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University of Bari

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FORMS OF PUBLIC PARTICIPATION IN THE PREPARATION OF LEGISLATIVE AND ADMINISTRATIVE ACTS

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INTRODUCTION

The colloquies on European law which are organised by the Council of Europe, each year in a different country, have as their purpose to take stock of problems of topical interest in the legal field.

The usefulness of these meetings derives from the fact that in Europe today it happens quite frequently that a particular legal problem arises in a more or less similar fashion in several States. These have therefore every reason to compare their experience with regard to the problem at issue, the difficulties they have encountered, or the positive results they have scored, so that each State may learn from the other.

The seventh colloquy, the theme of which was "Forms of public participation in the preparation of legislative and administrative acts" was held from 3 to 5 October 1977 in Bari (Italy), thanks to the hospitality of the Italian Government and the university of this city.

The colloquy was chaired by Professor F M de'Robertis, Dean of the Faculty of Law. Sir Denis Dobson (United Kingdom) and Professors Klaus Arndt (Federal Republic of Germany) and Louis-Paul Suetens (Belgium) acted as Vice-Chairmen.

At the opening session of the colloquy, the participants were welcomed by Professor F M de'Robertis, Professor E Quagliariello, Rector Magnificus of the university, Professor F P Bonifacio, Minister of Justice of Italy, and Dr. F W Hondius, Head of Division in the Directorate of Legal Affairs of the Council of Europe.

In order to make it possible to study, in the limited time available, the vast array of problems connected with the general theme, four main reports were prepared and presented by Professors H Maisl (Orléans) on "forms and techniques of participation", E Grisel (Lausanne) on "the referendum", F van der Burg (Tilburg) on "interest representation" and C Haagen Jensen (Aarhus) on "participation in the management of educational and social institutions".

The colloquy has fulfilled the expectations on all counts. The theme it was asked to deal with raised the fundamental issue of representative democracy and its impact in the law. Does direct participation by citizens, or groups of citizens, in the public affairs that concern them (environmental decisions, university management, town planning, price control etc) weaken or strengthen democracy? Is there any method by which the law can provide for the constantly changing ways in which the public intervenes in public affairs? Who indeed are the public? Is direct intervention by citizens compatible with the notion of general interest? How can the process of decision-making be made more visible to and be brought closer to the public, without weakening its effectiveness? Can there be decision-making power without responsibility? etc.

Fundamental questions such as these did not fail to lead to a lively debate, which was enhanced by the varied composition of the audience: university professors, judges, members of Conseils d'Etat and government officials from member States of the Council of Europe as well as observers from the Holy See and Canada. Not surprisingly, the participants' assessment of the positive or negative effects of such forms and tools of participation as opinion polls, referendum, or student's participation etc covered the full range of the spectrum.

At the end of the deliberations a number of conclusions were formulated by Professor Paolo Barile of the University of Florence, General Rapporteur of the colloquy, in the form of a general report.

The results of the colloquy have been communicated through the European Committee on Legal Co-operation (CDCJ) to the Committee of Ministers of the Council of Europe.

The proceedings of the colloquy which are contained in the present volume include the speeches made at the opening session, the main reports, some of the major contributions to the debates submitted by the participants, and the general report.

OPENING SESSION

3 October 1977

Address

by

Professor Francesco Maria de'Robertis,
Dean of the Faculty of Law, University of Bari,
Chairman of the colloquy

On behalf of the Faculty of Law of the University of Bari, I should like to thank the Council of Europe most sincerely for selecting Bari as the venue for the 7th Colloquy on European Law.

I. The relationship between representative and direct democracy, in other words, between the centralised and participatory exercise of authority, is fundamental to our chosen theme. Participatory democracy - if one disregards participation through the medium of proposals or consultation - basically involves citizen participation in the decision-making process associated with the exercise of power by the State and other public authorities.

Contrary to popular belief, participation of this kind is far from being merely a utopian dream. In fact, it occurs at the earliest stage of tribal society - so much so that the vesting of supreme power in an elected or charismatic chief represented considerable progress. Compared with this latter form, of course, the introduction of representative democracy in Greece and Rome undeniably constituted a further advance.

Needless to say, this is not the whole story: participation is subject to major limitations (we need only think of taxation, which is universally exempt from referendum-control) and its effectiveness is far from complete; hence a whole series of problems which we mean to submit for discussion by participants.

1. There are two main factors which limit the effectiveness of democratic participation: firstly, it is extremely difficult for those who cannot devote themselves full-time to politics and who lack the requisite technical knowledge to inform themselves properly, particularly where highly technical or specialised matters are concerned (energy or defence problems, for example); secondly, there is that powerful and frequently excessive individualism which leads us to prefer our own interests to those of the community. This being so, we naturally find ourselves asking whether these are permanent, insurmountable obstacles or temporary difficulties, which we can hope to overcome. If the second is the case, how - and when - can we hope to overcome them?

2. If we then go on to admit that satisfactory citizen participation presupposes a highly-developed sense of social responsibility, the next question is: to what extent do current educational methods, with their emphasis on individuality and on liberation of the individual from all conditioning pressures, help to foster this sense of social responsibility?

3. Also relevant are discrepancies between the techniques and instruments used in the various Council of Europe member States to give the individual a direct share in the taking of decisions and exercise of power. To what extent can instruments and methods which yield good results in one country be applied in another?

In this connection, we might think of referenda on new taxes - standard practice in Switzerland but unknown elsewhere - or again of Switzerland's system of semi-direct democracy: what are the chances of using and adapting these techniques in the various Council of Europe member States?

4. Might it not be suggested that the general ban on taxation referenda reflects a widespread absence of the maturity needed for useful participation in the decision-making process? If this is so, what can be done to put the matter right?

5. It is true that the system of participation and direct democracy represents a kind of challenge to the centralised and authoritarian exercise of power by the State, but does it not also imply the danger of corporate rule, since sectoral interests naturally tend to combine in pressure groups? How can this be avoided?

II. Finally, a perusal of the four reports presented at the colloquy suggests two questions:

1. Surely the ways in which citizens can participate in the State's administrative activities should include procedures for appeal (by individuals or groups, seeking to persuade the authorities to reconsider official decisions)?

2. Similarly, forms of participation in the legislative sphere should surely include:

a. the development of usage and custom, ie those norms which the people establish directly and which exist in all current legal systems;

b. interpretation of the law which, in its advanced forms - "interpretatio abrogans" and progressive interpretation - ends by annulling or at least radically modifying the original terms of the law.

A case in point would be interpretation involving non-application or even abrogation, as provided for in Articles 39 and 40 of the Italian Constitution, by the unions and courts.

However, my intention has merely been to draw a number of basic problems to your attention. It is up to you to find solutions or, at least, to pave the way for solutions. At the same time, you must guard against the easy temptation of assuming that representative democracy is being supplanted by the "new" realities of direct or participatory democracy, for the latter contains those seeds of agitation and revolt which have often threatened the basis of democracy itself and which have, in the past, been taken as a pretext for establishing dictatorial or authoritarian forms of rule.

Address

by

Professor Francesco Paolo Bonifacio,
Minister of Justice of Italy

The initiative taken by the Council of Europe in conceiving and organising the colloquies of European law, of which this is the 7th, cannot but be considered as having the greatest importance for the future of Europe. Thus I take this opportunity of expressing my great satisfaction and full support for that initiative.

Plainly, it is one of a series of activities which have already been fruitful in pursuing the harmonisation, within the limits of the possible, of the legal systems of the countries which have European civilisation in common.

This way one of the surest ways to bring together the European peoples, to make them more homogeneous, and to reduce some of the greatest differences between them: the object of harmonising the rules governing their lives together was to strive for a more intense and genuine solidarity. But although the aim of the European idea is clear, it must be realistically recognised that such harmonisation cannot but be partial at the present time. For to imagine that in the present state of affairs it is possible to achieve more ambitious aims would be utopian, since appreciable differences still exist between the European peoples, determined by important historical, social, religious and traditional factors.

Such differences are apparent in the various legal systems, since these can only reflect the society of which they are the expression. It follows that just as one cannot hope to erase these complex differences in a short period of time, it is vain to believe that full harmonisation of laws can be reached in the short term.

Nevertheless the European idea is spreading, as is significantly shown by certain developments. The increase in trade between countries, the frequent and large-scale migrations, the increasing quantity of news, the new legal reality constituted by the European Communities (with implications that often reach beyond the circle of member countries), and the approaching direct elections to the European Parliament are all factors helping reciprocally to influence the life of each national community, and which therefore contribute, in ever-increasing measure, to strengthening the trend towards the harmonisation of the very conception of social life.

In order that these pointers to tomorrow's world may be followed with some hope of success, it would surely be useful to reflect deeply about what is new in the legal thinking of our era; and by legal thinking I mean not only scientific speculation but everything happening, whether research or practical action, in the complex world of the law.

In that context, the choice of theme for this colloquy could not be more apposite.

Participation in the formulation of legislative and administrative acts is only one aspect of a wider phenomenon. There is in the contemporary world a very marked tendency to break with old formulas which, in various ways, were apt to isolate the world of law from the social framework and make of it a field exclusive to the élites of "technicians". Many barriers have fallen: the erosion of formalism, which for many decades characterised scientific research and even the judicial application of the law in certain countries (among them Italy), with negative effects on both, constitutes an important example of how the world of law is opening its doors to the ordinary life of human society.

The fact that even jurists today seek a dialogue and meetings with different social groups, in the course of which they obtain a direct contribution from the latter, shows that the old notice "no admittance to non-members" has been taken down.

All this is the result of a profound and undeniable change in values with respect to civil rights and liberties and even in democratic values. It follows that we should not be surprised if at this turning-point of history there arises with some force the problem of participation in the formulation of legislative and administrative acts as one aspect of the wider problem of participation in day-to-day government. This is a phenomenon which we should greet enthusiastically, for it points to a significant forward step towards the strengthening of democracy.

The complexity of the world in which we live, inspired by profound changes affecting contemporary society which are clearly propelling it towards new equilibria, require of the law that it take on a new dimension and abandon its traditional function of conservation.

Thus in so far as the law seeks and acquires the role of promoter of a new dimension of society, there is an ever-growing and indeed a compelling requirement to reduce the distance between ordinary citizens and the decision-making centres. Participation in the formulation of legislative and administrative acts is thus one of the means - the most important but not the only means - of satisfying this fundamental requirement.

The Constitution of the Italian Republic contains implicit and explicit principles legalising various forms of participation, all based on and legitimised by the sovereignty of the people. In some specific cases, however, popular sovereignty tends to be expressed in more tangible and immediate fashion than through the indirect methods of representation normally used, such as elections and political parties, not excluding them but complementing them and strengthening the very fabric of democracy by additional consensus.

The people intervene directly in the legislative process first through the technique of the referendum, which, besides the specific function assigned to it in the process of constitutional revision, can be used to abrogate ordinary laws, or the laws and decisions of the regions, and to alter regional territory in accordance with Articles 75, 123, 132 and 138 of the Constitution.

The referendum, whose operation has been governed in Italy for some years by an ordinary law, is now under critical revision, and proposals aimed at modifying certain aspects of form and content are before parliament.

Less widely known or used are the petition, provided for by Article 50 of the Constitution and governed by parliamentary rules, and the right of citizens to initiate legislation, also provided for by the Constitution in Article 138 and governed by an ordinary law. Their aim is to integrate or activate respectively the parliamentary legislative process through direct popular action.

At the present time, however, the most significant experiment in participation in the formulation of legislative acts is the practice of information hearings, which earned Italy special mention, with the Federal Republic of Germany, in a very recent study carried out at European level by the University of Geneva under the direction of Professor Sidjanski.

Deriving from parliamentary practice, information hearings are governed - and this is a recent innovation - by parliamentary regulations.

In accordance with these regulations, parliamentary committees which have decided to carry out enquiries aiming to collect information or documentation on any subject within their competence, can decide to hear anybody, whether administration officials or individual experts in the subject under enquiry.

The highly participatory nature of these hearings resides in the fact, which is new, that persons from outside parliament intervene at one stage of the legislative process, even if this is only a preparatory stage, and in the fact that the opinion of such participants is particularly significant in that it is not compulsorily but freely given. The invitation issued to them by the committee concerned is not mandatory and provides for no sanction in case of refusal.

The interest shown in such information hearings can be measured by their number. During the last legislative there were 26 hearings in the Senate and 19 in the Chamber, while during the present parliament, which began a little over a year ago, there have already been 11 in the Chamber and 8 in the Senate.

A particular feature of this participation technique is that its use is also provided for at local level under the various regional Statutes, with the positive result that the participation base is widened.

In the field of administrative law, Italian legislation long ago instituted numerous procedures for popular intervention. Thus as regards compulsory purchase in the public interest, town-planning, public water supply and environmental protection, there exists the possibility, governed by regulations, for any citizen to make comments, raise objections, or submit proposals.

There has recently been a large-scale administrative decentralisation on the basis of Law No. 278 of 1976 which institutionalised experiments already carried out in various towns, local authority areas or ward councils, allowing citizens to participate in concrete fasion in the administration of the commune.

Citizen participation in school management has also been implemented by legislation, which some years ago decreed the regulations applicable to elective school bodies, today set up in all schools, composed of teachers', students' and parents' representatives.

This is the legislative background against which past and present events in our country are to be assessed.

But it should be borne in mind that when we jurists study a given question, we should avoid the mistake of limiting our research only to normative sources. We should lift our gaze to a wider horizon, and see how the question under study appears in practice in the life of society. The urge to be practical and the need for consistency between the demands of law and the demands of real life are universally observed phenomena.

As regards Italy, although it will be seen from what has been said that legislation has provided considerable scope for the dynamics of "participation", experience shows that progress made and still being made is much greater than was expected.

Here my personal experience of government has given me tangible proof. It has taught me in particular that the participation - even of an informal nature - of social groups in the preparation of important legislative acts is a valuable factor in the strengthening of democracy and in the creation of highly effective legal instruments.

I am aware that there are plenty of harsh critics, concerned with the correct functioning of the constitutional system. To those I would like to reply with some very simple comments. It seems to me that the "dynamics of participation" in the elaboration of laws and of administrative acts does not interfere with the responsibilities of the decision-making centres, which remain institutional responsibilities. On the other hand it is certain that "participation", while it strengthens the validity and vitality of the choices made by the holders of various functions, also strengthens the correct functioning of the whole system, to which it gives greater authority through the working of a conscious consensus.

I am fully convinced that the reports and discussions of this colloquy will give us the opportunity for deep reflection on this theme so closely tied to the spirit of our times. Therefore I wish again to express my satisfaction at the initiative taken by the Council of Europe and my thanks for having been invited to speak. I accepted this invitation with the enthusiasm of the specialist and the interest of the politician. I wish you every success in your work.

Address

by

Dr. Frits W Hondius
Head of Division in the Directorate of Legal Affairs,
Council of Europe

I have the pleasant duty to transmit to you the good wishes of the Secretary General of the Council of Europe for a fruitful meeting. He regrets that he cannot be with you here today himself, as his presence is required in Strasbourg at the autumn session of the Parliamentary Assembly. Most unfortunately I have to inform you that Mr Muller, Director of Legal Affairs, cannot be with us today for reasons of health. I am certain that I can speak on behalf of all of you in wishing him a speedy recovery.

To our eminent Italian hosts I should like to say how much the Council of Europe appreciates that Bari is once more the venue of an important European meeting - the two previous occasions being the 1973 Human Rights Symposium and the 1976 Conference of Ministers of Physical Planning.

Our thanks are due in particular to His Excellency Professor Bonifacio, Minister of Justice, and Professor Quagliariello, Rector of this university, and Professor de'Robertis, Dean of the Faculty of Law, for their contribution to this opening session of the colloquy.

The theme: "Public participation in the preparation of legislative and administrative acts" can be said to be in the centre of preoccupation of the Council of Europe. Our organisation is concerned with the enhancement of Man in our Society. The 19 likeminded States who are members of our organisation share their attachment to certain basic principles such as the Rule of Law, the protection of human rights, and a pluriform, democratic structure of society.

Now one of the problems that crops up time and again, in all fields where the governments and parliaments of Europe work together through our organisation's two main statutory organs, the Parliamentary Assembly and the Committee of Ministers, is the distance between the citizen who is affected by laws and administrative decisions and those who make those laws and decisions.

One may discern three principal factors that cause this distance between Man and the political community in which he lives. To make our point clear, let us look across the sea, to Greece, and consider the city-States (Poleis) from which our word "politics" derives. In those cities, all members of the social, economic and legal community lived within literally sight and within walking distance of their meeting place, where they made their laws and decisions for the common weal, where everybody knew everyone else and where each in turn might be called upon to do different chores for the community. The poet would be elected to be admiral of the fleet. The statesman who came home would plough his acre or tend his vine. All men were near the centre of power, could participate in the exercise of power, and could grasp the issues involved. In modern western society, this is no longer possible. There is a physical separation, both in terms of geographical distance between people and the centres of power and in terms of contrast of scale. There is a separation in time, that is to say that people find it difficult to follow a particular issue all the way on its journey through legislation and administration. And there is a distance between people and public affairs due to the complexities of modern times which render it impossible for all men to understand all things.

European integration accentuates this problem of distance and complexity even further. I suppose that while no one here would deny the virtues of European co-operation, no one would underestimate either the problem posed by the physical and psychological distance between Europeans and the centres of European negotiation and decision-making. This explains, for example, the lively interest at the present

time in the plans of the EEC for the direct election of the European Parliament. It is significant that the famous University of Tübingen, which celebrates on 7 October its 500th anniversary, has chosen this theme for its solemn academic convocation. It is perhaps a bit surprising that a study about participation of the public in the legislative and administrative process has not been taken up much earlier in the framework of the Council of Europe. It seems all the more surprising as the principle of participation by the people in public affairs was considered important enough to be enshrined in the First Protocol to the European Human Rights Convention. Did our organisation feel that by proclaiming a principle it had solved the problem?

The answer is that our organisation works in a pragmatic fashion and has over the past years dealt with aspects of the problem as they arose in the different sectors where our organisation carries out work: education, environment, public health, planning, consumer protection etc.

I can cite, as examples, our work concerning access of citizens to information held by public authorities, or concerning the problem of how to recognise the representation of particular interest groups. It is interesting also to note the growing tendency of groups of individuals to bring collective claims under the European Human Rights Convention (for example the Swedish engine drivers, or the Dutch soldiers).

The time has come to consider the problem as a whole. By devoting this colloquy to that subject we have stated our conviction that our member States can mutually benefit from each other's experiences and that it should be possible to arrive at certain general conclusions from the confrontation between the experience of the different member States.

I do not think that I jump at a conclusion if I say that the wish of people to be associated more closely or more efficiently with public decision-making is making itself felt almost everywhere in Europe. Not seldom do initiatives taken in one country inspire similar initiatives in others. We only have to think of the great waves of university reforms in the late 60s or of the recent actions of ecologists for a better protection of the environment. The last example also points to another, typical European dimension of the participation issue: people feel concerned not only by the public affairs of the country of which they are nations. In particular the present mobility of Europeans and the increasing number of measures to grant rights and safeguards to foreigners (I recall in this connection the recent major achievement of the Council of Europe in this field, viz the Convention on the Legal Status of Migrant Workers), all this draws our attention to a situation where a rethinking of participation procedures, even if they are satisfactory from a purely national point of view, may be necessary.

The observer of the European scene is struck by another aspect which seems to contradict what I just observed with regard to the universal dimensions of our problem. The new formulas which are emerging in our member States, as a result of, or in response to the need for participation are often very different from one country to another. Sometimes it is even difficult to translate the terms that have emerged in different countries. Let me quote some characteristic words such as "hearing" in English, "Bürgerinitiative" in German, or "inspraak" in Dutch.

This remark brings me to the question of the working methods of this colloquy. We have thought that it might fulfil three functions: (1) to take stock of the major achievements and plans in our member States with regard to public participation in the decision-making process; (2) to try to arrive at a comparative analysis and (3) to draw conclusions, if any, at a European level.

One may ask of course if it is not sufficient for every national community to find those solutions which suit its own needs best. Why should anything be done at the European level?

The answer is first, a practical argument, which is not without significance in the present times when all our governments are beset by economic problems; by pooling our knowledge in this field - as in other fields - we may help each other to reach satisfactory solutions. But secondly, and certainly not less important, we bear in mind the objective of the Council of Europe which is to strengthen the common legal environment in which Europeans live and work, the ordre juridique européen.

The undertaking on which we are about to embark is an ambitious one. Three days will certainly not be sufficient. We have asked rapporteurs from four countries, Professors Maisl, Van der Burg, Grisel and Haagen Jensen, to help to start your deliberations by presenting exposés on forms and models of participation that have emerged in their countries.

On the basis of these examples we hope to generalise the debate on various aspects and forms of public participation. I should underline in this connection, that the colloquy is meant to be a forum for a free exchange of ideas and opinions. While the member States have designated the participants each of you is here in his individual quality. There will be no call for the adoption of any common conclusions or resolutions.

However, in order to provide the future readers of the proceedings of this colloquy, which will be published by the Council of Europe, with an overall impression of the deliberations we have asked Professor Barile to sum up for the benefit of us all his personal impressions of the colloquy.

If there are no general conclusions, this does not mean that the Council of Europe feels in no way concerned by what will be said here. In fact, if anyone of you is of the opinion that this or that question might usefully be taken up by our organisation, I hope that you will not hesitate to say so. You will find an attentive ear in our organisation the more so since it has a committee of experts on administrative law whose Chairman, Mr Morisot, and Vice-Chairman, Mr Wennergren, I am glad to greet among the participants.

In conclusion I should like to thank you all for having accepted to participate. I believe there is no better way to assure the success of a conference than to confirm in its very title the idea of participation of all persons in the formulation of policies and decisions that affect them all:

quod omnes tangit,
ab omnibus approbare debet.

WORKING SESSIONS

3 and 4 October 1977

REPORTS

Forms and techniques of public participation in legislative and administrative acts

Report by

Herbert MAISL
Professor of Public Law
Dean of the Faculty of Law and Economics,
Orléans (France)

The public may take part in legislative and administrative decision-making either directly or through its representatives, and our countries fluctuate between these two forms of democracy, direct and representative. In this paper an attempt will be made, mainly with reference to French examples, to make a tentative survey of the participation techniques used by the two systems, while showing the techniques' limits.

Ever since the Revolution the system in France, for example, has customarily been a representative one. However, this participation through the appointment of representatives is now in a state of crisis. At political level, techniques of semi-direct democracy are being used; in addition, the idea of participation has permeated the administration, throwing working methods of the unilateral and even quasi-military type into upheaval. Indirect, total participation in decision-making has been superseded by much more varied forms of participation: techniques have proliferated and the fields covered have expanded. This change reflects but an effort to adapt and regenerate participation in the face of the increasing activities of public authorities.

1. The purpose of participation is twofold, namely to strengthen democracy and to make public decision-making more effective. Sometimes this gives rise to a certain ambiguity.

In Lincoln's famous words, democracy is government of the people by the people for the people. Thus the people has its say either by electing representatives or by directly deciding public issues. Twenty or so years ago there was much talk of "depoliticisation" in France (1). The term was probably inaccurate. It denoted a challenge to a form of participation conducted solely through the agency of an institution, namely parliament. In fact, however, democracy is seeking new methods through an extension of participation. In particular, public participation in administrative decision-making has assumed considerable proportions; the administration, as it were, "negotiates" its decisions with those concerned; it prefers consultation to the issuing of edicts. The contemporary State, whose traditional channels of communication with citizens have deteriorated, is undergoing a crisis of legitimacy; would the extension of participation be calculated to overcome this crisis? Would democracy be revitalised by a proliferation of forms and techniques of participation matching each of the citizen's set of interests?

The purpose of participation is not only to help to develop democracy but also to make decision-making more effective. By providing new networks of communication, the administration is trying both to obtain and to impart information. Unilateral decision-making by a bureaucratic authority is very often inappropriate and rigid. By contrast, participation, even though it is time-consuming, enables the aspirations and motivations of those affected by decision-making to be taken into consideration. It achieves a two-way flow of information and helps to gain the public's acceptance of the execution of a decision even before it has been adopted. The style of government is changing: a bureaucratic, secret, quasi-military form of government is being replaced by open government (2).

Hence a certain ambiguity in the concept of participation. True, participation is a necessary counterweight to technocracy in our industrial societies; it enables the purposes of each activity to be discussed and ensures that attention is not confined to the question of means and techniques; it can bring together the State and the public. But it is also criticised for helping above all to increase the political efficiency of the State system; it involves the various social groups in decision-making. By giving itself a new legitimacy, the State is better able to absorb the force of social conflicts (3). Others are concerned at the way in which participation aggravates particularism and egoism without the State always being able to settle such conflicts (4).

A certain philosophy of participation is thus required. This need cannot be met without taking account of the various factors of participation in each society.

2. Factors of participation. In every society, at a given time, a number of variables make up an image of participation.

One variable is information. There can be no real participation unless the public is provided with full information. Participation demands open government. Very often, however, administrative secrecy makes participation very difficult, if not altogether illusory (5). In order to be able to participate properly in decision-making, a citizen needs to have access to administrative files. He needs to be aware of the purport of the reasons for decisions that are being prepared. However, superficial over-information poured out by the mass media conceals under-information in key fields. There is a whole environment of participation that is based on an improvement in relations between the government and the public (6).

Such information cannot be disseminated unless citizens are educated. A citizen needs to have reached a certain level of literacy and culture. It is important "to make schoolchildren aware of the existence of a public life and the presence of a political function which determines its direction and to show them that the essence of democracy is to make all citizens responsible for the conduct of the community's affairs" (7). Only through suitable education can participation be prevented from being used to manipulate the public. Such education enables citizens to assimilate information and understand the choices available. Educational systems, political parties, trade unions and associations work along these lines. In the words of Montesquieu, "the people is admirable in choosing those to whom it is to entrust some part of its authority. But can it handle a matter, take advantage of places, opportunities and moments? No, it cannot". Probably, only a "people of gods" could practise this direct form of democracy dreamt of by Rousseau. Even so, better education can foster participation.

Participation also requires that the partners should be available. If the administration is to agree to play the game of participation, citizens must also be ready to abandon their individualism, the "rust" of our societies, and spend some of their time interesting themselves in the management of public affairs. This interest can be aroused by the mass media and by intermediate authorities. It is associations and local freedoms which can stir the public from its apathy and induce it to participate. Even so, the participants must have the necessary material and financial means.

Can a size be laid down for participation units? It is probably no accident that participation has prospered most at local level. In France, the idea of participation has come to be regarded as capable of shaking off the strait-jacket of centralisation. Thus, alongside total participation at State level, new forms of participation have emerged in the framework of decentralised units, local authorities and public establishments. Power is thus shifting towards the periphery. Some will criticise this dismembering of the State, this dilution of responsibilities; others will welcome this assumption of power by those concerned.

Lastly, in this tentative inventory of factors of participation, attention should be given to the nature of the society involved and the type of social consensus that is emerging. A sociological analysis of participation according to the various political and social systems would undoubtedly be very fruitful and show the manifold meanings the concept may have.

The diversification of forms of participation is probably a general phenomenon. In France, for instance, whereas indirect public participation in decision-making through parliamentarians has long predominated, direct participation is now being demanded. True, General de Gaulle was fond of this form of participation, which enables intermediaries to be bypassed; but direct participation is above all a feature of an age when citizens want to have their own say in all matters which concern them most.

Nowadays, direct and indirect participation coexist. They coexist first of all at the technical level, as specialised participation is arising from each of the public's set of interests and immediate concerns. Total participation still remains, but it is often regarded as too abstract or too difficult to practise. It lies with politicians to decide how these forms and techniques of participation are to be combined according to the society they want to create. Let us now consider the rise of specialised participation and the crisis of total participation. This twofold trend prompts a re-examination of relations between those who govern and those who are governed; in other words, a rethinking of democracy.

I. THE RISE OF SPECIALISED PARTICIPATION

Less interest is taken nowadays in the abstract citizen than in the user of a public service, the resident, the consumer, the member of such and such a pressure group, the member of such and such a minority or such and such a socio-occupational category, the person who is concerned or qualified. Our society has moved on from a democracy of citizens to a democracy of "context-related people": a context-related person is "someone whom we meet in the relations of everyday life, as characterised by his occupation, his way of life, his livelihood, his tastes, his needs and the opportunities available to him" (8). He is distinguishable by his way of being and not, like the citizen, by any metaphysical meditation on his existence.

At the same time, to use hackneyed expressions, the State has changed from a gendarme State into a welfare State. It is against the background of this transition from an essentially political democracy to an economic and social democracy that this specialised or "multifaceted" (9) participation is developing. It is arousing the concerns of each category which will bring pressure to bear on an administration obliged to "negotiate" its decisions with those affected. The techniques, places and levels of this form of participation are highly varied. Indirect participation has become very extensive; various interesting attempts at direct participation are also noteworthy.

A. THE EXTENT OF INDIRECT PARTICIPATION

Traditionally, political democracy has been practised through representatives, namely parliamentarians. The intermediaries became more numerous and diverse when democracy spread to the social and economic fields.

Economic and social policy is one of the main sectors of indirect participation. In the economic field, the government tries to direct the economy; it is increasingly acting in concert with its "partners", thanks mainly to economic planning, and it is associating private individuals with its objectives. At the social level, the public authorities determine working conditions, employment policy and vocational training policy; they provide a system of social security or occupational medicine etc. The professional organisations take part in the drawing up of this policy. Moreover, the public authorities are employers which consult their staff's representatives on the staff's personal problems as well as on the organisation of the service; furthermore, by modern methods such as objective-setting (or participation) management, they try to encourage their subordinates to share in management responsibilities (10).

The expression "environment" nowadays covers a vast area which can include town planning, the prevention and reduction of pollution, the protection of nature and the countryside, the improvement of the environment, the protection of consumers etc. Action is developing not only at national level but perhaps above all at local level, where the demand for participation is very strong. Some believe that "environment

protection associations are at present emerging in a sector which is no longer represented and whose institutions, which used to defend it, have gradually been weakened and caught up in bureaucratic controls; whereas down the ages the same representative institutions - municipalities, districts, provinces, parliaments - became, so to speak, the natural trade-unionism of housing, the region and the environment" (11).

The intermediaries in this public participation are pressure groups, professional associations (farmers' and employers' organisations, employees' organisations and trade unions) and specialised groupings to which the "association phenomenon" may be related. There are probably almost 300,000 associations in France, 20,000 being created every year. This association-forming trend, which de Tocqueville observed in the Anglo-Saxon countries, has now emerged on the continent. Trade unions represent the interests of workers; associations defend the interests of users, consumers, residents etc. These pressure groups are the principal intermediaries in public participation. But the public authorities are usually still in control of the procedures by which the representatives are selected and may express themselves.

1. Representative selection procedures

Any representation technique is but an approximation of the ideal relationship between representatives and represented; any technique is inevitably imperfect.

a. The techniques

There may be said to be three main representative selection techniques - appointment without nomination of candidates, appointment with nomination of candidates and election (12).

1. Although appointment, without nomination, of candidates by the administration (parliament, but more often the government) is the most authoritarian method, it is variable according to whether appointment is entirely discretionary or limited to certain categories. The former case is not very common. It was used for the appointment of seventeen committees of users under Ministers in 1974 for the purpose of "proposing any arrangements enabling relations between the public and the administration to be harmonised". Under the chairmanship of parliamentarians, the committees held nearly 200 meetings and put forward a thousand or so proposals. Their members were appointed "intuitu personae" by the Ministers; they formed only an empirical sample of the very vague category of users (13). Similarly, the government's choice is virtually discretionary as regards the composition of "royal commissions", ie ad hoc commissions set up to study a specific problem with a view to the preparation of a reform. They are each "tailor-made, so to speak, according to problems and circumstances" (14). They may include both civil servants and non-civil servants as well as experts in the problems concerned, but the government is not subject to any rules in the matter.

The latter case is more common: the administration appoints representatives, but appointment is limited to certain categories. The appointer's freedom of action is variable. It is considerable when fairly imprecise or ill-organised categories are predetermined or when the number of representatives to be appointed is large; in such cases it is possible to exclude certain groups and choose one's own partners.

Thus the French Government appoints to the Economic and Social Council "sixteen persons qualified in the economic, social, scientific and cultural fields" and "twenty-one persons possessing knowledge of overseas economic and social problems or carrying on an activity related to the economic expansion of the franc area" (15). Similarly, the French regional economic and social committees as well as the Paris district committees include the fairly general categories of "representatives of social, family, educational, cultural and sports activities", "representatives of activities specific to the region and persons who by virtue of their qualifications or activities contribute to the development of the region" (16). As regards potential appointees, the choice is extremely wide. Another example of fairly discretionary appointment is provided by the Environment Committee. It comprises fifty members:

alongside representatives of government departments, there are "twenty persons chosen for their qualifications and responsibilities, appointed by the Prime Minister on a proposal by the Minister for the Quality of Life; these persons are chosen from among the interested scientific and university authorities and national associations or advisory bodies" (17). The same applies to the Hospitals Board, which includes "two persons well-known for their work on hospital problems or their devotion to the hospital cause" (18). Sometimes the concept of a qualified person will be disregarded, and the person appointed will be someone whom it was not possible to appoint in respect of some other category or whose qualifications are disputed but who may be relied on not to adopt attitudes that will upset the appointer.

The scope for choice will, of course, be nil when the category consists of only one person, an ex officio member of the body concerned. This is often the case, in particular, with ministry directors.

Lastly, mention should be made of a fairly original method of appointment which applies to the commissions responsible for preparing the economic plan. It is customary for these commissions to be "large and varied" (19). Their members are appointed by ministerial order without any nominations by the organisations concerned. There is no inter-group weighting; the representatives of the various categories are appointed "intuiti personae". However, the government does not really impose its choice. "Any individual possessing qualifications in a particular field may be appointed and is in fact appointed as soon as he produces tangible evidence of his intention to take part in the deliberations" (20). It is true that such persons will often be appointed by their trade union or association, but the original idea was to drop the principle of defining representative categories and striking a balance between them. As a result, between 2,000 and 3,000 persons are appointed to the economic planning commissions each time.

2. Appointment with nomination of candidates restricts the government's scope for choice and obliges it to take account of proposals submitted to it. Here, too, there is a wide variety of cases. The procedure for appointing the members of an advisory body may be said to comprise three stages (21).

First of all, the categories to be represented have to be decided on. Whether or not recourse is had to this or that association will depend on the size of the category. Thus, in France there is a category of "the most representative trade unions" (22); a certain number of nominations are reserved for these bodies, which stand apart from other representative organisations. In other fields, on the other hand, the profusion of associations may enable the appointing authority to sort out the "good" associations from the "bad"; only the former will be allowed to nominate candidates. Thus, the Council of Sex Information, Birth Control and Family Education comprises 45 members, of whom 30 represent "national family associations, unions, federations or confederations, organisations concerned with family planning, information for couples and sex information, family information, consultative or counselling establishments and family planning or education centres as listed in the Appendix to the decree" (23). It is in the sphere of environment protection, where associations abound, that the legislature has tried to give greater rigour to categorisation by defining the concept of approved association; this is an association which has been registered for more than three years, whose aim is to protect the environment and which has been approved by the prefect or the Minister for the Environment after he has satisfied himself as to its permanence and legitimacy (24).

Secondly, the appointing authority has to be specified. Thirdly and lastly, nominations are made to the appointing authority. Several cases are also conceivable according to whether the appointing authority may reject an initial set of nominations and call for a second one and whether or not the number of candidates nominated exceeds the number of posts to be filled. In the case of the Economic and Social Council as well as regional economic and social committees, the government or the prefect merely endorses appointments made by professional organisations.

3. Although election seems to be the most democratic method, it is less commonly used than those previously mentioned. Public authorities resort to it in respect of their users or their personnel. User and personnel participation began in the universities as a result of the unrest of May 1978. The establishments are administered by an elected council and directed by a president elected by the council; these councils, according to the law, are "composed, in a spirit of participation, of teachers, research workers, students and members of the non-teaching staff" (25). Participation covers administrative and financial questions as well as educational questions. Similarly, in the civil service, the joint administrative commissions, which are consulted on staff matters, notably recruitment, assessment, promotion, assignment and discipline, are composed of representatives of the administration and the staff, the latter being elected by secret ballot on a proportional representation basis (26). Up to 1967, elections also enabled those concerned to participate in the functioning of the social security system.

b. The defects of these techniques

"By the time citizens' opinions reach the administration, they are considerably muffled after passing through a succession of groups and intermediaries" (27). It is true that no technique is perfect. In general, techniques are used concurrently so that a government which has accepted the system of election or the nomination of candidates for a particular category will often attenuate its effects by appointing persons more or less at its own discretion. Does the government favour categories which are ready to co-operate with it? In respect of socio-occupational categories, it has been observed that the government accorded a greater degree of participation to the most representative farm workers' trade union than to the biggest industrial workers' trade union, the General Confederation of Labour (28). Should it be assumed that "these intermediaries impose themselves on the government by virtue of their position in the social system and that the government does not hesitate to distort the official system of participation in order to give them a place proportionate to their actual social influence" (29)?

There are undoubtedly some distortions of participation. Participation through associations, for example, probably favours the middle classes and the tertiary sector. Moreover, these intermediaries very often display oligarchic tendencies. "The life of associations is not exempt from the well-known iron law of the decrease in democracy and its transformation into an oligarchy of decision-makers who seize power simply because others rely upon them and there is no one to replace them" (30). The scope of such participation is limited both by the inequality of the groups concerned and by the lack of democracy which sometimes characterises their internal functioning. Are the groups not therefore more in the nature of screens than intermediaries? It may be observed that these distortions sometimes occur also when the representatives are appointed by election, especially if there were few voters; this is a pitfall which affects, for instance, participation in university institutions.

2. Modes of expression

In the light of the foregoing legal analysis it is possible to draw up a scale of participation, ranging from the mere transmission of information to the public authorities to the transfer of powers to individuals. A distinction is generally drawn between consultation, the most widespread form of participation, and negotiation; whereas the former involves communication or dialogue, the latter entails actual bargaining.

It is essential, moreover, to determine at what stage in the decision-making process public participation occurs. "Participants" may either take part in the preparation of the text concerned by following the whole process of its production or, on the contrary, merely express an opinion, varying in detail and weight, on an already existing draft.

a. Consultation is a technique in very common use at present on which there is an abundant literature (31). It provides the authority with information and at the same time constitutes a guarantee for those who are consulted. The number of

consultative bodies in France may be estimated at more than 5,000 (32); this large number sometimes gives rise to a certain disenchantment because of the "general consultative confusion" (33) it involves.

The legal system for consultations is a complex one (34). Some consultations are mandatory, others optional. In the case of the former, the government is obliged to hold a consultation, which must be "effective, fair and comprehensive"; as the opinion expressed is not binding, the government is then free to act as it sees fit provided that it does not adopt arrangements diametrically opposed to those on which the consultation was held and does not take any decisions on new matters. Optional consultations, on the other hand, do not involve any obligation for the consulting party, which is free to decide whether or not to consult and is in no way required to act on the advice given. Criticism has been expressed about this freedom for the government not only to disregard the opinion given but also to alter its original text. "If the administration chooses the course of consultation without being obliged to do so, it should pursue it to the end; if it intends to play the game of participation, it should do so in full. Referring a draft to a commission and then adopting a different one gives the impression that the consultation was at best a useless formality and at worst a trap" (35).

Opinions of this kind do not constitute decisions; they are regarded as preparatory measures which are subsequently incorporated in the decision. The case of a concurring opinion is different: here, the consulting authority must not only seek the opinion but act on it. This is tantamount to true co-determination (36).

Special mention must be made of the preparation of the economic and social development plan. French planning has probably never been anything else but indicative; nevertheless, it has always been believed that the plan derives its effectiveness from the way in which it is prepared. The commissions responsible for the plan, on which the economic and social partners sit, draw up proposals which are welded together by the Commissariat for the Plan and the government before parliament votes on them. Thus the plan's effectiveness may be said to depend solely on the consent of those concerned; the French plan may be regarded as a collective act or union act, to borrow Duguit's term (German theory of "Vereinbarung" or Italian theory of "atto complesso") (37). The result is a negotiated economy.

b. Negotiation

This technique is a perfect illustration of the transformations of an authority which renounces unilateral decision-making and compulsion. It prefers to regard citizens as partners with whom negotiations are conducted and whose agreement is sought. Emphasis is placed on encouragement and persuasion; compulsion is eschewed.

The economy is a favoured sphere as far as negotiation is concerned. A negotiated economy means "a system in which the representative of the State (or of secondary authorities) and those of firms (whatever their status) meet in an organised fashion in order to exchange information, compare forecasts and, together, either take decisions or draw up opinions for the government" (38).

It is in this way that the economic plan is prepared. Another interesting example is provided by the prices system. The French Minister of Finance has extensive powers in the control of prices; he may resort to taxation or freezing. In recent years, however, he has preferred to negotiate with the branches concerned. He has thus concluded "programme contracts" at various times with firms, groups of firms or occupational sectors; under these contracts he agreed to withdraw controls from the prices of co-contracting parties who undertook to maintain a general level or contributed to the achievement of the government's objectives (39). This prices system forms part of so-called "economic administration agreements", which involve persuading groups to behave in the way desired by the State for the implementation of its economic policy (40). This negotiated economy thus becomes a "contractual" economy. It should be pointed out that, to encourage participation by the public or rather by groups, the State nowadays makes less use of unilateral methods than of contractual or rather quasi-contractual methods.

c. If taken to the limit, public participation becomes, juridically, a sharing of decision-making powers. Apart from the above-mentioned example of concurring opinions, mention should be made of the many private bodies which are assigned a public service function and are authorised to take actual administrative decisions. This situation is characteristic of a neo-liberal State which, being unable to do everything itself, increasingly delegates administrative responsibilities to private organs.

Thus the State, after acknowledging the public-service status of certain professions, has entrusted the management thereof to the interested persons themselves grouped together in professional associations, obligatory bodies which are invested with administrative powers.

An important area in which the public service is managed by private bodies is the social field with, in particular, the social security and family allowance funds. It is however in the economic field that the phenomenon is most marked (41). Several private bodies have been entrusted with tasks of economic management and intervention. This is a common case with regard to the regulation of agricultural markets.

Corporatism may no doubt be regarded as one form of indirect participation. Typical in this regard is the example of the development and commercial town planning commissions set up in 1974. Composed of local councillors, representatives of consumer associations and above all representatives of commercial and draft activities, these commissions have genuine decision-making powers in respect of proposals to establish supermarkets. They thus control entry to the profession (41 bis).

The variety of forms of specialised, indirect participation prompts one to consider the scope for these intermediaries co-existing with those constituted by elected representatives of the people. Will assemblies of elected representatives be regarded as obsolete, as this trend towards a government/associations dialogue confirms the rise of executives? Or, on the contrary, is a sharing of roles between these various intermediaries conceivable? The question is all the more difficult to answer as attempts are also being made at direct participation.

B. ATTEMPTS AT DIRECT PARTICIPATION

It is perhaps somewhat artificial to distinguish between specialised and total direct participation, as total participation cannot be general and therefore covers particular fields. Sometimes it will cover the general policy of a city or the State; more often, specific fields of a concrete nature. It is not surprising, therefore, that direct participation should be practised particularly at local level. Sometimes the administration, not being satisfied with participation by representatives, will decide to let the public participate directly; at other times the public itself will impose its participation.

1. Participation at the administration's initiative

"The old procedures which the Emperor gave the administration are much more along judicial than military lines: they continuously give the citizen a say. The Empire style in administrative matters is characterised by a proliferation of preliminary enquiries, disclosure of the various stages of preparation and the laying down of time-limits which encumber administrative action" (42). Alongside this institutionalised participation there is also spontaneous participation which is feeling its way, particularly at local level. Many modes of expression are available to citizens, and their degree of rudimentariness varies.

a. The principle of "rights of defence" or "audi alteram partem", which derives from contentious procedure, is nowadays often applied in administrative decision-making. It requires the person concerned to be informed of the measure it is contemplated subjecting him to and the reaons for it; he can then present his defence and make objections to the decision (43).

This rule first appeared in the civil service: before any disciplinary measure is taken the person concerned must be allowed to see his file. It was then applied to any measure of an individual nature. It does not apply in police matters.

This right to defend oneself before a decision is promulgated constitutes a safeguard of some consequence. It is akin to procedures ensuring a two-way flow of information which are essential in decision-making. This is also the case with public enquiries.

b. A public enquiry entails recording the observations of all persons affected by a project in preparation. Such persons may express any comment on the expediency or legality of the project. It is for the decision-making authority to draw the necessary conclusions.

This technique is commonly used in Great Britain. It is either optional or obligatory, as the case may be. The fields to which it applies are local government, public health, town and country planning and expropriation. It entails quasi-judicial proceedings with hearings of lawyers, witnesses and members of the public.

The same procedure is developing in France, particularly in the fields of town planning and expropriation. In contrast to the rights of defence, it embraces a wide section of the population. Persons concerned make their observations either in writing (in a register) or orally (to an enquiry organiser).

Public enquiries have been criticised for often being held in a semi-clandestine manner without the public being provided with all the relevant information. "Enquiry procedures are governed by texts which disregard modern information techniques: the posters displayed are so illegible and the documents to be consulted so unintelligble that the consultation is robbed of its substance and reduced to a ritual" (44). It is therefore planned to inform the public more fully about the holding of the enquiry and about the relevant documents as well as to provide it with more information before the actual enquiry begins; the public will thus be able "to follow the course of studies and be better equipped to understand the choices to which they have led" (45). It is important to choose whatever means are most appropriate to local circumstances for prompting public reactions and suggestions in good time (press conferences, consultations, debates, permanent or mobile exhibitions, audio-visual media etc) (46). Undeniably, the purpose of a public enquiry is to meet the need for public information and enable the public to express its views. Is it really an effective guarantee or merely a "semblance of a guarantee" (47)? Opinions are divided on the subject. It is generally agreed that public enquiries will need to be further improved to a considerable extent before they become "an ordinary-law procedure prior to decision-taking" (48).

c. Mention should also be made of the various modern techniques for stimulating public participation, involving the mass media and audio-visual aids or the organisation of local democracy at neighbourhood level.

Communication between administrations and citizens may be established by the publication of bulletins or white papers and by recourse to the press, radio and television; but whether such communication constitutes an honest discussion prior to decision-taking or else mere manipulation of the public will depend on the manner in which it is carried out.

True, an opinion poll cannot be accurately described as a technique of direct participation; it does, however, also help to inform the administration about the views of those concerned without those being filtered by any intermediaries. Opinion polls have become common place, and they undoubtedly call for a code of good practice. In France the government has in recent years made use of opinion polls for, amongst other things, the reform of the marriage contracts system and the reform of education. A refusal to carry out a reform is often based on an opinion poll: such is the case, again in France, with the abolition of capital punishment. But, as the United Nations has pointed out, opinion polls like referendums, "are ambiguous when it comes to interpreting them, they are incomplete in their scope and, except in a quite abstract sense, they do not encourage any continuous interaction between the

people and decision-makers" (49). If the study of public opinion may, at a pinch, be included among techniques of direct participation, the participation involved is of a very special kind as it is passive and enables everyone's opinion to be ascertained through the consultation of only a sample. Opinion polls are undoubtedly useful provided they are used merely on a subsidiary basis.

The special problems connected with the environment have given rise to a new form of neighbourhood democracy, which is generally practised "at macadam level" and relates to very specific matters such as the routing of a motorway or a bus service, the building of a car park or the provision of a park. Such participation lies half-way between specialised and total participation. It arises from concern for the environment but in fact it embraces the whole life of the city and can change its course (see section II, B below). Residents and sometimes their representatives express their views at meetings of neighbourhood groups and conservation committees dealing with particular subjects. The difficulty is to assembly a large number of residents; according to the mayor of Grenoble, potential participants amount to scarcely any more than 10-20% of the population (49 bis). If, however, the administration takes no initiative, participation will be imposed by the interested citizens themselves.

2. Participation at the initiative of the citizens concerned

Such participation is not always institutionalised, but is sometimes spontaneous. It may result in decisions being influenced and even political and structural changes carried out. It may be obtained through the large-scale dispatch of letters and telegrams to decision-makers and through demonstrations, strikes and boycotts; if taken to the limit, it may create a revolutionary situation. As observed by the United Nations, "boycotts have been used with effective results in a number of countries to protest against the constant rise in food prices, and in some cases they have at least succeeded in delaying further rises or even in bringing prices down" (50). This form of "participation" will in extreme cases result in a change of administration.

As regards the various institutionalised forms of direct participation, some countries have given citizens the right of initiative and petition. As will be seen later, some cities, such as Bologna in Italy, have implemented this right. In Spain there are so-called suggestions and complaints offices and in the USSR a system of "proposals, requests and complaints". The aim, in fact, is to incorporate the concept of "ideas box" in relations between administrations and citizens.

Such participation may lead to a review of a decision already taken. Citizens have at their disposal a highly elaborate system of appeals against administrative decisions: administrative appeals, voluntary or hierarchical, aimed at persuading an administrative authority to reverse its decision for reasons of expediency or legality; contentious appeals to a judge in order to obtain the cancellation of an illegal administrative decision. It should be added that France has tried to copy the Scandinavian institution of Ombudsman by appointing a "médiateur" whose function is to receive complaints from members of the public and propose improvements in the methods of administration (51).

Direct participation, whether specialised or total, is always faced with obstacles resulting from a lack of availability on the part of the interested persons and from the size of the groups concerned. It is true that there is considerable enthusiasm for specialised participation at present; this should not however conceal the fact that "in any event the spread of participation does not seem capable in itself of dealing with the crisis of the contemporary State's legitimacy, as any process of participation increases the State's responsibility. More than ever, therefore, the State must define a policy enabling the particularism reflected in the variety of forms of participation to be transcended. It cannot be content with merely supervising participation" (52).

I. THE CRISIS OF TOTAL PARTICIPATION

Our political institutions fluctuate between two forms of participation. Under a system of representation the electorate appoints persons to govern on its behalf; this is indirect participation. On the other hand, participation is direct when citizens play a direct part in the decision-making process and in political life. However, this total participation is now undergoing a crisis: the representative system is in decline, and difficulties are being experienced in using the techniques of direct democracy. Hence a temptation to favour specialised participation. But the specialised and total forms of participation must coexist; neither can eliminate the other.

A. THE DECLINE OF THE REPRESENTATIVE SYSTEM

In 1962, during a celebrated debate on a motion of no confidence in which the government was attacked for subjecting to an allegedly unconstitutional referendum a proposal to elect the President of the Republic by universal suffrage, Paul Reynaud, from the National Assembly rostrum, exclaimed: "France is here". These words reflected a traditional conception of the representative system, a conception which has greatly changed.

1. The principles

The leaders of the 1789 Revolution rejected Jean-Jacques Rousseau's theory of "divided sovereignty", whereby each citizen helps to make the law, which thus becomes an expression of the general will. Belonging to a particular social class, the bourgeoisie, they wished to take power away from the aristocracy without giving it to the people. They thus constructed a theory relating sovereignty to the nation. The nation is an actual entity separate from the individuals who make it up; it is the holder of sovereignty but, as it cannot express its will, it appoints representatives. Franchise is therefore not a right but a function which is given only to those who have the education or the wealth to perform it; suffrage is not necessarily universal: its sole purpose is to appoint the nation's representatives.

Once elected, these representatives represent not their constituencies but the whole nation. In the words of Sfeyes, "the deputy of a bailliage is directly chosen by his bailliage but indirectly he is elected by all bailliages; that is why any deputy is a representative of the nation as a whole" (53). A deputy's mandate is not peremptory but purely representative. An elector has no right of supervision over a deputy, whom he merely appoints. The law made by a deputy is regarded as an expression of the general will; it is indispensable and irreproachable. The break with this constitutional tradition of entirely representative democracy occurred in 1958.

At local level, there is a kind of transposition of the representative system. Theoretically, citizen participation also consists in appointing municipal councillors every six years. The Council of State has ruled out any municipal referendum of a decision-making kind. The Constitution of 1791 provided that "citizens who make up each municipality may at such time and in such manner as shall be laid down by the law elect those of them who, with the title of municipal officer, shall be responsible for managing the particular affairs of the municipality". Apart from elections, citizen participation was fairly limited. In 1884 the opening of meetings of municipal councils to the public was not readily agreed to. Nevertheless the municipal councillor was closer to his elector than a parliamentarian. Subsequently, this state of affairs developed with the introduction of universal suffrage and new techniques.

2. Development

The introduction of universal suffrage, the spread of means of information and the emergence of political parties and pressure groups enlivened the political scene and helped to create government by public opinion, which is very remote from the purely representative system.

In 1922 the great jurist Carré de Malberg described how the representative system established in the Revolution had been distorted in order to let public opinion take part in decision-making. Elected representatives, formerly independent and supposed to have only the nation's interests at heart, became subject to numerous influences. In the first place, those of their electorate; thus short-lived legislatures encouraged the deputy to try not to arouse his electors' disapproval and hence to act as their spokesman; similarly, proportional representation made parliament "a 'mirror' of the country's electoral situation or composition, or else a 'map' reproducing on a smaller scale, as faithfully as possible, all the parties between which the country is divided according to their number of supporters" (54). And the same author observed that the law was now merely the result of traditional negotiations and arrangements between parliamentarians forming particular groups which matched the variety of parties and special interests.

This government by public opinion is probably more difficult to establish under a multi-party system than under a two-party one, such as exists in Great Britain where choices are clear. All the same, even in a country like France, which is divided into numerous parties, elections are no longer solely an operation for appointing representatives but also a means for the electorate to express its views on matters and determine general policy. And although these parliamentary regimes exclude referendums, they do provide for dissolution, which plays a similar role since it enables the electorate to be consulted and asked whether, on a particular question, it shares the view of the majority of the dissolved Assembly. And Carré de Malberg concluded: "Any system of government which involves some degree of representation of the will of electors by elected persons is on the way to becoming a system of direct government and can no longer be regarded as a system of purely representative government in the sense the concept had at the time of the Revolution" (55).

It is true that various factors have distorted the conventional representative system and helped to let the public take part in decision-making. One such factor is the importance assumed by political parties. In theory, parties are merely an expression of the electorate's will; in fact their role is much greater. They stimulate public discussion and single out themes which are then taken over by the public in order to bring pressure to bear on the administration and compel it to take certain decisions. The parties devise the political language with which the public expresses its views. At election time, a party must propose objectives or a programme to the electorate. "A primary function of political parties is to organise public opinion, gauge its attitudes and transmit them to members of the government and leaders so that governed and governors, public opinion and authority are reasonably close to each other" (56). Thus a political party, if it performs its function, is an instrument of public participation. Undeniably, a high degree of participation goes hand in hand with a good system of information; in this regard the mass media bear a heavy responsibility. Acting as an intermediary between public opinion and the government, this "fourth estate" pours out information in both directions with all possible risks of manipulation.

Thus the context of the representative system has changed considerably. As a result, the system, particularly its parliamentary institution, has perhaps been called in question. In any event, new balances need to be found. The role of parliament needs to be redefined in the light of two factors, viz the place of public opinion in the political system and the rise of executive authorities. This latter factor is of great importance. In France, over the last 20 years parliament has lost some of its powers to the government and most laws have been of governmental origin. It is not surprising, therefore, that participation is shifting to the administrative field and that consultative administration has become its chief technique.

At local level, representative democracy has also evolved under the effect of two factors, namely the growth of associations (see above) and the widespread demand for direct participation.

B. THE DIFFICULTIES OF DIRECT DEMOCRACY

1. Direct democracy is an ideal that has never been attained. The ancient democracies still serve as models for such a system, as under them decisions were taken by the general assembly of citizens. But there has never been a system where all powers - legislative, administrative and judicial - were exercised by an assembly of the people.

Jean-Jacques Rousseau acknowledged that this type of democracy was impracticable. "In the strict sense of the term, there has never been any genuine democracy, and there never will be (...). Such a perfect system of government is not appropriate to mankind" (57). What Rousseau recommended were assemblies in which the sovereign people would as a body vote the law, an expression of the general will, the government being responsible for its application. Even in an attenuated form, such a system would be difficult to implement. The constantly quoted example of popular assemblies of citizens of this kind is the "Landsgemeinde" which exists in some Swiss cantons.

2. Nowadays techniques of direct participation are used even under representative systems. They are employed at national level, while a demand for them at local level is frequently voiced.

a. At national level, States make use of referendums with varying degrees of frequency (see Professor Grisel's report). A referendum may be held either before the vote in parliament (consultative referendum) or afterwards (ratifying referendum); it is sometimes automatic, sometimes optional. In France the Fifth Republic has resorted to referendums on several occasions, but the use made of this device, particularly during the First and Second Empires, has given rise to fears of abuse and particularly a fear of the result being a vote of confidence for a particular person.

A right of initiative may also be accorded to the people to obliged representatives to consider a question. Sometimes the initiative is unformulated: a petition is subjected to a popular vote and, if the result is positive, parliament has to legislate in accordance with the wish expressed. Sometimes it is formulated: the petition subjected to a vote contains a text which, if it obtains a majority, immediately enters into force.

The French Constitution of 1793 provided for a popular veto: a law voted by parliament became final only if by a specified date a certain number of citizens had not objected to it; in the event of an objection, a popular vote had to be conducted.

b. At local level there has in recent years been a demand for direct participation by residents. In response, several techniques have been adopted, either spontaneously or, in some cases, after the passing of a law.

In France only moderate use is still made of the municipal referendum. Except in the case of the amalgamation of municipalities, referendums are not decision-making but merely advisory. Some fear that their "systematic use will destroy or diminish the sense of responsibility of elected authorities" (58). So far, therefore, enquiry procedures - opinion polls, information meetings, extra-municipal commissions, neighbourhood assemblies - have been used very pragmatically. After serving as a forum and a source of information, neighbourhood assemblies gradually came to submit proposals and demands to municipal councils; they may sometimes lead to a change of municipal council. This trend was encouraged by the movement of Municipal Action Groups, whose aim is "to give power back to the citizens" (59). On the basis of specific technical matters relating to the environment and town planning, an attempt is beind made to define a total form of democracy in the shape of small units adapted to residents' purposes.

The trend with regard to the number of municipalities in France is noteworthy. A few years ago the aim was to reduce the then total of 37,000 municipalities. Now, although it is still wished to make municipalities amalgamate, it has been realised that a large number of municipalities is advantageous in developing participation and even that in cities it is probably necessary to establish sub-municipal units, at neighbourhood level.

Feelings are still mixed about the emergence of neighbourhood assemblies. It is true that it is difficult to establish direct participation, as the proportion of the population regularly attending such meetings is not very high. Some people have therefore accused this direct form of democracy of having been taken over by groups and associations which "engage in politics" by challenging the existing municipal council and preparing for the next elections. Does this mean that district democracy cannot be anything but representative? In a recent report two solutions are envisaged (60). One is to set up neighbourhood committees on the basis of associations, even though "the choice of types of participants and their method of appointment will often raise difficult problems". The other is to hold elections: the neighbourhood would have an administrative council whose members would be partly appointed by the municipal council and partly elected by local residents.

Most European countries are, generally speaking, still at the experimental stage, and there is considerable scope for comparisons. Italy, for example, seems to have already given considerable thought to the subject. Schemes have already been tried out in various cities, such as Bologna: neighbourhood assemblies "have the following functions: fostering direct contact between the public and neighbourhood bodies; informing citizens about the activities of decentralised bodies; and promoting their participation in discussions on the principles of neighbourhood policy, the shaping of general municipal policy and the working methods of municipal services for whose management neighbourhoods have been made responsible" (61). Citizens may also submit written petitions and express their views orally. On 8 April 1976 the Italian Parliament passed an outline law in favour of decentralisation and citizen participation in local government. The Bari Colloquy will no doubt provide an opportunity to obtain the latest information on the subject.

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"A decision has both a past and a future" (62). In the view of many writers, decision-making is a complex, multi-stage operation which begins before the actual decision is taken and ends after it has been taken. The following stages have been identified: study, gathering of information, processing of data obtained, preparation and choice. Even though the somewhat arbitrary nature of this division is questionable, it is essential to determine at what stage of the process and in what forms public participation will occur. These are the questions I have tried to ask. Is participation direct or not? Does it merely involve the transmission of information or does it go as far as an actual transfer of decision-making powers?

What is fairly new is the realisation that any public decision-making is an intricate process. It now gives rise to negotiations; although this calls in question a certain conception of the State, it does not denote any "withering away" of the State system.

The State nowadays has a whole range of forms and techniques of participation at its disposal. It uses them all at once, and this is probably inevitable. Specialised and total participation are bound to coexist. In making its choices, however, the State is subject to two requirements. In the first place, it is important that the supply of participants matches demand: if the State fails to propose new participation techniques, the public will spontaneously impose them in a way that will often be detrimental to the standing of public authorities. Secondly, the State must insure coherence among the various forms of participation, as well as unity of political action. Only on such conditions can participation bring about a transformation of democracy (63).

NOTES

1. On this subject see, in particular, Association française de science politique: La dépolitisation, mythe ou réalité, A Colin, 1962.

2. Cf J RIVERO in Mélanges DABIN, Sirey, 1963, p. 820.

3. Cf J CHEVALIER: La participation dans l'administration française: discours et pratique, Bull. IIAP, 1976, particularly pp. 124 et seq.

4. Ch. DEBBASCH: La participation à facettes, une potion magique, Le Monde, 21 December 1974.

5. Cf Council of Europe Colloquy on Freedom of Information and the Duty for the Public Authorities to make available Information, Graz (Austria), 21-23 September 1976, in particular the report by L FOUGERE.

6. T AULAGNON and D JANICOT: La communication entre administration et administrés, Rev. adm., 1975, p. 311.

7. J MEYNAUD and A LANCELOT: La participation des Français à la politique, PUF, 1965, p. 117.

8. G BURDEAU: Droit constitutionnel, 12th ed. LGDJ, p. 182.

9. To borrow the phrase of Ch. DEBBASCH: op. cit.

10. J SIWEK-POUYDESSEAU: La participation des fonctionnaires à la marche de l'administration, Annuaire international de la fonction publique, 1970-71, p. 83; also in the collective work "La consultation dans l'administration temporaire", Cujas, 1972.

11. A MEISTER in Participation d'urbanisme, Centre de recherche d'urbanisme, 1977, p. 24.

12. On this subject, see the basic work by Y WEBER: L'administration consultative, LGDJ, 1968.

13. Cf the article by B SANTOLINI in Rev. Adm., 1976, p. 517.

14. F de BAECQUE: L'administration centrale de la France, 1973, A Colin, p. 317

15. On this subject, see the article by G and A MERLOZ in Droit social, 1976, p. 414 (preface by Ch-L VIER).

16. On the regional economic and social committees, see P FERRARI and Ch-L VIER in AJDA, 1973, p. 521; and on the Paris district committees, see the new stature of Paris, Notes et études documentaires, Documentation française, 9 November 1976.

17. Decree 75-672 of 25 July 1975.

18. Decree 75-555 of 7 August 1975.

19. A de LAUBADERE: Traité de droit administratif, Vol. 4, 1977, p. 101, LGDJ.

20. Cf Y WEBER: op. cit., p. 93.

21. See the article by G and A MERLOZ, op. cit., p. 425.

22. A BOCKEL: La participation des syndicats ouvriers aux fonctions économiques et sociales de l'Etat, LGDJ, 1965, p. 128.

23. Decree 74-1 of 3 January 1974.

24. Cf Town Planning Reform Act of 31 December 1976 and Nature Conservation Act of 10 July 1976; on the criteria laid down, see JO Déb. A N, 1976, p. 4437.

25. Cf Section 13 of the Higher Education Act of 12 November 1968 (JO 1968, p. 10579).

26. M VOISSET: Concertation et contractualisation dans la fonction publique, AJDA, 1970, p. 388, and critical analysis by D LOSCGAK: Principe hiérarchique et participation dans la fonction publique, in Bull. IIAP, 1976, p. 160.

27. J CHEVALIER: op. cit., p. 511.

28. Idem, p. 527.

29. Idem, p. 526.

30. A MEISTER: op. cit., p. 34.

31. In particular, Y WEBER: op. cit., and above-mentioned collective work edited by G LANGROD.

32. See B CHENOT: Organisation économique de l'Etat, Dalloz, 2nd ed., 1965.

33. See G DUPUIS in the work edited by G LANGROD.

34. R HOSTIOU: Procédure et formes de l'acte administratif unilatéral en droit français, LGDJ, 1975.

35. Cf concl. G BRAIBANT, Council of State, 15 March 1974, AJDA, 1974, p. 434.

36. Cf R HOSTIOU: op. cit.

37. See the article by H JACQUOT: Le statut juridique des plans français, LGDJ, 1973.

38. According to F BLOCH-LAINE: A la recherche d'une économie concertée.

39. In particular see C PIQUEMAL-PASTRE: Une expérience d'acte économique: le contrat de programme, RDP, 1974, p. 317.

40. A de LAUBADERE, Administration et contrat in Mélanges BRETHE DE LA GRESSAYE.

41. For example J P NEGRIN: L'intervention des personnes morales de droit privé dans l'action administrative, LGDJ, 1971.

41 bis. Cf Commerce and Crafts Act of 27 December 1973, and commentary by A de LAUBADERE in AJDA, 1974, p. 134.

42. As observed by J RIVERO.

43. J M AUBY and R DRAGO: Traité de contentieux administratif, 2nd ed., Vol. 2, p. 312.

44. J RIVERO: A propos des métamorphoses de l'administration d'aujourd'hui; démocratie et administration in Mélanges René SAVATIER, 1965, p. 824.

45. Cf Directive on public information and the organisation of public enquiries, 14 May 1976, JO 1976, p. 2986.

46. Idem.

47. Cf the proceedings of the Saint-Maximum Colloquy, AJPI, 1974, p. 786.

48. Cf the report by Mrs SIALELLI, quoted by A de LAUBADERE in AJDA, 1976, p. 365.

49. United Nations, Economic and Social Affairs Department: La participation populaire à l'élaboration des décisions concernant le développement, 1976, p. 62.

49 bis. Vie publique, April 1974.

50. Op. cit., p. 58.

51. In particular MESCHERIAKOFF: Le médiateur, in Ombudsman française, Bull. IIAP, 1973-256.

52. Ch. DEBASCH in the above-mentioned article in Le Monde.

53. Quoted by P LALUMIERE and A DEMICHEL: Les régimes parlementaires européens, PUF, 1966, p. 9.

54. Contribution à la théorie générale de l'Etat, Vol. 2, p. 368.

55. Op. cit., p. 380.

56. According to David E APTER: The politics of modernisation; 1969, p. 181, quoted by R G SCHWARTENBERG: Sociologie politique, 1971, p. 338.

57. In "The Social Contract".

58. Cf Commission de développement des responsibilités locales: Vivre ensemble, 1977, Documentation française, Vol. 1, p. 219.

59. See the thesis of M SELLIER, Université de Paris I, 1975.

60. "Vivre ensemble", op. cit., p. 221.

61. Cf the report by Dan BERNFELD to the Symposium "Environment, Participation and Quality of Life", organised with the help of the Conference of Local and Regional Authorities of Europe and the Council for Cultural Co-operation, Council of Europe, Venice, 8-10 March 1977.

62. G BRAIBANT and C WIENER: Processus et procédure de décision, in Mélanges STASSINOPOULOS, 1974, p. 467.

63. See "Les éléments d'une stratégie de la participation populaire" in the conclusions of the above-mentioned United Nations document.

Specific forms of participation in decision-making

Popular initiative and referendum in Switzerland

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Introduction

If democracy were really direct, citizens would be able jointly to take all decisions concerning the State. The idea is attractive enough, but obviously not feasible and, for that reason, not even the most imaginative philosophers have thought it worth developing. At most, it is regarded as something of a myth, which nevertheless arouses curiosity and has never been wholly absent from political thinking, even at the time of its worst eclipses. The Greek cities came close to the utopian model; the Roman Empire moved away from it. Both the Middle Ages and modern times experienced in turn, the popular assembly, absolute monarchy, national representation or so-called semi-direct democracy.

Whatever legend may relate, Switzerland did not escape all these transformations. Little known and occasionally misunderstood, its institutions evolved, in search of an equilibrium that was often threatened. The people did not always occupy, in these institutions, the place that is theirs today. Their primordial role, which is no longer disputed, was asserted little by little. Indeed, it has now assumed such importance that the other aspects of the constitutional system have been affected and become, as it were, subordinated to it. The frequent recourse to universal suffrage in the running of the country raises many problems. It is not sufficient for the constituent body to guarantee popular rights by adopting rational, precise and detailed provisions. The authority responsible for their application must see that the questions asked are clear and that the public will is respected.

In the first part of my report I will therefore describe how Switzerland established the principle of semi-direct democracy, and analyse the various consequences. In the second part, I will deal with the procedures - notably the popular initiative and the referendum - and we shall see the difficulties that are encountered in practice.

1. THE PRINCIPLE AND ITS CONSEQUENCES

Swiss democracy has a long history and this explains the form ultimately given to the popular initiative and the popular referendum. These, in their turn, have had manifold effects. This dual influence needs explaining.

1.1 The principle

1.1.1 Prior to 1948

The rural cantons which formed the first alliance, in the 13th century, were governed by a Landsgemeinde, an assembly of all the free citizens of the community, which settled the important questions such as those relating to agricultural markets, taxation and justice. They very soon united with the neighbouring towns, whose organisation was not so very different from theirs: admittedly, a bishop or a small council exercised extensive powers, but the people were consulted regularly. Then the differences between the rural and urban communities became more marked. Some became less pronounced as the proportion of citizens diminished. Others fell into

the hands of a corporate or patrician oligarchy, powerful enough to dispense with any consultation of the plebs. In the 18th century Berne, Zurich, Basle and Lucerne had discontinued the old voting system, while the Geneva aristocracy kept it only for the approval of legislation, refusing the general council of citizens the right of initiative. This provoked popular revolts: between 1707 and 1781 Micheli in Geneva, Henzi in Berne, and Chenaux in Fribourg were severely punished for demanding a return to democracy and fomenting uprisings.

The term referendum was not unknown in those days, but it had a special meaning. As the representatives sent by the cantons and their allies to the Federal Diet were not always provided with full instructions, they took certain decisions ad referendum, in other words subject to ratification by their respective governments. Borrowed from the diplomatic language, the expression subsequently took on quite a different meaning.

On 12 April 1798 the French invader had a hastily convened Diet adopt the first constitution of the Swiss Republic, "one and indivisible". Imposed by the occupying power, this text was not submitted to the people for approval. It was, however, to be amended later by the primary assemblies (Article 106). It was some years later, in 1802, that the national referendum was first experimented. The second Swiss constitution was then approved, but, in order to obtain a positive result, it was necessary, as was usually the case, to add the 167,172 abstentions to the 72,453 yeses, for there were 92,423 noes! More federalist than the preceding one, it stipulated that "new taxes shall be proposed to the cantons" (Article 15). By the Mediation Act of 19 February 1803 Switzerland became a confederation of States once more, and there was no further question of direct democracy except in the few rural cantons which regained their Landsgemeinde; the others acquired a representative system with a variable property qualification for voting. In 1815 a new Federal Pact united the cantons, freed from French tutelage, without restoring popular rights.

The Restoration was succeeded by the Regeneration. The majority of cantons adopted a liberal constitution recognising the separation of powers and the supremacy of parliament and guaranteeing individual freedoms. To these principles, which were not original, was added another, closer to the autochtonous tradition: the possibility afforded to the people to reject laws. St. Gallen (in 1831), Basle Rural (in 1832), the Valais (in 1839) and Lucerne (in 1841) introduced the legislative veto which functioned as follows: in each commune a fraction of the citizens could demand that a general assembly be convened within a few weeks of the Grand Council vote; if the opponents succeeded in obtaining an absolute majority of the electors enrolled in the canton, the proposal was rejected. The system was clearly far from perfect and favoured maintenance of the law. Because it was complicated and cumbersome, it was scarcely ever used successfully. But the democrats took advantage of the breakthrough to win more extensive rights. In 1845 Vaud made it possible for 8,000 electors to launch an initiative on any subject whatsoever, submitted laws to an optional referendum and made the revision of the constitution subject to a popular vote. Three years later a coalition of liberals and radicals imposed a revision of the Federal Pact: semi-direct democracy in Switzerland was entering into a new era.

1.1.2 Since 1848

The constitution of 12 September 1848 made Switzerland a federative State, whose central power was exercised by a bicameral parliament like the American Congress (National Council and Council of States), a 7-member collegial government (Federal Council) and a supreme court (Federal Tribunal). It was submitted to the conditions for approval. In each one, except Fribourg, the people were consulted, but only half of the citizens took part in the voting. When the votes were added up, the last Diet found that the draft constitution had been accepted by 145,584 votes to 54,320 and by 15 1/2 cantons to 6 1/2. The constitution introduced universal suffrage and, in addition to the election of the National Council (first degree), it guaranteed two political rights: 50,000 citizens could ask that the people be consulted on the advisability of a reform of the constitution, a task subsequently assigned to the Federal Assembly whose membership had been entirely renewed (Article 116); the partial or total revision of the constitution was also subject to a vote and was deemed approved only if it obtained the majority both of the votes

cast and of the federated States, it being understood that "the vote of a half-canton was counted as half a vote" (Article 114). While the people made no use of the right of initiative, they experimented with the referendum on 14 January 1866, when they adopted a new constitutional article (giving the right of establishment to Swiss of all denominations) and rejected 8 others (relating, inter alia, to the protection of intellectual property, the unification of weights and measures, freedom of worship, prohibition of lotteries).

Meanwhile democracy was making great progress in the cantons; the Zurich constitution of 1869 was looked upon as a model.

On 12 May 1872 the people (by 261,072 votes to 255,609) and the cantons (13 to 9) rejected a draft constitution, submitted by the Federal Chambers, on account of its over-centralising tendency. The draft nevertheless gave the electors an active legislation role by providing that 50,000 citizens could provike a referendum on the laws and general decrees drawn up by parliament, or themselves propose a law.

Despite this setback, the Federal Assembly drafted another constitution which was approved by 340,199 votes to 198,013, and by 14 1/2 cantons to 7 1/2, on 19 April 1874. This text was less generous than the preceding one but more generous than that of 1848. The legislative initiative was abandoned, but the referendum on laws was opened to 30,000 electors; it had suspensive effect: if the demand for a referendum was not submitted in due form within 90 days, the law could be promulgated; if referendum procedure was initiated within that time-limit, the law could not enter into force before it had been approved by the people. It was also provided that 8 cantons could request a referendum against a law, but that right was never exercised, the 90 day time-limit being too short. There was no change in the central authorities, except that the Federal Tribunal became a permanent body responsible notably for seeing that cantonal laws and decisions were compatible with the constitution.

It very soon became evident that the popular initiative system was defective: since it led only to a vote on the principle of total revision, its promoters could not propose a specific reform. To remedy this defect an additional clause was added, in 1891, providing, after the manner of the Zurich constitution, that 50,000 citizens could demand the adoption, repeal or amendment of a particular article of the constitution (Article 121 (2)). Sub-paragraph 4 stipulated: "The initiative demand may take the form of a proposal couched in general terms, or of a bill complete in all details".

There was another omission, which was remedied in 1921. Prior to that date international treaties concluded by the confederation were not subject to a referendum. It was thanks to a popular initiative, grudgingly recommended by parliament, that there was finally inserted into Article 89 of the constitution a sub-paragraph 4 making treaties which were binding on Switzerland for over 15 years subject to an optional referendum (30,000 signatures). The time-criterion proved impracticable and the new popular right was exercised only twice in 55 years. It was consequently revised. On 13 March 1977 the people)976,839 votes in favour, 504,924 against) and the cantons (unanimously) approved a text requiring: an optional referendum in the case of treaties concluded for an indetermined period or providing for accession to an international organisation or entailing a multilateral unification of law; a compulsory referendum, with a double majority of the people and the cantons, in the case of accession to collective security organisations (eg United Nations) or to supranational communities (eg the Common Market). The legislative referendum had its share of vicissitudes, too, for parliament could remove federal decrees of general application from its scope simply by declaring them urgent (Article 89 (2) of the 1874 constitution). The Federal Assembly has abused this power, particularly since 1933. A popular initiative introduced just after the war and approved by a small majority in 1949, devised a complicated but ingenious system. Since that date decrees of general application, which permit of no delay, may be put into force immediately, but only for a limited period. If they conform with the constitution, they are subject to optional referendum; when an optional referendum is requested and the result is negative, they become null and void after a year. If they depart from the constitution, they must be ratified within the year by the people and the cantons, otherwise they lose their validity on the expiry of that period.

To sum up, the following instruments may be availed of in federal law: initiative and compulsory referendum where the constitution is concerned; optional and suspensive referendum as regards the laws; optional and resolutory referendum as regards urgent decrees, the referendum as regards international treaties. But the picture is incomplete if the cantons are left out of consideration. To obtain the federal guarantee for their constitutions, cantons must have the constitutional initiative and referendum (Article 6 (2) (c)). They have usually extended these two rights to cover laws and even decrees; in several states, including the largest ones (eg Zurich), all the laws are automatically subject to popular ratification. The people's approval is also necessary, almost everywhere, for any major expenditure. In many cantons the people have even the right to revoke the authorities: a specified number of citizens may demand that the question of the dissolution of the Grand Council - or State Council - be submitted to the people. If the reply is in the affirmative, there are early parliamentary - or government - elections. Moreover, five states have retained their ancient Landsgemeinde. The communes, for the most part, are administered by an elected executive, closely supervised by a general assembly of citizens; those which elect a deliberative council make extensive use of the initiative and referendum. Thus, the smaller the com-unity the greater the citizen participation in its administration. Rousseau foresaw this perfectly natural phenomenon (Du Contrat social, Book III, Chapters 4 and 15).

1.2 Consequences

Semi-direct democracy in Switzerland owes a great deal to the country's history and also to its federative structure. It undoubtedly owes more to these than to Rousseau's ideas, which it is realising only imperfectly. It is having an influence, in its turn, on the political system, legislative procedure, constitutional jurisdiction and, first of all, on the guarantee of fundamental rights.

1.2.1 Individual freedoms

These can exist perfectly without the initiative and the referendum, but, since the converse is not true, they have taken advantage of the democratic institutions to progressively gain ground.

The authors of the 1848 and 1874 constitutions recognised the principal rights implied in the liberal dogma: freedom of trade and industry, of establishment, freedom of conscience, belief and worship, freedom of the press, freedom of association. They did not extend the list beyond what seemed necessary at the time. They did not, for example, think of introducing freedom of expression and freedom of assembly, as proclaimed by the first amendment to the American Constitution. Admittedly the list was completed by a number of cantonal constitutions. This resulted, however, in a certain inequality, not to say anomaly. Encouraged by doctrine, the Federal Tribunal established as "unwritten constitutional principles" the two rights that had been forgotten. The motivation is even more interesting than the practical result.

Without freedom of expression (the Federal Tribunal reasoned) there could be no truly democratic formulation of the public will prior to elections and votes, and political rights could not be exercised in complete independence (RO 96 I 224). Consequently "freedom of expression is not only ... a precondition for the exercise of individual freedom and an indispensable factor for the development of the human personality; it is also the foundation for all State democracy: permitting, as it does, the free forming of opinion, notably political opinion, it is indispensable to the full exercise of democracy. As such, it deserves a special place in the catalogue of individual rights guaranteed by the constitution and special treatment by the authorities" (RO 96 I 592). It is true that democracy is, by definition, a system which functions by the communication of ideas; the truth of this theory, which is borne out in any purely representative system, is even more evident in a country in which the popular initiative and referendum procedures are applied both in the constitutional and in the legislative spheres. This is illustrated by the following example. A prefect banned advertising of the film "Histoire d'A" which the Women's Liberation Movement proposed showing in Fribourg on 31 May 1974. The organiser appealed to the Federal Tribunal and won her case: the court considered that "even

if the film in question was not, properly speaking, a propaganda film designed to win over the spectators to a specific cause, it had been used by the WLM as a means of propagating the ideas it upheld (RO 101 Ia 255). The cantonal government's defence was that "the film in question might encourage recourse to abortion, which was punishable as a crime or misdemeanour" (p. 257). The court replied that such arguments were not relevant, because a popular initiative was demanding the "decriminalisation" of abortion and because "the electorate would probably be asked one day to vote on a reform of the current legislation. Hitherto a personal moral problem, abortion was becoming a national political issue" (p. 258).

Similar considerations prompted recognition of the freedom of assembly as an unwritten right, a right which seems indispensable in that it enables citizens to discuss political topics and pass resolutions, if need be outside the parties, which, for their part, are protected by freedom of association (RO 96 I 224). It presupposes that the State does not hinder meetings, without good cause, at least on private ground. On the other hand, the Federal Tribunal considers that the right to hold demonstrations in public places is not indispensable to the democratic order, although certain minorities have few alternative means of calling public attention to their ideas (RO 101 Ia 400). A demonstration on the highways exceeds the normal use of the public domain. Therefore, it may be made subject to authorisation. However, authorisation will be refused only for cogent, objective reasons, having regard to all the relevant circumstances. Thus a "Committee for Indochina" may not set up an outdoor theatre, complete with megaphones, on the main square of a small town, since the local inhabitants are entitled to peace and quiet; but, by virtue of the freedom of expression and of assembly, the organisers have a right to expect the authorities to put some other suitable place at their disposal (RO 100 Ia 404).

1.2.2 The political system

Outwardly the political system has not altered much since 1848, for the authorities have remained the same. Their membership, however, has undergone changes, which seem largely due to the workings of semi-direct democracy.

The federative State was built up by the radical party on the ruins of the conservative-catholic party. While the first succeeded, for a long time, in keeping the absolute majority in the Federal Assembly and the monopoly of government seats, the second became adept at using political rights as a weapon. Between 1848 and 1904 parliament proposed revisions of the constitution on 29 occasions; the people and the cantons rejected 15. During the three decades which followed the 1874 constitution, 28 laws (out of 237) were countered by referenda and 19 were rejected. To appease the opposition, a conservative was elected to the Federal Council in 1891. But the divorce between the central State authorities and large sections of the population persisted. The electoral system being partly to blame, it was it which was attacked. The National Council was elected by a three-ballot system of election by absolute majority (several members being voted for out of a list of candidates); the constituency divisions, which could not overlap cantonal frontiers, favoured the dominant group. On three occasions a popular initiative demanded the introduction of proportional representation. After two setbacks (defeat on 4 November 1900 by 244,666 votes and 11 1/2 cantons to 169,008 and 10 1/2 cantons; on 23 October 1910 by 265,194 votes and 10 cantons to 240,305 votes and 12 cantons) the initiative succeeded (on 13 October 1918 when the result was 299,550 votes and 19 1/2 cantons in favour and 149,035 and 2 1/2 cantons against). The radical party, which obtained 105 seats at the 1917 elections lost 45 in 1919 to the new agrarian party and the socialists. Immediately a second conservative entered the Federal Council. During the subsequent decade the number of legislative referenda (5) and constitutional initiatives (9) remained moderate. In 1930 the radical party lost a government seat to the agrarians. But the crisis brought a considerable increase in popular votes up till 1940 (9 referenda and 20 initiatives). There followed a relative calm: between 1941 and 1950 there were only 7 referenda and 11 initiatives (a socialist was appointed a federal councillor in 1943). The exercise of political rights became more frequent again between 1951 and 1960 (11 referenda and 23 initiatives). The distribution of seats after the Federal Council elections on 17 December 1959 was almost exactly proportional to the respective strengths of the four main national parties: 2 radicals, 2 conservatives, 2 socialists and one agrarian. Thereafter, while the number of referenda decreased (8 between 1961 and 1970, 2 since 1971), the number of initiatives increased (16 between 1961 and 1970, 28 since 1971).

Comparisons of figures can be tiresome, but at the same time highly enlightening. The use that the people make of semi-direct democracy depends, of course, on economic circumstances and the social climate, but also on the composition and behaviour of the authorities. Thus the initiative and especially the referendum inevitably influence the formation of State bodies; although it is impossible to demonstrate this, they certainly contributed to the introduction of proportional representation into the constitution as regards the election of the National Council and into practice as regards the appointment of the Federal Council. Such changes have had other effects besides, not only, as we shall see, on legislative procedure, but also on political life as a whole. In particular, the parliamentary opposition, reduced to almost negligible proportions since 1959 (two or three deputies out of 44 in the Council of State; about 30 at most out of 200 in the National Council), plays a very modest role. Moreover, it is divided, for it occupies seats on the extreme right and extreme left of the Assembly Chamber. These circumstances, in their turn, have rendered popular rights, especially the initiative, more useful still. The elector fully realises that, by choosing a list, he is not designating his future government, but that, in any event, the distribution of seats will be hardly any different and that the Federal Council will subsequently have every chance of being re-elected without opposition. He consequently treasures all the more his right to provoke and take major decisions concerning the State. This explains the increase in the number of popular initiatives, which some regret (see 2.1.6 below).

1.2.3 Legislative procedure

The referendum gives a law legitimacy. Consequently it implies a strict application of the principle of legality: it is all the more essential for State activities to be founded on a legal basis, since the latter emanates from the people. Obviously the authority may not resort to expedients in order to avoid a referendum, for example by abusing statutory powers. But it has other, legitimate means of achieving the same object.

No one will dispute that legislative procedure is so devised as to prevent, as far as possible, the risk of a referendum. This concern dictates the preliminary stages, prescribed by the Federal Council in its directives of 6 May 1970 and allowing increasingly for consultation of the cantons, the political parties and the circles concerned. All of these are heard repeatedly even before the draft bill is put before the government. Not unfrequently the relevant department begins by referring to them a list of the problems and asking them to propose solutions. They are also well represented in the committee of experts appointed to draw up or study the preliminary draft, which is then submitted to them for comment. The Administration takes their comments into account in the preparation of the bill intended for parliament.

The role thus reserved for the lower public authorities and the associations concerned is not beyond reproach.

Some see in this the exercise of an occult power, which is not provided for in the constitution (except in Article 32, in the economic sphere) and which deprives the federal authorities of their essential functions: when the bill is presented to them, it is hardly possible for them to amend it, the die having already been cast. Some, without rejecting the principle, criticise the procedures: the choice of associations consulted, the sometimes unrepresentative character of the body which speaks on their behalf. The system could certainly be improved on in many respects; its main drawback is that it delays the adoption of laws. It seems however, in itself, to be indissociable from semi-direct democracy, which necessarily entails compromise between the social groups and a relative weakening of the State organs. But there is nothing regrettable about this double consequence. For one thing, the democratic system could be tyrannical if the legislative process proper were not preceded by mutual concessions. For another reducing as they do the government's and parliament's margin of manoeuvre, the political rights certainly do not facilitate their task, but they serve to safeguard freedom, ensure respect for minorities and promote harmony in social life.

1.2.4 Constitutional jurisdiction

That it is incompatible with semi-direct democracy is easily demonstrated. Wherever laws and decrees of general import are submitted to the optional referendum, they are always accepted - by formal decision or tacitly - by the people as a whole. Possessed of this popular legitimacy, the legislative text inevitably eludes judicial control: how could the courts convince the sovereign nation that it had made a mistake in accepting provisions contrary to the constitution? Legally, this may be conceivable, but, politically, it is unfeasible. A choice has to be made between the democratic principle and "government by the courts". The authors of the Federal Constitution made this choice, perhaps to the detriment of the constitutional State and in defiance of the minorities, when it ordered the Federal Tribunal to apply, without review, federal laws and decrees of general import (Article 113 (3)). On 22 January 1939 a popular initiative proposing an extension of constitutional jurisdiction was rejected (347,340 noes, 141,323 yeses, the cantons voting unanimously).

It is true that the cantonal laws are subject to judicial supervision, even when adopted by the people, explicitly or otherwise. But here, another principle predominates, and rightly so: the federative State being composed of a central State and several member States, the legal order of the former prevails over the legal order of the latter and an organ is needed to ensure respect for this supremacy, in other words, to verify that cantonal law is in conformity with federal law.

2. PROCEDURES: INITIATIVE AND REFERENDUM

2.1 Initiative

Its regulation poses various problems. It is not sufficient to define its subject and its form; the conditions and date of submission to the popular vote must also be determined.

2.1.1 Subject

The popular initiative is the right granted to a specified number of citizens to submit a proposal to the people as a whole. Its subject varies: a constitutional article, the text of a law, a specific proposal, not to mention the removal of the authorities, although this plays only a subsidiary role in practice.

The initiative aimed at a revision of the constitution is not disputed. It is indispensable to maintaining an open political regime. It ensures a peaceful evolution of the institutions, as a safeguard against inflexibility on the part of the constituent body. Where partial revisions of the constitution are concerned, it undoubtedly has certain drawbacks. It compels the electorate to take decisions on questions which do not always deserve its attention, and it introduces into the basic law rules which could be embodied in a less fundamental text. It led to the adoption, for example, of detailed provisions prohibiting absinth (Article 32 ter), gaming houses (Article 35), the slaughtering of animals in the Israelite fashion (former Article 25 bis). Initiative demands tabled recently concern such commonplace subjects as: 12 Sundays a year without motor-vehicles or aeroplanes; provision of more roads and footpaths for pedestrians; noisy roads; forty-hour working week; number of naturalisations; advertising of products engendering addiction; age for entitlement to old-age insurance benefits.

One means of remedying this would be to authorise the legislative initiative, which exists in the cantons. But the people (by 409,445 votes to 170,842) and the States (unanimously) rejected this idea on 22 October 1961; they were apparently afraid of having to take too many decisions and on badly drafted texts. It is true that the promoters of an initiative complete in all details are required to produce a complex and difficult piece of drafting, which not everybody is qualified to do.

Should the initiative be extended to include decisions on specific matters, concrete proposals, in short, the manifold measures normally prepared by the government, but submitted to parliament for approval owing to their importance or to the

cost entailed? Certain cantons have done so. But the results are disappointing, and the dangers obvious. The alternative is this: either the purpose of the initiative is to repeal a particular measure, in which case there is a risk of its being too late - once a decision has been taken, it is generally executed forthwith; it would be absurd to challenge it, for example, if the work and the expenditure involved had already been effected (RO 101 Ia 366) - or the initiative is aimed at implementing a project, in which case there is a risk of its being badly conceived: what group of citizens, however ingenious, can draw up building plans?

2.1.2 Form

Whatever its content, the popular initiative may take one of two forms: it may be a simple proposal couched in general terms, or it may be a bill complete in all details. Both are allowed under federal law and in almost all the cantons. Each poses different problems and has different merits.

The proposal couched in general terms is addressed primarily to the authorities, urging them to take action. If they acquiesce, they prepare the text suggested by the initiative and submit it to a popular vote, compulsory or optional as the case may be. If, on the other hand, they reject the very principle enunciated by the initiative, they first submit the principle to the popular vote; in the event of its rejection, the procedure is terminated: it continues only if the proposal is approved by a majority and parliament is thus compelled to enact the desired text. The system has one advantage and three drawbacks. Instead of the promoters of the initiative having to draft the law or constitutional article, it is the specialists, namely the government department concerned and the deputies, who are assigned this task; the result will generally be better. On the other hand, however, it provides less effective protection for the popular right, for the chambers enjoy a certain margin of discretion when it comes to applying the proposal expressed in more or less vague terms by the initiative; thus there is a risk of the signatories' intention being distorted. Moreover, the procedure is complicated: each time parliament disagrees with the objective aimed at, a first vote has to be held on the principle; even when the resultant text is adopted, it has still to be submitted to a popular vote; consequently several votes take place on the same subject. Thirdly, the first vote, concerning the principle, may lead to an ambiguous result, whose interpretation gives rise to difficulties; for example, if the noes prevail does this mean that the people do not want any regulations in the matter concerned or that they would prefer a different solution from that proposed in the initiative?

Where the initiative is drafted in full by its authors the procedure followed is simpler and raises less serious questions. For that reason it is used more frequently. When it relates to a sphere in which a popular vote is compulsory it must always be submitted to the people, with or without a favourable recommendation from parliament. Where it is subject to an optional vote, it is possible to facilitate matters by distinguishing two situations: either parliament disapproves of the initiative, in which case it is automatically submitted to the people, or it approves of it and the text may be put into force without being submitted to the popular vote, unless of course it is subject to a demand for a referendum. Where an initiative is drafted in full, one vote, if not two, can thus be dispensed with. Admittedly, it introduces into the legal order provisions which are more or less well worded. But it entails a vote on a specific text and gives a clear result. It guarantees that the intention of the promoters is strictly respected.

2.1.3 The principle of unity of subject-matter

This applies to all votes, including those pertaining directly to a measure adopted by the authorities (referendum). In practice, however, it applies particularly to popular initiatives. It is in regard to these that the principle is stated in the Federal Constitution (Article 121 (3)). In the cantons it is not always stated explicitly, but the Federal Tribunal considers that it is a rule which being inherent in the free exercise of political rights, is implicit (RO 90 73; 99 Ia 645).

The need for it is evident. Since 1891 a distinction has been drawn in the Federal Constitution between a total and a partial revision and different procedures are prescribed for each. Consequently, some criterion is needed in order to distinguish the one from the other. The quantitative factor immediately suggests itself: it is possible, through the procedure for a total revision, to modify the constitution as a whole by means of a single vote. By contrast, partial revisions concern only specific matters and entail amendments to isolated provisions by means of successive votes. Moreover, generally speaking, the unity requirement is indispensable, for the popular will must be expressed both clearly and freely. If the people were asked to give a single reply to several independent questions the result would be ambiguous (for example, it may be that rejection of the whole does not mean that the majority refuses all the proposals) and the right to vote would be intolerably impeded (the citizens would not be making a real choice between the various alternatives).

The principle must, of course, be interpreted flexibly. As judge of the validity of constitutional initiatives, the Federal Assembly has required that "an instrinsic relationship" must exist "between the different points in an initiative" (Article 3 (2) of the 1962 Act on Popular Initiatives). In fact, it does not take this condition literally, for in 1899 and 1939 it accepted the two initiatives demanding an increase in the number of federal councillors (9 instead of 7) and their direct election by universal suffrage, as well as an initiative postulating the right to work and a series of measures for its implementation (1894). Since 1891 it has cancelled only one initiative, namely the one demanding a massive reduction in the military budget and an increase in social expenditure on child-welfare, low-rent housing and areas devastated abroad! For its part, the Federal Tribunal, the guardian of political rights in the cantonal context, can hardly be said to be any stricter. It does not prohibit the combination of several texts, provided they share a common aim, associating them closely by a genuine objective link (RO 90 I 74). Nor does it forbid the submission of a general plan whose various elements are "interdependent" (RO 99 Ia 186). Its attitude is still less severe in the case of legislative initiatives than in that of draft constitutional or financial orders (RO 99 Ia 646).

In short, whatever the importance of the said principle for the respect of the popular will, it is a general rule which must be applied judiciously, having regard to all the circumstances involved.

2.1.4 The counter-proposal

The popular initiative proposes an idea. The authorities may have different views on the same subject. Is it not reasonable that the people should vote on the former and the latter simultaneously? The fact that parliament is entitled to put forward a counter-proposal to the initiative is a major factor in Swiss public law. But it raises delicate problems.

The Federal Constitution rightly draws a distinction between two cases. When an initiative is "couched in general terms" it defines only an objective and requests the chambers to enact a clause designed to achieve it. If they approve of the proposal, they make a partial revision in the sense indicated, subject to the compulsory popular vote. If they do not approve, they submit the matter to the people with a recommendation to vote in the negative (Article 121 (5)). But there is no place in this hypothesis for a counter-proposal, which is, by definition, a different, it is true - but not too different - means of achieving the same aim as the authors of the initiative. An initiative in the form of a proposal determines only the ultimate aim, not the means of achieving it. Consequently, a counter-proposal would be pointless. Only, as we have seen, if the initiative is accepted, the Federal Assembly is required to draw up the desired text.

If on the other hand, the initiative is "complete in all details" and is not approved by the Federal Assembly, the latter may adopt a counter-proposal and submit it to the popular vote along with the initiative (Article 121 (6)).

Most of the cantons prescribe similar rules. Those which omitted to provide for a counter-proposal need have no compunction because the Federal Tribunal has ruled that the authorities are entitled to submit a counter-proposal even where the constitution and the law are silent on the subject (RO 100 Ia 57; 91 I 195), for it regards this power as an important factor in the working of democracy, in that it affords a wider choice to those electors who did not sign the initiative (RO 100 Ia 57).

The counter-proposal must naturally satisfy certain basic conditions. It must be closely related to the aim and subject of the initiative. Article 27 (3) of the Act of 23 March 1962 on relations between the councils stipulates that the counter-proposal must concern the same constitutional issue. In the cantons, the Federal Tribunal requires that the same criterion be observed: the counter-proposal may, of course, recommend the substance or of form to the original proposal. What it must not do is put a different question to the people from that embodied in the proposal; all it can do is to propose a different reply. But though the aim must be the same, and the subject related to that aim, the means may be different, in that they may go less far or further than those proposed in the initiative (RO 100 Ia 59).

There remains one cardinal problem: how will the questions be put to the people and what replies will the people be entitled to give? In federal law and in almost all the cantons the rule is a simple but debatable one: the citizens may reject the initiative and the counter-proposal or choose one of the two, but they may not accept both (Articles 8 and 9 of the federal law on popular initiatives). In other words, they may choose between three ways of voting: no-no; yes-no; no-yes. As the reply yes-yes is ruled out the odds are in favour of the noes (4) and against the yeses (2), and consequently against change. In contrast to the referendum, the initiative is designed to enable the people to play a creative role in the running of the State. It partially fails in its purposes if, on account of the counter-proposal and the exclusion of the double "yes" the initiatives have, in fact, little chance of being accepted. This defect could easily be remedied if one of the following three systems were adopted.

The simplest of these would appear, at first sight, to be authorisation of the double "yes". It was introduced in Geneva and in the constitution of the future canton of Jura, Article 76 (5) of which provides that, if the people accept both the initiative and the counter-proposal, it is the proposal which obtained the largest number of votes that is adopted. But this is not without its drawbacks. The majority of the electors have a preference either for the text of the initiative or for that of the counter-proposal. Nevertheless, some vote for both for fear of their being rejected. Thus manoeuvring is encouraged and too much importance is given to opinion polls and other predictions. Moreoever, it has to be recognised that a double "yes" does not have exactly the same significance as a double "no". Whereas the second is a rational vote (in the sense that the citizen rejects both proposals), the first is ambiguous, if not contradictory, because, as the voter knows very well, no two dissimilar laws on the same subject can be accepted and put into force simultaneously. If both are adopted, the one which obtained the relative majority obviously prevails, and those citizens whose reply was a double "yes" were thus deprived of the right to help determine the choice.

The second solution is more complicated: the first step, as in parliamentary procedure, is to ask the voters, in an initial ballot, to choose between the counter-proposal and the initiative; the text which obtained the majority of the votes is then submitted to the people for approval. This system has the advantage of being logical and of affording everyone the possibility of freely exercising a clear choice. But as it implies two successive votes, it protracts the procedure and makes it more costly.

The third system is an attempt to combine the merits of the other two, while eliminating the difficulties they entail. It has just been approved by the Grand Council of Vaud. It consists of only one vote, but on two questions, a principal one and a subsidiary one; the citizens are asked first of all to reply by "yes" or "no" to the question whether they wish a change in the law on the matter concerned, that is to say in the sense proposed by the initiative or the counter-proposal;

then they are asked, assuming that the majority vote is in the affirmative, to choose between the two texts. There is a double vote-count and the result is clear and unambiguous. First all the yeses and noes are totalled. If there is a majority of noes, the status quo is maintained. If not, the votes obtained by the initiative and the counter-proposal are compared and the text which polled the majority is deemed to have been accepted. Thus, the initiative has every chance of succeeding, and the voters make a free and full choice on one day.

2.1.5 Time-limit

If the popular right is to be fully guaranteed, the constitution must prescribe a strict time-limit for submitting the popular initiative to the vote of the people. In federal law and in many of the cantons this fundamental requirement is only imperfectly satisfied.

The Federal Act of 23 March 1962 makes the following distinction: if the initiative takes the form of a proposal the Assembly must take a decision within two years of its having been tabled (Article 26 (1)); if the initiative takes the form of a bill complete in all details, the chambers have three years in which to approve or reject it (Article 27 (1)). These time-limits may be extended by a maximum of one year in special circumstances and on a report by the Federal Council (Article 29). The government must order a popular vote if the two councils do not take a concordant decision within the legally prescribed time-limit. This really amounts to barring, as the Federal Tribunal recognised in an obiter dictum (RO 100 Ia 55). But experience shows that these rules do not always result in the rapid submission of initiatives to the people, for the Federal Council retains a certain margin of manoeuvre when fixing the date of the popular votes.

The provisions adopted by the cantons in this regard vary widely. Some have been modelled on the federal law, while in others the time-limit has been curtailed (in Geneva, it is one year); but the Federal Tribunal regards this simply as a working rule, which the Grand Council is not bound to observe strictly if it intends drawing up a counter-proposal (RO 100 Ia 56). Some prescribe no rule at all in the matter.

The problem is more complicated, however, than appears at first sight. But three observations are called for: no time-limit is effective unless it is binding and concerns the vote itself; if it applies only to the parliamentary decision, it has little significance in practice. It is advisable to prescribe a shorter time-limit for any initiative submitted in general terms (and requiring merely a decision of principle) than for a properly drafted text (parliament being entitled to submit a counter-proposal which necessitates more study and preparation). A flexible system is preferable to a rigid one: the Assembly must therefore retain the right to extend the initial time-limit, at the same time fixing a maximum, of course.

2.1.6 Number of signatures

The question is an incidental but topical one, for the Federal Council proposed, on 9 June 1975, that the number of signatures required for a constitutional initiative be increased from 50,000 to 100,000. This proposal will be submitted to the people in the autumn of 1977. The arguments put forward from the various quarters are interesting.

The government draws attention to the proliferation of initiatives: whereas there was an average of 6,5 per decade between 1891 and 1930, and 17,5 per decade between 1931 and 1970, 28 were tabled between 1971 and 1976. It sees several causes for this increase. The figure required represented 7,6% of the electorate in 1891, a proportion which had fallen to 1,3% by April 1975. The obtaining of signatures has been facilitated by the introduction of the female suffrage in 1971, and by the improvement in transport and communications. The enormous number of initiatives is becoming a burden on the people, who are required to turn out to vote frequently, on the political parties, which have to organise information campaigns and issue slogans, and on the authorities, who have to spend an excessive proportion of their time examining the texts proposed, to the detriment of the other matters requiring the State's attention.

Besides, it is accentuating centralisation, for it is relatively more difficult to carry through an initiative in the cantons. It prevents parliament from following a long-term legislative programme and compels it to resort more and more frequently to urgent decrees (15 between 1971 and the spring of 1975). It is provoking an increasing number of abstentions.

The opponents of the proposal point to the paradox which consists in deploring the citizens' lack of interest in State affairs and at the same time seeking to restrict a popular right on the ground that it is being exercised too often. The high proportion of absertions is due more to the complexity of the texts than to the frequency of the votes. Besides, it is in the cantons and the communes that the votes are particularly numerous. Raising the minimum number of signatures will not eliminate abuses: the leading associations will always be sufficiently powerful to obtain the requisite number.

It would be rash to draw conclusions. The weight of the arguments put forward necessarily depends on circumstances. It is true that the nation is required to vote several times a year and on matters that are not always worthy of its attention. It is to be regretted that certain circles are so dynamic and obstinate that they launch one initiative after another on the same subject (five "against undue foreign immigration" rejected between 1969 and 1977). But the initiative is a fundamental popular right which compels the authorities to listen to the voice of the sovereign people on important points: taxation, abortion, cost-of-living, conscientious objection, pollution, the protection of tenants, the separation of church and State, to mention only a few recent examples. Should such a useful institution be limited?

2.2 The referendum

The referendum raises fewer questions than the initiative, but its aim and scope need defining.

2.2.1 Legislative measures

Apart from revisions of the constitution, which are always subject to compulsory referendum, both in the cantons and in the confederation, it is generally acts of parliament that are submitted to the people for approval. Although formerly fairly common in the cantons, referenda against government decisions have become increasingly rare. However that may be, exceptions are always more interesting than general rules.

The Federal Constitution does not submit all decisions of the chambers to the legislative referendum. So-called "simple" decrees are exempted. Moreover, it authorises the assembly to give the referendum only resolutory and not suspensive effect by enacting, for a limited period, decrees "of general import" and declaring them urgent (Articles 89 and 89 bis; see 1.1.2 above). Thus these two groups of decrees are not subject to the same rules as the laws proper. In order to make the tripartite distinction, which has such immense practical significance, specific criteria must be applied strictly. The Federal Act of 23 March 1962 on relations between the Councils chose two of those. The first is substantive and derives from the concept of "rules of law", which comprise "all general and abstract rules imposing obligations or conferring rights on legal or natural persons, as well as those governing the organisation, powers and functions of the authorities or laying down procedure" (Article 5 (2)). The second criterion is of a formal character: the legislative measures are either of limited or unlimited duration. The following definitions follow from this. The law, in the narrow sense, contains rules of law, put into force for an indeterminate period; it is subject to the suspensive referendum. A decree of general import also embodies rules of law, but is limited in duration; subject, in principle, to the suspensive referendum, it may be submitted to the resolutory referendum if it is labelled urgent. The "simple" decree does not embody any rule of law; it is never subject to any demand for a referendum.

2.2.2 International treaties

Recently extended, the referendum on international treaties gave rise to keen controversy. Its opponents maintained that the people were not in a position to express views on foreign policy and that the government could not inform them fully on the subject; the votes would be preceded by campaigns frequently infused with hatred, and consequently detrimental to diplomatic relations and contrary to the traditions of neutrality; the freedom of movement of the authorities would be imperilled in a delicate sphere and the confidence of Switzerland's partners would be shaken if the treaties were challengeable before the people. The supporters of the referendum replied that it had existed for half a century wihout any of the risks referred to having materialised: it would be undesirable to withdraw from the popular vote essential elements of the powers exercised by the central State, elements all the more important because international law was steadily developing and was today affecting matters which formerly concerned the internal legal order. As is usual in Switzerland, the dispute ended with a compromise, widely ratified by the people and the cantons.

2.2.3 Expenditure

An institution which plays a major role in the cantons is unknown in federal law: this is the so-called "financial" referendum, which the constituent body rejected. A popular initiative, tabled on 23 September 1953, proposed the adoption of an Article 89 ter, making subject to optional referendum non-recurring expenditure exceeding five million francs and recurring expenditure exceeding five million francs and recurring expenditure exceeding one million, and to compulsory referendum, non-recurring expenditure exceeding a hundred million and recurring expenditure exceeding twenty million. The initiative was withdrawn after the Federal Assembly adopted a counter-proposal, albeit a more restrictive one, which was rejected by the people (331,117 votes for 277,660) and the cantons (13 to 9). The explanation for this rejection was that, while some had fears on account of military expenditure, others had fears on account of agricultural and social grants and subsidies.

The financial referendum creates many difficulties in the cantons, which fix variable thresholds depending on the size of their budgets. The determining of the minimum figure is always somewhat arbitrary: in the eyes of the citizens, the importance of a project is not necessarily to be measured in terms of the cost entailed. Besides, the system lends itself to diverse manoeuvres: the authorities are sometimes tempted to split the expenditure into successive fractions in order to avoid a popular vote, although the Federal Tribunal is always ready to call them to order (RO 100 Ia 375). So as to prevent the same question being submitted more than once to the popular vote, it is understood that only new expenditure is subject to the financial referendum; this implies a subtle distinction, which is difficult to make in practice, between so-called compulsory expenditure, which the canton is required to make in pursuance of a provision of federal law or of cantonal law, and new expenditure incurred for a purpose outside the administration's previous sphere of activity, or concerning which there is a possibility of choice as regards the scale and utilisation of the funds in question (RO 100 Ia 370).

2.2.4 Negative decisions

Normally these are not subject to the popular vote. In federal law this goes without saying, since only measures passed by the Federal Assembly are subject to popular ratification. But, in the cantons in which no express provision exists, this problem arises. It has aroused little attention hitherto, but a recent decision made it a topical issue. A communal parliament having rejected a proposal to build an underground passage for pedestrians, the requisite number of citizens submitted a demand for a referendum against this decision. The Federal Tribunal confirmed the cantonal authorities' refusal to submit the question to the popular vote RO 99 Ia 524). The court considered that a popular vote on the negative decisions of an elected body would be irreconcilable with the essence of the referendum, in that it would attribute to it a positive significance, whereas it was, by definition, of a negative character. Besides, its subject would be vague and uncertain; would it be directly concerned with the parliamentary decision or with the initial proposal, which

would not necessarily emanate from the government, but sometimes from a motion? Moreover, it would lead to an ambiguous result: how was the will of the majority to be interpreted if it disavowed parliament? The Federal Tribunal rightly concluded that the initiative procedure could be used to have the people adopt a draft text which the parliament did not want.

2.2.5 The number of signatures

It is possible, and even desirable, for this number to be different from the minimum number required in the case of initiatives. Under federal law the legislative referendum may be requested by 30,000 citizens. The Federal Council has proposed that the figure be raised to 60,000 on the ground that the total active population has increased almost six-fold since 1874. This is not, however, a decisive argument. While the number of initiatives has been growing the number of referenda has been declining (see 1.2.2 above). There is therefore no justification for restricting a right which is not being abused by the people, a right which is a fundamental element of semi-direct democracy.

2.2.6 Statistics

Between 1848 and 12 June 1977, the Swiss people voted on 282 issues. It is necessary, for a proper appraisal of the results, to bear certain distinctions in mind.

The total number of texts submitted to the compulsory referendum on constitutional issues was 201, including 123 emanating from the Federal Assembly (86 of which were accepted and 37 rejected) and 67 proposed by popular initiatives (7 of which were adopted and 60 rejected). 11 were urgent decrees contrary to the constitution, submitted to the resolutory referendum: all were approved.

Seventy-seven laws and decrees were submitted to the optional referendum: 30 were accepted and 47 rejected.

Of the four international treaties submitted to the popular vote only one was rejected.

Conclusion

Semi-direct democracy exists in many countries, but what makes the Swiss experiment unique is its constancy for more than a century. From the commune and the canton where it originated, it progressed gradually until it ultimately reached national level. The two pillars on which it rests are: the initiative, whereby a specified number of citizens may provoke a popular vote on a proposal formulated by them, and the referendum, whereby a specified number of persons may request that the electorate vote on a measure passed by parliament.

It raises the electorate to the rank of a State body, whose responsibility it is not only to elect representatives, but also to take decisions. In this regard, the negative role of the referendum is counter-balanced by the creative activity exercised through the initiative. It would be a mistake to believe that the exercise of popular rights has a purely conservative - or revolutionary - influence on political life. Its effect is rather to curb government action whenever there is a tendency for it to go beyond the aspirations of the people, or, on the contrary, to oblige the authorities to deal with difficult, controversial problems, submitting them, where necessary, to a popular vote which provides solutions. Good or bad, these solutions will seem all the more tolerable for having been chosen by the sovereign nation.

Admittedly, semi-direct democracy is not compatible with all forms of constitutional regime. It demands a great measure of respect for ideological freedoms. It is closely linked with the institution of the collegial executive. It entails proportional representation in the various State authorities. It implies long and complex legislative procedures, in which the interested circles are associated. In practice, it denies the judicial authorities jurisdiction to verify the compatibility of laws with the constitution.

It also creates practical difficulties. The subject and form of the initiative are not above controversy; although very useful, the counter-proposal engenders dangers, which can, however, be precluded by means of precise rules. It is important to ensure that the principle of unity of subject-matter is observed and to prescribe a strict time-limit for submitting an initiative to the popular vote.

The referendum, for its part, raises different questions depending on the nature of the proposal: constitution, law, international treaty, expenditure, negative decision.

In any event, popular rights must be guaranteed and regulated in order both to prevent the elected authorities from impeding their proper exercise and to enable the will of the people to be expressed in full freedom, and with utmost clarity and simplicity.

Participation and interest representation

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Participation

Introduction

In a representative democracy, elections for parliament and for local councils are held at regular intervals. The citizens who cast a vote thus take part, however indirectly, in political decision-making. Citizens are also subjects: they are bound by Acts of parliament and by the rules, regulations and decisions of the numerous local and other public authorities. Is the democratic role of the citizen restricted to the voting at general and at local government elections? This would seem a rather poor realisation of democratic ideals. By voting alone the citizen cannot identify himself with the community. The words "electoral" and "élite" are etymologically related. Members of parliament and of other representative bodies are in general more active and more eloquent than those who have elected them. Representatives should not be representative for their electors. In political theory a lot of attention is paid to elections and to the relations between government and parliament. The represented remain in the background and the people stands in the shadow of its elected representatives. Thus the emphasis is laid mainly on the élites which seek to gain the votes of the electors. In this connection, Schumpeter's view has become well-known, who regards democracy as "That institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote" (Capitalism, Socialism and Democracy, p. 269). In this context should be mentioned also the view that political apathy and limited participation should not be considered to be simply negative, because these are the very things that can contribute to the proper functioning and the stability of a democratic political system. This view is supported by research data which imply that it was rather the non-participating citizens who are, generally speaking, less tolerant and more authoritarian than those citizens who do parcicipate actively. The underlying line of argument thus runs that it is precisely the activating of apathetic groups, alienated from the political system, which may easily lead to divisions in the political system or to other disruptions of the political stability (cf. Lipset, Political Man, p. 32-33).

No matter how much this view was directed towards ensuring political stability, it stirred up a lot of uneasiness among political thinkers. If the political life consists mainly of struggles between rival élites and if political apathy has to be rated as something positive, then what remains of the idea that the people, the whole body of citizens, takes part in the government of the "res publica".

In the course of the sixties a marked countercurrent begins to manifest itself, which puts rather a lot more emphasis on participation by the citizens. Finding out the causes of this countercurrent would require a detailed study, which would be beyond the scope of this report. What this countercurrent amounts to is a striving after forms of democracy in which citizens are to be more actively involved in policy-making also in the periods between the elections.

Carol Patemann (Participation and democratic theory, p. 1) has pointed out that this countercurrent was an international phenomenon in the sixties. It could be observed in the United States as well as in several European countries. All the same, in each of the countries involved, the participation movement showed or reflected some stronger or weaker national peculiarities. In the Netherlands, the striving for participation has to be related to the Provo-movement, a movement with strongly anti-hierarchical, semi-anarchist ideas, bent on provocation of the authorities. The Provo-movement was a movement of protest against authority in general and Dutch notabilities in particular. The Provo-movement was a non-violent movement but not quite as peace-loving as the Flower People contemporary with it. Another national characteristic was the formation of a new political party, the Democrats 1966, which made participation one of the major issues of its political manifesto. The formation of this participation party was possible only thanks to the system of proportional representation. The striving after participation has to a certain extent changed or added to the vocabulary of the Dutch language. The two best-known examples are the changes in meaning, from positive to unfavourable, of the word "regent" and the introduction of the word "inspraak" (which means something like the American term "intervention". The word "regent" mostly used to have a historical connotation, referring to the notabilities that ruled the Dutch Republic in the 17th and 18th centuries. Now it came to be used, in a derogatory sense, to refer to present-day notabilities, with the implication that oligarchies still exist. The word "inspraak" denotes the act of making known (or the possibility of making known) one's views to the authorities concerning matters about which they will have to take a decision. Those who express their views want to have a genuine and real say in the matter concerned. They intend to co-decide and co-determine about the situation they live in. So they would not like to draw a sharp line between "inspraak" and co-determination, but even in government publications the line is not always clearly drawn. In addition to "inspraak" and "regent", mention should be made of the phrase "mongid burgerschap" (emancipated citizenship) and the use of the words "horizontal" and "horizontalisation" (in the sense of anti-hierarchical and de-hierarchisation). Interesting to note is also the use of the word "veld" (field) in the sense of all those involved in the same activities or the people living in a certain area who are especially thought to be in need of and entitled to "inspraak".

Political theory and constitutional law are mainly concerned with the highest level of the State structure, that is with the formation of the government, with the relation between government and parliament and with the judicial review of legislative acts. The reflections on participation bear on much humbler matters, such as the convening of a community forum in the context of the preparation of plans in the sphere of physical planning, the "inspraak" of undergraduates as regards teaching methods, the "inspraak" of the inhabitants of an old people's home about the regulations and decisions concerning food, recreation, visitors etc.

In the recently published report of a government commission, democratisation is characterised as anti-alienation. The nation of democratisation as anti-alienation implies that people must have an opportunity of participating in and identifying with the institutions that govern their lives. One may apply this idea of anti-alienation to participation in the decision-making process but also to voluntary work. The citizen who is dissatisfied with the limited influence he can exercise at election time, may find in voluntary work an important opportunity to participate in the community life. In many cases, voluntary work and participation should go hand in hand in the process of decision-making. Quite rightly, the Skeffington report (p. 18) points to the desirability of "involvement by activities".

Representation and participation are two closely related concepts. Participation often takes the form of representation of sectional or group interests. A lot of attention has been paid in the literature on representation to the question whether the elected members of parliament are the representatives of the nation as a whole or of the groups of electors who voted for them, and to the question (which is a related issue, really) of the free or imperative mandate. If one adopts the first point of view, ie that the elected are the representatives of the nation as a whole, then there exists a fundamental gulf between representation and participation. In the second view, the gap is much less marked.

Naturally, this report does not have the intention of re-opening the case of Sieyès versus Rousseau and to embark upon lengthy and detailed theoretical discussions of representation. Nevertheless, the relationship with representation will have to be taken account of time and again. Participation is sometimes directed towards individual members of parliament or towards parliamentary committees. In other forms of participation the question arises how far participation undermines the representative system.

Forms of participation

It is fundamental that information material to the process of decision-making should be made public; this is an essential condition of fruitful participation. Strictly speaking, publication itself however, is not yet a form of participation. It is very closely related to participation, however, in particular when for the very purpose of participation an obligation is created to publish certain documents such as annual reports, policy reports, environmental impact statements etc.

The most common form of participation is that in which the act of making a decision does not take place until the consumers, employees, interested parties etc have been given an opportunity to form and make known their opinions (community forums, public meetings, advisory committees).

The literature of this subject (cf. Stephen Hatch, Towards Participation in Local Services, Introduction) sometimes also mentions as a form of participation the addition of consumers, employees, (parents of) pupils to decision-making bodies. This form is perhaps workable in schools, community service institutions and the like, but it cannot be used with reference to decisions of the central of local government. The Skeffington report (p. 5) states quite properly: "Finally we would emphasise that public involvement at the formative stage in the making of a plan in no way diminishes the responsibility of the elected representatives to make the final decision about the content of a plan".

In a recent White Paper, the Committee of Burgomaster and Aldermen of Breda maintains that "inspraak" should be regarded as a means of exercising influence on the process of decision-making; not as a means of actually co-deciding in the literal sense of the word. This White Paper further states that co-deciding presupposes the sharing of administrative powers, which in our democratic system is as yet still reserved to popularly elected representative bodies. The paper draws a strict line of demarcation between participation and "inspraak". "Inspraak" is a means of exercising influence on the administration without sharing the power of decision. On the other hand, participation does comprise the aspect of co-deciding. In my opinion it would seem advisable to stick to these definitions in future.

The creation of new bodies (such as neighbourhood councils, elected councils of universities or faculties with members drawn from the staff and the students) and the devolution of statutory power to these new bodies are sometimes mentioned as yet another form of participation. Now this may be said to constitute participation in that a greater group of people is involved in the handling of public affairs, but it is not participation by the general public, only by those who are officially elected or appointed.

"Inspraak" in appointments

In the Netherlands, the burgomaster is unquestionably the most important municipal official. He is Chairman of the municipal council and of the Committee of Burgomaster and Aldermen. In the larger municipalities (those of over 25,000 inhabitants) he is the head of the police. According to the written rules, the municipal secretary is an independent official. But in most municipalities the burgomaster exercises a large measure of control over the municipal secretary (and the municipal officers). Therefore, the Dutch municipal secretary can certainly not be bracketed with the British clerk of the council. The burgomaster is appointed by the Crown, that is, the letter of appointment is signed by the Head of State; the nomination is made by

the Home Secretary, who, as the Minister responsible, also countersigns the letter of appointment. The Cabinet Council confers on the nomination for the appointment of burgomasters of the more important municipalities. The nomination for the appointment of a burgomaster is not made until the provincial governor has drawn up a recommendation. Before he draws up his recommendation, he enables the municipal council to express itself concerning the demands to be made of the new burgomaster. The council is not supposed to put forward names. The council should state which requirement the person to be appointed must come up to, for instance somebody who is capable of attracting new industries, or, on the contrary, rather a kind of social worker, who knows how to set about solving conflicts between different sections of the population. Of course, it is possible to draw up a profile in such a way that only one person can come up to the requirements. Municipal councils are often inclined to draw up profiles which ask for the impossible. Here "inspraak" is exercised by the elected municipal council and not by the population in general.

In practice, the significance of this form of "inspraak" is greatly restricted by the convention that the political composition of the total number of burgomasters in the Netherlands should to a greater or lesser extent be in correspondence with the political composition of parliament. Putting this convention into practice naturally entails political patronage. Quite frequently former Cabinet Ministers or sitting members of parliament are appointed burgomasters.

In some local government corporations the employees are granted "inspraak" in the appointment of their colleagues or their superiors. In this way the new clerk to the provincial States of North Brabant was appointed after a very complicated procedure in which a commission having the confidence of the employees was involved. This commission interviewed the applicants and made a recommendation to the executive committee of the provincial States. The responsibility of preparing this appointment was not, of course, entrusted exclusively to this commission. A specially constituted commission of the provincial States likewise had the task of interviewing the applicants and making recommendations to the executive committee.

Conditions of employment of government personnel

In the Netherlands, no collective labour agreements are concluded as regards the conditions of employment of the personnel in the service of the central government or of local authorities. These conditions are determined by orders on council or by regulations of local authorities after due consultation has taken place between the official side and the staff side in councils that strongly resemble the Whitley councils. So the associations of government personnel have a strong form of "inspraak" in the determination of their conditions of employment.

"Inspraak" in environmental matters

The Public Nuisance Act which is at present operative holds that when a request has been made for a permit for premises coming within this Act, anyone has an opportunity to make representations about it. Notice is given of the request for a permit in the manner customary in the municipality and in addition those most immediately involved (the neighbouring owners) are also notified of the request. The competent administrative authority (in general, the Committee of Burgomaster and Aldermen) is not under the obligation to state why it does not take into account any representations made. If the permit is withheld, on the other hand, reasons for the decision have to be given. But those who have made representations may appeal to the Crown against the grant of the permit. (The Crown decides after having heard the "section contentieux" of the Council of State. This corresponds with the "justice retenue" in France before 1872.) The Air Pollution Act, which applies to premises which may cause considerable air pollution, has a similar system. The possibility of making representations about the granting of the permit applied for is not available to "everybody" but to interested parties. In this connection, however, the well-known Section 85 of the Air Pollution Act is of great importance: it implies that an environmental pressure group is regarded as an interested party within the meaning of the Act.

At the end of last year, a draft Bill for general provisions about the environment was introduced into the States General. This draft Bill relates to the granting of permits under a number of Acts on the environment, in particular the Public Nuisance Act, the Air Pollution Act and the Nuclear Energy Act. The Bill is intended to provide a general legal framework for the granting of permits, which will ultimately replace the several provisions about the granting of permits in the separate Acts. The most important elements of the Bill are now summarised briefly here. The request for a permit will be made public as soon as possible, for instance in the daily newspapers. If the request relates to premises or works, the occupants of buildings in the immediate neighbourhood will be notified of the request. The request is deposited for public inspection, as are the enclosed documents, reports and recommendations submitted. Documents and recommendations that are submitted later may be deposited as yet. The documents may be inspected for the period of a month during working hours (but also for three consecutive hours per week outside working hours).

For the length of the period of deposit everybody can make representations in writing about the permit applied for. It is also possible to put forward objections at a public hearing where the application for the permit will come up for discussion. As soon as possible after the expiration of the term of deposit, the authorities concerned make a draft for a decision about the application. This draft is forwarded to everyone who has raised objections to the application. The draft decision is also deposited for public inspection for a period of two weeks. During this period those who made representations at an earlier stage can raise objections to the draft decision. The final decision is made as soon as possible. In the final decision, mention is made of the consideration given to objections raised at the first and second stage (the application stage and the draft decision stage respectively).

The final decision is sent to all those who have made representations; they also have the possibility of appeal (to the Crown), if they disagree with the final decision made.

"Inspraak" in physical planning

In the Netherlands, anyone who wishes to build a house or any other kind of building needs permission from the Committee of Burgomaster and Aldermen. The request for a building licence is turned down if the projected house or building conflicts with a development plan. A development plan indicates for which purposes the land involved in the plan is designated. As a rule, a number of regulations concerning the use of the land covered by the plan and the use of the buildings on it are attached to the development plan. The plan looks like a map on which colours, letters or figures mark out which parts of the "planned" area may be used for which purposes (for instance, land zoned for housing estates, trade and industry, agricultural use, recreation, traffic, preservation of natural scenery etc). As for the regulations attached to the development plan, these might include, for instance, a ban on storing car wreckages or other refuse, a ban on pursuing a trade in a dwelling and so forth. The procedure for the passage of a development plan is exceptionally complicated. The procedure begins with the preparation of a draft proposal by (or rather under the direction of) the burgomaster and aldermen. They are obliged to make a survey of a number of factors, which are important for and relevant to physical planning (in particular, the population statistics, employment figures etc). In the explanatory memorandum attached to the draft plan the results of this survey and research with which the burgomaster and aldermen have been charged, are laid down. The draft plan is placed on deposit for public inspection at the municipal hall for the period of a month. An announcement of this deposit is made in the local daily newspapers or those circulating in the area. Additionally, this deposit for public inspection is also announced "in the usual way", ie by posting at the town hall itself. During the term of deposit everyone can make representations about the draft plan. Within three months of the period of deposit the municipal council comes to a decision about the definitive version of the plan. If representations have been made, the council ought to state clearly why these have not

been followed. The plan now needs the approval of the provincial executive committee. Everyone who has put forward objections at the previous stage can now apply to the provincial executive committee and request it to withhold assent. The provincial council is legally bound to state expressly, if it decides to give its assent, why it rejects the representations made. Subsequently, they who made representations to the provincial executive committee can now bring an appeal to the Crown (the "section contentieux" of the Council of State) against the assent of the provincial executive committee. An almost completely judicial procedure governs the appeal before the "section contentieux". Appellants have the right to inspect documents and may call up witnesses and experts. The whole procedure is sometimes referred to as a "three-stage rocket" procedure in administrative law.

Although the provisions pertaining to the realisation of a local development plan may include just about everything Dutch administrative law has to offer, nobody is satisfied with it. The local authorities feel that the whole procedure takes too long. From the deposition up to the decision made by the Crown, the whole procedure may take as long as three years (or more). The citizens who make representations feel that they cannot really participate in the process of decision-making. Nor is it very likely that planning officers and experts, who have been involved in the preparation of a plan for many years, can adopt a sufficiently detached point of view as regards their plan so as to be fair and objective judges of representations made about the general objective of their plan. It goes without saying that the objective of the draft proposal is the criterion for judging objections of a more general nature is scarcely possible after the deposition. In 1970, the Advisory Council on Physical Planning gave advice on the consultation of the population as regards the shaping of physical planning. In this advice, a rough sketch is suggested of criteria underlying a programming phase and a proposal phase, both of which should precede the actual legal procedure. In the programming phase, facts and data should be assembled relevant to the process of decision-making. Next the potential policies are examined and possible alternatives are taken into consideration. The municipal council makes its final choice from the alternatives. The intention is for the population to join in thinking about and discussing the choices available. Naturally, this presupposes the publication of a statement of choices. In the proposal phase, the programme is elaborated at greater length in sketch form of alternative plans. These are submitted for discussion to the population. Finally, the municipal council makes a choice, having considered and tested what the population has put forward. Not until then does the official legal procedure begin. The rough sketch of criteria concerning "inspraak" is not meant to be a generally applicable model. It is not impossible that some parts of the sketch plan are telescoped. The Advisory Council's sketch was very general and will have to be tested in actual practice. As yet no legal regulations have been made as regards "inspraak" in physical planning. Nor has any Bill to that effect yet been placed before parliament.

In a circular of 1971, the Minister of Public Housing and Physical Planning stated that he concurred in full with the opinion of the Advisory Council that "inspraak" is a social technique which necessitates the framing of "rules of the game". To that end, further experiments with "inspraak" should be carried out. "Inspraak" is now a matter for the municipal councils. To a very considerable degree what "inspraak" will amount to in practice depends on their ingenuity and activity. The manner in which "inspraak" is in practice realised differs from one municipality to another. In several municipalities, burgomaster and aldermen have produced a White Paper on participation.

Several of these White Papers are extensive and elaborate reflections based on sociological research and legal study. Roughly speaking, there are three forms of "inspraak". One form is that of "inspraak" by means of public hearings at which everybody may speak and put forward his objections to a proposed plan. Although it could serve some purpose for an alderman to be exposed to the grievances and wishes of the common people, it is generally felt that the sum total of the grievances and wishes expressed in this way does not constitute a general, ie sufficiently representative, view of the plan under discussion. Consequently, a second opinion

holds that in order to channel "inspraak" an advisory council should be set up. This advisory council should, in its very composition, be representative of all sections of the population. In this way, the voice of the local population as a whole might be heard, not only that of an accidental audience at a public meeting. Should one hold the view that these public meetings ought not to be dispensed with altogether, then the duty to organise these meetings could be entrusted to this advisory council.

A third opinion holds that little purpose would be served in letting people merely voice their grievances and wishes. Instead, they should be set to the task of weighing the pros and cons of the various grievances and wishes. They ought to find out for themselves what is possible and what is not, which wishes are conflicting or mutually exclusive, which wishes could be combined or co-ordinated. Discussion groups should be set up in which people make their own plans. In this way, several plans are drawn up and submitted, after which a co-ordinating committee writes a general report on the basis of these plans. This report should not be a new plan but it should marshal and summarise the ideas produced by this do-it-yourself planning. Of course, this report cannot have a binding effect with respect to the local (municipal) council, but it can make its influence felt. This method has been thought out and elaborated by the Werkgroep 2000 (Working Group 2000), a non-profit organisation which has contracted with several municipalities to organise and to guide participation in the working out of a local development plan.

General planning decisions by the central government

Although no legal regulations have been laid down in this matter, an "inspraak" procedure has been operative for some years as regards general planning decisions by the central government ("planologische kernbeslissingen"). By these are meant mainly decisions about and standpoints concerning the main outlines of national physical planning.

The procedure concerning these general planning decisions by the central government may be sketched in broad outline as follows: the Council of Ministers decides whether the procedure for these general planning decisions is going to be set in motion. Next, interdepartmental consultations take place into which are also drawn the local authorities. On the basis of documents drawn up in these consultations, the Council of Ministers comes to a preliminary decision. This decision is published. This is done by means of advertisements in the public press. Everyone may express his opinion about the preliminary decision. The results of this "inspraak" are made public. The Advisory Council on Physical Planning and other advisory bodies involved also give their thoughts on the matter. If it is deemed necessary, a public hearing is held. The recommendations which are made in the "inspraak" are available to the public. The Second Chamber is notified of the decision the government has come to after the "inspraak". This decision will not come into effect until a period of six months has elapsed after this notification, unless the Second Chamber has decided earlier not to act upon this statement on the part of the government.

The Second Chamber has, at least in theory, the possibility of trying to prevail upon the government to go back on its decision or to amend it. It is not quite clear what the legal status of these general planning decisions is. They are not laws. Nor are they administrative decisions. The general planning decisions do, however, lay down directions in which future individual decisions will have to fit in, for instance licences or permits. One of the issues as regards which the procedure of these general planning decisions is being applied is the development of the Waddensea (an area of mud-flats between the north-eastern coast of the Netherlands and the string of islands north of the mainland). The government published a White Paper on the main lines of development of the Waddensea in May 1976. This White Paper comprises the policy proposals concerning the Waddensea. The preservation of the Waddensea is the aim the government tries to achieve, but the government admit that activities prejudicial to this objective cannot be stopped without due consideration. The White Paper gives an indication of how far these prejudicial activities can be continued (or extended). As far as military activities

are concerned, the White Paper states that a policy will be pursued of trying to find alternative training grounds. Till then the activities will have to be stabilised and contained. Recently (16 May 1977), the main outlines of the "inspraak" as regards the Waddensea were published. All in all, 406 reactions were received. Trade and industry provided some 70 reactions, whereas about a quarter of the reactions came from pressure groups. Plenty of criticism was levelled at the vagueness of the governmental White Paper on the subject of allowing activities harmful or prejudicial to the environment. It is apparent that "inspraak" is taken part in by sharply opposed individuals or groups. Some reactions (intervenors) go so far as to advocate restoration (rather than preservation) of the sea as a nature reserve. Another reaction insists upon the necessity of accepting the sacrifice - to some extent - of the natural environment in favour of the industrial development of the Emsharbour and Delfzijl.

The government White Paper had already stated that the Rhine is one of the greatest polluters of the Waddensea. Many reactions (intervenors) fully concur with this, but they point out that the government does not announce measures to counteract or decrease this pollution. This poses a crucial problem: the general planning decision by the central government has reference to a definite, more or less clearly defined subject, but in environmental matters many things are interrelated. Anyone speaking about the preservation of the Waddensea as a nature reserve cannot ignore the pollution cause- by the Rhine. Anyone who wishes to put a check on the development and use of industrial and harbour areas ought also to give some thought to employment in other parts of the country. The government will now have to make a policy decision soon.

Some tentative conclusions

1. This conference is concerned with public participation, but use of the possibility to participate is made not only by members of the public but also and especially by organisations. Sometimes, the possibility of participation is open only to organisations or public bodies (Whitley councils, municipal councils with regard to the appointment of burgomasters). The Air Pollution Act offers more opportunity to participate to organisations than to members of the general public.

2. Participation serves to supplement representative democracy but cannot be a substitute for it. Participation procedures are the entry lanes into the highway of representation. This seems a nice legal point of view but Samuel H Beer (Modern British Politics, p. 319) speaks of a "persistent corporatism" with reference to the notion that interest groups have a right to share in policy-making. Participation by organisations may also imply that the authorities consult with and come to gentlemen's agreements with powerful social partners with the result that no one knows any longer what has become of the national sovereignty. Generally speaking, organisations are more (and in a better way) capable of participating than members of the public (they possess greater access to information and have a greater capacity for expressing themselves in writing).

3. Participation makes it possible for individuals and for groups to bring their problems, wants and needs to the notice of the authorities. To this extent, participation is related to petitions, demonstrations and acts of civil disobedience which also aim at drawing the attention of the authorities. One could also make a connection between participation and sociological research conducted on the instructions of the authorities. These inquiries aim at adding to the insight of the authorities into the needs of society, but the initiative is taken by the authorities. In the point of view of some authorities, participation, too, is a communication technique at the disposal of the authorities. Seen in this way, participation is just an improved form of social research, the responsibility for which rests with the administration. Participation can be understood as a means of domesticating protest movements. Protests can be absorbed by "inspraak". Therefore, participation is a highly controversial subject for this point of view as held by some authorities is sharply opposed to the view that participation is closely related to petitions and demonstrations.

4. In several cases, participation is a form of interest representation. Participation can be a competitor of the representation of representative government. This competition can be healthy, but the sometimes defended opinion that participation is a matter between the Committee of Burgomaster and Aldermen and the local population seems dangerous for the position of the municipal council. In countries like the Netherlands or Belgium where there is one powerful executive committee, this danger seems to be greater than in the committee system of British local government.

5. Rules concerning participation in the preparatory stages of the process of making decisions cannot be maintained in any other way but by means of review of the decision made. This review will have to be carried out by authorities other than those who made the original decision (eg by higher administrative authorities, by judicial authorities, by the councils of local government corporations). In the Netherlands this review will, generally speaking, have to be done by the Crown (as for the central planning decisions by the central government the Second Chamber of the States General). So far, the Crown has not yet developed any clear procedure for this review. Of considerable importance seems to be the example of the "adequate consideration requirement" taken from American administrative law (Richard Stweart, The Reformation of American Administrative Law, Harvard Law Review, 1975, 88, pp. 1781). In Europe these criteria will have to be evolved from the principles of natural justice ("principes généraux de droit administratif").

6. The authorities who carry out this review do not arrive at a decision independently. They are asked by intervenors to give a decision. The realisation of participation depends therefore to a high degree on the law of standing. Dutch law offers ample opportunities to "ideological plaintiffs" to influence decisions on the basis of provisions which entitle everybody to intervene and to appeal to the Crown. People who want to have "inspraak", tend to form groups and associations. So, in practice the problem of standing relates especially to these groups and associations.

Participation in the management of social and educational institutions

Report by

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The subject of this report is first and foremost some legal problems concerning public participation in the management of certain public institutions, shortly indicated as "democracy of public institutions". Main stress is laid on an analysis of some legal aspects of participation in this field. According to this purpose I have not made any attempt to give a detailed description of different arrangements on public participation in the management of public institutions. I shall confine myself to the presentation of a few present arrangements in Denmark as the basis of the analysis. Before taking up the issue of public institutions (see below V-VIII) I have found it useful to place the problems of participation in this specific area into perspective by dealing more generally with questions of public participation in legislative and administrative procedures (see below I-IV).

I. THE SUBJECT IN GENERAL

It seems appropriate to take some fundamental features of the government systems of the Western European countries as a starting point. The government system of all those nations is one of representative democracy, where the legislative power - normally with few exceptions - is in the hands of parliaments elected by the people for a period of typically three to five years. In all the Western European countries some kind of local government can be found. Municipal councils elected by the local population administer Acts of parliament, and within certain limits they also have the power to establish several kinds of services on their own initiative. Local government is often found at several levels (eg district and county level), and in federal States the system is more complicated. Another important characteristic of the Western European democracies is the guarantee of several basic civil rights and liberties or "human rights", in most countries based on provisions in their constitutions. Among these rights and liberties are the freedom of speech and in connection with this right the public enjoys a differently organised and extended access to information about the work of legislative and administrative authorities.

A government on these lines ensures in itself essential possibilities for participation. A debate on this kind of participation is, however, not what is aimed at. Nor will the increased degree of participation by the transfer of duties from central agencies to municipal councils be taken into account. The subject of this paper is only public participation in legislative and administrative procedures beyond what is implied in the indicated features of government. Some kinds of participation outside the traditional system of government are deeply rooted, above all the rules relating to referendum in some of the States involved, but many forms of public participation are rather new. Especially in recent decades constantly growing demands for better possibilities for public participation have been put forward by many groups within society and have thus resulted in new legislation.

The subject is comprehensive and difficult to survey, because arrangements on participation have been established in different areas and in various forms. I have set up the following three simple minimum conditions which the phenomenon "public participation" must fulfil:

1. The arrangement must imply a possibility for the public to influence the result of the procedure. In the one extreme and the public decides the issue (eg by a decisive referendum) and in the other the influence is limited to giving opinions

which have to be taken into account (eg ordinary planning procedures). Public authorities giving information cannot reasonably be described as "participation", unless the arrangement also comprises a right for the public actively to exercise influence by other means than writing articles in newspapers and the like.

2. Participation must be open for the "public" and not only for one or a few individuals who will be specially affected by the decision in question. This condition is obviously fulfilled where the whole population of the country, the district or a minor geographical area is involved in the procedure, but I will also include cases where members of a larger group are entitled to influence the decision, even if they are not significantly affected individually (eg parents' participation in the management of schools). On the other hand, participation by civil servants is generally not considered to be within the subject, but rules relating to this question will be dealt with, where they are important to understand the arrangement on participation by the public, see below V-VIII. Whether the influence can be exercised directly by members of the public or indirectly through elected representatives is not important in this connection.

3. The arrangement must be formally and permanently organised according to rules. Participation by spontaneous protests or a specific procedure agreed upon in the individual case is outside the scope of this report, however great their practical importance may be. This limitation is among other things due to the legal character of the present investigation.

II. DIFFERENT FORMS OF PUBLIC PARTICIPATION

A. Criteria for a legal classification

When "mapping" the different forms of public participation a lot of criteria are relevant. Some of the most important should be pointed out.

1. The legislative and administrative level of public participation. A rough distinction can be made between participation at national, regional, municipal and other levels. The latter group covers first and foremost participation in the administration of minor parts of a municipal district, eg the area affected by a town plan or a school district. It is reasonable to emphasise this group, since the most vivid endeavours to establish arrangements on participation are linked with that group.

2. The legal influence by public participation. It is especially important to distinguish between decisive and consultative participation, but often the two categories are mixed. Traditionally, the first one is well-known from rules on referendum. Decisive participation may, however, also turn up in the form of boards with representatives from affected groups, the management of institutions and delegation of power to an association of landowners, eg to grant exemptions from town plans.

3. Direct or representative participation. Generally, it is most common for a system of representative participation to be set up, and even where the starting point of the law is direct participation the public influence will often in practice be canalised through representatives. An example of this can be found in the field of town planning, where the thoroughly prepared opinions frequently emanate from boards of different associations.

4. The initiative to participate can be taken either by the public or by the authorities, here including a minority of parliament or of a municipal council. Here again a simple distinction - an "either/or" - cannot be made. The more extensive the obligation for the authorities to give information, to set up alternative solutions, to encourage debate and to assist groups and individuals in working our proposals, the closer the system of in principle private initiative come to an arrangement based on the initiative of the public authorities.

5. General or special participation. By general participation reference is made to systems where the public can come in on a broad scale of issues. As examples can be mentioned an arrangement of general ballots among the population in a district and the establishment of local committees, which have the power to decide on for instance building legislation, social services and schools. Such systems form a contrast to public participation in procedures in specific fields like town planning and primary schools.

6. Permanent or occasional participation. Some systems restrict public participation to rare cases, eg depending upon the initiative of a minority in parliament or of a group of citizens, while according to other arrangements the public is involved in the current administration of certain local services, eg through representatives in a school board, see below V.B.1.

B. Typical forms of participation

Based on the indicated criteria it is possible to make a detailed classification of different forms of public participation, already known or under debate. For the purpose of this report a less ambitious description will do, however. In my opinion, it is possible to draw up a few broad categories which will cover practically all forms of public participation.

1. General ballots, eg in the form of a referendum or a ballot among the population in a municipal district.

2. Representatives of the public in boards whose duty is to participate in issuing regulations or deciding individual cases.

3. Planning procedures. It is characteristic for this category that a draft plan or a project is published, and that the public is entitled - in varying forms - to express opinions within a certain time limit and that the authority in question has to deal with these opinions. "Planning" is here taken in a wide sense, thus covering procedures dealing with the future use of real property, whether the rules concerned are to be found in the general planning legislation or in for instance legislation on environmental protection or nature conservation.

4. Local committees representing the population of smaller parts of a municipal district and undertaking a series of different tasks under some kind of supervision by the district council. These committees could be described as "mini-district councils", since they can be considered to be local government at the level beneath the ordinary bottom division into districts.

5. Participation in the management of public institutions with the duty to perform various kinds of services, eg educational and social facilities.

6. Delegation of powers from municipal councils to private associations such as sporting associations and associations of landowners.

In the last decade special interest has been paid to groups (3) and (5). Most of the public debate is dealing with planning procedures and "democracy of institutions", and several new arrangements have been established in these fields. There are two main reasons for this, apart from the fact that these forms of participation so far have not been very well developed. Above all, the issues concerned are felt relatively present and palpable for groups of individuals which means that it is easier to engage the public than in broader more abstract areas. The administration affects the everyday life of people in a rather perceptible way. As regards planning procedures it has also been of importance that the last years have shown a vivid general debate on environmental matters. Secondly, it should be noted that these forms of participation could be adapted to the general system of government with generally less detrimental effects to this than eg (1) and (4).

Public participation in planning procedures - the question will be examined in more detail in another report - has been known for quite a period in Denmark since the end of the thirties. However, the scope of these procedures has changed significantly. Efforts are being made to involve the public at the earliest possible stage, especially by splitting up the procedure into several parts. Furthermore, increasing efforts have been made to impose a duty on the authorities concerned to encourage a public debate and to assist the individual and groups in their participation. The problems of "democracy of public institutions", which have been sharply articulated in the last decade, are dealt with below in V-VIII.

III. SOME IDEAS BEHIND ARRANGEMENTS ON PUBLIC PARTICIPATION

I do not consider it my job to explain historically why different systems of public participation have been set up. The causes are many and varying, and their interrelations are difficult to point out with some kind of accuracy. Nevertheless, it seems useful for an analysis of the legal problems concerning public participation to bear in mind the main ideas behind the phenomenon in practice, even if it is not possible exactly to indicate their relative importance. And the main ideas are rather close at hand. I shall start by mentioning four ideas clearly connected with traditional political theory of democracy and finally describe some considerations of administrative expediency, which have also had a considerable influence.

1. The idea of direct democracy. The best decisions on public issues are taken by the people themselves. Of course, it is necessary to accept that in a society of some complexity the vast majority of social issues must be decided upon by representatives of the people, but the representative government system is only based on technical necessity. This means that where it is possible in practice the right thing to do is to let the people or groups of the people decide or to establish a system, which comes as close as possible to that ideal. Clearly, no arrangement on participation is based solely or essentially on old theorites of direct democracy, but on the other hand it is obvious that the ideas of Rousseau have had a renaissance in several politically active groups.

2. Civic education to democracy. Even if it is recognised that a representative system has a value in itself and is not just a technical necessity, participation - direct as well as representative - can be seen as an advantage. More people may get involved in decision-making and obtain knowledge and experience to the benefit of their participation in representative systems at higher levels. Participation consolidates the representative government system. According to this starting point, however, participation must be restricted to lower levels and is not allowed seriously to infringe upon the power of the basic elements of the representative system, parliament and municipal councils. This way of thinking is rooted in traditional theory of democracy, see for instance, John Stuart Mill, Principles of Political Economy, 1900, p. 607 ff.

3. Protection of individual interests and freedom. Public participation - or the possibility of public participation - implies a means to control the exercise of power and to avoid arbitrary decisions. Participation is a guarantee of the rights of the individual. A recent application of this old idea can be found in the Danish Statute on Municipal Planning of 1975, where a comprehensive system of participation is seen partly as an alternative to the right to appeal planning decisions to a central agency according to the previous Act of planning.

4. Stabilisation by pacifying. A lot of groups demand ardently public participation, often perhaps with the implicit and unconscious purpose to increase the influence of their own group. If these requests are not complied with, the result is likely to be protest movements and more or less violent actions. The establishment of procedures for public participation may be a means to preserve the stability of a representative democratic government. Members of the active group will feel more satisfied and their activities will be canalised into the system without damaging it. Public participation is not seen as a means to get better

decisions, neither directly nor indirectly, but serves as a method of "pacifying" the public - to express the point in plain language. No politician would argue in such an unconcealed way, but it can hardly be rejected that ideas of this kind have had some influence on, for instance, new rules on the management of universities. It should be pointed out, too, that there are threads between this approach to participation and theories on democracy of eg Joseph Schrumpeter, B R Berelson and S M Lipset with their concern of democracy as an "institutional arrangement" and of the conditions for maintaining a stable system of government. (See especially Lipset, Political Man, 1960, p. 32 f.: "A principal problem for a theory of democratic systems is: under what conditions can society have 'sufficient' participation to maintain the democratic system without introducing sources of cleavage which will undermine the cohesion?")

5. Technocratic considerations. All the above-mentioned ideas have as a starting point the concern for different aspects of a democratic system of government. There are, however, also important groups which advocate public participation as an adequate element of a well-functioning system of government, whatever the basis of this may be. Participation is expedient from an administrative point of view. It will bring about useful information and ideas as for the solution of social problems, it will increase the understanding of the decisions of the authorities which facilitates the carrying-out of different measures, and it implies possibilities of supervision and control of the activity of the executive. Public participation may also speed up the decision-making by the authorities, eg as regards the setting up of aims for planning. Of course, the change-over between this way of arguing and the above-mentioned ideas is smooth.

IV. PRIME MOVERS IN A DEVELOPMENT

Evidently, the interest in public participation has increased since the beginning of the sixties and especially in the seventies. Why is that so? The ideas dealt with above are in principle valid and relevant without regard to time, so other explanations must be sought. A lot of factors could be pointed out, but I shall confine myself to what I consider to be the three main prime movers in the development. The first one is concerned with the tasks of the authorities, the second one with an attitude among people and the third one with changes in the structure of government.

1. It is a trivial observation that society is becoming increasingly complex. In all Western European democracies this has been reflected in or is the result of a comprehensive increase in public control and services. Seen from the point of view of the individual the activity of the authorities has become a much more pronounced part of everyday life than previously, and at the same time the public sector is often felt to be incalculable and impenetrable. The feeling of a gap to the persons who take the decisions is intensified by the tendency towards concentration in industry. Seen from the angle of the authorities there is an increasing need for mutual co-operation with the public and different groups of society, because the number of decisions is multiplied, the decisions are made for longer periods, and more aspects have to be taken into account, see above III.5.

2. Especially the last decade has shown an important change in the general attitude to authority. Today, people - and above all young people - are less inclined than they were earlier to accept decisions affecting their affairs made by others. An explanation - but not the only one - can be found in what I should call "the dynamics of democracy". If a country has got a democratic, elected parliament and municipal councils, it is difficult in the long run for people to understand why their participation should stop here. What is so brilliant about democracy, if the influence of the people is restricted to ordinary elections? If all the decisions of society which affect the individual most are taken by others without the slightest participation of the people concerned. In the legitimation of democracy there are strong reasons for a continuous enlargement of the area for a participatory (-democratic) procedure. In the long run, a democratic government does not fit well into a society with authoritarian schools, authoritarian places of work and authoritarian administrative agencies.

3. In most of the countries the municipal districts have been enlarged considerably and the character of local government thereby changed. Denmark is a rather radical example of this development. In the early sixties we had about 1,300 municipal districts, but in 1970 - at the end of a reform period - the number was cut down to 277, and the smaller districts have 6-7,000 inhabitants. Many of the old municipalities were too small to carry out local tasks in a modern society. Furthermore, the division into districts was often inadequate because a town area was split up into several districts. To preserve and extend local government as an important element in public administration a reform was necessary. The maintenance of public participation through local government had its price, however. The personal relationship between the members of district councils and the population has been weakened a lot, and the increased number of civil servants in local government has changed the administration to be like administration of State agencies. The old idea of local government as administration by the population itself through its representatives has become rather thin, and the demand for public participation has increased.

V. DEMOCRACY OF PUBLIC INSTITUTIONS

Distinctive features of this form of public participation

A. The subject - delimitation and distinctive features

The following parts of this report deal with public participation in the management of public institutions. By "institutions: reference is here only made to institutions the task of which is to offer personal services to groups of citizens, called "clients". The exposition is, furthermore, restricted to cases where the clients receive some kind of treatment or care - contrary to, for instance, the lending of books and the offering of advice - and where the client is in contact with the institution for a longer period. As part of their duties, the institutions will make decisions regarding the affairs of the clients, but the essence of the function of the constant offering of services. The institutions being "public" cover institutions owned by the State or the municipalities as well as private institutions under intensive control by the authorities, if they are offering the described kind of services.

The problems of public participation are in several respects somewhat special within this field of public administration. This is first and foremost due to the fact that two different groups - the employees and the clients - demand the right to participate in the management.

The composition of the staff of employees is varying much and so is their number compared with the number of clients. However, the total number of civil servants in the institutions is great and in comparison with the staff occupied by issuing regulations, orders, prohibitions and carrying out legal directives the number of employees in the institutions is much higher seen in relation to the number of people directly affected by their activity. The work of the staff in the institutions is more similar to the work in different kinds of private firms than the functions of employees in, for instance, a ministry or an agency. It is further characteristic for a large number of civil servants in the institutions that they should have a good deal of independence in their jobs. This applies for instance to teachers in primary schools. No matter how much the principal may be their superior from a legal point of view, there are in practice relatively narrow limits for his supervision. Finally, it should be mentioned that the objections against participation by the employees are less pronounced here than when public regulation is concerned because typically, the general system of government will not be affected as much. Seen from the angle of political leadership the work of civil servants in the institutions will mainly be details in the carrying out of legislation, something which is of minor interest or which cannot be controlled.

The clients too could find good reasons for their participation. They make rather well-defined groups in relation to the kind of institutions dealt with here, and their position towards the institution is basically equal. The activity of the institution plays an important role in their life or the life of somebody for whom they are responsible. Among the clients the long attachment to the institution implies also a feeling of cohesion with the institution which is an important condition for participation in the management. As stated above participation does not necessarily affect very much the political leadership of the executive. This applies to participation by clients as well as participation by employees.

There are other distinctive features of the problem of participation in this feature. The participation by clients will practically always be carried out through elected representatives and the participation by the employees is as a main rule also representative. Associations may be important in the participatory system, but generally associations play a minor role than in, for instance, planning procedures.

B. Three typical arrangements on "democracy of institutions"

It would hardly serve any purpose to enumerate and describe all known and debated forms of public participation in the management of the kind of institutions I have in mind in this paper. I shall confine myself to characterising the main lines of the present Danish arrangements on public participation in three fields: primary schools, universities and social institutions. These areas have been chosen because they contain the most developed arrangements on public participation and because they show sufficient similarities and differences to form the basis of an analysis.

1. Primary schools

The Danish primary schools are based on two statutes. The Primary School Act (No. 313 of 26 June 1975) lays down rules on - among other things - the aims of primary schools, subjects for teaching, number of lessons, examinations and compulsory education. This statute sets up a framework concerning the activities of primary schools, but it leaves quite a margin for the municipal authorities, which run the primary schools, to issue supplementary rules. Provisions on the government of primary schools as well known as some other schools are to be found in the School Government Act (No. 44 of 9 February 1970 with later amendments). Most of the rules relevant for the following exposition are contained in this statute.

A simple graphic illustration of the organisation of the municipal primary school service is attached as Appendix A. As shown by this the organisation is split up into two levels, the municipal level and the level of the individual school. I will take the last one as my starting point.

At every school there is a principal appointed by the district council. According to the statute, he is the administrative and pedagogical leader of the institution. It is not quite clear what is implied in his pedagogical leadership. He has a duty and a right to supervise the teaching and it must be assumed that he also has the power to issue instructions although restricted by the traditional freedom for the individual teacher to choose his teaching methods.

Two councils are also attached to a primary school, the council of teachers and the school board. The council of teachers consists of all the teachers, including the principal. The council elects its own chairman. It has some power to make binding decisions, for instance concerning the ordering of special teaching for pupils who for different reasons have difficulties in keeping pace with the ordinary teaching. This competence is however very limited. The main task of the council of teachers is to give recommendations and opinions and the statute indicates a number of issues on which the council has to be heard.

The school board has five members normally. Four of them are elected for a period of four years by and among persons who at election time have custody to a child at the school. A father or mother who has no custody of a child is not entitled to vote. The elections are held shortly after the general municipal elections. The fifth member of the board is appointed by the district council among its members for the same period as the other members. The board elects its own chairman and this decision cannot be revoked during the election period of four years, unless the chairman resigns and a majority of the council accept his resignation.

The parents' members are elected by the method of proportional representations. The voters have to choose between different lists of candidates, but often there is not but one list. The lists are made on varying bases, and it is rare for a list to be linked to a formal association, for instance a political party. The poll is relatively small, generally between 10 and 30 per cent of the people entitled to vote.

The meetings of the school board are attended by the principal, the chairman of the teachers' council and two representatives of the pupils, if a pupil council is established at the school. Observers are entitled to participate in the discussions, but not to vote. As regards the chairman of the council of teachers, it is laid down that he cannot attend deliberations on recommendations concerning appointments of teachers and principals. The pupil representatives are not allowed to attend any negotiations on individual pupils or teachers.

The school board has a large number of duties. First, it has the power to decide several issues. The school board approves for each year the distribution of subjects among the teachers and a timetable regarding the lessons. The application of new teaching materials requires a permission from the board and it decides how the parts of the municipal budget attached to the individual school should be spent. In most of these cases the decision has to be made on, among other things, a recommendation from the council of teachers. Secondly, the school board has the right to give its opinion on a number of issues before they are decided by others, especially the school commission. This applies to the municipal budget regarding the school and the teaching plan which within the framework of the statute lays down rules on, for instance, subjects and a number of lessons. The appointments are formally made by the district council at the recommendation of the school commission, but the school board has to give its opinion on teachers who apply for an appointment at the particular school and in practice the commission will normally comply with the recommendations of the board. Thirdly, the board has a duty to supervise the activities at the school, among other things to see to it that the provisions of the legislation are complied with. If this should not be the case according to the opinion of the board it has no power to follow up its position by issuing instructions, but it has the possibility to present its points of view to the municipal authorities if the issue cannot be settled through negotiations. Fourthly, the school board is entitled to take initiatives as regards the affairs of the school. These initiatives may concern, for instance, the improvement of the facilities at the school and precautionary measures regarding the school road. In practice, most of the initiatives deal with the communication between school and parents, and the board is obliged to establish some kind of information service aiming at an improvement of the understanding of the parents as regards the position of their children in the school.

The impression from reading the provisions of the statute is undoubtedly that the school board has comprehensive powers. In practice, these powers are more limited however. Often the competence of the board is limited by rules issued by the municipal authorities, for instance as regards budget matters, the municipal authorities are frequently reluctant to accept specific arrangements for the individual school and the board is to a large extent dependent upon the advice given by the teachers.

According to the School Government Act, the pupils have the right to elect pupil councils and such committees are established at most schools. The pupil councils have no formal powers except for the right to appoint two observers to the school board. It should be added, however, that the pupils are entitled to participate in decisions concerning the individual class. A new provision in the Primary School Act stipulates that the more detailed planning and preparation of the teaching - including choice of subjects and teaching methods - should to the greatest possible extent be made in co-operation between the teacher and the pupils.

At the municipal level, you have three administrative agencies: the school commission, the common council of teachers and the district council. The school commission consists normally of 11 members. Six of them are elected by the district council - often but not necessarily among its members - and five by and among the parents' members of the school boards. All the elections are made for a four-year period. The top civil servant of the municipal school service - the school director - and the chairman of the common council of teachers are attending the meetings of the commission as observers. The commission has a duty to supervise the work of the schools, to decide a number of issues, for instance regarding special teaching for pupils who cannot keep pace with the ordinary teaching, to prepare teaching plans for the various schools and to make recommendations to the district council on a lot of issues.

The common council of teachers consists of a principal, a deputy principal and one teacher from every school in the district. All these elections are made for one year. The council has only advisory tasks, but it is entitled and obliged to give its opinion on a number of issues indicated in the statute.

All tasks not specifically attached to the above-mentioned authorities come within the province of the district council. Among other things it decides the division into school districts, the teaching plans, the budget - totally and as regards the individual school - and the appointment of teachers. Except for questions concerning the financial resources most of the issues are in practice settled by the commission and the approval of the district council is often but a formality.

There are some arrangements regarding central and regional control of the municipal school service. These are, however, considered to be outside the scope of this report.

2. The universities

The traditional government by professors was radically changed by the University Government Act of 1970 (No. 271 of 4 June 1970). The principles of this statute have in most important aspects been retained by the present University Government Act of 1973 (No. 362 of 13 June 1973) which extended the field of application to comprise institutes of higher education other than what is formally indicated as "universities". The following description is, however, only written with the universities in view.

As for universities, it is necessary to distinguish between at least three levels of administration: the university level, the faculty level and the institute level. Each university is divided into five faculties: the humanities, natural sciences, medical sciences, social sciences and theology. It is possible to subdivide a faculty into different groups according to subject; the faculty of social science, for instance, into law, political science, economics and sociology, and to establish special councils for each of these groups. To keep the model simple, I shall leave this possibility out of consideration in the following, see the attached graphic illustration of the governing system of the universities, Appendix B.

I have found it appropriate to start the description at the faculty level. For each faculty, a faculty council is set up. The number of members is varying and stipulated in rules regarding that particular university, but the principles of the composition is laid down in the statute. Half of the faculty council is elected by and among the university teachers. Most of them are full-time teachers elected for three years but part-time teachers are entitled to appoint at least one representative for one year at a time. The technical administrative staff elects a representation for three years, the number of which is corresponding to half the number of teachers in the council. Finally, the students elect half as many members as the teachers for a period of one year. The council appoints for one year at a time its own chairman, the dean, among the full-time teachers.

The members of the different groups are elected by the method of proportional representation. Especially as regards students' representation, several lists are usual and each list is normally supported by a student organisation.

The faculty councils are responsible for the activities of the faculty in general. Exemption is made only concerning the specific powers of the study boards. Among the tasks of the faculty council can be mentioned the distribution of appropriations among the institutes, appointment and discharge of full-time teachers and part-time lecturers, and the conferring of academic degrees. Decisions on appointments of teachers and the conferring of degrees can, however, only be made on the basis of recommendations of ad hoc expert committees, and rejection of such a recommendation requires a qualified majority of the council.

A study board is established for each university study. Half of the members are elected by the teachers and the other half by the students. Elections are held for one year at a time according to principles similar to those mentioned above in connection with faculty councils. The board appoints the chairman for a period of one year, but unlike faculty councils study boards are under no obligation to elect a full-time teacher.

Some general rules concerning each university study are laid down by the Minister of Education in a regulation. Within the framework of this regulation, the study board is entitled to decide questions regarding the study. It sets up a syllabus for each term indicating for instance the number of lecturers on aach subject, it determines the curriculum and the examination requirements and it establishes the conditions for examinations. Furthermore, the study board is empowered to grant some exemptions from general provisions regarding the study and to appoint part-time teachers other than part-time lecturers.

If a faculty comprises several studies, which is normally the case, a central study board is set up. Members of this body are elected by the study boards and the composition of the board is based on similar principles. The duties of the central study board are rather limited. Among the tasks should be mentioned that it has the function of an appeal board regarding several issues, that it has to deal with proposals for amending the study regulation and that it makes the decision in cases involving more than one study board.

The institutes constitute the basic unit in the organisation of the universities. Most research activities are carried out at the institutes and practically all full-time teachers and other scientific employees are attached to an institute. This means that also the major part of the teaching is prepared within the framework of the institutes. The institutes differ much in size. A size of 30-50 scientific employees is considered to be preferable, but many institutes - especially at the faculties of humanities and theology - are very small. As regards some studies all the teaching is given by one institute while several institutes are involved in more than one education.

The superior authority at the institute is the institute council. Members of the council are first and foremost all the full-time teachers and other scientific employees. Besides, the technical administrative staff and the students who take lessons from the institute are represented. The number of members from those two groups is decided for each election period of one year by the "konsistorium", see below, but their total number is not allowed to exceed one half of the members of the council. It is also possible for part-time teachers to be represented in the council. A chairman elected for one year at a time among the full-time employed is responsible for the day-to-day running of the institute. If the council has more than 40 members part of its functions is taken over by a committee set up by the council.

The activities of the institute are to some extent determined by decisions made by the faculty council and the study board. The former distributes the financial and staff resources and the latter sets up requirements concerning the teaching of students. The institute has, however, an area of power which is not subordinated by the above-mentioned bodies. The institute council - or the principal on behalf of the council - decides how the work should be taken care of by the individual employee. This power is limited on the one hand by the right of the individual scientific employee to choose his own subjects of research and on the other by some general rules on how much of a teacher's time should be spent on teaching and administrative work. Furthermore, it is the task of the institute council to take decisions on the application of the facilities of the institute.

At the central university level, you find two closely connected authorities, the "konsistorium" and the chancellor. The konsistorium is the supreme governing body of the university. It is composed on the same principles as the faculty councils of half teachers, one-fourth technical administrative personnel and one-fouthh students. The great majority of the teachers' representatives have to be elected by and among the full-time teachers. The chancellor, the deputy chancellor and the five deans are ex-officio members and the rest of this group in the konsistorium is elected directly for a period of three years. All the representatives of the full-time employed teachers as well as of the technical administrative staff are elected for a period of three years, while part-time teachers and students have an election period of one year. The chancellor is chairman of the konsistorium and the top civil servant of the university administration, the university director, has the right to attend meetings as an observer.

The konsistorium deals with matters concerning the university as a whole or matters concerning more than one faculty. Among other things it decides the distribution of appropriations among faculties and elaborates a draft regulation containing supplementary rules on the governing of the university. The final regulation has to be approved by the Minister of Education.

The chancellor and the deputy chancellor are elected separately among the members of the konsistorium by the members of the faculty councils and they must be professors or associate professors. The chancellor is elected for three years at a time, the deputy chancellor for two years. Besides chairing the meetings of the konsistorium the chancellor has a number of duties. He is head of the administrative branch of the university, including the university director, he has to supervise the legality of decisions of the councils and boards and he is entitled to decide all issues which are not attached to the above-mentioned councils and boards or the decision which cannot await the meeting of a council or board.

3. Social institutions

As regards social institutions the picture is more shimmering. There are several reasons for this. First and foremost, the social institutions form a considerably less uniform group than primary schools and universities. A kindergarten and a home for old and weak people does not have much in common and besides the differences between institutions of the same kind are great. Secondly, the rules on public participation differ even more than could reasonably be explained by the varying character of the institutions. Thirdly, some of the social institutions are run by municipal councils while others are private foundations although under tight public control.

In spite of the indicated circumstances I have chosen to deal with social institutions under one headline. This is mainly due to the fact that public participation generally does not have but advisory functions, that the rules of participation are less developed compared with the above-mentioned rules and that there are some arrangements at the municipal level covering all kings of social service, social institutions included. The differences between groups of social institutions considered I shall start by outlining arrangements on participation of a few types of social institutions and finish this part of the report by making a few short remarks on participation at the municipal level within the field of social services.

a. Kindergartens

The statute in question - the Social Assistance Act of 1974 - does not contain any rules on participation by neither the employees nor the clients but an instruction on, among other things, this issue, could be and is issued by the Minister of Social Affairs. According to this instruction, a distinction has to be made between kindergartens run by municipalities and by private foundations.

As regards the first group, two councils are set up. The leader of the kindergarten and the other permanent employees constitute a council of employees which must be consulted on questions on general guidelines concerning the pedagogical work. A council of parents is normally five members is elected for one year at a time. Apart from the duration of the election period there are three important differences to the arrangement regarding primary schools. The election is made in a simple way at a meeting among the parents; parents have only one vote per child, and membership expires immediately when the member's child leaves the kindergarten. The leader of the institution and one more employee are entitled to attend the meetings of the parents' council. The council has the right to express its opinion on issues concerning the kindergarten.

Kindergartens run by private foundations are directed by a governing body which appoints a principal to take care of the day-to-day running of the institution. The composition of this board is laid down in the statute of the foundation, but according to the above-mentioned instruction at least two members have to be elected by and among the parents in accordance with the principles on election of parents' council at municipal institutions. This implies that parents at a privately-owned kindergarten through their representatives participate directly in the decision-making. The principal and one employee have the status as observers in the governing body. The rules on a council of employees are similar to those regarding municipal institutions.

b. Homes for children and young people

It is a duty of the county council to provide a sufficient number of places at institutions of this kind. The homes can be run by the council itself or by a private foundation under public control.

The Social Assistance Act does not indicate anything on participation by neither the clients nor the employees, but provisions on this issue are here again laid down by an instruction from the Minister of Social Affairs. The rules regarding participation by the employees are quite similar to the arrangement concerning kindergartens, see above (a). As regards the clients, several differences can be observed. Councils of parents have to be established at all institutions run by the county council or by a private foundation. The council of parents has only the status of a consultative body, but certain issues have to be presented to the council in order to enable it to give an opinion. The parents have no representation in the governing body of institutions owned by private foundations. A considerable degree of advisory participation on the side of the children and young people is foreseen. General meetings of all pupils at the institution have to be held frequently and at the recommendation of the employees the principal is entitled to establish a pupils' council.

c. Homes for old and weak people

The provisions on participation in the management of these homes are more limited and summary than as for the above-mentioned institutions. The only rule on participation says only that a council of residents should be set up if posiible. The council has not but advisory functions. There are no common rules concerning the composition and election of the councils of residents.

The employees have no formal power to participate except for a right for the principal and one more representative of the employees to attend the meetings of governing bodies at institutions run by private foundations.

d. Institutions of rehabilitation

What is said about participation in the management of homes for old and weak people applies more or less to institutions of rehabilitation. Some modifications should, however, be pointed out. First, no councils of clients are set up. The instruction in questions restricts itself to requiring consultative participation by the clients almost without indicating how this shall take place. The reason is undoubtedly that as a main rule, the clients spend comparatively short time at the institution. Secondly, rules on public participation by people other than the clients are laid down. An instruction from the Minister of Social Affairs stipulates that as for institutions run by private foundations representatives of the local trade unions and employers' associations should be members of the governing body.

The municipalities are not obliged to set up arrangements on public participation at the municipal level. In the "travaux préparatoires" of the Social Assistance Act of 1974 it is indicated, however, that the district council may establish "a representation of consumers" in order to assist in the planning and preparation of the entire system of social services. The representation of consumers should only have consultative powers and should not participate in the procedure of individual cases.

Such representations have been organised in some of the relatively bigger municipalities. Members of this representation are generally elected by local associations of, for instance, disabled persons, old-age pensioners, employers and workers. Representatives of the clients of kindergartens and the like may be elected by the parents' councils, see above (a).

VI. TRAVERSING ANALYTICAL COMMENTS

A. The complexity of the arrangements

It seems indisputable that all the more developed systems of public participation in the management of institutions are very complicated. A more detailed description of the present arrangements than the one given above would underline this observation. The public is participating at several levels of administration and sometimes in more than one body at the same level. Moreover, many questions have to be dealt with by several authorities at the same and/or at different levels. The result is that public participation requires considerable financial and personnel resources and that the organisation is often working rather heavily.

B. Who represents "the public"?

A distinction can be made between participation by the people who receive the services of the institution - the clients - and others. In most cases, only the clients have been granted the right to participate. This applies clearly to the universities and the major part of the social institutions and with some reservations also to primary schools. The question, however, who should be entitled to represent the clients may give rise to doubt. There is no doubt that the students should be allowed to represent themselves as well as parents being allowed to speak for their small children, but what about the young people between, for instance, 14

and 18 years of age? The main trend seems to be that both the parents and the young people participate in the managing through different councils or representation in the same body. The arrangement concerning participation at high schools is an illustrating example of the problem. At present, elected parents are members of a school board as at primary schools, but it is proposed in a Bill prepared by the Ministry of Education that the clients should only be represented by two pupils in the council.

A clear example of participation by people other than the clients is only found at the rehabilitation institutions, where local trade unions and associations of employers elect members to the board of institutions run by private foundations. The same model could be applied at several other institutions, eg universities. In this connection it should be borne in mind, however, that the participation mainly concerns the continuous management of the university and that representatives of groups which are supposed to be served by the fully educated people, would lack interest and understanding of the problems of the day-to-day running of the institution.

Concerning primary schools, there is some doubt as to the role of parents. Through their children they are evidently "consumers", but some features of the arrangements indicate that they participate also as citizens of the municipality. Each parent has one vote irrespective of his or her number of children at the school. The representatives are elected for a period of four years and their membership of the board does not expire in case the child should leave school, eg because the compulsory school attendance of the child ends one month after the election. Furthermore, the principles of the election are similar to the rules concerning general municipal elections. This is not severely contradicted by the fact that one of the members is appointed by the district council. In this connection, it should be added that according to the above-mentioned new School Government Bill the district councils should no longer elect members of the school boards.

C. Participation by the employees

Most of the arrangements described above in V.B also imply a right for the employees to participate in the management of the institution. There are, however, differences between the extent of the right to participate of different groups of employees. This is clearly shown by a comparison of the rules concerning primary schools and universities. At primary schools, only teachers participate in the management, while the participation by employees at universities also include the technical administrative staff. The reason for this difference is partly that the technical administrative staff at universities constitutes a large group and at primary schools only a few persons. Nevertheless, the system of participation does not seem quite consistent on this point. In the new School Government Bill referred to above, it is proposed that the technical administrative staff at high schools elects one member of the school board, but a similar proposal is not made as regards primary schools.

D. The subject of participation

The field of public participation is different at the described types of institutions. The universities show the most radical solution to the problem. Here the students participate in all matters of the management of the institution and at all levels. On the other hand, the students have to share the influence as regards all aspects of the management with the employees, see below (E). At primary schools, it is the other way round. The field of public participation is limited although comprehensive, but within the competence of the school board the representatives of the parents are dominating, according to the rules. Especially two limitations are important. First, the competence of the school board is restricted to issues enumerated in the statute. Secondly, the appointed principal has an independent position as the administrative and pedagogical leader, while the chairmen of the councils and boards at the universities exercise their duties on behalf of the committee. Participation by pupils at primary schools does not, above all, cover

questions regarding individual teachers or pupils. As for social institutions, the subject of participation differs from one group of institutions to another. Generally, the field of participation is limited by the independent power of a principal.

Several differences can also be observed as regards participation by the employees. Employees at universities participate in the entire management of the institution. It should be mentioned, however, that the technical administrative staff has no influence within the sphere of the study boards. Participation by teachers at primary schools are subject to restrictions similar to those indicated above regarding the school boards and besides, they are not allowed to deal with questions of appointment of teachers, that is to say appointment of their future colleagues. At social institutions participation by employees is, as a main rule, restricted to general issues regarding the management, but the arrangements are very heterogeneous at this point.

E. The influence of the participating groups

Within the field of participation, the rules on the influence of participating groups vary. Generally, participation at social institutions is only consultative, while clients and employees at universities and primary schools participate directly in the decision-making structure. Even within the area of decisive participation, attention should be paid to some differences.

University students do not have the same degree of influence on all kinds of questions. They exercise the greatest influence on issues concerning their studies through their elected representatives in the study board, which consists of half students and half teachers. In other governing bodies of the university, the proportion of student members is smaller though considerable, still; usually one-fourth of the members. The influence of students is also restricted by rules to the effect that the chairman of all governing bodies but the study board has to be an employee, in most bodies a teacher. Even if the chairman acts on behalf of the board or council, he will generally have rather a strong position, among other things due to the fact that he cannot be overthrown during the election period of from one to three years. As regards the appointment of full-time teachers and the conferring of academic degrees, the students have not but a mere formal influence, because these decisions have to be made on the basis of recommendations from expert committees.

Parents at primary schools have a dominating position in the school board where only the four parents' representatives, and the member appointed by the district council has the right to vote. A limitation of the influence of the parents in the school board is, however, implied in several provisions laying down that the decision of the board has to be based on a recommendation by the teachers' council. The legal implications of such rules are not quite clear, but it must be assumed that at least regarding some issues an agreement must be obtained between the two councils.

F. The technical arrangement on participation

It is generally characteristic of the field dealt with in this report that both clients and employees are participating in the decision-making structure. The co-operation between the two groups is, however, organised in different ways. A main distinction can be made between what I should call "integrated participation" and "separate participation". Integrated participation exists where the different groups elect members of the same body, and within this body they participate on equal terms. Separate participation indicates arrangements the characteristic of which is that the different groups elect their own council and the decision-making is based on co-operation between the councils.

Apparently, the first principle applies to the government of universities and the second one to the government of primary schools as well as of most social institutions.

Each principle has its advantages and disadvantages. It is obvious that integrated participation is simpler in the sense that the same issue is not necessarily dealt with more than once. Furthermore, it seems to be an advantage that an issue is discussed by representatives of the groups involved in common which should guarantee that as many aspects as possible are taken into consideration. On the other hand, the groups are different as to eg age, education, knowledge and experience, and those differences cannot be equalised just by putting representatives of the different groups onto the same body. The members will not be entirely equal. Separate participation may imply a protection of the influence of the presumably weakest of the groups involved. The arrangement at primary schools could probably illustrate this. Moreover, the integrated participation may have as a consequence that several councils or boards are established at the same level because the proportion of representation of the groups involved should not be the same on all issues, see eg the government of universities at faculty level. Thus, it is doubtful whether integrated participation can always be considered a more simple arrangement than separate participation.

VIII. SOME LEGAL ASPECTS

It is disputable what aspects could be classified as "legal" contrary to other aspects. I shall not set up a definition but confine myself to saying that what I have in mind is some types of problems which are generally dealt with in legal writings. This is not at all a precise indication, but it seems to be sufficient for the purpose of this report.

A. Dislocation of power

A frequent objection to public participation is that it implies the dislocation of powers of especially the responsible parliamentary Minister and the municipal councils. In other words: public participation may infringe the basic system of a representative democracy. The consequence is that the demands of society or the municipality as a whole are overriden to the benefit of the interests of usually small and active groups.

In general, this objection is very strong. Regarding the types of institutions dealt with in this paper, the consideration mentioned seems to be less important than concerning other fields of public participation. Seen from the angle of the fundamental democratic authorities the main point must be that a number of general requirements as to eg the standard of services are complied with. A central direction and control of educational and social institutions could easily be carried out irrespective of public participation in the management of the institutions by setting up general rules and financial frameworks. Furthermore, it is very difficult - if not impossible - for central authorities to interfere with at least some of the activities of these institutions, especially the day-to-day running. As regards universities, it should be added that there is a tradition for a rather comprehensive self-government.

Observing the described types of public participation it is fair to say that very little power has been transferred from central bodies (eg ministries and municipal councils). At primary schools, some but very limited dislocation of power has taken place - from the district council to the authorities of the individual school. Regarding universities, it is more pertinent to assert that the recently introduced participation arrangement has intensified the central control rather than made the field of self-government wider.

The problem of public participation in the management of educational and social institutions is above all: should the traditional bureaucratic leadership of individual institutions be replaced by a management influenced by groups of the public, especially the clients? A reform of this kind implies certain dangers even from the point of view of a lawyer, but the infringement of the fundamental system of government does not belong to the most important ones.

B. The problem of responsibility

It is a generally accepted principle that the exercise of public authority should be closely connected with responsibility. If an authority is entrusted some persons, there must be realistic possibilities for holding those people responsible for their actions and omissions. As regards Ministers, the most important kind of responsibility is a political one. The same applies to members of municipal councils, although the practical content of a political responsibility is less important. Civil servants will, in particular, be held responsible by some kind of disciplinary measures - the phrase "disciplinary" taken in a wide sense. Possibilities of punishment and civil liability exist for all three kinds of personnel. The general provisions in the criminal code on responsibility for fault and negligence does not, however, apply to persons whose public task is based on an election, eg members of municipal councils.

Representatives of the clients at educational and social institutions are only to a very limited extent accountable for their public duties. Unlike civil servants, they do not perform their task under some kind of disciplinary responsibility, nor is their conduct comprised by the general provision in the criminal code on fault and negligence. In principle, they have the same kind of political responsibility as members of municipal councils, but in fact, the scope of their political responsibility is even smaller than as for members of municipal councils. They cannot be overthrown during the election period and the chance of not being re-elected puts hardly any pressure upon any of these members. Furthermore, it is unusual for political parties and other associations to compete at elections, which means that severe mutual criticism - especially public criticism - is relatively rare.

This lack of responsibility on the part of the representatives of clients is unfortunate.

C. Public participation and the demands on the administrative procedure

Especially the last decade has, in Denmark, as in most other Western European countries, shown quite a heavy increase in the legislation on administrative procedures. New rules on, for instance, access to public documents, the right to be heard and the duty to give grounds for a decision have been established or can be expected. Such demands are above all set up to guarantee the individual a thorough and impartial procedure and they constitute a preventive protection of the individuals against abuse of power.

Evidently, it is more difficult for laymen to fulfil these requirements than for the traditional personnel of civil servants with administratively relevant education and training. This applies even more to the unwritten principles regarding the administrative procedure. In that respect, it is not possible to put members of municipal councils and participating laymen at the institutions on the same footing. The task of the former group is much wider, which means that members of municipal councils get greater experience, and the municipal councils are assisted by a rather large staff of civil servants in carrying out their duties, while the professional assistance of the boards and councils at the institutions is normally very limited.

Nevertheless, an objection of this kind does not hit the public participation at the institutions as much as public participation in other fields, eg cases where associations of landowners are entrusted the authority to grant exemptions from town plans. The reason for this is that the decisions made by the governing bodies at the institutions are not so much directly aimed at the affairs of the individuals as at the more general planning of the activities of the institution. It should not be neglected, however, that the consideration indicated is relevant concerning parts of the management of educational and social institutions.

Finally, I shall draw attention to another consequence of public participation. When applying discretionary powers, it is, in general, regarded illegal to base a decision on the interests of a specific group. To do so is classified as "abuse of power" or "detournement de pouvoir". If representatives of special groups are made members of boards and councils it seems, however, difficult to deny these representatives to take the interests of their group into account. In other words, the public participation may to some extent change the content of the ordinarily accepted principles concerning abuse of discretionary powers.

IX. TENTATIVE CONCLUSIONS

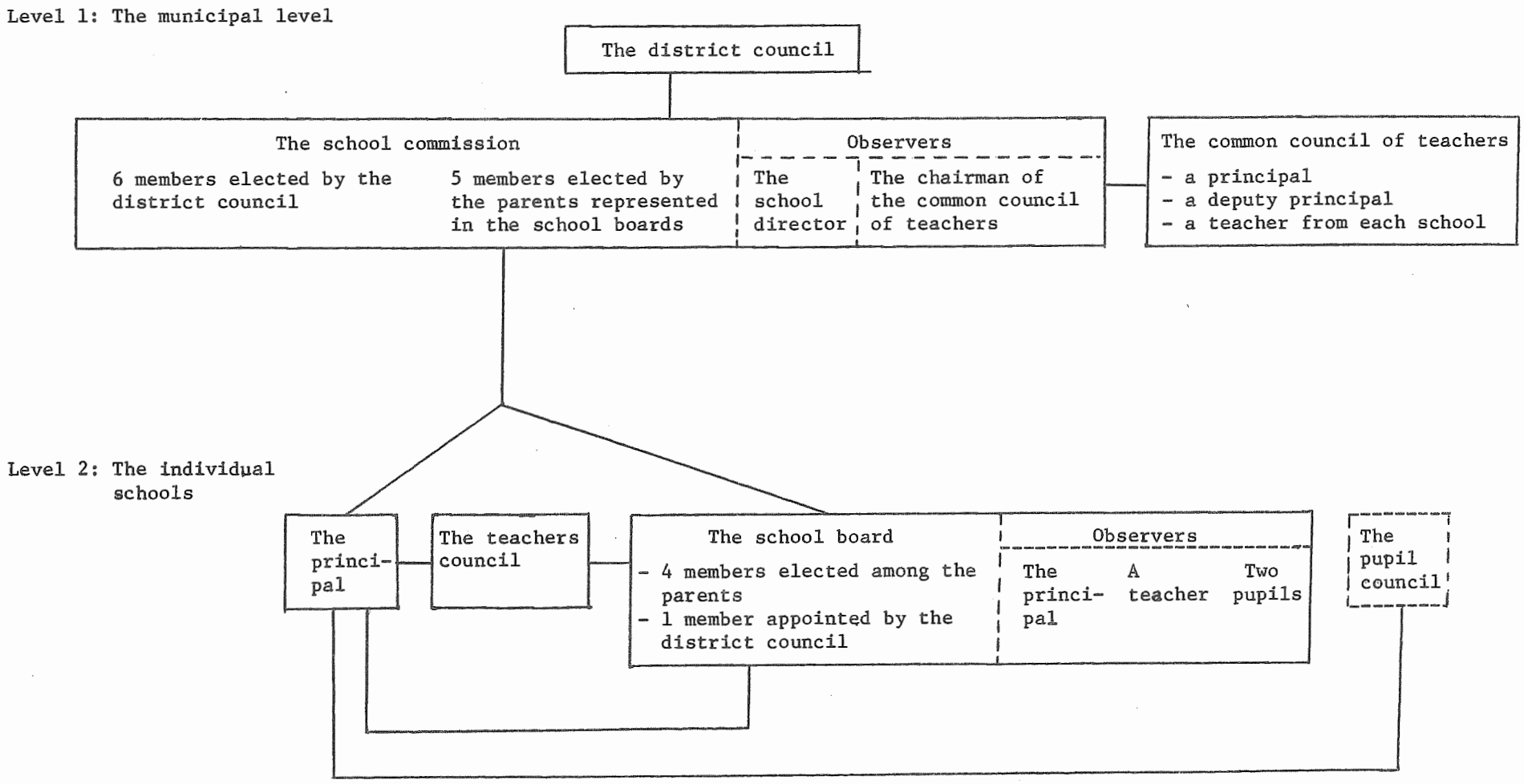
The above parts of the report do not at all allow more definite conclusions to be drawn. On the other hand, it should be permissible to make some cautious concluding statements.

1. The field of educational and social institutions seems to be suitable for arrangements of public participation. This applies in particular to institutions which offer groups of clients an extensive personal service during a longer period. In general, the period should be several years if an arrangement of decisive participation of the clients is set up. Within these limitations it is characteristic that the interest in participation is vivid and durable and that the legal objections to participation are of limited importance or could be overcome.

2. The conditions of a satisfactory participation can, however, be considerably improved compared to the present arrangements of public participation. Above all, the models of organisation ought to be made much simpler. The establishment of a large number of boards and councils - often at the same level of administration - and the complicated patterns of co-operation implies that the organisation as a whole works rather heavily. Public participation in the present forms may tend to be a conservative element in the administration, which is contrary to what is intended. Secondly, the system should be simplified by the drawing up of a more clear and extensive framework regarding the duties at the various levels of administration. Today, much too many issues have to be dealt with by authorities at different levels. Thirdly, it would be desirable that the rules on responsibility of the participating representatives are made more rigorous. It is difficult to do so, because a very severe responsibility would be unfair to the participating laymen and hamper their participation. The minimum achievement in this respect should be to put the participating representatives and the civil servants on the same footing as regards liability to punishment, but also other realistic measures to improve the rules of responsibility exist.

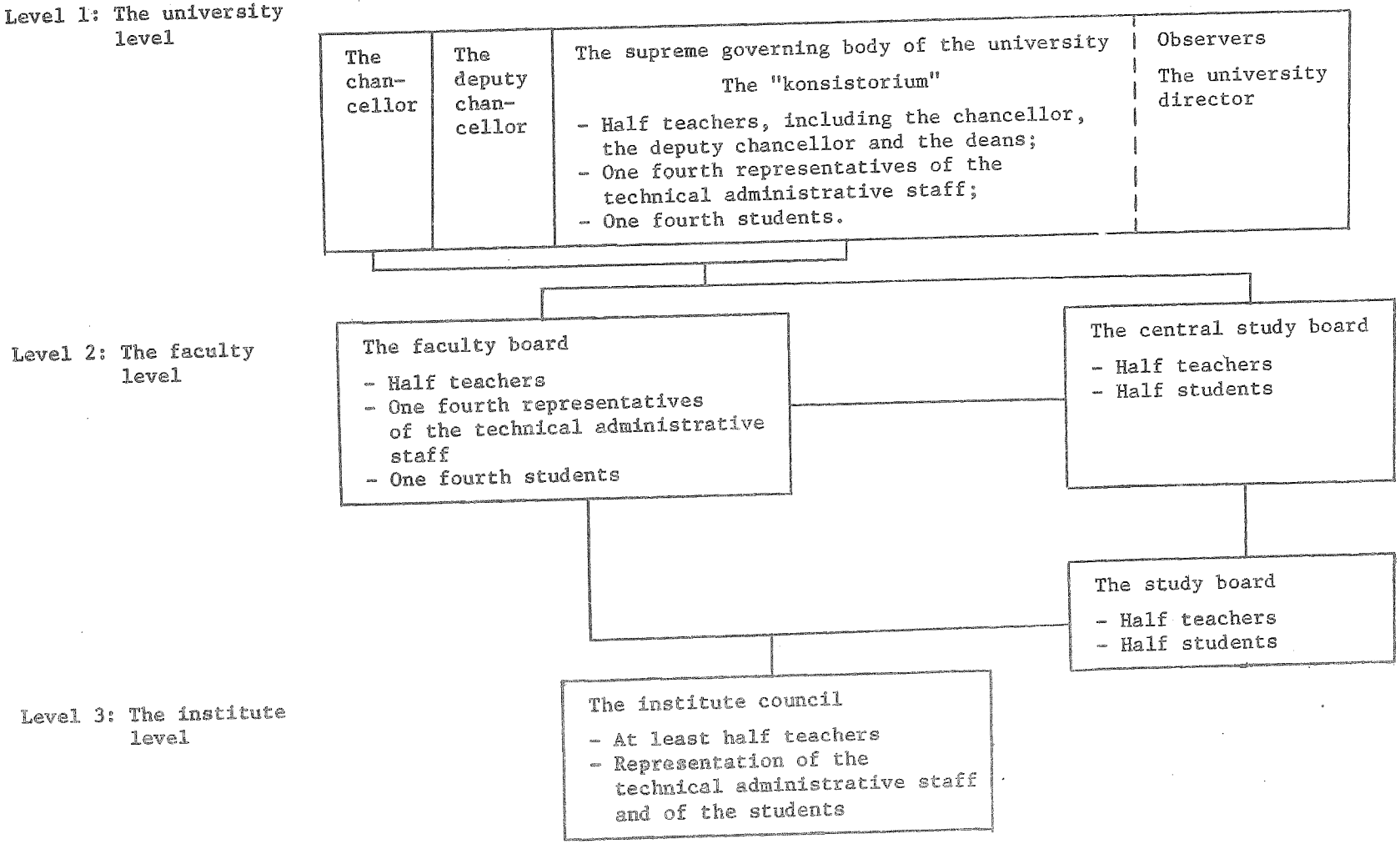
A P P E N D I X A

The government of primary schools



APPENDIX B

The government of universities



ADDITIONAL PAPERS

submitted by various participants
on certain aspects of the general theme

REMARKS ON PARTICIPATION BY THE PEOPLE IN THE PREPARATION OF TOWN PLANNING AND BUILDING DECISIONS UNDER THE LEGISLATION OF THE ITALIAN STATE AND THAT OF THE REGION OF APUGLIA AND UNDER MUNICIPAL BY-LAWS

by Mr L BARBIERA, Professor at the Faculty of Law, University of Bari

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Italian legislation (Acts 1150/1942, 765/1967 and 10/1977) provides for two levels of town planning instruments: firstly the master plan ("piano regolatore generale", or "programma di fabbricazione" for smaller urban communities), which gives the general outline of the main infrastructures and zoning; secondly the detailed plan ("piano particolareggiato"), which gives a specification of the town planning scheme applicable to each plot of land, has the force of a declaration of public utility regarding building and town planning projects, and includes the power to serve compulsory purchase orders on abstentee landlords.

However, the latter instrument has only been used in a few regions, such as Emilia-Romagna, and has been replaced by the land development agreement ("convenzione de lottizzazione"), which does not have the same effects, for instance as regards the declaration of public utility and compulsory purchase from absentee landlords.

Participation is provided for and implemented under the "piano regolatore generale" only, on the basis of spontaneous initiatives by owners. This takes the form of comments on the draft plan drawn up by the town council, which has to examine these comments and come to a decision on them. These regulations seem to me to be similar to those in force in the Netherlands and the Federal Republic of Germany.

As regards building, no participation is provided for under the procedure of granting a concession ("concessione"), governed by Act 10/1977.

The legislation of the Apuglia region, which, like the other regions, now has full legislative and administrative powers to control town planning and building, does not provide for any significant participation by the population in drawing up town planning projects, since these are adopted by administrative decisions.
Laws 9/1973 and 27/1973 of the Apuglia region provide for participation in respect of legislative and regulating activity only.

Act 276/1976 of the Italian State provides an opportunity for participation by the people. Significantly, it is called "Act on decentralisation and citizen participation in municipal administration". The district councils ("consigli di circoscrizione") are elected bodies, but are closer to the citizens because of the geographical scale they operate on. Under Section 12 (3), the district council is consulted before the adoption of the master; this consultation is compulsory but not binding. An important new feature is that the same procedure applies in the case of the detailed plan and the land development agreement.

In addition, the draft by-laws drawn up by the Town Council of Bari to implement the above-mentioned Act provide for a people's district assembly.

These two new innovations considerably improve the possibilities and importance of participation by the people in the control of town planning.

A PRACTICAL PROPOSAL: THE PEOPLE AND ELECTORAL REPRESENTATIVENESS

by Mr N d'ARGENTO, Faculty of Law,
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Public participation in the preparation of legislative and administrative Acts currently takes direct and indirect forms. Normally, the process of such preparation rests mainly on the legislative power, belonging to the representative chambers, and on the executive power, exercised by the organs of government. These two functions are different for two main reasons. Firstly, because the two "powers" are separate and distinct. Secondly, because the connection between parliamentary and executive organs is more or less direct depending on the source of their authority.

Especially in the parliamentary republics, sovereign power belongs to the people, whose legitimate representatives sit in elected assemblies. The formulation of administrative Acts, on the other hand, is the responsibility of other organs of the State, whose composition does not directly express popular sovereignty, even if they act in the general interest. This preliminary and fundamental difference makes it easy to understand that the requirement of public participation is much greater for the preparation of administrative than of legislative Acts. It should be pointed out, however, that there are few limits to the field of competence of legislative organs, whereas the competence of administrative organs, however extensive, is limited. This helps to individualise those matters closest to the requirements of the community: the result is a greater facility for setting up decentralised structures, either in an administrative form (in the sense of government offices), or in representative form (in the sense of regional or municipal assemblies etc).

On the other hand, public participation at central political level remains more difficult to ensure. Of course there are the traditional forms of participation, such as the referendum, plebiscite, legislative initiative, elections etc. But these do not suffice to satisfy the most recent demands for participation; this is why they are still under discussion, as witness this 7th Colloquy of European Law.

The purpose of the present paper is to propose a solution to this problem which, we would stress, is not designed to be exhaustive; it restricts itself to recommending the institution of a mechanism which, once generally accepted, could gradually be better defined and adjusted to the various institutional and political situations.

We should first point out that the demand for public participation in the preparation of legislative Acts derives from the gradual differentiation of the political forces present in representative organs. As long as representative and/or elective assemblies faithfully reflect the majority and minority in the country, the requirement of public participation does not correspond objectively to the socio-economic situation. This is the more true when uniformity in the political class largely reflects homogeneous society. On the other hand, when differentiated social classes are reflected by diverse political formations, the representative function of assemblies is impaired by the supremacy of the majority. As for the minority, it contributes to the maintenance of the democratic system merely by taking a passive part in the play of parliamentary forces. In specific situations, the opposing forces can harm the democratic system by claiming a representativeness which belongs not to the majority alone but to the assembly as a whole; or, in another way, by making use of obstructionist parliamentary tactics.

When these situations arise, consultation of the public can be useful to avoid particularly bitter political conflict. To this end also, popular participation should operate almost immediately.

Before stating our proposal in concrete terms, it would seem necessary to discuss a preliminary consideration. The question is whether a new form of public participation in the formulation of laws should be continuous or occasional. In view of the fact that the elective parliament system is already democratic in itself, it would seem sufficient to provide for an occasional form of participation; furthermore, other special means of popular intervention in legislative activity exist already.

In addition, it should be established at the outset whether public participation should be in the form of plebiscites or in less extensive forms. Obviously, the numerical scale of participation will determine the immediacy of the result. Thus it would seem preferable to opt for a system of consultation which involves only a proportion of citizens. This raises the problem of the selection of the population, and the identification of those to be consulted. In general, this solution is compatible with all European democratic systems, for it is a form of direct representation, without delegation, even if it is only partial.

Let us now turn to our concrete proposal. A number of electors, for example 50,000, are chosen at national level by applying an objective selection criterion to the electoral roll, such as for example alphabetical order. This electoral "sample" is maintained for a set period, for example, one year. At the end of this period the list is renewed on the basis of the same criterion, namely, in our example, by going on to the next letter or letters. Thus it is possible for the "representative" electors to exercise their function at any time, by going to their polling station or other office in the locality where they reside.

The intervention of this electoral "commission" could be requested, in accordance with legislation in force, by a certain number of electors or regional councils, or by a certain number of parliamentarians (eg at least one-fifth of each elected chamber).

Once the admissibility of the request had been verified, the Ministry of the Interior would rapidly convene the representative electors, whose vote, once cast, would be communicated officially to the parliament. There, the result of the consultation would have its political effect in requiring those supporting positions contrary to that resulting from the "survey" to assume a serious responsibility towards the whole electorate.

The result of the "survey" cannot be binding because those called upon to vote are in a very small minority in relation to the electorate as a whole. Furthermore, it is indispensable that legislative power continues to belong to the parliament.

A similar system might be applied for consulting regional and municipal electorates: using, of course, appropriate numerical proportions.

Of course this takes no account of the other forms of public participation, especially in the preparation of administrative Acts, on the basis of models already in use and proposed; public participation in the formulation of legislative and administrative Acts is closely connected with a wider plan for decentralisation and autonomy.

RECENT DEVELOPMENTS WITH REGARD TO PUBLIC PARTICIPATION IN THE UNITED KINGDOM

by Sir Denis DOBSON KCB OBE QC, The Law Commission, London,
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Devolution

1. A healthy democracy must develop and adapt itself to changing circumstances. The activities of central government include many substantial powers and functions which could be exercised at a level closer to the people. While decentralisation has gone some way to bring decision-making nearer the people affected further change may be necessary to give fuller recognition to the distinctive identity of some areas within a State.

2. There may be a case for the creation of elected as well as administrative institutions in some such areas whereby these institutions are given legislative and/or executive responsibility for decisions which primarily effect the people living in these areas.

3. In this connection mention was made of the concept of devolution to Scotland and Wales, particularly in the case of Scotland, where such responsibility was to be conferred on Scottish institutions, without prejudice to the unity of the UK and the ultimate sovereignty of the UK Parliament.

Community councils

4. Mention was made of the new concept of community councils in Scotland, which represented an effect to overcome the remoteness felt by the governed from the centres of decision-making affecting their area.

5. Under the Scottish scheme, the councils were given statutory recognition as an integral part of the local government structure, without however being another tier of local government (ie without being a legislative or administrative organ). They were regarded as an official organ of local public participation in relation to matters affecting their community.

6. The great advantage of such councils was that they represented a continuing framework of public participation - instead of an intermittent one only coming into being in a local crisis situation.

7. There was considerable flexibility built into the Scottish scheme, so that a type of council best suited for a particular area could be opted for. This might be for example a neighbourhood council (covering a compact area and having pressure group type of functions) or a locality council (covering a larger area and having more of a co-ordinating role in relation to public opinion).

8. Whatever type of council might be chosen, among the minimum statutory requirements were:

   a. that their purpose should be to ascertain, co-ordinate and express to the authorities concerned the views of the community concerned;

   b. that the councils and authorities concerned should have procedures whereby they keep each other informed of matters of mutual interest.

SOME NOTES ON PETITION IN COMPARATIVE LAW

by Mr P GIOCOLI NACCI, Professor at the Faculty of Law,
University of Bari

There is one institution in contemporary constitutional law which embodies the most typical example of a contradiction between reality on the statute book and in everyday life. This is the petition, which is recognised by almost all legal systems, yet is rarely used in the practice of democratic participation in shaping the state's decisions.

It is widely thought that the small number of concrete cases where the right of petition has been exercised is due to the fact that it is of little use in a parliamentary régime and is rarely productive. It is also thought that it is only exercised in exceptional cases because of the numerous, far more efficient means of influencing parliamentary bodies that public opinion has at its disposal nowadays, means such as the press, trade union pressures, party political propaganda, etc.

On the other hand, this right is expressly or implicitly recognised in almost all the present-day constitutions, with a few variations in wording or conception. Presupposition of this right, as opposed to mere explicit acceptance is the best expression of the need for it in democratic societies. While the petition, which is the only manifestation available to individuals, has been conserved despite its rare application in all societies defined as democracies because they are based not only on the double balance between government and parliament, but also on the triple relationship between government, parliament and people, and while it has been abolished in countries where absolute power reigns, it is awarded its surest recognition in systems which do not recognise it expressly. I am thinking of the Constitution of the USA, which does not guarantee the right of petition directly, but which does so indirectly in Article 1 of the Bill of Rights, which states that "Congress shall make no law abridging the right of the people to petition the government for a redress of grievances". This clause seems to consider the right of petition as a natural right (the birthright of all men, as the English judges had already affirmed), since any individual may apply to the authorities in order to assert his personal claims, even if that right is not recognised explicitly.

In Italy, in the regional context, the institution of petition has received not only express recognition but also an important boost to its value as a means of furthering local interests, which are necessarily general, and to its typical function as a technical instrument of liaison between the community and the representative bodies in the region in closest contact with the populations concerned. This has happened despite its infrequent use at national level, where petitions are few and almost always collective, and more particularly despite the Constitution's lack of reference to the petition. In Article 123, the Constitution delegates to the regions the right of initiative and referendum, in accordance with their respective statutes; but it says nothing about the petition at regional level. Consequently, it must be deduced that the right of petition to regional councils is not guaranteed by the Constitution.

Nevertheless, most of the ordinary statutes, in more or less identical words, provide for the right of each citizen to petition the regional councils in order to request the adoption of measures or to set forth joint claims. The only exceptions are the statutes of Apuglia and Venetia; however, in the latter region the council's rules of procedure (Chapter XII) do not refer to "petitions" as an institution belonging exclusively to the national system, but as one generally applicable. The same is true of the regions of Sardinia, Friuli-Venezia Giulia and Val d'Aosta, which have special statutes: in Rules 100, 85 and 29 of their respective rules of procedure they decree that all citizens may petition the council, deeming this institution implicitly applicable in their regions by virtue of the reference made in Article 1 of each region's statutes to the principles of the Constitution.

Regulations of this kind have developed and amplified the statutory rules, as elsewhere the statutes have amplified and enriched the constitutional clauses. Among the regions with special statutes, Sicily and Trentino-Alto Adige alone ignore the right of petition, and among those with ordinary statutes Apuglia alone does so. This attitude is also found on the occasion of certain legislative Acts such as the Apuglian Regional Council's Law of 16 April 1973, No. 9, setting up a régime of "participation by the people in the normative activity of the region". Even though it constitutes an exception to the general trend towards recognition of this right at both national and local level, this attitude certainly does not imply that citizens are forbidden to petition the regional councils of the above-mentioned regions. The difference between a lawful activity and a right is quite clear: the first is allowed, the second is guaranteed.

The institution, however, is not often used: neither as a request for information on regional activities, because other means are thought to be more effective, such as the press, especially the local press; nor as a request for adoption of legislative measures, because it is easier for citizens to get a member of the council to present a Bill. It should be emphasised that the legislation of petitions is not uniform.

The sometimes considerable differences between the various regional systems do not call for close study here. They mainly concern the parties entitled to present petitions, including municipal and provincial councils and trade unions (Statute of Lombardy, Article 61) or more generally corporate bodies, associations and groups active in the region (Statute of the Marches, Article 33; Statute of Molise, Article 41) or again citizens acting individually or jointly (Statute of Piedmont, Article 63). These statutes are distinguished from the others both as regards the persons entitled to avail themselves of this right, and also by the fact that they give new life at regional level to the institution of collective petition, which has disappeared from State legal systems.

The collective petition was provided for in the 1848 Constitution of the Kingdom of Italy, which limited it however to "constituted authorities", the exclusion of petitions presented by a community being the rule. On the other hand, the opposite rule may be inferred from the regional statutes mentioned above.

Collective petitions have been excluded from the most recent constitutional rules. In France this type of petition was energetically supported by the revolutionaries Robespierre and Marat. Although Article 32 of the 1793 Constitution authorised collective petitions, declaring that the right of petition could never be abolished, suspended or limited, they were nevertheless abolished by the Decree of 25 vendémaire year III (Articles 2, 3 and 4), after the fall of the "Incorruptible". The first French law on the right of petition expressly provides in Section 1 that "the right of petition belongs to each individual and cannot be delegated; consequently, it may not be exercised jointly by electoral, administrative, legal, judicial or municipal bodies, by municipalities and sections of municipalities, nor by societies of citizens". It was intended to affirm in this way the principle that all citizens shall exercise the right individually and personally, following the general rule that only such rights as the holder cannot exercise himself may be delegated.

However, although the holder of the right of petition is always the citizen, the addressee varies widely. Whilst some constitutions, such as the Lithuanian, Turkish and Italian (Articles 21, 89 and 50 respectively), provide that petitions shall only be addressed to the Parliamentary Assembly, others put petitions addressed to the legislative chambers and those addressed to other authorities on the same footing. Examples are: the German Constitutions of Weimar, Article 126, and Bonn, Article 17; the Swiss Constitution, Article 57; the Greek Constitution, Article 26; the Polish Constitution, Article 30; the Rumanian Constitution, Article 53; the Czechoslovak Constitution, para. 115; the Yugoslav Constitution of 1921, Article 15, and that of 1946, Article 38; the Constitution of the Empire of Asia (Japan) of 11 February 1889, Article 30, and its successor of 3 November 1946,

Article 16; the Dutch Constitution of 29 March 1814, Article 8; the Spanish Constitution of 9 December 1931, Article 35; the Belgian Constitution of 7 February 1831, Article 21; the Constitutional Act of the Republic of Estonia, published on 3 September 1937, Section 30.

Article 17 of the Basic Law of the Federal Republic of Germany, for example, provides that "everyone shall have the right individually or jointly with others to address written requests or complaints to the competent authorities and to the representative assemblies". The aim of this clause, similar to that of other rules, is to achieve a system of plurality of addressees. Although applications addressed to other authorities may be considered as really modern, typical expressions of the right of petition, in its original conception is due to English tradition the petition has a single addressee, parliament. The institution of petition originated in England, with two very precise aims: to draw the attention of the Houses of Parliament to the needs of the country, which must be given laws, and to complain to the political supervising authority of abuses committed by some of the State's administrative authorities. It is true that the Bill of Rights talked of petitions to the King, but is has been sufficiently clarified that under English law the King is neither the actual person nor the constitutional function (the Crown) but is "the King in parliament", a combination of the three functions in which sovereignty is embodied under English law, namely the King and the two legislative chambers.

It has been affirmed that the first amendment to the US Constitution was inspired by the English concept. However, it appears that the addressee of the petition is the executive authority and not Congress (the legislative power). The foregoing comments also concern the clauses of Carlo Albert's constitution. The Piedmontese Constituent Assembly only followed the English precedent and similar foreign examples. The presentation of the following article is recorded in the minutes of the Conference Council of 24 February 1848: "Each adult citizen has the right of petition to the two Houses". This was the origin of Article 57 of the final version of the constitution. Whereas English laws accorded the power to receive petitions sometimes to one and sometimes to the other House, our constitution made no distinction between the two legislative chambers in this respect.

Under the Constitution of 1947-48, the interested party presents its petition to the chamber of its choice. This is another aspect of the perfect two-chamber system achieved in Italy. This rule has been established not only by the specific law, but by the whole system; it is due to the constitutional need to ensure absolute balance between the two chambers, both being representative assemblies, both elected by universal suffrage and having an almost identical formation, rather than to a demand by the petitioner or to the extension of the sphere of his individual rights. The addressee of the petition is parliament, not only in its role as the legislative power, the political authority with the function of suppressing the Acts of the government responsible for its activities described in the petition, but also in its role as the representative of the people's common interests that the petition seeks to further (Article 50 of the Italian Constitution refers to "general needs").

As to the object of the right of petition, a study of the legal rules in different States shows up differences which are perhaps not superficial. In England, public petitions, which are strictly political, are distinguished from private Bills, which are petitions presented on behalf of particular interests, either individually or by public or piivate bodies. No distinction is made in this respect in Switzerland and the Federal Republic of Germany, both categories of petition thus being accepted. On the other hand, the first amendment to the US Constitution refers exclusively to petitions presented on behalf of individual interests "for redress of grievances". The authors of the Italian Constitution consider only interests of a general nature as a possible object of petition, such as the presentation to parliament of general needs or requests to adopt legislative measures. Amendments designed to remove this limitation of the object were not lacking during the drafting of the constitutional text, but the assembly rejected such attempts, remarking that the citizen has many possibilities of redress for his personal affairs, ranging from

extraordinary appeal to the head of State to other administrative and judicial remedies. Consequently, it was not deemed necessary to introduce into the constitution a right that was already guaranteed by other procedures. It was also sought to obviate the risk of several petitions of a personal nature being introduced, bearing in mind the French "complaint" which, in conjunction with the petition "at the bar", contributed to halting the activity of the French Parliament.

The petition presenting personal situations is justified under English law, where administrative justice, or rather judicial control over the administration, is not sufficiently incisive, and where action against a public authority is not taken against the institution but against the person responsible, and with the object, at least theoretically, of his being asked to pay financial compensation. This is not so under Italian law, where the citizen's safeguard against the public administration is given concrete form in two classes of remedy: action before the ordinary courts and appeal to special magistrates within the public administration itself. (Constitutional) recognition of a political remedy in order to expose interference by the authorities with subjective rights or legitimate interests to the detriment of individuals would have been completely superfluous.

ROUGH OUTLINE OF THE LEGAL SITUATION IN THE FEDERAL REPUBLIC OF GERMANY

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1. As to the term of "participation"

The German legal system knows "participation" in manifold forms, as is shown by the following examples. Nonetheless, the term of participation has not yet been admitted into the legal language. If one were bold enough to make an attempt at definition, this might be in the following form:

> Participation consists in a direct sharing of the citizen in decisions by organs of State; or: participation is the direct co-operation of the citizen in the exercise of State authority.

2. Participation and constitution

It is only for specific cases (such as Article 7, para. 3, 3rd sentence; Article 16, para. 1, 2nd sentence; Article 103, para. 1 of the Basic Law) that the Basic Law envisages a direct co-operation of the citizen in decisions of the State. Apart from this, Article 20 of that law lays down that the Federal Republic of Germany is a democratic State in which all authority emanates from the people. Such authority is exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs. The Basic Law thus decides in favour of what is known as representative democracy.

3. Development of participation outside the constitution

Outside the constitution the German legal system knows participation in the sphere:

- of the legislator (Section 73 of the "Geschäftsordnung des Deutschen Bundestages" /"Hearing"/),
- in the sphere of the government (Section 10 of the "Geschäftsordnung der Bundesregierung" /reception of deputations/ and Section 24 of the "Gemeinsame Geschäftsordnung der Bundesministerien" - Part II - /Hearing of directly concerned experts and unions at the preparation of legislation/),
- in the sphere of the practice of the courts (Sections 28 et seq., 66 et seq., 108 et seq. of the "Gerichtsverfassungsgesetz" /participation as jurors and honorary judges of commercial courts/).

The chief significance of participation, however, lies in the sphere of the executive, ie in the sphere of participation in administrative decisions. Various forms of participation may here be distinguished:

The hearing

A frequently found form of participation is the hearing of citizens affected by an administrative decision. It is found for instance

- in the field of the protection of the environment (Section 51 of the "Bundes- Immissionsschutzgesetz"),

- in building law (Section 18, para. 2; Section 21, para. 3; Section 120, para. 2; Section 151, para. 2 of the "Bundesbaugesetz"),

- in the sphere of town building law (Section 24, para. 2 of the Städtebauförderungsgesetz"),

- in the sphere of law concerning "Rechtsanwälte" (Section 16, para. 2; Section 17, para. 3; Section 28, para. 2 of the "Bundesrechtsanwaltsordnung").

Apart from the specific provisions it is a valid general rule that the affected citizen should be heard before an administrative decision encroaching on his interests is made.

The discussion

Numerous provisions make it mandatory for a public authority to discuss the situation in fact and in law with the affected citizens or common interest groups before making its decision. Examples of this are:

- Section 66, para. 1; Section 109, para. 1; Section 112, para. 1 of the "Bundesbaugesetz",

- Section 58 of the "Beamtenrechtsrahmengesetz",

- Section 94 of the "Bundesbeamtengesetz".

The right to make recommendations and/or proposals

In certain cases the legislator gives particular groups of citizens the opportunity of naming persons for specific activities or of delegating them into decision-making organs.

Examples:

- Section 6, para. 2 of the "Postverwaltungsgesetz",

- Section 10, para. 2 of the "Bundesbahngesetz",

- Section 94, para. 2; Section 107, para. 2; Sections 164 and 166 of the "Bundesrechtsanwaltsordnung".

Right to take an active part in decisions

In some spheres citizens - especially experts and representatives of common interest groups - are even conferred the right to take an active part in the decision proper.

Examples:

- Section 9 of the "Gesetz über die Verbreitung jugendgefährdender Schriften",

- Section 62 of the "Güterkraftverkehrsgesetz",

- Section 5 of the "Postverwaltungsgesetz".

4. Points of view proposed to justify participation

Participation such as the legal system of the Federal Republic of Germany provides for a multitude of spheres of life, serves many purposes:

- the self-determination of the citizen;
- the lucidity of the decision-making process,
- the control of administration,
- the increase of knowledge of those responsible for the decision,
- the propriety of the decision,
- the strengthening of the protection of the citizen's rights and interests by the law.

Participation thus serves the purposes of the postulates of the maxims of democracy and of constitutional principles as embodied in Article 20 of the Basic Law.

5. Current problems of participation

Recently we have seen the emergence of what are called "Bürgerinitiativen", chiefly in connection with the construction of nuclear power plants. They are unions of affected people united by a common interest. Their aim is to gain a right to practical co-operation in the decision-making process which is not envisaged by the law. The reason why "Bürgerinitiativen"have come to the fore lies in the fact that citizens have become conscious of their too limited possibilities to co-operate in the administrative decisions objected to - such as a decision concerning the site and construction of a nuclear power plant - and of the failure of the political parties and other common interest groups to make persistent efforts in looking after matters in which the citizens feel they have a concern in. The solution may lie in a broadening of the basis for participation or in shifting the decision into the parliamentary sphere.

FORMS OF PUBLIC PARTICIPATION IN THE PREPARATION OF LEGISLATIVE AND ADMINISTRATIVE ACTS IN THE FIELD OF BUILDING AND TOWN PLANNING WITH SPECIAL REFERENCE TO THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED KINGDOM

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Though the magic word "participation" may not have become popular before the mid-sixties, the principle behind it has always been discussed when people being subject to decisions were not admitted to participate in making them. Thus, an enormous amount of paper has been written about the subject before Charles de Gaulle used the word participation as a sedative to calm the revolutionary scene of France in 1968. Instead of adding to the overall literature on participation, it is intended to discuss it with particular regard to one small sector of political reality: building and town planiing, assuming that both are part of the same sector.

In the field of building, the role of experts has still more weight than in town planning. Without doubt it can be said that except the owner's rights there is no participation of the population either in the basic legislation for building or in the procedure of the building permit. Or, what is even more, it must be doubted that there is enough participation of the parliaments in the decision-making of experts in this field: we have only to regard the procedures by which norms and standards are usually introduced into legislation through by-laws, the deliberation of which is left to experts by the parliament. This assignment of parliamentary competences is based on the erroneous opinion that by-laws are absolutely non-political: an opinion fostered eagerly by the experts' clan pretending too that the scientific and technical components of norms are far beyond the comprehension of politicians. It becomes quite evident that standards are also political issues if one only looks for instance at the differences of national norms for the ferroconcrete being certainly not submitted to different laws of nature. The case can easily be followed up to find out that particular economico-political interests largely influenced these standards (for instance the proportion of steel and concrete under certain conditions).

Another example more directly affecting the user of buildings is the German standard of the basal surfaces of furniture. This norm - together with the one for the minimum (= maximum in practice) floor space in public y subsidised housing - led to the endless reproduction of identical rooms and apartments excluding individuality and adaptation to particular needs. The committees being charged by the legislator with the elaboration of norms are usually composed of experts representing science, practice (practising architects for instance), industrial production, higher public administration, and perhaps, a consumers' board. The position of the latter is notoriously weak. There is no need to add that the administration, particularly the ministerial one, being charged with the formulation of by-laws often contributes the most crucial details of laws which are sometimes themselves restrained to mere formalities.

Since there is not much room for participation in the field of building in the sense of construction, this report confines itself to the field of town planning. In spite of the reader's unquestionable acquaintance with the principles of participation in this field, it seems necessary to call back some historical and philosophical keywords in order to set up the background as well as the context of our discussion.

The uncontrolled development of the 19th century - due to its liberal conditions - has proved the necessity of planning. The evolution of democratic rules and the increase of autonomy of local government logically led to the submission of planning to democratic decision-making. But, planning was not as new as that. There had been planning as long as men tried to organise their social and individual existence. There had always been some sort of planning done by the territorial authority, whether it was the King, the Kaiser, or an inferior nobleman. This planning - of wars, battles, roads, canals, towns (as for instance Versailles and Richelieu), of housing (for veterans) - did not change in principle when planning and building control was established on the basis of the community of local government. From the beginning of a democratic decision-making in the field of building and town planning this very often found itself in competition or in conflict with the traditional planning being carried out by instances of the central government. Since they were supported by long traditions, governmental planning authorities developed technical, scientific and sometimes political abilities and competences on a much higher level than planning authorities particularly of smaller communities could ever attain. The political power being thus accumulated by and within governmental planning authorities has been designated as technocracy or expertocracy.

Local planning authorities being forced to deal with governmental offices had to develop similar abilities and competences. They also engaged experts who sometimes erected a technocratic fortress within the planning authority, inevitably diminishing democratic decision-making.

The phenomena described so far influenced more strongly the planning process in continental Europe than in the United Kingdom, where the planning officer was not allowed to show any political colour until the late sixties and was generally more restricted to a consultative status than his colleague on the continent. The fact that Great Britain was one of the first countries in Europe to establish participation in the planning process by law was perhaps provoked by an alarming increase of experts in the planning field and a certain instability of governmental decisions as a result of alternating governments due to the British election law. (To a continental observer it seems understandable that the man in the street being submitted to planning decisions and seeing them so often modified by change of the central government, searches stability for himself, in his own political and geographical "environment".)

Another reason may have been the lack of balance between the competences of central and local governments. The more planning decisions and the approval of plans are reserved to the central government, the more people on the local level may feel to be "overgoverned" and the more changes of policy of the central government break into local affairs in a disturbing way.

Still, the degree of democracy in planning is far from being higher on the continent as for instance in the Federal Republic of Germany. Here governmental institutions for sectorial planning (communications of all kinds, water supply, energy supply, education, industrial development etc) hold a dominant position in the planning process, being able to make decisions excluding parliaments, in ministries and other specialised organisations. And, which may even be more important, they normally have the money and the hierarchically organised staff to implement their plans. Concurring particularly with small communities and their planning decisions, they nearly always win the game if it is only for the reason that their implementations are considered as gifts.

To come back to a more general background, another fundamental defect of democracy should be mentioned, a defect which could be called the "interior subversion" of parliamentary decision-making. Without trying to analyse the reasons for the "interior subversion" it can be described from the point of view of the public concerned: nearly all parliaments of the world, no matter at which level, community or national, do really take important decisions in their sessions. These are more

or less the celebrations and the demonstrations of decisions already taken before by committees, by groups of experts, fractions of parties etc. Public control of that kind of decision is notoriously difficult, since committees, fractions etc are used to discussing behind closed doors. (There was a strong desire pronounced by British newspapers in 1970-71 to be admitted to sessions of planning committees at the level of the community.)

Another point is that members of parliament have become too much exposed to the pressure of the lobby or to structures of non-parliamentary power of other types being very well indicated by the German term "Honoratiorendemokratie" used with special regard to smaller communities.

Facts as exposed so far and perhaps some more have been at the origin of the institutionalisation of participation which was meant to be a possibility for the citizen to "take part" in decision-making during the planning process. This taking part was restricted on one hand by the power given legally to parliaments and on the other hand by the geographical and political "size" of the object of decision. To say this less abstractly: decision-making could be open to participation for instance on the level of a quarter of a town, some blocks of houses, a small community, the localisation of a kindergarten or a primary school etc, ie on a very local level, so that "the circles" of higher-level planning would not be disturbed. The late Joint Parliamentary Secretary, Skeffington, one of the prophets of participation in Great Britain, emphasises that all final decision-making has to be reserved to the elected, representative parliaments. This shows that participation is meant to influence parliamentary decisions but not to usurp them.

There is no value of its own. Value depends on a system of values, of the angle of view etc. Participation does not automatically mean more democracy. Professional planners very soon discovered participation as a means of planning. This version of participation is sometimes used very pragmatically to mobilise citizens against councils or - generally speaking - to strengthen the planner's position if this for once is weak. It also may happen that participation strengthens the position of minorities being able to play on the participation instrument with virtuosity. That is where Skeffington's concerns may come from!

Another quite current reproach to participation should not be concealed: it is said that decision-making sometimes becomes entirely impossible by the intervention of participating people. Or it may occur that decisions are delayed to an extent which paralyses planning. These critical remarks are of the same kind as the more general one that participation of people in planning has its success merely in being against an issue of the authority, a proposal or a plan, and that it almost never succeeds in setting up alternatives of constructive quality. Though there were some positive experiences in America, for instance, in the advocacy planning scheme showing that also constructive contributions can be produced by participation, these criticisms are to be taken seriously.

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PARTICIPATION OF PEOPLE IN URBAN DEVELOPMENT PLANNING (AND RELEVANT ADMINISTRATIVE ACTION) IN GREAT BRITAIN

The control exercised over town and country development is considerable and has been progressively extended since such control was first imposed in the Housing, Town Planning Act 1909.

From 1 July 1948, when the Town and Country Planning Act 1947 came into force, every local planning authority (that is, the councils of counties and of country boroughs and, for London, the Greater London Council, all of which are elected bodies) have had to make surveys of these areas and to prepare development plans based on those surveys.

Such a development plan must indicate the manner in which the land covered by the plan is to be used and the stages by which the development is to be carried out.

The development plan has to be submitted to the appropriate Minister, now the Secretary of State for the Environment, and notice of that submission must be published in the London Gazette and for two successive weeks in at least one local newspaper circulating in the area.

Those who have any objection to the plan may send their objections in writing to the Secretary of State. The Secretary of State has three options:

1. he may reject it and ask the local planning authority to think again;

2. he may give the objectors a chance of a hearing before one of his inspectors, usually a qualified surveyor experienced in town planning matters; or

3. he may institute an inquiry held in public by such an inspector. Such an inquiry is conducted like a case in court in accordance with rules made by the Lord Chancellor under the Tribunals and Inquiries Act 1971 with the local planning authority and all other interested persons being entitled to attend and to state their case, either themselves or through a lawyer or surveyor, and to call and examine witnesses who may be cross-examined. The Secretary of State considers the report made by the inspector at the end of the inquiry but he is entitled to accept or reject in whole or in part the recommendations of the inspector and to approve the development plan with or without modification. A copy of the Secretary of State's decision and his reasons must be sent to all those who appeared as interested persons at the public inquiry.

In 1967, a White Paper entitled "Town and Country Planning" - Cmnd. (Command Paper) 3333 was published by the government. In this paper there occurred the following passage (condensed):

> "A new factor has been introduced into planning by the government's regional policies and by the setting up of the economic planning councils in the regions and in Scotland and Wales.

The plans drawn up must be realistic in financial terms and the demands they make on the main capital expenditure programmes must be reasonable in amount and in timing. However admirable they may be, plans which cannot be realised are positively harmful. They stand in the way of more realistic plans, and cause needless worries to people who fear that their interests may be affected.

People must be able to participate fully in the planning process, and their rights must be safeguarded. One of the government's main aims in the present review of planning legislation is to ensure that there are greater opportunities for the discussion of important changes while they are still at the formative stage and can be influenced by the people whose lives they will affect. They intend also to maintain the rights of objectors - whether they are individuals or organisations - to argue their case at the formal stages.

The problem is that safeguards built into the planning procedure automatically slow it up. Procedural safeguards, vital though they are, slow the progress towards decision, and there is growing impatience at present delays. These delays may hold up development that matters greatly to the people concerned and may be of economic importance for the country as a whole. While the preservation of proper rights of representation is of overriding importance, some streamlining of the system is essential if unfairness to those who wish to develop is to be avoided.

There are therefore conflicting but basic requirements to be reconciled. On the one hand there is the desire for more consultation and wider association of the public with planning, on the other, there is the need for quicker decisions. The government believe that the way to satisfy these requirements lies in devolution of responsibility for some planning decisions, and in simplification of procedures. With these aims in mind, the government have decided to introduce legislation to improve and modernise the town and country planning system ..."

The new legislation referred to was contained in the Town and Country Planning Act 1971 as subsequently amended. (Similar provisions applicable to Scotland are contained in the Town and Country Planning (Scotland) Act 1972.)

Under the Act of 1971 a new system is imposed for certain areas. The duty to make a new survey every five years is in those areas replaced by a provision that the local planning authorities for those areas may cause fresh surveys to be made at any time and must do so whenever required by the Secretary of State.

This survey leads to the preparation of what is called a "structure plan" which is a written statement indicating the authority's general policy and showing trends and tendencies and setting out a broad basic pattern for future development. This statement must be based on the survey and have regard to regional economic planning policies. In particular, the statement must indicate any area called an "action area" which the local planning authority selects for comprehensive development.

The authority has to give adequate publicity to the survey report and to any matters which it proposes to include in the structure plan, and adequate opportunity must be given to any person expected to have an interest in the matters which are to be included in the structure plan to make representations to the authority which has to consider these representations. Thus the public has a chance to participate in the making of the structure plan.

When the structure plan is submitted for approval to the Secretary of State he must be informed about these matters and, if he is not satisfied, he may return the plan to the authority with instructions about further publicity and re-submission of the plan.

The Secretary of State may reject the plan outright: otherwise he must consider any objections and cause an examination to be made in public by a person appointed by him of such matters affecting his consideration of the plan as he considers ought to be examined.

Eventually, the Secretary of State may:

i. reject the plan, or

ii. approve it in whole or in part, or

iii. approve it with or without modifications.

He must issue such a statement as he considers appropriate giving the reasons for his decision.

The second innovation made by the 1971 Act is the provision for the making by the appropriate local planning authorities of "local plans". When a structure plan has been approved by the Secretary of State, the authority must consider the desirability of making a local plan for any part of its area. The authority may also be directed to make a local plan by the Secretary of State, and it must make one for any action area it has.

A local plan must conform to the provisions of the structure plan and is the plan which is likely to have a direct effect on an individual and his property. It consists of a written statement and a map and sets out in such detail as the authority thinks appropriate its proposals for the development and other use of land in that area to which the plan relates and for any description of development or other use of such land.

As in the case of a structure plan, the authority must give adequate publicity of their proposal to prepare a local plan and of the matters which it is intended to include in that plan, and must afford those who may be expected to have an interest in such matters adequate opportunity to make representations to the authority.

When sending the local plan to the Secretary of State, the authority must inform him of what they have done in this respect and he may interfere if he is not satisfied.

When the local plan has been prepared and before it is adopted by the local planning authority, copies must be made available for public inspection and information must be given about the time within which objections to the plan can be submitted. In this case, the objections are to be sent to the local planning authority. Any objections received within this time must be considered by the authority and they may in addition decide either to have a private hearing of the objections or a local public inquiry. After the objections have been received and considered and, if the authority so decide, a private hearing or a local public inquiry had been held, the local planning authority may adopt the local plan.

The structure plan, as approved by the Secretary of State, and the local plan, as adopted by the local planning authority, together form the development plan for the area.

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The reporters are convinced that no country in Europe has experienced participation as much as Great Britain, it really was the outrider in this field. There is such a variety of cases and methods that selection is inevitably accidental.

The spectrum reaches from mammoth planning issues as for instance the Greater London Plan to sectorial decision-making as for instance the proposal for a controlled parking zone in the London Borough of Ealing, both being organised thoroughly. Another example is the two-year lasting "campaign" of 15 public hearings, one for each well-defined district of the London Borough of Sutton. The hearings were attentively prepared by publications, information, discussions in small groups, exhibitions etc. Objects of the hearings were general aims of development as well as concrete planning issues. The administrative organisation was much the same as the one of Darmstadt being described later and having certainly learned a great deal from British experiences.

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CITIZEN PARTICIPATION IN THE PLANNING PROCESS AT THE LOCAL LEVEL IN THE FEDERAL REPUBLIC OF GERMANY

On the communal level, many different forms of participation have been developed. The differentiation of participation schemes follows partially the nature of planning objects such as: community development, development of limited areas, and town conservation or renewal.

Since the different planning objects have distinct legal backgrounds, a short description of these should be given.

In 1948-50, most of the Länder adopted "laws of reconstruction", conceived as temporary legal frameworks for planning. But, in reality these laws remained in force until a federal planning law was established in 1960 by the Bundesbaugesetz (BBauG), providing two levels of planning, the "preparing directory plan" and the "compulsory directory plan" (vorbereitende Bauleitplanung = Flächennutzungsplan und verbindliche Bauleitplanung = Bebauungsplan). The first planning step deals with land use regulations and the overall structure of the community, the second one is to be based on the first one and defines legally what could be built or developed and where it can be done.

Both planning processes include a hearing which allows "everybody" to pronounce his comments ("Bedenken und Anregungen") according to §2 and §12 of the BBauG vis-à-vis the planning authority. As certain reactions of the public and of the administration show, the sole possibility of the citizen to have a look at plans being exposed somewhere in a planning office, difficult to read and to understand and the opportunity to give written comments on those plans is more and more being considered as insufficient.

Parliaments, political parties and the administration attach more and more importance to participation and search for new forms to realise it.

In 1971, a new planning Act came into force. It focused on town conservation and renewal as well as on areas to be developed (StBauFG) (1) "Law for the promotion of urban renewal and development". The new law stressed the citizen's participation but also the acceleration of planning and implementation processes.

The law takes into consideration that conflicts between planning and people concerned by planning may occur. To solve such conflicts it endeavours to discover the desires, problems, and needs of the population concerned which is not only composed of landowners but also of tenants ie of all kind of users ("Sozialplan").

There is something quite new in the 1971 Act: people are not only consulted after the plan has been established, but they are given the opportunity to contribute their views right from the beginning of the planning process.

Still, the new law is read differently by different planning authorities according to their respective opinion about participation, though the additional expenses for participation are subsidised by the higher authorities.

Generally speaking, those who thought that a new air of participation dawned have largely been disappointed since the "social plan" merely was used as an instrument to smooth conflicts a posteriori. The socio-political improvement not only of the planning process but also of its objectives and objects was in reality not what it was theoretically meant to be. Also the means of expropriation and of other interventions into property (Bodenordnung) are not as effective as they were originally thought to be.

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(1) Städtebauförderungsgesetz.

Furthermore, an extended participation tends to conflict with the competences of the local government.

The amendments of the BBauG of 1977 introduced the new scheme of participation into the general building and planning law, thus unifying the basis for participation at all planning levels.

Some authors believe these amendments to be a sign of the conviction of the legislator that participation is of advantage both to citizens and planning authorities.

Following the British example, participation is now established an an opportunity or even a right given to the population at an early stage of the planning process to make comments also on aims and objectives of planning (§2 and 2 (a) BBauG). Nevertheless, communities have an enormous latitude in practising this paragraph: they can define the areas to which participation is limited, fix the delays for comments and the way participation is organised. The §2 (a) only sets a frame: the community has to publish as early as possible the general aims of planning and its effects. It has to give opportunity to the public to give comments and to discuss issues. The community is bound to put forward alternative planning schemes. On the other hand, the law clearly says that after this hearing there will be no other opportunity for intervention besides the one already included in the Act of 1960.

So far, no experience has been made with the new BBauG. Yet, it can be expected that the new participation model will only be applied if the expenditures caused thereby for the administration remain within defendable limits. There will also be a new discussion of the principles as soon as participation conflicts, in particular cases, with communal policy. The scheme provided by §2 (a) is described by commentators as an anticipated participation. Practice has to prove to which extent a genuine participation will be possible. It cannot be excluded that participation may also be employed to accelerate the formal planning process without taking into consideration the interest of the population to a sufficient degree.

The amended BBauG adapts the "social planning" of the StBauFG in its §13 (a) aiming to avoid detrimental effects for the population concerned.

In consideration of their financial situation, it must be doubted that the communities will be able to implement the results of the social planning because there will be no subsidisation according to the BBauG as it is provided to an extent of two-thirds of the total expenses to be paid by the State and the Länder according to the StBauFG.

PARTICIPATION ACCORDING TO THE StBauFG

As it was said before, the StBauFG (Law for the promotion of urban renewal and development) has been in force since 1971. Unlike the new BBauG, the StBauFG has been experienced also in its parts on participation, in particular in order to obtain the subsidies granted.

Though the social plan is more and more considered as a plan of social assistance or of social relief, participation of the population concerned is organised as provided by law. Certain models have been developed and almost institutionalised. The "development forum" on the community level, permanent advisory boards of representatives of the citizenship at the level of town distrcts "citizens' initiatives" (Bürgerinitiativen) etc. The law giving room for different forms of participation, communities very often applies particular organisational schemes adapted to the planning cases in question.

Some examples:

1. Tübingen (Baden-Württemberg):

A team for social planning is engaged in the social plan as well as in the promotion of participation. The team tried to combine both activities. The following elements have proved successful:

- activating methods of interviews;
- working groups composed of socially disadvantaged inhabitants and members of the team intended to give opportunity to expression of interests;
- exhibitions, meetings and inquiries in a specially installed "bureau for renewal" and other public relations activities.

2. Ansbach (Bavaria):

The community charges a consultant with the preliminary survey and the elaboration of principles for the social plan. The consultant:

- holds interviews;
- organises meetings in sub-districts of the area concerned to facilitate the survey and to promote participation;
- initiates the foundation of a "renewal board" to accompany the entire planning process as a forum for public discussion, an institution to reply on issues of the administration etc.

3. Darmstadt (Hessen):

The community decides to leave the local planning and the social planning to its own administration. Side by side with the working group "compulsory plan", a working group "social plan" is established. It is composed of representatives of the town planning department, the real estate department, the housing department, the department for legal affairs and for social assistance. In addition, a working group "renewal bureau" is established. It is composed of members of the "compulsory plan" and the "social plan" groups. The "bureau" has to guarantee close contact between population and administration and to inform as well as to advise citizens. The "bureau" is given an adequate possibility to act and to decide on its own. In order to enlarge participation, the community council engages an advocacy planner. (This model seems to be interesting for larger renewal and development schemes in larger towns.)

CONCLUSIONS

The changing conditions of planning due to the changes of the economical situation, the decrease in population, the reduction of public and private investments, demand a revision of participation policies.

In future, planning will be marked by the size of its steps becoming considerably smaller. Also the areas concerned by relevant planning will be reduced in size. This will implicate a shifting of the scarce resources from long time and overall planning to a short term and locally restricted planning. Therefrom can be deduced that participation has its best chances on the local level. On the other

hand, a tendency towards institutionalisation of participation cannot be denied. There is also (as, for instance, in Northrhine-Westfalia) a trend to give certain competences to councils of sub-districts of larger towns.

The level of planning which will be the most adequate for efficient participation is the town quarter or district being "handy" from the political and from the planning point of view.

The basis of participation is political emancipation. Emancipation may also be born out of experiences in others than the planning field as proves the French example of punctual participation practice in the town planning field sprung from the trade unions tradition. Participation without emancipation (which also means ability to take responsibility) can lead to paralysation of planning by "too much" democracy as we have seen it in some cases in the Netherlands where the planning law provides participation to a large extent.

Yet, it should not be concealed that a certain egoism of the local population may help to preserve local individuality and quality. In the Federal Republic of Germany we notice that the trade unions have discovered urban planning as an object of their interest.

Though the case of Bologna, Italy, cannot be transferred to other countries without difficulty, it shows that decentralisation of communal planning competences contributes positively to participation and to emancipation.

It was said in the beginning of this report that there is practically no participation of the population in building (neither at the state of planning nor in implementation). But this should not insinuate that there was no need of public intervention. The reporters believe in firstly making parliaments aware of their loss on control also in the field in question and of the political character of certain norms and standards. The consumers and their boards should be given more opportunity to participate in the deliberation concerning norms. But, there should also be more public control especially in cases where the technical components are of minor importance, which is true for many dimensional standards. Examples could be cited as the one Nader demonstrated in the USA and John Tyme, the British protester against motorways, showed in the field of planning. It should also be seen that numerous standards imposed humanly unbearable environmental conditions under the pretext of technical necessities. (This is in short one of Tyme's arguments.) Opportunity should therefore also be given to "opposing experts" in order to avoid one-directional argumentation or criteria.

Organising participation necessitates preliminary information of those who are to be invited to participate in the planning process. Many ways of information have been tried. From regional television to printed pamphlets sent individually to each household in the area concerned (Sutton). Everywhere the press, preferably the local one, is called upon. This is not without danger for participation if the press instead of restraining itself to information intervenes by opinion-making and directing actions. The same kind of manipulation may also result from the assistance of other mass media. There is certainly not less danger in mass media being under control of the planning authority or the administration.

Another form of perverting participation by a new representation can be observed wherever participation is solidly institutionalised when advocates specialise to represent people in public hearings and inquiries being confronted with other jurists eventually representing the authorities.

Even the best organised participation can be turned into its opposite. Participation being usurped by unscrupulous minorities can be perverted into anti-democratic action. But, this is one of the well-known risks of democracy and no reason to blame participation as such.

THE BELGIAN EXPERIENCE WITH REGARD TO PUBLIC PARTICIPATION IN THE PREPARATION OF LEGISLATIVE AND ADMINISTRATIVE ACTS

by Mr A VANWELKENHUYZEN, Professor at the Faculty of Law,
Free University of Brussels

A parliamentary régime of the classical type exists in Belgium already for more than one and a half centuries. Direct participation by the public in the preparation of legislative acts has hardly had any success. On the other hand, the personal intervention by citizens or groups of citizens in the preparation of administrative decisions is a living reality even though it is only a limited aspect of democracy and still occasionally subject to certain changes.

1. Participation in the preparation of legislative Acts

The fathers of the Constitution of 7 February 1831 ignored the institution of referendum. Since then attempts to introduce it on the occasion of constitutional revisions have failed.

When a revision was undertaken in 1893 at the initiative of Leopold II who was very much in favour of it (1), an attempt was made to bestow on the King acting under the responsibility of his Ministers the right to ask the opinion of the voters on any public or private Bill for legislation submitted to the chambers. The government proposal met with an "ignominous failure" (2). The private Bill by two "radical" politicians, JANSON and FERON, to institute a referendum post legem was also rejected by an overwhelming majority (3).

On the occasion of the 1921 revision, an extraparliamentary commission for institutional reforms suggested a referendum system the only object of which was to remove the separation between the chambers when there was a difference of opinion between them. This system was adopted by the senate but rejected by the other chamber. In that chamber, various other proposals to institute a referendum ante or post legem, or a decision-making referendum or else a consultative referendum were proposed to the chamber but were each time ruled out by large majorities (4).

When the declarations concerning the 1954 revision were being prepared the member of parliament, A SAINT REMY, proposed "to introduce in our country, like in Switzerland, the popular referendum" which should be both for legislation and constitutional matters and such in view of "the sacrifices of sovereignty" which "the creation of Europe" would require (5). The special commission set up to examine the draft declaration on revision rejected this proposal with a unanimous vote minus one, and stated emphatically: "it is undeniable that the referendum does not safeguard a better functioning of political institutions" (6).

It seems that in Belgium, the matter of the referendum has been definitely settled: the representative system of this country does not seem to permit such a device of direct democracy.

On the other hand, the idea of organising a consultation of the people (sometimes referred to as "consultative referendum") is generally regarded as an acceptable thing. In 1937, the Centre for Studies on Reform of the State (CERE) concluded that such a procedure could be resorted to by the law without any prior modification of the constitution (7). The distinguished lawyers belonging to this centre added however that a popular consultation was not in their view "particularly useful" and that "only under exceptional circumstances (...) should the legislative power decide to resort to it" (8).

An Act of 11 February 1950 provided for a "popular consultation with regard to the royal question". The question submitted to the voters was the following one: "Should in your opinion King Leopold III exercise again his constitutional powers?". The partisans of this consultation based themselves on the opinion of the Centre of Studies for the Reform of the State (9). Its opponents pointed out that the constituent chambers in 1921 had expressed their opposition against the referendum even if it were a simple consultation (10). The Act was adopted and the consultation took place on 12 March 1950: more than 57% answered "yes". Following a decree by the parliament of 20 July 1950 which founded that "the impossibility to reign" had ended, King Leopold III actually took up the exercise of his powers again. But after violent incidents provoked by his return, he renounced at the beginning of August to a continuation of his reign and an Act of 10 August 1950 confirmed on the Crown Prince, the future King Badouin, the function of head of State. The final solution of the "royal question" therefore was contrary to the wish expressed by the majority of the people who had been consulted. In other words, this reference to the opinion of the voters, albeit on a complex and highly emotional question on which people certainly had many different views, produced a result that was hardly a very convincing one.

Further popular consultations have since been proposed but none of these has actually been accepted by the legislature (11). We should like to mention in particular one of the most recent proposals "a Bill to introduce popular consultations with regard to constitutional and linguistic questions" (12). Its purpose was to allow a consultation of the inhabitants of certain areas whose incorporation in this or that linguistic area is a subject of controversy in order to obtain their opinion whether they wish to see their municipality attached to this or that administrative region which means that it will be incorporated in a particular linguistic region (where a legal régime concerning the use of languages is in force). The Bill was rejected at the commission stage by a large majority. To the advocates of this Bill who based themselves on the "elementary right of citizens of a democratic country to decide themselves on their own destiny" its opponents replied that a popular consultation "is contrary to the principle of parliamentary democracy and even not without danger for parliamentary democracy (13).

While the great political parties in Belgium are not very much in favour of appealing directly to voters in order to invite them to give their views on a hot political issue, members of the chamber of deputies and senators do not hesitate to receive and even to convene themselves to committee meetings at which legislative proposals are being discussed, persons whose interests are at stake or delegations from associations or other political persons (14). The rules of procedure of the chamber of deputies provides explicitly at Article 21: "when a Bill or a motion for legislation is under consideration, a committee may hear persons or organisations outside parliament, obtain written evidence from them and accept or ask for their collaboration" (15).

For a considerable number of years, consultative bodies and other different groups have been accredited and can address opinions and proposals to the parliamentary chambers. For example, the Central Economic Council and the National Council for Labour enjoy this facility. It appears however that they have encountered difficulties when they tried to present their proposals directly to parliament (16). During the last proceedings for constitutional revision it had been envisaged to recognise explicitly by a constitutional article the possibility for the ordinary legislature to grant the right of initiative to public law organisations to be designated by it. However this proposal has failed. Recently, an interesting suggestion was formulated to improve the relationships between parliament and the major advisory bodies: the Central Economic Council and the National Council for Labour; which would if necessary be merged into one single body, would be detached from the executive power from which it depends at the present time and they would be attached to the legislative power (17).

Another method for associating the public more efficiently to the enactment of statutory instruments would be to divide legislative power between the national parliamentary chambers and the sub-national representative assemblies, the cultural councils and regional councils; such a fragmentation of the legislative power has been realised or at least authorised by the revision of the Constitution of 24 December 1970 (18). The representative principle is entirely safeguarded. But the exercise of legislative power in certain fields to representative organs of regional or cultural communities, which after all are parts of the national community, would enable a better transmission of the will of the people via those who are called to express this will. In this field, however, the Belgian experience is yet too recent for any profound conclusions to be drawn.

2. Participation in the preparation of administrative decisions

Participation of individuals in administration takes various forms and occurs in a great variety of fields. This question has already been studied in Belgium from the legal point of view as well as from the point of view of administrative sciences and it would be impossible in the present framework to present a succinct summary (19). We shall restrict ourselves to some of the most characteristic forms in order to show how it works.

The public enquiry is often a means to learn the wishes of individuals and groups and above all a way of giving them an opportunity to manifest their opposition to certain decisions which the administration intends to take. In this connection one might mention more than 15 laws and other statutory instruments which regulate administrative enquiry proceedings. Most of them deal with administrative decisions concerning town and country planning, including public highways, and expropriation proceedings in the public interest (20). This type of consultation of the public does not always procuce a substantial impact on the participation of citizens in administrative decision-making. But at least when the enquiry is properly given full public notice it may provoke a more or less lively interest and may lead to other actions of the public in order to obstruct or to accelerate the administrative decision. By way of example we should mention a planning project for part of the municipality in the Brussels conurbation which led to the sending of 208 letters containing claims and commentaries, 412 protesters and 88 lists with 2,086 signatures (21). The impact of opposition that is registered under such circumstances or of the support that the authority finds with certain parts of public opinion is very difficult to measure, but it seems to be altogether of a certain importance.

Another aspect of public participation in administrative decision-making can be observed when the law provides that citizens, by themselves or as groups may demand the setting-up of certain public services or the grant of certain subsidies or other forms of assistance. We can mention here an example taken from education law. According to Article 4 of the Act of 29 May 1959 modifying certain parts of education law, the State is obliged to open a public school or to cover the cost of transport to such a school or again to grant subsidies to an existing secular private school, "at the request of parents who desire secular education and do not find within a reasonable distance a school at which at least three-quarters of the teachers hold a diploma of secular education". Similarly, parents who wish denominational education may obtain a grant of a subsidy to an existing establishment of denominational education or the organisation of transport of their children to such an establishment.

A third form of participation of individuals in the preparing of administrative decisions consists in the activity of persons representing within management boards of public services certain economic, social or professional circles. The most frequent examples concern the boards or committees managing semi-public or public establishments in the social sector (22). For instance, the administrative board of the National Social Security Agency is composed of a president and 10 members, five

of whom are "delegates of organisations representing employers" and five who are "delegates of organisations representing workers" (Article 57 of the Royal Decree of 28 November 1969).

Finally, contracts are a means of associating individuals with administrative action. We have in mind not only contracts for the carrying our of work or services or the delivery of goods or concession contracts for public services. In new sectors, such as economic management, a contractual procedure may replace the unilateral decision-making process in which a public authority exercises its political power. Let us mention as a typical example the "programme contracts" which according to the Act on economic and price controls (Decree Law of 22 January 1945, amended by Act of 30 July 1971, Article 1, §3) are concluded between the Ministry of Economic Affairs and individual, or, groups of enterprises in order to stipulate "undertakings with regard to price levels to be applied" (23). Such agreements have been made for sectors such as bread, electrical appliances, imported wood, non-ferrous metals, etc. This consultation procedure which is very typical, raises, unfortunately, where it enables individuals and groups to intervene in government decisions, "a risk that the State as representing the general interest is troubled by the emerging domination of certain private interests" (24). Here we face one of the limits of public participation in the preparing of decisions by public authorities: it should not result in making the general interest subservient to the private interests of the most active parts of the public.

Notes:

(1) See M. VAUTHIER, "Le Referendum - Quelques vues rétrospectives 1892-93", Revue de l'Administration, 1946, p. 149 et s.

(2) P ERRERA, Traité de droit public belge, 2ème éd., Paris, Giard et Brière, 1918, §73, p. 123.

(3) Doc. et Ann. Parl. Ch., 2 February 1892, 11 February 1892 and 13 July 1893.

(4) For fuller details, see "Centre d'Etudes pour la Réforme de l'Etat, La Réforme de l'Etat, Bruxelles, 1937, p. 634 et s.

(5) Doc. Parl. Ch., S.O. 1953-54, No. 326, 23 February 1954.

(6) Doc. Parl. Ch., S.O. 1953-54, No. 345, 25 February 1954.

(7) Op. cit., p. 643. Contra: M VAUTHIER, op. cit.

(8) Op. cit., p. 644.

(9) See report drawn up on behalf of the "Commission spéciale de la Chambre, par M OBLIN, Doc. Parl. Ch., S.O. 1949-50, No. 122, 22 December 1949.

(10) Ibidem, see "Note de la minorité" at end of document.

(11) See especially "proposition de loi instituant une consultation populaire au sujet des réformes institutionelles de l'Etat belge" tabled by the Communist representatives in 1965 (Doc. Parl. Ch., S.O. 1965-66, 31, No. 1, 9 November 1965) and the "proposition de loi organisant une consultation de la population bruxelloise au sujet d'un statut spécial pour la région de Bruxelles" tabled by representatives of the F.D.F., the French-speaking Party of Brussels (Doc. Parl. Ch. S.O. 1966-67, 433, No. 1, 7 June 1967), both of which were submitted when the "Chambres" were still constituent assemblies. See also the motion referred to in note (12) below. For previous motions based on referenda, see "La Réforme de l'Etat, op. cit., p. 636."

(12) Doc. Parl. Sén., S.O. 1968-69, No. 292, 27 March 1969.

(13) Doc. Parl. Sén., S.O. 1969-70, No. 400, 20 May 1970.

(14) On the subject of hearings ("auditions"), see the work of D SIDJANSKI, in particular "Auditions au parlement européen: expérience et avenir", Res Publica, 1976, No. 1, p. 5 et s. Mrs F DRION, research worker at the Brussels "Centre interuniversitaire de droit public" is completing a study of hearings in the Benelux countries, which demonstrates the importance of this phenomenon in the legislative process.

(15) Practice is identical in the Senate, although the rules are much less explicit (but cf. Article 57, para. 8).

(16) On this subject, see W J GANSHOF VAN DER MEERSCH, Pouvoir de fait et règle de droit dans le fonctionnement des institutions politiques, Librairie Encyclopédique, Bruxelles, 1957, p. 102 et s.

(17) Centre d'Etudes des Réformes Politiques, La Belgique de demain, Bruxelles, 1977, p. 38.

(18) Art. 59 bis and 107 quater of the Constitution.

(19) See E JORION, "De l'administration des affaires du peuple par le peuple", Administration Publique, 1976-77, p. 253 et s., and the studies quoted in that article, in particular J M FAVRESSE, P COURTOY and M VERMEULEN-MALCHAIR, "La participation des particuliers aux tâches administratives", Rapports Belges au VIIIème. Congrès international de droit comparé, Centre interuniversitaire de droit comparé, Bruxelles, 1970, p. 629 et s.

(20) R DEVREUX, "Possibilités de codification de l'enquête publique en Belgique", mémoire de licence en sciences politiques et administratives, Université Libre de Bruxelles, 1975, p. 106 et s.

(21) An action to void previous transactions, submitted to the Conseil d'Etat mainly on the grounds that the enquiry procedure was irregular, was rejected (C.E. 25 November 1969, No. 13.802, BRIDOUX, Rec. Jur. Dr. Adm., 1970, p. 264).

(22) See p. 67 of J SAROT, "L'évolution des organismes d'intérêt public", Travaux et Conférences, 1964, II, p. 55 et s.

(23) See J SAROT, "Le contrat, instrument d'organisation des services publics", Administration Publique, 1976-77, p. 100 et s., especially p. 114 et s.; J LEBRUN, "L'administration économique par voie contractuelle en Belgique", in Renaissance du phénomène contractuel, Martinus Nijhoff, La Haye, 1971; C CAMBIER, "Les contrats de programme", in Miscellanea W J Ganshof van der Meersch, Bruylant, 1972, t. III, p. 435 et s.; R ANDERSEN, "Le contrat de programme", Rec. Jur. Dr. Adm., 1975, p. 241 et s.

(24) See p. 470 of A JACQUEMIN, "Nouveaux rapports entre l'Etat et l'entreprise privée: concertation et corporatisme", Journ. Trib., 1977, p. 465.

STATEMENTS

made by various participants during the debates

Mr Donal Binchy - Ireland

Mr Binchy said that he spoke from the standpoint of a practising lawyer with no involvement in the academic field or in the fields of government or administration. He was necessarily uncertain of the conclusions that were expected from the colloquy. There was no great problem in reviewing or appraising existing forms of participation in legislative or administrative acts. But to where does this lead? He suggested that it could only lead to the establishment of some consensus on the desired or best degree of public participation.

He considered that total public involvement was not possible except in major matters such as elections or referenda. In practical terms almost any group of people - from a national to the smallest conceivable group (for example a club) had to manage its day to day affairs by some system of representative democracy through an elected parliament, council or committee. Moreover he thought that total involvement by all the people in all matters was undesirable. It was expecting too high a degree of selflessness from the majority to pass legislation that would penalise itself in taxes or legislation which gave rise to inconvenience or sacrifice in the fields of environmental control or planning. Paradoxically however people would submit to any necessary taxation or discipline imposed by their own elected representatives.

The referendum had been used responsibly in Ireland on major matters and not as a mere political or election gimmick. In one instance a government in power sought to change our proportional representation system of election to a system of single seat constituencies with a simple majority vote. The people were wise enough to reject this proposal but at the next General Election saw no contradiction in returning the same government under the proportional representation system.

In conclusion Mr Binchy felt that in general terms, the representative democratic process operated well in Ireland, although it was not free from some criticism. The preservation of a sound democratic system required continuous vigilance if it was to function for the good of the nation and all its people.

Mr Donal Binchy - Ireland

Mr Binchy made the following observations on physical planning and environment matters raised in the paper delivered by Mr Frans van der Burg:

- The legislation relating to planning and development and environment in Ireland was enacted by the process of representative democracy ie by Act of parliament.

- The powers given by this legislation were mainly delegated to and exercised at local government or council level.

- Reference to the various papers furnished to the delegated suggested that there was a great similarity in the laws on this subject in the various countries.

- In Ireland all were free to be involved in the Development Plan for any particular area or region. The plan had to be published, was open for inspection and submissions. Where appropriate an oral inquiry was held.

- At the level of individual applications, however, we had moved in Ireland to a quasi-judicial process as distinct from a decision making process. Any person could appeal against the granting of a permission by a planning authority and, where appropriate, this appeal became the subject of an oral hearing. Some restriction was imposed on this by amending legislation passed in 1976 under which a person pressing an appeal vexatiously or without substance could be made liable for costs.

- The general principle in all planning matters was the proper planning and development of the area. The legislation, did, however, have the effect of conferring rights on third parties, which could be abused. Mr Binchy had experience of one instance where, in his opinion, a valuable industry, with no risk of pollution was lost through the delays caused by unreasonable objections. The result was to the serious detriment of the local community and, indeed, of the nation as a whole.

- The grant of a planning permission did not abrogate the common law rights of interested parties. The principle "Sic utere tuo ut alienum non laedat" still applied, and affected parties could obtain a court injunction to restrain nuisance or interference with Common Law rights arising from the development.

Mr Jean-Daniel Delley - Switzerland

Mr Jean-Daniel Delley suggests three points which could be added to Professor Grisel's account:

1. The evolution from direct participation to indirect participation is a constant trend which was observed in the city-states of ancient Greece and mediaeval German towns just as it is today in Switzerland. Professor Grisel rightly points out that the referendum, which in legal terms follows a decision by the authorities, in practice produces effects before the decision. The development can also be seen in popular administration: the majority of initiatives are not put to a popular vote but are withdrawn, frequently in favour of compromises worked out by the authorities; initiatives which are submitted to the people are nearly always rejected. The representative element therefore dominates in the exercise of popular rights.

2. Paradoxically any attempt to formalise participation by individual citizens is doomed to failure - which does not mean that it should never be tried out. Whenever participation is put on an institutional footing a system of selecting demands made on the political system begins to operate, which favours some of the participants and discriminates against others. There will thus always be a need for types of participation which are not institutionalised, arising from the inequality of the participants vis-à-vis existing channels of participation.

3. It is flattering but dangerous to consider the semi-direct system of democracy in Switzerland as a special case: flattering, because the Swiss are bound to appreciate the curiosity aroused by their institutions; dangerous, because to classify a problem as a special case is merely a convenient way of taking no further notice of it.

Instead of marvelling at the individual genius and traditions of Switzerland it may be more rewarding to make a systematic comparison of two major types of participation: participation by individual citizens through identification with party or broad political tendency - what I would call the party state - and contributions by individual citizens to the solution of more practical ad hoc problems - what I would call the citizen state.

Such a systematic comparison should bring out the special characteristics of these different types of participation.

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Mr Roger Hayes, - Ireland

Mr Hayes explained the position in regard to the referendum in the Constitution of Ireland (1937). First, the constitution could not be amended except by the use of the referendum. In recent years the constitution had been amended by referenda in order to allow persons of 18 years of age to vote and also to permit Ireland to become a member of the European Community. Second, the President of Ireland may decline to sign and promulgate a Bill (projet de loi) passed by both Houses of Parliament (the Dail and the Seanad) until the proposal in the Bill is approved by the people at a referendum. The President acts on a petition to him by a majority of the members of the Seanad and one third of the members of the Dail. In fact, this latter type of referendum had never been used; but it was an important restriction on the actions of the Houses of Parliament.

Under the 1922 Constitution of the Irish Free State (replaced in 1937 by the Constitution of Ireland, which, unlike the 1922 constitution, was enacted by the people) there was provision for the initiative. However, an attempt, was frustrated in 1927 by the then government; and the relevant article in the 1922 constitution was subsequently deleted by parliament (which could amend the constitution without the necessity of a referendum).

Mr Hayes explained that human rights and human liberty in Ireland were protected by the constitution and were preserved by the Irish Supreme Court, which had shown itself to be constantly vigilant in the interests of human freedom. The Court had in recent times given a number of significant decisions in this sphere and, though some of these decisions had not been welcomed by everybody in executive authority, they had firmly established the Supreme Court as the protector of the individual in its role as the final interpreter of the meaning of the constitution.

It was important to remember that majorities could be just as tyrannical as dictators. The majority is not always right. Indeed, there were those who felt that it was always or generally likely to be wrong. Ibsen's "An Enemy of the People" contained a vital warning as to what could happen when the majority was governed by emotion and not by reason.

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Mrs S V Hoogendijk-Deutsch - Netherlands

As to the last remark by Professor van der Burg, I would like to underline that:

If one accepts that it is a rule of law that a government must act on two principles: a. on proper factual basis; and b. in fairness and with respect for interests of individuals, then judicial control of administrative acts is an effective means for making sure that due attention is paid by government to the voices of individuals and of interest groups.

I would like to give an example for this in Dutch legal practice.

Last spring the Crown annulled decisions made by government authorities in the case of a matter of great controversy and discussion: the digging of a canal in a way and direction which would be damaging to environmental values. This annulment by the Crown was made in spite of the fact that authorities had already made promises and much money had been spent. The Crown stated that there must be the possibility to give public policy a different course - even if measures had already been taken - if it is clear that new public opinion and new expert advice indicate that a different course is necessary.

This should be an example of unasked for advice from the public being followed, provided it is convincing.

And - too - an example of the influence to government policy by interest groups.

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Mr M Karamustafaoglu - Turkey

In my judgement, modern democratic States are being forced to seek a new form of legitimacy. It is true that political representation is clearly linked with the problem of legitimacy. Today, however, it appears that the democratic process has reached, or more truly is striving to reach a new stage.

In the constitutional and political history of western democracies, the first stage of that process has gradually been completed by the extension of suffrage. At that stage of the process the issue of legitimacy, more concretely the right or title to rule, was solved by expressing a preference for a person through voting for him in an election. This traditional form of representative democracy and political rule does not satisfy the aspirations and demands of the public anymore. The public, at present, wishes to participate more in public affairs not only as voters, but as consumers, employees, students, parents and the like. I agree with those who say that participation is not solely a legal concept. It is, indeed, related with sociological, psychological and economical matters. Our task, however, is to formulate and officialize a phenomenon which has become a fact in many of our societies. What is more, participation is compatible with semi-direct democracy. As Professor Jensen has rightly put it in his paper: "participation consolidates the representative form of government".

It is also possible to argue that participation can achieve what proportional representation cannot achieve.

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Mr Metin Kazanci - Turkey

Everyone agrees that there should be large-scale public participation in government and in the affairs of state. But it seems to me there is one major obstacle to this. In all the Council of Europe countries - countries where there are several social classes - the lower and middle classes are unable to participate, primarily because bureaucracies everywhere are closed to the public. The bureaucracy uses a language which is incomprehensible to outsiders and has extremely complicated and often pointless formalities to carry out. Because of the technocratic approach adopted within the administration, it becomes a world cut off from the middle and lower classes in any given country.

Civil servants also behave rather self-importantly and close the doors of the administration to the public. They prevent individual citizens from playing any part in it. Turkey provides many examples of this and it is likewise true of France. It would seem that in general, then, the bureaucracy is protected from any outside influence.

Let us take Turkey as an example. There are 10,000 different laws in force in Turkey, and 40,000 administrative regulations and decrees have been made over the last fifty years. In order to understand all these, ie in order to be able to overcome the obstacles set up by all these regulations, one has to be a specialist - a lawyer, financier, etc. It is impossible for the man in the street to cope with them.

It is therefore not enough to look at participation from the purely legal point of view. First of all, the protective barriers surrounding the bureaucracy must be broken down. This seems to me impossible. The alternative is to change the public, which has yet to be put on an equal footing vis-à-vis the administration. This implies setting up a society with no social classes. The participation problem could be solved by changing or at any rate influencing society. So long as there are conflicting interests and class struggles in a given country, the problem of sharing in government and the affairs of State will remain unsolved; the precedence and the advantages conferred by participation will remain concentrated in the hands of the rich and of other docile minorities who are able to have good relations with the bureaucrats.

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Mr Charles A Morand - Switzerland

Professor Maisl's report calls for the following comments:

The concept of participation which has been adopted covers all the ways in which individuals may intervene in political decisions. It concludes institutions as various as election, popular initiative, referendum, consultation of professional groups when framing laws, co-ordinated planning and the right to be heard or to appeal in administrative proceedings. In other words, we are virtually being asked to consider the whole field of public law.

Another approach would be to define the general problems associated with participation. A number of subjects would be deserving of more detailed study:

1. Are there any criteria for choosing between a political type of participation (voting, appointment of representatives) and participation through administrative institutions (the right to be heard, appeals, other legal remedies)? Can such forms of participation be combined or are they mutually exclusive? Such problems are currently arising in particularly acute form in Switzerland concerning the procedure for authorising nuclear power stations in connection with the drafting of a new law on atomic power.

2. Is there any qualitative distinction to be made between the various forms of participation? Among the various systems of representative democracy are there some which encourage more participation than others? Is the two-party system with its alternation of power the "direct democracy of the 20th century", in the words of Duverger? And in the context of direct democracy are there any forms which particularly lend themselves to participation ...?

3. Just what links can be established between devolution and participation? Should functions be distributed between central and local bodies in accordance with criteria which encourage the greatest amount of participation? This is a very topical question in Switzerland, because the government is thinking of completely reorganising the distribution of functions between the Confederation and the cantons.

4. Will participation depend on the fields to which it relates? Should direct democracy be ruled out, as has been suggested, when taxes or expenditure are being voted? Even in a sphere like regional planning, different kinds of participation could be employed according to what is being decided upon - general planning regulations, a master plan, an area plan or the plans for a building or a public square, for example.

5. Closely bound up with the preceding question is that of the link between participation and the size of a project. Can one, in order to encourage participation, subdivide problems into separate segments? This matter is considered in some detail by Alexander in his work on the organisation of the campus of Oregon University.

6. Sub-division of projects leads to a further question: how can a multitude of decentralised decisions be co-ordinated? Is participation always possible when it comes to aligning detailed projects?

7. Another problem which has proved crucial in constructing nuclear power stations is that of the compatibility between extensive participation at all stages of a project and the technological requirements arising from specific planning for building a power station. Extensive participation is likely to jeopardise the nuclear security of a project. Should any idea of participation therefore be given up and the decisions left in the hands of the experts? Or should one, on the contrary, abandon gigantic projects such as building nuclear power stations in favour of alternative forms of energy produced locally and subject to closer control by the users?

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8. Should participation be extended to cover all sectors of human activity or can it be confined to only some of them? Can one, as in Switzerland, grant a large measure of participation at political level and refuse it inside firms or in other areas of practical life? Will the worker who has no influence on vital decisions affecting his job or the flat he occupies feel concerned by the major political decisions on which he is asked to express an opinion? In short, is there any connection between participation at micro-society and macro-society levels?

9. What new forms of participation should be invented to cater for the huge needs which are emerging? Even highly developed institutions of direct democracy do not eliminate unorthodox procedures (demonstrations, occupations of sites or nuclear power stations, "Bürgerinitiativen").

What are the relations obtaining between these procedures and the institutional codes of participation? Can institutions be adapted to meet the various needs which arise?

The subjects I have proposed for study are neither exhaustive nor definitive but they should make it possible to proceed further with analysing a problem which is as old as the hills but whose complexity we seem to be only discovering today.

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Mr Jean-Claude Perier - France

I was much interested by the talk given by Professor Maisl, who gave an excellent commentary on his written report. There are, however, three points I should like to make.

1. The first point relates to the national context. I should like to qualify what was said about the growth of the executive power in relation to the legislative power in France.

Although it is true that the French Constitution of 4 October 1958 clearly curtails the powers given to parliament under the constitution of 27 October 1946 by specifying in Article 34 the limits of legislative power and by providing in Article 37 for the possibility of down-grading legislative texts to regulations, it is an exaggeration to maintain that the primacy of the executive over the legislature has been further increased in applying the constitution of the 5th Republic. On the contrary, the case-law of the Constitutional Council ("Conseil Constitutionnel") and the Council of State ("Conseil d'Etat") shows that for some years now there has been a tendency to restrict the field of regulations and make it clearer that some subjects fall within the scope of legislation.

2. The second point relates to public participation in the framing of regulations. It cannot be overstressed that in the field of regulations individual citizens may take action - admittedly indirectly but nevertheless effective - by means of a suit claiming that the regulation in question is ultra vires. By submitting to the Council of State any regulation which gives grounds for complaint - and the grounds on which such an action may be based are fairly numerous - an individual citizen may hope to get it revoked. The revocation is published in the "Journal Officiel", and from the reasons given for the decision (generally based on the arguments put forward by the complainant) the executive may gain some idea of how it should change its ways. Criticism made by an applicant can thus result in a regulation being annulled and the government being encouraged to reconsider the matter in the light of the point of view put forward by the applicant, who may be a private individual or an association or a trade union. This is a not inconsiderable contribution on the part of the individual citizen to the making of regulations and I was anxious to point this out.

3. My third point concerns opinion polls, the importance of which has, to my way of thinking, been underestimated. Obviously there is no question of replacing the will of parliament by rules based on opinion polls on a subject which falls within the scope of legislation. I should like to point out, however, that in France there is now a novel practice by which opinion polls are given a fairly important rôle, at any rate more important than has been suggested in previous speeches. You may perhaps know that the Act of 7 August 1974 which abolished the then French Broadcasting Authority ("Office de Radio-Télévision Française") with effect from the beginning of January 1975 conferred that organisation's monopoly on a public broadcasting body and various national programme companies. Under the terms of Section 20 of this Act, the revenue from the television and radio licence fees is apportioned annually between the programme companies and the public body in accordance with criteria laid down in a Council of State decree. The decree of 26 December 1974, as supplemented and amended by the decree of 16 June 1975, stipulated that this income should be distributed in proportion to the audience ratings achieved by each company as measured by the number of listeners or viewers per hour for the complete output of each company and, secondly, that in deciding on the overall mark to be awarded each company for the quality of its programmes account should be taken of the results of public opinion polls carried out by a body known as the Centre for Opinion Studies ("Centre d'etudes d'opinion").

Opinion polls are, then, one of the factors in apportioning the income between the programme companies. In other words, the results of opinion polls are one of the criteria by which the revenue is distributed quasi-mathematical by the government

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and subsequently endorsed by parliament through the Finance Bill. This novel system, which was introduced in order to eliminate political influences, functions quite smoothly. It shows, at any rate, that opinion poll results can be used in making administrative or legislative decisions. The example is an interesting one because it shows that opinion polls may have a different rôle from that mentioned by the Rapporteur and other speakers. Opinion polls can accordingly be considered as one of the ways in which citizens can contribute to the framing of laws, even if, as in the example I have given their scope is limited.

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Mr E Spiliotopoulos - Greece

In Greece as in other member countries of the Council of Europe there is a widespread demand in all social strata for more extensive and more substantial sharing of power in general and of executive power in particular. The demand is perhaps more emphatic today because of the very unhappy memories of a military dictatorship which are still fresh.

The constitution and the law provide for several techniques and methods.

I. At constitutional level

Since 1864 there have been five democratic popular referenda. The first of them concerned a choice of dynasty, the others related to the form of constitution - kingdom or republic.

II. At legislative level

a. On subjects of general concern (eg the education system or those affecting a large group of the population which has machinery for representing it (eg farmers, represented by agricultural co-operatives and their unions and confederations, or workers, represented by trade unions) or an organised profession (engineers, barristers, doctors, shopkeepers, craftsmen etc).

Before laying a Bill before parliament the appropriate minister consults the representative bodies of the group or profession concerned or commissions set up ad hoc to study the problem and to which experts and representatives of the people affected are appointed.

A typical example is the Bill on the organisation of higher (university) education; after being drawn up by a commission consisting mainly of university professors, it is being sent to the collegiate bodies of universities and faculties, lecturers' organisations and student organisations for their opinion.

b. The new constitution provides for consultative referenda which the President of Republic may call on questions of vital national importance; the instrument proclaiming the referendum does not even require a ministerial counter-signature.

III. At administrative level

1. Power to make regulations must be based on legislative delegation, except in the case of regulations containing wholly subsidiary stipulations or regulations concerning the organisation and internal functioning of government departments and public bodies.

a. Where the exercise of this power is completely centralised (in the President of the Republic, the government, ministers, prefects etc), participation is theoretically consultative in that legislation sometimes provides for obtaining merely the opinion of collegiate bodies representing the groups or occupations concerned.

Texts relating to development plans are a special case. The proposed plan is posted up at the town hall, those affected can make objections and the municipal council gives its opinion; if the proposed plan covers a fairly small area it is also notified to people owning land or property in the area.

Another special case is the regulation of wages governed by private law. If employers' and employees' representatives have failed to conclude a collective agreement, wages are fixed by an arbitration board chaired by a judge and consisting of representatives from the Ministry of Labour, the employers and the employees.

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b. Statutory powers are also decentralised. However, this devolution of statutory powers is incomplete since texts containing regulations have to be submitted for approval to the appropriate central authority (a ministry in the case of public bodies and the prefect in the case of local authorities). In this case participation is theoretically indirect because the members of the organs of public corporations are elected. This is the rule for all members of these organs in the case of professional organisations - which in Greece are all public bodies (the Bar, engineers, solicitors, doctors, dentists, chambers of commerce, chambers of craftsmen and so on) - and in the case of local authorities as well as some of the members of other public bodies (social security funds).

2. As regards unilateral industrial decisions, participation is guaranteed by the right of defence, long recognised in the case-law of the Council of State and enshrined in the new constitution (Article 20, paragraph 2 "The right of a person to a prior hearing shall also be enforced in any administrative action or measure adopted at the expense of his rights or interests").

B.

1. The methods and means of participation at legislative and administrative level naturally depend largely on the legal and political tradition of each country and on dynamic social and economic factors which influence the structure of its institutions, the main factors being political maturity and the desire on the part of the public to share in the exercise of public power.

2. Sharing in the exercise of legislative power and the power to make regulations is not always essential. Its expediency depends on several factors, the main ones being:

a. The nature of the matters to be regulated;

b. the number of people directly affected;

c. the type of regulation - the more discretionary it is, the more necessary it is to have participation;

d. the way in which the regulations are to be implemented - the more public support is needed for the regulations to be implemented efficiently, the more desirable it is to have participation.

3. It would be as well if our colloquy could systematise the various methods and means of participation. Such a systematisation could be a source of inspiration for Council of Europe member countries and could help in rationalising a trend whose importance cannot be overlooked.

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Mr E Spiliotopoulos - Greece

The example afforded by Switzerland has always been attractive to Greeks, perhaps because it reminds them of old times. The 1975 Constitution, for instance, as I have already said, provides for a consultative referendum on "crucial national issues".

One may reasonably ask what these questions might be, given that a referendum can be regarded as a challenge to the government majority when it is not the government itself which has called for it. It might be thought that these questions could be new problems which had not been covered in the electoral campaign that produced the parliament. One might also think of problems arising towards the end of a government's term of office or which face a government with only a very small majority.

Obviously if it is essential to have the electorate's opinion in order to decide a "question of vital national importance" within the framework of traditional parliamentary democracy, the government could dissolve parliament, call parliamentary elections and raise the question during the electoral campaign.

The dangers of consultative referenda should not be underestimated; the advantages and drawbacks of a referendum on the one hand and dissolution on the other should be carefully weighed and evaluated before it is finally decided which method to use to consult the electorate.

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Mr A Vanwelkenhuyzen - Belgium

I should like to make two comments in connection with Professor Herbert Maisl's excellent report. My comments in no way contradict the point of view expressed in that report but, rather, amplify its findings.

Firstly, then, on page 4 of his report, Professor Maisl notes that modern democracy no longer involves citizens who are all equals and in a sense interchangeable but that, on the contrary, participation, the latest form of democracy, concerns only "context-related people". It therefore seems reasonable to ask whether the "public" which is being invited to "participate" includes not only citizens, ie nationals, but foreigners as well. Whereas the exercise of traditional political rights - such as the right to elect or be elected - is generally confined to nationals, some forms of participation now seem to involve aliens in the decision-making process. If a public inquiry is set up, for example, all those concerned are invited to make known their views, regardless of their nationality. Similarly, consultation in the field of economic administration may involve firms other than national ones. In the countries of Western Europe, where there are large flows of population between different countries and where varying numbers of foreigners stay for long periods outside their native countries, this type of democracy, to which foreigners naturally have access, is of particular interest. In my opinion, it may be considered one of the advantages of participation that the "public" to whom such participation is available should include aliens.

Secondly, Professor Maisl comments in his report (p. 16) on the "decline of the representative system". He observes that the representative assemblies in various countries have largely ceded their power to governments, which are better placed to bring the public into the decision-making process. It is indisputable that nearly all forms of participation cited as examples - consultation of professional or other organisations, public inquiries, co-ordination etc - are implemented by the administration, ie the executive. But should we be content with this? In some countries, including the Benelux countries, parliamentary committees sometimes hold hearings ("auditions") rather on the pattern of the hearings in the United States Congress. When a Bill is being prepared on the organisation of university education, the education committee of the Chamber or the Senate will call before it university vice-chancellors and officers of the student associations. If it is a Bill on social assistance which is being drafted, the parliamentarians will have talks with the leaders of welfare bodies. In the case of a Bill on the control of aliens, associations of foreign residents will be asked for their views. This system is quite distinct from the one by which the government draws up a Bill in the light of opinions from various advisory councils, because members of the legislative chambers have direct personal contact and discussions with those whom the law will effect. The system of hearings by legislative assembly committees could make some contribution towards strengthening parliament's ability to regain its prestige, and for countries wedded to the parliamentary system this would not be the least of its attractions.

CLOSING SESSION

5 October 1977

General report

by

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I.

Part I of this report summarises the various reports and papers presented; Part II covers the main points dealt with during the discussions; and Part III attempts to sum up public participation in legislative and administrative acts. The report ends with a number of final comments.

The report and papers may be summarised as follows:

In his report on "Forms and techniques of public participation in legislative and administrative acts", Professor Maisl first of all pointed out that the purpose of participation was twofold, viz. to strengthen democracy and to make public decision-making more effective. But whilst public participation in administrative decision-making had assumed considerable proportions the same could not be said of the legislative field. The administration, as it were, negotiated its decisions with those concerned; it preferred consultation to the issuing of edicts.

Professor Maisl then discussed the factors of participation and a number of variables which make up its image, referring in particular to administrative secrecy. He emphasised that information could not be disseminated unless citizens were educated. Participation also required that the partners concerned should be available, together with the necessary material and financial means. Nowadays, direct participation and indirect participation co-existed. From the technical point of view, a distinction could be drawn between specialised participation and participation by the general public. The report described the rise of specialised participation, contrasting it with the crisis of total participation.

There was a difference between these two types of participation and their effects. This twofold trend prompted a re-examination of relations between those who govern and those who are governed; in other words, a rethinking of democracy.

Public participation was, juridically, becoming a sharing of decision-making powers. /The general discussion was centred on this assertion: everybody referred to it, and many challenged it. I shall return to this point later./

In the second part of his report, entitled "Attempts at direct participation", Professor Maisl conceded that it was perhaps somewhat artificial to distinguish between specialised and total direct participation. Nevertheless he sought to give a picture of participation conducted on the administration's initiative through the well-known forms of the "right of defence" (or "audi alteram partem"), public enquiries, particularly those concerning town planning and expropriation and, in general, the various modern techniques for stimulating public participation, involving the mass media or different local democracy movements at neighbourhood level. While acknowledging that an opinion poll could not really be called a technique of direct participation, he argued that it did enable the participation system to be developed and improved. /This point, too, will be returned to later./ The question of participation on the initiative of the citizens concerned, particularly through administrative and contentious appeals, which was also referred to by the author, was the subject of a lengthy discussion, some speakers feeling that this was not a genuine form of participation, particularly because it was restricted to those concerned.

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According to Professor Maisl, the crisis of total participation is bound up with the decline of the representative system and the difficulties experienced in using the techniques of direct democracy. Parliament's role, he argued, should be redefined in the light of two factors - the place of opinion in the political system and the rise of executive authorities.

This highly interesting report concluded as follows: "If the State fails to propose new participation techniques, the public will spontaneously impose them in a way that will often be detrimental to the standing of public authorities. Furthermore, the State must ensure coherence among the various forms of participation, as well as unity of political action. Only on such conditions can participation bring about a transformation of democracy."

In his report on "Popular initiative and referendum in Switzerland", Professor Etienne Grisel explained that federal law provided for: popular iniatives and compulsory referendums in constitutional matters; optional and suspensive referendums as regards statutes; optional and resolutory referendums as regards urgent decrees; and referendums as regards international treaties. Furthermore, in the cantons these two rights of action had been generally extended to statutes and even decrees; in a number of States including the largest ones, such as Zurich, all statutes were automatically subjected to popular approval. Major items of expenditure were similarly subjected almost everywhere. In some cantons, the people even had the right to dismiss the authorities: a given number of citizens could ask that the question of the dissolution of the Grand Council - or the Council of State - be put to the people; if the reply was in the affirmative, early elections were held by parliament or the government. Furthermore, five states had retained their ancient "Landsgemeinde". Thus the smaller a community was, the more fully citizens participated in its administration. Rousseau had therefore been right.

This is a very interesting range, and doubtless it would be possible to go further and devise other more modern techniques, starting with the "Landsgemeinde" which are still to be found in small cantons, and ending with referendums and popular initiatives. The report then demonstrated the importance of this so-called semi-direct democracy for individual freedoms, political systems, the legislative procedure and, lastly, constitutional jurisdiction. It went on to describe the procedures for popular initiatives and referendums, the subjects of popular initiatives and their interesting forms which differ considerably from that in Italy, for example.

An initiative may, for instance, take the form of a proposal. The proposal is first addressed to the authorities, urging them to take action. If they acquiesce, they prepare the text suggested by the initiative and submit it to a popular vote, compulsory or optional as the case may be. If, on the other hand, they reject the very principle enunciated by the initiative, they first submit the principle to a popular vote; in the event of its rejection, the procedure is terminated. It continues only if the proposal is approved by a majority, and parliament is thus compelled to enact the desired text. This is a most interesting system whose outcome always depends on the electorate. In this connection it should be noted that the number of signatures required for a constitutional initiative was recently doubled from 50,000 to 100,000. Regarding referendums, the rapporteur mentioned that this procedure had recently been extended to cover international treaties. /In Italy, where the constitution does not permit referendums to be held on international treaties, this problem will shortly become a very topical one because a referendum is to take place next spring on the subject of the pacts with the Vatican which, according to most authors, are international treaties./

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An institution that also played an important part in the cantons was the "financial" referendum, which the constituent body /as in Italy/, had originally rejected. Lastly, some figures and statistics were given: between 1848 and 1977 the Swiss people had voted on 282 matters.

The report's conclusion was highly optimistic, emphasising that the Swiss experiment was unusual in that it had lasted for more than a century. It had started with the municipality and the canton and had gradually reached national level. One cannot but agree that the experiment is indeed an interesting one.

The third report, entitled "Participation and interest representation", was presented by Professor van der Burg, from Tilburg (Netherlands). The author first of all noted that the striving after participation had to a certain extent changed or added to the vocabulary of the Dutch language. The two best known examples were the shift in meaning, from positive to derogatory, of the word "regent" and the introduction of the word "inspraak" (meaning more or less the same as the American term "intervention"). "Inspraak" denoted the act of making known (or the possibility of making known) one's views to the authorities concerning matters about which they would be taking decisions. Those who expressed their views wanted to have a genuine say in the matter concerned. They intended to co-determine the situation they lived in. /It is difficult, I believe, to translate this word into French or English./

The report continued with an examination of the various forms of participation. The most common form was that whereby decision-making did not take place until the consumers, employees and other interested parties had had an opportunity to form an opinion and express it. In short, "inspraak" was a way of exerting influence on the administration without having any share in decision-making powers. Influencing decision-making did not mean taking part in it. These were two different things.

The report then dealt with "inspraak" in appointment procedures, in matters concerning the employment conditions of government personnel, in environment matters, in physical planning and in planning in general. As regards the last-named field, it noted that "inspraak" had applied for some years to the central government's fundamental planning decisions. It mainly concerned decisions and views relating to the broad outlines of national physical planning. /If I am not mistaken, what is involved here is custom ie the old source of law which has almost been forgotten in this connection. If that is so, then "inspraak" has become part of the rules of Dutch law through unwritten law./

In conclusion, the author emphasised that participation was related to petitions, demonstrations and acts of civil disobedience aimed at attracting the authorities' attention. /In this connection it may be noted that at the symposium no reference was made (and rightly so) to acts of civil disobedience, because they are not relevant to public participation and the drawing up of statutory and administrative instruments. But they could be mentioned in connection with participation of a broader kind./

The report presented by Professor Claus Haagen Jensen dealt with public participation in legislative and administrative procedures, particularly from the point of view of participation in the management of social and educational institutions. The author recalled the various forms of public participation, stressing that three minimum conditions had to be fulfilled if there was to be real public participation: the public had to be given an opportunity to influence the result of a procedure; participation had to be extended to the public as a whole, not only to those specifically concerned; and there must be rules governing participation.

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The author then analysed the ideas which he considered to underlie public participation, and went on to deal with public participation in public institutions, ie institutions designed to offer services to groups of citizens which he called "clients". Three typical examples of democracy of institutions in Denmark were given, concerning primary schools, universities and social institutions. Particular emphasis was placed on participation by students in boards responsible for the management of universities and university faculties. The report ended with an examination of a number of legal aspects: the influence of participation on the system of representative democracy, the problem of responsibility (the Rapporteur deplored the lack of responsibility on the part of representatives of "clients"), the problem of participation and its implications regarding administrative procedure. The tentative conclusions drawn by the Rapporteur were as follows: the field of institutions seemed to lend itself to public participation, but the conditions for satisfactory participation were sometimes too complicated. Public participation in its present forms might end up by becoming a conservative factor, thus conflicting with the aim pursued.

Other reports were presented by Mr Schwantes and Mr Wertz and by Mr Vanwelkenhuyzen. In the reports by Mr Schwantes and Mr Wertz, referring to the Federal Republic of Germany and the United Kingdom, it was noted that no European country had as much experience in participation as Great Britain, which had indeed been a forerunner in this field, particularly in the building and town planning sector. Regarding the Federal Republic of Germany, it was stated that amendments made in 1977 had introduced a new scheme of participation into the general building and planning law, thus standardising the basis for participation at all planning levels. The joint conclusions of these reports were as follows: participation had every chance of succeeding, particularly at regional level. The level of planning which would be the most appropriate for efficient participation was the urban district, because of its manageability from the political and planning points of view. The basis for participation was political emancipation. A reference was then made to Italy: it was pointed out that although the case of Bologna could not easily be transferred to other countries, it did show that the decentralisation of municipal planning powers contributed positively to participation and emancipation.

Professor Vanwelkenhuyzen (Brussels) stated in his report that no participation existed in Belgium in the case of legislative acts. On the other hand, the personal intervention of citizens or groups of citizens in the preparation of administrative decisions was widespread. Belgium had not had a very happy experience with referendums, judging by the issue in 1950. The following three methods were mentioned in the report for participation in the preparation of administrative acts: the public enquiry, the possibility for individuals or groups to call for the setting up of certain public services or the grant of certain forms of aid or subsidy, and action by persons representing certain economic, social or professional interests on bodies responsible for managing public services. The contract was referred to as a procedure for associating private citizens with administrative action.

II.

I now come to the main questions dealt with during the discussion. The most general question, ie participation regarded as either an extension or an end to democracy, was the subject of a lively controversy: on the whole, the participants whose countries had tried out semi-direct democracy considered it to be an extension to democracy, while the others regarded it as an end to democracy. Mention should also be made of the speeches by Mr Wennergren and Mr Suetens on spontaneity, which they considered to be preferable to institutionalisation.

The second question was the paralysing of the right to information by secrecy. What does the right to information mean? It means the right to inform and also the right to be informed. In Italy this conception is reflected in the article on

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freedom of expression in the Constitution. And, in general, I believe that the recognition of this dual aspect - the right to inform and the right to be informed - is necessary to enable the mass media in general to perform the task of informing the public. Obviously secrecy is a major obstacle to the exercise of these rights. Professor Maisl spoke of administrative secrecy. But, in the case of my own country, mention must also be made of political and military secrecy, which is much more important there because administrative secrecy in general is not as "secret" as political and military secrecy. Several major trials in Italy are at present marking time because nobody has succeeded in overcoming problems of political or military secrecy. The Italian Constitutional Court recently declared in a judgement that secrets are legitimate from the constitutional point of view if they are based on the Constitution itself; more particularly, the only person who can invoke secrecy in a trial is the Prime Minister, except in trials concerning attempts to subvert the régime. (The Constitutional Court laid down the basic principle that secrecy can never be invoked in the case of an attempt to overthrown the régime; a law to that effect is being prepared.)

The third question concerned participation in relation to administrative or judicial appeals. In connection with judicial appeals, Mr Spiliotopoulos said that a distinction should be made between participation methods concerning the preparation of a statutory instrument and derogatory methods, adding that appeals could be classified in the latter category. I think that this is true. Judicial appeals may be regarded as a form of participation if the categories of persons who may avail themselves thereof are broadened. If, on the other hand, only those directly concerned can take action, then there is no participation but a right of defence, which is something very different. This is in fact the current trend, as Councillor Périer pointed out for France, Professor Arndt for the Federal Republic of Germany and Professor van der Burg for the Netherlands. In Italy the initial decisions of the Council of State are also significant in this regard.

By contrast, purely administrative appeals affect the preparatory phase. And everybody has "locus standi" here. If the administration is not duty-bound to such appeals and give a reasoned reply to them, then they are almost useless. The importance of participation depends on it being compulsory for the administration to do this.

The fourth question was negotiation. In connection with the replacement of "fiats" by "consultations", the problem of the relationship between negotiation and legality was raised by Mr Berchtold and Mr Hayes, amongst others. Clearly the former concept, ie negotiation, must be integrated into the law in order to solve this problem. Otherwise it would never be possible to reach an agreement. If the principle of the legality of the constitutional state is to be safeguarded, negotiation must become a part of legality. Professor Grisel referred to this problem in his report and, in particular, during the general discussion. When negotiation takes place with those concerned or with third parties, the public authorities run a certain risk. This risk exists in the pre-parliamentary phase, when it may result in things being done or not done which the public authorities might or might not wish to do. But, in my view, negotiation with the persons concerned is not the same as public participation; it is collaboration by the private sphere in the decisions of the authorities. That is merely a matter of sound administration. Negotiation with third parties is something difference: it denotes genuine depoliticisation. It results in a broadening of information; but then it becomes necessary to deal with the problems of joint decision-making and co-responsibility, about which a number of participants had something to say, particularly Mr Maisl, Mr Grisel and Mr Zanghi.

Joint decision-making and co-responsibility go hand in hand because it is clearly impossible to participate in a decision without assuming responsibility. Take the referendum and the popular initiative in the legislative field: here responsibility lies, on the contrary, with the administration, which cannot share it with the public. Those concerned have a right of judicial appeal. Third parties

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have a right of appeal to the electorate in so far as such a possibility exists. Nevertheless responsibility lies with the administration. It could then be said, as Professor Zanghi did, that legislation concerns everybody whereas management concerns only those who exercise power.

Another fairly important matter dealt with was the relationship between semi-direct democracy and what may be called the various forms of government. Professor Grisel dealt with this subject at length. He said that there was always an inevitable link between the form of government and semi-direct democracy. For instance, semi-direct democracy was encouraged by decentralisation but discouraged by highly personalised governments. Semi-direct democracy was also encouraged by a collegiate government (corresponding perhaps to what I would call a directorial governmenta, ie an elected government). And here there was a logical link because the government, contrary to conventional parliamentary régimes, did not necessarily fall in the event of its proposals being rejected in a referendum. There might merely be a few individual resignations. There was a direct link between semi-direct democracy and proportional representation because the former led on to the latter and this process applied even at government level. Semi-direct democracy and the control of constitutional legitimacy were theoretically conceivable but in practice impossible, because the federal tribunal would never tell the people that it had made a mistake. It was impossible for political reasons. Lastly, Professor Grisel maintained that the popular initiative and the referendum were inseparable. Generally, the former had a progressive effect and the latter a conservative effect. Mr Haagen Jensen and Sir Denis Dobson also emphasised the referendum's conservative effect.

Personally, I have my doubts aoout this in the light of the two Italian examplcs to date. The referendum on divorce came from Italy's conservative circles, whilst that on abortion was inspired by the progressive sections of the population, in other words the Left wing. But these are the only two examples in Italy, and so far only one has been concluded. In conclusion, I would say that semi-direct democracy is always compatible with the various forms of representative democracy.

The problem of participation and sophisticated technology was then raised, and Mr Morand stressed the difficulty of participation in the field of, for example, nuclear power stations. Participation in this case is certainly not easy, but, in my view, it is not impossible. The fundamental principle is that the public must be suspicious of technicians: the layman's doubts should be heeded.

The question of participation and opinion polls was the subject of a very interesting statement by Councillor Périer. It was generally agreed that opinion polls could be very important, ecen decisive, but that they were debatable because of their sampling methods. Mr Périer told us how the four French television companies were affected by opinion polls: their income depended on their success with the public. That is the only example known to me.

The right of petition was the subject of two interventions by Mr Giocoli Nacci, from Bari, and Professor Maisl. Opinions are fairly divided on this subject, some being more optimistic than others. I would count myself among the latter. But to a certain extent I endorse Mr Giocoli Nacci's remarks concerning the future of the petition procedure in Italy, because of the regions' intention to pursue this experiment further.

Mr Hondius talked about Yugoslav self-management and expressed his surprise that nobody had referred to it before. The reason was perhaps because the subject did not fall within the scope of the colloquy, as it relates to "social management".

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III.

It is difficult, if not impossible, to sum up the proceedings of the colloquy because of the many contributions to the discussions. I shall therefore simply set out a number of conclusions.

1. Let us begin with the legislative field - the referendum, the popular initiative and the plebiscite. My first comment would be that there do not seem to be any general features common to the various countries. Some countries, including Germany, the United Kingdom and Belgium, do not have these procedures, whereas in others, such as Switzerland, these procedures are very highly developed. Some countries, like Italy, are at the stage of preliminary experiments. Others, as Mr Maisl said, favour the plebiscite rather than the referendum; they include France (Napoleon and de Gaulle) and Italy (the Risorgimento and the republic). When the people are called upon to judge facts and not a legal question, then it is a plebiscite and not a referendum. Yet other countries, such as Greece, confine themselves to consultative referendums on crucial national questions, but they have not yet had any practical experience. Accordingly it is impossible to find common denominators, except in respect of the limits of the referendum. Mr Grisel spoke of Switzerland, Mr Maisl of France and Mr Capurso of Italy and of Article 75 of the Italian Constitution. With regard to the time-limits referred to by Mr Capurso, there are some new Italian proposals which even provide that a law could not, for example, be submitted to a referendum less than three years after its publication.

The same differences exist with regard to frequency. In Switzerland referendums are very frequent; in France and Italy they are fairly rare. Mr Grisel rightly pointed out that it was preferable to have frequent referendums because when they were rare they were much more dangerous.

2. The second aspect concerns "hearings" (I use the English term for the sake of convenience) and in general the problem of parliament's powers of enquiry. Very little was said about this at the colloquy. The Italian Minister, Mr Bonifacio, recalled that in Italy parliamentary committees had decided to hold hearings on matters for which they were competent. They heard people of all types, both civil servants and private persons. These hearings involved a considerable degree of participation since they had the novel feature of allowing of intervention by non-parliamentarians during the preliminary phase, the phase of legislative procedure, and because the consensus of those taking part was very significant since it was not imposed but free. Unlike the position in the United States, in Italy people invited by parliamentary committees to take part in hearings did not have to swear an oath; their opinions were therefore more important because they were given spontaneously. Mr Bonifacio also referred to the number of hearings during recent legislative periods, saying there had been 26 hearings in the Senate and 19 in the Chamber of Deputies; during the present legislative period there had already been 11 in the Chamber of Deputies and eight in the Senate. An excellent study by Mr Dusan Sidjanski on public hearings in the European Community (both national parliaments and the European Parliament) showed that the most advanced countries in the matter of hearings were Italy and Germany.

3. Still in the legislative field, mention should be made of parliamentary committees which submit their opinions to the government during the procedure concerning "delegated decrees" ("decreti delegati"), ie in matters for which parliament has delegated legislative powers to the government in a clearly defined field. In Italy ad hoc parliamentary committees are frequently set up to advise the government before it draws up "delegated decrees". The law of delegation frequently stipulates that these parliamentary committees should also include non-parliamentary members, ie experts. Theorists criticise this participation by citizens who are not members of parliament, and question the purely consultative role of these committees. Most of them feel that these committees should be able to express an opinion which the government was compelled to accept.

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4. Lastly, it should be noted that, in the case of the Italian regions, substantial provision has been made for referendums, popular initiatives, hearings, enquiries etc in the legilsative and administrative fields. It is particularly interesting to note that in all regions public intervention is envisaged in the field of economic planning.

5. Regarding administrative matters, ie the drawing up of regulations, the general trend in all countries is in favour of participation. In application of the principle "audiatur et altera pars", the hearing of interested private individuals in an administrative case is the general rule (right of defence and obligation to state reasons). In the case of the new category of what we in Italy call "interessi diffusi" (collective interests), we have a new "locus standi", generally covering all or almost all the public. The definition of interested parties had been broadened. In administrative matters, the most common concrete examples are those concerning town planning, the protection of the countryside and the environment, national parks etc. Participation by third parties is generally admitted, as well as that by co-interested third parties, even if they are only remotely co-interested, provided that they have some connection with the area concerned. Accordingly this type of participation does not cover everybody.

6. Unlike the examples given for town planning, popular initiatives can be taken by everybody. There are some civil status restrictions in Italy, but generally speaking everybody is entitled to take action. In Italy popular action is traditionally directed against the inertia of local authorities, in electoral and patrimonial matters, as well as that of employees and administrators. In practice it is very rare. In one case it was introduced by the 1967 Town Planning Act in respect of building permits. Under this Act, such permits can be challenged by anybody. But in its interpretation of the Act, the Council of State sought to restrict this right to people directly or indirectly concerned.

7. Regarding participation in educational establishments, including universities, I should like to mention what has happened in Italy in primary and secondary schools. In 1974 some laws were promulgated, introducing participation in the management of schools and setting up new bodies to that end, the principle being that the school should be regarded as a community having relations with society in general. Accordingly some five-tier bodies were set up, comprising teachers, pupils and parents. The Acts are highly detailed and so far the experiment had not been very conclusive, notably with regard to meetings of pupils and parents. But it is too early yet to draw any negative conclusions. Professor Maisl said that the experiment had proved difficult in France and the Netherlands. Professor Haagen Jensen said that the results had been positive so far. Nobody now suggests that this form of participation should be given up, and to do so in Italy would, in my view, mean taking a step backwards instead of going forward with all other countries. There is no reason to be pessimistic.

Conflicts between the various components of school life are inevitable, and I believe they should be regarded as a valuable dialectic. Regarding universities, reference was made to the negative result of a minor reform recently introduced in Italy. This was ascribed to the fact that the most important decisions are taken by the select faculty council, ie a council confined to titular professors and thus excluding other professors, lecturers and students. But that is only partly true, because the general rule is that the plenary council is responsible for educational matters. The select council has the power only to co-opt professors. At present the governing body also includes students. Accordingly it can be said that general powers lie with the plenary faculty council, ie the council composed of all those concerned; our faculty councils meet only in exceptional cases as select committees confined to titular professors.

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8. Regarding participation in the life of towns, I should like to refer once again to Italian experience, but not only to Bologna, where there is a 1976 Act which is beginning to be applied almost everywhere. The Act set up districts and provided for the transfer of the municipal council's powers to elected district bodies. Accordingly districts are more representative. They hade been set up almost everywhere, but the experiment is too recent to enable the question raised by Mr Maisl to be answered viz the question of the validity of this experiment outside Bologna. The powers of the districts are very wide since they range from regional planning to the most detailed matters affecting their inhabitants' interests.

9. Lastly, the great innovation, of which only Mr van der Burg spoke in connection with "inspraak", is public participation through trade unions, ie participation which in Italy began some years ago (I am not aware of what happened elsewhere since nobody referred to it). This undoubtedly constitutes a more effective form of participation than that operated through ombudsmen. In Italy there are two Acts concerning public employment. The weight of trade unions is very considerable in this matter, and this participation is provided for by law. The first of these Acts, dating from 1975, concerns public bodies which are not part of the state. It stipulates that the trade unions must be heard in matters concerning staff regulations and that the pay and legal status of such bodies' employees must be determined on the basis of agreements with the most representative trade unions. The second Act concerns state employees. It stipulates that the conditions of employment of civil servants must be determined on the basis of agreements concluded with the most representative trade unions at national level. The Act governs the recruitment of staff, basic career structures, responsibility and disciplinary procedures. Regarding "industrial recovery", we have an even more recent Act, No. 675/77, published on 7 September 1977, stipulating that for the purpose of co-ordinating industrial policy, the Council of Ministers must reach agreement with the regions and the workers' and employers' organisations represented on the National Economic and Labour Council.

10. Lastly, I should like to refer briefly to an old and unjustly forgotten form of public participation, ie participation in the formulation of unwritten law. In Italy, this is regarded as a subsidiary source of private law. In public law, this source may even be "contra legem".

IV.

I shall conclude with a single remark, but one which I believe to be very important. The Italian Minister, Mr Bonifacio, said that the participation movement strengthened the system because it brought with it a spontaneous consensus. At present we are undoubtedly facing a major crisis in democracy. People are very suspicious of the representative system. We are faced with a crisis of identity, ie parliamentary democracy is no longer adequate as a form of elective representation. The demand for democracy has grown; a change is imperative. I believe that in order to satisfy this demand we shall have to use the only method available to us, namely participation. I believe that in future the only solution will be representative democracy based on participation.

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