based on unanimous decisions.

Who installs the Caliph?

As the prophet has been sent by God in order to promulgate the laws and the lessons of God, the people has to obey him totally. The people is committed to the prophet chosen by God. He has been succeeded by the Caliph. How can the Caliph be chosen or nominated? In the Islamic world there are different answers to this question. According to the orthodox theories the Caliph has to be chosen (elected?) by the Prophet himself and by his family. Some other propose hereditary succession. For the Khardejiite there is neither hereditary succession nor do they recognize family privileges. They are of the opinion, that the community has to elect the most worthy and dignified personality as Caliph. An other theory evokes the destiny decided by testament of the predecessor of the Caliph. In practice the first Caliphs have been chosen by similar to the election of the leaders of a clan chosen by the old and wise members. It thus was somehow a type of gerontocracy. With the might the Caliph could acquire in later times they did reserve the right to choose themselves their successors determine the person within their testament.

The Position of the Caliph

What are the powers and function of the Caliph? The Caliph has to preserve the Islam in its original form. He has to conquer the non believers, defend the territory against foreign invaders and thus establish and maintain the required armies. One important power or competence however is lacking: The right to establish and to enact new legislation. He is only empowered to receive, apply and interpret legislation with the only exception to issue administrative regulations.

Religion and State in the Islam

When the Caliph is in office, he is the highest sovereign, monarch or despot with unrestricted powers. According to theory he explains and interprets though the Koran. In practice however he exerts uncontrolled and absolute authority. He is not only the highest worldly authority, he is of course also the highest spiritual leader of the people. This relationship between religion and state leadership prevents contrary to the occident any gradual secularization of the state power. State and Islam remain and are to be a unity. After some time the Sultan as military leader has though separated gradually from the Caliph and started to rule independently over the peoples. Its legitimacy however was always deduced from the Caliph. Within this limited legitimacy he did not only restrain to rule on worldly matters but also to decide on spiritual issues. Thus the growing institution of the Sultan did not at all initiate any separation between spiritual and worldly matters.

Legitimacy of the Caliphate

The legitimacy of the Caliphate can be found in the Koran. In the sure 11/30 and XXXNIII/26 it says: "We have made you to the Caliph on earth.; thus judge between the believers, and though shall not be tempted by your desires." To what ever extent the rule of the Sultan is established, it has to be legitimized by the Caliphate.

States without Territory

A part from the dispute on the question, whether the Caliph should be democratically elected, whether he can be legitimized based on the decision based on the testament of his predecessor or based on family privileges the much more dangerous and finally unsolvable controversies within the Islamic world also broke out based on the fact that according to the Koran there can only be one legitimized Caliph. Within the Islamic world there is even today only one legitimacy of state power: The Islam. It is obvious that the division of political power among several states within the Islam necessarily was the cause of indissoluble conflicts among several Sultans. Within this context the establishment of a territorial state according to the European perception and of the international law binding sovereign states was not possible. Nation- and state-building are thus somehow artificial, transitory and not at all covered in the legal system of the Islamic world. The fact, that different states belong to different Islamic tendencies does not at all solve this problem. These different tendencies are much more the reason for additional tensions within the Islamic world. The traditional natural law system marked by the Koran does not enable a legislative system according to the modern rational justification. The Koran and the other customary laws determine men and show him the way to be followed. The only power remaining to the state is its competence to interpret the laws, it however can not modify them. Concepts of democratic legislation, separation of powers, rule of law are strange to this perception. A state marked by traditional laws does only have to deal how to implement them and how those who have to apply them should be elected. The guidance of rulers by

the people with the power of the laws, the obligation of the rulers to follow binding decisions of the courts can not be introduced in such a perception.

The first time in 1925 ALI ABD AL RAZIK developed a theory which would enable to separate state power from religion. He tried to prove that the authority of the previous prophets did not depend on there divine mission. This theory however has been rejected by the orthodox Muslims, although the idea of a rational sovereignty legitimizing political power seems to gain slowly support also in the Islamic world. At least the important decision of Turkey under Mustafa Kemal (Atatürk) to abolish article 2 of the constitution, which declared Islam as state religion and with a new article 2 of the constitution which declared the state as a secular state, may have initiated an important development in the Islamic world. The decision of Turkey to become a member of the European Union increases the hope for a better understanding among occident and orient. One can not foresee the future. But these signals may enable developments, may enable the integration of the rule of law in a totally different tradition.

One can hardly assume, that the secularization which lasted in Europe centuries and was linked with bloody religious wars will be implemented in the Islamic world from today to tomorrow. Setbacks, controversies, tensions can not be avoided. It is however important that one can find a legitimacy bases for the political power, which enables a part from religion the establishment of a independent political authority. First and for all the social contract theory may have to be in the centre of such theories as in Europe. As some tendencies of the Islam have already approved some democratic principles at the time of the election of the Caliph and as in the early Arab philosophy basic ideas of communities controlling political power have developed a new concept of the legitimacy of political power might emerge which is embedded within the roots of the philosophical Arab and Islamic tradition. These tendencies will also have to overcome the principle of pre-destination. Who's belief is based on the pre-destination of human fate can not accept, that society may be designed by rational state legislation.

IV. The States of Middle- and Eastern Europe in Transition

a) The Specific Characteristics of Eastern-European States before the Fall of Communism

1. The Fundament of an Authoritarian Political Regime. Autocracy as Governmental System

Not Constituted Legitimacy of Political Authority

All communist states in Middle- and Eastern Europe were authoritarian political systems. This was a logical consequence of the fact, that communism considered the state only as an instrument to establish its proper monopoly of power and thus denied the constitution the possibility to provide any constitutional instrument to

control this power. In a authoritarian political system one individual person (or a group of persons) can prevent political decisions, which would threaten its or their interests and can promote or even order measures, which support their interests. Power is unaccounted and not checkable. It is neither constituted nor limited, because the politically powerful person can disregard any possible barrier. In the case of the communist system, this somebody is the communist party. As however the party is strictly controlled and ruled by a tight leadership, the central committee and within the central committee the general secretary or leader of the party disposes of the entire potential of the despotic tyranny.

Absolute Power of the Leadership of the Party

The might permanently and systematically to be able to influence the results of a political process included as well an ex ante as an ex post control over the entire society. The leadership of the party as actual power-holder was not only able to decide on and to control the process but also the content of the process and its results. Thus it could continuously modify adapt or even cancel the process and its results. Any time the leadership of the party could at its whim overturn the result of a political process, which it did already initiate.

Goal-Oriented Democracy as Legitimacy Bases

The constituted state of the 19th century did liberate itself from the legitimacy of the ruler as King by the grace of God and it replaced this religious legitimacy by the peoples sovereignty to be traced back to the constitution. Communism at its turn re-established the absolute but this time secularized legitimacy of the despot as the Leviathan and ruler of the communist party over the people and the state.

The evidence of the identity of the position of the power-holder as leader of the party and ruler of state and society was obvious as the actual power-holder could himself and by his own define the legitimate goals of the society. The real-socialist democracy was based on the assumption, that the monopoly of the communist party to represent and decide for the people will be able to achieve the goals of the society without any further control. And it were these goals, which finally did legitimize the supposed progressive and progress producing power-monopoly of the party. The democratic process has permanently been perverted, because the process was always subordinated to the goal, which alone had legitimacy.

The basic and fundamental goal of communism is the emancipation of men in the universal sense. The working class is the historical subject of this epochal process of emancipation and the communist party is its legitimate representative, who alone knows and for this reason is able to decide, what is good for the working class. Therefore the party decides on its own, whether a constitutional system and its political fundament is democratic. Relevant is only whether the results of the state policy fit the declared and determined goals.

2. Structural Differences between the Communist States and the Constituted Democracies

No Demos

In a communist state the nation is no demos. The nation has only a value as it can also be used as an instrument to serve of the party. Is it useful to serve the interest of the party, the nation can be misused as a superficial legitimacy bases for state structures. From this perspective and taking into account the relationship between party and democracy one has also to understand the communist nation-state: All men – of course under the leadership of the party – are united under the universal demand of the emancipation of the working class. The people has to pursue this goal. The "Nation" is integrated into a exclusive value system, which represents itself as universal.

Sovereignty and Party

For this reason the communist society is not a community in the modern sense. There is no democratic sovereignty which could be the fundament of state institutions. The communist "state" is not a modern state, as it can not be constituted as constitutional democracy. The state is a façade in order to feign legitimacy. The real holder of sovereignty is the party. The party disposes of power, which is not accountable to anybody. Who-ever wants to analyze the political decision making process in the communism, should not examine the state but the and its internal power-structures. Even the legal system and the judiciary are only to serve the interests of the party. Courts are installed and judges nominated at the whim of the party, which can remove them any time. In all cases, which may affect directly or indirectly the power-monopoly of the party they rule and interpret the law in the service an in the interest of the party. In the end the valid "law" and the state structure installed by the constitution are marginalized to a shadow-existence.

Law and Constitution as Facade

Consequently the law in general and the constitution in particular have to perform total contradictory functions. They have to generate a parallel, fictive that is a feigned reality, which has to legitimize goals and power-structures and at the same time to conceal the reality behind. In any case one has to prevent that this parallel and feigned reality can creep into the actual reality and influence it. The legal system will finally be misused, in order to cover up the effective reality of power-structures and to protect the before politically "inadmissible" influences. The law installs as well the façade as it protects the party leadership hiding behind this façade.

Mutatis mutandis the constitution should create the legitimacy of the identity of those governed and those governing and to feign it by positive law and on the other hand it has to make sure, that all institutions, which transpose this identity into reality and which could empower the governed, remain powerless and helpless.

The Party as the Constitution Making Power (pouvoir constituent)

The actual constitution giver is the party. The party decides in the background the content of the constitution. The external and officially acting constitution making organ is only executing, which has been ordered by the party: Thus there is a total discrepancy between the constitution-giving and the constitution-passing power.

The political stability is not guaranteed by the institutions installed by the constitution but only by the party. The party will continuously modify and adapt the constitution in order to strengthen and expand its powerbases. The party is even in the position, to preserve its power by permanently violating the constitution. The deficit of constitutional stability is immanent to the system. Permanently the constitution is deliberately and consciously violated. The *breakthrough of the constitution* is part of the system. Moreover the system is characterized by a everlasting *constitutional change*. *Praeter* and *contra constitutionem* the laws, ordinances, decrees and judgements, applying the constitution give way and deviate the constitution. Concluding one can claim, that the *constitution has become the fundament for lawlessness and justice less ness*! Absolute power does not exist because of the law, which guarantee the legal security, it is rather characterized by a *law in constant move*. The goal of the constitutional policy is the preservation of power within a ever changing environment.

Constitution in Constant Move

Mutatis mutandis the constitution is in constant move or in a process of constant modification. Its function was not legally to stabilize the system but to change and redefine it permanently: What was yesterday constitutional, today is thanks to the law of history already again unconstitutional. Absolute power of course is not declared as nude capriciousness, it is rather justified seemingly, because it is in the service of the law of history, which realizes justice. Thus the law of history determined by the party becomes the real source of authority!

The constitution is no basic law in its real sense, which limits state power with legal prescriptions. It is rather a *tool to power in the sense or "Realpolitik"*. It has to guarantee *post festum* legality of political decisions, which have been issued already before by the party.

Modification of the Constitution without Need for Justification

The party as the effective constitution giver could always impose each modification of the constitution as breakthrough or constitutional change, because it did not have to justify its decisions as legitimate constitutional modification. It did not have to explain, that the goal of the revision is legitimate; it did not have to substantiate that the actually valid procedure for modification is observed. It could disregard the amendment procedures. An finally it did neither have to prove whether and to what extent the legitimate aim of the constitutional modification could at all be realized.

The constitution was a positive legal bases, in order to feign for instance the so called ideologically proclaimed self-administrative democracy in Yugoslavia, or

to feign in other democracies of middle and eastern Europe the legitimacy bases for the dictatorship of the proletariat.

4. How did Communism understand the Nation?

As already mentioned according to the communist tradition the nation did not represent a political concept. It has traditionally never been considered as a unifying factor. Unifying was only the communist party. The nation is only used as the totalitarian variant of a ethnic nation lead by the party: As such it will become a predestined ethnic collectivity a unity dominant to the particular individual. The nation is not to implement a democratic pluralism in order to carry through national interests; it remains rather an additional collective legitimacy bases for the parastate power of the party. Additionally to the proletariat also the ethno-nation had to serve the totalitarian political goals and to become an instrument for the realization of collective interests. In the worst case the party should decide authoritarian over conflicts and interests.

Communist Federations

As consequence with regard to communist multiethnic federations equality of the ethnic nation had absolute priority to individual equal rights. The unequal treatment of human individuals should somehow be compensated and equalized by the equal treatment of the ethno-nation. Equality of the nation had as inherent consequence the inequality of individuals. Communism can by definition to tolerate the citizen. Therefore all communist federations did only recognize apart from their ideological bases of the socialist system only the ethno-nation and its mother republics as legitimacy bases for the entire state. All constitutional questions and controversies contained thus immanently to their system the potential for finally unsolvable ethnic conflicts as soon as the despotism of the party did implode. The common state did not dispose of a proper identity and legitimacy potential, which would have enabled it to soften or even to overcome the conflicts. Logically the ex-communist federations had to dissolve themselves after the decline of communism. If the communist party has lost its leadership over the entire federation, the exclusive principle of the ethnic nation took over the claim to lead the collectivity and the state.

Right to Secession

Thus the constitutions of the socialist "federations" did at first provide for a ambiguous right of self-determination as a right to ethnic self-determination and ethnic secession.

In the constitution of the UDSSR of 1977 e.g. the right to self-determination including the unilateral right to secession has been recognized explicitly. Although Yugoslavia did not guarantee expresses verbis the right of self-determination in its constitution of 1974, but it has referred to the so called principle the right of self-determination of the ethnic nation and its republics as legitimacy bases of the federation.

National Consciousness against the State

The historic events have in addition substantially contributed *to the instrumentation of the issue of the Nation*: The national movements in the multi-nation regions in middle- and southeast Europe could historically develop within big empires, which they considered as big prisons of the people: Austria-Hungaria and the Ottoman empire and Russia under the Tsar.

Contrary to the German Nation the consciousness of the Nation is not built up ***within*** *and* ***by*** *the state, but in opposition to the actual state*. The existing state is the alien and strange, which impedes the development of ones own cultural personality. (cp, THEODOR SCHIEDER, Nationalismus und Nationalstaat, Göttingen 1991)

Consequently the modern nation state can only be constructed by separation and secession. The inner democratic freedom will only by possible by and based on the external liberty as had already been proclaimed by THOMAS MASARYK with his ideas. Compared to nationalism based on unification the nationalism based on separation and secession against the “state prison” of the state ruled by communism has much more emotional power and energy.

Federations as Communities Hold together by Force without Pre-political Legitimacy

Communism as only bases for political power as well as the historical causes, which generated ethno-nationalism have manly contributed to the fact, that the new ethno-nations did fight vigorously against the straitjacket of the ex-socialist federations. The ethnic homogeneous socialist states needed to install the fundament for democratic pluralism, which in the communist system was immanently impossible. The three socialist federations did not only have to fight for a democratic pluralistic that is modern political legitimacy. The exclusive ethnic identity did rather mark the dominant borderlines along which the political community was split. At the same time it became the fundament and cause for the inner-ethnic political mobilization and homogenization. In other words: The decline of all socialist federations had structural causes and was finally “pre-programmed”.

Right after the fall of the old regimes it was clear, that a new democratic and multiethnic state could not be established within the original border lines of the federation. With regard to the society torn apart by different ideological camps it was not possible any more to achieve a democratic consensus. With regard to the structural tensions between the new liberal claims to get legitimacy based on a open and inclusive democratic procedure with guaranteed rule of the game on one side and the permanent “ethnification” of the political conflicts on the other side one can explain why all three ex-communist federations the CSSR, Yugoslavia and the UDSSR had to be dissolved.

b) The Constitutional Aspects of the Process of Disintegration

1. Introduction

Different Role of the Constitution in the Transition Process

In principle one has to distinguish between states which embraced a undisputed territory and states which unity and by this the state as such based on mainly multiethnic disputes in principle was denied basic legitimacy. In states with undisputed territory and border-lines the constitution making process was at the same time a process to democratize and legitimize the state authority. In states however where the territory and therefore the state and its legitimacy as such as well as the state authority was disputed the disputes on the constitution turned into a dispute on the legitimacy of the state as such. Depending on the question whether the existence of the state as such was legitimate or not the constitution in the process of transition had a totally different role and function. In one case the disputes on the constitution did lead to the dissolution of the state as such and in others it contributed to consolidate its new democratic structure.

States with Undisputed Territory

To be more precise, the so called ethnic homogeneous states were legitimate as states, the territory was not contested and the state community was undisputed as a predetermined territorial unit legitimate to establish the social contract or to serve as bases for the peoples sovereignty. Not legitimate though was the authoritarian regime. The population had suffered under the authoritarian discretionary rule of the party. However as states in the pre-modern sense they were legitimate because the nation and people such as e.g. the Hungarians and the polish people were mainly homogeneous communities. (The fact that a big part of the Hungarian population has been distributed to other neighbour states after world war one did only later influence the Hungarian politics). Thus, although in these states the regime imploded but the state as such did not dissolute.

Multi-Ethnic Federations

Multi-ethnic federations however suffered as well under the crises of the regime as under the crises of the state. – They lacked any basic legitimacy as authoritarian societies as well as multi-ethnic communities forced to togetherness. The crises of the political authority of the regime has triggered a real crises of the state and with this also a crises of the territory of the state, because the state and its territory were considered to be identical with the former enemy regime. Thus, the state was identified as the symbol of the enemy of the different ethno-nations.

2. States with undisputed State-Question

The Constitution Turns into the Instrument of the Democratic Consensus

With the decline of the former social and political order the constitution and namely the constitution making process receives a new fundamental importance. The new state will from now on be established and designed with the constitution and the constitution making process. The constitution turns into the instrument provided to establish the new principle democratic consensus and the new content of this consensus will have to be defined by the new constitution.

At the time of the communist rule, the party did permanently define by the constitution making process the new concept of the state. As a consequence all most important political conflicts which have been released with the dissolution have also been put on the level of the constitution making. The constitution was expected to find solutions for those disputes. The constitution making was considered to be the process in order to *regenerate a new democratic legitimacy in the modern sense*. In other words it had to determine the content of the agreement decided and accepted with the old power-holders (at the round table).

Pouvoir Constitutant at the Round Table without Ideology

The *peaceful transition* (e.g. Hungary) did start without proper ideology. People were mainly interested to tie their constitutional culture again to the culture of the West-European tradition, which has never been idealized. This re-cached (HABERMAS) revolution developed within constitutional tracks – which means mainly within the procedures provided by the old constitution. One did not install a new constitution making assembly with the mandate to initiate the transition process. The transition process did manifest itself on the level of the constitution with repeated amendments of the old constitutions according to the amendment procedure provided by the former constitution. Constructive majorities were found according the former electoral laws provided for the election of the former members of parliament and representatives of the people.

The content of the proposal however has been established before at the so called "*round table"*. These in all transition countries founded "*round tables*" have nowhere been identified as a "government merged out of a revolution" but as *representation of the unorganized civil society* with regard to the power power-holders previously elected by the people. Its legitimacy was based on a comprehensive consensus of the population. De facto the round table had the position and the power of a pouvoir constituent.

The political concept which was the fundament for the constitutional amendments aimed at a sustainable legal protection of human rights. Inevitably such concept moved the Constitution again into the centre of the transition. (PREUSS, ULRICH K., Die Rolle des Rechtsstaates in der Transformation postkommunistischer Gesellschaften in: Rechtstheorie 1993, p. 181)

3. States without Legitimacy

The Collective Ethno-Nation as new Fundament fort he Legitimacy

In multi-ethnic states the crises of the regime was not only a crises of the governmental system. The crises of the regime has been followed suddenly with the much more serious crises of the state. The trigger was in most cases the dispute on the new constitution. It was this dispute which did initiate the real process of dissolution. The different ethno-nations or ethnic communities considered rather the collective of the nation instead of the individuals as the real victim of the former communist regime. The state had to serve the regime. The ethno-nations were thus the real victims exposed to the state. Thus, the state became the real symbol of the enemy of the nation. The nation on the other side was idealized. Individual interests had to be sacrificed to the interest of the nation. The legitimacy of the state was replaced by the legitimacy of the nation. However, the nation had no democratic decision making process. The members of the nation thus remained subject of the nation without democratic participation . The democracy was first sacrificed to the right of self-determination of the nation. The nation took over the legitimacy of the state and seceded from the mother-state somehow as amorphous quasi state.

Democracy and Minorities: The Victims of the Majority-Nation

The new state became legitimate only based on the collective nation. The majority nation did not only sacrifice the democracy to the nation as new fundament for the legitimacy but also the rights of the minorities. Logically the majority nation feared minorities as potential enemies threatening the new state. As potential enemies they needed to be excluded and suppressed. Thus, those minorities felt themselves within their new states even more as victims of the majority nation than before. Exposed as potential threat to the majority nation they observed all endeavours of the majority nation to achieve its collective unity of a national homogeneity. Indeed they were endangered with regard to their very existence. The majority nation on her side feared that the minorities would just as the majority nation seek a new identity of the minority-nation and by this seek a new legitimacy in order to secede from the majority nation or to fight with other minorities against the majority nation.

The Claims for Human Rights turn into a Political Pretext of the Minorities

Thus the minorities were not contented only with the guarantee of individual human rights or even with minority rights. A state considered as a “hostage” of the majority nation had no legitimacy to protect human rights. The disputes on human rights thus turned into a instrument to de-legitimize internationally the state and to internationalize the conflict. The minority-nation considered itself as a collective state-nation and thus it required the state-right that is the participation on the bases of equal rights and equal values provided for all nations.

Ethnification of Constitutional Conflicts

There were no principles and concepts which would have enabled the establishment of a new federation. In particular there was no common identity and the bases for loyalty of individuals to the community and of the federal units to the federation was lost.

First and for all the structure of the federation was contested. Decisions of the federation were blocked. Each constitutional conflict turned in principle into an ethnic conflict. By instrumentalizing the constitutional crises and the constitutional stalemate the right to self-determination as an ethnically justified right of secession has been claimed. In the process of negotiation no neutral mediator or facilitator could get credibility, because the conflict did lead to an exclusively friend-enemy scheme. Any facilitator or mediator was immediately labelled as supporting the one or the other party. Even the international community did follow this friend-enemy scheme and did disqualify neutral facilitators immediately as friend to one and enemy to the other party. Within the state nobody could remain neutral because contrary to the ethnically homogeneous states in the face of multi-ethnicity any communality was lost and could not at all be regained. Without the ideology of a consensus the multi-ethnic state remained but an *enforced community*.

Referendum for Secession

As a consequence the different nations as did namely the republics in former Yugoslavia organised a referendum on the question of a unilateral secession. These referenda contained mostly unclear and vague questions. They were based on the pure majority principle and tit not at all contribute to the interests of the minorities. After a positive result of the vote the declaration for independence of the new state followed immediately.

International Community

However, later with the recognition of those new states as subject with all rights according to the international law the international community enabled those states to become full functional actors within the concert of the community of nations, equal to their sovereign partners. In particular this recognition made it possible that the new states could enjoy the protection and the guarantee of the Charter of the United Nations. Attacks against the seceding nation, which originally would have been qualified as civil-wars changed with this recognition into a military intervention prohibited according to Chapter 7 of the Charter of the United Nations and thus enabled the international community to intervene within the conflict in order to protect world peace. With this possibility the international community has an important competence and responsibility by recognizing a nation as sovereign state. By such recognition it influences decisively the development of such states without having a specific legitimacy for such important decision.

The Newly „Created“ Foreigners

With this birth of a new state also new internal legal problems did emerge. Citizens of the federation who however did belong within the new born state to the minority nation turned all of a sudden into foreigners without permit to work, to live, and to property on real-estate. Soldiers which in the evening fell a sleep as members of the regular army woke all of a sudden up as combatants fighting for their life in the enemy-country. As far as those soldiers did belong to the majority nation they could cross to the new army based on their loyalty to the new majority nation. For such cross however they were considered by the former army as traitors or deserters. Custom borders did have to be newly installed, passports needed to be re-written and diplomatic representation needed to be constructed. With regard to language the former dialect turned into a new language.

c) The Social and Political Environment of the Transition and the Problem of Transformability

1. To the Goal of the Democratic Transition / the process of Liberalization versus the process of Democratisation

Goal: Transformation of Democracy

The aim of the democratic transition corresponds in principle to the liberal democratic model. According to the concept of the liberal democracy the constitution establishes the rules of the game for the procedure but not with regard to the goals to be achieved. If one, however, departs from this liberal interpretation o the democracy one should already in the beginning essentially distinguish between the liberalization within a authoritarian system on one side and the democracy on the other side. However this was not the reality of the transition in Eastern-Europe.

Liberalization without Multi-Party System

Within a first phase one did liberalize by granting individuals more liberties. This liberalization however occurred without democratisation. Democracy understood as an open process has not been allowed in this phase of the transition. The liberalization was not *a democratic transition*. By this one has still today to ask the question, whether liberalization did indeed already turn into a true democratic transition. The liberalization was simply considered as a new strategy or better: It was the tactic of the power-holders to remain in power. Thus it was restricted but to the instalment of new political organisations and to the acceptance of different contradicting pluralistic interests without introducing at the same time any control of the party leaders. The party as final instance of authority was principally not contested. The liberalization was a process of opening controlled by the party which did not touch at all the primarily authoritarian regime.

Preconditions for a Democratic Transition

One can only call a transition to be democratic in its true sense when the following preconditions are fulfilled and implemented;

The old apparatus of the party must dissolve as apparatus of might and power. Instead of the pre-constitutional sovereignty of the party new structures of authority must be constituted. Those structures need on one hand to achieve democratic legitimacy and on the other hand they must be democratically accountable. The pluralism as political principle must be transcended into a constitutionally established governmental system of a multi-party state and thus be democratically recognized. Democracy as open procedure need to lead to a political balance of the different interests and to rational solutions carried by the people. The power-struggle needs to be fought with equality of arms, opportunities and rational arguments in the public arena transparent to the citizens. The new democratic order thus has to meet a new challenge: The state will have to create the new constitutional bases for the integration of the citizens. This difficult task aggravates obviously and substantially the search for new constitutional concepts.

The Pre-Communist Heritage

(PREUSS) As heritage of the pre-communist area the old conflicts and tensions emerge, which did already split the state and the society in the previous times. Latent and subconsciously those conflicts existed also at the socialist time. But they were lacking legitimacy with regard to socialism and thus have been kept silent or have been subtly suppressed. Now they emerge in new forms. Heritage in this sense are namely the ethnic and religious and cultural conflicts.

2. The Dilemma of „Simultaneity“

For the establishment of the Nation-State in Western Europe as a modern state the three essential key-problems needed to be implemented. (cp. dazu namely : CLAUS OFFE, Der Tunnel am Ende des Lichts, Frankfurt a.M. 1994):

> The State question needed to be solved for all humans living in this state, that means that the border-lines of the state territory needed to be recognized by everybody as legitimized state borders,
>
> Democracy needed to be installed against the old monarchic principle of the King by the Grace of God,
>
> And a social market economy based on private property needed to be guaranteed.

Switzerland and Germany as Counter-Examples

In Switzerland e.g. the dispute on democracy has been fought manly on the cantonal leverl in the 1830ies. The territorial question was to be solved within the civil war in 1848 called war of “Sonderbund”. With this settlement the foundation of the new Swiss Confederation was possible. The guarantee for a market econ-

omy on the federal level was only introduced in 1874 with a new constitutional amendment. In Germany the national question was in the centre of the war against France of 1870, democracy has been introduced after the first World War and the guarantee of property and liberal fundamental rights has been introduced in the new basic law after the Second World War. All states in Western Europe needed several decades in order to solve the central problems of territory, democracy and market economy.

Market Economy, Territory and Democracy within the States of Eastern Europe

The states in Eastern Europe need to solve within the short period of transition at the same time the question of the state, the establishment of democracy and the implementation of the market economy. As has been formulated by CLAUS OFFE they are facing the *dilemma of the simultaneity*. Those three for each modern political system basic pre-conditions have been realized in other states by revolutionary and some times also violent conflicts. They have been established after a long process and corresponded with regard to their mode of realization to the revolutionary disputes and to the tradition of the political party systems. The conflicts which emerge necessarily when such issues need to be solved, put in question the real existence of the state and its society. For this reason it is almost impossible to solve all these three basic issues of the state at the same time.

The *process of transition* therefore is connected to inherent and high risks. It activates a historically unprecedented dynamic for a simultaneous alteration of the territory, the economy and the political system of the State and its appearance. This historically unprecedented dynamic has been initiated as a "top-down revolution". For such process there does not exist any historical model and no revolutionary theory which could have provided some experiences and principles in order to support the change. Instead the acting persons did cover up their uncertainty an inexperience with short term verbal inventions of very vague semantic content such as e.g. Glasnost, Perestroika etc. (PREUSS).

3. What is Sociopolitical Specific with regard to the Eastern European Transition to Democracy?

If one compares the transition to democracy in Eastern Europe with the transition in other countries after the Second World War one can distinguish three different types of countries:

The Democratisation of Authoritarian Regimes

Immediately after the Second World War the transition to democracy did manifest itself in the three states Italy, Japan and Western Germany essentially as a process to a modern after-war democracy. To the second types of countries one can count the democratization process of the three Mediterranean states Greece, Spain and Portugal. Finally we have experienced the dissolution of the authoritarian Regimes in South America such as Argentina, Brazil, Chile and Paraguay. With regard to all these examples the transition the authoritarian regime was mainly a process of

democratization. Market economy and territory were undisputed and thus not an issue of the state question.

Democracy, Territory and Economy

The transition which took place in the former socialist or communist countries has been in respects much more radical: Besides the alteration of the political system as well the territorial integrity as the construction of the state have been disputed. For this reason one could not be contended with the mere establishment of new governmental systems. The transition could not be reduced only to the issue of democracy. At the same time the economical constitution needed a fundamental change. Part of this change was the most difficult and because of controversial historical claims conflict loaded issue of property and in addition the issue of privatization of state enterprises. After the end of the Socialism one could not settle to seek a new political and constitutional bases for a form of government. The relationship between state and society could not be modernized by a mere reform of the governmental system. Without *reform of the economic* constitution neither politic could be democratized nor liberty re-installed. Imperiously the establishment of the market economy had to be on the agenda.

In the countries of Eastern and Middle Europe one could thus observe a transformation on *three levels*: The establishment and construction of a *new nation-state identity*, the dispute on the *constitution making* and the ordinary politics by the normal process of legislation or amending the constitution and finally the *installation of a new economic* system.

Lack on Controllability

All those countries suffer inevitably because they lack on controllability. This failure of controllability apparently has to be accepted as a logical consequence of each transition to a democratic state. Until based on the French Revolution one could establish a sustainable and democratic government it lasted some seventy years. On the other side one has to admit that the controllability and stability of a country are unavoidable preconditions for a democratic transition. Accordingly those states lack the necessary preconditions for a democratic transformation. Paradoxically the need at the same time to enable the preconditions as well as to install the results of the transformation.

For this reason and contrary to the Western European States, which did follow continuously the different stages of the process from the nation state to capitalism and to democracy according to the standard of "normality" facing the revolutionary turn around in Eastern Europe the states facing the transition have to meet all three challenges simultaneously:

The Issue of Territory

With the issue of the *territory* the question of the true existence of the state as such is raised, since – as we have already seen earlier – only if the three for any state essential pre-conditions such as people, territory and sovereignty are given one can define a polity as a state in the normal sense. If the territory of the state

and its borders are open and not clear one can not seriously struggle for democracy. Nobody knows which part of the population will participate in this democracy. Security of the big bulk of the population with regard to the territory therefore is the first and utmost important precondition for state-making. Moreover the insecurity on the territory leaves any decision on the inner state structure totally open. Will this state become a federation or a unitary state, should it become a confederation or only a decentralized regional state? Who is part of the constitution making power? As long a the most elementary questions remain open, how then can issues with regard to the rule of law to minority protection and to the social market economy be decided. Even on the European level the fact that one does not know what will be the future fate of the Turkish part of Cyprus leaves many questions open as for instance the legitimacy of the decisions of Cyprus with regard to a possible future European Constitution.

The Issue of Democracy

With the *issue of democracy* the claim of one party to have the monopoly with regard to any political force within the state is liquidated. Simultaneously one institutes a constitutional democracy which has to prove itself immediately as a representative / procedural democracy , which has to meet the Rule of Law (separation of powers in the sense of checks and balances as well as human rights) including the minority protection. The political reform follows two steps: first the individual freedom rights have to be guaranteed and protected, then one has to put into effect the democratic rights of participation. Did one only install democracy without protection of individual liberties such attempt would in the Eastern European environment necessarily lead to a new form of authoritarian populism.

Market Economy

With the economical reform towards the *free market economy* one does not only fundamentally change the legal system but one also installs a new system of the society connected to a new order of *private property*. With regard to the point of view of the constitutional questions the privatization, deregulation and liberalization including compensations, reduction of state grants and construction of a new social-security network as well as a fundamental change of the taxing system has to be taken into account. In connection to deregulation one has finally to consider the reform of market prices that means the introduction of free prices oriented and determined by the market not to forget the establishment of a banking- and monetary system which is investment oriented and which can meet the financial needs of the society.

The Irreconcilable Antagonism

Guarantees for individual freedom and the reform of the property system depend on each other. Thus, there is paradoxically between the reform of democracy, property stem and market prices an almost irreconcilable antagonism because the primary effect of economical reforms will lead to shortage of labour and to inflation. Since humans have not the passion to wait until the "blessings" of the mar-

ket economy has reached all of them many will have to face important draw backs during the phase of transition. This is the core of the antinomy.

For this reason those growing deceptions and frustrations result in demands for a new type of democracy which is not liberal but populist and with will end with the introduction of new authoritarian presidential dictatorships.

The simultaneity of the reforms will thus contrary to the previous transition of Western European countries have as consequence that the process of transition does not only be loaded in the beginning with a gigantic burden of most complex decisions (the risk of the strongly dynamited transition process) but it will also suffer because during the transition process contradictory claims will have often obstructive effects. For this reason as well the political procedures as the actors and the solutions are blocking each other. At the end of the tunnel one does not detect the light but only darkness. The political economy of patience will be overstrained. (so aso OFFE)

The Economic Fundament of the Civil Society is Lacking

In order to enable the development of a democratic-representative system a minimum of autonomous economic development must be realized. On this bases different competing interests can emerge out of a system of social and political division of labour and such development leads to the party pluralism. Only then the constitutional democracy but also the rational state authority of law can be legitimized. As long however, as the economic fundament for a true civil society are lacking the massive mobilisation of the population is only possible on the bases of a ethno-nationalistic or a fundamentalist ideology.

Privatization contra Authoritarian Egalitarianism

Reversed countries of Middle and Eastern Europe can not economically liberalize without democracy. The market economy which did emerge in Eastern Europe does manifest itself – totally different as its western pendant – based on the way how it has been established: It did become much more a political than an economical capitalism. In fact, it is a capitalism which has been politically organized and promoted by reform-elites. These elites claim to represent the interests of the society. However, they can by acting so neither base their claims on the interests of already existing capitalistic owners of properties nor can they refer to represent their proper needs. For this reason the reform elites need a democratic mandate which does allow them to carry through the privatization against the political majority culture of a authoritarian egalitarianism. As long as the new capitalism mainly results in unemployment and poverty and as long as it can not generate welfare they cannot expect support for their political economy by the democratic majority.

Liberty from Fear

Facing those somehow chaotic conditions of the economic transformation crises in those countries the liberal democratic political regimes and their constitutional orders can only be stabilized if *besides* the democracy and the market economy si-

multaneously also social security is institutionalized. Such social security however can not be established without reform of the tax system. (taxes and contributions to the social security). Then only by such reforms one can generate the necessary profits.

Without social security and without trust into the social institutions the state and its authority are lacking in the end the necessary legitimacy. Human beings need to be "free from fear" in order to be able to trust that democratic procedures will finally provide for them social security and that they will not undermine their acquired welfare. Without such basic trust the rule of law can not be established. Only when the economy develops parallel to the general development of the welfare the pre-conditions for a democratic transition respecting the constitution and the rule of law are given.

Teleological Constitutions

Most constitutions of transition in Eastern and Middle Europe contain some promises and goals concerning namely social rights. In many states social rights are constitutionally enshrined and guaranteed. According to the will of the constitution maker they are even given priority to other rights. The basic core-function of the constitution, namely to establish and to limit simultaneously the political power changes: The constitution turns into a true instrument for integration.

Has once the social policy of socialism been preventive, this prevention is altered into a proper social policy with subsequent precautions. This subsequent precautions however need to be financed by taxes manly based on the profits of the market economy. This new logic of the welfare-policy leads however to an immanent conflict between the finance ability on one side and the constitutional goals on the other side.

The Tension between the Procedural and the Substantial Legitimacy

The transition should not implement the substantial but only the procedural democracy. The transition process suffers however by the lack of constitutionality. Then the procedural democracy presupposes substantially that the rules of the game are not put into question. *In this transition process however even the rules of the games have to be negotiated and adapted to the continuously to the changing requirements*.

Since in the countries of Middle and Eastern Europe the concepts of collective identity have priority the procedural and the substantial legitimacy are confronted in a almost not solvable contradictory relationship of tensions. As long as namely the collective of the state nation as the constituted entity of citizens is of higher quality and importance than individual rights, the republican political culture and the constitutional patriotism inspired by this culture cannot be implemented. This ethno-nationalism endangers the rule of law of the democratic transition and results in permanent drawbacks of authoritarian, military, ethno-nationalist or presidential-populist systems.

Ethnification as Political Strategy

A thorough analyses of the ethnification of political systems and political conflicts (OFFE) in Eastern and Middle Europe is essential if one wants to understand the tension relationship between the constitutional procedural goals wanted and the truly existing substantial legitimacy of the democracy. Indeed ethnicity is the strategy of many political elites, which are embedded within the ethnicity of the nation. Ethnic identity which in principle is exclusive with regard to other ethnic groups becomes the fundament of the requests for solidarity, responsability and obligations. It grants simultaneously social integration and homogenisation of the society. The common good is what is good for *us* (*but not for all*). Such a reduction of politics is based on the assumption that ethnic identities are permanent, more important and also from the normative point of view more valid than any other diversities. Ethnic categories apply as final and proper source for sensitive social relationships. Those categories determine finally rights and obligations and decide on the content of solidarity to be observed within the community. They set up the expectations of readiness of each member of the collective to sacrifice its proper interests to the interests of the collective.

d) The major tendencies of the post-socialist constitutions

1. The New/Old Pouvoir Constitutant

Constitution Making as Factor to Legitimize the Revolution

The "peaceful transition" which in fact makes up the later on the "revolution" is not driven by values which would substantiate or even restore the unity of the people. There does neither exist any claim for values with regard to the unity and totality of the sovereignty of a "political nation" united by communalities and common values. Thus, one can not consider the nation in the French understanding as the pouvoir constitutant as real constitution maker for a new society. As the society is pluralistically dispersed and because the people does not consider itself as a unity there is no intention of the society to impose to the state a sovereign and homogeneous will of the people and to design its structure with the unlimited power of the people to make the constitution according to a clear political strategy.

Thus, the heteronomous character of the revolution of 1989 (a defect of a massive mobilisation of the people even in Poland) did lead to the result that constitution making could not be conceived as an aim beyond party-interests. Constitution making did nevertheless substantially contribute to the legitimacy of the "revolution". One can even pretend *that the constitution making was a permanent interaction between a constitutional policy determined by the parties and politicially constituted policy („politique constitutionnelle politisée" and „politique constitutionnelle politisante")!*

Constitution making became thus to a process for a careful adjustment of the old constitutions to the new needs and realities. The constitutional amendments did thus also take into account the many different risks of a process of transition.

Only within countries where the party succeeding the communist party could maintain the political control over the society as in Rumania and Yugoslavia (Serbia and Montenegro). In the beginning also the new coalitions of the political elites in Bulgaria or in countries such as Croatia, Slovenia, Slovakia and Lithuania had full political control of the constitution making process. Thus in all those countries the total revision of the constitution was possible and was also carried through by the political elite. But even in those cases the continuity to the previous constitution was somehow visible.

The new states which emerged out of a secession of course had a specific incentive to install a totally new system of state institution. And the new nations made full use of these new possibilities. Within their preambles some of them have deduced their legitimacy for state-hood out of their previous pre-communist societies and polities. (e.g. Croatia and Lithuania)

Two different Procedures to Build up New Institutions

The construction of new institutions and the establishment of a new constitutional order has been determined in two procedures totally different from each other: In Hungary, Poland and Russia the new institutions have been negotiated within a real pluralistic process. In many states of the GUS as in Lithuania, Rest-Yugoslavia, Rumania, Croatia, Bulgaria, Slovenia and Slovakia the new ideas have been carried through by only one dominant political force. The more the procedure respected pluralism and democracy such as e.g. in Hungary and Poland the less fundamental were the constitutional reforms. This seeming contradiction reveals that the parallelogram of the power within a consensus driven democracy is only in the most exceptional case prepared to take into account the risk of important and fundamental reforms. (vgl. dazu auch V. BEYME)

Participation of the People

The more fundamental and principal the new constitutional order has been negotiated the less the elites were ready to open the process for a full participation of the people. During the democratic transition the elites did not find the time for a double participation of the people. The people was neither consulted *ex ante* for the election of a constitution making assembly nor *ex post* with a constitutional referendum. On the other hand there were cases as e.g. in Serbia (1990) and Rumania (1992) where a real failure of legitimacy has been eliminated with a later referendum. However, one has also to mention Russia where a violent conflict between the president and the parliament has been decided by a constitutional plebiscite and where the referendum was the only way out of the constitutional stalemate on one side and to de-legitimize the parliament.

As well in systems in which ex-communists played an important role (Rumania and Serbia) as in ethnically legitimized and homogeneous new states (Croatia) it was possible without great difficulties to change into a presidential democracy with a powerful head of the state. Otherwise most of the Eastern European systems supported a rational parliamentary system in the sense of the endeavours after the war to stabilize the executive. These goals could be achieved by the popu-

lar election of the president, the introduction of the constructive vote of no confidence and the instalment of the politically collectively responsible ministers.

Main Goal of the Constitution-Making: Efficient Government

The main goal of the constitution makers was to establish with the new constitution institutions which are efficient and effective. At the same time they should get a democratic legitimacy. The state organs needed to be embedded within the constitution and its system; nevertheless the state should remain governable. The main problem of the constitution making was therefore to install the institutional preconditions for a new executive government which at the same time could carry through new reforms and simultaneous achieve a legitimacy based on a broad democratic consensus. But how could those partially contradictory requirements realized in a process of transition which necessarily did lead to a social, political and economical instability? These concentrated admirable efforts for the development of new constitutional legal fundaments and for an improvement of the governability of the polity did often lead in the end to some seeming legitimacy of a benevolent dictator.

Parliamentary System – Presidential System

The dispute between the parliamentary and the presidential system can not only be seen as a technical debate between two different constitutional alternative options. This dispute has namely much more fundamental roots and is an issue of utmost importance. In reality it touches on the proper substance of the "new democracies". Constitutions which install a mighty head of the state did namely decide immediately also for a nationalistic plebiscitary legitimacy and against a rational constitutionally democratic governmental system.

Moreover in fact the motives for the different positions were not really constitutional. Because:

- the system has often been designed to fit to the specific candidate in view;
- the competences of the head of the state were "negotiated" with regard to other political requests;
- the negotiated compromise was most often based on a miscalculation.

Disputed Hierarchy of the Governmental Branches

With the system of a dual leadership of the head of state and the prime-minister a new tri-axel concept has been brought into the principle of checks and balances: Parliament – Executive – Head of State. With this similar to the French system the hierarchy of the political branches of Government remains still disputed.

Human Rights

In the first phase of constitution making the ideology of a negative constitutionalism (limited government) in the *classical sense of liberalism* dominated the debate: The most important function of the constitution was to provide for and install a legal bases in order to protect human rights in order to limit state powers. Therefore as well the concept of the bill of rights as a catalogue of fundamental rights as

the introduction of the constitutional court (as institutional guarantee for human rights) played a most important role. As the human rights were in the centre of the constitution making and because they should become the fundament for the legitimacy of the new state the ideology which was underlying the constitution making process was focused on the principle of the tyranny of the majority. Other democratic systems have not even been taken into consideration. It is for this reason that one is even allowed to say that there was an "over-legitimacy" of the constitutional court.

The four Models of the Constitutional Transition

Some countries as e.g. Estonia and Latvia have *re-installed the original constitution* in force before the instalment of the authoritarian regime. With this they wanted to point to the modest continuity of a democratic system in order to brand the illegal and illegitimate soviet period as a permanent act of violence.

A second group (the so called negotiated revolutions – Hungary) did *first revise the previous early-socialist constitutions by partial revisions*. These revisions contained with regard to their original edition still strong concessions to the bourgeois "Rechtsstaat" state of rule of law.

A third group followed the route of *the total revision*, which of course would in principle be inevitable for a change of the system.

When this was not possible one agreed – as in Poland in October 1992 – to a provisional order, which was labelled the so called "small constitution".

The Function of the Constitutional Jurisdiction

Some socialist states did introduce the constitutional jurisdiction already before communism has imploded. (Yugoslavia in 1963 and Poland in 1982)

In the new democracies of the first and second wave of transition the constitutional jurisdiction achieved a stabilizing effect. It also was one of the most important contribution for institution building for the transition after 1989 in Eastern and Middle Europe.

The constitutional jurisdiction hat a specific function with regard to the solution of disputes among governmental branches and organs. For instance in Hungary, the constitutional court had to decide a dispute between the president and the executive including the parliamentary majority. But also in Russia the constitutional court had often to rule as an "arbitrator" between the president and the parliament.

Judicial Activism

With regard to constitutional review many of these courts follow now the important principle of judicial restraint in particular with regard to issues which have some kind of political implications. However, this principle has only slowly managed to convince constitutional judges. Previously political activism has been the general slogan for many of those courts.

Some fundamental decisions of constitutional courts had to deal with the difficult and simultaneously decisive decision of the function of the state ruled by law in the transition period from a communist to a post-communist society. How could

and should previous arbitrary decisions and crime be assessed by the courts retrospectively? Is the court to be committed to the political justice (political judiciary) or primarily to the rule of law? In this sense the Hungarian constitutional court has in march 1992 declared a draft of the legislature to be unconstitutional, which provided a retroactive validity of the criminal law with regard to actors which for political reason have committed crimes in the period from 1945 to 1990 but who have not been punished for those crimes. The main issue here was the massacre in the 1956 revolution.

2. The Role of the State Ruled by Law within the Democratic Transformation of Post-Communist Societies

i. The Dilemma of the State Ruled by Law

The Dilemma

The principle of the rule of law contains the same goals with regard to constitution making and legislation for the states in transition as for all other states. But, already when the conception of the constitution is at stake it becomes apparent that there is an important structural paradox which can some how be determined as follows:

- Simultaneous the state ruled by law has to be installed as well as the preconditions have to be created which should enable the instalment of the rule of law itself.
- Many humans of the states of Eastern and Middle Europe have different expecttions within the state ruled by law. One can formulate those different expectations somehow with the following sentence: „We did expect justice and we got rule of law!" Legitimacy and legality which should be identical within a state ruled by law seem to be in an somehow obvious contradiction.

Core Questions

With this we have to answer the following questions:

1. Is it at all possible to respect fully the principles of rule of law when one has to regulate he transition from a communist regime with a totally different economic and social order into a political liberal and democratic state determined by the constitution? (PREUSS) The state ruled by law can not only be envisaged as the goal to be achieved in the end of the transition. The process and the entire phase of the transition itself should be ruled by the principle of the rule of law.
2. Today the core question to be answered is moreover: *How should the new state which builds upon the rule of law principles deal with the injustices of the previous regime without violating simultaneously those basic rule of law principles?*

Discrepancy between Legality and Legitimacy

In a state committed to its constitution and democracy the principle of rule of law requires that legality and legitimacy correspond. The positive law should be legal but also legitimate. What is legal and thus according to the legislation should in principle also have legitimacy. One assumes at least – that finally legality and legitimacy are identical. Within the states of Eastern and Middle Europe however, previously the legality that is those laws enacted by the power-holders were against the legitimacy. In the phase of the transition, in which revolutions have been initiated top-down, there remains even today often a tension relationship between the "ordained" legality and the legitimacy.

Mastering the Past

A discrepancy between legality and legitimacy is – as we shall see – not only apparent with regard to the instalment of the market economy and the dismantling of vested welfare rights but also with regard to the question how to deal with crimes of the old regime.

When the actual generation wants to deal with its past in a legitimate way in order to handle the responsibility of the representatives of the previous generations, one has clearly to distinguish between the legitimate and the illegitimate systems in order to prevent a illegitimate future. But, precisely as a legitimate target this condemnation and critic of the illegitimacy of the past gets with regard to the population of many countries in transition only a limited approval.

Legal responsibility of the past requires finding of the truth. However, finding of the truth is always strongly connected to a specific individual.

In the sense of the rule of law one has also clearly to distinguish between the analyses of the past on one side and the subsequent compensation. According to HANNAH ARENDT (*Vita Activa)* one has to claim: „When forgiveness is not possible at all, or is possible but not enough, *punishment* is the only acceptable alternative to revenge!" Undoubtedly punishment must be part of the rule of law. However, it presupposes a fair and just procedure and that justice is not only done but also seen.

Can one require expiation if the need for inner peace demands to conceal the past? Can one on the other side by hiding them justify past injustices and crimes with regard to the victims although they have still to bear and to suffer from the consequences of the past?

Often even the rule of law itself – namely the prohibition of retroactive legislation – forbids such retroactive justice. The more actors can be identified which have committed on behalf of the old regime injustice in the past the less it is possible to build the new order only on the principle of compensation.

How can finally a state committed to the rule of law pay off with the problem of the illegal state of the old regime without breaking of from the new bases of the state: the rule of law? Virtually all efforts to strengthen the principle of the rule of law can be blocked with the same principle!

The unsatisfactory Dilemma of Privatisation

When private ownership has to be established one needs to decide whether and according to which principles the property of the previous communist regime has to be given back to the expropriated owners or whether privatization of state property has to be put into the service and interest of a future oriented economy. Should the available resources be of use for the realization of a future welfare of all and thus for the interest of a dynamic market economy or should previously vested rights of former property owners have priority?

With regard to a proper economical point of view a but past oriented guarantee of the legality would probably not lead to economical welfare. Does the state committed to the rule of law and to justice require for all future and for the entire past the protection of vested rights? How should this unsatisfactory alternative be solved? Should the unjust but economically successful privatization finally serve a future oriented efficiency or should one decide for the property rights of previous owners? How should one decide between the free acquired and a socially bound capitalism of owners? Can injustice of the past after so many years and generations at all be corrected?

In principle such dilemma did dominate the transition in all states of Eastern and Middle Europe. The mere rule of law principles do not offer clear guidelines for such conflicts. Finally it is the task of the political legislature to decide whether the state and with this also the actual positive law should be guided by a preservation of the previous law retroactively or whether politics should rather decide future oriented. With such decisions one has also to take into account the interests of those persons which have been born within the communist system, living and working there for many years. The expectations of these persons are as well "vested rights" as the property rights of previous owners. At least there rights do not turn into illegitimacy just because they have been acquired within a system which today is denied any legitimacy.

Vested Rights against Market Economy

In a concrete case of the Hungarian constitutional court this issue can be shown very clearly:

This court decided in 1995 a statute to be unconstitutional which has reduced and abolished some social welfare rights in order to economize the state expenditures. It had to decide whether social rights acquired during the socialist system have to be protected and therefore can not be questioned based on goals to be achieved for purposes of the market economy system.

The court did justify this decision with the following arguments: To establish a system of the market economy is a political goal; welfare however is a basic need and therefore a legal claim. This justification of course could end in a judicial activism. The court understands itself namely as "the protector and guardian" of the people and gains in popularity and public authority.

Following the doctrine of the rule of law the court was of the opinion that legal security is an essential part of the rule of law principle. Accordingly social rights

are purchased quasi-property rights, which have been gained and acquired during years.

Ironically the Hungarian constitutional court followed with this as concept of substantial justice which contradicts with the formal rationality of the rule of law. The fulfilment of substantial justice however can finally destroy the market economy and the liberty of contract.

Separation of Powers and State Ruled by Law

The constitutional judge will take over the lead within a system of separation of powers in case of weak legitimacy of the legislature. He/she will interpret finally the rule of law. In particular he/she will determine the content of justice of the state ruled by law in order to guarantee legal security as principle of justice which should survive generations and should have priority with regard to the positive law. The contradiction between the protection of the "vested?" rights guaranteed by the constitution and the need for economical modernisation with regard to the specific post-communist facts thus becomes apparent.

Although one has to depart from the principle that the rule of law is in accordance with the need for democratisation and the enhancement of the market economy, the consistent application of this principle results in this case to a unexpected conclusion.

Liberty, Legal Security and Rule of Law Principle

The goal of post-communist societies namely to establish a political order ruled by law is of much more complex and difficult task than one would have expected in the beginning. One can not simple erase injustice of the past out of the world. Neither can former injustice be atoned by new injustice. An old wisdom of law tells us that injustice can never be turned into justice. As a consequence past injustice should never be hidden or forgotten. For the victims which have suffered injustice new justice has to be established but without creating new injustices. Each generation however is responsible for itself and for the future generations that the law serving the creation of the new state ruled by law should primarily contribute to promote the welfare of the living and the future generations.

The constitutional guarantees of property, liberty of contracts, freedom of collective bargaining of the social partners can finally only be realized in a system based on solidarity which respects freedom within the state (participatory rights), from the state (negative rights), by the state (social rights) and to the state (minority rights).

ii. Constitutional Jurisdiction

With the constitutional jurisdiction a court can review the statutes enacted by the legislature or the ordinances or decisions enacted by the executive with regard to their constitutionality. There are many different models of constitutional jurisdiction. The states of Eastern and Middle Europe did implement namely the two following models of constitutional jurisdiction:

American Model

According to the American model each ordinary court can and shall with regard to a *concrete case* in addition also review the constitutionality of the statutes which support the arguments of the parties. The constitutional review is part of all legal assessments of the case. However, such review can only take place in a concrete case where the parties have standing and have a concrete dispute and controversy. The court can only review the constitutionality of the concrete application of a legislative norm. Thus, it has no power to declare the norm as such unconstitutional but only its application in the concrete case. Neither can the court review a statute *ex ante* before it comes into force. The review is thus reduced only to the concrete case *ex post*.

Austrian Model

According to the Austrian model the power to review legislation with regard to its constitutionality is transferred to a special constitutional court which has only jurisdiction on issues of constitutionality. These constitutional courts which have been installed all over Europe have often also jurisdiction on the constitutionality of abstract norms notwithstanding their implementation. In these cases they also review the norm as such and are given the power to quash the unconstitutional norm or if necessary the entire statute. According to this model the constitutional review is centralized within a constitutional court which is only and alone competent to interpret and apply the constitution as first and final instance. There is no appeal against decisions of a constitutional court. These specialized constitutional courts have in addition often the power to review legislation ex ante before they are enforced and validated. This ex ante review enables the constitutional court to control the space of action of the executive and the legislature according to the constitutional criteria's.

Constitutional Review fort he Protection of the Rule of Law

As already mentioned the constitutional jurisdiction functions in many states of Eastern and Middle Europe as stabilizer between politics and society. The constitutional courts interpret the political rules of the game once for all such as e.g. the management of elections (e.g. Rumania). They participate substantially within the proper establishment of a political culture of a country (e.g. Poland). If their decisions and their justifications are credible and comprehensible they indeed contribute to the system as a stabilizing factor. From this point of view they are also to be considered as an important factor which enhances democratisation because they protect democratic rights and take care for credibility. As arbitrator which decide on the rules of the game they can also enhance the entire culture for a constitutional democracy.

iii. State and Civil Society

Rule of Law with regard to the Historical Controversy of Western States

The liberal constitutional model has developed within a field of political tension within a society which has already been stabilized by mechanisms of self-regulation with regard to the challenge of the absolutistic state. All elements of the rule of law which have been introduced into the constitutions of the countries in transition are as we have seen in the fourth and fifth chapter the result of a complex long-lasting process. In this process the despotic rule of absolutistic governments has been continuously and slowly broken. Within this process the elites of the civil society had a decisive function. As promoters of different interest groups they became the proper source of the power which was even able to use pressure in certain cases. The elites of the civil society at all events an important role in establishing constructive and creative solutions.

Weak Society – Weak State

In post-communist states such as namely in Southern-Eastern-Europe however it was just the other way round. According to the communist tradition of those countries weak societies were facing a mighty state respectively a authoritarian regime.

Accordingly after the imploding communism those countries were not able to introduce the principle of the rule of law as basic constitutional principle within the constitution based on a long lasting development of the state. Has however the principle of rule of law been embedded with careful constitutional drafting within the constitution, the state was still not able at all such as western states to implement the rule of law into the social and political reality.

With this one has to ask the question: Can the rule of law at all successfully be implemented in these societies,

Damit stellt sich die Frage: Kann die Rule of Law überhaupt in Gesellschaften erfolgreich umgesetzt werden,

- which have no support from a developed political and economical system of pluralism of interests;
- which are rather required to dispute with different NGH'Os of which each pretends to act within tha national common interest;
- can not build up on legal traditions with a corresponding political culture and
- can hardly count with a real economical development?

The State as Motor and as Brake

In South-Eastern Europe the state is asked to promote and support the growth of the society within a liberal spirit. This it can only do when it also creates the conditions for a system guided by the rule of law. The state however is only credible when it observes it self the rule of law. It can not reduce it self to its proper power-competences. The paradox is thus to be found that the state as instance is required simultaneously to promote activities of the state according to the rule of law and to

restrain itself within its proper powers. The authorities which are to implement the rule of law are at the same time limited by these principles.

The state should establish the constitutional conditions which aim to liberate the society and this not only with regard to the economy and management but also with regard to human rights, decentralized local self-management and the development of a political public articulated by free media's.

Odyssey of the Rule of Law

The first fundamental step in the direction to implement to rule of law is the enactment and enforcement of a new constitution, which enshrines this principle of legitimacy within the positive law. With this firs step the Odyssey of the rule of law within this states has only been initiated.

After 17 years of constitutional practice in many countries in transition it becomes clear that the institutions of the constitutional democracy how consistent and carefully they have been drafted are facing a weak and already corrupted (privatized) state on one side and a only slowly developing civil society on the other side, which is not at all embedded within the social day to day live as it should correspond to the efficiency of the constitutional reality of western countries. This problem will certainly decisively influence the constitutional policy of those countries within the near future. This, problem will certainly influence decisively the constitutional politics of those countries in future in particular when they prepare for the next wave of constitutional development (e.g. Bulgaria and Serbia)

3. The Governmental System of the Middle and Eastern European Countries between a Parliamentary and a Presidential System of Government

i. Notions

Presidential System

In Eastern and Middle Europe one can principally distinguish between two different governmental systems: Some countries have decided for a *presidential democracy*, others have preferred the constitutional set up of a *(rationalized) parliamentary system* as counter model. With regard to the presidential governmental system the president is elected by the people and functions at the simultaneously as head of state and executive. With regard to the parliament it is politically not directly accountable to the parliament. On the other hand he/she has the power often to control the parliament and if necessary to require new elections and to decide on the emergency situation.

Parliamentary Governmental System

On the other hand within a parliamentary governmental system the executive depends on the majority and thus the confidence of the parliament. The president has mainly reduced to symbolical and ceremonial matters. He/she has to be contented to remain within the shadow of the power. However, his/her symbolic role as a representative of the national unity is also within those systems still decisive. If

e.g. the parliament tries to solve conflicts which appear to be insolvable he/she can as national mediator look for the unity of the country or even restore this unity. Thus, for instance the Hungarian president could successfully appease the conflict between anti-communists and the anti-anti-communists.

ii. The Socio-Political Environment affecting the Governmental System or: What Kind of President was Wanted, and what are the Consequences fort he Consolidation of Democracy?

The decisions for a presidential or a parliamentary system was much more far-reaching than any other open issue of the constitution making. Namely the choice for one or the other system has mainly been influenced by the aim to achieve simultaneously legitimacy and governability of the institutional system. When it is difficult to achieve a democratic consensus and when society is strongly fragmented one tried with the mostly already existing personal charisma of a strong president to connect the charismatic legitimacy with the efficiency of a powerful presidential office.

Advantages with regard to the Strengthening the Head of the State

Accordingly the strengthening of the position and function of the head of the state had at first *positive aspects*:

The “pouvoir constitutant” has mainly made the choice for a powerful presidential office, in situations it feared, that with free elections it would not be possible to establish a sufficient coherent parliament which would be strong enough to install and control a political homogeneous effective and efficient executive, able to carry through the transition and to be bear this heavy governmental responsibility.

Moreover one has decided for flexibility and efficiency of semi-presidential governmental systems with a bipolar executive that is a head of the state which simultaneously also guides the executive because with this institutional mechanism one can always guarantee that the executive is capable of acting and that it can drive forward the process of reforms to keep it going and to react to the specific problems of transition rationally and reasonably. An elected president for a fix period represents finally with regard to the permanently changing cabinets the continuity needed for the maintenance of the reform-process.

Risks

Governmental systems which strengthen the office of the head of the state contain however also the following *negative aspects*:

States which face still the burden of an open undecided territory and an open “stat-issue” and which still legitimize on the mere ethno-nationalistic principle such as for instance Serbia or Croatia can with the strong president who symbolises the Ethno-Nation in fact establish a phantom-democracy. Then with a powerful head of the state one can feign a rational constitutionally democratic legitimacy in order to legitimize in fact with the might of the president a nationalistic/plebiscitary democracy.

When the president is directly elected by the people he/she can be tempted to impose its / her power in the name of the people against the parliament. By this he/she can de facto eliminate the parliament with his her populist charisma. By addressing him / her self directly to the people he/she can marginalize the legislative because the ethno-nation sees its unity symbolized by the president and endangered by the fragmentation of the parties which is detrimental for the nation.

The conflict between the two organs democratically elected by the people namely the parliament on one side and the president on the other side is almost inevitable in presidential systems. The structure of a parallel legitimacy of the two offices with executive function has the immanent risk of a almost unsolvable constitutional conflict. Paradox with this is that this system does not provide a institutional tool to solve this conflict. This fact leads necessarily to a authoritarian-populist instrumentation of the plebiscite. There remains always a constitutionally unsolved ambivalence between the president elected by the people and the prie-minister linked to the confidence of the parliament.

iii. The Different Governmental Systems

The Five Different Forms of Government

Between the pure presidential system and the pure parliamentary system one can distinguish five different mixed systems. All those systems principally aim at achieving a sustainable political stability of the state and the society.

The rationalised parliamentary system provides within the interest of stability the election of the head of the state as an essential additional element.

In order to provide for further stabilisation the executive cab be dependent only of the so called constructive vote of no confidence.

But the constitution can also rule that ministers of a cabinet are collectively accountable to the parliament.

Such mixed forms of a semi-presidential governmental system can according to the political environment be assigned de facto rather to a parliamentary or to a presidential system, without including into the mixed system all characteristics of one or the other system.

The following five different forms of government can be distinguished:

– the pure presidential (Ukraine) or the super-presidential governmental system (Russia, Belo-Russia)
– the premier-presidential governmental system (Rumania)
– the presidential-parliamentary governmental system (Croatia, Serbia)
– the parliamentary system with the direct elected president (Bulgaria, Macedonia, Poland and Slovenia)
– the pure parliamentary governmental system (Hungary, Chechnya, Slovakia, Albania, Lithuania).

Chapter 8 Multicultural State: A Challenge for the Future

A. Challenges of the Multicultural State

I. Introduction

Multiculturalism: A Challenge for our Time

Today 95 percent of the world population is living in multicultural states. In those states the societies are fragmented by different ethnic groups, cultures, languages or religions. 40 percent of the world population is living in federal states and 60 percent in so called unitary states. In many states the diversity of culture has lead to a almost not bearable fragmentation. Multiculturalism has become in particular after the fall of the Berlin wall a fundamental challenge, which is threatening the inner peace of states but also of the world community with growing conflicts which are becoming every day more brutal.

How can the states take profit out of their diversity? How can different societies and cultures be brought again together into a unity based on diversity? All states which have to cope with the globalization of the world order on one side and need to meet the challenges of their inner local social order on the other side are confronted with inner conflicts, which up to 1989 have been frozen because of the bipolar world and the assignment of the states either to capitalism or to communism.

Who should govern over whom?

Up to now the problems of the states have somehow been reduced to the issue of the organization of state power and to design the state structure in order to have broad support and legitimacy. Good governance was at the centre of the traditional state theory. How should the state authority be organized? How should states be structured in order to meet the needs for justice and rule of law? Today we are confronted with the much more difficult and controversial question, namely:

1. Who should govern over whom?
2. Which majority should decide over which minorities?

3. To whom should political power be assigned?
4. And primarily: Who should in what procedure decide who should become the power holder and will decide on the might of the state with whhat authority and competences?

Federalism: A State Organization, which is able to bring diversity together?

For a long time one has only analyzed the federal state structure under the point of view of vertical separation of powers. Indeed: in federations federalism introduces in addition to the horizontal separation of powers a vertical separation between the powers of the federation and of its federal units. Thus federalism was seen as a additional tool to limit the might of the state. In this context the vertical separation of power has also been criticized, since it leads to inefficient state activity and is detrimental for the protection of equal rights.

We consider federalism as the state concept, which constitutionally guarantees and implements a balance between the autonomy of the federal units (*self-urle*) and the participation of the federal units in the decision making process of the federation (*share- rule*). In this sense federalism can be an additional response to the burning question, what can be done in order to bring diversity of ethnicities, cultures and religions together into one state and constitutional authority. Federalism does not only answer the question, *how* one should govern multicultural societies, but also, *who should govern over whom*. Federalism is thus a constitutional system, which in the core of its substance aims at the prevention and the peaceful management of conflicts within multicultural states. Who however analyzes the slowly burning inner-state conflicts caused by the multiculturalism of the state, will get many different controversial answers on the following questions:

1. Why is multiculturalism inherently conflicting?
2. Can federalism and/or decentralization contribute to bring or hold different societies together? Can federalism and/or decentralization provide special tools, in order to prevent or solve inner-state conflicts caused by the multicultural fragmentation of the society?
3. Undisputed governmental system of the state of modernity is democracy To what extent can a democratic society, which is composed of several cultures consider itself as a civil-society, which does legitimize and control governmental powers? Can a fragmented civil society only be united with additional and special political and legal instruments and procedures?

II. Multiculturalism and State-Concept of Modernity

Equality of the Homo Sapiens

The political and pragmatic-theoretical substance of the constitutionalism of modernity is based on the idea of the secularized state, which recognizes only the people's sovereignty and the social contract as secular legitimacy of state authority. Political authority has thus its roots in the idea of the "homo sapiens". Men and

women of modernity can say “no”, because they are considered to be capable in order to judge what is true, just, legal and correct. The secularized democracy of modernity therefore presupposes that all men and women are in principle *equal because the are*:

– egocentric beings (HOBBES);
– holders of inalienable rights (LOCKE);
– reasonable citizens (in the sense of the “citoyen” from ROUSSEAU);
– exploiters or exploited (MARX);
– political human beings (homo politicus nach ARISTOTELES und THOMAS VON AQUIN);
– cost-benefit oriented men/women („homo oeconomicus“ nach ADAM SMITH, JOHN RAWLS).

The democratic and liberal constitutional state of modernity is rooted in the idea, that finally all men/women are substantially equal, since they all belong to the species of the homo sapiens. They have the capacity to acquire new understanding with their own reason and they can based on this new insight make their proper value judgments and act accordingly. The essence and the nature of men and women, who have the capacity to say “no” or “yes”, are the reason for the new legitimacy of the secular state based on the social contract. Without understanding of the essential equality of men/women there would not be a secularized democratic state. Precisely this equality did however impede the political state organization to take into account those “inequalities” and identities of human beings, which are caused by their culture, tradition, language and religion. Who only sees the equality of human beings, dispels the fact, that men/women identify with their special community by their particularities which does distinguish them from the other “kind” of their species.

Does Inequality Legitimize the Construction of Special Political Communities?

If we thus accept, that finally all individuals being part of their species homo sapiens are equal, then one has to ask, what the reasons may be, that some individuals are inclined to unite politically with some particular communities and what would legitimize such exclusiveness? Why and based on what reason they feel being part of a certain community, which induces them to use the “we” against the “others” which may be considered as partners, adversaries or even enemies. Why do specific individuals exclude themselves from other communities and why do they integrate into a special group? Are these reasons only private or can one find a political motivation behind those reasons? And if yes, can groups or communities based on this integrating and excluding identity claim sovereignty and establish their proper polity?

In this context one has to question the legitimacy of a (cultural, religious or linguistic) polity, which decides democratically and dominates by its perennial majority position other minority groups based on the majority principle of the democracy. What are finally the criteria’s which integrate some individuals into a polity and exclude some others? Why are Austrians and German speaking Swiss not

considered as Germans, since East-Germans and resettled Germans in the East are considered as ethnically Germans? Why does the Italian speaking majority of the canton of Tessin prefer to identify with Switzerland than with Italy and why do Italian speaking Slovenes and Croats feel differently?

With other words: Why did the international community in the peace of St. Germain after the first world war prohibit the re-unification of Germany with Austria and why it did celebrate after the re-unification between East- and Westgermany the famous sentence of Wille Brandt which he did proclaim after the fall of the Berlin wall: "What belongs together has to come together".

The Nation Ignores Diversity

The nation, which can only be built up by the state and its constitution is composed of particular, equal individuals enjoying thus fundamentally equal rights. The nation serves as rational political instrument to bring human beings belonging to different cultures and ethnicities together. The conception of men/woman which is based on the principle of equality of all human beings and of their universal reason (in the sense of the homo sapiens), excludes by its very definition per se cultural, traditional, historical and linguistic differences.

The political diversity, which would be the result of a political recognition of these different cultural communities, has to be ignored by the state and its constitution. The human being thus is reduced to a rational political being (Citoyen). The emotional attachments on an ethnic community of this being are dissolved when it is entered into the social contract founding the rational state community.

The People Excludes Diversity

In a reversed sense also a state depending on the culture of its *people* that is a state developed out of the pre-state community of fate (Schicksalsgemeinschaft) excludes diversity. Such states are marked by the identity of the pre-constitutional already existing ethnic community and the polity constructed out of this community. The political recognition, of other communities on equal footing and with the right to participate in the constitution making process would principally endanger the unity of the state and the mono-cultural people's sovereignty.

Demos

With the social contract men and woman have agreed to unite as a political unity, that is to unite into Demos. Based on their reason and based on their force and will the participants change their proper status into the status of a political being, that is into a citizen. They have made their judgment by reflection and choice and are willing to sustain their polity also in future. What values underlie this act of their will to construct or establish a polity or to unite with an other Demos? When Napoleon confronted the confederates of Switzerland with the choice either to remain a federal and marginal small state or to unite with the great nation, the Swiss did decide for the marginal small state. Why? Is it the common experienced history, the religion or some common political values such as democracy, federalism etc.

which did generate such emotional common feeling and made them prefer the marginal nation to the "Grande Nation"?

Pre-Constitutional Unity of the People

Finally there are states, which build up their nation concept on the culture of the majority people. The people, who legitimizes the sovereignty of these states is culturally homogeneous. Each state-citizen enjoys the same cultural identity. Who does not belong to the culture of the people will be considered as second class citizen is thus unable to identify totally with its state. These nations are not built up on common values and are not hold together by reflection and choice. Not the will and rational choice of the people but nature has weld men and women into a unity. Their identity and communality is pre-political, pre-state and pre-constitutional. The state unity is based on the natural and given cultural identity of the people. Such states can not integrate other cultures. In the best case they can somehow tolerate foreigners as guests; in the worst case they require total integration or assimilation of the foreigners and expect that in order to receive their new citizenship and to become member of the new state on equal footing with all other citizens they have to renounce to their previous identity. Who ever wants to change its nationality, has thus also to change its cultural identity. Although most of those states confess within their constitutions universal values, one can recognize their ethnic fundament often by analyzing their laws on citizenship. On one side those states prefer in their naturalization process all human beings belonging to their culture although they might be living in an other state, on the other side they require citizens of other states willing to naturalize to renounce their previous citizenship. They exclude any double citizenship and thus also multiple loyalty. Moreover those states consider that thy a special obligation not only to represent the interests of their citizens living within their territory, but in addition to defend the interests of citizens of other states, which are naturally linked by ethnicity to their ethnic origin. In addition those states consider themselves committed to protect and the interests of the neighbor peoples belonging in fact to their proper nation but are legally subject to the sovereignty of the neighbor-state. They consider them-selves even then obliged to protect the interests of the members of their nation, when they are in fact citizens of the other state and do not even have obtained the status of a citizen of the mother state of their nation. (cp. Art. 116 of the basic law of Germany)

States which are hold together by a common pre-political culture need – if they want to survive as a unity – exclude other cultures. The guiding culture (Leitkultur) is considered as the only motor to build the identity and communality of the nation. Cultural diversity must be excluded as a unity building element. It has no space in such exclusive concept. Multiculturality is rather felt as threat to the very existence of the state and its nation.

If the polity defines itself as a community of common culture, language, religion of history particular values such as language, religion, race or ethnicity will become decisive factors in politics. Peoples whose identity is determined by those values belong together and should in case of division grow together. (cp. Big-Germany, Big-Albania or Big-Serbia). In consequence Multiculturality or frag-

mentation of a community caused by traditional minorities, immigrants of foreign worker will be feared as a threat and defect, which artificially splits the natural unity of the nation.

The collective ethnic nationalism as dominant ideology: The example of Eastern Europe

The ethno-nationalism of several new established states in Eastern Europe has ethnic that is pre-political cultural roots and causes. The central significance of ethnic codes has direct impacts on several strategic measures, which inflences directly ethnic minorities:

– First it affects the tendencies to draw the territorial border lines as fast as possible in order to maximize the ethnic homogeneity of the population.
– In addition citizens rights and the socio-economic citizen status will be granted according to the ethnic affiliation of persons to the ethnic community.
– Also in politics and in particular in constitutional politics and the party system are lined up to promote the overall interest and well being of the ethnic community.

Accordingly ethnic (including religious, cultural and linguistic) areas of conflict will be given priority to conflicts of classes determined by the issue of just distribution of welfare.

Nation-State and Constitutional Nationalism

Within such a socio-political environment two different situations will have to be distinguished: Either the population of the given state is with regard of its ethnic composition internally heterogeneous (e.g. Bulgaria, Serbia-Montenegro, Rumania) or externally heterogeneous (e.g. Hungary or Albania).

As a conclusion one can consider those mentioned tendencies as ethno-radicalism: In fact all political endeavour which construct the distinction between friend and enemy along ethnic characteristics and accordingly pursue aims even with violent means.

Citoyen-States

If peoples or a nation identifies with the polity and not with the dominant cultural community the political people (*demos*) includes all persons within the territorial authority of the polity. This inclusive political value however presupposes that the individual persons can internalize the political values and that they abstain from any request to recognize their cultural community as a special political entity. The common interests of the polity must be given priority to any other private membership. Multiculturality and diversity will rather be ignored and this in particular because they could become the decisive structural factors to determine decentralization and could thus threaten the unity of the nation. For this reason a state such as France or Turkey which are hold together by political values reject any cultural pluralism. It is legitimized only by its homogeneous unity established and held together by political values. Culture has to be banned from any rational political de-

cision making process, as in its substance it puts the very existence of the state in question. Without rationality there is no nation.
Nations which negate culture as political value are built up on the rationality of their citizens and exclude the cultural dimension of the human beings. Cultural identity in those states can not be a acceptable political identity. Turkey e.g. prohibits the official use of the Kurdish language, because it would endanger the republican unity of the state. France has refused to ratify the framework convention for the protection of national minorities of the Council of Europe. In Switzerland the canton of Geneva has prohibited the use of the chador of teachers in school, as it puts into question the principle of the secular state. As rational human beings all citizens are equal. Cultural differences must remain politically irrelevant and should not at all become politically determining factors.

Immigration Countries

When people choose a specific territory as geographical bases and unit for their polity (as they did in the classical immigration countries) they have, since they come from different cultural background, to renounce by necessity to their culture and history as factors to build up the new political unity. The preamble of the Constitution of the United States begins with the sentence "We the People of the United States..." With this declaration it expresses the will, that all human beings living in the united states belong to the people because they live within the same territory. (principle of ius soli). Culture and history are neither considered as relevant nor as factors threatening the unity for the nation building. The cultural blindness is compensated by the guarantee of the "*universal equality for every human being*". Nevertheless one has also to admit that the USA has not always consequently implemented equal rights. The history of Native Americans as well as of Afro-Americans tells innumerable cases of inhuman discrimination.

Constitutional Patriotism as Pretext

If so called Culture-States (Kulturstaaten) refer apart from their cultural roots also to the values determined by their constitutions, which should somehow substitute the nationalistic and exclusive character of their state (Constitutional patriotism according to S. HABERMAS) those values reflect a universalistic affiliation to the polity. Each person can as rational being with equal rights decide whether it can identify with the universal principles and procedures determined in the Constitution. Indeed with constitutional patriotism states based on the pre-political existence of the ethnic unity of their people, can proclaim universal values. However it remains to be seen whether they can realistically escape the ethnic bed of Procrustes of their cultural people. Even though constitutional proclaimed values may effectuate external changes, the effective inner identity as per-state cultural community remains stick a least to the subconscious memory of the people. The fact that today almost all constitutions proclaim universal values in order to be part of the family of political nations implementing universal values, should not deceive, that the real identity of the cultural people has to be found in their common culture, language or religion.

Such consideration may even be justified with regard to the French nation, which has founded in consequence of the French Revolution the a-cultural citizen-state. The first constitutional draft made in 1791 has even provided, that all persons living for more than one year in the state territory would automatically be given the French citizenship. With regard to the actual anti-foreigner movement with strong support of the population even in France it seems that also the French Nation considers itself as a Nation, which is strongly rooted in the French history of the catholic Kingdom overthrown by the later revolutions. Although France very credibly confesses the republican values and although it promotes the French language as "universal" value open for all cultures the idea of a unity of culture as a state-building and state-sustaining factor is always shining through.

Universal v. Particular Values

Constitutions of modern constitutionalism are almost all at least according to their appearance shaped to the universal citizen. Today universal values only seem to give legitimacy to the state authority within a geographically determined territory. Although the polity proclaims universal values, the particular values of the community actually seem often to have priority for the feeling of individual persons to consider themselves as members of a certain nation. Indeed the nations have to create a "we", which distinguishes them from the "others" and which can be used as criteria for external delimitation. The state has to be based on values which are universal and which can be considered as "*good for all*" and on the other side the constitution has to be rooted in values, which reflect the identity of the respective entity (*good for us*). In both cases the constituted values should exclude cultural fragmentation or diversity.

Diversity as Political Value

When a state wants to write a constitution for a culturally heterogeneous nation, which aims unity although it is fragmented by diversity, it has to ask what values would on one side create a motherland which distinguishes the nation from "the others" and on the other hand what values would enable each of the different communities to identify with the common nation. How can a political identity be established for several cultures, which does neither dissolve those cultures nor banish them from the common political identity? Are there particular political values, which are not universal but still can create a "we" and a common denominator for different cultures and which take into account the diversity of the state? It is the reality of the modern Multiculturality which forces us to put into question the concepts of the state of modernity. With regard to the threatening potential of violent conflicts within multicultural states one has to establish political units and entities which do neither discriminate minorities nor segregate them nor pursue a policy of Apartheid or ethnical cleansing and thus become an environment of brutal violations of basic human rights.

Constitutionalism and Cultural Diversity

The state philosophy, which has developed out of the constitutionalism of modernity ignores the actual reality of a multicultural society. The political recognition of cultural diversity as a requirement of collective communities within the state would fundamentally destroy such state concept. As long as the unity of the state is identical with the majority culture or as long as it is defined by the culture of the majority the citizens belonging to the minorities in this state will consider themselves as second-class citizens. But in no case the reality of the Multiculturality will by recognized as bases for the state and nation building.

With regard to diversity states either

- ignore the multicultural reality (Immigration countries such as the United States)
- reject it (France, Turkey)
- oppress it (Germany with its preamble of the Basic Law: „*the German People have adopted, by virtue of their constituent power, this Constitution*“).

Challenges of Multiculturality

These different concept of nations are not only contradictory with each other, they are also one of the causes fort he different ethnic conflicts of the last decades. Moreover those different state concepts are not able to face the challenges of the reality of “trans-national citizenship” caused by modern migration and immigration. The traditional state- and nation-concepts neither do enable the states to manage their ethnic conflicts (cp. e.g. the Basque region, Northern-Ireland, Corsica) nor do they provide a solid political answer on how to integrate the growing trans-national citizens into their own political system.
A state concept, which would integrate different cultures into their autonomous diversity and which would give them a political status e.g. for school education, judiciary, police etc. could may be solve some of those conflicts. Such concept would neither question the political unity of the state – could thus be acceptable by the majority – nor would it downgrade minorities to mere state guests. As such concepts however are missing states can not afford political fragmentation caused by their multicultural society.

III. What are the Causes of Conflicts within States Fragmened by Diversity?

Various Causes

Whoever is investigating new state concepts, which could prevent ethnic conflicts or at least manage them peacefully, needs to know their real causes. However: as those conflicts are very different, also the theories and perceptions of the causes are contradictory.

As possible causes one sees:

- economy (social injustice),
- history (retaliation for suffered historical injustice, „stolen“ self-determination, historical discrimination),
- Interference into innerstate conflicts by neighbour-states, which support the kin communities living in foreign neighbouring territory,
- religious fundamentalism,
- power greedy warlords,
- deficit of legitimacy of the state or of the nation with regard to its minorities
- fear and mistrust as consequence of terrorism of minorities and terrorism of the state.

Ethnic Chauvinism as Cause

It is uncontested however that those causes are somehow related to the issue of ethnic identity and the according self-confidence. The ethnic dispute is marked by a friend-enemy relationship, which can easily be manipulated and thus radicalised by various private interests. Ethnic differences can be emotionalized in order to impose economic, political, cultural or mere power-interests or simply to turn away from other internal problems.

Symptom or Cause?

Within the scientific community there is no doubt, that one of the essential reasons, why the medical science has had such an incredible development within the last century has to be found in the fact, that at the end of the 19th century one started not only to analyse the symptoms of an illness but to investigates its real causes. In social sciences one still is on the level to discuss the symptoms of the pathology the real causes however are hardly investigated. There are the ones who pretend to see the causes in the brains and harts of the individuals. They think that all conflicts are subjective thus they can be solved by “group-therapy”. Others in turn discern within the linguistic and religious differences qualitative human discrepancies which would never allow integrating the different human beings into one political order. Thorough analyses of the causes of such conflicts thus are needed more than ever. Only if one agrees as to the causes one can reasonably debate on solutions. The question however, which are the real causes is often as controversial as the enemies within the conflict itself.

Can globalisation contribute to solutions?

There is a most common believe on the effect of globalization: Most experts expect, that through globalization the sovereignty of the nation-state will finally merge into the global market. The private market will undermine the need for social and political solutions on the local level. This may lead as well the opponents as the advocates of ethnic demands to “switch” from the local nation-state to the global market. Conflicts on the explosive question, who should govern whom, how should one govern multiculturality, who should participate within the consti-

tution making body, those questions might become redundant, since the real political power of the nation-state and also its possibilities to implement solutions will gradually fade away. As governments of nation-states may be loosing their scope of action one may not be able to make them responsible for problems causing inner-state conflicts. The need for a national government may have lost its significance as the state will meanwhile turn private.

Globalisation versus Localization

Actually we are confronted with contradictory tendencies. On one side one can observe a strong evolutionary trend to globalize. On the other hand one is at the same time confronted with effective tendencies to localize or even to ghettoize. Indeed the needs of human beings, who want to overcome the insecurities of today's world, are contradictory.

- Consumers seek the global market in order to optimize the profit with optimal costs;
- Citizens and voters postulate universality of human rights;
- Individuals wish to withdraw with their emotional dimension into the security of their „homeland"; they find their refuge and their identity within the local community;
- There is to be more precise a global market for products, finances and services; the labour-market however is still local and needs local solutions for local social problems;
- The employees seek thus mainly local security.

Legitimacy of the "globalizer" and the "universalizer"

Those contradictory human needs obviously differ widely. Once one claims globalization, once one seeds security within the universality, once one flees into the local homeland. The power to decide on the global market however is just as little evenly distributed as the power to decide on the content of the universality of human rights. Though the market though is global and human are universal, the decision however on the content is made by the global "universalizer". The control over the globalization belongs to the only super-power. Its decision making actors are elected by the local democracy according to local interests. The global power thinks local and acts global. Moreover internal activity is controlled by traditional checks and balances. The foreign policy power, which allows all different agencies to intervene in local politics of other states is above all possible control.

Localization

The more global needs raise, the more the expectation of the citizens with regard to the local governments are growing. Local authorities are asked to find local solutions for problems caused by globalization. It would thus be fatal if one would investigate the question of the state only taking into account globalization and fading away of sovereignty. One has also to take into account the tendencies for localization.

Which effects will this have for multicultural states? It is obvious that globalization will strengthen the need for localization such as the need for local identity and local security. These needs however can not contrary to the global market be privatized. They can only find a reasonable answer by political decisions. Only the local political structures are finally able to meet the human needs and fears. Those local solutions will have to go to the roots of the local community. Only taking into account the roots of the identity and existence of human beings one will be able to provide for them and their families more security and to soften their fears.

Homo oeconomicus versus homo politicus

The more globalization becomes relentless, the more it will loose humanism. the more the need to replace global injustices by local justice. For this reason local conflicts will not reduce, in contrary they will expand and explosive radicalize, if no political, economical and social solutions can be offered. The cost-benefit oriented homo oeconomicus is seeking it profit in the global market, the homo politicus requires local compensation for injustices caused by globalization. For this reason the challenges and the need for solutions with regard to Multiculturality will grow in future and not disappear, particularly since globalization will increase global migration.

IV. What Tools and Procedures are available for States in order to meet the growing Challenges of Multiculturality?

What is good for all, is good for us?

Tendencies to globalize and localize will amplify. This will increase the fragmentation of multicultural states. We have to take into account that multicultural states will rarely be able to overcome the increasing problems of multiculturalism peacefully. The gaps between communities will become wider and risk of growing violent conflicts will become dangerously alarming. States will not overcome those conflicts, if they are not able to gain legitimacy for their governmental system by the great bulk of their population that is the individuals including the different communities. If states want to hold or even bring their multicultural society together, they should not only be able to find a legitimate answer to the question what is good for all, but also what is good for us and what is good for our communities. This answer however will only be considered legitimate, it the great bulk of the population can identify. States have to create a “WE” which includes the diversity and does not exclude but even foster the smaller “we” of their different communities. Multiple loyalties should become the general rule. States oppressing such multiple loyalties will radicalize their ethnic conflicts.

Who should govern whom?

Who ever is looking for instruments which could rationalize emotional conflicts, can not afford to investigate only the classical instruments of the so called “good

governance". In particular states with multicultural societies will have to find legitimate solutions for the following problem: Who should govern over whom; in what instances minorities can decide autonomously; when and how should they participate in the decision making process of the majority; who should decide in what procedure, how the power of the state should be distributed, arranged and how decision making processes should be arranged (*pouvoir constituant*)? Until now states have developed several instruments in order to meet the demands of multiculturalism. Who ever wants to seek or arrange such instruments needs to know, which pre-conditions and causes have to be realized in order to hold or bring a multicultural society together.

a) Politics and Tolerance

Trust and Tolerance

The most important pre-condition of a state aiming to hold different communities together is the tolerance among those different communities in particular with regard to the majority. Indeed each community must be convinced that democratic decisions made in accordance of the constitution and supported by other communities will not endanger the own community. On the other hand any community must be prepared that it does not misuse democratic decisions in order to violate essential interests of other communities. Each decision having an impact on the overall communities must be acceptable for the loosing minority. The loosing minority must be able to accept it as in the public interest of everybody. This condition of tolerance in democracy must be expanded to all decisions having an impact on the different communities. With regard to decisions which can not be entrusted to the majority, the competences must be devolved to the different communities for an autonomous decision making process.

Guarantee of Human Dignity as Minimal Standard

States can thus try to gain legitimacy of the power of the ethnic majority with regard to ethnic minorities by constitutional tools of tolerance, which would enable them to bring different communities together. However one has to be aware that those who are (but nonetheless) tolerated will never feel to be fully integrated into the community. On the other side tolerance provides the minimal standard human beings belonging to minority communities may rightly claim from the majority as indispensable for the protection of their human dignity. Mutual respect is a minimal claim. Without implementing this minimal claim a peaceful coexistence within a state is not possible. Who is tolerated can at least survive as individual in a community without being discriminated. As member of a but only tolerated ethnic, religious or linguistic community human beings however will still feel downgraded as second class citizens.

As far as such tolerance is integrated into the legal order of a state, it guarantees individual human rights on equal footing colour-blind and not looking at the race, religion or language with regard to all individuals. Tolerance requires a compre-

hensive guarantee of human rights on the bases of equality of all human beings living in the respective state. Who ever belongs to a minority can not be discriminated as individual because of his/her race, language, religion or gender.

Tolerated Guests

However those who are only tolerated will never feel as being part of the "We" as fundamental bases for the political legitimacy of the state. For this reason one not reasonably expect to call in solidarity from the majority with regard to tolerated minorities. Tolerated minorities consider themselves not to part of a more or less generous host-state. They can not influence the political strategy of the country. Diversity which has to be respected is not seen as an integral part that is as the phenotype of the country. It is rather considered as a burden and as an asset. Minority protection has to be guaranteed as it is part of the human rights obligation and of universal values. Diversity however can not be internalised, if the state is not prepared furthermore of the status of tolerance and individual protection of minorities to grant and protect a collective autonomy.

Affirmative Action

In order to guarantee tolerance as minimal standard, each state has to protect the human dignity as universal value and as a general right subsidiary to all other human rights. The states however can not protect minorities by only strengthening the individual protection. They can only equalize the social and economically deteriorated chances of discriminated minorities with concrete quota regulations that is affirmative action which enable those individuals to compete with individuals of the majority on the same level. If the states support minorities, which have been discriminated for decades, e.g. with additional aid and special quotas for admission to higher education or to specific jobs or governmental position, some members of those minorities might get the possibility to work one up out of their crises. This "positive discrimination" may as counter-effect discriminate some individuals of the majority. Such discrimination the majority will have to accept, if it really will achieve that finally all citizens can compete with equal chances notwithstanding their race, religion or language.

b) Politics of reconciliation

Peace as Constitutional Goal

The preamble of the new Constitution of South Africa contains the following substantial sentence: "….adopt this Constitution as the supreme law of the Republic so as to - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;". Article 70 par. 2 and 3 of the Swiss Constitution provides: "(2) The Cantons shall decide on their official languages. In order to preserve harmony between linguistic communities, the cantons shall respect the traditional territorial distribution of languages, and shall take

indigenous linguistic minorities into account. (3) The Confederation and the Cantons shall encourage *understanding and exchange* between the linguistic communities."

Strategy of Compromise

Peace and harmony as constitutional mandate for the state may certainly be indispensable for all those state, which because of their cultural diversity are threatened by a considerable potential for conflicts. Whoever wants to bring different cultural communities peacefully together can not limit its endeavour to guarantee individual rights. He/she has to provide instruments, tools and procedures for reconciliation, restoration of harmony and rational conflict management. Compromise seen as asset and not as weakness needs to find priority in politics. Multicultural states need to develop a strategy of compromise and of procedures to find compromises as well as a philosophy for balancing to find justice also among the different ethnic communities.

Self-Determination of the Nation versus Self-determination of Ethnic Communities

Moreover one needs procedures to rationalize and even solve conflicts. Thus for instance Article 235 of the South African Constitution requires a balance between the claim of ethnic communities, which are hold together by common language, culture or historical heritage, for self-determination on one side and the right of self-determination of the entire South-African nation.

Constitution Making as Process for Reconciliation

The procedure of the South-African constitution making has convincingly revealed the importance of the constitution making process for the building up of a new nation and also civil society. The entire process has had indeed a heeling reconciliatory effect on the ethnicities split by deep hatred. Mistrust could be dismantled, trust restored, fear smoothened and hope fostered. The two-part process (pre-constitution by consensus and negotiation, final constitution with a democratic referendum) has largely contributed to this result. According to this concept first a pre-constitution has been negotiated among all important parties involved in the peace process. Then it has been formally approved by the legal but illegitimate only whit parliament. This pre-constitution included already some basic guarantees fort he protection of minorities. Based on this pre-constitution a constitutional assembly has been elected based on the general electoral system based on one person one value one vote. The final constitution has been drafted by this, which could only be altered by a qualified two-third majority. This parliament established the new final constitution. However it could only alter basic principles already enshrined in the pre-constitution by a 2/3 majority. A constitutional court was installed, which had the jurisdiction on these issues in order to protect minorities against the tyranny of the majority. The long time period from the first negotiations until to the election of a government according to the final constitution enabled the people and the public informed by the media to follow this transparent

process and to intervene in order to make all negotiators and constitution makers accountable to a more and more educated demos defending common interests. At the same time this process had a healing effect, as the focus was to find good acceptable solutions for the future and not to dig into the failures of the past. In this sense the constitution making process effectively contributed to the nation-building of the "rainbow state".

Direct Democracy

The so called semi-direct democracy in Switzerland is an additional procedure contributing to peaceful conflict-management. At first glance direct democracy appears to be majority driven and thus would not seem help reconcile majorities and minorities, to protect minorities or even to provide legitimacy for the majority. However according to the practical experience in Switzerland direct democracy has turned out to become a essential factor in order to foster peaceful settlement among different cultures and communities. The reason for this peace-making factor of direct democracy is the traditional behaviour of the voters. Indeed if the main parties and the political elite in Switzerland has not reached a consensus, the chances to get an approval in a referendum are very slim. This general mistrust of the people to the political elite forces the government and the parties to agree to compromises, which are acceptable for all important social and political forces in Switzerland. Consensus and compromise thus became a fundamental element of the entire political culture. The people, in its role as opposition compels the government by direct democracy to find and accept compromises. Moreover the thorough analyses of the turn out of the different referenda reveals, that often not the same minorities are confronted with the same majority. Overlapping contrasts such as town versus rural areas, mountain region versus lowland, languages, religions etc. result into the effect, that almost all Swiss belong at the same time to a majority as well as to a minority. Direct democracy finally has also an educational effect. Is a minority e.g. depending on special economical or social support, it will get the approval of the majority of the voters namely, when also other minorities agree. Those minorities will approve, when they also can expect that in a cases needed also the other minorities will join them. Thus direct democracy in Switzerland indirectly has contributed as important procedure, to rationalize and to temper emotional conflicts. Direct democracy has thus turned into an instrument for reconciliation and peaceful settlement of conflicts.

c) Equality of Nations and Minorities

Equality of Nations as Constitutional Goal

Democracy is in principle majority-oriented. Majorities however are not allowed to misuse their might, they should be impeded to tyrannize minorities. When states want to hold different ethnicities together, the majority will have to grant the minorities the right to be recognized as a ethnic unit on equal footing with other ethnicities including the unit of the ethnic majority. It is not enough that human be-

ings as individuals are considered to be equally as individuals with regard other persons. It is essential, that the particular individual being a member of the minority can consider itself to belong to a ethnic unit, which as collective entity belongs to a community on equal footing with all other communities of the state. Equality shall not be reduced but to an individual equality. The requirement of equality principle is only implemented if each particular human being is treated equally as particular individual as well as a member of a ethnic community which is considered as entity on equal footing with other communities.

For this reason minorities claim also the right to be treated as collective unit on equal footing with regard to the majority unit. Individual persons, which belong to a minority, are not contented to be treated equally only as individuals. They additionally demand to appear as member belonging to a community less numerous but still having equal rights as collective unit with regard to the unit of the collective majority The goal does thus not only have to be to grant every individual equal chances but to provide for each individual also to be a member of a ethnic community with equal rights as collective.

In 2001 a expert committee in charge to draft a new constitutional proposal for Serbia became famous and known with a sensational proposal, which has been considered by the Venice Commission of the Council of Europe as a model for many other states in transition of Eastern Europe. This constitutional proposal requires for example a preamble with the following content:

„*Conscious of the state tradition of the Serbian people and determined to establish the equality of all peoples living in Serbia…"*

Peace an Liberty: The Balance between Individual and Collective Rights

How does this mentioned constitutional draft implement the principle of equality of the different ethnic communities? The answer can be found in Chapter III of the draft: "*Persons belonging to a national minority shall have special rights, which they exercise individually or in community with others.*" When states with fragmented societies intend to implement the constitutional goal of equality of the peoples the will have to put into effect this mandate by granting collective rights to those communities. Collective rights can however also limit individual rights. Thus the collective right of religious liberty of a fundamentalist sect can give the power to the community to infringe within the religious liberty of its members. To what extent such collective powers may limit individual rights? In Switzerland the federal court has developed by cases consistent for more than a century, that the individual liberty of language, may be restricted for the sake of the principle of territoriality if the linguistic minority is threatened in its existence. For the protection of the survival of a threatened minority the collective territorial language right might limit individual liberty of language. Thus a romontsch speaking municipality in the canton of Grison with three official languages may prohibit public publicity of a bar in Italian (also a official language of the canton), for the protection of the minority language romonsh as official language of the municipality. Therefore if states with multicultural societies intend to keep multicultural societies together, they can not only as Hannah Arendt requires limit themselves to promote liberty and to have individual liberty as primary goal of their strategic policy. A

part from liberty they have also to achieve and promote peace among the ethnic communities, which has to be a goal with the same priority as individual liberty.

A state, which want to realize such fundamental principles, will have to implement the principle of equality of ethnic communities into constitutional rights, defendable in court proceedings by the concerned communities. Thus one can find in article 232 of the constitution of Brazil the right of the Indians, to defend their rights not only as individuals but also as ethnic community for the collective protection before the court.

However those minorities should not have the possibilities to infringe in the core of individual rights or even the human dignity of persons belonging to their community. The core of individual rights, which according to international treaties or charters can never be violated and restricted even not in cases of emergency must remain inviolable and has to be sacrosanct also with regard to collective rights.

d) Fostering Diversity

Also Minorities Must have the Chance to Identify with their Mother-State

The multicultural state can aim at holding together the society by not only considering diversity as a burden but as an asset. Then it would not only endure diversity but foster it because it enriches the society. Article 2 of the new Swiss Constitution for instance provides: "*It (the Confederation) shall promote .... and the cultural diversity of the country*".

Autonomy

How can states foster cultural diversity? The only known possibility to foster diversity is to grant the different communities not only rights and liberties but also equip them with the autonomy and the necessary competences to develop themselves according to their proper values. They will have to provide the constitutional frame in a manner, that the great bulk of the people of the communities can identify with the multicultural state and that they can consider the state also as their state ("we"). For this reason men and women of this state should be able to find a common answer to the question: What is good for us as multicultural fragmented state and what is good for us as collective ethnic community.

If one can find to this essential question a legitimate answer, one can consequently also find an answer to the question: Who should govern over whom; which majorities and which minorities should under which conditions have the right to claim governmental powers or majority rights?

Indeed decentralization is a excellent instrument to grant local communities limited autonomy and thus to enable them, to exercise their limited right of self-determination. If one however decides only to decentralize, the communities have no possibility to participate on the responsibility of decisions on the level of the centre. Moreover: The degree of decentralization and often also the drawing up of the borders can be changed by simple majority. The minorities will thus still be

exposed to the majority, as they do not have a special constitutional protection enabling them to defend with legal means their autonomy restricted by the majority of the legislature.

Shared Rule

For this very reason only a balanced distribution of powers between the centre and the decentralized unites on one side and a mechanism of decision making in which different minorities are able to influence decisions of the centre and to share the central powers of twill finally bring solutions legitimate also for minorities. Such balanced regulations of autonomy and shared powers can finally only be realized by federal constitutions. Those constitutions prevent at the same time the tyranny of the minority as the tyranny of the majority legislature by providing balanced shared rule institutions and constitutional protection with constitutional review.

e) Conclusion

Take Serious Diversity

These different instruments and procedures, which enable states to bring and to hold communities together and thus to overcome fragmentation, are only possible, if the states are prepared radically to adjust their political vision. They must with regard to their political institution to diversity serious. They should neither ignore it nor should they deny, exclude or even eliminate cultural diversity from their political institutions. If they are prepared to take diversity serious, the constitution making bodies can not only settle to create constitutions, which proclaim universal values. They also have to put the much more difficult question, who should govern over whom and in what procedure should this question be decided. With regard to universal values they have in addition to ask, what is good for them in order to hold the different communities together and what can be implemented within their common state, without violating universal values.

Federalism

Federalism can be understood as a constitutional model, which would not only tolerate diversity but also foster it as an additional value, for which the multicultural state stands. Viewed from this position, federalism is to be regarded not only as an instrument to further limit governmental power but to include different communities within the branches sharing governmental power and at the same time to enable them within the limits of the overall common interest, to govern themselves and design themselves what is in their common interest. States should not only be open for universal values by excluding other cultures. They have rather to integrate different cultures all of them to be considered as a value for all citizens and all communities and thus to let them share governmental power in a way that all inhabitants and all ethnicities can participate on the common endeavour to implement peace, justice and liberty.

Federalism could so become a guarantor of the multicultural state, which does not only preserve diversity but rather foster it. Federalism becomes thus the instrument to implement the principle of diversity in unity. So everybody can assist the strategy of the state, which considers that all different cultural communities deserve to be fostered. If governments focus on fostering the diversities they are also integrated within the world order of global diversity and will be able to adjust local needs and meet effectively the emotions of their inhabitants.

B. To the Theory of Federalism and Typology of Federations and Models of Decentralization

I. Federalism: Self-Rule and Shared Rule

What is Federalism?

Federalism can be defined as the concept of state, which constitutionally implements a balance of shared and self rule. If there is only shared rule we talk on autonomy, regionalism or devolution. If autonomy is only established by legislation we are confronted with decentralization. In order to consider a state as a federal state both principles that is shared and self-rule must be realized and in general the balance and guarantees must be provided in the constitution. Some 25 States of today's world can be considered as federal. However there is probably even more diversity among the different federal states than one can observe with regard to unitary states.

Federalism is a structure of a state, in which the different political are united under a superior political entity. The powers of the centre and of the federal units are distributed in order to guarantee the whole system as such as the units to be viable, legitimate and effective. As long a there is no superior unity and where the member states remain fully sovereign, we consider the structure as a confederation. If the alliance has a legislative power based on a limited majority principle it comes close to a federal system (European Union). However as long as the basic legal fundament is still an international treaty, which can only be amended by ratification of all members it remains an alliance or a confederation.

The power of the federation and/or the federal units has to be defined and distributed by the constitution. The criteria's for the distribution of powers among the federation and its units have to observe a certain balance among the central unit and its decentralised units. The balance between federation and federal units is the institutional bases for the vertical separation of powers. This vertical separation of powers enables a additional control of the powers by a vertical system of checks and balances. On the other hand the preservation of the vertical balance is by itself the fundament of the stability of the political system.

The main goal of a federal state structure may be to provide an additional restriction and control of the federal power in the interest of a better integration. This is certainly the case for the United States and many other federal states, which have as bases for their state legitimacy based on a homogeneous nation. Federalism moreover can also aim at to legitimize the federation and at the same time to provide for the conditions, that the federal units can legitimize their proper might on a proper concept of legitimacy. The presupposes a common state, which is constructed upon multiple loyalties and which does not seek to integrate multi-

ple loyalties and diversities into the national unit, but rather to preserve and even to foster the actual diversity.

Differences between Decentralization and Federalism

Federalism is the *constitutionally* guaranteed self-rule and *constitutionally* organized shared rule of the federal units on the federal level. Decentralisation on the other hand is the self-rule or autonomy, which is only provided by legislation and which can thus be modified, amended or even abolished by simple majority of the legislature. In addition decentralization in general does not provide at all or only to a very low degree the possibility of shared rule by the federal units on the federal level. In the federation each structural modification among the federation and the federal units needs to be provided by the constitution. Since the federal units participate within the amending procedure, the distribution of powers among federation and federal units receives a higher overall legitimacy as if it would only be decided by the simple majority of the legislature. If this decision is in the hand of the legislature, the minorities are totally dependent on the majority, which can always change by simple majority even the basic rules of the content of their autonomy.

The Dynamics of the Different Forms of Government

Each state is continuously stretched between the centre and its periphery that is between centralization and decentralisation. Influenced by the economical, social and political development as well as by the international environment governments will have either to centralise or decentralise responsibilities. The increasing globalization will add new tensions between the centre and the periphery. The global watchers as the World Bank and the IMF require today that states which want to follow the guidelines for good governance include in their strategy decentralization. Thus if poor states need international grants, they are obliged at least to give enough evidence that they are decentralizing their central might. However one has also to admit that globalization limits the margins of independent governmental decisions considerably. They have to hand sovereign powers to international organisations and are forced to implement the obligations of international cooperation and the international standards by centralized decisions.

Today not only traditional nation states are federal. The international community and in particular the regional organisation such as the European Union have often a federal outlook or some federal and/or confederal characteristics. Federalism belongs not any more to the monopoly of the nation-state. Taking this international development into account one has to ask, whether a state structure with four vertical levels from the bottom of the municipality to the canton, the duration and the supranational European Union is conceivable. If sovereignty is considered as the bases, which provides legitimacy for governmental power on several but different levels, one can perfectly well think of such structure. According to such model, each of the governmental levels would then have its own original legitimacy bases for the use of its delegated powers.

What is the motor which pushes or pulls the states either to centralize or to decentralize? Which are the causes of the dynamic? On one side the dynamic is certainly determined by the human need for security, identity, self-determination and integration into its own culture, language and religion. On the other side, foreign and external influences bring the states to new decentralizing or centralizing policies. Here one can quote social security, mobility, division of labour, environment, globalization and the need for equality.

What however are the underlying political ideas and principles to the concept of federalism?

II. Philosophical and Historical Backgrounds

The three Important Philosophers of the Sixteenth and Seventeenth Century

During the last 300 years the issue which was in the centre of the philosophical debate was the secularization of the state, its separation from the pope, the establishment of popular sovereignty, which finds its expression in the notion of the Nation. These revolutionary changes which did end in dissolving the feudal state and society of the middle ages ware only possible by the establishment of a strong and independent central government. The great philosophers BODIN, HOBBES, LOCKE and ROUSSEAU were the main protagonists of these basic ideas.

BODIN explained and justified the legitimacy of the King out of the grace of God: "Car qui méprise son Prince souverain, il méprise Dieu, duquel il est l'image en terre" (Since those who disregard their prince sovereign, disregard God, of whom he is the image on the earth). With this explanation BODIN not only made the monarch a absolute and not questionable or accountably ruler for the country, he also made him independent from the church and in particular from the pope. It is clear, that such absolute and incontestable position of the Monarch does not allow any division of the sovereignty, let alone any rights of minorities. The might of the state has to remain central, undivided and absolute.

The final step towards a absolute and secularized sovereignty has been made by THOMAS HOBBES. According to HOBBES the people replaces the authority of God, and it can do it on the bases of the social contract. It legitimizes without any claim to make it accountable the might of the state as the sovereign Leviathan. HOBBES however leaves the today the most burning question open, who would belong to the people with the absolute sovereignty to assign with the social contract absolute sovereignty to the ruler. For him the people is a mere abstract notion. All human beings in this world being part of the species of the homo sapiens belong to the people. Those human beings decide and make the demand to the political might. Within which territorial border lines however those human beings can establish the association necessary for such demands to conclude a social contract as fundament for state sovereignty? Are these all Spaniards, the Basques, or the Catalans etc.? Are these the English, the Brits, the Northern Icelanders or is it the inhabitants of the entire Irish Island?

The Concept of the Mandate of the Ruler: ALTHUSIUS

ALTHUSIUS has been born in 1557, thus after BODIN but before HOBBES. He was influenced by the concept of the theology of the alliance as it has been developed by ZWINGLI and CALVIN. Both reformers go back to the Christian old Testament and invoking the early alliance between God and the people of Israel. They pretend that God did never convey absolute power to a King of the people of Israel. On the contrary the people of Israel has been entrusted political power through the alliance between God and the people. Based on this mandate the people of Israel conveyed the power to the King. According to ALTHUSIUS sovereignty does not find its basis in a King by the grace of God, but in the alliance which has been concluded by God and the people. However the people do not dispose of an unlimited and absolute sovereignty. Since sovereignty has not been created by a secular social contract, which can only be fixed by human beings a alliance between God and the people can only convey powers limited by such an alliance. Thus the alliance only conveys to the people a limited mandate that is to rule the respective territory for the wellbeing of men and woman. If this mandate is not respected and heavily violated, the people has the right to resistance.

Mandate – not Sovereignty

Since the mandate is limited and since it does not convey unaccountable powers but only tasks and competencies, the competencies entrusted by the mandate can also be divided and thus distributed to different bodies. Therefore it can be divided between authorities on local, provincial and empire level. Thus ALTHUSIUS develops a concept according to which municipalities, provinces and also the empire are given specific mandates different from each other to authorities in order to rule and administer for the wellbeing of the people of their respective territories. The empire turns into a structured empire, which does not dispose on any level of absolute powers and which distributes the limited powers among the central and local authorities. This concept of ALTHUSIUS is compared with the social contract concept more flexible, urgently needed in the actual situation. Thus it takes into account the different needs of the dynamic of globalisation and localisation. Moreover it contains for itself a dynamic model of legitimacy, as it enables the foundation of a stated structured by vertical distribution of powers from the bottom of the municipalities up to provinces and even to international regional and supranational organisations.

Finally the starting point of the concept rooted in the alliance theology meets also the actual demands for democratic governance, since it does entrust the people and not the ruler with the basic mandates. ALTHUSIUS builds upon the right of the people, as only the people can convey the mandate to be governed. Finally it is not nationalistic, as the right and obligation to rule, requires the holder of the entrusted mandate to treat all entrusted human beings equally. The legitimacy to rule is not derived out of the ethnic nation, but out of a limited and assigned mandate. Since the people can never achieve absolute sovereignty, the fiction of an imagined unity of the people or of an ethnic community can not be interested to gain the absolute monopoly of sovereignty and based on it the legitimacy for a unlim-

ited self-determination in order to create a new state, as this state will not have the legitimacy to exclude from its politics other communities.

The Influence of the two Revolutions: United States and France

Both democratic revolutions at the end of the 18th century have led to two totally different democratic governmental systems: The founding fathers of the United States have founded with their constitution a new Union with a federal structure. The goal of the new governmental system was, to strengthen the already existing democratic and republican elements of the civil society and to secede from the colonial ruler. On the other hand the French Revolution over through a hierarchical feudal system and replaced it with a centralistic unitary republican-democratic state, committed to the declaration of Human Rights promising liberty, equality and fraternity.

The French Revolution installed the "assemblée nationale" as the supreme legislature with absolute and centralistic competences. This new absolutism is somehow reflected in article 6 of the constitution of 1795: „La loi est la volonté générale, exprimée par la majorité ou des citoyens ou de leurs représentants". (The Legislation is the general will, expressed by the majority of the citizens or their representatives).

The French Revolution has thus abolished the former validity of the law within the reason and it has established the basis for the legitimacy of an absolute and power of the unaccountable authority: the Legislature whose decisions can never be questioned.

Indeed such absolutism can only stand up, if it denies any claim to local autonomy and decentralization. Only on the basis of centralized competences the concept of an absolute sovereignty undividable in the interior and unaccountable in the international community can be maintained. The assemble of the installed parliament becomes the only united, legitimate and recognised source of Law and Justice.

Contrary to the French Revolution the American Revolution was not intended a part from the installing of a new governmental system also to change the society. The new state with its republican government was rather conceived to serve the actual system. It is for this reason, that the founding fathers have been primarily interested to found a new state but with limited powers. Consequently they did not only seek to divide the powers horizontally but also vertically. A federal system thus was within the direct revolutionary interest, that is to limit the constitutional government.

III. Federalism and Decentralization as Modern Concept for Democratic Governance

Globalisation

The decentralization of federal but also of unitary states has turned into a appropriate and effective instrument of modern governance because by decentralization

many problems in today's globalized world can be solved in a more plain and more efficient way.

One can not oversee however, that with decentralization democracy and even autonomy of local bodies are not always strengthened. Decentralization may also lead to more privileges of local rulers and clans. As long a those rulers or clans can rule without transparency and accountability decentralization in the end will damage the idea of democratisation. Decentralized states can on the other hand much quicker, easier adapt to new situations and needs. Decentralized units are in general much more flexible than the centre of a unitary state. In addition the centre of a decentralized state is often able to take over successful experiments of decentralised units. It can base its innovations on the experiences of the decentralized units.

The complex networks of today's structured global world enable decentralized units in addition to connect by international co-operation with other units and thus increase their competences and means with a better network. Federal and/or decentralized units thus can increase substantially their autonomy by trans-national and regional co-operation.

Claims of Minorities

Linguistic, religious and cultural minorities claim in specific domains such as education, cultural activities and religion a certain autonomy, right to administer their proper affairs themselves and to be able within the limits of the overall state to organize according to their proper tradition and culture. They demand, that in addition their problems are treated by representatives, which belong to their community. Minorities require economical support of their region. They want to be able to co-operate with their kin culture of other states and to have friendly neighbouring relations with those states in order to exchange cultural performances and endeavours of each other culture. In particular minorities require that in they can foster and develop their identity within a state of a majority belonging to other culture. They want to live their way of live, maintain and develop their culture. For this reason they claim institutional guarantees, which allow them to influence the decisions making process of the legislature, the executive and the judiciary.

Often Minorities are settled within clear defined territorial border-lines. In these cases the states can to a great extent take into account their demands by way of territorial federalism. However even in these cases there will always be territories and in particular cities, which are inhabited by different cultures and minorities. In Brussels e.g. where as well the Netherlands speaking Flemish have been living for a long time and French Walloons population have settled more recently there is no territorial separation possible. In such cases the claims of cultural communities cannot be taken care of by territorial decentralization. In such cases one can only meet the demands by devolving certain powers to collective groups formed by the members of the respective language or culture. Solutions will have to be found along personal federalism and/or group rights. We can find examples of such solutions within the constitution of the Lebanon, where religious communities rather then territories are represented in the legislature.

Personal Federalism

Such constitutional solutions based on personal federalism European states were always very cautious to implement. In the Middle East however they have a long tradition, which can be traced to the Millet-System of the Ottoman Empire and which has its roots even in the Qumran, which requires that the autonomy of different religious communities should be respected. As already mentioned also the Old Testament and the Talmud and Torah are based on a alliance theology giving certain autonomy to the different tribes of the old people of Israel. According to the Millet-system the different communities could foster their proper culture and religion autonomously, although being under the supremacy to the Sultan as a ruler in the Ottoman system. IBN KHALDUN, the great philosopher of the Arab middle age was of the opinion, that the Sultan should organise hold together its polity by providing strong autonomy of the different communities. Facing increasing minority conflicts in these areas, this form of personal federalism might be in the future of considerable interest in order to provide for conflict management tools.

IV. Answer to the Problems of the Excommunist Countries

Federalism as Pretext

After the fall of the former socialist federations (Sowjet Union, Yugoslavia and Czechoslovakia) in Eastern Europe it may sound daring, to speak in favour of federalism and to postulate, that these societies finally will only be able to solve their interethnic conflicts and the brutal nationalism finally only on the basis of a federal co-operation. These countries have been, as we have already seen, Para-states or fictive states under the communist party and its general secretary as the real ruler. The people's and their states have been ruled by one party, which pretended, that its capricious despotism would be in the interest of the volonté générale.

Federal States Serving the Interests of the Party

The transition to a new constitutional state based on the rule of law from a system ruled by the parties to a pluralistic democratic system was much more difficult for populations living in former federal and communist countries then for those states, which only had to set up a new political system within uncontested border-lines and uncontested legitimacy of the state-territory and state-unit.

Once the people have been freed from the yoke of communism in particular the minority communities rejected not only communism but also the legitimacy of the state as such having been ruled by the despotic party and considered as a colonial power. Thus they claimed to fill the vacuum as a result of the imploding power of communism not only with a new governmental system but with new territories corresponding to their history, tradition, culture, religion and/or language. The disappearing legitimacy of the party could only be replaced by a new legitimacy of the nation, providing legitimacy for a new state with historic but new border lines.

Each Nation has a Legitimate Claim to its own State

Initially the communist regime over multiethnic societies has been legitimised by the principle of equality of the nations. A regards content this claim to equality either meant the right of each nation to have its own state or the right of the nations to membership on equal footing within a just federation. Although equality has been proclaimed in the constitution it could legally not be transposed and implemented. The conversion of the principle of equality into reality remained within the powers of the ruling party, which had to solve contradictory interests among the different nations. The perception of the nation was not – as in democratic societies – to conceive itself as a unity in the political sense, which should be able to implement independence, equality and democratic pluralism. The self-conception of the nation was rather to be a totalitarian collectivistic unit superimposed to the individual which is hold together by the three principles one people, one state, one ruler. For this reason nobody did really ever question the political inequality of several individuals belonging to minorities. Nationalism in these countries therefore is nothing but the final and last phase of collectivist communism.

Nationalism Replaces the Legitimacy of the Party

Has the legitimacy of the communist party once imploded, the power-holders of the party were seeking a new legitimacy in order to justify their despotic regime. They found this legitimacy within the national interests, which are recognized as universal value. In order to remain in power they instrumented ethnic conflicts and stirred up ethnic conflicts by radicalising and building on the friend-enemy conception for their proper purpose. Without the substructure of the civil society they gave the state an external democratic shape. From now on they pleaded only for their ethnic interests, and promoted a strategy based on ethnic or ethnicised symbols: The very value of the ethnic identity was misused it had to hide the really hidden ethnic interest that is to maintain and strengthen the power of the ruler. One has to be aware as long as those federations have been ruled by the communist party they were never federations in the real sense. Real federalism can only be realized within a legitimate democratic constitution and rule of law oriented society.

V. Peaceful Conflict Solution

Federalism Fosters International Co-operation

In the long range a "European House" will only be established by a democratic and federal system. Democracy however can only be developed in a pluralistic society, which distinguishes between the political, economical and social forces and which is institutionally divided into different cultural linguistic and religious communities. Only if those conditions are provided the citizens can effectively participate within the decision making process.

The concept of federalism is based on the self-conception of the sovereignty of the people, which allows the distribution and division of sovereignty on several levels of government. Understood in this way the sovereignty can be entrusted as will to internal bodies as to external bodies. Federalism is the state structure, which is does not question sovereignty, when it entrusts part of its sovereignty either to internal or international bodies or organizations.

Internally federations dispose of a much more flexible structure than unitary states. This structure allows certainly international and regional co-operation, which it even does promote. Federal unites often dispose of specific external competences which do allow the to generate by their proper structures international co-operation.

Inner-state Conflicts

Arises a inner-state conflict, federal states often have at their disposal several different procedures in order to adapt their structures to the conflict. They even can found new federal units and thus re-establish the federal balance (The Tamil State in India, the Canton of Jura in Switzerland). They can also increase the autonomy by strengthening decentralisation or even provide asymmetric autonomy of certain units in order to neutralize the conflict (Russian Federation). Thanks to the federal structure this dynamic is possible as part of the proper system, because the decentralized units are already existing, thus decentralization has only to be adapted to the new situation. As federal units have already gained original legitimacy with regard to their demos, they are also able, to set up proper political structure in order to meet internal challenges for decentralization and/or centralization. Also the constitutions of the federal units can provide their proper checks and balances and entrust sovereignty to the three branches of government.

If a conflict can not be solved democratically federations should be able to find a compromise based on negotiations. Negotiations which lead to compromise solutions should be possible in particular in federal states, because federalism fosters a political culture as an essential element of federal politic. Compromise legitimises the federation, which as such is already the result of a compromise.

The federation is installed upon the principle of self-determination of its demos as well as the people's of the federal units. The clear political will of a federal unit or of its people has to be respected and thus taken into account, if it is the result of really democratic and fair procedure with equal chances of all parties. Federal states are not satisfied by the implementation of a mere minimal standard for minorities. They also enable minorities to structure themselves into territorial units and to participate in the decision-making process on the federal level in order to maintain, develop and foster their proper identity. People belonging to minorities thus are not only protected by individual rights but also by their collective autonomy.

VI. Increase efficiency of the management of public agencies

Parallelism of Power and Responsibility

The actual structures of the public administration have developed into a threatening complexity of clumsy, non-transparent, inefficient, anonymous and non flexible bodies. This impersonal structure of administration turns out to become really centralistic. Although internet makes information easy available the centralistic bureaucracy is not prepared to inform itself on the real needs and problems of decentralized units and the people administered by those units. Whoever in the centre is able to use power, often does not dispose of the needed similar responsibility and thus accountability. He/she has the power to decide for the fate of persons, for whom he/she has no direct responsibility. Decisions have an impact on human beings, which are in no connection to the centre. The concerned have no possibility to react efficiently and to make the decision maker responsible for the consequence of the decision. Often the central bureaucracy has not to bear the consequences of an inappropriate decision, which have to be bearded by the decentralized units. The results of bad politics have often to be carried by the local bodies.

Transparent Flow of Information

Federal and decentralized systems make information on the level of the local decentralised unit easier. Local bodies are closer to the people. If the citizens of local units decide on election, income and expenditure of their local authorities, they have direct impact on their behaviour. Thus local authorities are able to decide based on better information with regard to the consequences of their decision. At the same time they are directly accountable to the people for failures and injustices. Problems will be recognised and solved faster. The authorities elected by the local population or by local parliaments will have to react rapidly and effectively to demands and complaints of their voters. Within their autonomy they to not have to take into account contradictory interests of other regions. They can decide on a local public interest, because the decentralized structure respects local interests designed by the local authorities. Their quick reaction will be accepted by the population because is meets its demands.

Competition

If decentralized units dispose also of financial autonomy with regard to expenditures and income (local taxes), which enables them to provide for the means necessary to finance the development of the local unit within the local interest, competition will provide for incentives between the different local units. Based on these incentives in particular the federal units will seek to provide attractive cost-effective performances. It is obvious though, that such competition will only have positive effect on the whole federal or decentralized unitary state, if it is supplemented by the indispensable solidarity among the different decentralized units.

Creativity

Federal governmental systems may have a more complex and longer lasting decision making process on the federal level than unitary states. Still they perform their task more effective and efficient because the chances that their decisions are accepted and thus respected by the population are higher. They may need some time to prepare the decisions which must find a comprehensive consensus, however after the decision is made it will not disturb the social and ethnic peace of the state. Energies have to be invested in the decision making process. After the decision much less energies will be lost by a difficult implementation process. They can be easily realized, because decisions and their consequences are accepted by the people. The government by consensus is best implemented in a federal and democratic system. In addition central decisions are usually more effective because they will have to be implemented by the local authorities close to the people.

Rigid central decisions will not find the consensus. Central decisions will only find the necessary consensus if they take local autonomy and the necessary flexibility of different implementation of different local bodies into account. Thus within the necessary margins, they imply flexibility and creativity of local bodies implementing the central strategy. From this point of view they permit innovation, because it is easier to experiment in a small circle that on a large non transparent scale. Local areas can learn from neighbour regions and based on their experiences improve develop their own solutions. If experiments fail damages can be quicker eliminated or improved then on the central level of the entire country. On the central level one would have to get a big administration to move and to improve its own failures. Local bodies are easier teachable then central bureaucracies.

Globalization

In the face of the increasing international insecurity and the limited possibilities available for nation-states to eliminate the negative effects of globalisation, the need of the uncertain human beings to flee into the identity and some times fictive security of their local home-land is continuously growing. It may well be, that nation-states will feel necessary to grip to authoritarian means of government, in order to rule over the social unrest caused by globalisation. After 9/11 they have already initiated substantial restrictions of individual liberty in order to fight against terrorism. In federal states decentralized structures may impede to a certain degree the development of authoritarian systems and regimes and this in particular thanks to the vertical separation of powers and the local responsibility of the authorities. With this they contribute with their part to the inner peace and harmony.

C. Comparing Systems of Federalisms and Decentralization

I. What is Federalism?

Decentralisation, Devolution, Federalism

There is no unitary state, which does not delegate devolve certain tasks to decentralised units. Each unitary state is somehow composed out of local units, which have to take care of certain tasks. If the state devolves to certain territorial units important budgetary powers and if it provides strong autonomy for local decision making bodies (legislatures parliaments etc.) one calls the decentralisation devolution as the devolution of powers to Scotland, Wales, Greenland etc. On the continent also this territorial devolution is called decentralisation if it is based on a legislative decision. In the French administrative law a decentralisation which is based on an executive decision and has no legislative bases is called "déconcentration". What does distinguish decentralisation or devolution of unitary states from federal systems? In fact one can distinguish between decentralisation or devolution, "déconcentration" and federalism with strong local autonomy.

With the French word déconcentration one labels a delegation of tasks made by central authorities with directives they can any time change. With déconcentration a authority gives the directive to a lower body to execute some tasks without having a proper responsibility. When a decision of a lower authority based on déconcentration is delegated the higher authority can review it on any grounds if it considers it to be inappropriate. Any directive of the higher authority can revoke the delegation any time. The responsibility for taking the decision and the content of the decision remains on the level of the higher authority. Lower authorities are only mandated to execute and to follow the directives of the higher authority. In case they can be disciplined by the higher authority if they do not fulfil the mandate according to the directives.

Decentralisation is the delegation of legislative and executive powers to a lower body. If this lower body is defined by a territorial unit, one can also call it devolution. Contrary to déconcentration in cases of decentralisation the delegation is made by the legislature and it contains not only legislative but also budgetary and executive responsibilities. In addition decentralisation or devolution does not only mandate to execute some specific tasks. It also delegates the responsibility to the lower territorial body, which is asked to decide on its powers, if it considers it to be necessary out of public interest.

Decentralisation or devolution is the technique of the unitary state to provide either asymmetric or general autonomy for its regions. As the decentralisation can

either be enlarged or restricted by the simple legislature, the parliamentary majority of the ruling party can always modify the system. With regard to the expenditures the main responsibility remains on the central level. There may be delegated some budgetary powers, but those powers are linked to the grants and contributions of the central unitary state.

On the other hand decentralised unites have direct responsibility with regard to the population living within their area.

Die dezentralisierten Einheiten sind aber ihrer Bevölkerung gegenüber für den – im Rahmen des Ermessens zweckmäßigen Vollzug ihrer „Autonomie“ – politisch verantwortlich. Die Implementierung dieser politischen Verantwortlichkeit ist für die dezentralisierten Einheiten aber von ausschlaggebender Bedeutung. Je transparenter die Behörden in die demokratische Verantwortlichkeit ihrer Einheiten eingebettet sind, desto wirksamer ist die Delegation und desto besser lässt sich damit die Gefahr eines undemokratischen Elitismus verhindern. Die Delegation hat aber keine Staats- und Verfassungsqualität. Die Wahrnehmung dezentralisierter Aufgaben ist lediglich durch den Gesetzgeber des Zentralstaates delegierte Verantwortlichkeit.

Comparing to federalism decentralization is only decided by the legislature and can thus be revoked on a majority of the legislature. Federalism is a constitutionally guaranteed decentralisation. In addition federalism also provides for a shared rule system. Federal unites not only enjoy legislative, budgetary and jurisdictional autonomy, they also participate in the decision making process on the federal level. This shared rule principle is at least provided for the constitution making or amending process. For this reason revocation of federal autonomy needs in general a constitutional amendment. Minorities and smaller unites are better protected in federal systems than in decentralised systems. They do not only depend on the majority of the legislature, they are also integrated into the constitution making process.

In federal states there is no delegation of tasks to the federal units. The federal stat is only responsible to execute its own tasks determined by the constitution. Other powers which are not designed to the federal state by the constitution are to be taken care of by the federal units. They decide on the priorities of the tasks they will implement according to their responsibility. A part from this independent competences in particular the federal states founded within the tradition of the civil law system often are obliged also to execute some or most of the federal tasks on the legislative and/or on the administrative level. This delegated task to implement still empowers the federal units to determine the way of implementation and in particular the inner decentralisation to local authorities according to their own interests and tradition. Often those federal units of the member states of the EU with regard to EU directives still bear the financial burden of the execution. In addition they are politically responsible with regard to their proper sovereign of parliament for implementing delegated federal responsibilities.

Autonomy

Federal units of federal systems dispose of their original autonomy or residuary power, which is not designed and protected only by statutes but by the constitu-

tion. The modification of the distribution of powers can not only be decided by the majority of the legislature. It is only by constitution making that new powers can be taken a way from one level and entrusted either to the federation or to the federal units. As in general constitutional amendments on the federal level need a higher consensus than legislative decisions, minorities are thus better protected within their autonomy than in systems with decentralisation only provided by law. Autonomy in fact reaches a higher quality. It is in fact partial sovereignty and implemented by the three governmental branches of the federal unit, the executive, the legislative and the judicial branch. Implementing legislation of the federal units depends again in most cases on the proper constitution of the federal units themselves. Local authorities are accountable for their implementation of the legislation of the federal units not to the federation but to their proper federal unit. It is by the constitution of the federal unit, that the inner system of decentralisation and of the autonomy of local authorities is designed.

Participation

In addition to their autonomy the federal units also participate in the decision making process of their federations. In fact they are part of the consensus needed to determine the volonté générale of the federation. It is not only the simple majority of the centre, which decides on the fate of the federation. In particular the smaller federal units may have equal rights in participating with regard to bigger units unconsidered of the size of their population or territory. Thus they hive proportionally a higher voting impact compared to the bigger units with. The principle of equality of the sovereignty of small and big units can be applied unconditionally to all units (US and Switzerland) or with some adjustments to the very big and very small units (Germany and Austria)

Residual Power

Federalism is the constitutional balance of self-rule and shared rule of federal units and the governmental branches of the centre. If a federation is founded top-bottom (by decentralisation) as in Belgium and not bottom up as in the US or in Switzerland the central state does in fact not delegation competences to the lower units, it just abstains to implement its sovereign power and it leaves it to the federal units to regulate within their constitution certain tasks. In fact by doing this within the constitution the federal units receive by de facto decentralization some new residual powers. It however the federation as been installed bottom up the residual power will remain within the partial sovereignty of the federal units.

Size of the Autonomy

Who determines the size and the scale of the autonomy, will have to be sure on how much competences will have to be left to the decentralized units, who will in future have to decide in what procedure on further centralization or decentralization and finally what should be the “quality” of autonomy given to the federal units. Will the federal units only have the competence to look for tasks, which are any way financed by the central unit or will they also be obliged to finance those

tasks? How can the authorities of federal units be made accountable with regard to their representatives or with regard to central authorities? Which should be the supervising authority and power of the central state? Whoever can answer those questions clearly knows the size, scale and quality of the autonomy given to the federal units in the respective federation.

Financial Competences

The degree of decentralization can not only be measured by the distribution of legislative competences. One can not only impose the responsibility to the local authorities to look for the health of their population. In order to empower the authority to take this responsibility, it will have to decide by law, which tasks with regard to health care should be of private or of public matter. In addition it will have to dispose also of the necessary financial as well a men-power means to implement and to apply the law. It will have to be able to construct and install hospitals, to educate the medical personal and to guarantee its professional training. Further it has to control the quality of doctors and must have the power to provide also preventive measures.

Distribution of Powers among the Branches of the Central Government

It is self-evident, that the assessment of the quality of decentralization is somehow also dependent on the distribution of powers within the centre. If the governmental branches of the centre have a balanced distribution of power and if those branches are in a equilibrium based on each others checks, the autonomy of local unites will have much better constitutional guarantees than in system which privileges for instance the head of the state with even legislative powers as is actually the case in the Russian Federation.

Legal Culture

Decentralization is finally also dependent on the legal culture and on the history of the state, its constitution and its legal system. The decentralization in states with common law tradition has to be distinguished from the decentralization of states, with clear separation of public and private law. In civil law systems almost everything is regulated by legislation. The distribution of legislative competences between the centre and the federal units is thus the decisive indicator for the assessment of the autonomy of the federal units. In common law federations however the decentralisation of the judiciary and the jurisdiction of the courts is of much higher importance. In the USA e.g. criminal law and criminal procedure as well as the traditional contract law and family law has remained within the competence of the traditional common law courts. Since the courts of the states exercise jurisdiction as federal units and since they are the actual successors of the British Common Law courts they did keep the traditional jurisdiction of the common law courts of the former colonial power.

Hierarchy and Pyramid of the Legal System in States with Civil Law Tradition

According to the concept of the legal system on the continent, the legal system represents a unitary unit without any contradictions within the system. Contradictions however can only be excluded by a principle hierarchy and priority of certain law. Thus the idea of the legal order is based on the idea of a pyramid, in which - in order to maintain the unity of the system - higher laws will always be better and therefore superior to lower law. As a logical consequence federations within a civil law system will be much more inclined to a federalism, which provides the implementation and execution of federal laws by the federal units. In such system the federal law will upheld its priority and the federal units as inferior are only required to implement the higher law. This of course does not exclude some legal original competences on the level of the federal units.

It is obvious that in such federal systems the jurisdiction of the courts of the federal units will also be integrated into the system. Thus federal legislation will always be implemented by courts of federal units and the federal courts will have to guarantee the unity and conformity of the lower court decisions on the higher federal level.

Municipalities in Common Law and Continental Law Tradition

The Common Law is a legal system which is historically marked and somehow still today is labelled by a high diversity of different courts with different jurisdiction whereby each court is deciding according to its proper precedents. But also local authorities exercise e.g. with regard to their police-powers traditionally tasks given originally to the police, without formal legislative delegation.

The system of municipalities on the continent on the other hand has been regulated differently by Napoleon. According to the concept of Napoleon the local private corporations of farmers should be made real agents of the central state. The state authority should thus be able to delegate public powers to those agents. Insofar thus communes did execute public tasks in the French state, they always did it based on delegation and mandate of the central state. This is the very reason one has basically to distinguish between decentralisation in Common Law and in Civil Law traditions.

Local Law Enforcement

Finally one has to consider, that the law enforcement of decentralized unites is guaranteed according to the French tradition by the power of the central authorities to issue directives and to punish local authorities violating those directives with disciplinary measures. In the British legal system already very early the writ of mandamus has been introduced. With this writ the central authorities could summon the local authorities to the court and thus enforce with the power of the court the legal requirements made by central authorities. One has however to note, that in centralized unitary France the central government according to the new system of decentralization can enforce local decisions only by court decisions and in principle not any more by disciplinary measures.

According to the old British tradition is finally also possible to empower local authorities with a decision of Westminster to issue local so called "Bylaws". Local unites do not have an original or even residual power to legislate. However the parliament can delegate to those units to issue bylaws. Of course the parliament keeps the power always to take away those powers from the local authorities.

Competition between Federal Units and Federations

The distribution among the powers of the federation and the federal units can as one can imagine be very different from federation to federation. In the USA Federation the state power is not only divided vertically but also horizontally among the branches of Government on the federal but also on the level of the federal units. The federation implements in principle its own legislation with federal agencies and disposes for the law enforcement of federal affairs also of proper federal courts. Federal units on the other side are originally accountable for the enforcement of their proper legislation. The consequence for this dual law enforcement of course is, that there are on the level of the police e.g. two agencies responsible to enforce federal and the other responsible to enforce state law.

This parallel competences and responsibilities of state and federal police can lead to unforeseen conflicts of competences of both authorities. As the federation implies federal statutes with federal agencies, citizens are also often confronted either with federal or with state agencies. It will be difficult for them to appreciate, that federal servants will act according to federal law and state agents according to state law.

II. Competences and Authorities

a) The Constitution Making Power (pouvoir constituant) and rhe Constituted Authority Representing the People

Considering the constitution making power, one has to distinguish among the very power constitutant that is the authority which has originally made the constitution and the state on one side, and on the other side with the constituted power, that is the authority, which has been installed by the constitution to amend and modify the Constitution. The theory of SIEYES who has invented the idea of the pouvoir constitutant is finally based on the idea that the highest authority with revolutionary powers is based on its factual political power the absolute sovereign, which can enforce final and total obedience. The constitution has its roots original legitimacy within the pouvoir constituent, and it is the Constitution, which devides who in what procedure can amend the Constitution, which once and for ever has been finally adopted as the result of the revolution. The pouvoir constitutiant uses in most cases it charismatic power, which it has achieved out of the revolution or of the violent coup d'Etat. Out of this charismatic legitimacy it develops its rational and legal legitimacy.

Pouvoir constituant

It is obvious, that the theory of the pouvoir constituent is in open contradiction to the fundamental idea of federalism. Federalism provides by its basic concept a division of powers and sovereignty among different state unites. If on the other hand one would accept the theory of the pouvoir constituent one would have logically to depart from the idea, that each federation as been established originally by a revolutionary act and that the federal unites should finally derivate their proper competences also from this centralized revolution. Such thinking however doe not correspond to the reality. Even after the civil wars in Switzerland the body representing the sovereignty of all sovereign cantons in 1847 in Switzerland had to face the reality of a multicultural society. For this very reason it could not impose on the reality of the Swiss multicultural diversity a centralised concept of a unitary state. The founding Fathers although using some revolutionary powers after they did win the war on the secessionist cantons had still to be prepared for compromise in order to establish a sustainable constitutional order among protestant and catholic cantons with different cultural and linguistic background. Of course their understanding was based on a somehow revolutionary power, because only based on such a concept, they could consider them to have the power to abolish by majority the former treaty among the cantons providing unanimity for any amendment. And even the proposal, that the constitution will become valid if it is approved only by the majority of the people and the cantons was somehow revolutionary and not at all based on any legality power. The actual stalemate of the European Constitution rejected by some important members shows that even a small minority can in a non revolutionary environment impede a constitution making process.

And indeed the question, how a real federal constitution could be established by and for the member states of the European Union, remains an open and unsolved question. According to the theory of the pouvoir constituant the precondition for the establishment of a real constitution would be the existence of a Demos, which can provide the legitimacy for a constitution making power. In reality notwithstanding the concept of a European citizens Europe is composed of different European people's and sovereign states. Do we have to draw from this the consequence, that one would have first to establish the Demos and could only then adopt a European Constitution?

The history of federation teaches us, that a gradual construction based primarily on the sovereignty of the member states to a confederation and then to a federation is by all means thinkable and appropriate. The constitution making power in federal states is itself composed of different people's. Thus the constitution approved by the convention in the United States could only enter into force after it has been ratified by nine of the states participating in the convention. But it had only force for the ratifying states. The others could only become new federal units by ratifying on their own the new constitution.

A part from the European Constitution we are also contemporary witnesses of other constitution making powers of other federal states. The Constitution of Bosnia has been drafted at the American military bases in Dayton in cooperation of the Warlords and then finally signed with the participation of the international

community. The United Nations are mediating since years among the Greek and the Turkish Cypriotes in order to establish a new Constitution for Cyprus. The constitutional proposal called the Anan Plan has been rejected by an overwhelming majority of the Greek Cypriots and approved by a big majority of the Turkish Cypriots. One of the reason for this important gap between the two societies may certainly also be seen in the procedure of the "pouvoir constituent". Can indeed a constitution be drafted by diplomatic negotiations without taking into account, that a constitution can only be adopted by a divided society if the procedure as such includes a nation building process? Unfortunately there was no space at all for a somehow democratic engagement of the Demos within the constitution making process.

If a federal system is developed by decentralization out of a unitary state as it has been the case recently in Belgium (the seventies of the 20eth century) or may be soon in the UK for Scotland the original demos as the legitimate constitution making power is certainly not questioned at all. The new federal constitution however creates itself besides the one and unitary Demos additional different people's or demoi, which will be asked in future to share the constitution making power on the federal level.

Constituted Powers

Once the federation is established, the question will arise according to what procedure and with what competences the new constitution can be amended. Which governmental body should be and in what procedure it should be competent to amend the Constitution? To what extent the federal units should participate in the decision making process? Should the majority of the federal units have more weight in the decision or should the majority of the voters of the entire people be given priority? Should the federal units be given equal opportunities notwithstanding size of population and/or territory? Should the procedure for constitutional amendments be more difficult and require higher approval than the legislative process? What should be the relationship between the constitutional court interpreting and thus also modifying the constitution and the democratic majority of the people empowered to amend the constitution? The Constitution of the USA e.g. can only be amended in most difficult process which may last over years. This formal rigidity of the constitutional provisions has had certainly a big impact on the constitutional decisions of the supreme court, which on its turn felt responsible not only to control the constitutionality but also to interpret and thus de facto often to amend the Constitution. Although since more than two hundred years very few amendments have been adopted, the content of the constitution has been adapted to new necessities and to the changing society by the Supreme Court. Indeed the real content of the US Constitution can only be analyzed by a thorough analyzes of the constitutional cases of the Supreme Court. A very similar situation can be observed on the international level. Since international treaties can only be changed and adapted by unanimity of the member states the courts empowered to interpret those treaties receives a great finally unaccountable power to adapt and change the treaty to new needs. Thus the European Court of Justice has become

the actual motor of the development of the European Union. It has now become the keeper of the holy grail of the treaties of the European Union.

b) Parliaments

Electoral System and Parliament

In the unitary state it is the lower chamber representing the entire population of the country and thus also the so called "volonté générale" of the nation. For this reason the national chamber has also the legitimacy to change and amend the constitution. The more the electoral system becomes important. It is the electoral system, which either provides a large representation of the variety of the different opinion of the people or it produces an efficient majority as the more desirable effect for the stability of the country. The UK and the USA elect their members of parliament by constituencies mandating only one elected councillor to represent the people of the constituency in London or Washington. Since only one election is taking place, even the one who has gained a relative majority of the voters can decide who is representing them in the parliament. On the other hand it is even conceivable that the borderlines of constituency are identical to the borderlines territory of the country and that the constituency as a whole elects all members of the parliament either with a majoritarian of proportional system (Israel). Many European countries have developed proportional systems or a mixture of proportional vote for the parties and majoritarian votes for personalities (Germany). In most countries the constituencies produce more than only one members of parliament; but they are smaller than the territory of the country. In federal states the constituencies coincide often with the territory of the federal units. If within those constituencies representatives are elected according to the proportional system the parties of the federation can strongly influence the choice of the candidates to be proposed for the election. And finally the parties even decide which candidates are to represent them within the parliament. According to the influence of the parties and according to the electoral system candidates may be elected, which are committed to more or less autonomy for the decentralised unites.

Thus the electoral system may have a considerable influence on the centralization or decentralization of the State. Namely if the constituencies are identical with the decentralized unites, and if the choice of the candidates is made by the local parties the elected representatives depending on their local parties may commit themselves much more for interests of their local region, than if the choice of candidates is made by the central party.

Of course one should not oversee, that the second chamber often representing somehow the federal units is in particular installed in order to defend the federal interests. This is even the case in unitary states. Thus within the French Senate the local interests are better taken care of than within the lower chamber.

Governmental System and Parliament

The governmental system in itself is finally also very influential on decentralizing or centralizing policies of the state. In a pure Westminster type cabinet the two parties fighting for the majority are interested to have a strong and rigid lead on their members in the parliament. In such a system the majority party ruled by its president, who is often at the same time the prime-minister dominates the parliament and the executive. Only with a tight leadership the party may have some chances to get re-elected in the next term of election. It is obvious that in such systems local unites may hardly bring their proper interest into the debate. If on the other hand the fate of the executive does not depend on the result of the elections as in Switzerland, local interests may have better chances to be taken into account by the national parliament.

The Power to Legislate

Who ever has the power to make the laws, decides not exclusively but mainly also on the structures of the respective country. In a unitary state, only central bodies are entitled to make laws. Without specific delegation decentralized units have no power to make laws. In the UK e.g. local units need to be specifically empowered to make so called by-laws. In federation on the other side, the competence to make laws is divided among the federation and the federal units. Within the frame of the Constitution therefore the law-making power of the federation is limited to federal competences.

In France as now also in several States in Eastern Europe the fact that the law-making power is bound to the counter-signing of the head of the state. This has certainly an additional substantially centralizing effect on the law-giver.

The Budget

The Budget is one of the most important and most traditional power of the Parliament. With the competence to decide with the budget on the expenditures the majority within the parliament disposes of very far-reaching possibilities to influence the day to day politic. By deciding on the budget, the parliament often decides also on the means to be granted to the local authorities. Therefore the central parliament decides for what local interests the decentralized units can spend public finances. With this power parliament decides on the concrete extent of the decentralization. If it grants financial means with high generosity the decentralized units may have better chance to prove one self within the frame of regional policies and to accomplish the mandates according to the expectations of local citizens. In case of refusal by the parliament the decentralized units will encounter inevitably expected critic of the population for unsatisfactory fulfilling their mandates. And thus it will again loose credibility, power and reputation.

Indirectly the parliament can also influence decentralization with the fiscal system. If it grants local authorities the power to levy local taxes, it ties the local unites to the local democracies, since local authorities will only be able to levy taxes for political purposes if they are able to convince their local taxpayers to spend more taxes for better local public services. At the same time the local repre-

sentatives will be most interested to control local expenditures paid by the local taxpayer. Without efficient systems of auditing and local accountability the danger of corruption will raise. Lacking transparency and lacking democratic accountability will lead to mismanagement of the finances available to local authorities.

c) Relationship between Parliament and Executive

Westminster Type Government versus Presidential Systems

The identity of the majority party controlling the executive and controlling the parliament has be no means a centralizing effect on the policy of the country. The majority party is interested to remain in power. Access to this power is only possible by gaining the majority of the people in the elections. In such a system minorities or local decentralized unites are hardly able to make more of their interests with regard to the central parliament. The influence of the centre of the party on its party politics is much more important in Germany for instance than in the USA of in Switzerland. In both of those countries the executive does not depend on the majority of the parliament. If in addition as it is the case in Germany the elections of the parliament of a federal unit (Landtag) turns into a hidden election of the chancellor representing the executive local interest will hardly be represented even within the local parliament. The contrary to this can be found in Switzerland where even national elections turn into hidden local battles and local interests. National elections often reflect the national interests within the local area.

Head of the State

For national Governments the position of the head of the state is an important factor with regard to centralizing or decentralizing policies. While in many countries the Head of the State has become a mere symbolic figure, the Russian president for instance embraces far reaching competences. There the constitution has entrusted the Head of the State at the same time with the powers of the American who is commander in chief and also controlling the administration and of the French President who has been empowered with even some legislative powers and with the power to decide on the emergency and to dissolve the parliament. For the time of its fixed mandate the Russian president thus embraces almost unaccounted and unlimited powers.

In federal countries following the Anglo-Saxon system the Head of the Federation often competes with the governors of the federal units. In Australia for instance the governors of the federal units still represent the crown within the federal unit. In the USA the states have installed a governmental system similar to the federal system. The governors compete as heads of the local state power with the president. With this power the federal unites achieve almost at least a symbolic equal position to the federation. The president on the other hand has important influence on federal unit policies, because he decides almost unaccounted on federal grants for local business and can influence the economic development in addition by federal contracts e.g. for military purposes.

In many states the head of the state is at the same time also commander in chief of the army. The army obviously is the most centralized body in all federal states. By its power to control the army the Head of the state can also decide on emergency powers or it can propose anti-terror legislation controlling private citizens.

These powers of the commander in Chief should never been underestimated by assessing its possibilities either to centralize of decentralize the country. By no chance Switzerland has always resisted despite its fragility in the middle of a most conflict laden Europe contrary to the US not to opt for a head of the state as commander in chief of the army, not even to think of a president with almost the similar powers to the American President. The diversity of the country and the different communities of the multicultural state which is Switzerland would never have been able to identify with the symbol of one president. It is for this reason that in Switzerland there was even no real command of the army. Only in case of war (case of armed neutrality) the army is mobilized. An only in this case the federal assembly elects a commander in chief of the army. The mandate to defend the country however is given to the general by the executive the federal Council.

Executive

In the unitary state the executive represents the interests of the nation. The "volonté générale" is symbolized within the executive. It is he executive to decide also what administrative tasks should be accomplished by what means by the local authorities. The national governing authority has also the power to steer with appropriate directives the good management of finances. In case needed, it can enforce its decisions with disciplinary measures. The delegation of the tasks mandated only with by de-concentration however can any time be revoked or strengthened. Never an executive body will have the power to delegate real responsibilities to local authorities. Such power is only given to the legislation by way of decentralization.

Judiciary

Unitary states but also federal states have installed a centralized judiciary. By this central organisation of the judiciary the competences of the different courts and the procedures and their organisation are regulated. The unified legal system should be applied by a unitary, unified and hierarchically structured organisation of the judiciary and its courts. Decisions of the lower courts can be appealed bottom up to the final highest court on the national level. Judges often are appointed by the Head of the state, which disposes of a special centralized body for the preparation and proposal for new judges. In the UK the Lord-Chancellor appoints the members of the higher courts. This again shows how intense the different powers of the governmental branches are intermixed within the office of the Lord-Chancellor. In Israel the judges are appointed by a special committee which is composed of members of parliament, the executive and the Magistrate.

By assessing the judiciary one has however to take into account, that – from the important value of the Rule of Law and of the judicial protection – decentralisation of the court system should not have such an importance. The most important

factor is the independence of the judiciary and the general access to justice, which has to be guaranteed for all human beings notwithstanding of the federal unit they are living. The decentralized judiciary in federal states may mainly be assessed from the point of view of its credibility and legitimacy.

d) Specififities of Federal States

1. Diversity of Federal Structures and of Forms of Organizations

25 Federations on Earth

If we have a chance to look at the world map today, the following states may be considered as states with a somehow federal system. In all those states the Constitution guarantees some kind of autonomy to the local federal units and provides on the constitutional level some basic shared rule competences: On the American Content Canada, the USA, St. Kitts and Nevis, Mexico, Venezuela, Brazil and Argentina have federal systems. In Eurasia we will find Australia Micronesia, Malaysia, Pakistan (Constitution for the time being suspended) and India. On the Africa Continent South Africa, Nigeria, the Comoro Islands and Ethiopia are federal. In the Middle East the Arab Emirates are federal and in Europe Belgium, Spain, Germany, Austria, Switzerland, Serbia and Montenegro, Bosnia-Herzegovina and Russia have federal or strongly decentralized constitutions. In addition the European Union can be labelled as ad federation in the making or in transition. The constitutional draft does not provide the notion of a federal system but of a Constitution for Europe. But it labels the new "State" as a Union as for instance India. If one however compares the inner structure of the constitutional draft with the constitution of Serbia and Montenegro, this new Union provides for much stronger inner coherence than Serbia and Montenegro. Authoritative is not, the label given by the constitution, authoritative is the inner structure of the state. Switzerland e.g. labels its state still as Confederation (Schweizerische Eidgenossenschaft in German) although it is a state with a undisputed federal structure. South Africa on the other side but also Spain have by purpose avoided the notion federal, which is seen in South Africa as a symbol of the apartheid and in Spain as a tool to prepare secession. The founding Fathers of the American Constitution have been disreputable for their centralism which they promoted against the con-federalists. For this reason the UK would still strongly reject the label federal for the European Union as a label, to be used only for a centralist governmental system. Who ever promotes federalism in the UK is considered as a advocate of centralism in the same way the founding fathers of the US constitution were reputed as centralistic.

States, which in the last years have strongly been decentralized on the European Continent are Italy (with even some shared rule powers of the regions on the central level), the UK and recently even France with its constitutional amendment of 2003 providing a constitutional regionalisation of the former unitary country.

Special attention should also be given to such states which are still governed as unitary states, but which provide an important asymmetric federalism for certain regions such as Hong Kong (China), the A land Islands (Finland), South-Tyrol (It-

aly), Mindanao (Philippines), Zanzibar (Tanzania) and Greenland (Denmark), which although Danish is not under the jurisdiction of the European Union from which it has seceded in 1985.

Meaning and Purpose of the Federal State

The federal structure of the United States and of Germany aims clearly to limit the governmental power of the state not only by horizontal checks and balances but in addition by a vertical separation of powers in order to control with additional tools the state powers. The purpose thus is, to increase the protection of liberty and to avoid with all possible means the misuse of governmental power. In Switzerland on the other hand federalism is not thinkable without the multicultural background. Multicultural Switzerland can exist only through, with and by federalism. The purpose of federalism therefore is not only limited to install an additional tool for separation of powers but to bring and to hold multicultural Switzerland together. The aim of Swiss federalism thus is to strengthen with the support of the federal order the federal units in order to enhance diversity. Insofar Switzerland has designed its own and specific type of federalism. Compared again to the USA and Germany, which aim with their federalism to strengthen the national unity, the Swiss federalism strengthens the national diversity. Switzerland has thus found in its federalism the new concept of a polyphonic state versus the monophonic state.

Status and Size

As we have seen, who-ever defines federalism and federations cannot limit the notion to the concept of a composed state. Federalism has to be seen as a model of a state in which the balance of the shared rule and self rule of the member states is constitutionally guaranteed. This notion of t the federation is open and allows many different designs of federalism according to culture, tradition and legal system. Indeed in today's world 40% of humanity is living in 23 federations which differ substantially in size, population, tradition and structure. From the small islands St. Kitts and Nevis to the Arab Emirates until the most populated Federation: India and from the United States of America to the federations of Latin-America up to the Russian Federation and Nigeria we find the most diverse arranged organizations of the different federations. Even in Western Europe the differences of Federalism between Belgium, Germany, Austria and Switzerland are enormous. And finally still disputed is the question, whether one can determine actually the European Union as a federation or whether strongly and asymmetrically decentralized countries such as Spain and Italy can be labelled as federations.

Moreover we one has to be aware, that states of civil law tradition as well as of common law tradition have found their way to install modern democracy in a federal structure of their constitution. Some federations such as Belgium and Canada have been developed out of a unitary centralized system, some have been constructed bottom up out of Confederations such as the US and Switzerland and in case one labels it a federation: the European Union.

Self-Rule

With regard to the local autonomy of the federal units, one can find important differences. In Austria for instance universities are ruled from the centre of the federation in Vienna, they are ruled in Germany and Switzerland in principle by the federal units. In some federations the taxing power is essentially entrusted to the federation in some the federal units could keep an important part of the whole financial cake to be taken by taxes from the citizens. In Switzerland e.g. two thirds of the income and of the expenditures is generated by the federal units including the local municipalities, while in many other federations most of the income and of the expenditures is generated by the centre. The federation of Serbia and Montenegro designed according to a proposal of the EU has even allowed the two different federal units to have its own currency and to print its own money. Disputed is often also the distribution of powers in the area of police and defence. In Switzerland the cantons are responsible to upheld public order. For this task they run their proper police agencies. In the US and in Germany a special federal police (FBI, National Guard, Bundesgrenzschutz) has to guarantee inner security within the federation. Law and Order within the federal units is to be secured by the local police.

The Arab Emirates have founded a federalism without taxes. It is the sheikh who distributes to the federal units every year the income of oil production. This federation of course is in principle ruled by the sheikhs who are running their states still in a traditional and patriarchal manner.

Besides the real federal states, several unitary states provide for a specified part of their territory large and with regard to other regions asymmetric autonomy. Thus for instance the A land Islands of Finland enjoy a status of autonomy, which is designed by the parliament of the unitary state on one side and the parliament of the autonomous islands on the other side. It can change only based on a consensus of the majority of both parliaments. Greenland though part of Denmark, but it is not part of the territory of the EU. South Tyrol has a special status in Italy, Scotland in the UK, which considers itself to be one the most traditional unitary states, which may in future be even more decentralized if not even federalized. Zanzibar as autonomous Island of Tanzania as well as different republics in Russia are profiting with regard to other areas of their country of a privileged autonomy. If we consider the special status of Catalonia, the Basque country and Galicia in Spain, we get additional ideas of asymmetric federal solutions.

Second Chamber

Big diversity can also be found with regard to the second chamber system. There are second chambers, which are installed with the purpose to represent directly the interests of their federal units and in particular of the executive bodies of those units. This is for instance the case with regard to the German Bundesrat or to a certain extent also the council of ministers in the EU. There are second Chambers of other federations, which are entrusted with the same amount of similar competences to the national or lower chamber. Often in such cases the upper chamber is composed of members representing their federal units on equal footing, each unit having notwithstanding its size the same number of representatives. Other second

chambers are composed according very different principals. In Canada for instance the members of the higher chamber are appointed by the Governor (representing the Crown). Finally there are even federations such a St. Kitts and Nevis without a second chamber.

Equality of the Federal Units

Very differently shaped is also the position of federal units with regard to the federation. As well in the USA as in Switzerland the principle of legal and sovereign equality of the federal units has been upheld. This principle could not be defeated by the other just as important principle of one person, one value, one vote. Unlike in the USA in Switzerland for historical reasons some cantons have only the status of a half canton. They have only one instead of two members in the second chamber and the popular vote for constitutional referendum counts only half a vote with regard to the other full cantons, which are counted with vote of one value. Although the US or Brazil do not provide for legal or constitutional inequalities, the factual inequality among the different economically developed federal units is considerable and has certainly even a constitutional impact on the entire federation. As already mentioned on several instances also Spain and Italy know important asymmetric solutions. Probably the most substantial asymmetry has been realized in the Russian Federation. Russia does not only provide for a different treatment of the federal units within the constitution, in some cases diversity is even enlarged by additional treaties among the Federation and some Federal units such as for instance Tatars tan. Moreover Russia labels within the constitution its federal units also in a different way according to the differences in status and autonomy, some units are called Republics, some Territories, some Regions, some autonomous regions, some autonomous territories and then finally the two cities Moscow and St. Petersburg (Art. 65 of the Constitution)

Foreign Policy

For a long time foreign policy has been considered to be of the exclusive competence of the central state. Even in strongly decentralized federations such as Switzerland, the principle was upheld: “Inner diversity, external unity”, although already the constitution of 1848 provided for some limited cantonal external competences. Developed out of the monarchical tradition the principle, that finally only the head of the state should be in a position to represent the country internationally and therefore only the Head of State should have the power to ratify international treaties and by this to impose new rights and obligations to the state he/she is representing. In substance all external policy decisions were taken away from the competence of federal units. According to international law the states are the only recognized subjects of the law of nations. Only states can be bearer of rights and obligations according to the international law and only states can proactively participate in international decision making processes.

In the actual historical period of globalized networks the need for intensive international co-operation has considerably increased and at the same time shifted from the centre of the state to all lower levels including the municipalities. This

new development had as a consequence, that constitutions of federations not any longer entrust the only and exclusive power of external affairs to the federation but more and more empower also the federal units with additional external competences. This development however should also have its effect on international law. International treaties and in particular international organisations should pay attention to the fact, that our today's international community is not any more composed of states to be represented according to the monarchical tradition by one person. Democracy has not only changed the interior of the states but also its external actors. Thus at least with regard to international court proceedings the federal units often only responsible for the implementation of certain international obligations should also be recognized the right to defend their position in international proceedings. In our interdependent world the states are not any more considered as hard and impenetrable billiard balls to be hit on the table, they are not any more islands of sovereignty drifting on the see of the international community. Borderlines have become transparent and permeable. Human beings have common cross-border interests. They constitute communities independent of territory and state policies. These new realities should be recognized by the modern international law.

New external competencies and activities of federal will be increasingly important. The development will force federations and international law to embrace these new needs and developments. And in particular with regard to these transnational developments the advantages of the internal flexibility of federations will also has its effects on the strength of federations with regard to the developing international and transnational co-operation. Without loosing prestige federations can devolve competences and can entrust the ability to act internationally to their federal units. International law and in particular the law of international organisations will be challenged by this internal dissolution and it will namely take into consideration, that federal units of federations will have to be recognized as valid actors on the international level.

2. Right to Self-Determination

Right to Unilateral Secession

During centuries the philosophers of state and law did not agree on the question, whether federal units, colonies or ethnic communities would have a right to secede based on the natural law right of self-determination of the nations. Against such unilateral right one can evoke the argument that in case of any unilateral secession not only the seceding part but also the mother-state is always affected. For this reason the concerned constituted state based on its proper right to self-determination should also be granted the similar right to share the decision on secession with the community willing to secede. The right to unilateral secession most often is invoked by minorities. In case minorities demand secession, they will be on their turn in most cases be challenged by the minorities within the minority. If Québec for instance would secede, the English speaking minority in Montreal would on its turn require minority rights and may be also secession rights with regard to the new French majority. If one follows this argument to the

end, the states will finally be destroyed by total anarchy. The other consequence could be, that minorities using their right of self-determination once they have set up their polity will expel with economic or other pressure and - if necessary even with violent ethnic cleansing - the minorities remaining on their territory in order to avoid new self-determination aspirations of those smaller communities. Ethnic cleansing has historically often been the consequence of secession.

Arguments evoking in favour of secession often point to the secession of the former British Colony, which using its right of self-determination seceded from the UK and founded the United States of America. In the declaration of independence the colonies justified their secession with tyranny of the UK exploiting the American colonies. The second line of arguments to justify the war of independence was based on the inalienable rights of the people to establish its own state and of the guarantee of the new state fully to respect those rights. In the history of the colonies of the 20th century the international community accordingly was much more favourable with regard to the acceptance of the right of self-determination of colonies with regard to their colonial masters against a general and universal right of self-determination of all minorities.

Finally one can also invoke the unilateral right of secession out of the preamble of a constitution, when the federation has been founded by the free will of the federal units and has been constructed bottom up by the sovereign member states agreeing to submit in future to the majority and limited sovereignty of the federation.

The final right for unilateral secession however can not be deduced based on a positivistic interpretation of the international law or of the constitution. There are situations which are of such specific nature, that they cannot be solved with generally accepted rules and principles. It would namely be without any sense to upheld a federation for any price if a big part of the federal unites are not any more prepared to share the common fate of the federation.

Rebus sic stantibus

Federal units with a clear majority of the citizens willing and claiming to leave the federations also put forward as argument that the pre-conditions which made them to enter the federation have in the mean time radically changed. They namely raise the principle of *rebus sic stantibus*, which requires new assessment of the situation. Since the conditions have change in a way which was not at all predictable and since one can reasonable not burden the population to remain in the federation, one has to look for new solutions, which can accommodate all parts of the population of the mother-state and of the secessionist federal unit. With regard to this argument not only the right to self-determination of the people, which desires to leave the country but also the right of the population remaining has to be taken into account. In a way the article 53 of the new federal Constitution, which provides inner secession and foundation of new cantons could be used in case of a major crises also for external secession.

No Homogeneity of the Territory

One has finally also to be aware of the fact, that actually there are no territories which is composed of an ethnical homogeneous population. In each territory some people are native and some immigrated. In case even the right to self-determination of immigrated minorities would consequently have to be considered. Who claims for the right of self-determination will thus have to recognize such right for all communities living under the same constitution and which will all also be affected by the majority decision of the population claiming its right of secession. In other words this means that secession can only lead to a peaceful solution, if all concerned are prepared to find and work for the necessary consensus and compromise.

Provided by the Constitution

Besides the Constitutions of Ethiopia and of St. Kitts and Nevis and by accepting a extensive interpretation of article 53 of the Swiss constitution the federal constitution have not given the federal units the right for unilateral secession. In St. Kitts and Nevis the federal unit Nevis has recently hold a referendum on secession. However the secessionist did not reach the required majority. Without explicit constitutional right also Quebec has hold several though for the secessionist unsuccessful referenda. In former Yugoslavia Montenegro has threatened with a referendum. Only this threat has already brought the federation to redesign the federation into a confederation like federation. Not even the European Union has up to now introduced in its treaties the right of the member-states to leave the union unilaterally. Nevertheless the new draft for a new constitution established by the European Convention provides for the possibility of each member state to declare unilaterally its decision to leave the Union. (Article I 60)

Historical Secessions

Historically known is the secessionist claim of the Southern States of the US in the second half of the 19th century. This claim has been rejected by the federation and the Southern States were defeated in the civil war by the Federation. Historically also known are secessions which took place in the 19th century of Columbia (Panama) and of Sweden (Norway).In Switzerland the catholic cantons established a illegal separated alliance (Sonderbund) to secede from the rest of the confederation. This unilateral secession was also defeated in the civil war with almost no casualties. This defeat of the catholic cantons and more the strengthened alliance of the other cantons was the main cause to establish out of the loose confederation a new federal state, which for several in particular for translation reasons kept the label confederation. The UDSSR and Czechoslovakia have been dissolved peacefully, while in Yugoslavia the secession of Slovenia and in particular of Croatia and Bosnia have been carried through by one of the bloodiest wars after world war two in Europe.

The Right to Self-determination as Collective Right of the Nation

The right to self-determination is a logical consequence deduced from the idea of people's sovereignty. The Declaration of Independence of July 4th 1776 did not only proclaim the idea of limited governmental powers in the sense *that men should be governed by law and not by men.* It was also based on the recognized natural law principle of self-determination of nations. This concept is based on a liberal, natural law theory influenced by the philosophy of John Locke. The right of self-determination is also provided in the Charter of the United Nations (art. 1 par.2). In addition both United Nations pacts on civil and social rights provide in article 1 the right of self-determination of all nations.

Although it has obviously been recognized as principle, still some basic uncertainties with regard to the right of self-determination remain. This is in particular the case, when one has to interpret the principle and namely determine the bearer of this right.

Self-determination as principle and right was historically the legitimacy bases of the entire process of decolonization (UN Declaration on Granting of Independence to Colonial Countries and People, Resolution, December 1960).

The notion of the external right of self-determination includes however the right of a state, not to have to tolerate any external interference in its internal affairs by any foreign state. Such interference would have to be considered as violation of the state sovereignty. Thus it should also not be possible, in case of secession of one part of the state to realize this demand without consensus of the concerned state.

Could one deduce also from the international law principle of self-determination the right to unilateral secession, this would permanently put into question traditional borderlines of the states. The international peace-order would then permanently be threatened.

According to our understanding the right to self-determination will thus have to be understood as a inner-state and not as international right. Such understanding enables a progressive interpretation of the self-determination on the bases of article 1 par two of the UN pacts of 1966. This provision provides according to its content for a inner-state right to self-determination. Thus the right to self-determination does include the right of all individuals to participate politically and democratically in the decision making process as well as the right of ethnic communities to be given inner-state autonomy.

Such interpretation would provide for a guarantee of general and comprehensive democratic participation based on one person, one value, one vote for all individuals (art. 21 of the Universal Declaration of Human Rights). From this one has to deduce the right of the people to have a government for and by the people that is a government of acceptance. By recognizing the right of self-determination the nations have accepted the people as a demos as an essential democratic element of the state.

Who are/is the People?

Who however can be the bearer of the right of self-determination? Who may refer realistically to this vested right and in what way or procedure he/she should claim the right?

1. The federal units of a Federation?
2. The people ort he people's?
3. The minorities?
4. Only those minorities, which have been recognized to have the status of a ethnic community – and if this is so, who should have the power to provide for such a status?
5. The *demos* (nation in its political meaning)?
6. The *ethnos* (Nation in it pre-political cultural meaning)?

Can one at all taking into account all these different possibilities of interpretation and perception really determine the nation as the actual bearer of the right of self-determination? What can be done if minorities are beginning to understand them-self as a (state-) nation and logically demand the right of self-determination in order to found their own state?

The right of self-determination of the people's with regard to their mother-state will be claimed, when their loyalty to their home-state or state of domicile is lacking. The sense and the subjective feeling of the citizens to belong together" is indeed the precondition for the very existence of the state. The consequences of the different most often from the outside influenced interpretations could however become politically and historically fatal for a society composed of different people's. On has still however to consider that to ignore the right of self-determination may also aggravate the potential and even actual conflicts of different ethnicities. Thus the Canadian Supreme Court has decided in a leading case on the right of secession of Quebec that Canada will have to respect the will of the Quebec nation based on a referendum of Quebec asking a clear question and decided by the people with a clear majority. But with regard to the legal effect of such decision, it also clearly warned, that such obligation to respect the result can not be interpreted as an acceptance of a unilateral legal right to secession. It rather required in such a case the Quebec to seek for a consensus solution including the whole people of Canada, which should be based the rights of the minorities, on the principle of democracy and of the Rule of Law (Decision of August 20 1998). Such comprehensive solution should also take into account, that today the French speaking people of Quebec understand themselves as an independent nation. Would they - taking into account a independent state of Quebec – consider themselves to be a unique Nation even with regard to the French nation, which according to the French ideology has been created by the French state?

A total different approach with regard to this conflict has been taken by the so called Badinter Commisssion composed of the presidents of the constitutional courts of the European Union under the presidency of Professor Badinter at the time president of the French council of state (Conseil d'Etat). This arbitration commission was asked to give a legal answer to the secession of the different Republics of former Yugoslavia. According to the Badinter Commission a federal

state is less sustainable then a unitary state. Federations have somehow to be considered with regard to their sustainability and compared to unitary states as second class states. In case federal units of a federation have a major conflict with the central governmental branches, one has to consider that such federation in fact has become in-existent! The federation is in a process of dissolution. Therefore the federal units would have the right, to found their own state out of their own right of self-determination. They do not secede from a state, because there is no state any more. They rather found their own state out of a vacuum and based on their right of self-determination. Based on this opinion, that federal states are evaluated to class states. (Decision of November 20 1999) Only such unrealistic view of de-classifying 25 of the existing federations with almost half of the world population could justify the recognition of the secession of the Republics of former Yugoslavia, a decision which finally did lead to one of the most brutal wars of the 20th century.

e) Statehood of Federal Units

1. Sovereignty

Division of Sovereignty

The classical theory of sovereignty can not be applied to federations. According to this theory the supreme power is exclusive and absolute, it can not be divided. The supreme power is either hold by the federation, then the federal units are no states; or the absolute and exclusive power is on the level of the units, then the federation is no state and in the best case an alliance of states or a confederation. Such theory claims the state to be a unitary, indivisible supreme unity. Although the Swiss Constitution labels cantons in its article 3 as sovereign the advocates of the theory of absoluteness of sovereignty (not shared by the authors of this book) claim that the meaning of sovereign in this article is similar to competences. Only the Swiss federation is accordingly sovereign it can change the constitution and thus diminish the competences of the cantons. It is the holder of the competence-competence. The cantons dispose accordingly only on delegated competences even the residual powers of the cantons are implicitly delegated by the federal constitution, because it did not take those powers away from the cantons. Therefore cantons who claim themselves to be free-states or republics apply notions to their unit, which are fundamentally wrong.

Perception of a Super-State Sovereignty

A special theory with regard to this sovereignty-issue has been developed by HANS NAWIASKY (1880–1961). As sovereignty is indivisible but as the federal units still exert original powers he constructed in theory that in fact the federation and the cantons form together a fictive super-state, which as actor embracing federation and cantons divides the powers among cantons and federations. Sovereign thus are neither the cantons nor the federation but only the fictive super-state,

which embraces the states of both levels. According to this construction of a super-state there is neither authority nor governmental branch entrusted with the power at least to provide for the division of those powers. Most interesting however is the new development in Switzerland with regard to the cooperation of the federation and the cantons in the field of the universities. The new legislation has provided for a new university conference, which is mandated to coordinate the universities of the cantons and of the federation. Its mandate has its legal ground in a federal statute as well as in treaties among the cantons and among the cantons and the federation. As far as this commission can issue obligingly decisions for the federation and the cantons it comes close to the idea of the Super-State-Body of NAWIASKY.

Legitimacy of the Local Democracy

When a car driver of the Canton of Vaud (Vaud is one of the French-speaking cantons of Switzerland with a strong federalist perception of the great bulk of its population) would be stopped on streets of his/her canton by a federal police man, he/she would feel basically threatened in his/her identity. For such persons it is even unthinkable that the federation even though it could amend its competences would exert sovereign powers on the territory of the canton of Vaud. He would rather advocate the principle, that federal police has no powers to be implemented by him or her on behalf of a federal agency on the territory of this canton. As long as he has not been entrusted with sovereign powers of the canton, he/she cannot claim any jurisdiction over cantonal territory. Within the territory of the canton of Vaud only a cantonal police with cantonal authority has jurisdiction and the power to control e.g. car-drivers. The cantonal police force does not deduce its authority from federal legislation but from cantonal statutes and from the cantonal constitution.

The cantonal Constitution has its legitimacy ground in the people of the canton, which has approved the constitution in a referendum. Never a citizen of the canton would come to the idea, that the cantonal referendum has to be or is justified, because the federal constitution entrusts the cantons with police-authority and with the power to organise and empower its proper police agency. The consideration that sovereignty has principally been delegated to the canton is unrealistic. He/she are rather looking for the legitimacy of state power within its own canton that is within the people’s referendum.

To the federal government he/she would only recognize those powers, which are entrusted to the federation by the Federal Constitution. In other words: The he/she finds the ground for the legitimacy of the power of the canton within the democratic decision of its people. This legitimacy does not have to have an additional justification or legitimacy ground within the federal constitution. As each delegation of new powers on the federation needs to be entrusted by a constitutional amendment, also this new constitutional amendment is legitimized by the democratic majority of the people and the cantons.

This example shows that the legitimacy of state power in the federation is according to the perception of the citizens divided between the two levels of government. The justification of the jurisdiction of the federal unit within the federa-

tion is given by the people it is not derived out of the federal jurisdiction. Thus e.g. the preamble of the constitution of the new secessionist canton of Jura (before 1980 a region of the Canton of Berne) very clearly proclaims:

> „The people of the Jura, conscious of ist responsibilty towards God and to the peoples with the intention to restore ist sovereignty and a united community, enacts the folloswing constitution: ... based on its principles the Republic and the Canton of Jura founded by the act of autonomous decision on the 23. of June out of its right to self-determination

As disputed this preamble was, as clearly it shows the federal intention, which still is dominant in Switzerland.

Original and Divided Sovereignty

If we see sovereignty not as a principle, which entrusts supreme state power not dependent on any other authority but as a concept, which provides this community of peoples sovereign, which is able to provide legitimacy for the respective state territory, we can of course also admit, that sovereignty can be divided between the federation and its federal units. Such understanding however requires that the people's sovereignty is original and that the residual power has remained within the federal unit as it is the case in the Swiss federation, which has been constructed bottom up out of the cantons.

These explanations may also prove that real federalism finally is only possible on the bases of people's sovereignty. Hierarchical authorities legitimised by the Grace of God can just as little claim for a concept of federalism as totalitarian regimes, which do not tolerate any disobedience of their "autonomous" communities.

Partnership not Social Contract

Whoever accepts the phenomena of genuine federalism may also have difficulties to share the theory of the social contract as the only ideology legitimising state authority. The social contract presupposes a united people's community, which by its fictive or historical contract entrusts the central power to the state. Exactly such concept is not possible within a federal system. The federation in fact has taken over some structural divisions already existing in the pre-modern feudal times, adapted them to a modern democratic system integrated within the rationality of modernity.

"I do not know exactly what is meant by "federalism". For me it is somehow the relationship and the concept for cooperation between different governments on the horizontal level and with the hierarchical government of the supreme state supervising them. These and similar definitions of federalism can be found in writings of practitioners as well as of scientists. They show how difficult it is to bring the reality of the dynamic phenomena of federalism of all federal states to a clear and comprehensive notion covering all diversities applied by federal states. This is particular the case, when one has to define federalism in the context of sover-

eignty. Cooperation and competition among the different state units is one of the essential key-elements of federalism. Partnership is the core substance of federalism. It implies distribution of powers among different power-centres which have to negotiate in order to achieve common goals. If one has the intention to bring the basic idea of federal democracy into practice, one cannot move backwards to the classical concept of BODINS indivisible sovereignty, which is concentrated within one state-body. Federations as well as their federal units have different legitimacy bases. The sovereignty behind this legitimacy is founded within different nations and thus also different people's sovereignty, that is the people's sovereignty of the federation and of the federal units.

Therefore sovereignty has to be understood as a concept providing legitimacy for state power which can be divided between the federation and the federal units. It is this understanding of federalism which has lead MADISON and HAMILTON to claim for division of sovereignty between the federation and the federal units. Sovereignty can not at all be the legitimacy bases for either absolute power of the centre and not at all for the absolute power of the federal units according to the claims of the southern states in the American civil war.

Conclusion: Constructive Elements of a Federation

Concluding these considerations the constitutive elements of sovereignty of a federation can be seen as follows:

1. State character of federal units (Self-determination of the federal units with regard to their constitutions);
2. Autonomy includin Fiscal Autonomie with regard to taxes and expenditures;
3. Devolution of state powers;
4. Shared rule: participation of federal unites in decisions designing the federal system and the federal responsibilities;
5. Overall responsability of the federal units with regard to the federation and of the federation with regard to the federal units.

2. The Nation

Diversity and Multiculturality

There is almost no state, which has jurisdiction over a territory and nation homogeneous with regard to religion and language. 95 % of the world population is living within states with different languages, cultures and religions. Borderlines of states and of cultures are almost always overlapping. In federal Germany although most people are native German speaking, they are divided by different religions (Christian and Jewish) but hold together by the common state. But even with regard to language some native Danish speaking minorities are living in Schleswig-Holstein and some Slavic people (Sorbs) are living in the eastern part of Germany. In Italy French, German, Slovenian, Croatian and Greek speaking minorities are part of the Italian nation. France is the home-land of Corsicans, Catalans, Basks Bretons and Alsatians. In the UK since ages live Welsh, Celts

(Jersey and Guernsey) and Scots. Slovenians and Croatians are also living in Austria. The Eskimos of Greenland are autonomous but under the final jurisdiction of Denmark only to mention one example of Scandinavian minorities. Many native minorities in Eastern Europe, Africa, Asia and in the Middle East as well as the Native in Northern and Southern America as well as in New Zealand and Australia have become tragically famous in the last centuries. All those minorities are somehow rooted in their historical territory. However the Roma, the Tuareg and the Bedouins are minorities which are not related to a territory. They are still of the nomadic tradition of early mankind and have never been settled in specific territories as most of the modern nations. And finally we should not close the eyes looking at the problem of modern migration, which has actually caused a new most difficult minority problem.

Jurisdiction over Territory and Nation

Within federations such as Switzerland the cantonal border lines of are often not identical with the border lines of language and religion. Switzerland itself is a state, which encompasses at the edge of the big European languages some small German, French and Italian speaking peoples willing to form a special country separated from the main country of their mother-tongue. These cross-cutting cultural cleavages is certainly one of the reasons Switzerland was able to hold different communities together for centuries. However the conflict between the French speaking minority of the Jura region with the German speaking majority within the canton of Berne has finally lead to a new Canton of Jura. Although within this new canton, the religious border lines are identical with the new state jurisdiction, as small protestant and French speaking minority preferred to remain within the old mainly protestant but in majority German speaking canton.

As soon as a country decides to solve its language problems by democratic majority decisions minorities feeling discriminated by the tyranny of the majority will with all possible means hamper the decision. The language problems of Belgium show clearly what may be the result, if one tries to solve ethnic disputes and decides on language border lines based on majority decisions. Multiculturality can not be solved by simple and plain concepts such as federalism, minority protection etc. Interethnic conflicts require a permanent and continuous conflict management, which is sensitive for the particularities of the specific conflict.

Legitimacy by Minorities

By internalizing constitutionally the minority interests and minority protection into institutions, procedures and territories and by using it as a constitutive element of the state order the federal state of a multicultural society receives its legitimacy bases. This legitimacy by minorities however can only be realized if the following pre-conditions are reached:

1. A federal state has to be built upon a democratic consensus, which on the different institutional levels always according to their impact and influence on the cultural diversity provides for different democratic procedures, such as e.g. the procedure to come to a consensus, to regulate conflicts, to set the

environment of a political consensus and compromise oriented culture (e.g. proportional electoral system) which all defuse the pure majority principle of democracy.

2. The values of the civil society will have to become the fundament of the state and they should enable the development of a political culture, which presupposes a pluralistic society but overlay ethnic-nationalistic thinking. Such culture will also have to avoid any attempt to foster the perception of the majority nation to be the dominant political factor. When nationalistic emotions start to dispel the basic values of the civil society the negative legitimacy of the different ethnic communities will decompose the the state by friend-enemy perceptions and it will dissolve into violent anarchy. The ethnic principle will become the fundament of politics and within the majoritarian democracy the minority people will become a second class nation, which rejects the state as an only instrument to pursue the interests of the majority nation. This is how formally recognized minority nations come into being; but the peoples of these minorities will consider themselves as second class citizens, which in the best case are tolerated as guests within the country in the worst case feared by the majority as possible danger in case they would once reach the majority. As logical consequence those minorities will claim their rights as absolute rights including the right of self-determination and of secession.
3. The majority nation of a specific state will have to renounce to its exclusive power, to identify the unity of its nation with the peoples sovereignty. It has rather in order to overcome antagonistic interests to look for institutions and procedures which foster the credibility of an inclusive compromise of all concerned people. On the other side minorities will have to renounce to claim absolute autonomy, which questions the existence of the state. They should not provoke procedures, which would lead to violent conflicts, in which violence will be considered by both parties as a legitimate mean to enforce its proper interests.

f) Inner Structure of Federal Units (Autonomous Constitution Making of Federal Units)

Proper Constitution

The position of federal units is constitutionally guaranteed which in principle determines the structure of the federation. Besides the federation also the federal units have jurisdiction and state authority over their territory. They have in most cases (Except e.g. India) their own constitutions installing horizontal and some times also vertical (municipalities) checks and balances. They provide within their autonomy the procedures for revision of the constitution and for constitutional amendments. By giving themselves a proper constitution, they provide for their state authority the necessary proper and autonomous legitimacy. Thus they proclaim that their constitution making power is made out of their proper roots which

are the original sovereignty of their nation. This nation is the fountain of justice, state jurisdiction and legitimacy.

Territory

Federal units of a federation should have jurisdiction over their proper territory. Within the borderlines of this territory, they should have either exclusive and/ore shared authority with the federal agencies. The integrity of the territory should be granted by the federation. According to the classical theory of federalism federations are divided primarily by territorial border lines and not by personal differences such as language or religion. Federations are fragmented by territory and not by communities. The territorial division is essential for a federation. In particular the classical state powers to guarantee police protection can hardly be implanted without territorial separated jurisdiction.

Several states provide within their federal constitution, how borderlines between the territories of their federal units may be changed, how new territories may be founded or old units abolished. (cf. Article 53 of the Swiss Federal Constitution). Article 29 of the German Basic Law regulates the procedure for the adjustment of the borderlines of the Länder. According to article 79 of the Constitution however the basic principle of federalism can never be changed by constitutional amendments.

Personal Federalism

The personal federalism on the other hand finds its historic roots in the millet-system of the Ottoman Empire and of the Austrian-Hungarian Monarchy (KARL RENNER). This system has been taken over from the feudal structure "federalism" of the middle ages. It was applied in Eastland before the Second World War und also part of the structures of Poland in the 17th century. Today this personal federalism is realized probably in the most consequential way in the Lebanon. The Belgium constitution provides territorial regions as units as well as communities formed by persons and not by territory. In Switzerland and in Germany one can find some personal federalist structures in the area of religion. The original German and also in most Swiss cantons adopted concept of state-church community has some similarities to personal federalism. According to this concept, persons belonging to a certain confession are bound to a community hold together by state law and supported with some state-authority.

Federal units composed by persons belonging to a common culture are restricted to perform only cultural tasks of the state such as education, religion and family law. With regard to these functions personal federalism may in certain cases be quite appropriate. It however becomes useless as soon as those units would have to deal with law and order issues of the traditional police function. For such tasks only power-sharing models may be applied in order to have the support of all communities by exerting specific police functions. But as the case of Lebanon shows, these possibilities are very limited.

The Bearers of the three Classical Governmental Branches

As bearer of the three classical governmental branches the federal units exert legislation, execution and administration and judicial functions. The federal units regulate autonomously the organisation, competence and the checks and balances of the three governmental branches. Unlike decentralized units of a unitary state where authorities are mainly accountable to their centre, the authorities of federal units are mainly accountable to the people of the respective federal unit. The federation has no power to enforce its rules directly with regard to specific agencies of the federal unit. The federal units are only accountable as a unit to the federation, which has to control that the federal units act within their autonomous powers and that they do not violate federal law. The final responsibility to act within the rule of law of course belongs to the federation and not to the federal units.

Foreign Policy

In many federations the federal units are competent, within the frame of the federal law to pursue their proper foreign policy. Thus they can conclude international treaties for better cooperation. These external competences are part of their status as states. Foreign policy belongs to the traditional function of every state. In this sense the federal units take part in international decision making process, they are recognized actors of the international community. Internationally accountable is only the federation. The federation however can divide and delegate part of this international sovereignty to the federal units; thus the federal units dispose within their sovereign competence also on external powers; they share it with the federation, but they still have some specific responabilities.

Constitutional Guarantee of the Autonomy

The autonomy of the federal units, which is the bases of their state-hood status, is of course not unlimited. Legal acts of the federal units are only valid, within their competences usually designed by the federal constitution. They have to respect in principle the supremacy of federal law and to fulfil implement the higher law of the federation and the obligations provided in international treaties ratified by the federation. Exactly for this reason the judicial control of the federal constitution is of greatest importance.

Indeed the judiciary as arbitrary institution among federal unites and federation assumes an important task interpreting the federal constitution. The American Supreme Court has with its dynamic interpretation of the commerce clause essentially expanded the central powers during the New Deal period. The constitutional court in Germany however could not influence federalism in Germany the same way, as the German Basic Law is much more strict and precise. Moreover the German constitution can be amended much easier than the American constitution. On the other hand the European Court of Justice has expanded in its jurisdiction quite extensively the order of competences between Brussels and the member states. In fact in many cases it not only interpreted but even amended the treaties by its most extensive interpretation and thus expanded the competences of the Union substantially. Indeed it could initiate changes in the European order similar to

the jurisdiction of the American Supreme Court. In particular the new clause of subsidiary in article 3 of the treaties could become a function contrary for what it has been introduced into the treaties that is to enlarge the powers of the union. As it is almost impossible to decide, what function is proper to the Union or to the member states it could interpret this clause in the sense, that the Union should have the necessary powers appropriate to impose its union interests on the treaties. An important function is also given to the Spanish constitutional court as a custodian for regionalism as this court has the jurisdiction to interpret the competences of the centre and the regions according to the Spanish constitution.

Distribution of Competences

Many federations – and in particular those, which have been built bottom up by centralization list explicitly all the specific competences reserved to the federation. At the same time those constitutions assume, that the competences not mentioned in the federal remain to the federal units originally competent in all matters. In some federations the constitutions provide for a distribution of powers on both levels. They list at the same time all competences entrusted to the federation and those entrusted to the federal units. Finally there are constitutions, which enumerate only the competences of the federal units as exception. Competences not mentioned are assumed to be dealt with on the federal level. (Federalism by decentralization Canada)

Fiscal Principles Provided in the Constitution

Federations have to decide on fiscal issues:

1. Which taxpayers will have to pay taxes on which structural level: Federal, federal unit, municipal and they have to decide for what activities or services taxes have to be paid;
2. on what level expenditures will have to be provided for what financial purposes and what public services have to be offered to the people;
3. how injustices caused by decentralization of fiscal competences can arise and how those inequalities can be equalized. (financial equalization)

Decentralization of fiscal competences is based on four different assumptions: Local products and services, which have to be financed by those, who take profit out of those services, should be financed locally. The mobility of the taxpayer should neither be hindered nor enhanced by the fiscal system (the rich go to the rich, the poor to the poor). Finally one has to avoid that federal or decentralized units are neither disadvantaged nor that they profit by external (spillover). The fiscal system should aim a just distribution of public services. It has to respect the historically developed legitimate structures and needs transparency in order to guarantee full accountability to the citizens and taxpayers.

In order to avoid corruption within the decentralized units the central state as well as on the level of the local democracy effective and efficient instruments have to be provided, which can prevent, avoid and if necessary fight against corruption. In order to achieve such goals political, cultural and economical wisdom hat to be put together into a comprehensive concept, in order to determine the real

public interest. Unfortunately this was lacking up to now, since economy, political policy and constitutional law have developed their proper ideal autonomous concepts, without taking into account the other scientific discipline.

Decentralization of Taxes

As well in confederations as in supranational organizations as in the European Union the member states decide on the finances to be granted to the confederation, supranational organization or to the alliance. Neither the confederation nor the supranational organization can provide its financial support with its proper decisions and institutions. The budget is often dependent on a unanimous decision or at leas in some clearly defined areas on a qualified or simple majority of the member states.

In clear contradiction to this system the regions in unitary states usually do not have any financial competences. Taxes are levied on the central level. The regions are either granted specific contribution in order to finance specific tasks. In some cases they can based on a global contribution decide priorities in their proper expenditure budget. In addition budgetary policies of the region are controlled as well as their financial behaviour by the central agencies.

Between those two different extreme solutions there are plenty of different possibilities and solutions. With regard to taxes the federal units may for example be empowered to levy specific taxes. Based on their expected income the federal units decide on their budget and how the tasks assigned by the federation or those decided by their proper bodies should and will be financed (USA, Switzerland). One can also imagine that the local authorities are given the power to levy proper taxes in order to finance their tasks. Do they dispose of far reaching taxing autonomous powers they can based on this autonomy by their fiscal policy even provide economical incentives in order to attract foreigners to invest within their region. This system enables federal units to pursue a limited specific economic policy.

One can of course also imagine that in the entire federation every one is taxed according to the same principles or even according to the same tariffs and that each federal unit receives according to its specific tasks global contribution from the federation (Germany). This may cause in case of economy measures to serious conflicts among the different units, which may reproach each of them, to waste money of the federation or that they accuse the federation for the excessive burdening tasks they have been assigned by the federation or which they have to fulfil in the interest of other federal units.

Decentralization of Expenditure Competences

The next step to reach financial autonomy consists in the right to limited or even unlimited self-determination with regard to the expenditures. In this case the regions dispose accordingly over a global budget and can decide autonomously on their proper political priorities. In this case the federal government will limit its control over the budget only with regard to the transparency in order to guarantee the democratic accountability and legitimacy.

Equality, Justice and Solidarity

According to the principle of equality all inhabitants of the federation should with regard to their income and fortune equally economically be burdened independent from the federal unit they belong to (Germany and Spain). In this case one has logically to provide that all inhabitants of all regions independent of the economic wealth of the federal unit must have the same quality of public services. Thus federation have the difficult task to decide according to which solidarity principle financial burdens have to be distributed.

Still disputed will be, how most expensive services as high cost medical treatment in hospitals or universities or high burden of expenditures for traffic (mountains) which all are in the overall interest of the population of the federation should be settled and paid either by grants of the federation or of the other federal units.

If the federal balance should be maintained the federal units need to dispose of sufficient financial resources in order to exert their original or delegated tasks. Federal grants should only contribute to compensate inequalities by fiscal equalization. Only when federal units decide on their own on income and expenditures they bear the necessary political responsibility with regard to the taxpayer, citizens and consumers. Only in this case they are able to accomplish a policy for the common interest.

Efficiency

The fiscal distribution and the fiscal autonomy will also have to be looked at from a different point of view. Which level of the federation can fulfil specific tasks more efficient and more effective: the federal level or the level of federal units? Which of those levels has better legitimacy for what fulfilment of what kind of tasks? The answers to these questions will give important hints as to what tasks should be assigned to the federal and what should be assigned to the level of the federal units.

Mobility

The distribution of powers and the distribution of fiscal autonomy will also influence the mobility of the population on one side and of the interest of economy to invest. Federal units will engage to attract investors in order to provide more financial income for their political obligations. Federal units however, which are unjustly disadvantaged for geographical, historical and may be also cultural reasons will ask the federation for an appropriate equalisation based on the common solidarity.

In multiethnic states such equalization may cause far reaching conflicts. If e.g. one ethnic community is convinced that the other ethnic community which may be the minority is only profiting from the majority but not prepared to look with more efficient and hard work for better performances. On the other hand the minority may be convinced, not to have equal chances because of being discriminated in the competition (language, history former DDR) and thus would never have the chance of economic improvement of its disadvantaged region. All those reflec-

tions show clearly that the questions of financial solution of decentralization or of federalism are not at all technical but highly political.

g) Decentralisation of the Three Branches of Government

Legislature

By delegation of legislative competences to the federal units the first and probably most important step to the establishment of a federation is accomplished. Whoever achieves legislative sovereignty obtains the status of statehood. At least according to the legal perception of the continental European legal systems the state expresses its sovereignty and statehood by its legislative function.

Part of the legislative power is the right of taxation. In most countries the parliamentary approval of the budget is made in the form of a statute. In Switzerland the approval of the federal parliament is not submitted to a referendum, thus the budget decision is called simple federal decision. It is based on it power of the purse, that parliament can control the executive and the administration. With the budget it determines political priorities. When it approves the proposed budgetary bill, parliament may also have to decide on the income necessary to provide the expenditures approved by the budget. If the expenditures can not be financed by the taxes or by federal grants, they have either to be diminished or the parliament will have to raise the taxes or provide for public loans (debts to be paid back by the future generations) in order to cover the deficit. This belongs to the power of the purse and is part of the power of the legislative branch, which of course has to be part of the legislative branch on the level of the respective federal unit. According to the principle of federalism it is decisive that the central power does not intervene and decide in lieu of the parliament of the federal unit. Neither should it reduce expenditures for reason of incompatibility of the federal policy compared to the policy of the federal unit. Such interventions are only provided for a possible within a concept of decentralization with regard to the decentralized units but not for federation.

Before 1988 the foundation of regions and communities has not made a federation of the Belgium state. Only with the constitutional amendment of 1988/89 Belgium became a proper federation. With this amendment the communities were assigned for the first time legislative competences. In addition they were given important shared power competences by installing the collegial executive (cabinet of the parliament). And finally the language communities had the possibilities to represent minority interests in the first chamber. Since 1993 Belgium has become an expressive federation which is labelled as such in the constitution. This example shows, what importance have to be given to the legislative competences of the federal units as the main attribute of a federation. This is mainly true for countries belonging to the civil law system, which as mentioned consider the legislative power as the most important attribute to sovereignty and thus to statehood.

Even in France there seem to be today important and serious attempts, to assign to the regions more important competences. But even though regionalism has once been proposed as an addition to the principle of unitary and indivisible France in

article one of the Constitution it would not turn France into a federal state, because the regions would still not have the state-hood status.

Executive Branch

Federal units have necessarily to dispose of an executive branch. They need the proper and constituted power to enforce the laws. This executive branch will have to be primarily accountable to the federal unit: people or parliament. This executive government of the federal unit should not be dependent of the central government. The central authorities should neither be able to issue directives and to enforce those directives with disciplinary measures. The governmental branch of the federal unit will have to be accountable to its parliament or to its people. Id needs the power to install its proper administration and agencies to implement and enforce the laws of the federal unit and in some instances also of the federation.

Judiciary

An additional essential element of the power of the federal unit is its competence to install and organize its proper judiciary. Contrary to unitary states which enforce the law by a unitary judiciary, in federal states the judiciary is regulated by the federal units either parallel to the judiciary of the federation (USA) or as their judiciary, which has jurisdiction on federal and unitary law within the territorial jurisdiction of the federal unit. In federal states of the civil law system with a so called "executive federalism" (Vollzugsföderalismus) often the courts of the federal units are asked to apply also federal law, whereby of course an appeal to a federal court as final instance is provided against the decisions of the federal units.

III. Shared Rule of the Federal Units Within the Decision making Process of the Federal Level

a) Shared Rule as Legitimacy Bases of the Federation

Federalism is one of the most important constitutional concepts and designs which enable legitimacy of political power with regard to a fragmented society. Thus the main question to be asked with regard to the way federalism is designed has always to be: *Will the tools of participation enhance or destroy the legitimacy of the federation towards its people and its different communities?* Devolution and autonomy based on decentralisation is mainly a challenge for the federal units to achieve based on this autonomy legitimacy with regard to their own democratic community. The issue of participation of the different federal units in decision making processes on the other hand is the most sensitive issue of legitimacy of the federation. Indeed through their participation the federal unites are required to find solutions in order to accommodate the different units but also to establish justice within the entire community. Their challenge is to contribute to the legitimacy of the federation and at the same time of their proper federal unit. When dealing with

the different solutions of participation in this paper, one has to be aware that the overall and always underlying issue will be to what extent participation will enhance integration or disintegration.

The right of federal units to participate within the decision making process of the different levels of the federation is one of the essential core elements of federal states, which distinguishes federalism from pure decentralization. The main argument of the right of federal units to participate in the decision making process on the federal level is to be found within the legitimacy of the federation. The federation can only be built upon the legitimacy of the federal units, if it accepts that the federal units are able to influence federal policies. The federation needs for its legitimacy to respect, recognize and include the federal units into its decision making process. Exclusion would destroy its legitimacy. Also the federal units need to build their proper legitimacy on their people. They exist because of their people's sovereignty. If they would be integrated within a federation which would disrespect the people's sovereignty of the federal units, the federation would loose its credibility and finally its legitimacy.

PAUL LABAND (1838–1918) one of the most influential constitutional scholars of Germany considers the shared power principle as the only decisive element, which distinguishes federal states from unitary states. Also his counterpart in France GEORGES BURDEAU considers the shared power principle as decisive for federalism.

These reflections did lead federations to introduce and even expand the powers of their federal units as essential element of their federalism. The most far reaching solution has been found by the German Basic Law. According to the German Governmental system the federal units (Länder) participate on the decision making process on the federal level in the second chamber called Bundesrat. It is not though the people's of the federal units, which are represented by elected senates as in the US or in Switzerland, but the executive governments of the federal units which are directly participating through their respective ministers in the decision making of this chamber. This chamber can be compared to a council of ministers in a confederation or international alliance as the ministers voting in this chamber vote on behalf of their respective governments. Those votes however are neither counted proportionally to the size of population of the Länder nor according to the principle of equality of the Länder according to the American or Swiss senate. The amount of votes depends on the size of the population of the Länder. Each Land is guaranteed at least 3 votes, those with more than 2 Million inhabitants have four, those with more than six million 5 and those with more than seven million inhabitants have 6 votes.

The second chamber is marked by its function to participate in all law-making decisions of the federation, which will have once in force to be implemented by the Länder. It is for this reason that the executive governments of the Länder are directly involved in the process because they will have to organise, provide control the correct implementation on the Länder-level. For this reason the ministers sitting in this chamber vote according to the instructions they have been given by their governments. They represent the opinions of their governments, which is not

the case in almost all other second chambers, where the governments of the federal units have no direct influence on the decisions of the second chamber.

b) *The Dynamics of the Shared Rule Principle*

The Balance between the Right to be Equal and the Right to be Different (Un-Equal)

The federal of a state is only sustainable in a democratic environment which respects the basic principles of the rule of law and of separation of powers. Rule of Law and in particular the principle of democracy generating the value of one person, one value and one vote is based on the basic value, that all human beings are equal.

Federalism as a state concept to accommodate diversity on the other hand has to recognize the right to be different or unequal. The minority languages for instance require equal recognition not based on the number of peoples speaking this language but based on the cultural value of this specific language to be taken on equal terms with the cultural value of the majority language. Thus equality of cultural values is only possible if one accepts the consequence that is the right of individuals belonging to those cultural communities to be considered as un-equal that is different and thus privileged compared to individuals belonging to the majority culture.

The Balance between Tyranny of Majority versus the Tyranny of Minorities

Thus the dynamics of participation of federal units is shifting between the equality of individuals and the equality of values of federal units. To put it on other terms, minorities in federations want to be protected against the misuse of the tyranny of the majority; the majority on the other hand wants to be protected against the misuse of the tyranny of the minority. Thus the wisdom of every federation is to find the appropriate balance which overcomes mistrust and enhances common trust.

Any federation would loose its legitimacy, if majorities tyrannise or if they are able to tyrannise minorities and if minorities would tyrannise or if they would be able to tyrannise the majority. Thus the balance between the right to be equal and the right to be unequal has to be found in the legitimacy of the federation. If the federation can generate comprehensive common values, the minorities will trust the majority and pay the price for the winner takes all democracy. If the federation has only limited legitimacy and the majority only limited trust from the minorities, it will have to accept for the sake of the common interest of the federation more power-sharing with the federal units.

This is one tension which is the motor to speed up the dynamics between effective participation of federal units against the winner-takes all only majority democracy.

Balance Between Shared Rule and Self Rule

The other reason for different solutions of participation of federal units is to be seen in the very essence of any federal solution. Federalism is the constitutional

balance between shared rule and self rule. If one takes this principle serious one would assert that the more self rule is implemented the less shared rule is required and vice-versa. If federal units loose autonomy and thus self rule powers they would require compensation on the federal level with more institutions guaranteeing shared rule. Thus in order to upheld the balance between self-rule and shared-rule federation need to accommodate to the dynamics of the globalised world, which requires for economic and social reasons centralisation, the federation would have to improve the shared rule tools in order to keep the balance.
In order to establish and limit political power, constitutions must have legitimacy. As they are under the stress either to accept more globalisation or to accommodate minorities with more localisation they are to seek the balance between the two federal principles. But in contrary to unitary states, which do not know such balance federal states can meet these challenges of a changing world as they have not only institutions to decentralise but also institutions to enable shared rule institutions.

1. The Tools of the Shared Rule Dynamics

With regard to different Issues

With regard to the legitimacy of the federation, the federal units will require participation at least on all issues, which they consider crucial for their own legitimacy with regard to the demos they represent on the federal level. But they will also need participation on the federal level in order to be able to identify as federal units with the decisions of the federation. If for instance traffic planning is decided on the federal level, the whole planning process must accommodate the different interests of the regions, but it has also to accommodate the common interests of all people's of the federation including all different federal units as well as a community but also as individual units. If on the other hand the federation decides on currency matters, it will of course not include all different federations in the decision making process, but it will have to assure, that the citizens of all different federal units will be able to identify with the currency of the federation. This aim however can only be achieved, if through the decision making process all federal units are able to claim somehow their ownership on the final result.

Abolition of Federal Units

If on the other hand the federation would decide on the very existence of a federal unit itself, then it would need the consensus of the respective unit in order to guarantee that such essential decision could be implemented peacefully and without endangering stability. Decisions changing the self-rule of federal units that is enlarging or diminishing their autonomy are more sensitive than decision on import or export of goods. Thus follows that the tools of shared rule institutions differ with regard to the issues to be decided on one side and with regard to the legitimacy and communality of the federation on the other side. Strongly integrated federations with large consensus of the population will need less shared rule insti-

tutions than federations which are required to accommodate diversity and which have to build up new communalities with regard to their fragmented society.

Other issues

The very existence of a federal unit can certainly not be questioned without unanimous consensus of the respective unit. With regard to the other decision making processes one will have to distinguish on their impact and consequence for the federation itself. Constitution making will require more consensus than legislation. The implementation of legislation by the executive is less sensitive for federal units than the legislative process. The judiciary committed to the rule of law should never be biased and thus not dependend on the federal units.

Foreign Policy

Interesting though is the implementation of the shared rule system in foreign policy. Foreign policy has long time been considered as of only federal interest. Thus federations usually do not have any tools which would enable them to participate in foreign policy matters. The American Senate as one exceptional example has rather to be seen as the high chamber following the powers of the British high chamber in the 17th and 18th century. With the new development of international networking based federal units seem now to require more shared rule tools in international affairs. The most important example is certainly Belgium which can only ratify international treaties dealing with competences of the federal units with the consensus of the parliaments of those units and which includes those units in the international decision making process. It may also be interesting to note, that the integration process has also induced the Swiss Cantons to require more participation in the international decision making process, which is now constitutionally guaranteed in Article 55 of the Federal Constitution.

Second Chamber

Traditionally the most important tool for shared rule institutions is the second chamber. Comparing the different second chambers one can deduce however two important differences: The second chamber based on the liberal model of representation representing the constituency of the federal unit such as the American senate and the Swiss council of the states on one side and the concept of a council of ministries representing the governments of the federal units such as the Bundestag and the Council of the European Union. With the new federal development of the Swiss federal constitution a new body has been created by the cantons, which is the conference of the cantonal governments. It remains to be seen which body will gain more importance in the future the traditional liberal council representing the constituencies of the cantons or the committee of the cantonal governments, which up to now has no real constitutional competences.

The two different concepts reflect in principle also to different concept of federalism. In Germany the Länder are more or less the units, which have to implement and execute federal statutes. Thus to have the executive power of the federal units represented is quite appropriate. The governments of the Länder in fact can

at best evaluate to what extent federal legislation is in fact appropriate and to what extent they can guarantee implementation. The chamber based on representation is asked to evaluate legislation under the criteria of common interest taking into account the different interests of the different constituencies. In the 19th century when the second chamber was established in Switzerland the focus was of course not on the administration but on legislation. Thus the second chamber was to be installed as part of the legislature to represent the interest of the cantons.

Other Branches of Government

However one has to be aware that shared rule tools are not only installed with the second chamber but with different elements even in the executive, the administration and the judiciary. Even though the executive, the administration and the courts have to be committed only to act in the common interests of the federation the legitimacy of those decisions would be questionable if the executive its administration and the judiciary would exclude professionals belonging to minorities. Indeed one should transform the famous sentence guaranteeing the independence of the judiciary: "Justice has to be seen to be done" into a federalist principle and thus postulate that "federalism has to be seen to be done" and thus in all important issue of the federation people have to see to what extent solutions are influenced by the federal diversity of the country. Only if the federal units acquire ownership with regard to the administrative and judicial activity, they will consider federal decisions also to be their decisions.

This has as a consequence, that decisions which are existential for the federal units need more acceptance than decisions with less impact on the existence of the federal units. Thus constitution making and constitution changing can influence the competences and the power of the federal units.

Legislative decisions may have far reaching consequences on specific issues such as education, culture and language it is clear that those issues need better acceptance.

But also on the executive level there are federal units, which require to be represented in order to influence the day to day politics from their point of view.

Finally also on the level of the judiciary participation may be required.

Important is also the issue of representation. For some units the governments of the units require to be represented, for some the people of the units require representation. There are even combinations possible.

Creating New Federal Institutions

In Switzerland the legislature has recently revised the legislation on the federal support Universities. As universities are federal and cantonal it has set up a new institution, which includes the federal government as well as cantonal governments with universities and some representing cantons without universities. This new body is deciding on the development of cantonal and federal universities. It embraces all federal and cantonal units interested on university issues and is able to develop a policy common for federal and cantonal universities. One could even label this new body a super-body as it has to decide on federal and cantonal issues.

This is an example which demonstrates the flexibility of federal arrangements, which can meet and bring together in one body the interests of different federal levels.

2. Challenges

There are mainly three arguments used to prevent shared rule and participation of federal units: The deadlock of the necessary dynamics of federal processes on one side, the privilege for minorities to be given more powers than to the majority that is the discrimination of the majority on the other side and the restriction of the majority rule of the democracy.

The Deadlock Argument

The stalemate argument is particularly most effective in federations with very few or only two federal units. In the case of Cyprus, Serbia-Montenegro, Sri Lanka all opponents of a federal solution have constantly evoked this deadlock argument. Except for the Constitution of Serbia Montenegro, which has however been imposed by the European Union, a peaceful solution for Cyprus and for Sri Lanka has been impeded mainly with this argument. Of course one has to be aware, that in particular in conflict situation the necessary trust that the other party would neither misuse its veto-position nor its majority power is almost always lacking.

Need for Common Values

It is probably much more difficult do unite two conflicting units into one federation based on common values to be pursued by the federation for the common interest of both units and the entire population. But unless there are communalities which convincingly induce the population of each federal unit to pay a certain price for a compromise, the chances of a federal solution are very low.

Indeed the most difficult challenge of any federation and in particular of those with only two units is to generate communalities and to find the common values able to hold or even bring fragmented societies together. The more legitimacy can be regenerated on the federal level the less federal units require participation.

Constitution making as Nation Building

It is evident that such process can not be achieved only by diplomatic negotiations on a new constitution. In South Africa for instance the two levels constitution making process has not only helped to find the consensus for a constitution, but it has also helped to the nation building process. Thus I would consider that the self-rule concept of any federation has also to be assessed as a nation building process, which should support and enhance the integration of different communities into the bigger composed nation.

Federalism is the state organisation and structure, which enables federal units to influence federal decisions in order to identify themselves with the federal state. It is a part from the democratic participation of the people the possibility to legitimise federal power and federal decisions. Only through participation can the fed-

eration guarantee that federal units can consider themselves to be part of the federation.

3. Tools to overcome the Deadlock

There have been different types of tools to overcome deadlocks: Decision making processes which end up in an arbitration procedure which usually either support the majority or the minority or procedures which install an unbiased mediator as a court or as an international body. One might also think of procedures which give to some minorities the possibility of opting out. Of course one has to be aware of the consequences of federalism with different speed. But often for the sake of peace and stability asymmetric federalism is the only possibility to hold conflicting communities together.

The Privilege Argument

The strongest and most convincing arguments against federal types of solutions are based on equality issues. In Switzerland for instance in any constitution making democratic decision the vote of a citizen in the smallest canton weighs 36 times more than of a citizen in the canton of Zurich. In the federation of Serbia Montenegro the number of Inhabitants of Montenegro is only one fourth of the number of inhabitants of Belgrade. The decision making process for the new Constitution of the European Union showed how difficult it was and still is to find the compromise between the big and the small states. Thus in many cases constitutions provide adapted scales, which take into account the number of inhabitants, the size of the federal units etc. Those scales are usually calculated in order to prevent a veto position for the small and to avoid the big states to be able to make decisions against all the small units.

In Switzerland the argument for the privilege of the small canton was based on a historical argument. The small cantons claimed that the quality of sovereignty transferred to the confederation is the same notwithstanding the size of the canton. Today this inequality is again disputed as it privileges excessively the small federal units. A solution between those positions can only be found on the bases of diversity. If diversity is as an important value as the value of majority, then the balance between diversity guaranteeing inequality and the majority guaranteeing equality is possible. The challenge for the minorities, that they misuse their power against the interests of the majority remains however. It can only be met; if in the day to day political life minorities do not misuse their legal power.

The Democracy Argument

Federal units participating as units in the decision making process are claimed to limit democracy. Thus federalism is considered to be a limit to the majority rule. If democracy is reduced to the winner-takes all democracy principle, this argument has some grounds. However if one considers democracy as a tool to enable as much as possible self-determination within a community, one has to seek procedures which enable the largest possible consensus. As the federal units are within their entity to guarantee stability and implementation of federal laws, they have to

be considered not only as part of the common nation but as a unit which has to seek values which are good for its own community. For this reason as federal units have to have their own legitimacy and as the federation can only get legitimacy through the legitimacy of the federal units, it has to seek the support of the largest possible number of federal units.

Further developments

In what ever dynamics will influence the shared-rule principle, multicultural states have to take their diversity serious and build their composed nation upon this diversity. Communalities can probably only be found on the bases of fostering diversity, accepting multiple loyalties and to provide common ownership for all federal units in order to establish a common fatherland for all different communities. The right to be unequal must be kept in balance to the right to be equal. This will only be possible if one perceives this shared rule principle as an instrument to implement collective rights of the federal units able to defend those rights in court proceedings.

Dynamics of development of shared rule elements will never achieve appropriate results if the only aim of the state is reduced to the guarantee of individual liberty. Peace among the different communities has necessarily also to be a main priority of the federal multicultural state. It is only for the sake of peaceful common development, that one can justify privileges of minorities versus discrimination of the majority.

In order to establish and limit political power, constitutions must have legitimacy of the great bulk of the concerned cultural communities. This legitimacy can only be achieved if the different communities have the power to participate on equal footing in the constitution-making process. The winner-takes-all democracy cannot be the foundation for a governmental system that achieves legitimacy with regard to those cultural communities that will fear to end up as permanent losers. Only by introducing elements of power-sharing, and thus softening the rule that 51% equals 100% majority, the principle of democracy will be acceptable by minorities, which otherwise would permanently be excluded from participation in the political decision making process.

The legitimacy of a state with cultural diversity can only be achieved if each cultural community considers the state as its own state. This goal is only attainable if the cultural community is convinced that its own cultural heritage is best developed within the respective state. The state must aim to enhance diversity.

The primary aim of democracy is not to only produce simple majorities, but to seek consensus of the society on crucial issues. A consensus-driven democracy operates on a bottom-up process, beginning with self-determination of the individual, and rising through the ranks of municipal, district, and regional communities to possibly finish on the state or international level. Decisions should be made on such a level as to enable as many citizens as possible to participate in the decision-making process, so as they may identify with the outcome of their input.

Most democracies are prepared to give 100% of the state power to 51% of the voters. In a state with cultural diversity such a system needs to be adjusted on the basis of compromise as fundamental political value. In such a system 51% must

not be considered as 100% but as a small majority lacking 49% of support. Thus the tiny majority will have to find the necessary compromise in order to achieve a higher percentage of approval. The political decision making process and the political institutions have to be guided by the idea that a compromise, which produces larger approval, has higher value than a small majority.

Democratic procedures should not only produce effective and legitimate decisions for the society. They must also be conceived as tools for conflict management among the different conflicting communities. In this sense democracy can be seen as an aim and as a common value to be achieved by the fragmented state in order to enhance self-determination for individuals, communities and for the composed demos.

IV. The Control of the Federation over the Federal Units

The Challenges

To solve the federal control over the federal units is one of the most difficult challenges to be solved and regulated by each federation. How can federations control that federal units implement federal statutes correctly? How can they enforce federal decisions against the clear opposition of a federal unit? With regard to the international cooperation there is even a more difficult challenge to be solved. Would Switzerland e.g. dispose of the appropriate tools to enforce international obligations and in particular the obligations of the treaties with the EU? How should a federal constitution for Cyprus be designed, that this member state can after the political unification with the northern part control the application of directives and ordinances of the EU and even more difficult the decisions of the European Court by the federal units?

With regard to the Human Rights obligation Switzerland was confronted with the problem to implement the decisions of the Human Rights Court of the Council of Europe with regard to cantonal decisions violating the European Convention for Human Rights. How Switzerland could have e.g. force the cantons to apply the minimal standard of article 6 EUHRC within their administrative statutes enacted within the legislative autonomy of the cantons?

Different Instruments to Implement Federal Law

The Swiss constitution does only provide the possibility of the federation to intervene in cantonal affairs, when the constitutional order is disrupted. According to the German Basic Law the federation can enforce with federal police power the federal obligations with regard to the Länder. This intervention however needs approval by the Bundesrat. The Cabinet of the federation can - in order to enforce the legal requirements – issue directives to be followed by the authorities of the Länder. Federations of Common Law systems have common law tools at their disposal. Thus the federation can issue a writ of injunction and require the court to enforce a legal obligation. The court on his behalf has the power to enforce its de-

cision by contempt of court with regard to the official, which does not obey the court sentence. Such power is not given to courts in the civil law countries.

Of specific interest in this context is the so called Francovich decision of the European Court of Justice. In this case it has decided Italy to be liable for not issuing the necessary social insurance laws required by a directive of the commission of the EU. For this reason Italy was required to pay compensation to Francovich who did not receive the social payments required by the European directives. This decision has far reaching consequences as it makes member states financially liable before the European Court of Justice who did not enact the necessary legislation they would have been required to according to the European directives.

Parallel Administration in USA

Federalism with regard to implementation and enforcement has been designed quite differently compared to the European federations. In the USA federal laws are implemented and enforced within the states by federal agencies, state laws are implemented by state-agencies. Thus within the states two parallel administration are acting: federal agencies and state agencies. Accordingly two parallel judiciaries are provided either to enforce federal statutes or state statutes.

V. Can Multicultural Fragmentations be Hold together by Ethnic Federalism?

a) Mapping the Issues

Connexion between Multiculturality and Federalism

Federalism provides the instruments to manage interethnic and inter communal conflicts. On the other side federalism as well as Multiculturality and multiethnicity as political movements to establish proper identity may question and in the worst case endanger the existence and substance of the state as such. So federalism meets both fundamental challenges of the traditional liberal state with regard to the multicultural societies, which is based on one side on the inalienable individual freedom and on the other side on the pure majority oriented democracy.

Notion of Ethnic Federalism

By ethnic federalism we consider in the following not all the different federal solutions of multiethnic societies, but in particular only those federal solutions of multiethnic societies, which are structured territorially and at the same time aim to bring and to hold ethnic diversity together. Ethnic federalism has been developed out of the nation-state principle. Then the nation-state is confronted directly with the ethnicity since it is either based on the concept of the dominant culture of the majority people (Leitkultur) and thus tolerating minorities or it is built upon the a-cultural nation, which per se ignores the political existence of minorities.

Federalism as Political Principle for Partnership

Federalism can legally be seen as a state structure of a territorially fragmented state. However one can understand federalism also as a principle which enables a political organisation having as goal to bring and hold different political units together within a supreme political system.

Whatever political point of view is taken the federal system enables to establish the constitutional balance between self-rule of lower political units and of shared rule of those units on the higher federal level. This structural balance leads to a vertical separation of powers and in particular to a mutual power control on the different levels of the state and thus as well of its "democracies" as of its authorities. If this constitutional principle is transcended to the political level, federalism presupposes institutions, which replace or at least complete the majority principle by the negotiation principle and the principle of partnership seeking consensus within a decentralised or even centralized state.

Nation-State versus Ethnic State (Volksstaat)

The modern nation state requires within is specific and clearly defined territory unlimited universality. The relationship between universality and territorial limitation is made by the principle of citizenship. The principle of citizenship can as a clip only hold a state together, when it is built upon an identity, which creates a accepted homogeneity of the citizens and by transcending the consensus of the great bulk of the population into the state legitimacy. This homogeneity of the state community (nationality) is either based on common political values or on a common language, culture or religion (nations-state versus ethnic state). Identity and homogeneity are thus the two indispensable pre-conditions of a modern democracy. Modern societies require a policy of different diverse identities and not a unitary identity.

Major Challenges of the Countries in Transition

An additional distinction is imperative: While federalism and Multiculturality are but permanent challenges for western democracies, federalism as well as Multiculturality did explode in countries of transition in Eastern Europe and have after the rule of the communist party finally either deconstructed the traditional state or led to a permanent conflict. And this was even also the case with regard to states, which have been built up as federations. Federalism and Multiculturality will also be in the near future a immanent obstacle for the establishment of stable political democratic relationships within those societies.

Balance of Diversity and Unity

As a consequence we have to ask primarily, whether federalism can at all establish a balance between diversity and unity. And strongly connected to this question is the relationship and connection between federalism and democracy. Why? Simply because federalism as an instrument of conflict management for multiethnic societies can only be successful if it can give as well an institutional and political answer to the question how multicultural contradictions can democratically be

solved and how this solution can at the same time establish the necessary loyalty to the overall state.

The demos which is the fundament of the sovereignty as well as of the state and the governmental system provides democratic procedures with which the people can sustained and permanently control the decision making process of governmental bodies. By its nature each political power position depends finally directly or indirectly on the acceptance of those who are prepared to follow and obey its legal orders. This preparedness has its ground in the conviction of the obedient citizens that their obedience is finally within their proper interest.

b) The Structural Challenges

1. Federalism and Democracy

Equality and Diversity

In order to understand the relationship between federalism and democracy we base our reflection on the following hypotheses: Looked at both principles from the point of view of the concept of the constitution both provide instruments and procedures for the power-control. However they have their roots in different values and political preconditions: Federalism is based on diversity, democracy presupposes equality.

Checks and Balances versus Collective Group-Rights

Federalism and federal structures have ultimately developed out of the claim of communities to provide not only the guarantee of individual but also of group-rights. Ethnic federalism as normative concept presupposes that regional diversity developed by different ethnicities is recognized as legitimate. In order to respect this legitimacy federalism must have as basic goal, not only to maintain but also to enhance this legitimate diversity. Such goal however seems to be in open contradiction to the modern democracy established on one side by the principle of individual political liberty and on the other side by the respect and guarantee of absolute equality of all individuals and citizens. Thus federalism is the result of the traditional principle of separation of powers of the state of modernity. On the other hand federalism has provided the new basic principle of group rights an inequality in the sense of the right to be different, which are in open contradiction to the state of modernity. Seen from this point of view federalism is a permanent challenge to the republican understanding of democracy and peoples sovereignty.

Federalism and Peoples Sovereignty

With this federalism has permanently put into question both pillars of the modern liberal state. Namely it has challenged the political perception that the state of modernity is built upon the democratic sovereignty and legitimized by the political procedure. Federalism denies the majority of the nation its claim to be the only fundament of people's sovereignty. As already repeatedly mentioned the federal

state replaces sovereignty with a diffuse distribution of sovereign competences between the federation on one side, the federal units and their municipalities on the other side. In other words: By recognizing collective liberty federalism transcends democratic sovereignty as legitimacy bases as well as the supreme might in the sense of competence-competence.

Public Status of Minorities

Federalism does also substantiate the legitimacy provided by procedure in all those cases, where the structure of the federation aims at accommodating minorities by giving them a public political status within the multi-ethnic and multicultural society. In this case democracy doe not only guarantee a specific procedure, but it also guarantees the result, in limiting the openness of the outcome of the procedure, because the claims of the minorities should not be endangered by the procedure.

Different Types of Federalism

Both federalism and democracy aim at limiting the power of the state by specific institutions and procedures not only at the stage of the enacted constitution but also in the process of constitution making. If one confronts both state principles, one can even speak of a democratic control of federalised power on one side and of a federal control of democracy on the other side. In particular with regard to the point of view of the relationship of federalism and democracy some basic differences have to be recognized: Different types of federations express an inherent ambivalence. On one side the federation has to legitimize its system according to the legitimacy principle of the state of modernity; and this legitimacy principle is largely based on democratic procedures. On the other side the federation has to take into account its structural challenges to accommodate its ethnic diversity. Ethnic diversity based on the principle of equality of all ethnicities independent on the size of population on one side and the democratic

Complement of Democracy: MADISON-Federalism

For the federation, which is based on the principle of federalism developed by MADISON who together with JOHN LOCKE recognizes individual freedom as the only legitimate goal of the state and for which democracy is organized only based on the majority principle (USA and to a certain extent also Canada) democracy is the bases, which is completed and corrected with an additional tool of vertical separation of powers. So far as the accountability to the people is mainly realized by the control of state powers, the federal vertical separation of powers complements the horizontal checks and balances. In this sense it corresponds to the requirement of MADISON in federalist papers No 51, that by establishing new state powers the constitution making body has to design powers and checks very carefully. The decisive problem with which federations are confronted however consists in the fact, that they have to internalize a partnership negotiation principle based on the balance of the partner into a system based on pure majoritarian de-

mocracy. In addition they have to bring together into one national unit different communities with different loyalties.

According to MADISON the constitution of the United States with regard to its historical roots has to be labelled as federal, but as national as far as the constituted powers of the governmental branches are concerned which constitutionally have to maintain, defend and promote the common interests of the United States (Federalist Papers No. 39). The type of the American federation is a democratic federation in the sense, that it is on one side committed to the values established by the democratic majority and that it has on the other side to overcome the structural tensions between the majoritarian democracy and the federalism opposite to the majority principle.

Universalistic versus Particularistic diversity

The challenge for liberal democracies of the multicultural society is existentially immanent to the state, since those democracies are based on the principle of individualistic majority. Those states are essentially oriented towards the equal representation of all individuals. By this majoritarian democratic principle the constitution has procedurally excluded diversity as a value to be achieved in politics. Authentic liberalism can not accept diversities of groups and communities as basic fundament for the state-building. For this reason federalism is structurally incapable to meet the demands and claims of multiculturality and to include the value of diversity into the political system. Therefore the recognition of collective rights is excluded for a liberal state. Indeed the liberal state is in the defensive when it is confronted with the argument of multiculturality: that individual equality is in reality no guarantee for real quality, as long as the individual equality of human beings is not completed by their being equal as member of a community independent from the size of this community. Liberal democracy recognizes diversity only in a universalistic but not in a particularistic perspective.

Federalised Democracy

The European federalism however, which is influenced by the philosophy of ALTHUSIUS is more open to collective values. Switzerland can be taken as paradigma for a federalism open with regard to collective values of communities. Switzerland is mainly rooted within the strong cantonal identities and within a democratic integration, which recognizes and even fosters the diversity of language and religion not only on the level of constitution making but also with regard to its constituted decentralisation and devolution of state powers to cantons and municipalities. Thus Swiss federalism lacks almost all institutions and procedures which in many other federation are aimed to integrate and to unite the society on the level of the federation. Unlike the Madison-Type federalism the exertion of state powers by the governmental branches is not national but federal. In Switzerland federalism does not complement democracy but has much more to be considered as structural bases of a consensus oriented democracy.

Reconciliation of Democracy and Federalism

Based on the communal character of the Swiss democracy which is aimed at serving the principle of communal liberty state policy does not have as a major goal to reconcile federalism and democracy. State policy is rather oriented to implement the participatory democracy as a federal element to articulate and to protect the interests of structural minorities in a multicultural society. Since federalism as structural element is integrated into a consensus oriented democracy one can label Switzerland as a federalized democracy. Even more provocative one can even say that the Swiss form of substantial legitimacy has not only reconciled federalism and democracy but it builds rather upon those two elements considered that both are and should be essentially assigned to each other.

Particular Swiss Citizen „Citoyen“

Assuming the two different concepts of nation or people of western democracies underlying the principle of citizenship, one can say, that besides those two concepts namely the citizenship without or against ethnicity (USA, France) and citizenship based on ethnicity (Germany) Switzerland has developed a third model, which combines both models and which consist on a citizenship which integrates and build upon the different democratic ethnicities.

2. Can one Reconcile Ethnic and Political Pluralism with Democracy?

Ethnic Conflicts are Territorial Conflicts

Ethnic conflicts which turn into an irreversible conflict are immanently conflicts on territories. On this fact we have in the first place to insist. Namely the close connection between territory and ethnic identity emotionalizes the conflict. Thus territory turns into a strategic symbol.

If one accepts the inherent connection between territory and the modern nation state, the closeness of ethnic relationship to the territory can rarely be separated from the real source of the national identity. This is valid notwithstanding the fact that the national relationship historically is rooted in two different systems: Citzenship namely has its origins in the ius soli (patriotism) and in the ius sanguinis (ethno-nationalism) and that in most cases the ethnic community is not identical with the state territory. This is one of the main reasons, why ethnic conflicts can only in very rare cases be solved by a pure human rights strategy and why the problem in most cases is directly oriented to federal solutions in the sense of conflict management not conflict solution.

Integration by State Making

Indeed: As far as federalism can give diversity a territorial dimension, it makes it obvious, that federalism becomes one of the structure of states, which is apparent as a concept for conflict solution. This however is only possible with one indispensable precondition: There must also be a democratic consensus on the solution! In other words: The decisive problem between federalism and ethnic conflicts can not be solved only with institutional structures. A solution of the conflict is only

possible, if the solution (the making of the state) as such includes and is made by the multiethnic society. Since only when the different ethnic communities are included in the making of the state, a democratic integration of different communities on the original constitution making process is enabled.

How can "Ethnification" of Constitutional Conflicts be Avoided?

The decisive paradoxon of federalism as instrument for conflict management of multicultural societies is to be found in the potential which is hiding the relationship between territory and ethnic oriented constitutional solutions of a multiethnic federation. The probably most difficult challenge ethnic federalism is confronted is to find federal solutions, which enable the federation to avoid on the federal level, that constitutional conflicts turn into ethnic conflicts. One has to be aware that all constitution making and constitution amending conflicts may very quickly degenerate into ethnic conflicts, because they can easily be interpreted as such and thus tempt the parties to engage in a ethnic irreversible conflict.

Cross-Cutting or Identity of Territory and Ethnic Community

Sometimes it is claimed that ethnic federalism would only contribute internal harmony and the building up of a citizenship democracy when the concerned ethnic communities are concentrated on specific territories and thus can be territorially separated and kept away. However the Swiss case shows, that this must not inevitably be so. In Switzerland the different ethnic communities are crosscutting with each other (religion and language) and with the territory of the cantons. In addition the ethnic communities are not organised in one cantonal territory, which would become the symbol of their ethnic identity. There is no mother canton for the German or French speaking Swiss. An even the Italian speaking Swiss are concentrated in two and not only one canton.

Radicalizing Ethno-Regionalism

On the other hand the example of former Yugoslavia has shown paradigmatically, that federalism can turn and thus be radicalized into ethno-regionalism, when the territorial crosscutting of the ethnic communities is integrated constitutionally and institutionally in one identity of the dominant ethnic communities. The expectations with regard to federalism, namely that pluralism can be sustained has led the parties to renegotiate the federal alliance from scratch on. Doing this, each and even the slightest controversy has been emotionally loaded and turned into an ad hoc ethnic conflict and has been fought along ethnic lines. Thus the success of ethnic federalism depends, whether the federation, which has been founded, takes into account the ethnic diversities and is able to foster a double identity and loyalty. If in contrary ethnic conflicts are radicalised by the ethnic communities, which systematically exclude a common democratic identity and legitimacy, a common state is excluded.

It is however much easier to formulate such postulate in words than to implement it into the reality. Some recent conflicts, where one has tried to accommodate ethnicity with federal solutions in order to set up a new political legitimacy

have shown dramatically how difficult it is to create new ethnic fundaments for a political society. In Ethiopia for instance a case of clear ethnic federalism it is not the constitution but the leading party or coalition of the leading parties which holds different ethnicities together. The ethnic constitution seems to be working because of the political leadership of the party. It remains thus to be seen, whether the constitution will still be able to hold diversity together, when the leading party has to hand in the power to a pluralistic multiparty system. On the bases of a ethno-territorial structure of politics neither multiethnic nor ideological parties engaged for universal values parties which are not based on a ethnicity might have a real chance in the future.

3. The Function of the Constitution during the Dissolution of the ex-communist Countries

Constitutional Conflicts as Instruments of Disintegration

Constitutions can neither establish nor destroy federations. But they reflect the fundament of the state and the structural deficiencies of the constitutional order. In the case of the previous multiethnic communist federations the crucial fundamental principles of the federal order made apparent, that in fact during the communist regime a real federal alliance as bases of the federation did in reality not exist. For this reason when the communist regime once had faded away, whenever a constitutional dispute did arise simultaneous the actual fundament of the federation has been put in question

Thanks to the structural deficiencies of all three dissolved ex-communist federations Czechoslovakia, Sowjet Union and Yugoslavia) the constitution was considered to be the most appropriate tool to dissolve the common state. In all three federations the process of disintegration has been initiated by the constitutional dispute on a new structure of a common state to be constructed by a new constitution.

Construction of Federalism by the Ethnic Perception of the Nation

It is not coincidental that in all multiethnic communist federations the decline of the political domination of the party went parallel to the collapse of the common state. The process and the way those federations collapsed however differed substantially from each other. The different historical circumstances, by which the communist federations have been established, did lead to different types of conflict. The structural and constitutional causes however, which did lead to the dissolution have been similar within all three communist federations. Decisive was namely that the communist constitutions have been constructed upon a ethnic perception of the nation, which did lead to a construction of the federation, which was rather different from other federations.

Principle of Equality of Nation

As already pointed out the communist parties of multiethnic states did establish the legitimacy bases for their political power upon the principle of equality of the

nation. This had the following effect: First it presupposed the right of each ethno-nation to its own and proper state. Second the legitimate claim to be member of a nation within a "just federation". Of course the principle of equality of the nation was not proclaimed expressly in the constitution. But it enabled the party besides or external to the constitution to establish a para-constitutional order and political power which gave it the possibility with permanent manipulation and re-definition of the interethnic balance and of the interethnic relationships to develop and expand its authoritarian regime.

The Constitutional Crises was a Crises of the State

In a federation constructed only upon an alliance of the nations and their relationship to each other any constitutional dispute had necessarily to turn and degenerate into an ethnic conflict. In the long run this has probably been the most disastrous consequence of the authoritarian instrumentation of the interethnic relationships. Whereby the goal of this instrumentation was not to transform the diffuse might of the ethnic nation into an accountable power of the citizenship people; the aim was rather to empty out the legitimacy of the overall state by stirring up constantly the enemy loyalties with a continuous confrontation of the different ethnicities.

Friend-Enemy Perception

The bases of the legitimacy were not common values but rather the differences and contrasts of the various nations. Thus a negative-legitimacy has been established which served as fundament to develop the essential political relationship into friend-enemy relationships according to the theory developed by CARL SCHMITT. For this reason the constitutional crises which was first latently developing and later became public and apparent should have been a signal of alarm, that with the constitutional crises not only the constitution and the governmental system was at stake but rather the common state and its territorial structure and border lines.

Federation without Federal Loyalty

Thus it becomes clear that the three multiethnic federations at the time of the dissolution of the communist regime not only were "illegitimate" pre-modern societies, which were looking for a new appropriate constitutional ground in order to establish a new state in which citizens became actual associates of the state and thus received a new status activus. They also were illegitimate pre-modern communities because they considered the state, which compelled them to enter into the federation, to be an enforced community. Thus not only the regime was missing but even the state as such did lack legitimacy. Between the normative demand of liberal democracy to a legitimacy by procedure and the need, to institute it in the constitution on one side and the pre-modern socio-political background (result and ethnic oriented democracy) on the other side a tension has been built up, which would never have allowed to replace the old federation and set up a new state entity. As soon as the multiparty system has been introduced the dissolution of the state was the only value to achieve. Only a political strategy oriented versus this

goal could be realistically converted into a successful political program. A federation without federal loyalty had no chances with regard to the ethnic nation. The only acceptable legitimacy with a political content was in fact the legitimacy of the nation.

The Phases of the Dissolution of the Federation

Constitutionally considered the dissolution of the federation in all three federations has followed the same model:

First the constitutional crises expanded into a constitutional blockade and stalemate, because there was not one proposal to revise the constitution, which was aimed at the common interest of the federation. Each proposal was rather oriented to consolidate the proper political position and power. In the second phase the process of decentralisation was driven forward. This process ended in a secession procedure. Finally the declaration of independence came legitimised by the referenda of the people.

Proclamation for Human Rights as Facade of a Constitutional Democracy

The technology of the constitution explains of it self better then everything else the two remaining and just as important factors and causes:

a) The dissolution of the state in relation to the collapse of the rgime had structural causes. It cannot be explained only by pointing to the power-greedy political leaders. Those were rather the consequence then the cause of the process.
b) The ethno-nationalism always tries to appear fort he outside as a decent and proper state and fort his reason it constantly refers to democracy and human rights. It is fort his reason why political leaders could hush the real facts and simulate the process as highly cultural and decent. Thus they were able to give the new ethnic state the façade of a real constitutional democracy.

As in the previous communist states no constitutional rights could individually be enforced and since all rights were considered to be collective rights there did not exist in the society any recognized individual but only collective rights and values. Thus it was just normal that the rights of the previous communist party as collective rights have been transcended to the new collective, the nation.

As earlier the dissidents and opponents of the communist ideology have been excluded from the society and considered as traitors of the national interests and as they were declared outlawed and lawless human beings, so later the members of other nations were considered at least as potential traitors and in any case as excluded human beings, if they were not able in a very particular way to swear and confess their absolute loyalty to the new state.

Federal Facade

Thus it is easy to understand that the constitution in this historical and sociological environment at the time of the collapse of the party did have a totally different function than in other communist states with a more or less ethnic homogeneous

population. One can characterise this function as follows: the constitution turned into the most appropriate instrument to carry out the dissolution of the common state. Then the federation was not a constituted federation but a federal façade, which has been hold together by the might and force of the communist party. The party became the real and sustained power-structure, which did use the constitution only as a pretext to be used for its regime. Therefore the constitution could only exert its function as long as the decision making process of the party without common democratic policy was enough centralized in order to guarantee the survival of the "sovereign" ethnic nations.

Ethno-Nationalism

Finally the notion of a constitutionally based ethno-nationalism needs additional explanation. It is no coincidence that for all multi-ethnic states in transition this phenomenon of ethno-nationalism is typical, because only with ethno-nationalism a strategy of ethnification of politics could be carried through. This can be observed in all Central and Eastern European states in transition. In a multiethnic society the citizenship can only be implemented based on the ethnicity of the majority nation. The constitution making power lies in the hands of the majority nation. It is the majority nation, which has the goal by constructing an ethnic state to achieve "universality" in order to legitimize the new political order.

Constitutional Wording and Constitutional Reality

However one should never forget, that ethno-nationalism has almost not left and will in future not leave any expressive hints in the text of the constitution. When the nationalistic regime should not be pushed totally in isolation, it will always have to seek for allies in order to maintain the appearance of a decent democracy with the real guarantee of human rights. Nationalism one can recognize by assessing the facts and the activities and not by the words of the constitutional texts. And when one has to carry through the text, nationalism appears not within the positive text of the statutes, but by the way and the climate, which have induced the implementation of the law.

Hints of Ethno-Nationalism in the Text of the Constitutions

Nevertheless one can find in the constitutions, which have been proclaimed as a act of the sovereign ethno-nation using its right of self-determination in the sense of the constitution making power (pouvoir constituant) some hints containing the fundamental message, that the holder of the nation state is the ethno-nation. The dominant ethno-nation has the perception to be the real "*cause*" of the state and the "*owner*" of the state-hood and the territory. Logically the "others" will be treated as foreigners, which should behave as loyal state citizens. They belong to the tolerated and to tolerate minority. The constitution makers of all these states have used a similar norm-editing-technique. The ethnic fundament of the state is to be found in the preamble of the constitution, while the normative part of the constitution only speaks of the demos as exclusive fundament of state democracy! Indeed: In all those cases the constitution contains the function to foster the further

homogenization of the state. But this function has permanently been questioned by the underlying controversy: In a multiethnic society, in which ethnicity is misused as an instrument to politically mobilise and homogenize because of the ethnic division fundamental ethnic conflicts will be indispensable.

c) Conclusion: Why is Ethnic Federalism almost not functional?

Causes of the Democratic Unity of a Multicultural State

One has occasionally tried to bring federalism and multiculturality into a common harmony by analyzing the fundaments of the Identity of the unity able to hold the multicultural state together. From our point of view multiculturality structurally questions the existence of the liberal state, when it seeks to bring and hold together ethnic diversity by federal instruments. In this sense one has to ask principally, why ethnic federalism is almost not functional. To the following question we namely do not have a satisfying answer: What are the real causes and reasons of the democratic unity within a multiethnic state? Ethnic communities, which claim for their right to equality within the diversity and difference are still waiting to new constitutional principles of a democratic state, which could carry through a democratic integration of a multicultural society and at the same time establish new types of corporations, which would install the structural preconditions of a real human rights policy.

How can ethnic postulates be transformed into political principles?

Federalism has developed into an instrument to conflict management of interethnic conflicts. This development has however been possible only for federations, which are based on principles, which are strange to liberalism. In most cases however ethnic federalism has radicalised the problems it should have been solved. Why was it not able to de-ethnicise the conflicts? Because it has not taken serious ethnic postulates and thus was not able to solve the ethnic problems. *Ethnic demands should be transcended into political principles and structures*. Liberalism however is structurally not prepared to provide political solutions for such demands.

VI. Concluding Theses to a Theory of Federalism

1. Theses: Legitimacy

How peoples, cultural, religious or language communities are hold or brought together in a state? The answer can only be: If the state is able to achieve legitimacy with regard to all communities it will also be able to hold or even bring those communities together. How can the state build up such legitimacy with regard to those communities? Two elements are indispensable: First the state has to be able to provide inherent values, which each of the communities prefer to any intention

to achieve independence. Then it has to be inclusive with regard to all those communities and to include them into the process of state-building and general decision making in a way that those communities can finally identify with their state designed according also to their concept. This however is probably only possible, if in stead of a majority oriented democracy, which counts only heads a consensus oriented democracy is established which is oriented towards negotiation and compromise.

Such aim can only be achieved, if the state also is constructed upon different legitimacies: Legitimacy of the municipality, legitimacy of the federal unit and legitimacy of the federation. Such structured legitimacy can only be realized, if on each level decisions which belong to the specific area of interest of the concerned community can be made autonomously. A uniform legitimacy would destroy the federation.

In each case fragmented states need to provide the bases, that all human beings living in the state can identify with the state independently of the cultural community, they belong to. This remains still probably the most difficult and almost not solved challenge of today.

2. Theses: Divisible Sovereignty

In the area of globalization sovereignty as concept of the “big bang” of the existence of the state which is the fountain of all state might has lost its magic power. There is however still no stat, which would have by its own decision abandoned the symbol of sovereignty. In the future sovereignty can certainly not any more be used as an absolute and exclusive fundament of the state. Only divisible sovereignty can still serve in the future as fundament of state power.

State power and sovereignty will today have to be open, divisible and participatory. The state whatever is its construct can only claim to hold a part of sovereignty. But if sovereignty can be divided, then it can be divided internally and externally.

This presupposes a new concept of sovereignty. Sovereignty is not the “power to have power”, but it is the fundament of the *legitimacy* of the state. Today sovereign is who has legitimacy of state, federal unit or international power. Within a federation legitimacy is divided: the people of the federal units legitimises the power of the federal unit and the people of the federation as well as of the federal units legitimizes the power of the federation.

The concept of a divisible sovereignty is only thinkable for a state, which not only with its interior with regard to its citizens, “citoyens” but also with regard to the exterior is open. The federal state is open for division in its internal structure but also with regard to international integration. The assignment of tasks according to the principle of subsidiary but also the legitimacy as well as the perception of responsibilities by democratic decision making are the fundaments of a genuine federalism. Integration is the natural development of a polity which has been built bottom up from the municipality to the federal unit up to the federation and which is open and flexible for additional international developments.

Globalization fosters federal structures, because the take at best into account the actual transnational and international networking, which has replaced the for-

mer international cooperation of sovereign state islands in the see of the international community according to the perception of the peace of Westphalia.

The geometrical symbol of the middle ages was the hierarchically designed pyramid. The symbol of the period of industrialization and enlightment with machinery functioning with gear wheels meshing with each others, the symbol of globalisation is the network. The biggest chances to achieve influence in this network have nodal points with high legitimacy and flexibility. Unitary states dispose only of one nodal point. The federation however can utilize the nodal point of its federal units, the municipalities and of course of the federation.

Traditional nation-states have developed in the 19th century to isolated "islands of sovereignty" which however dominated important colonial territories. Federalism has no colonial tradition. Many federal states are the results of previous colonies. Federalism as state-concept which is flexible externally as well as internally has the chance better to develop within a complex network-system.

The traditional nation-state with its impenetrable "sovereignty skin" will have to ask, when it will be able to meet the challenges of tasks getting always more complex and requiring flexibility within the interior (decentralisation) as towards the international community facing growing internationalization. In France each debate on further integration in the EU as well as on inner decentralisation often triggers a discourse on the existence of the survival of the republic. In contrast federal systems can only develop with a political culture, which is open to internal and external developments, in which disputes on more centralisation and decentralisation are part of daily political life without triggering a discussion on the very existence of the state as such. This fosters a culture of negotiation and compromise, necessary to manage conflicts.

3. Theses: Power and Responsibility

Only in federal systems power and competences can be assigned to territorial units, which are also able to bear the corresponding responsibility. A basic principle of modern organisation requires each unit to be assigned all the powers and competences not more ant not less which it can also bear the responsibility for and be accountable for.

Modern multinational companies have discerned that the secret of flexible, effective and efficient leadership is decentralization of power and responsibility. In most states it is still the central legislature, which decides on the content and amount of the democratic rights of the citizens in regions and municipalities. Can the central legislature or the central state also bear the responsibility for such decision and make sure, that the concept of organization it is providing for those decentralized areas fits also to the historical and cultural particularities of the region?

Corporations, which for instance have to decide on the planning of hospitals or of general health care need to dispose of the necessary means and influence on the choice and training of the human resources and finally should they be able to guarantee, that the planning corresponds to the concrete needs of the people.

How many modern conflicts have been caused by the fact, that governments did decide on the fate of regions and human beings far away from the centre because they have the formal competence to decide; but they will not have to bear

the negative or positive consequence of their decisions and thus have no direct responsibility. An appropriate balance of power and responsibility can finally only be realized in decentralized units. Modern public and private institutions will have to be designed in a way that each leader having to decide for other human beings, has also to bear the consequences of his or her good or bad decisions.

Who is asked to decide on the construction of a new school-building should dispose of only of the financial means, which his/her electors, taxpayers and later beneficiaries have entrusted. When the central government is empowered to decide on the language and the curriculum of the school education in a certain region, neither ministers nor civil servants nor their children are affected. Most probably then also the decisions will not have been prepared with the necessary care.

Only in polities guaranteeing autonomy for regions and municipalities the magistrates in charge to govern will be close enough to the people affected that they will feel the effect of their activity, the measures and decisions. Thus they will be able to adapt their behaviour and react to failures in time. Only when the population can react on the spot to failures, the authorities will have the necessary flexibility to react and improve their policies.

4. Theses: Capacity to Adjust

Only in federal decentralization democracy can be developed in order to enable citizens open for experiments to initiate quickly, flexible necessary changes meeting their needs. In such federal and democratic structures they can also quickly react to measures with unjust or negative consequences. The competition among the different democratic corporations will be enhanced. The local units will be motivated to find and achieve solutions if necessary with experiments, which finally are also in the overall common interest of human beings living in this area.

5. Theses: Diversity

Diversity is wealth; diversity destroys the uniform identity, equality and loyalty. The opinions on diversity could not be more contradictory. There is no doubt that federalism is built upon the conviction that diversity contributes to the cultural and spiritual and even to the material wealth of a country. Diversity is a value, which has to be fostered constantly. With federalism the liberty of the individual can brought to harmony with the liberty of language, culture and religion of the communities it belongs to. Humans need multidimensional loyalties. They want to be loyal to their cultural and/or religious communities, loyal to the municipality, to the federal unit and to the federation. Such multiple loyalties are only consistent within a federal concept.

The unitary state embodies either a uniform culture which turns into the leading culture of the state or it set up its democracy by the political rational "citoyen", which is asked to privatize its culture. Both solutions are unsuitable as conflict solving models in new states.

Horizontal separation of powers has been for LOCKE and MONTESQUIEU and is also for today the precondition for individual liberty. Vertical separation of pow-

ers on the other side is the precondition for autonomy and self-development of linguistic, religious and cultural communities to be secured by the supreme common polity.

The lesson of modern history we can learn from is the dangerous effect caused by a society atomized into millions of isolated individuals. Humans are free as individuals only, when they can develop within their group that is the family, the local and the cultural community. Besides the liberty guaranteed for the single individual also the religious, linguistic or cultural community he/she belongs to needs to be guaranteed independence and autonomy. In a federal polity such limited autonomy and liberty can be realized, without endangering the indispensable solidarity to the superior polity. In contrast a centralistic uniform nation-state confronted with autonomy of groups will have to fear for its survival.

The federal state is much more flexible. It can pragmatically call in for more autonomy or more solidarity without giving up its basic structure. In contrary, autonomy of territorial units is the indispensable "wealth" of its cultural diversity and just as important as the liberty of the single individual. For this reason besides the individual basic rights the group rights of the cultural communities have to be guaranteed. Diversity is not seen as burden or break shoe of the national or unity, but rather as the motor, which moves forward by permanent disputes and provides vitality, innovation and creativity within the federation. In today's time of increasing international migration the federal state should not retreat to its traditional and classical diversity it is rather challenged to integrate into its existing diversity also the new immigrated population of transnational human beings enriching the old and classical diversity.

6. Theses: Social Balance

Federalism enables the equalization among the unbalanced economy of regions and thus to provide the necessary social balance. Social justice within the actual state has not only to be implemented among the different social classes but also among the different regions for instance the rich industrial centres and the economically marginalized regions.

The modern state ruled by legislation has in principle provided the conditions and the economical environment for the balance between employers and employees. The centralistic oriented market economy however has also induced the uncontrolled growth of big centres endangering the environment and has emptied out the economically weak regions at the margin of the state. Globalization will only increase this tendency already going on since more than hundred years.

Federalism completes the balance between the social groups and engages for a just repartition of economic wealth among the underdeveloped and overdeveloped regions, because in federations the regions with little population are defending their interests with equal rights compared to the federal units profiting from an increasing population. Economically they are weak, but constitutionally they are with equal rights and equal powers. Moreover they can participate on the wealth of the common polity much more efficiently than marginalised regions of a unitary state thanks to the fiscal equalization. Such equalization however is only possible, if the federal state is able to generate enough solidarity among its popula-

tion. Such solidarity presupposes that the common federation fosters values, with which the different cultures can identify and are prepared to pay the price of solidarity for in order to maintain the harmony of the common polity.

7. Theses: Liberty and Peace

The goal of the state of modernity is individual liberty. Who only cares for individual liberty, will of course also go to waste by privatization the traditional cultural communities. Minorities which want to cultivate their language do not profit from individual liberty. Their culture will be dispelled by the majority supported by the individual rights. If one wants to protect and foster the culture of minorities one has to recognize their right as community to maintain and develop their proper values. Minorities under pressure of the majority and fearing for their existence will deny the state they are living in the necessary legitimacy and initiate secessionist procedures. For the sake of peace the common state will have to give in some instances group-rights priority against individual rights.

Precondition of each federal perception of the state is the rule of law and the recognition of human rights. Without the absolute guarantee of the dignity of human beings federalism has no chance. The dignity of men/woman protects the human as a person with regard to its rational but also emotional dimension. It protects the homo oeconomicus as well as the homo politicus. The federal diversity takes into account the complexity and multidimensionality of human beings. Each human being should find in a federal state its niche where he/she feels safe and protected in its diversity.

The balance between individual liberty and collective rights is to be found in the need of humans for peace and harmony. When peace is at stake, the dignity of a community as well as the dignity of the single individual are in danger and have to be put into the balance.

8. Theses: Self-Determination and Democracy

The centralistic majority principle can be opened by the federal separation of powers and completed by a appropriate model of modern, partnership and compromise oriented participatory democracy as instrument to solve and manage conflicts. Indeed the majority principle alone is not a sufficient model for conflict solutions within a state. It has to be completed with the recognition of group-rights and the possibility of groups to participate as units in the decision making process of the state.

The pure majority principle of modern democracy leads as has already pointed out TOCQUEVILLE often to the tyranny of the majority. When the fate of the community is at stake, the majority should not only be counted by the heads of the individuals. Each single territorially structured cultural community should be considered as a unity and should be able to participate on equal footing with other communities with equal rights independent of its size in the decision making process of the common polity.

Equality of votes must be brought into harmony with the equivalence of the cultural and/or territorial communities. Basic conflicts can not be solved by a sim-

ple majority vote but only based on partnership oriented solidarity, which is based on the equivalence of groups, the negotiation principle seeking consensus and not only majority.

A pure majoritarian democracy destroys the federal balance. Federalism is not reconcilable with the winner-takes-all democracy. The majoritarian democracy legitimizes majority decisions which aim at solve conflicts of interests with the distributory character of the decision. Categorical conflicts over religion, language, territory and symbols of sovereignty or culture can not be dealt with by a simple majority. Moreover categorical conflicts can not be turned into distributory conflicts by democratic disputes to be decided by the simple majority.

Conclusion

The American founding fathers have been lead by the principle: „Let us be guided by experience, because reason might mislead us“. Based on these experiences the Americans hat installed for the protection of their local democracy a superior democracy that is a federal state with divided sovereignty and a federation, fragmented into smaller democratic units. They have established a federation which provides the environment in order to foster the smaller democracies to develop them-selves.

This idea, that democracy can be maintained and developed within the democracy was in particular during the time of the French Revolution revolutionary. By inventing this up to then never been realized new state concept they found the “constitutional wheel” which developed as counterbalance to the European continent influenced by the centralistic equal rights oriented French revolution. The experience of the US has shown to the world, the democracy of a federation can only be developed if it is based and when it fosters and not destroys the several local democracies. The evidence of a small weak anti-colonial democracy to develop from a rural society to the modern industrialized universal only existing superpower is astonishing!

Switzerland adds to this experience with new federal concepts. It has achieved and developed with federalism and direct democracy a complex multicultural society in the middle of a conflict loaded Europe. Switzerland had to complete the American federalism with new concepts of democracy, legitimacy and political culture. Thus it has given to federalism a new identity, namely the identity of a state-concept, which by permanent conflict management of the consensus oriented democracy was able to bring and hold most different cultures, religious and language communities together.

D. Theory of the Swiss Federalism

I. Multiculturality and Swiss Federalism

Unity in Diversity

The paradox formula *unity in diversity* paraphrases the federal principle of Switzerland. It expresses not only the importance of the contribution of the language and cultural communities to the nation made by the common will, but also the dialectical tension between self-rule, shared-rule and solidarity. Federalism as the political state concept of the federation is rooted in the constitutional balance of self-rule and shared rule. The assignment of responsibilities to the different level of the federation is complex and often very differentiated and is usually followed by re-interlacement by new rights of participation. Contrary to the USA and to Germany the Swiss Federalism is not only an instrument or an institution to guarantee vertical separation of powers. The Multiculturality and diversity of the country provide rather the "pre-constitutional" bases for a federalism strongly rooted in the environment of the society and considered as a structural principle essential for the survival of the country and the Swiss nation.

Peace and Liberty

Primary goal of the state of modernity are the protection and the promotion of individual freedom. A multicultural state as Switzerland with an inherent dangerous potential of conflicts will have besides to foster freedom also to engage into the peaceful living together of different cultures. The goal of Swiss federalism thus is moreover besides the individual liberty to foster the diversity of the society and to maintain the juxtaposition of the different cultures with legitimate institutions and appropriate procedures. Not only liberty but also peace among the different cultural communities is the proclaimed aim of the constitution. The individual liberty thus will have often to be submitted to the superior interest of the peace among cultural and linguistic communities and thus to the *collective right* of those groups.

Federal Responsibilities of the Federation

Diversity and autonomy have up to now only been granted by the limited competences assigned to the federation. Direct democracy, guarantee of cantonal autonomy and the political climate in which each political decision was only enforceable, when it was justified under federalist criteria's, these were up to now the de facto guarantees of the multiculturality of Switzerland. These instruments have served as well to regulate conflicts as to protect minorities. The new constitution now contains clear responsibilities of the federation to maintain federalism and in particular to foster diversity solidarity and the togetherness of the society. The executive the Federal council has to foster endangered languages and to engage for a

better mutual understanding of the different language communities and it has to support poor regions and in particular the mountain areas and city agglomerations.

According to article 46 par. 2 of the Constitution the federation has to take into account within its entire legislation and administration the cantonal particularities and to provide for the highest possible autonomy of the cantons. It has to respect cantonal independence as well as the right of self-determination. Simultaneously it has to determine under which circumstances and preconditions regulation on the federal level would be in the interest and necessary for a uniform regulation of the country.

Each of the three federal governmental branches is thus asked to take over new responsibilities. When they propose new decisions or if they engage in new activities, they have to assess the aims within the interest of federalism and evaluate whether the activities are necessary or even supportive for the new Swiss federalism and what will be the consequences for federalism of measures undertaken or proposed. Thu in future the federation is asked to find out and decide accordingly what is good for federalism and what could damage the federal balance.

a) Culturel and National Differences of the „multiethnic" Switzerland

Swiss Diversity

Switzerland with its only 42'000 square kilometres is undoubtedly the country with the largest diversity of religions and languages of the western European countries: Three equally entitled official languages, four national languages and four religious communities recognized as official public corporations. If one looks at the diversity of countries for instance in Eastern Europe as of the Balkan or of the Caucasus or of countries of other continents they exceed this impressive considerably. Comparing however the diversity of those countries with the Swiss diversity some essential differences with regard to Switzerland have to be taken into account.

The Swiss federalism (in Latin foedus: Alliance, Treaty) has developed out of a multitude of different, independent, partly democratic, partly oligarchic organised different polities. Those small corporations have seceded in a process lasting several hundred years from their big neighbours in order to maintain their somehow democratic uniqueness. Thus at the edge of the three big linguistic regions of western Europe 26 small corporate polities came together within a most complex and diverse alliance, in order to defend their political and cultural independence with regard to their mighty neighbours. Each of those polities was able to develop its own legal system its political and religious culture, its independent historical perception and at the same it remained linked culturally and in particularly linguistically with the culture and language of its neighbour state. Thus citizens in all of these 26 different states partly influenced by the constitutionalism of modernity and based on their rural or democratic guild or aristocratic tradition more or less loyal either to the catholic or the new protestant religion developed own and specific perception of the state.

From the Conflict of Religion to the Conflict of Languages

Until the end of the 19th century the tensions splitting Switzerland a part and endangering its federalism were mainly caused by the two opposite Christian confessions: the Catholics and the Protestants. Today and since the beginning of the 20th century the new tensions are mainly due to the language and cultural diversity of regions and cantons. Indeed based on its multi-linguistic culture Switzerland faces new and important challenges to hold its diversity together. Thus it is no coincidence that the new federal Constitution has weighed carefully the equally entitled national languages (Article 4) and the three official languages with some less equal rights of the Romonsh language (Article 70 par.1) under the point of view of the liberty of language (Article 18) and the diversity of languages (Article 69 par.3), the principle of territoriality and the harmony and mutual understanding of language communities (Article 70).

The Municipality as Smallest Homogeneous Territorial and Democratically organised Corporation

Switzerland is historically embedded within the environment of the political culture of the traditional western nation-state which has developed in the 18th and 19th century to linguistically and/or religiously somehow homogeneous states. Accordingly Switzerland has never been confronted either with the autonomy of peoples provided by the old millet system of the Ottoman Empire nor with the concept of autonomy of nationalities within the Austria-Hungarian Empire. Those traditions of limited personal autonomy of peoples are not familiar to the traditions of the Swiss. Thus autonomy has never been developed based on communities but mainly based on territory. Even in the canton of Grison which has to manage the most complex diversity the different languages (German, Rononsh and Italian) and regionally overlapping religious communities (Catholics and Protestants) are territorially separated by somehow homogeneous municipalities. For a long time even the Jewish population has been assigned in early time specific territories.

Not a Melting-Pot

The Swiss diversity has to be seen in contrast to the United States: The United States offered with the reservation of the discriminated and decimated nations of Native Americans a melting pot for immigrants coming from Europe, Asia and even Africa (previously as imported slaves). This melting-pot system is based on exclusively individual rights of freedom and equality. Thus in all places immigrant individuals are treated equally and respected within their individuality. In Switzerland as in the rest of Europe the linguistic but also to a certain extent the borderlines are territorially unalterably defined

Stability of Ethnic Border Lines

Contrary to Eastern Europe the Swiss population has never been victimized by war or foreign occupation since more than two hundred years. Besides the religious war in the 16th century ethnic cleansing has never been practiced in any region of Switzerland. The religious wars of the 17th century did though also lead as

in Germany the 30years war to a certain territorial apartheid regime and territorial cleansing based on the principle cujus region ejus religio. But besides the separation of the Canton of Appenzell into two half cantons it did not enforce important resettlements. On the contrary, the territorial border lines between languages and religions have kept astonishingly stable up the present times.

No Concept of Mother-Republic

The notion of Mother-State which has been developed fort he concept of homeland for nations in Eastern Europe is totally unfamiliar to the Swiss tradition. Would one transplant Switzerland into the area of Eastern Europe the German, French and Italian speaking population would have its correspondent Root- or Mother-Republic either in Germany, France or Italy. Those languages would not have any right to build a new Nation-State, they would be declassified from nations to nationalities. Only the smallest minority the Romonsh speaking population (0.5%) would have the legitimate claim to build its own state or Mother-Republic. Such concept as mentioned is however unfamiliar to the Swiss. While the people with different mother tongue living in Switzerland culturally feel connected to their neighbour-state, there is not the slightest reason for any of those individuals or communities to lean not only culturally but also politically toward its kin-nation.

This need is neither felt by the neighbour-states nor by their nationals. While for instance Italian Speaking Italians of Istria (Croatia or Slovenia) of feel linked to the kin Italians from Italy, the Italian speaking citizens of the canton of Tessin in early history linked to the city states of Italy would never consider themselves to be politically linked to Italy.

Nation without Minorities

The essential reason of this independence and uniqueness of the language communities is to be found in history and in the later political structure of Switzerland: As well the German, the French and partly also the Italian speaking Swiss are since centuries divided into separate political independent cantonal democratic corporations. Within those democratic federal units they don’t consider themselves to be a minority, as the homogeneous territory (besides the cantons with two or three languages) is under the jurisdiction of the corresponding language majority. As within Switzerland all the three main languages are on equal footing, they reject often to be considered a but only counted in numbers as a minority.

b) Swiss Procedures and Institutions to Manage Ethnic Conflicts

No Tyranny of the Majority

Most modern democracies provide as only legitimacy bases of the majority the parliament as main democratic institution. Within the parliament the people is represented according to the electors won by the parties. Multinational states however are rarely able to entrust the entire governmental responsibility to a majority party

or majority coalition as in such multinational states such regime can easily degenerate into the tyranny of the majority over the minority. When the minority party is identical with the ethnic minority the minority turns into a perennial looser and the people belonging to this minority into second class citizens. For this reason besides the pure majority principle some additional principles will have to be implemented, if one intends to build up a state composed of different ethnicities.

Basic Principles

Such principles may be summarized as follows:

- Concept of a State without nation: a-national state;
- Power and responsibility: Only those authorities should be entrusted with power and competences as long as they also feel responsible and accountable because the persons acting on behalf of those authorities will have to bear themselves the consequences of their decisions;
- Limits of state power: not only horzontal but also vertical separation of powers;
- Authority and Reaction: flexible democracy, which can react quickly in order to correct failures and improve its policy with regard to the need of the population;
- Internationally open State and open society: A multicultural state with links to neighbour-states needs to pursue a international policy of neutrality it can not afford to be politically biased and to discriminate one of the neighbour-states;
- Diversity has to be the common value of Switzerland which is fostered;
- Social balance: solidarity;
- Humanity: Guarantee of the dignity of human beings and local governmental and administrative action close to the citizens;
- Self-determination: autonomy.

c) „A-national“ State

Principle of Domicile for Political Rights of Citizens

Within the entire Switzerland democracy is organised according to the municipality the citizens are having their domicile. Each cantonal citizen who has immanently also the Swiss and a municipal citizenship is entitled to exert its political rights in each of the Swiss municipalities. As soon or not later than three months after he/she has changed domicile to an other municipality and/or canton he/she has to be given by the respective new municipality all rights equal to all other Swiss living already in the respective municipality. This includes the right to vote and participate in the elections on the level of the municipality, canton or federation. The pre-condition is in most cantons the Swiss citizenship. In some exceptional cantons and municipalities also foreigner with long time domicile are entitled to vote on local affairs. This Swiss citizenship includes also the cantonal and municipal citizenship. It is difficult to receive but it is not at all linked to a specific

nation. No nationals living a broad are having any privileges as according to Article 116 basic law in German some German Nationals coming from a broad.

No Cantonal Ethnicities

Also internally e.g. with regard to the relationship among the different cantons a national understanding of the "nation" is unfamiliar to the Swiss tradition. Most cantonal constitutions, which relate to the people within their preamble refer to the citizens living within the canton. Only exceptional they speak e.g. of the Jura-People. Even in the previous federal constitution article 1 had no national concept of the peoples of the cantons: "Together, the peoples of the 23 sovereign Cantons of Switzerland united by the present alliance, to wit: Zurich, Berne, Lucerne, …. Geneva and Jura, form the Swiss Confederation." It does not refer to the "Genevans", the "Zurichians" and "Jurassians" etc. Totally different is the wording of the preamble of the USA "We the people of the United States. The preamble of Bosnia refers on the other hand to the Bosnians, the Croats and the Serbs.

Citizenship

The perception of a state of the "German People", of the "Georgians", Croats or Serbs is not familiar to the Swiss Constitution. According to article 14 of the statute regulating the receipt of the Swiss citizenship the following persons can become naturalized Swiss citizens: those

„a. who are integrated within the Swiss society;
b. familiar with the Swiss way of life, the Swiss customs and values;
c. respects and follows the Swiss legal order;
d. does not endanger the inner or external security of Switzerland."

Although this provision has lead partially to peculiar and partly even humiliating practices of implementation of naturalization, one can not deduce out of this provision a national perception of a "Swiss Dom" especially since such a perception would substantially change according to language culture and cantonal tradition.

The Jurassic People

The only canton, which at least in the phase of its making had a certain ethnic perception of the nation was the canton of Jura. The citizens, who were given the right to decide on the self-determination of the people of Jura were determined by the Canton of Bern. At this occasion some persons claiming to belong to the Jurassic people demanded that this right of self-determination should only be given to the long established autochthones persons belonging to the Jurassic people. Affording to their requirements only those living since more than seven generations within the area should be given this right. Even persons living outside the canton but belonging according to this notion to the Jurassic nation should be entitled to vote. This postulate has then finally been rejected with the argument that in Switzerland the right to vote is defined by the domicile the person is established.

Not National Minorities

Switzerland is by its proper definition a “a-national” state. It is neither based on a cultural nor linguistic nor blood and soil determination of the Swiss Nation. The preamble of the constitution only mentions the Swiss People and the Cantons. It avoids however to use the notion of Nation. As there is no stem-nation there can neither be national minorities. Since the federation precisely is not legitimized by the nation and since Switzerland has not established a new Nation-State all human beings, who have acquired the Swiss citizenship either by birth or by nationalization, have equal rights and thus can identify independent of their previous nationality with their new municipality, canton and federation.

Who speaks one of the three Swiss languages belongs based on its language to a language community, but not to a nation as for instance the people in Quebec. French speaking Swiss are not “Swiss French” as for instance the Serbs living in Bosnia are called the “Bosnian Serbs” or the “Bosnian Croats”. All citizens understand themselves primarily as citizens of their municipality, canton and of their federation and only in second instance as members of a specific language or religious community. This is the main reason, why the notion “ethnic” is fundamentally unfamiliar to the Swiss political culture.

No Territory for Nationalities

Would Switzerland have a traditional notion of a Nation, the cantons had since long time allied along the borderlines of their nations and had made three of four regions out of Switzerland. Thereby Switzerland divided into language regions would have greatest difficulties to apply this language principle to the canton of Grison with its three languages. As final consequence such division would finally lead to the total dissolution of Switzerland. By such design of the borderlines it would loose its historical roots, which are primarily cantonal and not at all regional or linguistic. Fortunately most of the state unites of Switzerland that is of the cantons have found their unity, identity and territorial design not only in the time of the nation building in Europe of the 18th and 19th century but already in the early middle ages.

As Traditional Nation-State Switzerland Could not Survive

Would Switzerland be made traditional nation-state e.g. in the sense of the Spanish State, one had to decide, which should then be the national language. As a Nation can only have one national language, Switzerland would have as Spain to opt for one language, which probably would the language of the majority as Spain decided for the Castilian. Thus it would be German or the dialect of the Swiss Germans, which differs from region to region. Such preference of one language would necessarily discriminate the minorities. A people with three/four languages on equal footing cannot be a uniform nation. As however Switzerland is located in the middle of neighbouring Nation-States it had to find its own self-perception of its notion of a *political Nation* with which most of the Swiss speaking different languages can identify.

Secularization of the Federation

As the Swiss population is composed almost by as much believers of the protestant as of the catholic religion the federation had no choice but to secularize the state in order to guarantee freedom of religion. Switzerland can not allow itself to privilege one religious community against the other. For this reason for a long time Switzerland had no representative at the Vatican. The religious conflicts led the federation to do eliminate any possible mistrust namely of the protestant community with regard to the religious neutrality of the federation.

d) Legitimacy and Democracy

Legitimacy of Political Switzerland

The only bases of the Swiss identity and legitimacy holding together the different cantonal, language and religious identities is to be found in the recognition of the great bulk of the society of political Switzerland that is of federalism, democracy, liberty and independence. This political identity is the reason why for instance the French speaking Swiss doe not see itself as a member of the French nation. Those French speaking Swiss living in a municipality on Swiss territory know very well, that they can decide on their own, when they want to build a new school for their children. Those living on the other side of the border will have to ask first Paris, Rome, Vienna, Stuttgart or Berlin.

The fragmented federation however established in the end of the 19th century will always have to struggle for its legitimacy. This overall legitimacy can finally only be strengthened with far reaching competences of the cantons and a shared rule principle supported by the culture of compromise.

The unique challenge of the Swiss federation is to be found within its *multiculturality* and connected to it within the *legitimacy* of a nation hold together by the common political will of the people which has no pre-constitutional homogeneity. This challenge is even more provoking in an area, marked by the contrast of the economic globalisation on one side and the national emotional localisation on the other side. Will the French, Italian, and Romonsh speaking Swiss also in future be able to identify in the same way with Switzerland as the German Speaking Swiss?

Legitimacy and Diversity

The legitimacy of Switzerland is based on one side as mentioned on the peoples of the cantons and on the other on the diversity of a fragmented and "composed" Swiss nation. This nation on its part is structured by the cantons as its political units on one side and by the different cultures overlapping the different cantonal borderlines. The homogeneity of the state is to be found within an internalised political perception of common Switzerland. This historically grown reality determines lately the federation. In a programmatic not normative mandatory way the preamble thus confesses that Switzerland lives and will live according to the principle diversity in unity. Consequently it mandates the federation in article 2 par 2 of the constitution to foster diversity. This confession and this mandate to the fed-

eration and the cantons establish in the end the legitimacy of the might of the federation.

What are finally the reasons, which induce the different communities to renounce on violence and to agree to a peaceful and rational democratic decision making process? Decisive is probably to find the legitimacy within the unity of the composed nation. Unity in diversity can only be realized, when all sides are prepared to compromise. At the same time many see, that they can survive as Swiss finally only by this diversity. An ethnic homogeneous Switzerland is no Switzerland! Switzerland exists only by this diversity.

Political Nation

However as divers the culture is, as homogeneous is the declared political believe for the basic values of state and democracy and in particular the local corporate democracy, federalism and liberty. These basic values have formed and built up the nation, to which every one independent of its culture and religious believe can adhere. The political values have been "internalised". Provocatively one can even say, the Swiss nation has become by the force of its common political values to one homogeneous "political" ethnic nation.

Switzerland belongs probably to the very few states, which do not base their legitimacy and identity on the perception of language, culture and religion but on the declaration of the great bulk of the society to the basic values of the state. As far as one can admit to consider Switzerland as a unit, this unit is based on common historical and political but not on cultural, religious or linguistic grounds.

Only because Switzerland exists by its generally recognized and accepted political values it can grant the three/four languages equal rights and is forced not to discriminate the religious communities and not to treat them as minorities. Switzerland with its almost 70% German speaking Swiss is de facto dominated by the German speaking culture, but this culture as legally no privileged position.

Since the language and religious border lines only exceptionally coincide with the territorial border lines of the cantons the historically grown political tradition, the local autonomy and the political culture of the canton has become more important for the emotional feeling together and of the identity of the people of the canton than common language or religion. This common political roots of the canton has become the essential pre-condition for the "civil society". The emotional identity with the canton has become stronger than the feeling to belong to a language or religious community.

Consensus oriented (Concordance) or Majoritarian Democracy

The legitimacy of important decisions can not be generated only by simple democratic majority decisions. Legitimacy for basic decisions determining the strategy of the polity or of the society needs the acceptance of the decisive communities, groups and actors within the state. This search for consensus and harmony corresponds to the old tradition of political culture in Switzerland. A small majority of only 50,01% is considered somehow as the worst case. If ever possible one tries to generate a higher consensus for democratic decisions. If the majority reaches only

a majority slightly over 50%, it will have to try by concessions and compromises to take into account the arguments of the loosing minority almost similar in size. Totally unfamiliar is the idea of the domination of one party with a small majority over a bi minority. Such coalitions with the support of 50% of the parliament would any way later no chance to win popular referenda. Only with the consensus of all big parties if at all the government has a good chance to be successful in a referendum.

The procedure of direct democracy has substantially contributed to the development of a particular political culture. One has namely to know, that by experience the political elite of the country can only win a referendum, when it can base its proposal on a general consensus of all big parties. Whoever however would misuse this need to concordance and consensus by overdoing with its veto and blocking consensus will have not chance to win the majority in the referendum. The people usually does not reward the misuse of such de facto veto-power. Based on these experiences direct democracy has in fact forced the elite to stick together by compromise and it did not split the country in a ever winning majority against a perennial looser.

Equality of the Cantons

The idea of the concordance has found its result also within the principle of equal rights of the cantons. This equality is also shown with regard to the relationship of the second chamber of the council of cantons to the first chamber representing the nation. Both chambers are equivalently equal. In addition within the council of the cantons, all cantons except the half cantons are represented with two councillors independent of their size, population or economic strength. It is finally also shown with regard to constitutional referenda, then any constitutional amendment needs the approval of the Swiss people and the majority of the peoples of the cantons, each canton counted with two votes.

Although for instance the canton of Zurich counts a population, which in size is 70times bigger than the population to the canton of Appenzell interior, the vote of the canton is only divided by two for its votes on constitutional matters and for its representation in the council of the cantons. And the reason for this asymmetry is not the size of the population but ancient history. The Confederation did never allow cantons to split and then to get additional two votes. All cantons which for different reasons had to split in two paid the price of only one vote per half canton. The consequence of equal treatment of cantons in referenda means that the value of the votes of this canton counts 40 times more than the value of the voters in Zurich!

On equal footing the cantons including even half cantons consider themselves as units with the same limited sovereignty in their relationship to the federal government.

Proportional System

Moreover also the proportional system introduced for almost all elections induces concordance. Based on this system important minorities within the Confederation

as well as within the cantons and the municipalities are represented in parliaments and even in the executive and in the courts. There is in Switzerland almost no committee, no authority, no court or no other institution, which is not composed proportionally with a representative of the Latin speaking, German speaking of the Catholics and the Protestants, of women and old people of right wing and left wing of a employer and of an employee etc.!

Double and multiple Loyalties

Switzerland is not composed of 26 cantons representing 26 nation-states. It is composed of 26 different peoples of the cantons. (Article 1 of the Constitution of 1874). In these cantons the *citizenship* has authority and not the culture or language. Citizenship is granted based on a naturalization process. In order to become a nationalized Swiss, one has to prove duration of domicile, knowledge of the political system. The decision does not depend at all on language, religion, kinship or blood. Only once achieved nationality it is inherited by the children. With the naturalization the Swiss confess loyalty towards the political Switzerland but not towards a specific cultural nation. Their loyalty towards the culture of their previous homeland remains and can not be lost by the acquisition of the Swiss nationality.

According to the Swiss understanding one has thus to depart from the idea that the Swiss traditionally always had different loyalties towards their canton and towards Switzerland including towards the culture of their neighbour-nation. Finally they can also remain loyal towards their previous homeland and in many cases towards their religious community. The acquisition of nationality does not establish a totally new status of loyalty. It grants political rights and founds for certain persons the obligation to serve in the army. With regard to other constitutional rights Swiss and foreigners with Swiss domicile (green card) enjoy the same constitutional rights.

Multiple Nationality

For this reason nationality has not any more the same meaning as in earlier times. Since long time already many Swiss have had several cantonal citizenships. The cantons have already decades ago accepted double and multiple citizenship.

Since the double and multiple nationalities on cantonal level has been and remains undisputed the idea of multiple citizenships and the principle of multiple loyalties could probably easier be transcended to the Swiss nationality. Thus today it is possible to obtain the Swiss nationality without renouncing to its previous original nationality. Thus the actual legislation on nationality already recognizes to a certain extent the reality of the transnational citizenships enhanced by modern migration caused by globalization. The state can not any more require from its citizens absolute and unlimited loyalty. This openness of the citizenship is denial to the traditional other human beings excluding nation-state.

Political Alliances of the Cantons

In the 19th century Switzerland was a very instable country permanently under the threat of its neighbour-monarchies. Because of this permanent external threat the constitution of 1874 forbid the cantons explicitly to conclude any political alliances among themselves and also with other countries. Such alliances would have threatened the frail federal balance of the country. Today such treaties are not any more explicitly banned by the constitution. Switzerland is no longer threatened by conservative monarchies. This however may also be a sign that the traditional and long lasting democratic and federal procedure has established the fundament for a real and actual nation-building and that by this the inner balance of the political nation has been made out of itself. Democracy and federalism have led the fundament for a undisputed legitimacy of a state, which in the 19th century was still very frail, instable and economically poor.

Coping Constitutions

Each multi-ethnic situation has its specificities. The specific problems of a multinational of multicultural identity can almost never be transposed as such from one to other states. For this reason institutions and procedures, which in other countries such as the USA, Switzerland, Spain or Italy did lead to peaceful conflict management can not without any ifs and buts be applied to other countries.

In other words, constitutional instruments can not be transferred indiscriminately from one to some other states. However constitutional experiences and procedures, which successfully could be developed and experienced in a free and democratic environment can give instructive hints on the question, what may be supportable for the population of a multiethnic country, what proposals made with best intentions are realistic, feasible, appropriate and which initiatives are unacceptable without any chances and which may lead to hopeless stalemates be counterproductive or stir up emotions and endless disputes. In addition the successful examples give ideas as to the pre-conditions of solutions and to principles which may also be conducive for solutions in other states.

Liberty of Religion Freedom among Religious Communities

For a long time the federal tribunal has considered in its jurisprudence on the liberty of religion, that it should not only consider the fundamental individual constitutional right and liberty of religion but also the overall interest to maintain peace among the different religious communities. With such arguments the court finally also took into consideration the group and collective right of religious communities. This care for peace balanced against the individual right of liberty has lost priority within the jurisprudence of our Swiss high court with regard to religious liberty. Still article 72 par. 2 of the constitution provides as provision, which empowers the federation as well as the cantons explicitly to provide for measures to maintain public peace among the different religious communities.

Liberty of Language and Principle of Territoriality

Worldwide besides the religious conflicts also conflicts among different linguistic communities die raise in the last decades. In Switzerland also the tensions among the different linguistic communities did increase. For this reason the obligation of the Federation and the Cantons to seek and promote the mutual understanding of the different language communities has got a certain priority within the constitution (art. 70 of the Swiss Constitution). In addition the almost not solvable conflict among the individual constitutional right of liberty of language (art.18) and the collective shelter of the integrity of the territory of the language of minorities (art. 70 par.2) are two provisions, which contain inherent but hidden contradictions between the individual right of each person and the collective right of the language group; this is a conflict which will cause in the near future quite difficult considerations of the federal tribunal.

Constitutional Procedures to Solve Territorial Conflicts

The Constitutions of 1848 and of 1874 have been drafted under the influence of the frail internal stability of Switzerland after the civil war caused by the particular alliance (Sonderbund) and as mentioned under threat of inner peace caused by the monarchic regimes abroad. The new constitution renounced to repeat those provisions which prohibit cantons to conclude political treaties. Notwithstanding these provisions the inner peace was still threatened because some of the still ongoing territorial conflicts with the cantons have not been solved. The peaceful solution of the conflict of the canton of Jura however has certainly contributed to the fact that the new constitution keeps not any more silence on the issue of adjustment and even of changing cantonal borderlines and territories. For these changes a special federal and democratic procedure is provided which takes into account all concerned majority and minority interests (art. 53 of the Constitution)

Neutrality and Relationship towards the Neighbour-States

The Swiss policy of neutrality has its origins not on its foreign affairs interests and it is only to a limited extend a result on the need to remain independent. The traditional Swiss policy on neutrality goes back to the internal religious conflicts of the 17th century. The 30years war did not only rage in Germany but also in Switzerland. The religious conflict has split the early Confederation into too religious camps. In order however not to perish within the hostilities of the neighbour-states the catholic and protestant states of the Swiss Confederation came together in the so called “Wiler Defensionale” in order to defend in common endeavour any foreign invasions of troops under foreign command into Swiss territory. This alliance still counts as the very origin of the century old politic on neutrality.

In the 20th century neutrality during World War I and II was the precondition for the maintenance of the inner language peace. In particular during the first World War the hostile parties Germany and France could have destroyed the peace among the language communities in Switzerland by concluding alliances either with the German or French speaking community. Thus the conflict would have expanded to Swiss territory, if the Federal Council (executive of Switzer-

land) would not have observed strictly a policy of neutrality, although one cannot deny some German-friendly tendencies of the foreign policy of Switzerland. The lesson learned by the policy of neutrality of Switzerland teaches, that multiethnic states which are linked to stem-nations in the neighbour-countries can only survive as common states, when they treat all neighbour-countries equally. Such equal treatment is possible almost only with a continuous and strict policy of neutrality.

One can not oversee though, that the Swiss neutrality has had its negative effect. In particular it has contributed to a sense of isolation. The mentality of hedgehog even arrogance, ghetto-mentality and self-sufficiency are the price to be paid including the negative consequences of such policy of isolation. European integration and at the same time preservation of the identity and plurality are today the most difficult and provocative challenges which the small multiethnic federal and democratic state Switzerland has to meet.

Example Secession and Foundation of the New Canton of Jura

An impressive example, which does confirm the culture of compromise and concordance is the procedure, which has taken place for the secession and foundation of the new canton of Jura. Since more than hundred years the so called new part of the canton of Bern also labelled Jura did fight for its right for self-determination, its independence and thus secession from the Canton of Berne. In the seventies of the last century the Canton of Bern changed its constitution in order to provide for the right of self-determination of the corresponding region of Jura. Two different issues had to be solved: First the question, whether the majority of the population wanted to found a new canton and second within which borer lines the territory and jurisdiction of this canton should be determined.

In order to enable the population of this region still belonging to the canton of Bern could at all exert its right of self-determination in the first phase the constitution of the canton of Berne had to be amended. This amendment needed the democratic approval of the voters of the entire canton. The overwhelming majority of the voters of the canton approved and introduced into their constitution the following procedure with three different phases of democratic votes:

1. Within a first vote, the population of the entire region could decide on the question, whether it approve the foundation of a new Canton of Jura.
2. After the approval of the majority of the region to use its right of self-determination the populations of the different districts were entitled to decide in a second vote that they do not want to join the majorty willing to found a new canton and thus want to remain within the canton of Berne.
3. After the determination of the borderlines of the districts engaged for a new canton of Jura the peoples of the municipalities along the new borderlines were given the possibility to decide under which of the two neighboring future jurisdiction they prefer to live.
4. After approval of a new Constitution of the Canton of Jury by the constitutional convention and by the voters within the new border lines the voters

of the Swiss Federation and of the Cantons had to approve this new Canton to be introduced as 23rd (26 with the half cantons) canton of Switzerland.

Such complex and long lasting procedure was introduced in order to establish the consensus of the great bulk of the Swiss society fort he new canton. All concerned majorities and minorities including the small municipalities should be able to contribute to such important decision. A new Canton can not be established by a slight majority of only 50.01% of the voters.

The pragmatic and often cumbersome procedure of secession of the region of Jura from the Canton of Berne was based on the following constitutional and political values and principles:

1. All parties agreed by consensus to submit to a procedure open with regard to the result but considered as legitimate by everyone.
2. The idea of a unilateral secession from Switzerland has realistically never been on the table.
3. The final decision fort he establishment of a new canton presupposed a constitutional amendment of the constitution of the canton and by this the democratic approval of the voters of Bern. Then the voters within the region Jura had to decide on their own with regard to their future fate. All Swiss citizens living in the aera were entitled to vote (principle of domicile for political rights). Primarily the majority of the region decided, then the different districts and finally the municipalities along the new border line.
4. After the border lines fort he new Canton were determined a new convention had to be elected in order to draft and propose a new constitution. This new constitution needed as all other cantonal constitutions the approval of the federal parliament. Finally the people of Switzerland and the peoples of the cantons had to approve the necessary amendment of the federal constitution and by this whether they approve the foundation of a new Canton of Jura.

Democratic decisions were not dependent on the simple majority principle according to the "winner takes all" democracy. Districts and even municipalities, which did not want to join the seceding majority were entitled to decide to which state they want to belong. The state-question has not been entrusted to the simple democratic majority; it needed an overall consensus only to be achieved by negotiation and democratic votes. Even the interests of the smallest community represented by the municipalities on the borderline were taken serious. Constitution making and State making depended on a inclusive procedure which included as much interests as possible.

e) Local Autonomy and Decentralization

The Swiss Federation is not only federal with regard to the cantonal and federal level; it is in fact a federation with three levels including the level of local authorities of the municipalities. The autonomy of municipalities is to be seen in particu-

lar as autonomy of the citizens who decide on all important issues of the municipalities on the lowest federal level with their democratic participation.

Municipalities

The autonomy of municipalities is constitutional right enshrined in the constitution. Municipalities grant on the lowest level of the federation the citizenship of the municipality. They issue their proper regulations on the level of the municipality, which have legislative validity not to be compared with local by-laws of common law countries. By this they decide on the tariffs of the taxes to be paid by the inhabitants of the municipality, decide on expenditures for the accomplishment of communal tasks such as school, traffic, police, social affairs, health, culture, sport, disposal, planning and zoning.

The municipalities can provide measures, in order to cover their needs. Towns will in priority more care on issues of housing and of drug-abuse, municipalities of mountain areas will provide better protection against the danger of natural disasters and of course provide facilities in order to promote tourism. Industrial centres will engage in environment protection, measures for unemployed persons and day nurseries, municipalities of suburbs will give priority for sport, relaxation and culture.

Close to the Citizens

As it is much easier to contact members of municipal authorities personally the citizens are less hesitant to contact directly persons belonging to such authorities than persons on the cantonal or federal level. Thus the contact and relationship to the citizens on the local level is much better guaranteed than on the cantonal level. The chances that needs, wishes, critics and support of the citizens are known quicker and easier on the local level are much higher than on the other public levels. It a municipality decides to build a new school-building it bears all proper responsibilities for such decision and measure. It has to finance the building by its own tax income or it has to ask for public federal or cantonal grants. It can at best assess, what needs the children, the drivers with regard to traffic decisions, the environment or the poor have.

Deficits of Decentralization

It would of course be totally inappropriate to idealize the small communal democracy. Often communes are to small, overwhelmed without resources and to dependent of certain interests in order to exert their tasks in the very common interest. Important taxpayers or economic firms can easily misuse the municipalities for their private interests. Often the needed know how is lacking. Finally the expanding cancer of corruption threatens mainly the small inefficient municipalities on the local level. It has more chances on the local level than on the more transparent level of the canton or the federation. Moreover one should not underestimate the egoism and provincialism of local democracies which may be mobilised against solidarity and common interest on the higher level.

Public Spirit on Local Level

The Swiss are at the same time citizens of the municipality, the canton and of course the federation. But also as taxpayers all persons are debtors of the municipality, the canton and the federation. In return the municipalities provide services for the inhabitants, which they need for their day to day life: Supply with energy, water and traffic and disposal are as much part of the traditional tasks of communes then school, social affairs and security. Indeed the communes care about the day to day life and needs of their inhabitants according to the rules determined by direct democracy.

School and Democracy

The political rights within the system of direct democracy enable the citizens of the municipalities to control income and expenditures of their authorities. They elect their representatives within the local parliament and within the executive of the municipality. It is on the local level that young politicians have to prove oneself. Municipalities are often the area of experiments for many political initiatives which if successful on the local level will be expanded on the cantonal and even federal level. Within the arena of the municipality the citizens can develop their social competence. It is mainly also for this reason, that the local level is a substantial element for the federal understanding in Switzerland which has a bottom up structure of federalism.

Constitutional Guarantee of Local Autonomy

The Constitution (art.50) dedicates the municipalities an entire section. It guarantees the autonomy of municipalities – although only as far as the cantonal legal order provides it – and mandates the federation, to assess all measures on their possible effect on municipalities. Federal law has to be wholesome for municipalities.

The Smallest Communes are under the Pressure of Globalisation

The rapid economic development and in particular the effects of globalisation (loss of jobs in small municipalities), the complexity of the modern welfare, planning, and environment state overtax specially the many small communes with less than 500 inhabitants. Up to now Switzerland has rejected to adapt its structures of local authorities to new needs of administration as it was the case in Germany and in the Scandinavian states. As France Switzerland left unattached the structures of municipalities, which go back to the times of Napoleon and did not intervene into the most traditional competences of the cantons. Thus the cantons still decide within their constitutions and statutes what tasks of the modern complex state the municipalities are asked to accomplish and how they have to finance their measures.

Cantons did meet the challenges with regard to local structures only partially. Thus they have enabled the communes to merge and facilitated the cooperation of communes with new procedures. However the charming songs on efficiency, tax-reduction often have a deaf audience of citizens engaged for democratic identities

and legitimacy. They feel emotionally bound to their ancestors and are not prepared to give up their municipal identity if even they have to pay a high price for it. For the short run this may paralyze efficiency, for the middle or long run it still may contribute to maintain peace and social harmony, which are the indispensable preconditions of an efficient administration. Since however the expenditures prescribed by the Federation and the Cantons are very burdensome for the communes, there remains almost no space at all for their proper politics. They have not frame to determine priorities or to have even the slightest deviation from cantonal determined strategies. All those mentioned principles to have thanks to local autonomy closeness of politics to the people remain valueless as long as the communes do not dispose of a real free space for their political strategies.

Homogeneous Municipalities

Since the Switzerland with its system of local authorities is structured into territorial very small and smallest territorial local democracies and corporations, the cantons with different ethnic communities as for instance the Canton of Grison with its three languages and two Christian confessions still possible to maintain somehow the homogeneity of the ethnicity with the different ethnic communities fragmented into different municipalities. Thus one can find within this canon small Romonsh speaking catholic besides Romonsh speaking Protestant and German speaking protestant as well as catholic municipalities within a small region and area (cp. Surselva and Obersaxen). They do not fall into conflicts, because each municipality can still decide independently on issues of school, security, social affairs, culture and relaxation including public order. As they have to collect the necessary financial means by their proper taxes, they can count on the democratic acceptance of their policy by their inhabitants.

Cantons as Small States

The Canton has the power to give itself its proper Constitution. It organises the governmental branches, the checks and balances, regulates the political rights of the citizens including referendum and initiative of the people and determines for what measures have to be financed with what necessary income taxes. Indeed one third of all expenditures and of the entire public income in Switzerland is spent by the cantons and one third by the municipalities. Only the last third is used by the federation. In addition the canton organises is inner territorial structure, provides the necessary autonomy for the municipalities and regulates their tasks and their limits with regard to levy autonomous taxes.

The cantons organise their courts and the respective competences including to procedure. (This competence has been substantially diminished by the European Convention on Human Rights and will be further diminished by the provided centralization of procedural law). Up to now some cantonal procedure are influenced by the Franch Code Napoléon, by the German civil law, by the Austrian and by the Italian laws. The culture of these legal acts is connected to the cultural tradition of the respective legal systems. In school-books history for instance of the reformation period is differently revealed in cantons close to the CALVIN tradition

or in catholic cantons. On the other side catholic cantons have different regulations and relationships to the catholic church than protestant cantons.

No Asymmetric Federalism

Contrary to Spain (e.g. Basque and Catalonian Region), Canada (Quebec) and Italy (South-Tyrol and Valley of Aosta) neither the Swiss cantons nor the municipalities have requested a special status with special autonomy because of their language or religious situation. The autonomy of all territorial federal or cantonal units (municipalities) is similarly regulated with regard to their supreme authority (Federation for cantons and Cantons for municipalities). The principle of sovereign equality has dominated all federal constitutional regulations. Since cantonal autonomy and also municipal autonomy is largely extended there is no special need for a special autonomy for some territorial units. If in Switzerland special minorities would have been granted special autonomy those autonomous provisions would have been necessarily expanded to all other territorial units. Undoubtedly the request for autonomy of the multiple small minorities besides direct democracy has largely contributed to the strong decentralisation of the Federation structured into three levels.

Two Branches of Government on all Levels

On all three levels the public polities dispose of a legislative and executive branch and respective competences. The Federation and the cantons in addition have their proper *constitution* and a proper *jurisdiction*, whereby the federal courts – contrary to the United States – have the restricted function only as courts of appeal against final cantonal courts in most instances. Even with regard to their public law and administrative law function contrary to the Queens Bench in the UK or the Supreme Court in Israel they have limited first instance jurisdiction but function much more as courts of appeal against cantonal administrative law decisions.

1. Direct Democracy

Educational Laboratory of the Nation

Many foreign observers of Swiss democracy certify to the Swiss citizens a certain maturity and use this assessment simultaneously as an argument to prove that direct democracy would be in their proper country inefficient, not appropriate and would have disastrous effects. It would lead to emotional populist decisions, because their own citizens are not mature enough. Actually the contrary is the case: Switzerland as a society with a high potential of conflicts is dependent on institutions, which enforce equality, balance and reason. Democracy does not function because the country is mature, the immature country can only function because of its democratic institutions. In fact democracy is in first instance an general school and laboratory to educate citizens to think in principle universally acceptable dimensions. In democratic disputes the people do not only have to follow strategies of parties and party programmes. They have finally to decide themselves at the ballot. Thus they cannot reduce the advocates and opponents of certain proposi-

tions as party-strategists. They have to consider their arguments and make a final proper conclusion for their decision on the ballot. Advocates and opponents of certain proposals engage into rational arguments and motivation of the people to come to the same conclusions.

Influence of Direct Democracy on the Political System

Who ever wants to understand the political system of Switzerland will have to consider, that direct and half direct democracy have totally changed and still influence substantially the political system. Somehow one can say, that almost every political decision in Switzerland can always be traced back to direct democracy in the sense that all organs try to make decisions which can either avoid the referendum or get the approval of the majority of the people. From the system of the collegial executive directory to the concept of the peoples civil servant down to the system of decentralisation to the bottom of the municipal level, there is no institution and no procedure, which is not finally influenced by the system of direct democracy. The mistrust of the Swiss with regard to the state ruled by judges and thus ruled by law is rooted finally within this concept of direct democracy. It is democracy which grants freedom and not the rule of because through democratic decisions people can decide how much of their liberty they want to give up. Moreover the proportional system not to forget the consensus oriented democracy in itself has been directly influenced by direct democracy. The Federation needed a parliament, reflecting the actual social and political forces in the country. The majority-system provided a distorted proportion, only with the proportional system the parliament had the chance to make decisions which in the challenge of direct democracy had a chance to get the approval of the sovereign.

Rousseau's Mistrust with regard to the Parties

The principle understanding of Rousseau of the importance of the assembled democracy of peoples and that within this democratic system parties would only fragment the decision and not contribute to the common interest in the sense of the volonté générale finds its support also in the reality and in the understanding of the Swiss direct democracy. When the peoples assembled within their municipality or by voting on the ballot decide on the expansion of a school building or of a important municipal road, or even when they are asked to decide on a initiative proposing to abolish the army party-proposals and recommendations have only a secondary influence on the decisions of the people. Decisive are the more robust questions as the costs, the consequences for increasing taxes, personal advantages and disadvantages. Within the political disputes the strategy of parties with regard to the overall interest of the country are of small importance. Rather cost-benefit analyses influence to a yes or no on the ballot.

Political Choices of Issues and Election of Politicians

Since the most important issues of a polity are decided by the voters on the ballot, the parties in Switzerland have less influence then in political systems with a Westminster type or even presidential type government. When the party is em-

powered by its victory to form the cabinet and is able to impose a majority on the parliament its legislative programme, the voters do not only elect the person of the Prime-Minister but with him/her the entire party programme. Questions of issues and choices of persons are mixed and interdependent. Can no party succeed in the election the coalition partners forming the government not only decide on the persons belonging to the cabinet but also on the content of the common governmental political strategy, which should be imposed by their majority on the parliament. Within direct democracy the citizens decide at the election only on the persons, which will represent them in the parliament or in the government. On all important issues they will decide at the time of all referenda, which will have to be submitted to the sovereign.

Parties and Lobbies within direct democracy

The parties at least those holding the power are less interested on direct-democratic decisions. Their influence on the parliament is much stronger without having to convince the entire people or at least their constituency in a referendum. Thus it is much more the interest groups representing economic interests, civil society interests (such as environment, consumer protection etc) labour unions and minority groups which use the instrument of direct democracy such as initiative and referendum in order to increase their general influence and to pull through their concrete interests an proposals in politics. The consequence of this again is a important diminishment of the power of the parties on Swiss politics at least compared to the power of the parties in Westminster type governments as in only very few cases parties are direct actors requiring a referendum or proposing a new initiative. In addition the electors do not have to get influence on the parties, when they want to pull through new ideas within the state. They have their direct instruments of democracy, which are much more influential than any pressure on the parties exerted by the voters.

No ethnic oriented parties

This is mainly the reason that in Switzerland almost no parties have been built along ethnic lines or ethnic communalities. Parties did distinguish themselves from other parties based on political concepts. The only important exception in this context may have been the catholic-conservative party, which did postulate as one of its political aims the removal of the constitutional prohibition of the order of the monasteries and the order of the Jesuits. As soon as this goal has been achieved (1973), the party had to seek with some difficulties a new party concept, which did not any more line up on the battle against the religious discrimination of the Catholics.

Direct Democracy and Civil Society

With the direct democracy voters are educated, not to consider political adversaries in the light of specific party ideologies, but with regard to cost benefit analyses of certain proposal to be decided by the sovereign. This contributes to a de-

emotionalization of politics, which in addition enhances the development of the civil society.

But also between language and religious community stereotype concepts of the enemy can not be constructed. Within the political debate which requires from each voter at each poll a personal decision (even when he/she does not participate on the poll) citizens cannot be influenced only by the mere interests of a language or religious community. With regard to this point of view they would in addition also assess representatives of other language or religious communities. Those participating in the decision see themselves first as human being and not as party-representative. In this sense direct democracy educates citizens directly to the civil society.

Federalism and Decentralization

Direct democracy determines decisively the still strong decentralized structure of the Swiss polity. The fact that still two thirds of all state financial means are earned and expended by the cantons and the municipalities is an other evidence which demonstrates the liveliness and alertness with which direct democratic decisions defend the preservation of their autonomous and democratic rights.

Influence on Small Democratic Assemblies

Each citizen has higher influence by his/her voting within a smaller polity providing for the voters also decisions on concrete issues. The smaller the polity is, the more influential is the single citizen. If only 500 voters of a municipality have to be found in order to sign a initiative, the possibility to influence politics within the municipality is much more important, than in polities where voters have to find not less than 100’000 signatures as on the federal level for constitutional initiatives. Authorities of municipalities or of towns can not afford for a longer term period to govern without being informed or interested on the needs, desires and demands of the people.

Democracy and Local Autonomy

The impact of direct democracy is certainly one of the essential reasons, why the autonomy of the cantons and the municipalities could be preserved to such an important extent and why the small democratic polities still are expected to assume such important tasks and responsibilities. In case of the smallest doubts in general citizens resist to transfer competences to the federation, because with any centralization they loose influence, power and flexibility. Neither effectivity nor subsidiary, nor equality, nor profitability can be used as arguments to convince citizens to hand power and responsibility to the federation. Only the issue of legitimacy and impact will convince the ordinary voter.

Even higher costs of a decentralized administration will only partially influence the voters as long as they are convinced that on the local level they can rather influence an economical administration of the specific public task then the moloch of federal bureaucracy. This may also be the reason, why precisely financially week cantons and municipalities often react more federal than financially strong

cantons, although they do neither dispose of the personal as of the required financial means necessary to assume the tasks accordingly.

Equalization and Harmony by Direct Democracy

If the local municipalities or cantons are composed of diverse religious and/or language communities, they have to seek political equalization and common understanding within the direct-democratic process, which enables the development of a harmonious living together of the different communities. Of course language communities are interested to preserve the dominance of their language. However they will be very careful to provide measures, which finally would force minorities to change the municipality. In such case the majority depends on the income of the taxes of all inhabitants and therefore is interested to maintain the harmony among the different citizens belonging to different communities. All citizens including the minorities contribute for instance to the success of a football or hockey team. Notwithstanding language or religion, they all participate when new industrial plants have to be wanted, they all are engaged in social activities and participate in private association and they all want to protect their working places.

Minorities and the Majoritarian Democracy

In case the core interests of a language or religious community belonging to the minority is affected, their members are expected to participate completely at the vote with almost all the citizens belonging to their community. On the other hand the members of the majority not so strongly affected have seldom the same motivation to participate in the vote as the minority. The core interest of the minority for instance the maintenance of a minority school has not such an important meaning and is not considered as a symbol for the majority as it may be for the minority. For this reason a minority of 20 to 30% even if it is fragmented into different parties may have good and realistic chances to win the vote, as in total not more than 40% of all voters go to the polls.

Thus direct democratic structures can easier than parties provide on the lowest level of municipalities for a peaceful management of conflicts among different religious or language communities as long as the citizens remain responsive to their democratic responsibility.

Open Procedure for Consensus Building

Within direct democratic disputes prognostics on the final outcome of a vote among predetermined majorities and/or minorities is impossible. Chances for positive outcomes are only given if a consensus among important communities is reached. Only by seeking concordance among the most important groups decisions can be prepared, which will finally also be accepted by the sovereign. In this sense direct democracy educates people for tolerance and a civic sense of responsibility for the polity.

Flexibility and Responsibility of the Democracy of the Municipality

Not only the citizens also the political authorities of the municipalities will have to decide on rules and measures, which concern themselves directly and may have a direct impact on them. Who is committed for a new school-building may be motivated because its own children or grandchildren are attending the respective school, because he or she my be influenced by the teaches or as neighbour he/she may be interested to have a nicer building which does better protect the noise of the children. He/she will have to consider, that because of this new building a dangerous road-crossing may not be improved, that the disposal of the garbage remains problematic and that the police of the village does not have enough means to fulfil its tasks and mandates.

Within the small frame of the municipality experiments are easier possible then on the higher level of the canton or of the federation. Parents can be better integrated into the decision making process. School experiments can be carried through without the risk that a failure will have effect on thousands of people. The municipality is teachable. It can take lessons out of bad experiences. The strong imbedding of local authorities within the democracy of the municipality will require them to respect the interest of the citizens as clients of the administration. They have to serve their interests and should not loose their goodwill, if they want to count on a sustainable support of the citizens. On the other hand conservative forces may often impede new solutions and developments with emotional arguments. By pointing at the tradition and at the loyalty to history they can block any flexibility. Still it is an advantage, if such conflicts are dealt with on the level of the communes, because the affected will be able better to evaluate the consequences and the effect of any of their municipal decision.

Chances for Minorities

With their democratic voting rights minorities may as paradoxically it may sound minorities may be better gain attention from the great bulk of the people than in a parliamentary system. Within the parliamentary democracy minorities have to seek support by a specific party. Each requested party will however have to consider, to what extent the support of a minority will in the end by paid off with additional votes in the next elections. Such support however can hardly be guaranteed by supporting specific requests of minorities. Which party is ready to go to the barricades and to support for instance a better integration of foreigners? Such initiatives are only possible with a popular initiative. Although such commitments may not find the necessary majority of the voters however already the democratic discourse before the vote will have a certain educative effect.

2. Cantons as Partners of the Federation

Network of Solidarity

A federation can only survive, if the partners of the alliance or federation remain solidary. Partnership is not only indispensable between the federal units, is has also vertically to be fostered top down between the federation and the cantons and

vice versa bottom up. Without such elementary solidarity the Swiss federation could not survive. This may be the justification of article 44 of the new Swiss constitution:

"(1) The Confederation and the Cantons shall support each other in the fulfilment of their tasks and shall collaborate generally.

(2) They owe each other respect and support. They shall mutually grant each other administrative and judicial assistance.

(3) Disputes between the Cantons, or between Cantons and the Confederation, shall, as far as is possible, be resolved through negotiation or mediation."

In fact the federalism of such a small country as Switzerland can only survive if the vertical separation of powers is supplemented by a network of informal cooperation on all levels of the government, the executive and the administration including the social partners of the economy. Such network often is not transparent and informal. But the communalities and the feeling to belong together, which are strengthened by such network contribute mainly also to the nation building process.

The explicit obligation for solidarity is to be found in Article 44 par. 2 with the requirement, that they owe each other respect and support. This obligation requires more attention and support than the only federal loyalty provided by the German basic law. It does not only ask for loyalty but also for pro-active support, that is initiatives and measures to assist other cantons in case of need. Thus this provision is a mandate for solidarity, which can not be integrated into a hierarchical system, but is principally conceived on the bases of equal partners. If those partners in particular those which represent majorities are not ready to abstain from certain interests in favour of the community, diversity may be damaged.

Balance between shared rule and self rule

The challenge of the European Union will certainly lead to additional centralisation which at the moment is even not foreseeable. This may have been the main reason, why the new Swiss constitution has much less concern with regard to the protection of cantonal autonomy, that for the better participation of the cantons on the decision making process on the federal level. With regard to this point of view one can discern the longer the more a decisive influence of the German on the Swiss federalism.

Three essential factors have on this occasion to be taking into account: The first two are obvious: rights of the federal units to shared rule with regard to foreign policy as with regard to intra-state legislation. In addition one should not underestimate the provision, which transfers the far reaching competence to the cantons to inter-cantonal and international cooperation by conclusion of respective treaties. This opportunity to establish new partnerships with the federation, the neighbour cantons and with foreign countries opens new important chances to the cantons. If they can make use of them, the Swiss federalism may get new innovative inspirations.

Shared rule and Executive Federalism (Federalism based on the implantation of Federal Statutes by the Federal Units)

The new constitution has limited the self-rule competences of the cantons but it has enlarged their shared rule possibilities and thus re-installed the former balance between shared rule and self-rule. The cantonal participation in the decision making process however has not induced the constitution to enlarge the powers of the second chamber, but rather strengthened the shared rule powers of the cantonal governments. The cantons though would have theoretically the possibility by their constitution to elect the members of the second chamber neither by the people nor by the parliament but by the cantonal executive body. By such initiative they could on their own change de facto the second chamber into a chamber of cantonal ministers. But such proposal up to now has never been made. Such initiative probably would not have any chance to be endorsed by the voters, because this would limit substantially the vested democratic rights of the people.

Thus the constitution has decided to integrate constitutionally the cantonal government mainly into the decision making process necessary to execute federal statutes or ordinances by the cantons and thus to give cantonal governments better access to the decision of the federal council. Since several years this task has been exerted to by the conference of the cantonal governments. The constitution does not prescribe the principles and the procedure to be followed by this conference of cantonal governments. Contrary to a body such as the second chamber which is democratically representing the cantons the decision making process of the cantonal governments will rather be influenced by the big cantons (similar to the big Länder of the German federal council). *Here we can observe probably as a consequence of the raising importance of the administration, that federalism is shifting more and more from the legislature to the administration and in particular to the executive.* The new constitution is based on the idea, that in future the fate of the cantons can not be left only to the second legislative chamber.

Governmental System

The governmental system with seven collegial members of the federal council equally powerful with equal vested rights individually elected by the parliament for a fixed term period not removable during their term of office may be unique in the actual world. This executive council decides as a collegial body by consensus and if necessary by majority to issue ordinances or proposals to the parliament for new legislation. As the seven members of the federal council exert at the same time the function of the head of the state, the prime-minister, the cabinet and the final instance for complaints against the administration, and as this body is composed proportionally with regard to parties, religion, languages and gender, the most important cultural and political communities consider themselves to by directly represented in the government of the federation. For this reason they identify with the state or the confederation.

Balance of the Mass-Media

The mass-media and in particular the television have substantially changed the existing language diversity of Switzerland. Regional interests on the level of language regions have replaced the focus on the cantons. The Swiss German audience of television get another political conception of themselves then the French speaking audience. The German speaking know the German speaking members of the federal council and of the parliament, while the French speaking audience is much more familiar with their French speaking members in the federal council because they have a privileged access to the French speaking media.

The performance of radio and television will have an important impact on the future development of the country. For historical reasons only one radio and television institution with a license to broadcast public and official programs within the entire Switzerland has been developed. This organisation is fragmented into regional sub-divisions and has provided important autonomy with regard to the design of the programs to all divisions linked to a specific language region.

A financial equalization concept favouring the smaller language regions guarantees that the three respectively four language communities can enjoy a somewhat equivalent program. The constitution obliges those responsible for the program to provide for a equalization and for respect with regard to the different language regions.

Solidarity and Financial Equalization

A alliance (*foedus*) is based on a solidary partnership. It presupposes essentially a partnership among the federation and its federal units. Those units owe each other mutual solidarity. Without such solidarity the federation cannot exist. In this sense article 44 of the Swiss constitution requires the federation and the cantons to cooperate by the implementation of their tasks. Indeed within this territorially small Swiss federation state tasks can only be fulfilled through some informal but also not transparent networks of authorities on the federal, cantonal and also communal level, among magistrates and civil servants but also among social partners within the economy. Laconically this is expressed in article 44 par 1 of the Swiss constitution. It is the obligatory mandate to solidarity. However when in par 2 federation and cantons would not be obliged to mutual respect, understanding and consideration such provision is nothing but the express formulation of solidarity, without which the partnership between federation and cantons would fall a part.

A multicultural federation with fragmented society does not only depend on solidarity between single individuals but also solidarity among the different cultural linguistic and religious communities. Solidarity is the enzyme which can hold the society in Switzerland with potential conflicts together. For this reason the aim of the state is not limited only to provide equal opportunities for each single individual. Also different communities of peoples must be given the possibility to have equal chances in the competition among each other. Equality of those communities may even have priority to the demand for equality among individuals. For this reason the constitution provides for provisions, which require equal living conditions among the entire population.

The right to individual equality and the right to be equal as an individual belonging to a minority have to be seen on the same level, since a multicultural state requires a double equality: on one hand equality of individuals is postulated, on the other hand the different communities require equal treatment, as only when different communities have guaranteed equal treatment, the individuals of those communities can see themselves comparing to other communities to have equality. If for instance persons belonging to the minority community of the romonsch minority language are only individually treated as equal, they will always feel to be second class citizens if their cultural identity is not treated on equal footing.

If on the other hand the culture of their community is treated on equal footing as a whole they belong to a society as individual persons which respects all different cultures as communities with equal values.

It is obvious that the Swiss Confederation is seeking the balance between equal individual rights and the right of all human beings belonging to certain cultural communities to be treated as equal persons.

The actual truth on equality within a federal state is expressed within the fiscal reality with regard to taxes and expenditures. Indeed we in Switzerland different tax burdens between persons can be found according to the canton and within the canton according to the municipality. Respecting the federal principle of cantonal autonomy the federal constitution has limited the competences of the federation to levy taxes in order to let the cantons and the municipalities the greatest bulk possible of the tax substratum. The confederation tough has been given the competence at least to harmonize the tax system including tax procedures within the cantons, but not the amount of taxes to be levied. Thus the taxpayers will have to hand in taxes according to their domicile to the respective canton and accordingly to their municipality.

This however will lead to inequalities with regard to taxes, which can not be justified taking into account values of justice and solidarity. Mountain cantons for instance have not at all equal opportunities as cantons with big and rich towns. In addition they have to spend enormous sums for the construction and maintenance of roads, while town cantons are burdened by the growing traffic of the agglomeration. Certain cantons have to assume federal responsibilities, which are in the interest of the entire country or of a specific region but are only partly carried out by other cantons such as cultural performances. The cantons have to fulfil important federal tasks. The burden however, which the cantons have to bear are rather different. Often they are determined by different terms of initiation. Equalization thus with regard to the different burdens are indispensable. Finally the cantons enjoy for their economy specific advantages with regard to their site (airports), which they can use for their economic development. These are all arguments, which should lead to a just fiscal equalization.

However one should not oversee that in many cases for each argument on one side there is a specific counterargument on the other side. Strong economic development often leads to higher pollution, which affects rural areas less than towns. Without actual preparedness to solidarity which is in the focus of the interest of the entire country and its fragmented society, there will hardly be long term solutions of fiscal equalization.

Supremacy of Federal Law

Not all federations provide within their constitution clear and plain provisions, which guarantee the supremacy of federal law with regard to the law of the federal units. Since the beginning of the federation the Swiss constitution has followed the model of the American constitution, which has anchored clearly the supremacy of federal law. There one has to consider that the Swiss federation is integrated into the continental European civil law system. Therefore the law including statutes and court decisions form a unity. Decisive are not the cases of the courts but the "sovereignty" of the legislature and thus the statutes. Accordingly one has to accept that the unit is constructed as a pyramid top down level by level from the constitution to the lowest ordinance of a municipality. This idea has mainly been treated by the philosophy of the great legal philosopher KELSEN. The hierarchical highest level is given to the federal law. The cantonal law and the bills (not by-laws) of the municipalities have to be in conformity with the higher law. This supremacy is also provided in the German basic law and it has been carried through on the European level by the European Court of Justice. Its decisions have not been disputed by the courts of the member states. Legal security and in particular equality before the law can only be guaranteed, it the lower bills follow the higher law.

Constitutional Jurisdiction and the Rule of Law Principle

Switzerland belongs to the very few states, which already in the 19th century have introduced a however limited constitutional review of cantonal legislation. Therefore the supreme court had jurisdiction over cantonal decisions violating the federal constitution. This constitutional review with regard to cantonal legislation has federal roots and federal reasons. With regard to citizens within the cantons the federal constitution could only achieve legitimacy if they were given the right to sue violations of the constitutions provided by the cantons. The protection by the highest court has been understood as a democratic right aimed at protecting the people against the whim of cantonal might. Up to now citizens have vigilantly watched that this protection with regard to cantonal might could be sustained.

On the other side one has to one has to note that Switzerland although several initiatives for constitutional amendments have been submitted up to now could not introduce a comprehensive constitutional review with regard to federal statutes. The parliament has prevented all proposals, which would finally have given the court the jurisdiction to review statutes adopted by the parliament and submitted to a facultative referendum of the people. The majority of the people still is of the opinion of a "volonté générale" realized by the legislature which can not be questioned or reviewed by some few judges and which manifests itself in and by the statute adopted by the parliament and by the people. According to the majority opinion of the parliament this body is still the highest instance of the country with the only reservation of the competences of the people. Decisions of this instance can not be analyzed by a small body of judges. Politicians thus have pointed at the contradiction of the judge-state versus democracy. The argument that constitutional review finally would strengthen the credibility of democracy was politically

not convincing. The strongest argument against the introduction of a judicial review of the constitution has by no means been the fact, that finally in the end the people even if it renounces to use its referendum rights has silently adopted the statute or in case of a referendum explicitly adopted the legal solution which can not be abolished by a court.

Thus there is no judicial authority which would have legitimacy to overthrow a law because of its unconstitutionality when it has been explicitly or silently accepted by the people. Even today this argument is supported by the majority although the European Court of Human Rights has now jurisdiction with regard to federal statutes violating human rights guaranteed in the European Convention on Human Rights. Accordingly also the cantons can not defend their autonomy (not even before the European Court of Human Rights) when their constitutionally vested autonomy has been has been violated by federal law. Thus federalism in Switzerland has remained a political issue which depends on the consensus of politics and by this gives as already mentioned minorities certain protection with regard to their vested interests.

3. Pluralism in Cantonal Constitutions

Overlapping Cantonal, Linguistic and Religious Borderlines

That neither linguistic nor religious borders are identical with cantonal political border lines may be of highest value for the peaceful living together of different ethnic and cultural communities. By this mere fact many cantons are forced to introduce institutions procedures or other solutions which enable the different communities within the cantonal territory to develop their proper identity without questioning the cantonal identity and to hold those communities together with political means.

Goal: Civil society

The goal of each constitutional solutions on the cantonal level has finally to be, to establish the fundament, which enables the realization of a civil society. That is: dot guarantee that peoples living within the canton, consider themselves first as huma beings and only then as German speaking, Jewish, Protestants foreigners Catholics or Romansh speaking.

Equal Rights of Individuals and Collective Equality of Territorial Units

Basic condition for this is to achieve equal rights of each citizen on the political level based on domicile. Swiss citizens are able to exert their vested political rights according to their domicile on all three levels: municipality, canton and federation. They are members of the assemblies of the municipalities with equal rights including the right to elect and to be elected in any position of the municipality. Political rights thus are not at all and not in any way linked to language nor to religious affiliation.

The only but very important discrimination affecting the foreigners is the denial of political rights to all non Swiss citizens by the federation and most of the can-

tons and municipalities. Only the canton of Neuchâtel and Jura provide limited political rights for foreigners with permanent domicile in the respective canton. In other cantons the Swiss citizens have refused to grant political rights to foreigners. This denial is even more serious as almost 20% of the population living in Switzerland are foreigners. Although they are asked to pay taxes and to contribute with their work to the wealth of the country, they are denied to be part as full citizens of the Swiss civil society.

4. Diversity of the Religions

Peace through Equal Treatement of Religions

The policy to maintain the balance between the different religions and confessions was the starting point to maintain peace among the communities and to maintain multiculturality. As this confessional balance would have been disturbed the voters of the canton Grison rejected in the 19th century the request of the Italian district of valtellina to become part of the canton. Such change would have raised the power of the Catholics within the canton.

In order to upheld this balance of religions in the canton of Aargau at the beginning of the 19th century a representation on equal bases of the Catholics and the Protestants in the cantonal parliament was granted although based on one vote one person one value the Protestants outnumbered the Catholics. In the canton of Fribourg a part from the confessional school of the municipalities (Catholic or Protestant) the so called free public school was open to children, which did not belong to the majority religion of the municipality. The constitution of the canton at this time provided explicitly an obligation of the canton to pay the costs for schooling of the children for the other religion in case the official school has a religious orientation. In the canton of St. Gallen the municipalities did usually run at the same time a Catholic and a Protestand school.

This "policy of balance" could be implemented within cantons which were somehow clearly divided in a confessional majority and minority. Cantons with clear religious majority such as the cantons of Valais, Uri and Tessin were for long periods reluctant to grant to their religious minorities with regard to primary education full religious liberty.

In this context one has of course also to be aware, that in Switzerland unlike man other countries schools are run by municipalities and most of the children (95%) visit those public schools.

If one analyzes the decisions of the federal tribunal of Switzerland with regard to the liberty of religion one observes that the highest court has almost never dealt only with the individual side of religious freedom but always additionally also with the issue of peace among different religious communities. The most important goal for the court was always the preservation of religious freedom. The court has on the other hand never explicitly recognized a collective right of the religious communities. Its argumentation to maintain the religious peace combined with the preparedness to limit individual rights in favour of this highest goal can only be finally justified, if one balances the collective right of the communities with the individual rights of the defendant. Today the liberty of language looses at least

with regard to the traditional religions established on Swiss territory its importance. New religions such as scientology or other modern religious believes and the religions of the population emigrated from other countries (Islam, Buddhism, and Hinduism etc.) are at the forefront of most European human rights decisions. Notwithstanding these new tendencies article 72 par.2 of the constitution still requires federal and cantonal authorities to ensure the necessary measures in order to uphold the religious peace.

Management of Peace by Secularization

Those cantons such as Neuchâtel and to a certain extent also Zurich which did secularize the entire school system and introduced a clear separation between state and church were most progressive. Based on the constitutional guarantee of liberty of religion in general and in particular in public schools the federal constitution prepared the cantonal developments for a more general and generous policy with regard to individual religious liberty.

However, as soon as they were challenged with regard to a new diversity which required the guarantee of religious liberty beyond the traditional Christian confessions, the cantons were more reluctant with regard to a constitutional guarantee of a comprehensive religious liberty. This was already the case in the 19th century with regard to the Jewish religion and becomes even more challenging with regard to the Islam.

Even on the federal level the liberty of religion has originally only been granted for Christian religions. Only the constitutional amendment of 1866 as introduced a general guarantee of liberty of religion with regard to all religions including namely the Jewish religion. A comprehensive general guarantee has then been introduced in the total renewed constitution of 1874. But at that time the function of this human right was much more aimed to upheld peace among the religious communities. Only in second instance religious liberty has at this time been seen as a individual right.

Protection of Multiculturality by Territorial Autonomy

The instrument to maintain and promote multiculturality is provided by th territorial autonomy of the cantons guaranteed by the constitution. Thus within this autonomy the relationship between state and church is designed by the cantons. For this reason the cantons can even now regulate within their cantonal constitutions this relationship and thus introduce perceptions developed out of their cultural roots. Originally catholic cantons provide for a different relationship between state and church as other cantons with protestant tradition. Cantons with a religiously mixed society in turn had as already mentioned to find pragmatic solutions, corresponding to the tradition of both confessions.

Personal Autonomy: The Politically Recognized Religious Communities

An additional possibility to preserve multiculturality which has been adopted by the cantons is the recognition of a public status of the church community and at the same time granting to it autonomy. Based on such public recognition the

church can levy taxes based on a bill enforceable with state authority from the members of its community. In this case the church community is under a limited financial control of the state, but it has an almost not limited autonomy with regard to expenditures provided for church goals. Recently the protestant and also catholic cantons have started to provide such special public status also to the religious minorities.

With regard to cantons with a majority of Protestants the Catholic Church could achieve its public recognition based on the cantonal synod. Catholic cantons, which delegate church issues mostly to local parishes, were much more reluctant to establish a public synod similar to the protestant concept and thus democratize the catholic community.

It is obvious that such recognition is important for important religious minorities. For small communities or for those communities which neither have a socially recognized states, such privilege to other religious communities has a discriminatory effect.

5. Language Communities within the Cantonal Legal Order

Problems of Language Diversity

Almost not to solved in a appropriate way can be the protection of multiculturality with regard to language. The following issues are to be looked at:

– Which is he official language ort he language of authorities and civil servants?
– Which language is or can be used in parliament?
– Which language is spoken and written in court proceedings and
– Which language is used in education on the different schhool levels?

Rhomansh

With regard to these issues one has in particular to distinguish among the three bib cultural languages on one side: German, French and Italian and the Romansh language spoken in the canton of Grison on the other side. With regard to this language it has several idioms quite different from each other. Since several years however the Canton has democratically imposed by legislation a somehow artificial Romansh Grisun which combines all different idioms within one language. While the three big languages are commonly used in politics, court proceedings and in the schools, they have achieved a special Swiss design, the Romansh can only maintain itself within a German speaking environment. Every person speaking Romansh will thus necessarily have to speak a second language which is in general German. On the other hand a person with Italian as mother tongue can survive much easier without second language as well as a German of French speaking Swiss.

Multiculturality by Decentralization

The most important protection of multiculturality with regard to the language is implemented by territorial decentralization. Cantonal autonomy with regard to

education and culture already is for itself a substantial element of decentralization. The French, Italian and German speaking cantons can organise and design their educational system, their curricula as wall as to decide on the promotion of culture according to their traditional language.

Within multilingual cantons, with two (Fribourg, Valais, Berne) or three languages (Grison) the protection of diversity and multiculturality is also provided by territorial decentralization within the canton to the municipalities. In those cantons large competences with regard to education and culture are delegated to the lower municipal level. The municipalities are the bearer of primary school education and the canton guarantees on cantonal level education of the secondary level: Gymnasium, professional school and on the third level University within the language of the canton. The university in the bilingual canton of Fribourg is bilingual as well as to a certain extent the university in the canton of Berne.

As the judiciary is not decentralized on the municipal level the language of the court proceedings is determined most by the territory of the district. When the district is bilingual, the court proceedings must also be open in both languages. This is for instance the case in the district of the lake of the canton of Fribourg.

Multiculturality by the Principle of Territoriality

The principle of territoriality as bases for the protection of language or religious communities is of essential importance on the European continent. For two reasons this instrument protects multiculturality. Genuine decentralization is only possible with units defined by territory. Municipalities as well as cantons are such territorial units. It is in conformity, that analogous to the principle "cujus region ejus religio" (the subjects have to follow the religion of the ruler of the territory) the territory is also decisive for the determination of the language. In this sense for instance the principle of territoriality has been introduced for the sake of protection of the threatened languages strictly in the canton of Grison. Thus for instance municipal bills for housing can prohibit open publicity on private houses such a restaurant by an other than the official language of the municipality.

When the language territory is not in danger, the principle of territoriality is considered to serve the maintenance of peace among language communities. From this follows, that the borderlines of languages can not be changed at whim by any authority. In this sense for instance the cantonal constitution of Berne determines the French speaking, German speaking and the bilingual districts. Even though language is territorially defined a municipality within the German speaking area was allowed by decision of the federal tribunal to provide for French speaking children to attend a school in the bilingual neighbour town of Bienne.

Since recent times the constitution of the canton of Fribourg has been expanded by a special provision with regard to language. This article determines, that within the canton of Fribourg French and German are on equal footing (The German speaking minorities has about one third of the total population of the canton). At the same time the article provides for the respect of the principle of territoriality and decides that the official language used by the authorities has to respect the principle of territoriality. In addiction cantonal authorities are obliged to promote harmony among the different language communities.

Protection of Multiculturality by Multilingualism

The protection of cultural diversity by promotion of bi- or multilingualism has namely been realized within the canton of Grison. In order to protect the different language communities the municipalities decide the language used in school for official education. Considering the social importance of German, the bill determines that in Romansh or Italian speaking schools German as second language is mandatory. In order to promote bilingualism of the German speaking the school bill empowers the municipalities with primary education in German the possibility to declare the education in Romansh as second language mandatory.

The Italian speaking canton of Tessin is facing a continuously raising German speaking minority. Traditionally only the small mountain commune of Bosco Gurin is a German speaking enclave within a Italian speaking environment. But also in this municipality the official educational language is Italian. However Children with German mother tongue are given an additional teacher according to a special decree of the cantonal government.

6. Political Protection of Multiculturality

The cantonal possibilities to provide for political privileges of different language communities are limited as they quickly infringe within the principle of equality. Thus cantons cannot within their constitution provide for special representation of ethnic, linguistic or religious minorities within the parliament or even grant a special representative of foreigners within the cantonal parliaments. The principle of universality impedes any of such tendencies. Neither can cantons provide for a special position of cultural communities with regard to popular votes. On the federal level the double majority of the peoples of the cantons and of the people of the federation is possible. On the cantonal level such "federalism" is prohibited, as the federal constitution requires that the cantonal constitution can always be change by the majority of the people. This principle would be violated if in addition also the acceptance of a certain minority is required.

Guarantee of specific territorial representation within cantonal authorities

If the principle of equality up to now did impede a personal representation of minorities within the authorities, a certain representation based on territorial limitation still is possible. Thus for instance the constitution of the canton of Berne requires, that one now 7 members of the cantonal government should come out of the region of Jura. This Jura-member of the bernise government however is not elected only by the citizens of this region. He/she has rather to be elected by the citizens of the whole canton. Thus the minority can not determine on its own, by whom it wants to be represented.

A somehow different solution can be found in the bilingual canton of Valais. Out of the five members of the Government three members are to be elected out of three regions composed of several districts. The constitution prohibits however that more than one member is coming out of one district. By this way the constitution can guarantee that at least one member of the government is of the German speaking minority.

The constituencies for the election of the member of parliaments are in almost all cantons the citizens of the traditional districts. By this system the district have a rather important influence on cantonal politics which should not be underestimated. The members of parliament will have to get legitimacy within the constituency of their district. Thus they have to defend and promote the special interests of their district. As the division and the border lines of the districts in most cases corresponds to the historical, cultural and linguistic tradition some protection of multiculturality is also provided by this electoral system.

Proportional Election and Political Culture

An important contribution to the protection of multiculturality is given by the proportional electoral system. By the proportional election the smaller parties have a chance to send their elected members into the parliament. Thus the parliament becomes as mirror of the existing diversity within the society.

As no canton provides for a minimal percentage for the electoral support of a party to get access to the parliament, even a representation of a small party with only one representative in the national chamber is possible. The governmental system legally but also practically prohibits the parties or the party groups in parliament to require from its members to vote according to party discipline. For this reason a single member of parliament, even though he/she does not belong to a big party, can have reasonable political influence if only he/she produces convincing arguments.

The proportional system which has been introduced in the beginning of the 20th century has radically changed the political culture and the political reasoning as well on the federal as on the cantonal level. Every Swiss authority, each court and all committees and commissions will have to be composed at least with one representative of each of the big parties of different language communities and both big Christian confessions. This newly developed political culture rooted in the proportional system and in direct democracy has also led to an over-proportional representation of the smaller language communities within the federal bodies empowered with final competences and this has been factually implemented although the constitution does not provide for a clear and concrete obligation.

Thus for instance in the canton of Valais the German speaking minority is represented based on common understanding by one of the big parties altering every 8th year. In the canton of Fribourg by customs the German minority has always been represented in the second chamber although the German speaking voters count only one third of the constituency.

These examples show that besides the constitution and the legislation in addition the political culture is equally important in order to enhance and maintain Multiculturality. Based on such culture the smaller cultural communities are some times given privileges, which in fact will over-privilege those minorities. Only based on such political culture the conditions necessary for any harmony among minorities and among majority and minority can be established.

7. Conclusion

Democracy is not only a procedure to produce legitimate governments. Democracy is also to be perceived as a procedure to peaceful settle conflicts. This is namely the case for categorical conflicts of a fragmented multicultural state. Within the democratic discourse the parties have to struggle for rational arguments, which may convince undecided citizens. Who is forced to transcend its emotions into reason and wisdom will also be prepared to adopt a pragmatic compromise justified under the point of view of values depending on justice.

The actual motor for such a consensus oriented policy is in Switzerland direct democracy. If a party or an executive body is seeking new solutions, they will have to search for a consensus among the political elite. If the elite do not reach a consensus the failure of the solution within a democratic referendum is foreseeable. The principally majority oriented democracy thus has the indirect effect to induce the political elite to accept compromises and to adopt a consensus oriented behaviour.

Such consensus oriented democracy did turn into a major and fundamental pillar of the Swiss governmental system. It gives minorities even in democratic procedure a real chance to win and get the approval of the majority with convincing rational arguments. Within the Westminster system an ethnic minority is condemned to an eternal looser. In the Swiss system, which seeks the approval of a more and more comprehensive majority, minorities are also taken serious in a democratic procedure. They are not condemned to folklore. Their legitimate interests have to be taken serious by the majority, when it will win a battle and convince the sovereign people" within a direct democratic procedure. By this within the consensus oriented democracy the fundament for a comprehensive legitimacy of the state and the nation (nation building) is constituted.

A perennial looser will never identify with a state, in which they do not have any chance to show the overall advantage of their interests. They will continue to feel themselves as second class citizens. A multicultural state can only survive in the long range, when it sets the goal to search for a consensus with the minorities and to motivate the minorities to participate on the decision making process. This however can only be successive, if these minorities are convinced to have a chance to successfully stand for their ideas and interests.

Within a multicultural state in which the cultural communities are abele to develop their identity they should not be mutually assimilated or melted into the melting pot. This however is only possible if decisions of the Federation, which are considered to be essential for their survival, are bearded by the comprehensive consensus of the majority of the overall federation. The great bulk of the different communities has to carry such decision.

II. How do Minorities Legitimate the Federation?

a) What Gives Compromise Legitimacy?

„Sonderfall“ or Model Case Switzerland?

The Swiss federal system has long been self-evidently denoted as a *Sonderfall*. By the Swiss authors it has been mainly regarded as “unexportable”. At the same time it has remained a matter of pronounced academic interest among non-Swiss scholars. No doubt, an outsider approaches the model differently: It is he who aims at reconsidering and analyzing something an insider would often take for granted.

Such a methodological option requires further explanation. Namely, the paper will focus on the analysis of the principles underlying the Swiss federal model; it certainly will not try to politically evaluate the results, either from structural or functional point of view. The conclusions will take analytical arguments into account, without any self-understood political values behind. The ambition indeed cannot avoid the risk of arriving at a purely speculative construction, actually not very much to the issue at stake. It is nonetheless the only position to be followed by an outsider confronted with the question:

By looking at institutions, principles and their fundamental roots is different their point of view in analyzing the system is different and indeed they may even focus on issues self-evident for the Swiss but not at all evident for a scholar used to different systems and models and thus consider them most interesting. Thus for example the draft of the United Nations for a constitutional solution for Cyprus of February 2003 has pointed with regard to its fundamental regulation directly to the Swiss constitution.

> *„The status and relationship of the United Cyprus Republic, its federal government, and its constituent states, is modeled on the status and relationship of Switzerland, its federal government, and its cantons.“*

With a somewhat ironic undertone the Swiss writer Friedrich Dürrenmatt has quoted in his novel “Justice”: “Either the world will be drowned or it will become swissifized (verschweizern). The German scholar on Constitutional Law Prof. Hans Peter Schneder has analyzed this provocation in a scientific paper and came to the following conclusiond:

> *„Therfore the Swiss model can be quite helpful as has been said by Dürrenmatt….Why then should experiences which have been made in Switzerland with all what is described as substantial identity of the Swiss Confederation namely the Size without extention, a people without nation, a democracy without parties, a government without opposition, a alliance*

> *without bond a country without power, common sens without altruism not be exported into any other country of the world and there be made as standard for good governance and orderly statehood?" (In: Mensch und Staat, Festschrift THOMAS FLEINER, Freiburg 2003 S. 201ff)*

The following statements focus in particular with regard to the political theory on basic principles on which the federal model of Switzerland is built upon.

Minorities participate on Nation and State-Builing

What are the lessons to be learned from the Swiss *Sonderfall*? Where does the instructiveness of the system lie, if respective historical context is missing to accompany a specific set of institutional designs?

We will try to address these problems from the point of view which affects both the constitutive principles of the Swiss federal system and their relevance in articulating the essentials of minority issue at the very legitimacy level of a multi-ethnic federal state. The argument in favour is actually that of *Realpolitik* in the first place. Given that Yugoslavia, like other East-European countries in transition in general, and the newly constituted multi-ethnic federations in particular, faces the minority problem as radicalized as that of a permanent legitimacy crisis, there is no other way to pursue democratic constitutional stability but to cope with minority demands at the very constitutive level.

It is precisely here that the instructiveness of the Swiss federal system comes afore. The lesson to be learned can be indeed simply formulated, but understood only without simplifications: *What gives compromise a crucial legitimizing function?* Is it only a peculiar, "unexportable" and hardly transparent network of history and own institutional set-up? Or - also! - a phenomenon of political socialization of power elites, a process of social learning, undertaken with a full awareness of the fact that a society with ethnic, religious, linguistic and the like diversities territorially cross-cutting, simply cannot afford the luxury of having winners and losers? In other words: Compromise not merely as an inevitable part of everyday political tactics, but compromise as commonly accepted political value of itself, deeply rooted into the long-run political strategy of democratic integration of diversities already at the constitutive level of the *Confederatio Helvetica*.

b) The Essence of Swiss Polity

1. Communal Civism

Taking Multiculturality Serious

The *Willensnation* paradigm marks the common place for most of the Swiss scholars when they explain successful nation-building process in the nineteenth-century Switzerland. Political unity emerged out of and maintained cultural diversities, due to the fact that the Swiss both "share the same basic notions about po-

litical society, which differ from those found abroad", and "take diversity seriously". Generally speaking, this is the message an outsider gets after having read quite a few of the relevant authors. He also learns that the Swiss Constitution is "something developed by experience. It is certainly not something that would have been developed by reason".

On the other side, a foreigner cannot help remaining a bit puzzled by the very fact that the Swiss scholars have mostly taken for granted the basis of the phenomenon of the Swiss political nation. The very fact that they have remained somehow unchallenged to reflect more fully upon the issue, can be also interpreted - from epistemic point of view - as a part of the Swiss *Sonderfall*. Since *Willensnation* not only testifies of reason and choice that must have sustained such an experience; it also leads the way to the very fundamentals of Swiss polity, usually denoted as "communal democracy" or "communal liberty".

Where does Swiss Modernity Come From?

In other words: Where does the Swiss modernity come from, where does it end and what can be understood as its particular, historically determined content? To give a more summarized form to the question: What specifically makes a Swiss citizen (in the meaning of citoyen) today; w*hat are the immanent tenets of contemporary Swiss civism?*

As already pointed out, the Swiss nation is a political entity, based upon commonly shared political values which had been articulated through centuries-lasting nation-building process. One may indeed argue that Swiss citizenship fits into the French political concept of nationhood without ethnicity and runs counter to the German concept of nation as ethnic community (Volksgemeinschaft), based on pre-politic, pre-modern, cultural properties like ethnicity, but also religion, language, race and the like (Schicksalsgemeinschaft). Given that the French concept is political and voluntarist, it is also unitarist and universalist in its essentially political understanding of nationhood as a "daily plebiscite". The nation is composed of citizens (citoyens) as individual members of polity which represents the association of individuals endowed with inalienable natural rights: Whoever enjoys universally valid rights within a given polity is by definition a citoyen. Consequently, citizenship is eminently an inclusive, assimilationist concept, as a result of a culturally heterogeneous collection of peoples living within one state.

Is it not the Swiss who paradigmatically demonstrate such premises?

However, further lines are going to argue that the Swiss *Willensnation*, although based upon a political concept of nation, marks a substantial *re*interpretation of the French concept *stricto sensu*.

German People – French Nation– Swiss Willensnation

The starting thesis reads as follows: What Swiss Willensnation has in common with the French concept of citizenship is indeed the idea of a citizen; the idea about a citizen, however, is substantially different.

Swiss civism is of a specific character. Behind the Swiss concept of Willensnation, there is no social contract theory and no natural rights' doctrine. The Swiss

citizen is indeed a *citoyen* in the meaning of participating in a common set of political values, but he does not become the citizen by enjoying - as an *individual member* - his inalienable rights within the polity. No such liberal universality underlies the Swiss political tradition. On the contrary, the Swiss polity starts with community *a priori. Collective rights* instead, those of local political entities, of Gemeinde, as pre-positive and supra-constitutional, make the very fundamentals of Swiss communal democracy. Individual liberty has been emphasized here within the community, never apart from it.

In this specific sense it could be argued that Swiss civism still has something in common with the German concept of citizenship. It indeed entails a "concreteness," in the meaning of exclusiveness of the German Volksgemeinschaft, and certainly lacks the "inclusiveness" of the French idea of a nation. Political values that underlie the Swiss concept stem out of a particular, both traditional and modern, i.e. radical-democratic understanding. The "alte Schweizer Freiheit", implying "die Unabhängigkeit des Kollektivs nach aussen", has persisted as a permanent collectivist underpinning of modern individual liberty. The ideas of Enlightenment and of American and French revolutions were not alone to affect the "entscheidender Paradigmenwechsel" in the evolution of the Swiss political thinking. The "alteidgenössische Tradition" imbued "fast alle bedeutenden Ideen des modernen schweizerischen Staatswesens - individuelle Freiheit und Gleichheit, Volkssouveränität, Freiheitsrechte, Machtteilung, rationale Legitimation des politischen Systems". One can indeed speak of the *exclusive concreteness of the Swiss Willensnation*: The underlying basic principles are not universal since they can hardly be internalized as self-evidently valid by an individual whose identity does not participate in the Swiss history and tradition.

Universal versus Local Communality

However, this concreteness cannot be but political, because the group entities on local levels, whose rights are at stake and whose membership free individuals enjoy, are already communities, *politeas*. Switzerland is today probably the only country in the world having also municipal nationality. Besides, Swiss civic identity lasts as a voluntarist political fact too, dissociated of pre-political diversities - ethnicity, language, religion. And yet, as already pointed out, it dispenses with the universality of individual political status. The latter has been instead inherently associated with communes and/or cantons. Namely, the process of modernization which centralized conflicting religious loyalties at the nation-state level elsewhere in Europe, reinforced cantonal loyalties in Switzerland. Swiss modernity ends up with the cantonal level. It is localism - and not universality! - that only can make part of civic activism, of civic political culture.

The most relevant consequences of such communal civism - from our point of view - are as follows:

Difference to the French Nation

Given that Swiss democratic polity has been "organized around common interests and integration rather than (as in such homogeneous states as France and the

United Kingdom) sectional conflict, the combat of interests, and clashing power", it has made a legitimate way to politically homogenize diversities (the legitimizing function of compromise in formatting civic identity).

Due to the citizenship as "the common ground of adversaries", as "the search for agreement, with decisions made through different pluralities," the notions of "majority" and "minority" actually have little meaning.

Unlike the countries which have embraced political tradition with liberal democratic setting, Switzerland has never been guided by the paradigm of an individual confronting the state. Common and active citizenship has of itself excluded the idea of state as a potential invador upon inalienable rights of man and the citizen.

Communal Civism

In other words, communal civism has profoundly affected: a) specific concepts of state and the constitution; b) *re*interpretation of rational legitimacy as based on majority principle; c) federalism and democracy principles within a peculiar "Spannungsverhältnis".

It is under the above-formulated topics that the following analyzes will go on.

The thesis that Swiss constitutional democracy runs counter to the starting premise of a liberal state, that of society (private) and state (public) as immanently opposed to each other, presupposes that the main issue to address be formulated as follows:

In what sense can Switzerland at all be taken as a constitutional democracy?

Certainly not in the Anglo-American constitutionalist understanding of the sovereign as - with individual human rights immanently limited – regardless of its democratic foundation. The central point of departure with liberal democratism starts precisely here - people have been given the status of an unlimited sovereign, whose democratically articulated will is the common source of validity both for governmental power and positive law. *Demos* is the supreme und uncontrollable *pouvoir constituant*.

Accordingly: *Swiss constitutional democracy does not represent constitutionalized*, *i. e. with fundamental law principles limited will of the people*, *but - through the constitution - designed process of permanent and substantively unlimited democratic decision-making*.

The Swiss conception of their state has very much in common with the idea of "politicized Gemeinschaft". It is "citizen state", based on the radical-democratic idea that the citoyen's primary virtue is to transcend his private will and to freely identify himself with the community within which he actively participates. The understanding of state "as a natural extension of common will" is inherent in common citizenship.

How Rousseauist is Switzerland?

With the above said in mind, one inevitably arrives at the question: How Rousseauist are the Swiss?

Swiss polity is indeed Rousseauist when embracing the idea of state as "political society". However, "sovereignty of the political" does not necessarily imply that only one place should generate supreme political power within a given institutional design. In other words, the potentially authoritarian or even totalitarian consequences of Rousseau's General Will have not been followed. In Switzerland as a heterogeneous community, the volonté générale could have never been understood as "a consummation of democracy, but as something to be held at bay". Swiss civism of a federal and participatory democracy as essentially "decentralized loyalty" runs counter to any centralist state design, which of itself makes a structural *conditio sine qua non* of the institutionalization of authoritarian populism. As G. Ionescu rightly noted, *Confederatio Helvetica* seems to be "a *society* with a multiplicity of centres of equal powers working in *association*".

On the other hand, the Swiss conception of democracy as rather participatory than representative has a lot in common with Rousseau's teaching that a genuinely democratic government is to be institutionalized only as an unlimited and direct performance of sovereignty. The Swiss had long practiced the decision-making procedure Rousseau suggested as solely proper to have the laws express the volonté générale, and not the volonté de tous, when he claimed that the only possible way to articulate a legitimate common will was to provide a common basis for as many as possible individual opinions. In the absence of "eine Selbstregierung des Volkes im Sinne von Rousseau" the principle of "Volk als oberste Instanz" in Switzerland has been nonetheless accommodated through powerful instruments of participatory democracy. The significance of the initiative and referendum is not simply that they permit public participation in national legislative and constitutional issues, but most of all that they change the public's attitude toward the government.

Swiss understanding of democracy does not count with elections as democratic activity of primary importance - people do not control their representatives by elections, they do it in a more substantive way - by being in a position directly to influence concrete constitutional and legislative decisions. In other words, the representative principle, so crucial in preserving accountability in systems where there is otherwise little participation, is relatively less important in a system where considerable power is devolved on the cantons and communes, and what remains is subject to constant public review through the legislative and constitutional referendum, and initiative process.

Anti- Locke?

The Swiss have not interpreted political power in the Lockean sense, namely negatively, as something to be controlled. On the contrary, political power has been understood as something people should participate in on as large as possible a scale. With this premise behind, democracy and constitution are in a relationship of equal footing. The function of a constitution is merely to provide positive law form, and force for political will of the people. The act is in consequence fundamental and supreme not because it lays down the government by law, but because it operationalizes the populist idea of demos as the supreme, uncontrollable politi-

cal power. The Constitution positivates the Common Will, it does not control its content.

This brings also to a more or less instrumentalist, i.e. technical perception of the constitution. The Swiss constitution to a large extent entails provisions not falling under *materia constitutionis* properly taken. As Steinberg puts it, "the Swiss use their constitution not to control the abuses of human nature but to regulate the relationships among the elements of government. It is a kind of protocol of decisions taken and compromises agreed. ... Unlike the United States, then, Switzerland is not governed by its constitution; *its constitution reflects how it is governed*". Some Swiss critics not only warn that voters as the supreme (constitutional) authority are not always vested with political maturity. They first of all contest the flexibility of the Swiss Constitution. Germany, for example, speaks of a process "vom Revisionsgalopp zum Verfassungsinfarkt". Switzerland has "das unstabilste Grundgesetz der Welt und führt in einem weltweit einmaligen Ausmass Volksabstimmungen durch". This certainly stands true as far as the procedure of constitutional revision alone is concerned. However, in a more substantive sense it can be nevertheless argued that the Swiss take constitutional principles *stricto sensu*, those laying down the basic principles and institutional designs of the Swiss federal democracy, as something fundamental and by all means not easily revisable. Besides, the same author also refers to already long-disputed crisis of Swiss democracy as its structural incapacity to face "die europäische Herausforderung".

Finally, republicanism has been immanently linked to communal and participatory democracy. Not only does Swiss civism show "a strong inclination for non-personalized government". The republican element is as a structural precondition for communal democracy as "die Möglichkeit weitgehender Selbstbestimmung". The latter can be only of republican form in the sense of republican elements of popular participation at all points in the process of governance.

Reinterpretation of Rational Legitimacy

As already pointed out, modern rational legitimacy underlies also the Swiss idea of state. Beginning with Hobbes and Locke and proceeding with Rousseau, the theory of modern natural law elaborated a substantially new conception of legitimacy. As opposed to the hitherto dominant traditional metaphysic postulates, the new legitimacy principle was not established either in God or in nature. It was, rather, imbued with the idea of *consensus*, deductible from *ratio*. Now the original legitimating reason did not govern anything other than the procedures and preconditions which had to be fulfilled in order to have the people arrive at general decisions taking common interests into consideration.

The above outlined general idea of rational legitimacy as primarily procedural, when applied to Switzerland, gains both specific grounds and a fairly different content:

Firstly:

Because Swiss polity dispenses with the idea of social contract and has remained instead deeply rooted into the tradition of Swiss federalism, which was

characterized by the use of covenants as devices to promote federal political integration.

Secondly:

Because the basic idea of rational legitimacy - that the validity of a given political order directly depends upon its having fulfilled the procedural conditions of arriving at a consensus - implies, rather, the majority which is to be taken as qualified to represent common interests. Such an understanding of consensus indeed underlies liberal representative democracy, but - alone - certainly cannot work within Swiss communal democracy tradition. A particular reinterpretation of rational legitimacy was the only response that communal civism of decentralized loyalty could have when facing modernity as a process of centralizing conflicting religious loyalties.

Swiss rational legitimacy contains both procedural and substantive principles as a reason of validity for the government. In order to be a just, good government, power has not only to be institutionalized in a way that can guarantee to all of those *individuals* subject to power a share in making decisions which concerned them (the issue of "representativeness" of political representation). It necessarily has also to provide the institutional set-up along which collective political rights are to be given proper consideration in the decision-making process. This only could provide a basis for democratic integration of minorities already at the constitutive level.

Power-Sharing of Structural Minorities

Power-sharing among different linguistic and religious groups emerged as the basic principle of Swiss federal design. In functional terms relating institutional developments of "Konkordanzdemokratie" could be interpreted as "a highly integrated decision-making structure to cope with the inputs from complex and fragmented cleavage structure". Switzerland as a comparatively heterogeneous society has gained a legitimacy basis homogenous enough to integrate linguistic and religious diversities. *Legitimacy reason has internalized as self-evident these cultural diversities and gave them a constitutive political relevance*. Ethnic-cultural divisions are not taken as "pre-existing" in the sense of "pre-political". On the contrary, *structural minorities* as such constitute a *substantive* value of democracy. This is why the rational legitimacy principle founding modern Swiss state dispenses with the majority consensus procedure as of itself valid. More precisely, it dispenses both with "majority" and "minority" taken as permanently confronting one another under the paradigm of "long-life winner vs. long-life looser". It postulates instead *autonomy* - "als Freiheit politischer Selbstgestaltung unter Verzicht auf Majorisierung".

It is this autonomy of structural minorities within a democratic decision-making process which governed the emergence of modern Switzerland as a politically coherent society. The federal governmental structure has been given both democratic legitimacy and identity, neither by basing legitimacy upon differences ("negative legitimacy"), nor by isolating from decision-making process the differences that stem out of ethno-cultural diversities as "pre-political"; but rather by in-

corporating a degree of autonomy for itself which principally does not endanger the collective identity of minorities as of themselves subjects of political rights. The principles and institutions to guarantee such a status of minorities run across the whole Swiss constitutional system. They comprise "der föderalistische Staatsaufbau, das Prinzip der Bundesstaatlichkeit mit der Selbstständigkeit der Kantone, der Gemeindeautonomie, die kantonale Sprachhoheit und die Sprachenfreiheit sowie die kantonale Ordnung des Staatskirchenrechts verbunden mit konfessionellen Grundrechten und Friedensartikeln".

Overlapping Minorities

Swiss authors have often referred to the phenomenon of overlapping minorities as a crucial argument to explain a more or less successful political integration of cultural diversities in contemporary Switzerland: "Fast jeder Schweizer ist in irgendeiner Weise gleichzeitig Angehöriger einer Mehrheit und Minderheit". However, it could be even argued that this overlapping phenomenon - taken from a *constitutive* point - is to be understood as an outcome and not a basis of the Swiss model. Given the fact that minorities participate in legitimation at political and not pre-political level, the federal/cantonal structure has never been perceived as a guaranty of equality of different ethnic segments of society through giving them "mother cantons" i.e, by establishing new cantonal borders along prevailing ethnic lines. It instead did provide minorities with institutional venues on federal, cantonal and communal level to politically "consume" their *ad hoc* diversities. This is what can explain another important peculiarity of the Swiss federal system, that of *breaking through cantonal borders* when integrating cultural diversities into formative elements of federal decision-making structure. Lehmbruch claims that, contrary to some preconceived ideas, the cantons themselves, as institutionalized corporate actors, have no strong influence in federal policy-making. The important political actors on the periphery have, in the past, been successfully coopted into the federal centre.

The underlying "historical logic" in democratic integration of minorities in Switzerland has always been quite clear about the character of collective political subjects to be accommodated. It was and has remained restrictive from a socio-economic point of view. What has been named as "specific Swiss culture of institutional democracy" can be rather qualified as *democracy of institutionalized cultural (linguistic and religious) diversities*, within which there is not much place left for socio-economic cleavages. Democratic pluralism has been ever since 1874 conceived as a coexistential *modus vivendi* for religious and linguistic/ethnic groups. The well known "magic formula" of "Konkordanzdemokratie", that of a proportional representativeness of the Federal Council, went hand in hand with minority position of labour in politics and industrial relations. "The political left was denied what Catholics and farmers had achieved: Recognition, political influence and participation in the Federal Council".

Accommodated Diversities?

The Swiss have politically accommodated diversities in order to oppose outside pressures and not to overcome social and economic inequalities. The Swiss democratic pluralist set-up has remained immanently "immune" to social and economic differences and these have been addressed through social-state mechanisms. Due to premodernity of Swiss participatory democracy, its populism has never been inspired by egalitarian ideology. Systematic economic inequality of major language and religious groups would be detrimental to the Swiss participatory democracy governed by power-sharing system. The same is, however, certainly not true for those socio-economic cleavages that get around cultural diversities. This, speaking in general, cultural basis of minorities' integration into a political system is also crucial to understand the problems of newly emerged immigrant minority in today's Switzerland.

Digression on the Jura Case: Disintegration on Integrative Premises

The secession of three northern Catholic and French-speaking districts of canton Bern, and the creation of the new canton of Jura in 1978 can be indeed invoked as an exceptional example in modern Swiss history where integration failed. The Jura region represents within Switzerland "the rare case of overlapping socio-economic, language and religious differences". This fact, that language and religious diversities within canton Bern went hand in hand with socio-economic inequalities ("cumulative disadvantages"), made the power-sharing system on the level of canton Bern hardly effective for the three districts in northern Jura, and generated a radical separatist movement already at the beginning of the XXth century. Because the creation of the new canton actually had split the Jura region, the movement went on with the idea of independence for the whole of Jura.

The Jura secession process did demonstrate profound cleavages and went through sharp polarizations all over Switzerland. Given the appropriate structural conditions within the federal order, the case can nonetheless be interpreted as *a paradigm of Swiss model of democratic integration of minorities already at the constitutive level*. A cascade system of popular votes within the Jura region, composed of three downward levels - the Jura region, districts, communes - transparently testifies of the basic element to give validity to the Swiss federation: *Cultural minorities cannot be overruled on constitutive issues*, *because these affect state legitimacy itself*.

Under the principles of procedural legitimacy strictly taken, the separation process would have been valid by the very fact that the Bernese authorities decided first to establish a constitutional framework, and the procedure under which the majority could have arrived at a consensus. However, the Bernese people did not vote on secession procedure merely to make secession procedurally legitimate, i. e. valid for the majority. The procedure simultaneously took into consideration the founding tenet of the Swiss federalist political culture, that of decentralized loyalty: Minority issue was addressed as the issue of political integration already at the constitutive phase of a new canton. By being given the possibility to decide against majority, *minority also democratically legitimized the creation of the new*

canton. The Protestant French-speaking population, who wanted to stay within the canton of Bern, were themselves vested with the same right to territorial self-determination as the separatist majority.

The Jura problem has still remained unsettled. The step has recently been undertaken to moderate these two conflicting positions which affect the cantonal structure of the Swiss federation. The Agreement on political settlement of the Jura conflict (politische Beilegung des Jurakonflikts) was signed on March 25th, 1994 by the government of canton Bern, the government of the Republic and canton Jura and by the Federal Council. It proves once again how fundamental is the role of compromise in Swiss politics:

First:

The parties to the Agreement have consented upon "einen echten interjurassischen Dialog," as the only way to arrive at a political solution of the Jura problem, since "eine Interessengemeinschaft die beiden Teile der jurassischen Region verbindet". However, the Agreement underlies two diametrically opposing positions. On the one side, neither the separatist minority nor the canton of Jura itself have given up the idea "d'un Jura uni". On the other, the Bernese authorities refer to "die Existenz des Kantons Bern in seiner territorialen Integrität", including the Berner Jura "als Gebietskörperschaft", as it has been spelled out in the new Constitution of canton Bern. So, the issue at stake remains open. It is "merely" a peaceful conflict-resolution procedure - a dialogue within inter-Jura Assembly (interjurassischen Versammlung) that has been agreed upon.

Second:

The Agreement once again demonstrates how procedural democracy can be reinterpreted through the self-evidently accepted position that majority overruling is not democratic, since confrontations block any identification of principal problems: "Si le but est fixé d'avance, le dialogue risque d'être dénaturé". This is why the basic democratic standards first of all imply that a pursued political aim be realized by means of convincing the opposite side: "Si l'on veut respecter la volonté démocratique, il s'agit de parvenir à l'objectif en gagnant des convictions".

Third:

All this has been so transparently laid down in governmental statements, and not merely spoken out during secretly held political bargaining. It proves that for the Swiss, compromise is a legitimate political strategy and not mere real political tactics. Moreover, one can speak of the ideological function of the "compromis helvétique".

Fourth:

The very fact that a dialogue procedure as such has been given legitimacy relevance in the Agreement reveals the Swiss motive "der bewussten Entscheidung zur Selbstbeschränkung", which Deutsch has qualified as a precondition of successful political integration.

Federalism and Democracy

It has become almost common to address the problem of relationship between federalism and democracy (also) in Switzerland as that of "Spannungsverhältnis".

Given that democracy "self-evidently" implies one-man-one-vote and majority principles, as opposed to an equal status of all cantons, the issue at stake is that of a "Dosis" of federalism and democracy.

However, federalism and democracy can also be taken as *constitutive principles of power control* for a given political community *which have different values in the background*, *those of diversity and equality*, *respectively*. Consequently, their relationship within a given political order implies much more than compromising the effects of inequality of individual citizens as voters with the principle of equality of federal units. One can indeed speak of *democratic control of a federalized power*, *and federalist control of democracy*.

For a federal state organized as individualist liberal democracy, like Canada and the United States, federalism serves to bring different groups together, and to transcend particularist loyalties. Consequently, democracy is a basic, and federalism a supplementary, corrective principle of power control (vertical checks and balances). The crucial issue for these federations remains how to build in a federal contractual equilibrium within a majoritarian democracy setting. Unlike them, Switzerland relies upon strong cantonal identity and democratic integration by maintaining given linguistic and religious diversities and decentralized, communal and cantonal loyalty. This is why Swiss federalism lacks those institutional devices usually found in federal systems, which are instruments of unification at the federal level. Here, *federalism* has been introduced as a *structural principle of democracy*.

The substantive legitimacy formula of the Swiss federal system not only reconciles federalism and democracy, but rather, understands them as *intrinsically* linked to each other. Due to the communal character of the Swiss polity, democracy cannot be merely identified with the principles of majority rule, and political equality of individual voting rights. Communal civism has embraced *participatory democracy as a federalist element* to protect "inherent minority interests". The abstract principle of people's sovereignty has been operationalized through traditionally Swiss instruments of democratic decentralization (Landsgemeinde, Referendum). The outcome is a complex federal system with a basic consensus about the fundamentals of social and economic rights, high enough to make the institutional set-up work effectively.

It could be even argued that the Swiss have "functionalized" participatory democracy as protective for their decentralized loyalty. "Volksrechte" are also justified on the basis of their safeguarding effect upon other, more fundamental, collective rights of structural minorities as of political subjects themselves, since collective rights make a constitutive element and not the consequence of sovereign people's limitation and control of governmental powers. By "federalizing" participatory democracy in the sense that the relativization of central power has been effectuated through referendum and initiative, federalism also received the key competitive role in the Swiss political arena.

On the other hand, the federalist principle of minority protection has been democratized through popular initiative. The popular initiative accommodates a chance for minorities to bring new ideas in the political debate, to make the government and parliament enter into debate and eventually win the majority of the

people and the cantons - as often has been the case until now - in spite of the opposition of the government and the parliament.

One should never forget that the opposing groups within the Verhandlungsdemokratie process vary according to the subject in dispute and not *vice versa*. This is precisely what makes Swiss Konkordanzdemokratie functionable. As Rhinow puts it, “der Grundsatz der Konkordanz gebietet ein unablässiges *Suchen nach einvernehmlichen und* “*tragfähigen*” *Mehrheitslösungen*, gewährleistet *unterschiedlichen und wechselnden Minderheiten* Chancen der effektiven Einflussnahme und Mitwirkung und erleichtert damit auch Akzeptanz und Durchsetzbarkeit von Mehrheitsentscheiden”. Given the strongly decentralized foundations of democratic decision-making under which a compromise-oriented bargaining policy is taking place, the *Konkordanzdemokratie* could be defined as the principle of *tendentially established majority*. A consensus-formation procedure in most cases ends up with a majority decision. Swiss democracy is not anti-majoritarian. It is, rather *prominoritarian in the sense that minorities can be overruled only under a broadly reached consensus* (qualified majority). This brings a more clear explanation to inherent conflicting underpinnings of compromise in Konkordanzdemokratie.

Individual political rights are also integrated into such federal democracy. It is community within which individual liberty in the sense of individual self-determination is protected. Fleiner explains this as follows: “Die föderative Gliederung ihrerseits erlaubt ein recht weitgehendes Mitbestimmungsrecht der Bürger in kleinräumigen Kantonen und in den Gemeinden. ... man versucht in der Schweiz auf allen Ebenen die Partizipation der einzelnen Bürger auf allen Stufen umfassend zu gewährleisten und das reine Mehrheitsprinzip zugunsten einer möglichst starken Vertretung der Minderheiten abzuschwächen”.

Recent tendencies of legal centralization, administrative centralization and closer relation between authorities of the three levels of government have changed Swiss federalism. The emergence of a non-transparent network of different forms of co-operation and co-ordination between governments and administrative units at the three levels, Klöti finds as a sign of a “dramatic” change. However, the result of what had begun in the middle seventies as a reform to support the federal order, ended up in “weak decentralization”. Thereby has the territorial dimension of politics gained new impetus from functional and economic inputs.

There is another tendency of growing socio-economic cleavages which transcends territorial diversities and rather affects the non correspondence of the Swiss democracy hereto. In other words, the very “representativeness” of participatory democracy has come under question. The Repräsentativitätsdefizit is not purely quantitative. A low participation in the polls has indeed often been referred to as a sign of a deep crisis of Swiss participatory democracy. However, it turned out that:

a) the number of polls on constitutional matters has increased about 100 per cent every twenty years since 1930; b) the impression that the percentage of those who abstain is permanently growing is a false one - over a longer period, 80% of the electorate has, for one topic or the other, run to the polls. On the other side, it is a qualitative Representativitätsdefizit which has become a matter of concern. Linder

rightly points out that "the most important restriction on the democratic norm of equal and general participation therefore lies in the unequal representation of the social classes. And it is this increasing inequality of representation that makes low overall participation problematic". One could indeed speak of "elitism" in Swiss semi-direct democracy.

Inherent limits of the Swiss Federal Democracy and its Lessons

The Swiss model of nation-building under conditions of multi-ethnic and religious diversities has provided an alternative to liberal democracy. It is an empirical, historically verified counter-argument against the underlying axiom of individualist democracy, which does not reject the category of collective rights as such, but cautions against structuring social and political relationships through collective rights. Under Swiss communal democracy, "modernity" receives a somewhat reinterpreted content. *Democracy of institutionalized cultural diversities* - due to the fact that they have been democratically integrated already at the constitutive level - *has politicized ethnic*, *religious and linguistic principles*. This indeed makes a starting point to understand inherent limits of the Swiss federal democracy, as well as to argue its instructiveness for newly-emerged multi-ethnic federations in Eastern Europe in general.

The inherent limits of Swiss federal democracy stem out of the communal civism. As already pointed out, the basic political values of Willensnation cannot be internalized by an individual who has not participated in the Swiss history and tradition. The system emerged and persists as the one democratically integrating *given* cultural diversities. It remains closed for those minorities that are not structural from the system-point-of view. This is why the problem of immigrant workers, who have now reached about 18% of the population in Switzerland, can never be solved within premises of the Swiss federal democracy. The immigrants with the Swiss passport could only be given an institutional possibility to break through the system by introducing majoritarian democracy. That would certainly give new political minorities as such structural relevance. However, on the other side, that would definitely delegitimize the system for all those who perceive their Swiss citizenship as a participation in the Swiss Willensnation. This is why, on the long run, the only feasible and viable solution for the immigrant minority is their *willing assimilation* into the system.

On the other hand, the lessons that Swiss federal democracy can offer to new multi-ethnic federations which are still undergoing a constitutive phase, are multifold and mostly relevant:

Firstly:

Individualist liberal democracy with relating institutional set-up of constitutional government cannot cope with the problem of *ethnification of politics*, underlying all transiting countries of Eastern Europe. This is a level of political reality one has to work with. The basic principles of the Swiss model of decentralized, pro-minoritarian democracy, as we have tried to argue in the paper, can certainly pave the way, if not already provide an answer.

Secondly:

The examination of the Swiss federal experience shows that the legitimacy of multi-ethnic federal states cannot afford to dispense with minorities. In other words, the latter cannot be overruled on the constitutive issue. This is the only strategy to provide a given federal order with democratic identity coherent enough to counterbalance secessionist movements. Once the federal order has been given a broad, genuinely representative democratic legitimacy, the indispensable autonomy of central government will not be perceived by minorities as something to endanger their distinguishable collective identities. This is how can be avoided a ground for defensive nationalism of minorities, which has been and will always be politically instrumentalized.

Thirdly:

Within the inherent logic of the role minorities have played in laying down legitimacy basis for the modern Swiss federation, the minority issue cannot end up as a state issue. The minority question has been democratized by not being overruled by the majority. It was instead politically integrated through the system of proportional democracy. Another important consequence: There is much more space left for constitutional and statutory accommodation of minority rights, because they as such do not question the legitimacy of the state.

Fourthly:

The vertical and horizontal inter-ethnic tensions within Russia and Yugoslavia testify that these new multi-ethnic federations in Eastern Europe seem not to have yet learned the lesson that disintegration is immanent to communities lacking *own* democratic legitimacy and identity. They still refuse to articulate the essentials of a founding democratic consensus. The dilemma they should have already faced is, on what principles is *demos* to be constituted on the level of a common state. What would be a way to a legitimacy basis homogeneous enough to integrate diversities of a multi-ethnic structure. The Swiss model of constitutive democratic integration of minorities cannot, as such, provide them with a ready-made solution. However, it can certainly instruct how to articulate the minority issue already as a legitimacy issue. Above all, it keeps on warning all those who, in brutal ongoing inter-ethnic conflicts, stubbornly persist in making others lose what they "self-evidently" have the right to win.

If there is any message to be certainly taken from the Swiss case, it reads as follows: Multi-ethnic societies can survive only if *all* respective groups within feel themselves as "winners".

IV. Conclusion: 14 Constitutional Principles for a Multicultural State

a) *Legitimacy*

1. Principle: Take Cultural Diversity Serious

The constitutionalism of modernity is based on the concept that human beings are universally equal as *Homo sapiens*. Factors which may promote particularities are either denied or ignored as politically irrelevant. Thus culture as a political factor is ignored or at best considered as a nation building factor for homogeneous nations. Thus modern constitutionalism excludes the reality that 95% of the world population is living in a multicultural society, and ignores the fact that many citizens are not satisfied to be only politically respected as reasonable citizens without cultural roots. They require political recognition as cultural human beings equal as human beings with reason and understanding, but unequal with regard to their language, religion and historical roots.

In order to take cultural diversity seriously those constitutions that deny or ignore culture as a political factor need to change their policies and to recognise culture as an essential political factor, which in multicultural states enhances cultural diversity based on the unity of universal values. States based on the pre-cultural homogeneity of the people will have to recognise culture as a political factor not only for one, but for all cultural communities living under their jurisdiction. This means that cultural communities must be given a political recognition, which enables them within a guaranteed autonomy culturally to develop and to participate on decisions to be taken with regard to the common destiny of the common state.

2. Principle Fatherland / Motherland for Minorities

A constitution that wants to take diversity of languages and cultures seriously cannot treat minorities only as tolerated guests; it must, rather, give different language communities a proper constitutional status within the polity they constitute. Cultural communities must have state status in order to identify their state as their fatherland. Indeed they will only be able to recognize the state within they live as their Fatherland or Motherland if they participate in the "ownership" of the state as "their" state.

3. Principle: Composed Nation

A culturally diverse political system requires a new fundament for its legitimacy. Such bases can only be built upon the concept of a composed nation. Up to now the nation concept united human beings by the social contract on the basis of "*we*" against "*them*" the "*we*" being united on the basis of political (what is good for all) or homogeneous cultural values (what is good for us). A composed nation will need a political social contract to unite different cultural communities and to recognise some internal cultural values, including also political particularities. The

constitution of such states will be based on values which are good for "us" as common values and in addition good for "our different communities" but not necessarily good for all human beings in the sense of universality.

4. Principle: of Double and Multiple Loyalties

Most states are built on the basis of the one and only loyalty of their citizens. Duel citizenship is prohibited. A state which recognizes the political value of its different cultural communities will have to be based on a concept of multiple loyalties, a concept that will have to rely on double or even multiple citizenships as for instance the citizenship of the European Union.

b) Rule of Law

5. Principle: The Right to be Different versus the Right to be equal

Our actual concept of equal rights is based on the assumption that all human beings are equal because they want to have the same opportunities within the political community. However, in multicultural states people want to have the same opportunities within their community and then achieve equal opportunities of their community with regard to other cultural communities. Thus, with regard to cultural diversities, human beings require equal rights as individuals with regard to their community, and the right to be equal as belonging to a community respected as an equal unit with regard to other communities. Being rooted within their culture, they want to be respected as being different from human beings belonging to other cultural communities. Their cultural particularity has to be recognized in the sense that their difference is considered to be a value and not a burden.

6. Principle: Collective Rights

Individuals belonging to different cultural communities should not only be protected in their equal rights as individuals, but they should also be respected as equal within their rights as being part of their community. Good relationships among different communities have to be built on the recognition of the equality of their cultural value. When a minority culture is not recognized as a culture with equal cultural value with regard to the majority culture, those human beings belonging to this minority culture will feel discriminated. Harmony between the different cultural communities is in particular based on this equal cultural recognition and also political recognition of the different communities. The collective value of culture has to be appreciated on the same level with regard to other communities not taking into account numbers or statistics.

7. Principle Four Dimension of Liberty: Liberty from the State, By the State, to the State and Within the State

The first dimension of liberty is the liberal negative right to require the state to abstain of any infringement within the unalienable rights according to the Lockean concept. The second dimension: Liberty by the state embraces the social rights.

Without education liberty of press becomes an empty right. Without social security in case of illness, age or accident nobody can enjoy liberty and those who are in good health will always fear of loosing some times their liberty because of the common human fate. Liberty needs a state which provides the necessary conditions to enjoy it. The third dimension is the liberty to the state. This dimension points to the so called collective rights. Communities must be able to require from the state autonomy and to a certain extent the right of self-determination. Without such right, all those belonging to minorities will feel discriminated with regard to their other liberties. The fourth dimension is liberty within the state. This liberty corresponds to the specific Swiss view of democracy. According to the Swiss tradition democracy is seen as a right granted to the citizens to decide in common to what extent the laws should limit their liberty. Democracy thus gives self-determination to the people, which limit its freedom by democratic legislation. This is seen as freedom within the state. With regard to cultural communities such concept requires delegation to the communities enabling them at leas with regard to cultural issues to decide in common to what extent they agree on limitation of their freedom in order to promote and finance their common culture und to provide common education.

The aim of the Lockean state is, as Hannah Arendt puts it, individual liberty. A state composed of different cultural communities must additionally aim to enhance peace among the different communities. The constitution will have to achieve the difficult balance between individual liberty on one side and peace among the different communities on the other side. For the sake of peace e. g. individual language rights, for instance, might have to be restricted in order to uphold the right of a minority fearing for the preservation of their culture.

c) Shared rule

8. Principle: Participation of minority cultural groups in constitution-making

In order to establish and limit political power, the basic constitutional principles must be perceived as being legitimate by the all of the different cultural communities concerned, regardless of the question of whether they agree on every single political decision that is taken within the political process. This legitimacy can only be achieved it the different cultural communities have the power to participate on an equal footing in the constitution making process.

9. Principle: Power sharing of cultural communities

Democracy based on the principle that the “winner takes all” cannot establish a governmental system which achieves legitimacy with regard to minority cultural communities which will fear ending up as permanent losers. Only by introducing elements of power sharing, and thus softening the rule that 51% equals a 100% majority, will the principle of democracy be acceptable to minority cultural groups

which otherwise would permanently be excluded from participation in the political decision-making process.

d) Self Rule

10. Principle Autonomy

Cultural communities must be given autonomy based on territory or personal group belonging. They must have the opportunity to decide and implement decisions with regard to cultural development of their community based on their cultural heritage. This may include: education, judiciary and administration, including police. Moreover they will have to be empowered to implement the decisions made on the higher level based on the shared rule principle within their proper cultural community.

11. Principle: Enhancing Diversity

The legitimacy of a state with cultural diversity can only be achieved if each cultural community considers the state as its own state. This aim is only possible if the cultural community is convinced that its own cultural heritage is best developed within the respective state. Thus the federation must have the enhancement of diversity as its aim. The realisation of this aim is realised in practice by allowing the cultural communities a significant level of self-determination, especially on questions relating to culture. Such goal however can only be realized, when the cultural communities are convinced that their proper values can better be put into effect on the common level than within an own cultural state by secession and self-determination. Since ages the development of polyphonic music has been considered as a sign of the development of culture and civilization. In the area of politics and democracy however still many states and peoples prefer monotony to polyphony. Federal states are somehow examples for the development of more complex forms of political order. Analogous to polyphony in music they can be considered as a sign of a more complex form of political order which meets the human realty and does suffocate diversity within monotony but enhances diversity as a value of a “polyphonic” state.

e) Democracy

12. Principle: Self-determination of individuals as a democratic aim

The primary aim of democracy is not to produce simple majorities, but much more to seek consensus on the crucial issues facing society. Consensus driven democracy is based on a bottom-up decision-making process that begins with the self-determination of individuals and continues to small municipal, district and regional communities and ends with the level of state or even international communities. Decisions should be taken at the level at which the citizens, as individuals,

are able to give the highest possible input in order to enable the highest possible majority of individuals to identify with the decision resulting from their input.

Democracy should not be reduced to a state principle, which has only to serve the "production" of an efficient majority. Democracy has rather to serve liberty and it should enable by the political public discourse legitimacy of procedure and of institutions providing a political consensus making process. A consensus oriented democratic process which prepares decisions bottom up is based on the conviction, that each decision of a polity should provide for the single individual as much self-determination as possible: either by its individual liberty or by its participation in the common decision making. The smaller the community is, in which one has to decide the less is the individual self-determination limited. Within the small group the single individuals are given the best chances to design the polity and the freedom of the individual within the respective group. The federal division of democracy into the municipality, the canton and the federation which can even be continued on the international level provides for a optimal balance of self- and co-determination. It guarantees that all decisions have to be taken by the best possible consensus in order to guarantee best possible self-determination.

13. Principle: Value of Compromise as Alternative to the Winner Takes All" Democracy

Most democracies are prepared to give 100% of the state power to 51% of the voters. In a state with cultural diversity such system needs to be adjusted on the bases of compromise as fundamental political value. In such a system 51% must not be considered as 100% but as small majority lacking 49% of support. Thus the tiny majority will have to find the necessary compromise in order to achieve a higher percentage of approval. The political decision-making process and the political institutions have to be guided by the idea that a compromise, which produces larger approval, has a higher value than a small majority. This of course presupposes a political culture, which considers compromise as a value and strength not as weakness because only with the compromise one can reach a higher consensus and thus a more comprehensive majority. In a multicultural democracy therefore the small minority of only 51% is challenged to seek a compromise and better consensus in order to take most of the voters of the loosing minorities on board. The decision making procedures and the political institutions will have to be carried by the value of compromise as instrument for conflict management.

14. Principle: Conflict Management

Democratic procedures should not only produce effective and legitimate decisions of the society. They must also be conceived as tools for conflict management among the different conflicting communities. This is only possible if procedures are designed in order to overcome in particular categorical conflicts among cultural communities by democratic procedure by a rational discourse. Moreover democratic procedure will only become sustainable if they are able to diminish categorical conflicts and to turn those conflicts open for a rational democratic procedure.

Chapter 9 Outlook: The State of the Rule of Law at the Junction of a new Millenium

A. Introduction

The Annex to the Registration Form for Membership in the UN?

When the Pacific island nation of Vanuatu applied for membership of the United Nations, the Vanuatuan government had to submit a constitution as part of its formal application. Writing a constitution to gain admission to the United Nations compares markedly with a constitution born out of revolution as in France, or an agreement to form a civil body politic such as the Mayflower Compact, or a constitution imposed on a military basis by NATO upon the Republic of Bosnia-Herzegovina.

In other cases, constitutions have formed new territorial units through alliances, such as the United States of America, Switzerland and the European Union. They have also served to legitimise new secular and democratic governmental systems created through revolutions and secessions. In the process of secularising political power from the king by the grace of god to the president by the grace of the people, such constitutions shifted the hierarchy of power from the Head of State to the executive, to the parliament and finally to the people. In communist regimes, however, constitutions were mere façades created to hide the uncontrolled and unaccountable power of the communist party and its head, the Secretary General. These examples of constitutional documents demonstrate the variety of constitution making procedures, the diverse functions that constitutions can serve, and the reasons for their different content. That said, is it possible to draw a common thread from the Magna Carta in 1215 to the Bill of Rights of 1679 up to the current South African Constitution?

Communalities of Constitutional Documents

Can we draw some general lines from the Magna Charta to the Bill of Rights of 1679 up to the South African constitution shaped by a pre-constitution and partially implemented by the constitutional court? Some constitutions of the states in Eastern Europe have been drafted in round table discussions. Some other constitu-

tions have been either drafted by the old constitutional organs or they have been imposed by a powerful post-communist executive.

Constitutions did *constitute* new territorial units, that is States as the United States, Switzerland and the European Union, which can be defined as a state like alliance of states. Constitutions did also legitimise new secularised and democratically based governmental systems in order to justify previous revolutions and secessions. In these cases they *constituted* not a new state but a new Government. Constitutions shifted the hierarchy of power from the Head of the state to the executive, to the parliament and finally to the people. They legitimised secularised political power from the king by the grace of god to the president by the grace of the people. Constitutions were mere façades in the communist regimes in order to hide the uncontrolled and unaccountable power of the communist party and in particular of its head: the Secretary General.

Enlightment

In the Enlightenment period of the 17th century, the constitution was proclaimed as the method of limiting governmental power and implementing the rule of law. However, it was only with the French Revolution in 1789 that the constitution became instrumentalised as the formal method of empowering the nation, the state and the parliament to transform a feudal society of subjects into a liberal civil society of citizens. In Switzerland the constitution became the document to implement the democratic decisions of the people on governmental policies similar to a party program. The U.K., Israel and New-Zeeland for different reasons renounce to enact a constitution as a comprehensive written constitutional document. But they have all a constituted government.

Of the 192 recognised states today, only 14 can claim an uninterrupted history of nation-statehood greater than 200 years. Between 660 BC, when Japan became a political unit, and the Declaration of Independence in 1776, a new state was created on average only once every 175 years. In the Enlightenment period of the 17th century, the constitution was proclaimed as the method of limiting governmental power and implementing the rule of law. In the 19th century, a new state was born every four years. In the first half of the 20th century, a new state gained sovereignty with full international recognition every 18 months, and in the second half of the century, the average was just over 5 months. Since the end of the Second World War, a total of 113 new states have been recognised by the international community.[1] Further, this trend is likely to continue because the international community is faced with potential state-making conflicts in Basque country, Canada, China, Congo, Cyprus, Georgia (Abchasia), India – Pakistan (Kashmir), Indonesia, Macedonia, North and South Korea, Northern Ireland and Ireland, the Philippines, Russia (Chechnya), Somalia, Sri Lanka, Sudan and Yugoslavia.

Today we are confronted with state-making and state breaking conflicts and procedures in South and North Korea, Cyprus, Ireland, Basque country, Congo, Canada, Indonesia, Georgia (Abchasia), Russia (Chechnya), China, Northern Ire-

[1] Der Fischer Atlas, globale Trends auf einen Blick, Frankfurt a.M. 1996 p. 152 (with updated figures).

land, Sudan, Somalia, Serbia-Montenegro and Kossovo, Indonesia, Philippines, India – Pakistan (Kashmir), Sri Lanka and Macedonia.

There is no doubt that we are living through a crucial period for the future development of constitutionalism. In fact, one might even ask whether the British constitutionalism born in the Enlightenment will be replaced by some new constitutional theories grounded in multiculturalism, globalisation, universality of human rights and democracy. It is this question that I shall address by focusing on four major issues that have seen significant change over the preceding centuries.

In short we can focus on four major issues, which have seen major changes in the last centuries.

We are the people versus we are one people
Inclusive states versus exclusive states
From sovereignty as reality to sovereignty as a symbol
From reason to emotions

B. We are the people versus we are one people

„We are the people“

Before the fall of the Berlin Wall, several thousand East German citizens prayed for freedom in the now famous meetings in the Church of Leipzig. The legitimacy and justification for their peaceful opposition against the constituted government was their fundamental belief that the communist party and its leadership no longer represented the people. The legitimacy they claimed was expressed in the slogan ‘we are the people’ The sovereignty of the people versus the sovereignty of the King, was the main achievement of the constitutionalism of modernity.

The essential development of the modern constitution has been the shift in sovereign power from the king by the grace of god to the Head of the State by the grace of the people. However, the secularisation of state legitimacy to the people did not clearly solve the issue as to which part of the constituted government should represent the people: the elected president, the parliament or an executive drawn from the parliamentary majority? From the English Civil War to the dissent at Leipzig, many despots have been overthrown with the cry ‘we are the people’ and in each case both the revolutionary organ claiming popular sovereignty and the post-revolutionary civil government have differed significantly. For example, the anarchic English Long Parliament of 1640 was replaced by Oliver Cromwell; the symbolic 1789 Assemblée Nationale in revolutionary France relinquished its sovereignty to the ‘government for the public good’ (comité du salut publique); and the elected 1848 German national assembly convened in St. Paul’s Cathedral, Frankfurt, offered the crown to the King of Prussia. That said, it was only at the end of the 19th century that the struggle for pre-eminence between the governmen-

tal branches – Head of State, executive or parliament – developed a real variety of constitutional models.

The essential development to a modern constitution was the secularisation from the King by the grace of God to the Head of the State and its executive by the *grace* of the people. Who however can legitimately represent the people: the elected president, the parliament or an executive coming out of the parliamentary majority? The secularisation of state legitimacy to the people did not clearly solve this issue. The communist party thus claimed, that it can at best represent the will of the people as it is the only institution, which can legitimately determine, what is in the real interest of the people. The people in the Church of Leipzig symbolised the fact, that neither the communist party nor its leaders could any more act on behalf and/or for the people.

Until Leipzig since the glorious revolution many tyrants have been overthrown with the slogan "We are the people". Since the long parliament the organs claiming sovereignty that is to be the only legitimate representation of the people differed significantly from one revolution to the other. First it was a more or less anarchic assembly, then it was the symbolic assemblée Nationale composed of the three states of 1789 in revolutionary France, and in 1848 in Germany it was the elected national assembly in the St. Pauls Cathedral of Frankfurt.

The anarchic assembly of London has later been replaced by a tyrant who claimed sovereignty by the grace of the people. The assemblée nationale had to hand in its sovereignty to the "government for the public good" (comité du salut publique) and the German emperor refused to take the crown offered to him by the parliament, because kings do not take the symbol of power out of the hand of common people. Only in the end of the 19th century the struggle who is on top of the hierarchy of governmental branches the head of the state, the executive or the parliament, did lead to a great variety of different constitutional systems. Usually after fierce and sometimes violent struggles between different parties the constitution making powers could opt either for the strong Westminster type parliament or for a French or American type presidential system. The result of these struggles is the balance of legitimacy and accountability of governmental offices on one side and the temptation of power-holders to misuse their power on the other side. Usually the tension of the rational discourse was between efficiency on one side and democratic legitimacy on the other side.

Opposition leaders were fighting for more democracy and transparency. Those holding offices argued for reasonableness, responsibility and public interest. Experience was the argument against risk, legitimacy of tradition against innovation, and finally reasonableness was weighed against manipulated and emotionalised voters. Those who were able to convince the majority of representatives educated by the history of their nation, could implement their constitutional concepts into reality.

„We are one people"

After the Leipzig revolution and the fall of the Berlin Wall in late 1989, the slogan 'we are the people' shifted into 'we are one people'. The issue was no longer the overthrow of an illegitimate government, but the unification of the German nation.

In fact, Germany was united solely under the slogan ‘we are by nature one people’; it was not legitimised by popular ratification through a referendum, but by reference to its former historic unity. A common election procedure gave sufficient legitimacy to unite two formerly independent states and people into the Federal German Republic. In other words it was recognised that one people, which by its nature is a unity, has a fundamental right to self-determination as a single political entity.

This concept reflects an important shift in constitutional thinking. The secularisation of sovereignty to the ‘people’ did not include the transfer of their historical or religious heritage. In fact, it intentionally made the ‘citizen’, as the unit of the people, a culturally barren construct. As a result, modern constitutionalism has ignored the natural unity and, in consequence, diversity of different peoples. The validation of the cry ‘we are one people’ in Germany has the potential to give cultural content back to ethnic groups, and with it concomitant political rights. For example, if a people is part of another state as a minority nation, it could demand unilateral secession based on the argument that historically it has always been a separate nation and thus has a right to self-determination. The questions will be what constitutes a natural right to self-determination and what historical period should be considered decisive. These issues are currently being faced in the Middle East, where Palestinians and Israelis have fought for over 4000 years, in the Balkans, where ethnic groups have been in conflict for almost one millennium, and in many settler countries, where the indigenous people are claiming the historical rights of their native nations. The major constitutional problem facing us today will the resolution of issues over self-determination and, as a logical consequence of territorial claims based on historical disputes, the foundations of nations and people.

The constitutionalism of modernity has secularised political power to the “people” without questioning its cultural, historical or religious roots. The “citizen” as only unit of the people is culturally nude. Thus it has ignored the natural unity and in consequence diversity of different people’s. Today we have to admit, that the main constitutional struggle is on issues with regard to self-determination and as a logical consequence of territorial claims based on historical disputes of the roots of nations and people’s. Democracy is instrumentalised to legitimise the so called natural right of the people to an own state.

C. Inclusive States versus Exclusive Ethnicities

From universality in theory to universality in praxis

The first modern constitutions proclaimed universality and inclusiveness as part of the inalienable natural rights of all beings. The French Constitution of 1791 was based on the idea that all individuals living within the constitutional territory would automatically become French citizens after one year of permanent residence. This inclusive concept of citizenship reflected the liberal idea of the politi-

cal citizen (citoyen), who is part of the social contract as a political human being. Hence, citizenship was not based on cultural or historical background, but accorded on an individual's acceptance of a liberal constitution and on a willingness to become resident in the country. Thus modern constitutionalism, which implemented liberty, democracy and the rule of law, also established 'homelands' for every person regardless of cultural background. But the first constitutions also had significant exclusive elements. The French language, for instance, was considered of universal cultural value, but not everybody would consider French to have universal worth. Similarly, the Declaration of Independence, which proclaimed the natural rights of every human being, excluded Native Americans and African Americans.

Although the first constitutions were considered to be inclusive in theory, in praxis they had also important draw backs, that is exclusive elements. The French language for instance was considered of universal cultural value, however not all human beings did and would today consider French as a language with universal value. The American declaration of independence proclaimed the natural rights of every human being, but it did exclude Native and Afro-Americans. Constitutions of the second half of the 20th century where open to all traditional citizens but more exclusive to foreigners and people seeking immigration. Switzerland for instance counts 7 million inhabitants out of 20% are foreigners thus second-class citizens with almost no voting rights. In reality Switzerland did become de facto an 80% but not a 100% democracy. According to article 116 the German constitution expressly privileges foreigners with ethnic German origin to get German citizenship.

Very often however constitution do not directly and openly refer to the ethnic origin. They proclaim universality and inclusiveness but in reality they are exclusive to foreign residents. Until today constitutions took territory and people for granted. Originally the social contract was defined by the people of a chosen territory. Today however territory has lost its importance, what remains are people's with more or less stable residence. In future: constitutions will have to deal with these most crucial issues, that territory and people become less relevant. They will have to face the fact, they cannot any more preach in their text inclusiveness and implement in reality exclusiveness.

From Homogeneity to Diversity

Liberal values, equal rights and democracy can at best be implemented uniformly in a unitary state. In a unitary system freedom and equality have the same content throughout the country. In a unitary democracy parliament can better represent the whole population without discriminating or privileging some territorial units. The democracy can at best produce a efficient majority in a unitary country with a one constituency as for instance in Israel.

However most states of today are fragmented with cultural and religious diversities. Old constitutions did, either ignore diversity (US), deny diversity (France) or overcome diversity by assimilation (Germany). I do not know of any constitution, which tried to respect diversity as an asset of the society or even promote diversity as the newly enacted Swiss constitution. How can modern constitutions

cope with the reality of existing diversity? This has become one of the most scaring issues of today's ethnic conflicts.

In order to have legitimacy of the bulk of the society the State has to gain this legitimacy also from its minorities. Constitutionalism of tomorrow cannot ignore cultural, religious and historical realities. It has to recognize that its inhabitants are human beings not only with their rational but also with their emotional dimensions. The need of every human being to identity and community must get a political recognition and cannot be banned into the private life. One of the major constitutional problems of tomorrow may thus be to find the acceptable criteria's which will permit to distinguish those diversities which have to be promoted politically and those which will only be recognised as tolerated minorities.

From majoritarian to consensus driven democracy e

In taking diversity serious the constitutions of tomorrow will have to grant autonomy on local level and to provide participation of collective communities in the decision making process. On the constitution making level important communities may be given full constitution making status. Only by consensus of those communities a new constitution will gain the required legitimacy by all relevant political communities. The "winner takes all" democracy can never achieve real legitimacy in a multicultural state, because it will establish a permanent winner majority and a permanent looser ethnicity. Democracy as efficient majority maker may thus have to be reconsidered.

The liberal democracy was a procedural democracy. It provided the democratic rule of the game and accepted the outcome, without questioning the content. The constitution provided procedures, which enabled the building of efficient majorities based on a democratic discourse. The communist democracy was substantial in the sense that its aim was to democratise the society without respecting procedural rules. The democracy of a multicultural state will have to optimise individual self-determination and to include consensus and compromise as new important assets into the traditional procedural majority rules.

If political issues are not radicalised as either or issues and if by arguments in the political discourse parties are able to change majorities, the winner takes all democracy granted stability and prevented the misuse of power. However when political issues become radicalised and turn in either or alternatives as in particular in ethnic conflicts, the procedural democracy ends up in a permanent winner of the ethnic majority and a permanent looser of the ethnic minority. In this moment democracy looses its authority that is to legitimise efficient lawmakers for an ethnically divided country. The constitutions of tomorrow must find the innovative democracy in order to enable the political society to turn irreconcilable enemies into reconcilable adversaries.

In future democracy as twin sister of liberty can not only be considered as an instrument to legitimise efficient government, but also as a tool to guarantee individual self-determination. By influencing the democratic process, each individual must be empowered to influence as part of its community political decisions. If democracy is decentralised to local authorities, the possibilities of citizens to influence smaller units are even more important. Thus the consensus driven democ-

racy understood as an instrument to empower self-determination and guarantee liberty will turn from a simple majority producer into a peaceful conflict manager.

Equal rights - Right to be Equal

The feudal system as very target of the liberal constitutionalism was constructed on the bases of the big family, which was represented by the housefather. The housefather as owner of real estate property with its proper fortune as the main holder of private power representing his family was considered as main bearer of constitutional rights. Only in the 19th century workers and employees without property and fortune gained voting rights. The 20th century finally was determined by the struggle of women to get equal voting rights and to be considered as equal human beings in social life.

Issues have also changed; the debate has shifted from voting rights to equal rights as equal opportunities within the society that is education, employment, right to marriage, right to social security etc. Thus other minorities such as handicapped, retired and even persons formerly considered as outcast of the society like homosexuals are claming and gaining equal rights. The guarantee of equal rights did become a guarantee to accept almost all life-styles as equal.

Other discriminated minorities followed to be respected as community equal to the majority community. Persons belonging to cultural minorities required equal respect not only as individuals but also as members of the racial, cultural or religious minority. They fight not only for equal rights but for the right to be equal. Affirmative action was considered a tool to overcome historical injustice and discrimination. However it seems that the sovereignty of the global market will slowly replace affirmative action with a colour-blind strict guarantee of equal opportunities not at all taking into account equal results. On the other hand the need of collective identity will strengthen the importance of collective rights.

D. From real sovereignty to symbolic sovereignty

Sovereignty as big-bang

Sovereignty was the key issue for the nation-state of the 19th and 20th century state. It was the magic formula to protect freedom and create social justice by state rule. According to the ancient Greek Saga Prometheus has stolen the fire from the gods and thus he gave “cultural sovereignty” to each individual for his surviving. Because Prometheus has deprived the gods from their power, he was terribly punished for the entire eternity. Thomas Hobbes and with him all enlightenment philosophers who invented the social contract theory have stolen the fire of sovereignty from the gods in order to give the Leviathan the power to create justice. They have deprived God from the power to decide on law and justice for mankind. Since Thomas Hobbes sovereignty has been considered the fountain of justice or even more the “big-bang” out of which emerges the universe of the state, its authority, its power, freedom, justice and the Law. Sovereignty thus became the in-

dispensable precondition for every state and legal order. Once achieved the states used sovereignty for their inner isolation and their right to decide on peace and war on their own. The states became isolated stars on the sky of an emerging international legal system.

The international community became the "pouvoir constituant"

This concept of sovereignty does not fit any more to the reality of today's globalised world. Based on the prohibition of a war of aggression by the charter of the United Nations the international community and in particular the security council considers conflicts and wars between the states and even within a state as a danger of peace and thus claims the right to intervention. State tyrants cannot hide any more state terror behind the veil of sovereignty. Human Rights are considered universal values under the final control of the international community. Thus the constitution making power has no full sovereignty in creating or denying basic human rights. The international charters of human rights did become de facto an integral part of modern constitutions.

International organisations without democratic accountability such as the World Bank and the IMF decide on good governance and control whether governments are supporting, respect and implement basic and universal constitutional values such as rule of law, democratic accountability of governments, human rights and decentralisation. Within this new spirit of universal values sovereignty de facto has been reduced for most states to a symbol. Sovereignty was once crucial for any constitution making power today it has lost great part of its magic of the past.

Sovereignty of the Global Market

Today states formulate their constitutions in order to attract international investors, to be accepted in regional or international organisations and to get the necessary credits from the World Bank and the Monetary fond. Constitutions have to enable good government, they must be sustainable, protect minorities and must be open to the real sovereignty of the global market. Today constitutions turned into exchangeable documents. In earlier times constitutions were the pride of the particularity of each nation in the sense of Montesquieu: "It is the business of the legislature to follow the spirit of the nation, when it is not contrary to the principles of government; for we do nothing so well as when we act with freedom, and follow the spirit of our natural genius."[2] This basic obligation for any constitution making assembly to produce a constitution, which reflects the spirit of the past in order to provide the fundament for a prosperous future, has lost great part of its content. In a time, where diversity becomes more and more important, it is not considered an asset to produce diversity with regard to constitution making.

The sovereignty of the nation is merging into the sovereignty of the global market, regulated by the invisible hand and if necessary for the defence of its vital interests by the only remaining superpower. The sovereignty of the free market

[2] Montesquieu XIX Nr. 6

guarantees the free flow of products, capital and services. The free flow of labour and people on the other hand is still under the strong control of the national sovereignty. For the future it remains to be seen, whether the market can be divided into a global flow of capital and products on one side and the local regulation of the labour market on the other side. Social unrest caused by migration and internal identity crises may well be the consequence if the constitution of the future is unable to face this future challenge.

E. From Reason to Emotions

Reason-Religion-Ideology

According to the Philosopher Agnes Heller modernity started, when men achieved the ability to say no. No and yes are results of self-reflecting judgments on good and bad, right or wrong, just or unjust. Human beings are considered to be the only known living beings, able to fulfil their life according to their proper reflection and choice. The capacity to separate the good and the bad, the reasonable from the unreasonable, the just from the unjust with reason and experience is the very fundament of human dignity.

In fact the sovereignty of each individual is its intellect. The reason made him or her independent from value judgments of authorities or other pairs. This view of the homo sapiens is the fundament of modern constitutionalism and of the secularisation of state authority. The fundament of the constitution of modernity is to be found in philosophy not in theology as in middle age. As consequence state authority cannot anymore find its legitimacy in religion but in reason acceptable for all human beings. A fortiori constitutions have to be legitimised by reason not by any legitimacy based on the "grace of God".

In consequence constitutions found very diverse ways to deal with religion. All did guarantee in principle freedom of religion. The French considered secularisation essential in order to prevent the Catholic Church from intervening in state affairs. Americans granted freedom of religion, in order to upheld diversity of different religions. Germany granted freedom of religion but conveyed special privileges to some Christian communities and the UK maintained the relationship between the Church and the State but protected the freedom of religion of other religious communities. In all cases the relationship between state and religion remained conflictual and required compromises.

Today many ethnic conflicts are rooted in religion. Several states committed to Islam, which was in the middle ages much more tolerant towards other religions than Christianity, deny freedom of religion according to the universal charter on civil and political rights. Religion became a major source of conflict in Ireland, in the Middle East, in former Yugoslavia, in the conflicts of India, Pakistan and Sri Lanka, Tchechnya, Tibet and in Indonesia. Most of those communities reject a fully secularised society and claim the obligation of their Constitutions at least to foster the majority religion if not to adopt the majority religion as official state relig-

ion. The religious communities claim for collective rights and political recognition, which includes their right to limit individual rights with political means of its members. This renaissance of theology controlling constitutionalism may change considerably our basic constitutional concepts. With regard to religion, the individual will loose its capacity to say no, he or she can only change religion or citizenship.

It is obvious that such privileges will in addition raise major conflicts with regard to discriminated minorities. Many religions require further control of state, law and justice. They influence criminal law, educational systems and impose the morality of religion on the family system including the whole society. Such tendencies are in clear contradiction to the principle of secularisation, which was the very fundament of modern constitutionalism. Inclusive universality will fade away and it will be replaced by exclusive particularities.

Parliament and Internet Society

Without the invention of printing, modern constitutionalism could never have developed. Martin Luther could distribute his theses on reformation thanks to Gutenberg. Gutenberg enabled the French philosophers of the enlightenment to prepare the spirit of the French revolution. Because the constitution could be distributed as printed document, it could transparently inform the citizens on the limits of governmental power. The constitution as a written document could provide transparency of powers and responsibility and thus the indispensable democratic accountability. Modern democracy was only possible thanks to modern means of communication.

However the limited possibility of citizens to intervene in governmental affairs only through their parliament and the restriction of democracy to mere election procedures was also due to the restricted possibility of communication by the print media and later by the mass-media. The new possibilities of communication through Internet and mobile telephone have created a new communication society. The government by permanent consent is no utopia any more. The internet possibilities of today and tomorrow enable citizen to a permanent contact with their government. It may well be, that in the end of the day the traditional concept of representation by parliament with all its constitutional ideology behind it will be at least partially replaced by direct democratic influence of the citizens by internet.

From Civil Society to Consumer Society

The "citizen" as rational and reasonable human being interested in the public interest of the state, prepared to sacrifice even his or her life for the sake of the nation, the citizen integrated by a social contract into a nation committed to freedom, human rights and rule of law: this was the fundament of the state of Rousseau. "To all general purposes we have uniformly been one people each individual citizen everywhere enjoying the same national rights, privileges, and protection."[3] This image of the idea of a human being, who is with regard to its political unity a citi-

[3] Jay Federalist 2

zen that is a “civil soldier and with regard to its private welfare a consumer has radically changed in the end of the 20th century. The society shifted from the public-spirited universal civil society sovereign by its nation towards a private society ruled by the sovereignty of the globalized market. The citizens as individuals of a nation committed to liberty have shifted into the pleasure-seekers, the bored, the ambitious, the space-age technicians and the retired. Self-liberation and self-fulfillment are reduced to freedom for life-style choices. This might end up in a new division of the society (Brazilian society) between the marginalized, outcast and lawless (foreigners, minorities etc.), who cannot afford to choose and the integrated, who dispose of the rule of law for their own interest.

The distinction between the “public” and the “private” has become fuzzy. Private terrorists wage wars against the entire humanity. On September 11th they were able to break into the very heart of the fragile society and to change the history of states in one day. The growing cancer of corruption is another alarming signal for the misuse of public power for private purposes. The manipulation of public interests by private economy and privately owned media is the other side of the coin. Public functions such as police, security, prisons etc. are administered in certain states by private firms. Public agencies do not anymore convince citizens for public interest, they “sell” the public products and influence the choices of the consumer-citizens through marketing policies.

The once unquestioned authority of the executive and even of the legislatures is withering away. Democracy by consent is the consequence. On the other side the least dangerous branch, the judiciary seems to gain on power and political importance. The court is the very governmental branch, which in recent years seems to have gained and not lost in recent credibility with regard to the civil society.

F. Conclusions

The “agesing” constitution seems to come soon to its first maturity. If one could distinguish the different historical periods by symbols one could say for the middle age the symbol was the hierarchical pyramid, for the industrial period it was the wheelwork in the sense of the exact clockwork and for our period it is the multidimensional network. Networks are complex and not transparent. Each knot has its own function and possibilities to influence the net. But it can easily be marginalized and isolated. Nations and states will not fade away. They will have other functions and they will convey some functions to the network of international, transnational, regional and private cooperation. Thus coming constitutions will have to provide the environment and the fundament that governmental branches can at best make use of this network, which will grow in strength, density and complexity. We will try to formulate some final theses, which to my estimation should lead the constitution to a modern world of tomorrow, without loosing the essentials of the constitutionalism of modernity.

1. The aim of a multicultural constitutional state can not be reduced to the protection and the enhancement of individual liberty and basic rights, but

in addition also the maintenance of peace in order to hold or even bring a multicultural society together. The constitution thus has to provied for legitimate institutions and procedures which provide the legal order as a environment for a harmoneous living together. The main mandate of the state will be to determine, how it will cope and deal with multiple identiites and loyalties of its communities. It has to assess, which diversities will have to be relecant and which her therefore should promote.

2. The actual discourse with regard to human rights should shift ist priority from the issue of universality to the question, up to which degree particular cultural specificities shoudl be acceptabel and could be gurarantеed by granting particular collective group-rights. The golden rule "thouw shall not do to your neighbour what you not want to be done to you", which somehow can be found in almost all religions should be the fundamental criteria fort he recognition of such particularities.
3. The goal of democracy is not to be reduced only to produce a efficient and legitimat government; democracy has rather become a useful and substantial tool to manage conflicts peacefully and thus has strong connections to the individual and collective rights. Decentralization on to local authorities does not contradict the principles of democracy but it rather is an essential core element of democratic governance.
4. The actual challenge of the modern constitution constituting representative governments should also consider the development to a globalised communication society which may have important impacts on the traditional principle of representation established by local elections. A modern constitution thus has to reconsider the principle of representation as part of the modern global communication society.
5. Universalisation and globalisation require from constitutionalists to extend their horizon beyond the nation state. Their concern on democratic legitimacy, rule of law and accountability should also include the regional and international communities of states. On the other hand, they have to integrate the constitution making process of the Nation harmoniously into the constitutional principles of the international community. The discourse on democratic legitimacy and rule of law should embrace also the dimenstion of regional, transnational and international communities. Primary responsibility will be to bring the national constitution making procedur in harmony with the constitutional principles of the international community in particular with the principles of democratic governance.

6. The reality of multicuturality, which lead to local emotionalisation of politics can terribly shake the state of modernity, if it is not able to cope with local needs of collective groups and to transcend those interests into the transnational, global and universal network.