Comme l'affirme le vicomte Hippolyte Le Gouvello dans son apologie du "vénérable Michel Le Nobletz... apôtre de la Bretagne", "La Bretagne... (est)...ce pays catholique entre tous les pays du monde"
(LE GOUVELLO,1898:XI).

La Bretagne,étant devenue aux yeux de certains,la dernière "fille aînée de l'Eglise",succédant ainsi à l'Espagne puis à la France,elle se devait d'être à l'avant-garde du combat catholique dans l'ensemble France.

§2 -l'importance et l'ambiguïté du rôle du clergé missionnaire dans le maintien de la langue bretonne.

Le père Julien Maunoir,ayant appris,pour les besoins de son apostolat,la langue bretonne,fixe les premières conventions d'une orthographe de cette langue ainsi que les grandes lignes de sa grammaire.D'autres prêtres joueront un rôle important dans la codification du breton moderne.Ce rôle est ambigu à plusieurs titres:le clergé utilise le breton non pas pour lui-même mais comme instrument d'évangélisation;il n'est donc pas intéressé pour "purifier" cette langue,contrairement à ceux qui voyant dans la langue bretonne un moyen d'approfondir le fossé entre la Bretagne et la France,chercheront à l'expurger de ses nombreux emprunts français(il y a là une différence importante,source de conflits,entre la pratique du clergé en matière linguistique,et les tentatives d'unification linguistique faites par certains intellectuels ayant adopté une démarche plus théorique et plus politique).
Pour conclure,nous mentionnerons la thèse selon laquelle les missions bretonnes du 17ème siècle auraient exprimé,par bien des côtés,une volonté de réduire le particularisme breton, d'aligner spirituellement la Bretagne sur la France,thèse avancée notamment par Olivier Loyer (LOYER,1965).

**********

## CHAPITRE TROISIEME/ LES CLIVAGES RURAL/URBAIN ET POSSEDANTS/TRAVAILLEURS.

S'interroger sur la nature du clivage rural/urbain en Bretagne,c'est en fait décrire certaines des caractéristiques socio-économiques qui font de la Bretagne,au fur et à mesure de son intégration dans le royaume de France,un espace de plus en plus périphérique.
La Bretagne qui a échoué dans sa tentative de s'ériger en espace auto-centré (tant du point de vue politique que religieux et économique) va devenir de plus en plus un espace désarticulé;nous n'avons pas l'intention ici de passer en revue les modèles qui permettent de décrire et d'expliquer ce processus,mais simplement d'isoler les aspects de ce processus qui nous sont utiles pour mieux caractériser le clivage rural/urbain et de mieux comprendre,dès maintenant,certains aspects de l'articulation de ce clivage avec les clivages centre/périphérie et Eglise/Etat.

L'une des raisons de l'échec de la Bretagne à se constituer en Etat indépendant est d'ordre économique:dans la division européenne du travail,la Bretagne peut être caractérisée,aux 15 et 16ème siècles, comme une semi-périphérie avec notamment les traits suivants:essor trop tardif du développement urbain,vulnérabilité de son rôle d'intermédiaire sur mer,le tout expliquant la faiblesse de la bourgeoisie bretonne.A la suite du traité de 1532,la Bretagne connaît,dans un premier temps,un développement économique certain,puis son économie va être progressivement désarticulée.Cette désarticulation que certains auteurs attribuent à un processus de sous-développement de type colonial (thème du colonialisme interne) est visible notamment à trois niveaux interdépendants:le développement urbain,le développement des moyens de communications et la place de la Bretagne dans la spécialisation de l'économie française.

* le développement urbain est centré essentiellement sur deux types d'activités,toutes deux contrôlées de plus en plus par un centre extérieur (Paris):le commerce international et les activités militaires.Nantes,Saint-Malo et Lorient doivent une grande partie de leur prospérité au commerce avec les colonies.Brest et Lorient deviennent des bastions militaires stratégiques;Rennes devenant le "centre" administratif.Il est intéressant de noter ici la bi-céphalité de la Bretagne,bi-céphalité illustrée par la rivalité entre Nantes et Rennes, et leurs prétentions respectives à être reconnues comme "la" capitale de la Bretagne.Cette bi-céphalité,et plus généralement une poly-céphalité urbaine de ce type caractérise souvent des espaces de type dépendant et/ou colonial:pour rester dans le cadre européen,nous citerons les exemples du Pays-de-Galles (Cardiff/Bangor/Aberystwyth) et de l'Ecosse (Glasgow vs.Edinburgh).Cette polycéphalité urbaine peut être expliquée en partie par le fait que ces espaces ont échoué en tout ou partie dans leurs processus d'édification étatique et nationale,et que très souvent,elle est "entretenue" par le centre.

** le développement des voies de communications corrobore ce type de "dynamisme" urbain:il s'agit avant tout de relier le centre (Paris) aux villes commerçantes et aux arsenaux et ports militaires,sans se soucier des retombées sur l'arrière-pays.

En bref, on peut dire qu'il y a une surdétermination des divers réseaux de communications et de la hiérarchie urbaine, par la place affectée successivement à une périphérie(la Bretagne) par le centre,dans la division

régionale du travail:spécialisation militaire, économique (devéloppement du secteur primaire accentué par une stratégie de désindustrialisation),touristique et démographique (réservoir de main d'oeuvre au bénéfice du centre).

Cette évolution explique l'importance du clivage rural/urbain dès la fin de l'Ancien Régime:ce clivage est d'autant plus contrasté qu'il oppose des "îlots" capitalistes très dynamiques à une formation de type pré-capitaliste.Comme le dit très bien Yannick Guin, "Saint-Malo et Nantes surtout se dressent comme deux cancers sur les flancs de la féodalité bretonne" (GUIN,1977:26).Cela explique que la bourgeoisie bretonne ait été,dans un premier temps,une des plus avancées dans la dynamique révolutionnaire:en effet,née à la "périphérie" de la société bretonne précapitaliste, elle est encore plus motivée pour mettre fin aux anciens rapports féodaux.
La question la plus importante était de savoir au profit de qui (aristocratie terrienne liée à l'Ancien Régime ou bourgeoisie dynamique) allait se faire la mobilisation de la classe paysanne:cette dernière avait déjà fait la preuve,à plusieurs reprises,de ses récriminations à l'encontre des abus seigneuriaux et les Cahiers de Doléances en font largement état;néanmoins,contrairement à ce qui se passe dans d'autres régions de la France,la paysannerie bretonne va "basculer" du côté de l'aristocratie et du clergé,contre la Révolution bourgeoise.Cet échec de la bourgeoisie à mobiliser à son profit la paysannerie bretonne,s'explique de plusieurs façons:

*très rapidement,la paysannerie s'est rendue compte que ses revendications propres (notamment en matière foncière) étaient "incompatibles" avec les prétentions de la bourgeoisie (on retrouve ici des conflits déjà mis en valeur dans les travaux de Tilly sur la Vendée et de Bois sur la Sarthe).

*la paysannerie bretonne a très mal accepté la conscription militaire ("résistance" commune à d'autres régions).

*surtout,comme nous l'avons indiqué plus haut,la politique religieuse poursuivie par la Révolution Française provoque une rupture fondamentale.

Cette série de facteurs va pousser les paysans dans les bras de l'aristocratie et du clergé,leurs "élites naturelles" pour reprendre le discours de ces deux dernières catégories.

En résumé,on peut dire que la révolution bourgeoise,pour ce qui est de la Bretagne, n'a fait que "renforcer" la cohésion tant socio-économique qu'idéologique,de l'ancienne formation pré-capitaliste (féodale),i.e. du "bloc agraire" breton.
Cette situation va se stabiliser pendant tout le 19ème siècle,car l'aristocratie terrienne,de type légitimiste,dans l'impossibilité de conserver le pouvoir central, effectue une stratégie de repli territorial sur ses bastions,essayant,avec l'aide du clergé catholique,d'isoler au maximum la Bretagne rurale des flux tant socio-économiques qu'idéologiques ou politiques (valeurs républicaines,laïques,bourgeoises,urbaines, etc...) en provenance du centre et des îlôts capitalistes bretons,bref,en cherchant

à "endiguer" la pénétration du mode de production capitaliste.Cette volonté d'isoler la Bretagne rurale va prendre plusieurs formes dont la principale, en ce qui concerne le clivage rural/urbain, est la corporatisme paysan,avec notamment l'exemple de l'Office Central de Landerneau (voir BERGER,1975).
Il s'agira également,lorsque les contraintes du marché commenceront à provoquer des failles dans le bloc agraire,de contrôler l'organisation et les effets de l'émigration (avec l'aide du clergé catholique).

L'attitude de "repli" sur la Bretagne rurale va creuser encore plus l'écart avec d'une part la bourgeoisie,francisée,républicaine, et d'autre part avec une classe ouvrière à la fois très minoritaire et très typée (ouvriers des arsenaux directement liés à l'Etat central,personnel des conserveries,etc...).La première opposition est souvent décrite en termes de luttes entre les Blancs et les Bleus, les Rouges (expression renvoyant à la deuxième opposition) étant restés assez longtemps en marge de ce premier conflit.

La stratégie de repli territorial sur un bloc agraire cimenté par l'idéologie corporatiste,catholique et régionaliste,ne pouvait durer (même en co-habitant spatialement avec un bloc urbain) que dans la mesure où la Bretagne continuait à se voir "assigner" une spécialisation "correspondante" dans la division régionale de l'économie.
La pénétration croissante du mode de production capitaliste,par intervention directe de l'Etat et par diffusion à partir des îlots urbains (selon les modes d'activité) va faire éclater ce bloc.Ce processus a été très bien décrit par Renaud Dulong et par Yannick Guin:pour Dulong, "...on peut lire la question bretonne comme celle d'une société précapitaliste confrontée à un ensemble social dont le développement implique la transformation.La Bretagne constitue,jusque vers les années 1950,un ensemble économique relativement autonome dans le système productif français....
A cet ensemble économique,correspond une structure sociale dont la caractéristique politique est d'être dominée par les notables qui sont en quelque sorte le lien entre la bourgeoisie dirigeante en France et la Société Bretonne.C'est cet état de choses qui est remis en question à partir des années 1950:le développement des forces productives et le passage du mode de production capitaliste à un stade nouveau bouleversent les structures économiques et démantèlent l'ancienne société bretonne pour en intégrer les éléments au système général de la production capitaliste"(DULONG,1975b :42)

Ce type d'analyse permet à Dulong (suivi en cela,sur certains points par Louis Quéré) de réintroduire la notion de populisme comme forme de mobilisation sociale spécifique d'une société en transition et de mettre l'accent sur les déterminants sociaux des discours et des pratiques des acteurs du mouvement breton,qu'il s'agisse de renvoyer à une base sociale comme la petite bourgeoisie ou à une alliance conjoncturelle de fractions de classes (DULONG,1975a, QUERE,1978).

## CHAPITRE QUATRIEME/L'ARTICULATION SPATIO-TEMPORELLE DES CLIVAGES.

Nous venons de passer en revue,de façon analytique,les caractéristiques principales des clivages en Bretagne.Il nous reste désormais à nous interroger sur l'articulation spatio-temporelle de ces clivages:articulation à deux niveaux,au niveau structurel,c'est-à-dire montrer qu'à un certain moment historique,ces clivages ont pu se renforcer mutuellement, se chevaucher ou s'exclure en tout ou partie, et au niveau des processus,de la dynamique, c'est-à-dire,montrer la logique à l'oeuvre dans la genèse,l'ossification et la dissociation de ces clivages,et surtout s'interroger sur leur interaction réciproque en termes de causalité.Une description de l'articulation historique entre les clivages renvoie à une interrogation sur une éventuelle "hiérarchisation" de ceux-ci.

Que l'on caractérise la Bretagne du 19ème siècle comme une formation sociale dominée par le mode de production pré-capitaliste (féodal) et/ou par une opposition dialectique entre un bloc agraire et un bloc urbain,dans les deux cas,on met l'accent sur la cohérence et le renforcement réciproque des diverses instances propres à chacun de ces blocs.

Nous allons donc montrer,dans un premier temps,comment les différents clivages décrits plus haut se sont renforcés mutuellement pour former un véritable bloc;nous verrons,dans un deuxième temps,comment ce bloc s'est peu à peu désintégré face à la pénétration du mode de production capitaliste

### SECTION A/ LA GUERRE DES BLOCS.

Le renforcement réciproque des clivages centre/périphérie,Eglise/Etat et rural/urbain s'effectue pendant la Révolution Française,en s'articulant sur un clivage "secondaire", le clivage constitutionnel Monarchie/République,le tout rendant partiellement inopérant le clivage possédants/travailleurs.Cela aboutit à la constitution d'un véritable bloc s'opposant,dans la totalité de ses éléments,au bloc proposé par le nouveau pouvoir central, selon les oppositions,deux à deux,suivantes:

| BLOC "BRETON" | BLOC "CENTRAL" |
|---|---|
| Monarchie (Ancien Régime) | République (Nouveau Régime) |
| Eglise catholique (rôle du clergé comme "intellectuel organique") | laïcité (+ protestantisme, + Franc-maçonnerie) (rôle des instituteurs) |
| Langue bretonne | Langue française |
| valeurs "féodales" | valeurs "bourgeoises" |
| aristocratie | bourgeoisie |

Afin d'illustrer cette opposition absolue,et son maintien pendant tout le 19ème siècle et le début du 20ème siècle,il nous a semblé particulièrement intéressant de sélectionner les justifications idéologiques proposées par chacun des protagonistes pour rendre compte la cohérence interne de leurs blocs respectifs.

## §1 - Le bloc français.

En 1794, Barère soumet au Comité de Salut Public un rapport sur les idiomes:les extraits suivants de ce rapport se passent de commentaires:

> "Quatre points du territoire de la République méritent seuls de fixer l'attention du législateur révolutionnaire sous le rapport des idiomes qui paraissent les plus contraires à la propagation de l'esprit public et présentent des obstacles à la connaissance des lois de la République et à leur éxécution.
>
> ...l'idiome appelé bas-breton,l'idiome basque,les langues allemande et italienne ont perpétué le règne du fanatisme et de la superstition,assuré la domination des prêtres,des nobles et des praticiens,empêché la révolution de pénétrer dans neuf départements importants,et peuvent favoriser les ennemis de la France.
>
> Je commence par le bas-breton.Il est parlé exclusivement dans la presque totalité des départements du Morbihan,du Finistère,des Côtes-du-Nord,d'Ille-et-Vilaine,et dans une grande partie de la Loire-Inférieure.Là l'ignorance perpétue le joug imposé par les prêtres et les nobles;là les citoyens naissent et meurent dans l'erreur:ils ignorent s'il existe encore des lois nouvelles.
> Les habitants des campagnes n'entendent que le bas-breton;c'est avec cet instrument barbare de leurs pensées superstitieuses que les prêtres et les intrigants les tiennent sous leur empire,dirigent leurs consciences et empêchent les citoyens de connaître les lois et d'aimer la République.
>
> ...Vous avez ôté à ces fanatiques égarés les saints par le calendrier de la République;ôtez-leur l'empire des prêtres par l'enseignement de la langue française.
>
> ....
>
> Les lumières portées à grands frais aux extrémités de la France s'éteignent en y arrivant,puisque les lois n'y sont pas entendues.
>
> LE FEDERALISME ET LA SUPERSTITION PARLENT BAS-BRETON;L'EMIGRATION ET LA HAINE DE LA REPUBLIQUE PARLENT ALLEMAND;LA CONTRE-REVOLUTION PARLE ITALIEN, ET LE FANATISME PARLE BASQUE.CASSONS CES INSTRUMENTS DE DOMMAGE ET D'ERREUR. "
>
> (passages mis en valeur par nous).

La même année (1794),l'abbé Grégoire soumet à la Convention Nationale un rapport sur la nécessité et les moyens d'anéantir les patois et d'universaliser l'usage de la langue française,suite logique du rapport précédent.Il y reprend les mêmes arguments et constate ou propose des solutions radicales:

> "(il faut)...consacrer au plutôt (?),dans une République une et indivisible, l'usage unique et invariable de la langue de la liberté.
>
> ...chez les Basques,peuple doux et brave,un grand nombre était accessible au fanatisme,parce que l'idiome est un obstacle à la propagation des lumières.
>
> En général,dans nos bataillons on parle français,et cette masse de républicains qui en aura contracté l'usage le répandra dans ses foyers"

(les textes intégraux des rapports Barère et Grégoire sont reproduits in CERTEAU et al.,1975).

Plus de cent ans après, en 1903, Emile Combes, président du conseil et ministre de l'intérieu et des cultes, vient à Tréguier (Côtes-du-Nord) inaugurer la statue d'Ernest Renan. Son discours reprend la même problématique que celle de Barère et Grégoire (il ne faut pas oublier que nous sommes en pleine guerre anti-cléricale):

> "...cette Bretagne que la réaction affecte de signaler comme un de ses fiefs électoraux et qu'elle se flatte vainement de pouvoir disputer longtemps encore à la République.
> Il est vrai que, pour des raisons diverses, où l'ignorance systématiquement voulue de la langue française occupe une des premières places, des influences séculaires, perpétuant de vieilles coutumes, ont retardé la diffusion des idées républicaines. Mais...la lumière se fait peu à peu dans les esprits:..j'ose prédire que le moment n'est plus éloigné où la Bretagne secouera le joug de ses hobereaux et de ses prêtres pour instaurer, sur les ruines des vieux préjugés et des vieilles dominations, les principes libérateurs du régime républicain"

(souligné par nous :source:X, 1903).

Dernière illustration de l'offensive du bloc français: en 1924, Yves Le Febvre fait paraître un roman intitulé La Terre des Prêtres, roman dans lequel il montre le cléricalisme à l'oeuvre et dénonce l'immixtion constante de l'institution cléricale dans des domaines qui ne la regardaient pas. Ce roman est attaqué en justice par plusieurs prêtres de la région de Bretagne où se déroule le roman. En 1932, l'affaire rebondit par la réédition du roman, enrichi des dossiers du procès et surtout par la création d'une pièce de théatre directement inspirée du roman. Ces représentations donnèrent lieu à de véritables affrontements verbaux et physiques.
Yves Le Febvre, incarnation de la défense des Bleus de Bretagne, était entré en guerre contre le cléricalisme et contre le mouvement autonomiste breton dès la fin de la première guerre mondiale, écrivant notamment en 1919:

> "...la lutte pour le maintien de la langue bretonne constitue un mouvement essentiellement réactionnaire et clérical, dans ses origines, dans son développement, dans ses conséquences.
> ...Il a pris tout de suite la signification d'une protestation contre la culture française, en tant que celle-ci est représentative des idées de démocratie et de Libre-Pensée...Or, en Bretagne, la logique des faits c'est que la lutte pour la langue bretonne s'y double fatalement d'une lutte contre la langue et contre l'influence françaises et que cette lutte y est menée par le clergé ou, tout au moins, y est pénétrée d'influences cléricales"

(LE FEBVRE, 1919 /voir aussi LE FEBVRE, 1980).

Ces divers extraits, étalés sur presque 130 ans, montrent la persistance du bloc breton antagoniste. Il est vrai que, comme le dit très bien le chanoine Falc'hun: "On défendait comme un bloc indissoluble ce que l'adversaire attaquait en bloc. Cela fit la vogue du slogan: ar brezoneg hag ar feiz a zo breur ha c'hoar e Breiz, "le breton et la foi sont frère et soeur en Bretagne""

(cité in POISSON, 1955).

Etudions donc les discours justificatifs du bloc breton.

§2 - Le bloc breton.

En 1843,un abbé breton proche des milieux favorables à une politique d'unification et de purification de la langue bretonne,écrit:

> "...j'ai caressé longtemps cette idée d'une sainte ligue contre l'invasion de l'incrédulité,et de l'immoralité venant à la suite du français sur les ruines de notre breton...Dieu sait que mon voeu le plus ardent est le maintien de la religion et de la nationalité de la Bretagne."
> (cité in TANGUY,Tome 1:163-164).

1977

Le même abbé,secrétaire de l'évêque de Quimper,rappelle,en 1845, "l'accord de nos évêques bretons pour la conservation de notre langue nationale,boulevard contre l'invasion de la corruption et de l'impiété" (idem:162-163).

L'évêque de Quimper lui même affirmera à la même époque que "(la conservation) de notre précieux idiome...importe au bien de ce pays;il y a une intime connexion entre le langage d'un peuple et son caractère,ses habitudes,ses moeurs et ses croyances"

(idem:154).

On pourrait ainsi multiplier les exemples:nous terminerons l'illustration du bloc breton en montrant que ces propos,tenus au début du 19ème siècle,sont également, et "logiquement" repris à la même époque par l'aristocratie,et que,presque cent ans après,une partie du clergé continue à défendre cette argumentation.

En 1847, Hersart de La Villemarqué,aristocrate légitimiste,fait paraître un Essai sur l'histoire de la langue bretonne,d'où il ressort que la lutte pour la langue bretonne a une fonction idéologique précise,celle de préserver l'ordre établi en Bretagne contre l'ensemble des valeurs et des pratiques développées par le nouvel ordre bourgeois et républicain:La Villemarqué écrit notamment:

> "...ce n'est pas seulement,qu'on le sache bien,le goût des antiquités,de la philologie ou de la littérature celtique qui soutient et anime les hommes éclairés auxquels la langue bretonne doit sa culture actuelle;ils veulent remplir,à l'aide de cet idiome,une mission bien plus importante.S'ils ravivent,s'ils épurent,s'ils perfectionnent le breton,c'est pour le rendre plus propre à instruire le peuple...leur but est de répandre l'instruction dans la foule,par tous les moyens possibles,mais surtout par la presse; d'entretenir les traditions d'honneur et de loyauté des ancêtres;de développer les bons instincts des classes laborieuses,d'élever leur coeur et de les rendre meilleures en les éclairant"
>
> (idem,tome 2:106).

Enfin,en 1926,l'évêque de Quimper écrit,à l'occasion des voeux du Nouvel An:

> "Le sens breton,il fléchit.C'est un malheur.Le fléchissement ne vient pas de nous,dans son principe.L'Etat,l'école,la caserne,les journaux en sont les premiers responsables.Le clergé,pour sa part,n'a jamais cessé d'être fier de sa race,de l'histoire et des traditions de la Bretagne.
> Il en aime et il en parle la langue,et c'est en grande partie grâce à lui qu'elle

a reconquis sa pureté et enrichi son patrimoine littéraire...C'est un devoir plus pressant que jamais pour les prêtres,pour les maîtres et les maîtresses d'écoles catholiques de défendre et de cultiver LA LANGUE NATIONALE,de la faire étudier,de la remettre en honneur.L'âme de la race y est intéressée.Les circulaires des ministres n'ont ici aucun droit d'intervention.
Sans se laisser entraîner à l'utopie du séparatisme,le Breton a le devoir d'exiger qu'on respecte ses coutumes et sa langue comme sa foi.Elles font partie de son armature.Elles fortifient son tempérament moral.
...
Messieurs,si j'ai touché cette question devant vous,c'est que le clergé représente mieux que tout autre groupe social l'esprit breton, et il saura mieux que tout autre dans quelle mesure doivent être unies l'action catholique et l'action bretonne si intimement associées dans nos coeurs"

(souligné par nous; POISSON,1955:93).

Nous avons donc là un exemple très intéressant d'ossification de deux blocs au sein desquels chaque clivage se superpose et se renforce mutuellement,y compris le clivage centre/périphérie (dans sa composante ethno-linguistique).
Au bloc breton impliquant la défense simultanée de l'ancien ordre établi (Ancien Régime monarchique,rôle de la noblesse et du clergé,religion catholique,langue bretonne) s'oppose un bloc français proposant la défense de la République,des Lumières,des valeurs bourgeoises,de la laïcité,de l'universalité de la langue française.

Ce qui est important c'est de montrer que cette opposition systématique (clivage contre clivage) explique que la mobilisation de la population bretonne ait été faite à l'exclusi des solutions de type autonomiste ou séparatiste;c'est-à-dire que la défense parallèle (car comme "allant de soi" au départ) de la cause monarchiste,de la cause catholique et de la cause paysanne allait faire aussi office de défense de la Bretagne,de l'âme bretonne,de l'esprit breton,dans le cadre d'une opposition de type centre/périphérie, et l'étude des acteurs du "mouvement breton" dans l'acception la plus large du terme confirme cette hypothèse.
L'idéologie régionaliste/nationaliste bretonne est utilisée pour mieux cimenter ce bloc agraire et catholique,et sera donc secrétée "naturellement" par les acteurs sociaux et/ou intellectuels organiques de ce bloc,à savoir l'aristocratie terrienne et le clergé catholique.
En conséquence, les avatars du mouvement breton vont être expliquables par la destruction progressive de ce bloc,c'est-à-dire par la dissociation progressive des différents clivages qui,dans un premier temps,ont été cristallisés,ossifiés à l'occasion de la Révolution Française;la question est,en dernier lieu,de savoir quel va être le sort du clivage centre/périphérie,une fois qu'il sera mis à nu, c'est-à-dire libéré de ses surdéterminations.
Nous allons donc voir,dans une deuxième partie,la dissociation progressive du bloc breton.

SECTION B/ LA DISSOLUTION PROGRESSIVE DU BLOC BRETON.

§1 - Première dissociation:le ralliement à la République.

La première dissociation concerne le clivage constitutionnel,monarchie vs. république.
La Bretagne sera bien l'un des derniers bastions du monarchisme:au début du 20ème siècle,le Groupe des Droites à la Chambre des Députés est composé des derniers députés royalistes dont une grande partie représente des circonscriptions électorales de Bretagne,ou mieux,représente la Bretagne,puisque,nous l'avons vu,on trouve encore à cette époque des professions de foi électorales cherchant à mobiliser encore l'électorat sur la base de l'association Monarchie/Bretagne/Religion catholique.
L'évolution du système politique français va rendre ce clivage caduc.Il est vrai que cette évolution avait été accélérée par le Ralliement des catholiques à la République.

§2 - Deuxième dissociation:la "sécularisation" de la cause bretonne.

La politique de Ralliement de l'Eglise catholique au nouvel ordre républicain (fin du 19ème siècle) ne signifie aucunement,nous l'avons vu,l'abandon de l'équation Bretagne(Breton) = Catholique,bien au contraire.Cela explique les difficultés et la lenteur qu'il y a eu à laïciser la lutte pour la défense de l'entité Bretagne.
En effet,l'ampleur de l'association entre défense de la langue bretonne (et de l'esprit breton) et la défense de la foi catholique,a été telle qu'il a fallu attendre le début du 20ème siècle pour voir des personnalités en rupture du mouvement breton contemporain,proposer une sécularisation de la cause bretonne.Ces tentatives étaient d'autant plus méritoires qu'elles étaient condamnées des deux côtés:du côté du clergé,qui avait tout intérêt à continuer à confondre les deux causes,et du côté opposé pour qui parler breton ne pouvait être que favoriser l'obscurantisme et le cléricalisme.

Cette volonté d'émancipation de la cause bretonne du carcan catholique est très bien traduite par Emile Masson (sur un mode lyrique et spontanéiste) et par les fondateurs du mouvement autonomiste breton de l'entre-deux-guerres, (dans le cadre d'une stratégie plus rationnelle de mise sur pied d'une organisation bretonne indépendante de tout clivage).

Après s'être offusqué des généralisations relatives à l'emploi de la langue bretonne (langue bretonne = langue de la barbarie,de l'obscurantisme,de la réaction et du cléricalisme),Emile Masson s'écrie en 1912:

> "Une langue qui soit d'un parti! Une langue qui soit réactionnaire! Comme si une langue,surtout une langue qui nous vient d'un passé aussi loin de toutes nos misérables querelles présentes,d'un passé où l'âme était libre et farouche comme celle des fauves,pouvait être rien d'autre que l'expression du libre farouche fauve humain"
>
> (MASSON,1972:205).

De leur côté ,les fondateurs du mouvement autonomiste breton incarné par la revue Breiz Atao,écrivent en 1924:

> "Il est inadmissible qu'on veuille mêler religion et question bretonne au point qu'elles soient inséparables et que sans l'une il soit interdit de s'occuper de l'autre...On peut défendre toute la nationalité bretonne sans prendre parti dans la question religieuse;on peut être nationaliste breton en étant neutre vis-à-vis du catholicisme romain".
>
> (cité in DENIEL,1976:67).

Propos explicites sans doute,mais "contraires" à ceux de l'historien La Borderie et propos qui resteront sans suite réelle car l'association breton/catholique était trop bien ancrée pour être remise en cause aussi rapidement et aussi nettement. Il faudra attendre les années soixante et un certain changement dans la base sociale des acteurs du mouvement breton,pour assister à une sécularisation effective de la question bretonne.

Nous terminerons cette étude sur l'association Bretagne/Catholique en rappelant la nécessité de faire une différence entre le bas-clergé et le haut-clergé,en matière de défense de la langue bretonne.Le bas-clergé,plus proche par définition de la population rurale bretonnante,que le haut-clergé,va bien évidemment,dans un premier temps et de façon permanente,être à la pointe du combat breton,tandis que le haut-clergé verra son attitude évoluer en fonction de sa "proximité" avec le pouvoir central.Dans le cas où le fossé est encore très profond entre le haut-clergé légitimiste et le pouvoir central (notamment sous Louis-Philippe),on trouvera des évêques pour défendre explicitement et politiquement l'association breton=catholique.

Par contre,à la suite du ralliement,le haut-clergé,tout en continuant de défendre cette association,refusera de suivre la logique d'un abbé Perrot pour qui,face aux attaques répétées du pouvoir central contre la langue bretonne,la seule solution restante était l'autonomie de la Bretagne.

La volonté affichée par les autonomistes bretons de laïciser la question bretonne, y compris dans une perspective de néo-paganisme celtique à connoation fascisante, jouera,paradoxalement , au détriment de cette question,car une grande partie du clergé finira par abandonner de lui-même la cause bretonne.

§3_-Troisième dissociation:le clivage rural/urbain.

La question est là plus complexe car elle nécessite la prise en compte de la base sociale des divers mouvements bretons.Sur le plan de la pratique linguistique et des pratiques culturelles dans leur ensemble,le clivage rural/urbain demeure opérant jusqu'au début du 20ème siècle,c'est-à-dire que les secteurs urbains sont peu affectés (on peut même dire que ce sont eux qui constituent les foyers de francisation).

La dissolution de la société bretonne rurale et les flux d'émigration qui en résultent vont amener certaines modifications/

*les émigrants bretons,aidés en cela,dans un premier temps,par un fort encadrement écclésiastique,vont maintenir,hors de Bretagne,des activités culturelles (groupes folkloriques,cours de breton,messes en breton,pardons, etc...) témoignant d'une volonté de conserver une certaine identité bretonne.Ce mouvement est toujours très important de nos jours et est renforcé par une certaine mode (retour aux sources).

* la "renaissance" du mouvement littéraire et autonomiste breton va être souvent animée,à partir des centres urbains,par des personnalités,dont certaines ne connaissent pas la langue bretonne comme langue maternelle. Ce phénomène de "réappropriation" linguistique répond aux mêmes soucis d'identification que ceux indiqués plus haut.
On trouve là une opposition intéressante entre deux types de pratiques culturelles bretonnes:celles de la paysannerie,"résidus" ayant encore échappé aux effets uniformisateurs de la pénétration du mode de production capitaliste,et celles des "émigrants"(internes et externes à la Bretagne), coupés de leur milieu rural breton d'origine, et soucieux de se réapproprier une "nouvelle" culture.

**********

CONCLUSION GENERALE/

Pour notre conclusion générale nous aborderons deux problèmes sous forme de questions et d'hypothèses.

§1/ Dans le cas de la Bretagne,la mobilisation de la population bretonne, compte-tenu de la spécificité socio-économique,politique et culturelle de cette région et de l'histoire de ses rapports avec le pouvoir central,s'est effectuée essentiellement sur la base des clivages constitutionnels(dans un premier temps),rural/urbain (corporatisme paysan) et surtout religieux (défense de la religion catholique), surdéterminant ainsi le clivage centre/ périphérie et empêchant la constitution d'un mouvement régionaliste/autonomiste "propre",de masse,en dehors de ces types de mobilisation.La mobilisation sur la base de la religion catholique,faisant référence à une entité supra-étatique (Rome) en conflit quasi-permanent avec le pouvoir républicain central,n'a pas permis une solution du type "gallois" ("Eglise nationale"). La mobilisation sur le thème de la défense de la monarchie,renvoyant à un mode de gouvernement du pouvoir central,a empêché là aussi une mobilisation politique "autonome".Le mouvement breton a été victime du fait que la population bretonne a été durablement mobilisée sur des clivages concernant l'ensemble de la France.Cela nous semble expliquer à la fois le "lieu" et la "forme" de la mobilisation,fournissant ainsi une clef possible pour qui veut comprendre la faiblesse du mouvement breton.
Le régionalisme breton n'est opérant que là où il est redoublé par des clivages étatiques ou lorsqu'il est issu d'une alliance de classes conjoncturelle et fragile.Dans les deux cas,il n'est pas vraiment autonome si tant est que cela soit possible.

§2/ Le dernier problème est plutôt une invitation à approfondir notre recherche dans une perspective plus théorique et plus globalisante. Nous avons, dans un premier temps, "isoler" artificiellement une série de clivages, dans l'optique des recherches menées par Rokkan, et dont nous pensons qu'ils permettent effectivement de rendre compte de l'hétérogénéité des cultures politiques de l'Europe Occidentale (dont la Bretagne); nous avons ensuite montré la nécessité de ré-articuler ces différents clivages dans leur historicité concrète: en effet, ce n'est pas un hasard, si, ont pu coexister au sein d'un même espace, des rapports de classe de type pré-capitaliste, le maintien d'une langue autre que la langue du centre et une religion catholique omniprésente: cette situation n'est pas propre à la Bretagne. Il est donc nécessaire d'aller plus loin et de s'interroger sur les modèles permettant de rendre compte de ces phénomènes: c'est là un travail que nous effectuons dans le cadre d'une thèse en cours, travail visant à évaluer ceux des modèles qui nous semblent les plus pertinents: analyses centre/périphérie, colonialisme interne, théories de la dépendance, analyses marxistes.

---

REFERENCES


I975, BERGER (Suzanne) - Les paysans contre la politique. Paris, Seuil, I975, 346p. Bibliogr. Index.

I954, BOULARD (Fernand) - Premiers itinéraires en sociologie religieuse. Paris, Ed. Ouvrières/Ed. Economie et Humanisme, I954, I59 p.

I975, CERTEAU (Michel de), JULIA (Dominique) et REVEL (Jacques) - Une politique de la langue. Paris, Gallimard, I975, 320 p.

I976, DENIEL (Alain) - Le mouvement breton, I9I9-I945. Paris, Maspero, I976, 45Ip. Bibliogr. Index.

I975a, DULONG (Renaud) - La question bretonne. Paris, Presses de la F.N.S.P., I975, 208 p.

I975b, DULONG (Renaud) - "La question bretonne". Bretagne-Aujourd'hui (Cahiers du Bleun Brug), n°I9, I975: II-I8.

I98I,a GUILLOREL (Hervé) - "Problème breton et mouvement breton". Pouvoirs n°I9, I98I: 83-I02. Bibliogr.

I98I,b GUILLOREL (Hervé) - "France: religion, periphery, state and nation-building", pp. 390-428 in: Torsvik (Per) ed. - Mobilization, center-periphery structures and nation-building. A volume in commemoration of Stein Rokkan. Bergen, Oslo and Tromsø, Universitetsforlaget, I98I, 567 p. Bibliogr. Index.

I985, GUILLOREL (Hervé) - "Surdéterminants socio-culturels du conflit linguistique: langue, religion et politique. Le cas de la Bretagne". (à paraître dans les actes d'un colloque organisé par l'I.P.I.E. sous les auspices de l'UNESCO).

I976, GUIN (Yannick) - Histoire de la Bretagne de I789 à nos jours. Paris, Maspero, I977, 345 p.

I898, LE GOUVELLO (Hippolyte) - Le vénérable Michel Le Nobletz (I577-I652). Paris, Victor-Retaux, I898, 490 p.

I9I9, LE FEBVRE (Yves) - article in Les Cahiers Bretons, septembre I9I9.

I980, LE FEBVRE (Yves) - La terre des prêtres. Le Cuilvinec, Ed. Le Signor, I980, 260 p. (Ière éd. I924).

I965, LOYER (Olivier) - Les chrétientés celtiques. Paris, PUF, I965, I39p. Bibliogr.

I972, MASSON (Emile) - Les Bretons et le socialisme. Paris, Maspero, I972, 287 p. Bibliogr. Index.

I955, POISSON (Henri) - L'abbé Jean-Marie Perrot, fondateur du Bleun-Brug (I877-I943). Rennes, Plihon, I955, 258p. Bibliogr.

I959, POISSON (Henri) - Histoire de Bretagne. Saint-Brieuc, à compte d'auteur, I959, 368 p.

I978, QUERE (Louis) - Jeux interdits à la frontière. Essai sur les mouvements régionaux. Paris, Anthropos, I978, 383 p.

I970, ROKKAN (Stein) - Citizens, elections, parties. Oslo, Universitetsforlaget, I970, 470 p. Bibliogr. Index.

I983, ROKKAN (Stein) and URWIN (Derek) - Economy, territory, identity. Politics of West European peripheries. London, Sage, I983, 218 p. Bibliogr. Index.

I980, SEILER (Daniel-Louis) - Partis et familles politiques. Paris, PUF, I980, 440p. Index.

I977, TANGUY (Bernard) - Aux origines du nationalisme breton. Paris, UGE, IO/I8, n°II55 (T.I, 440p.) et n°II69 (T.2, 3I4p.), I977.

I976, WEBER (Eugen) - Peasants into Frenchmen. The modernization of rural France, I870-I9I4. London, Chatto and Windus, I977, XV + 6I5p. Bibliogr. Index.

I903, X - Les fêtes de Renan à Tréguier. Paris, A. Joanin, I903, I02p.

# CENTER-PERIPHERY STRUCTURES IN SPAIN: FROM HISTORICAL CONFLICT TO TERRITORIAL-CONSOCIATIONAL ACCOMODATION?

César E. Díaz López
Teoría del Estado
Universidad Complutense de Madrid

# CENTER-PERIPHERY STRUCTURES IN SPAIN: FROM HISTORICAL CONFLICT TO TERRITORIAL-CONSOCIATIONAL ACCOMODATION?

INTRODUCTION

I. THE HISTORICAL BACKGROUND

1. State building Vs. nation building
2. Historical discontinuity
3. The failure of the unitary State in the 19th C.
4. The socio-economic territorial differences
5. Origins and support of the Peripheral Nationalisms

II. FROM AUTHORITATIVE CENTRALISM TO DEMOCRATIC DECENTRALIZATION

1. The birth of territorial subunits (Preautonomies)
2. General principles of the Autonomic State in the 1978 Constitution
3. Modalities of access to autonomy
4. Application of the model and subsequent developments

III. CONFLICTS BETWEEN THE CENTER AND PERIPHERIES

1. The juridical nature of the Center-Periphery relations
2. The problems of control by the State and the guarantees of Autonomic Communities. The role of the Constitutional Court
3. Protagonism recovered by the Center. The Organic Law of Harmonization of the Autonomic Process (LOAPA)

IV. THE SOCIO-POLITICAL DIMENSION

1. Objective differences across the territory
2. The multidimensional character of identity consciousness
3. Peripheral parties versus the Spanish party system
4. A further consideration of the Basque Case

V. IN THE GUISE OF A CONCLUSION

1. Analysis and General Criticism
2. The "Departecon" model of Center-Periphery relations

## INTRODUCTION

It is the aim of this paper to highlight the crucial importance of the territorial dimension in contemporary Spanish politics. Distinguished historians (Americo Castro, 1930; Pierre Vilar, 1963...) teach us the relevancy of the continuous struggles, from ancient times, between the warrior inward looking tribes settled on the central plateaus and the more trade - oriented and, therefore cosmopolitan peoples, established on the generally richer and more inviting coastal lands.

This is true to the extent that no history of contemporary Spain worthy of its name can possibly be conceived without taking into account the tension between the homogenizing centralist drive and the romantic reaction of a periphery stressing - the superior values of its differentiating features. It can be rightly argued that this tension, directly derived from the "National Revolution" -which confronted the nation-building central culture with the peripheral resistent ones holding differentiating ethnic, linguistic or religious features- is not exclusive of Spain. However, it can be safely stated that nowhere but in Spain is this center-periphery issue the main catalyst of the process of profound redefinition of the Spanish State. This is due to the fact that -and unlike what happens in other European States- the two areas with the highest level of local-nationalist support: the Basque Country and Catalonia enjoy the highest per capita income as well as degree of development.

## I. THE HISTORICAL BACKGROUND

Any rigorous approach intending to do justice to the complexities of the problem ought to, at least, point out the following features:

1) the premature process of Spanish State building not preceded, nor immediately followed, by another of nation building.

2) the historical discontinuity brought about by the crisis of monarchical traditional legitimacy.

3) the collective feeling of the Spanish State's failure by the 19th C., having been unable to encourage the peripheral regions into a common national endeavour.

4) the objective socio-economic gap between the more advanced and industrialized Catalonia and the Basque Country and the rest, more traditional and rural.

The previous features are so inextricably intertwined that it becomes difficult, at times, to distinguish causes from effects. They deserve futher elaboration.

1. State building vs. nation building. Historically Spain was born in the 16th C. out of a union of kingdoms -achieved either through dynastic marriage (Castille, Aragon...) or through forceful annexation (Navarre)- under the authority of one king, known not as the King of Spain but rather as the King of Castille, Leon and Navarre, Count of Barcelona, Lord of Vizcaya, etc. . The process resembles that followed by the United Kingdom. However there is an important difference between both models. Despite the fact that the Spanish units were very different among themselves in cultural and legal traditions and institutions, the central powers, fom the Hapsburg onwards, started a process of bureaucratic centralization in the Continental tradition unparalleled in the British Isles . This effort was further pursued under the Bourbons. (Suffice it to say that the first of the dynasty, Philip V, was the grandson of "Le roi soleil"). Later, around 1812, "the liberals pushed the policies of the Bourbons toward their logical conclusion: uniform centralized government, destruction of local oligarchies, etc. (Herr, 1971).

In 1833 Spain was administratively divided into 49 artificially drawn provinces directly united to Madrid. It was a hard blow to the regions which were deprived of their meaning as organizations situated between the individual and the State (Díaz López, 1980). And yet, it has been said that "the total unification of the Spanish politico-juridical system was not completed until 1839". (Linz, 1979). How can we account for this seemingly anomalous development? The most plausible expalnation stresses the premature birth of the Spanish "confederal" State long before the age of nationalisms. This prevented it from becoming a full fledged Nation-State. The different "tempo-storico" between Spain and other European countries has been clearly pointed out by Pierre Vilar:

"L'Espagne, état unifié, d'une structure ancienne et de solide apparence, a tendu, sous l'influence des "renaissances" nationales du siècle dernier, a se désagréger comme les empires incohérents d'Europe centrale et orientale, et a laisser revivre des souvenirs politiques mediévaux, au moment même ou les vieux royaumes allemands ou les glorieuses cités italiennes, achevaient de se fondre en Etats modernes. Curieuse contre-experience".

It is a counter experience which underlines the fact that a process of nation building as "a matter of building group cohesion and group solidarity for international representation and domestic planning", to borrow Karl W. Deutsch's words, never properly took place in Spain.

## 2. Historical discontinuity.

The unique Spanish 19th C. is further complicated by the break of the principle of dynastic legitimacy, a consequence of the lack of continuity or vacuum of authority, that the anti-Napoleonic War produced. The three successive Carlist Wars are the corollary of the 19th C. ideological-territorial division.

According to Juan J. Linz two other facts reflect this crisis of tradtional legitimacy 1) The attempt to declare a Federal Republic in the 1870's, precisely at the time when Germany and Italy unified under monarchic forms. 2) The paradoxically anti-traditional character of Spanish traditionalism which - attached the legitimacy of the king to a number of ideological principles foreign to the monarchic tradition itself.

The awareness of this historic discontinuity will push Spaniards to connect, explains Linz, with local medieval institutions interpreting them as democratic. (Linz, 1977).

3. The failure of the unitary State in the 19th C. is double edged:

1) Domestic as shown by its inability not only to carry out the industrial revolution but even to cope with public order issues, education (in terms of linguistically assimilating the peripheries), etc. It is in this sense that we must understand Charles Tilly's words "Spain entered the age of industry and empire with one of the least stately governmental structures of the continent."

2) External: best epitomized by the defeat and loss of the colonial empire -at the time Britain and France were building theirs- and the retreat into the metropolis. All these engender in the population a collective feeling of frustration and concern (best portrayed by the literary generation of 1898) in which Cuba and the Philipines were lost after war against the U.S.

4. The Socio-economic territorial differences. The Spanish State was not only unable to create a sense of purpose for all the regions in the way sought by Ortega y Gasset but its weakness made it subject to uneven territorial development. The industrialization process undergone by Catalonia and the Basque Country

drew thousands of emigrant workers from the underpriviledged regions of the South while it consolidated those poles as economic centres vs. the political center of Madrid reinforcing in this way the Center-Periphery tensions.

5. Origins and Support of the Peripheral Nationalisms.

a) Catalan Nationalism. Catalanism was born at the end of the 19th C. as a purely cultural and literary movement around associations whose members were fundamentally liberal professionals and cultural scholars. Catalanism was then, a profound sentiment of cultural identity among a restricted intellectual elite. It would be a conflict of economic interests which politically vertebrated Catalan nationalism . The loss of Cuba and other colonies and with them, of important markets which constituted approximately one fifth of the cotton textile exportation mobilized an important portion of the Catalan bourgeosie that was conscious of the fact that Catalan economic interests were defended in Madrid through negotiations with the State. Catalonia needed the Spanish State's protective tariffs, importation policies on raw materials and a guarantee for markets in the knowledge that such economic protection was the guarantee for their own progress.

Catalan nationalism allied with the urban industrial element on the economic front. From this alliance were extracted the financial and organizational resources which it would not have had access to had it remained solely an intellectual group. On the religious front it appeared in alliance with the Catalan secular element. It is possible that this coincidence of ideological patterns in which both Spanish and Catalan nationalists form alliances with secular elements contributed -together with the Catalan transactional and pactist political style- and basically, thanks to a convergence of interests at a given moment, to

a certain continuity which explains the civilized and peaceful way in which, in 1977, they proceeded in the restauration of the Catalan institutions of self-government: the historical Generalitat.

b) Basque Nationalism appeared on the scene when Carlism lost its strength in the defense of the "Fueros". Having been long preceded by a strong sense of self identity this nationalism was articulated around the "Partido Nacionalist Vasco" founded by Sabino Arana in 1895. Its origins must be related to the "profound social and economic changes that Vizcayan politics experienced throughout the decade of 1880-90 as a consequence of the industrial exploitation of its iron mines." Between 1886-1900 the population grew by 47.88%. Miguel de Unamuno - would even say that nationalism was born as a hostile feeling towards emigrant workers that Arana feared would defile the Basque "race". The ideological origins of the PNV are unclear. Originally it was indebted to the reactionary and ultrareligious tradition of Carlism and eventually it leaned towards racist attitudes. In the thirties Aguirre had already democratized the PNV converting it into a social Christian party. Its strong religious and clerical component which contrasts with the secularized urban tint of the Catalans, was what gave it its conservative and populist character which it maintained until the Civil War in 1936.

The social base of support for Basque nationalism contrasts dramatically with that of Catalan since here it never found, (with the exception of a few important businessmen in Bilbao) adherents from the Basque haute bourgeosie who, satisfied with the benefits of the concession of the "economic concerts" by Madrid in 1878, had already abandoned any "fuerista whims". It was above all, the traditional middle classes of the small

Basque towns as well as the peasants, who unreservedly supported nationalism. On the religious front the Basque nationalists allied with the clergy (ultramontane and partisan of short-circuiting Toledo and relating directly to an anti-liberal Vatican which supported them). The interests of the high clergy were objectively clashing with those of the liberals and their unifying project. The disentailment applied by the nation builders favored the businessmen of the cities who could buy land at low prices, but it hurt the peasant renters.

The low rural clergy, extraordinarily influential in the direction of nationalism, and which had traditionally supported Carlism vs. "Godless liberalism", found an excellent shield in the return to local traditions, in the revival of the vernacular language and in the peasant and family traditions, to protect against marxist and aetheist subculture propagated among the workers of the industrial zones. This nationalism, explains Fusi, would provide political expression to an uneasiness which in Basque Catholic middle classes was provoked by the presence of large contingents of population alien to the mentality and traditional Basque ways of behaviour.

The Basque nationalist pattern of alliance with peasants and semi-rural small bourgeosie in the economic terrain and with the Catholic Church in an unofficial, but Vaticanist, version, does not provide the same continuity we observed in the previous nationalists' fronts between both Spanish and Catalans through secular elements. On the contrary, between Basque alliance models and the Spanish one we find a cleavage line. The Basque model seems to be complete, enclosed within itself.

c) Galician nationalism. In spite of the enormous ideological differences of support and political culture that divide Basque and Catalan nationalisms, they both offer certain common denominators since both arose during the period of capitalist development of their respective bourgeoisie and during the initial and progressive industrialization of both countries. This means that the Basque Country as well as Catalonia received large masses of immigrant workers from the rest of Spain. The superimposition of both processes of nationalism and capitalistic industrialization produced tremendous tensions in the two areas with the highest standard of living which implies that "feeling different" collectively as a community is not only bound to cultural or psychological differences but also to economic ones.

In Galicia we find that all the possible differentiating factors are given to form a nationality: own language and literature, different social structure, important economic peculiarities, different psychology and tradition, etc. The only difference with the two previous nationalities resides in the fact that in Galicia there never arose a strong industrialization process in the 19th C. That meant that there was no authochthonous industrial bourgeoisie nor a mass extra-Galician immigration which would have catalized, the same as in Catalonia and the Basque Country, its own nationalism. Due to this fact Galician nationalism had more trouble and took longer than the other two, to emerge from the cultural phase and to enter the stage of political maturity.

Galicia has always been and still is today, to a large extent, a fundamentally rural country with a minfundia property structure. In the case of Galician nationalism we find a scheme in which the urban element of classes tied to the state, function-

aires (or businessmen, intermediary bourgeoisie between the industrial bourgeoisie of the rest of Spain and the Galician people) -not industrial bourgeoisie as in Catalonia- appear bound to the nation builders from whom they receive their living in exchange for loyalty. Special ocassions for demonstrating this loyalty arise with elections in which the urban element through civil governors, mayors, etc. clientelistically influence small rural land owners to obtain the electoral support which legitimizes the nation builders in power. The Catholic Church, for its part also influences the peasants. The influence exercised is different from that of the Basquization and sense of solidarity offered by the Basque clergy. In Galicia the Church, through parish priests, became the strongest Castillianization factor along with the state education system. We are left with Galician nationalists, intellectuals and professionls isolated, incapable of achieving the support of the urban middle classes, from where they originated sociologically, and of influencing the peasants or small landowners, the social sector they intended to redeem. This fact explains the relative weakness of Galician nationalism compared to the other two until very recent times, and making clear the principle that the regionalist/nationalist movements begin to be operative only when the urban bourgeoisie takes a protagonist role, a circumstance which still has not occured in Galicia.

Another common feature of Catalan, Basque and Galician nationalisms is that there are two tendencies, in spite of their varying degrees of strength, in all of them: the more radical one -those who would conquer sovereignty and political independence- and a more moderate (federalist or autonomist) which believes that it is preferable or admissible to integrate the varying nationalities within one Spanish state. It is the latter which has prevailed today as well as in the 30's with the writing up of the various Autonomy Statutes and which were plebiscited by the electorates of the three communities. There is, however, a funda-

mental difference among the autonomist movements of today and those of other times since the ideological origins of them were basically conservative in all three cases but today have been largely taken over by leftist peripheral parties, influenced, to a greater or lesser extent, by those movements of national liberation of the 50's and 60's. The greater virulence of extremist Basque nationalism protagonized by ETA is perhaps the most outstanding difference externally conforming the three peripheral Spanish nationalisms.

## II. SPAIN: FROM AUTHORITATIVE CENTRALISM TO DEMOCRATIC DECENTALIZATION.

The historical period that began in Spain after the death of General Franco (November 1975) is an expectant moment for Spaniards who hope to unite the "two Spains" through a democratic restauration. It meant reaching agreements on the "rules of the game" which would allow the different citizens and peoples of Spain to live peacefully together. As in other moments when Spain has been found in a period of expansion and opening to freedom -the Federal Republic of 1873 or the Second Republic (1931-1936)- the always unresolved issue of finding a formula for accomodation between the center and the peripheries, or better yet, between the State and some of the territorial units that compose it, come to the surface. The process of transition from authoritarianism to democracy includes that of transforming a centralized political administrative structure to a clearly decentralized one. In the following paragraphs we shall analyse the experience.

### The Birth of Territorial Subunits.

The Political Reform Law of 4 January 1977, approved by Referendum, had the characteristics of the Fundamental Laws of the Franco Regime, implying a reform from within

authoritarian regime arising from the Spanish Civil War (1936-1939). This law returned sovereignty to the Spanish people and permitted the first general elections to be held in forty years.

The Preamble of the Bill on the Law of Political Reform, having finally disappeared from the legal text, aluded to the institutionalization of regional differences as an expression of the diversities of peoples that constitute the unity of the Kingdom and the State. The importance of the autonomic issue and the necessity of discussing it in a democratic context was clear. The Bill did no more than manifest the deep desires for autonomy held by some Spanish regions with their own language, culture and traditions. Under such influence the first democratic government of Adolfo Suárez included in the cabinet a Secretary of Relations with the Regions and in the government's Program proposals there were allusions to constitutional recognition of the Regions. (Different parties had already expressed autonomic aspirations during the 1977 general election campaign).

Immediately following the June Gövernmental electoral victory and by Royal Decree Law (29 September 1977) the "Generalitat" of Catalonia (a deeply rooted historic institution with an important role during the Second Republic) was provisionally reinstated. This provisional Autonomic Regime, through the figure of its exiled President, maintained the Republican legitimacy of 1931 and furthermore was not a novelty for Comparative Law as similar experiences were witnessed in Sicily (1944), Val d'Aoste (1945), Sardinia (1944) etc.

Given the circumstances, it represented a courageous and realistic political step for Suárez and his government. A new formula emerged: "Preautonomías". It was a fomula for provisional decentralization dictated by the urgency of certain communities to have their own political-administrative institu-

tions while waiting for the Constitution and Autonomy Statutes. These provisional autonomy Regimes or preautonomies, which had begun in Catalonia, eventually existed in the Basque Country, Galicia, Aragon, the Canary Islands, the Valencian Country, Andalusia, Baleares, Extremadura, Castille-Leon, Asturias, Murcia, and Castille-La Mancha. There was a double objective to the preautonomies: on the one hand a political character that intended to include Catalonia and the Basque Country within the general framework without favoritism that would cause distrust of traditional sectors of the Spanish society and on the other hand to allow a certain "training" in the practice of competencies leading to autonomy.

Royal Decree Laws created these provisional regimes (and were subject to some criticism due primarily to the fact that this type of law is usually passed for reasons of urgency but more than one year elapsed between the publication of the first and last regime, and also due to the fact that at that time Decree Laws did not need to be approved by Parliament), and postulated the existence of administrative entities without legislative power, having only restricted reglamentary power and which could assume the transfer of functions from the Central Power to contribute to the gradual transformation from an authoritarian, centralist State to a decentralized, democratic one. These preautonomies which would have an influence on the future Constitution, did not however, achieve its purposes since, as Alvarez Conde noted, the transfer of services was not always followed by the transfer of the corresponding means.

That first Congress, elected in 1977, elaborated and approved a Constitutional text which was approved by Referendum and sanctioned by King Juan Carlos I, on 27 December 1978. It had taken more than fourteen months, after electing the seven members of the Constitutional Committee in August 1977, to draft the Spanish Carta Magna.

The 1978 Constitution, in the framework of a gradual political reform is a text approved by consensus of the main political forces, desiring to find flexible rules which would make governing of different political parties possible. In this context the Constitution is not a one party Constitution (an almost endemic problem of contemporary Spanish constitutional history) and could not fully satisfy all political groups but which did receive overall acceptance. Coherently with the political dynamics of the time, the constituent process included reformists from the previous regime as well as known democrats in the chore of constructing a new State.

This spirit of consensus in the elaboration of the Constitution is noticeable in the question of the territorial organization of the new State (Title VIII). Such spirit of consensus is to be politically praised especially in moments when the Spanish society was seeking its way out of the tunnel of the previous dictatorship, but was the cause of certain juridical imprecisions of the Constitutional text, as we shall see.

## 2. General principles of the Autonomic State in the 1978 Constitution.

Title VIII has been subject to more criticism than any other aspect of the Constitution due to its technical vagueness according to jurists and, from a political science perspective, due to its doubtful capacity for efficiently solving the Center-Periphery problem. Let's take a closer look at the issue.

According to S. Muñoz Machado,[1] the system of autonomies entails three important general consequences:

1) analysis of the constitutional principles would hardly permit a clear image of the autonomic regime as it deals with a system open to subsequent specifications recognized by

the very Constitution.

2) the Constitutional ruling of organization and functions are not explicit.

3) the constitutional rulings on the structure of the State are ambivalent due to the fact that they are susceptible to use by a semi-centralized State as well as one with a system of generalized autonomic regions.

The initial vagueness of the model and its corollary: leaving the initiative to the interested territories, only demonstrates the absence, on the part of the writers, of a clear idea as to the territorial organization of the State or, even more, the confluence of differ ing as well as opposing criteria about what the State model should be: a Nation, according to the conservative right, a "nation of nations" in the opinion of some progressive autonomist sectors or simply a "state but not a nation" according to the peripheral nationalists. The Constitution does not, therefore, contain a scheme of the autonomic map Spain should conform to.

Having indicated what the Constitution does not say, we could perhaps proceed to question the articulating features of the structure of the State that can be deduced from a reflective study of the legal text.

There are two basic defining principles which are clear: unity and autonomy and another two which are derived and complementary to the previous: wilfulness and solidarity. Article 2 portrays these four constitutional principles in detail:

"The Constitution is based on the inseparable unity of the Spanish Nation, common and indivisible fatherland for all Spaniards, and recognizes and guarantees the right to autonomy of the nationalities and regions integrated therein and the solidarity among all."

In the text, the terms "unity" (defining characteristic of the Spanish Nation and reinforced here by the notion of indivisibility), "autonomy", understood as a right of the communities (principle of wilfulness), and "solidarity", form a minimum model of Center-Periphery relations in which unity and autonomy are outstanding. In a mutual dialectical relationship, they constitute the pilars of the territorial organization of the State.

Unity and Autonomy.

One author has stated that "the maintenance, ~~come what may~~, of unity is as important to the Constitution as the effective consecration of autonomy. For that reason Art. 2 could constitute a general guideline for the course of action of public powers and justify the constitutional reproval of any measures affecting either of these two basic rules of order."[2]

The Constitutional Court underlines this idea of dialectical relationship, although in a hierarchy of the notions of unity and autonomy, as can be seen from the Sentence of 2 February 1981: "Above all, it is clear that autonomy refers to limited power. As a matter of fact autonomy is not sovereignty -and even such power has its limits- and given that each territorial organization having autonomy is part of the whole, in no case can the principle of autonomy be opposed to that of unity but rather it is precisely within it where the true meaning is achieved, as expressed in Art. 2 of the Constitution".

There is, therefore, only one juridical ordering of the State as well as only one constitutent power and a plurality of political-legislative centers: the Autonomic Communities. But the territorial organization of the State is found in Title VIII of the Constitution whose first article (137) states:

"The State will be territorially organized in municipalities, provinces, and in those Autonomic Communities that are eventually formed. All of these entities shall enjoy autonomy for the management of their respective interests". Does that mean that the autonomy of the Autonomic Communities, the provinces and the municipalities is identical? And, if so what sense is there in the organization of Autonomic Communities? In answer to the first question we can advance that the use the Constitution makes of the term "autonomy" -as well as its use of the term "state"- is ambiguous.[3] According to the Constitutional Court: "In agreement with the Constitution, the autonomy guaranteed for each entity is in function of the criteria of their respective interests: that of the municipality of the province, of the Autonomic Community..." and it continues: "the Autonomic Communities (are) conceived as entities having an autonomy qualitatively superior to the administrative one" (of provinces and municipalities), Arts. 150.3 and 155 among others and as far as local entities go 148.1.1 and 2. For some authors this qualitative difference lies in the legislative power of the Autonomic Communities versus the simple exercise of administrative faculties and the execution of State laws, etc. which would be characteristic of the province and municipality. This exercising of administrative autonomy has been qualified as autarchy in contrast to the true autonomy of the Autonomic Communities and the sovereign condition corresponding to the State. The Constitutional Court confirmed this orientation when it affirmed that the autonomy of the Autonomic Community is "qualitatively superior" (sentence of 2 February 1981). Since it assumes "legislative and governmental powers that form an autonomy of a political nature, whatever the autonomic limits may be, they will be set by the State which will articulate the competencies assumed by the Autonomic Community within the framework established by the Constitution". (Sentence of 14 July 1981). The Autonomic Community therefore has the function of "indirizzo politico".

Solidarity and Wilfulness.

Article 138 sustains the meaning of the idea of interterritorial solidarity in two points:

1) "The State guarantees the effective fulfilment of the principle of solidarity consecrated in Art. 2 of the Constitution, ensuring the establishment of an adequate and just economic balance among the different areas of the Spanish territory and attending especially to the circumstances of the insular differences.

2) The differences among Statutes of the various Autonomic Communities will, in no case, imply economic or social privileges".

In short, the writers of the Constitution do in fact recognize the interterritorial social and economic imbalances that actually exist in Spain, declaring themselves protectors of the weaker regions. There is a latent fundamental worry - therein: that of the principle of unity could be seriously endangered if, rather than creating a feeling of national Spanish solidarity, the imbalances (and with them the inferiority and solidarity complexes, as well as the clichés that go with them-) would create difficulties for achieving mutual knowledge and interest. An Organic Law for the Fianancing of the Autonomic Communities (LOFCA) was subsequently drawn up in order to detail these aspects.

The principle of free choice, or wilfulness, for a region to become an Autonomic Community or not was the bone of contention of Spanish political autonomy between 1978-1982. This principle is due to the radical vagueness of the Constitution respecting territorial organization of the State (which we have already commented) and finds its antecedent in the 1931 Spanish Constitution which consisted of sending the autonomic initiatives

to local entities and regions. In this way the writers of the Constitution avoided conflicts that would undoubtfully have arisen in any constitutionalized autonomic map. In spite of its inhibitions it is not radical but extremely nuanced regarding the means or ways of acceding to autonomy. A complex system was designed that was not directed exclusively to the problem peripheries as in the 1931 Republican Constitution (basically Catalonia, at that time) nor generalized for all the regions (or those that are constitutionally specified as in the Italian case) but rather susceptible to being generalized.

3. Modalities of Access to Autonomy.

The desire to actualize the potentiality was left to the decision of the individual community according to the stipulated Constitutional conditions. Very briefly we could say that there are two means or ways for a region or periphery to acceed to the constitutional rank of Autonomic Community: The procedure through Article 151 or special regime, which requires a strong autonomic wilfulness made concrete through the support of at least three quarters of the municipalities of all of the provinces (and other requirements) that would allow achievement of the ceiling of autonomic compentencies relatively quickly, and the ordinary regime of Art. 143 which although being slower as the ceiling is not reached for a period of five years, is much less demanding a procedure.[4]

In both cases the municipal and county councils are responsible for beginning the initiative. To the previous two means of access, and to complicate the issue, we must add two more one considered priviledged for those areas mentioned in the Second Transitory Disposition: "Those territories which in the past had affirmatively plebiscited Statute Bills and which

at the time of promulgation of this Constitution have provisional autonomic regimes..." These are Catalonia, the Basque Country and Galicia. An important omission of Art. 143 is that it neglects a description of the Community institutions.[5]

Finally Art. 144 states: "Parliament can, through an organic law and for reasons of national interest, among other things, "substitute the initiative of the local corporations" and create Autonomic Communities. These are the four means of institutionalizing the communities and as we shall see will - create more than a few difficulties.

4. Application of the model and subsequent developments.

The principle of wilfulness of the territories to become Autonomic Communities caused, after 1978, that is to say once the Constitution was promulgated, a series of conflicts due to the reaction of the political elites of the "non-historical or "non-priviledged" communities versus those who were. The feeling of being discriminated against, in some cases real and in others fomented by the elites, led to a generalized - syndrome of comparative grievances. No region[6] wanted to be less than Catalonia, the Basque Country or Galicia, attempting to achieve the same level of competencies as the former in the shortest time possible, without even considering the "degree" of the autonomic "temperature" of its population or the objective conditions in terms of infrastructure and means for responsibly undertaking self-government in a number of administrative areas. The Minister of the Interior at the time, (end of 1980) denounced the risk involved for governability of the State if all regions intended to acceed to autonomy through Art. 151. A plebiscite once a month for each of the different Statutes for a year and a half was more than the country could bear, argued the Minister. The aborted coup d'Etat of 23 Feb-

ruary 1981 seemed to prove him right. One of the primary objectives that led the insurgents to storm the Parliament lay in their profound unhappiness about the "dismemberment of the Spanish fatherland" which they supposed the construction of the Autonomic State would lead to.

It was clearly necessary to revise the autonomic situation and modify its course. To do so, and in the face of the sheer confusion by many politicians regarding the subject, the two principal parties UCD (at the time in the government) and PSOE (in the opposition) agreed to request a technical report by a group of administrative specialists headed by Professor García de Enterría. The "Report of the Commission of Experts on Autonomy" was published on 19 May 1981 and some months later was complemented by another report regarding the financing of the Autonomic Communities which was prepared by a group of experts in economy and financing.

Let's review the summary made by one of the members [7] of the first Report of May 1981:

1) "Specification of the Autonomic map of Spain in order to leave behind the uncertainty of the state model to be followed".

2) Generalization of the autonomic process for all the regions in that way avoiding the State's having to organize and simultaneously limit rules according to two different models: a centralized one and another of maximum decentralization. The report considers the generalization of the process as a prerequisite for the functioning of the State.

3) Need for uniformity in the rhythm of construction of the different Autonomic Communities as well as the means to acceed, which in the Commission's opinion should be through Art. 143. It proposed that by 1983 the first phase of autonomic implantation should be concluded with the approval of all

the respective autonomy statutes. This point was fulfilled in the first few months of the year stated.

From the need for uniformity we can derive several points:

1) to inhibit single provinces from acceeding to autonomy through strict application of uniformity and also of Art. 144.[8]

2) Maintaining the five year transitory period which appears in Article 148.2[9] and insisting at the same time that their being different from "historical nationalities" does not necessarily imply the existence of two types of Autonomic Communities. The report insists that in the Constitution there is only one kind of Community, with different tempos. The complexity of the operation indicates a need to avoid precipitation by imposing a slow rate of transformation. "...the Autonomic Community should wait at least five years before assuming in their statutes the maximum powers allowed by the Constitution."

3) The effective directing of the process on the part of the State is perhaps the greatest demand of uniformity, and it is to be aided through arbitration of the following measures:

- -Recognition of a pattern or block of competencies common to all communities.
- -Recognition of legislative powers for all the Autonomic Communities as a requirement for the autonomy to be political (and not just for those who acceed through Art. 151).
- -The transfers must be homogeneous in content and in order to be effective must occur simultaneously in all Communities (the contrary would be disfunctional).
- -It would be convenient to create sectorial commissions specialized according to subjects in whcih representatives of the Central Administration and of the Autonomic Communities would participate thereby constituting a block and complementing the already existing mixed commissions between the different Autonomic Communities and the State, in charge of transfer policy.

In summary and in the words of one of the Commission experts: "the core of the May 1981 Report is intended to criticise and correct the most serious organizational problems resulting from the unconditional use of the principle of wilfulness in autonomic matters..." and whose "excessive flexibility ...created substantial problems for the construction of the Autonomic State".[10]

We have extensively cited the Report by the Commission of Experts on Autonomy because it served as a base for the writing of the Autonomic Pacts signed by the UCD government and the, at the time, principal opposition party, PSOE, on 31 July 1981 and which subsequently was complemented by an Organic law: LOAPA, ("Ley Orgánica de Armonización del Proceso Autonomico") presently contested by the peripheral parties as we shall see and pending verdict from the Constitutional Court as to its supposed unconstitutionality.

These pacts clarify some of the questions posed by the gaps and omissions in the Constitution in regards to the definition of the form of the State and other subjects along the lines put forth by the Commission of Experts Report.

1) Through these pacts an autonomic map of Spain is drawn up. (See Annex) There will be sixteen Autonomic Communities: Andalusia, Aragon, Asturias, Baleares, Basque Country, Canary Islands, Cantabria, Castille-La Mancha, Castille-Leon, Catalonia, Extremadura, Galicia, La Rioja, Madrid, Murcia, País Valenciano, with Navarre having a special solution in accordance with its long standing legal (foral) tradtion and also for Ceuta and Melilla, the two Spanish cities in north Africa.

2) the single province communities could, if they so decided, join other larger communities, for example Cantabria with Castille-Leon; La Rioja with Navarre, or even Navarre, quite improbably, with the Basque Country which -

claims rights.

3) Generalization of the organization of all Autonomic Communities which will have legislative Assemblies and an Executive. In this way the Autonomic Communities that acceed to autonomy through Art. 143 would have a common block of competencies with identical faculties in matters of their competencies. This would facilitate the general and uniform application of State norms and the general ordering of regional norms.

4) The introduction of homogenizing criteria and simultaneous transfers carried out by new sectorial commissions such as the Report suggests.

The author we have consulted, due to his detailed study of the subject, concludes with the affirmation that these pacts, having respected the Constitutional guidelines mean a generalization "in the entire Spanish territory of all the Autonomic Communities as well as uniformity and homogenization of the autonomic content."[11]

Such unilateral uniformity -the peripheral nationalist parties were not invited to participate in the pacts- could not help but have serious consequences for the subsequent autonomic development, which we shall study in the following section.

## III. CONFLICTS BETWEEN CENTER AND PERIPHERIES

Until October 28, 1982 (date of the last general election) five governments had existed in Spain: one central government (controlled by UCD) and four autonomic community ones --Catalonia, Basque Country, Galicia and Andalusia, respectively controlled by the parties of "Convergencia i Unió", "Partido Nacionalista Vasco", "Alianza Popular", and "Partido Socialista Obrero Español". Five governments and five different parties, two of which were nationalists (CiU and PNV). Following the

socialist governments thereby reducing potential conflict which in the past was extremely noisy between the Seville and Madrid governments due to popular demonstrations throughout Andalusia against the government of UCD.

(or, perhaps because it had been foreseen)

In spite of this conflictive situation, the Constitution not only did not foresee the institutionalization of intergovernmental relations but actually prohibited the federation of Autonomic Communities (Art. 145).

The poor intercommunity institutional relations[12] (excepting official visits from presidents of autonomic executives to other communities) must be contrasted with the relative proliferation of conflicts that to date are pending - constitutional legislation. Even in this realm of legal relationships the scarcity of basic state legislation allowing a legislative development in the Autonomic Community thus contributes to the ~~paucity of legislation~~ in the Autonomic Parliaments. There is however, a predominance of appeals on inconstitutionality and competence conflicts. As Eliseo Aja has pointed out "this initial dynamism of our Autonomic State contrasts with the tendency of regional and federal states where shared legislation occupies the nucleus of the Federal-State relations" and according to this author it is also a contrast to the very system of the Spanish Constitution which has (Art. 149.1, in relation to 152.1 and the subsequent statutary development) a general system of legislative relations between State and Autonomic Community based on shared legislation and also has exceptional or extraordinary mechanisms to make the stated general system more flexible (three items of Art. 150)."[13]

1. The Juridical Nature of Center-Periphery Relations.

Before considering the specific list of disputes

posed to the Constitutional Court, it seems oportune to recapitulate some previous specifications regarding the juridical nature of Center-Periphery relations in Spain.

1) There is no plurality of juridical ordering although there is of political legislative centers since the Autonomic Communities legislate. There is no original constituent power in the regions, only Autonomy Statutes approved by Central legislation and sanctioned by the King.

2) The relations between State laws and those of the Autonomic Communities are based on the principle of competency.

3) Principle of hierarchy. In accordance with the two previous points there is a prevalence of State law over that of all Autonomic Communities but their legislative control by the State is of a jurisdictional and not an executive character. We shall study this point in the light of the most recent Center-Periphery conflicts.

On developing these points we find:

1) Sole juridical Orderings. From the first point we can deduct the non-federal nature of the autonomic State (although it has some characteristics we shall mention).[14] It is a unitary, politically and legislatively decentralized State which originated from a strongly centralized unitary State having only one political legislative center (Madrid). In both cases there is, certainly, a sole juridical ordering and in the case of the autonomic state a sole sovereign constituent power (the Spanish Parliament), elected by the Spanish people, and without regional representation (the provinces are represented in the Senate, theoretical territorial chamber).

2) The principle of Competency governs relations between State and regional orderings and therefore a detailed study is crucial to understand the nature of Center-Periphery relations .

What treatment does the Constitution conceed to such an important subject? Let's first consider an interpretation according to which Chapter 3 "On Autonomic Communities" of Title VIII "On the territorial organization of the State", is technically deficient, often contradictory and clearly ambiguous. A systematic and finished list of the distribution of competencies cannot be found but at most only the criteria and principles (sometimes incoherent in itself)."[15] The comment is interesting but needs finishing. Quite so, the criteria set out by the Constitution does not respond to a classical federalist technique of tripartition of competencies having one list for the federal state, another for federated units and a third - list of shared areas. The Spanish Constitution at first glance establishes a double list of areas aluding to the exclusive competencies of the Autonomic Communities (art. 149) on the one hand and to the State (Art. 149) on the other. However, as L. Cosculluela has pointed out, this list is more apparent than real since, ultimately there is only one list: that of competencies reserved solely to the State (art. 149) and to which the Autonomic Communities do not have direct access".[16]

In the article mentioned we find that the areas in which the State is explicity authorised exclusive competency, are the following:

-nationality, immigration, emigration, foreigners and right to asylum
-international relations
-defense and the armed forces
-administration of justice
-customs and duties, foreign commerce
-monetary system: exchange control, coversion
-bases for control of credit, banking, insurance
-Internal Revenue and the State Budget (debt)
-Health abroad
-merchant marines and registering of boats
-costal lighting and maritime signaling
-ports and airports of general interest

-control of air space, air transit and transport
-meterological service and registration of aircrafts
-railway and land transport travelling through more than one Autonomic Community
-general control of communications, traffic and motor vehicles, mail and telecommunications, air cables, submarines and radio-communication.
-Public works of general interest or whose carrying out affects more than one Autonomic Community
-control of production, commerce, possession and use of arms and explosives.
-regulation of the conditions for obtention, expedition and homologation of academic and professional titles.
-statistics for State use
-authorization to convoke popular consultations through referendums.

Besides the above mentioned competencies Art. 149.1 lists competencies in other areas not attributed entirely and exclusively to the State such as the previous ones. These are precisely those competencies that are shared by the Central State administration and the Autonomic Communities. Eight possible cases of this happening have been established:[17]

1) Areas in which the State is attributed legislative competencies as framing principles.[18]

2) Areas in which the State shares general legislative power, reserving certain specific sectors to the legislation of certain Autonomic Communities.[19]

3) Areas in which State competency is exclusive in relation to its legislative ordering.

4) Areas in which the State keeps the competency of planning or determining the bases of administrative policy of the sector (example: economic activity).

5)Areas in which the State is attributed the competency of coordination of attributions that could correspond to the Autonomic Communities.

6) Areas in which it corr esponds to the State to determine the economic regime for service management.

7) Areas in which the State keeps certain management attributes, allowing the rest to pertain to the Autonomic Community.

8) Areas in which the State keeps only the title of the service but not its management.

Residual Competencies.

Regarding areas not considered in the Constitutional list (residual competencies) Art. 149.3 establishes a final rule to close the system of distribution of competencies in virtue of which "all areas not expressly attributed to the State by the Constitution can correspond to the Autonomic Community according to their respective Statutes but when unassumed, it belongs to the State. Art. 148 specifically lists the competencies that the Autonomic Community can assume.

As a general criticism, it is interesting to add that the constitutional system of distribution of competencies favours a state political organization with Center-periphery confrontation in which the peripheries tend to maximize their area of competencies and power in an unending "give and take" with a center reluctant to conceed them. Let's analyse the most common types of conflict and the grounds chosen to settle them.

The most recent Center-Periphery conflicts: kind and character.

Unavoidably, the quality and mode of Center-Periphery relations is influenced by the intricately juridical characteristics of the territorial model chosen and constitutionally defined, such as could be expected from the professional background of its writers, all of whom were jurists, and out of them

five are Law professors, and obviously conditioned the approach and patterns of resolving problems. In this sense -and together with the constitutionalized principle of competency, previously studied- the complementary principle of hierarchy of the norms (Art. 9.3) demanding respect for the hierarchy of the sources becomes very important. The combination of both principles provides a theoretical separation between State and Autonomic Community norms; a separation and independence of both types of norms that operates in the reglamentary sphere as well in such a way that autonomic laws cannot overrule state regulations and vice versa. However, there is a "crossed" legislative activity which is specified in the "framing laws" and in those of "harmonization". Regarding the former "Parliament can attribute to all or to some of the Autonomic Communities the faculty of dictating their own legislative norms within the framework of principles, bases and guidelines established by a State law..." (Art. 150.1). In the same constitutional article, section 3, the laws of harmonization are made clear: "The State can dictate laws to establish the necessary principles to harmonize normative dispositions of the Autonomic Communities <u>even in the case of areas attributed to their own competency</u> when necessitated by the <u>general interest</u>."[20] It corresponds to Parliament (absolute majority in both Chambers) to assess this necessity. The strong potential conflict in this disposition is easily understandable as, using juridical techniques of a regional state, it specifically limits the regions' margin of power in areas defined as belonging to territorial autonomic authority. The underlying question is, what is general interest? and who decides? The Constitution only answers the second part of the question saying it is Parliament but does not determine the criteria to be used.

The previous disposition is complemented by the second part of article 149.3, conflict norm (and only apparently

on competency) since it states "competency in matters that have not been assumed by the Autonomy Statutes will correspond to the State whose norms will prevail, in case of conflict, - over those of the Autonomic Community,[20] in all that which is not declared the exclusive competency of them. The state law will be, supplementary, in any case, to the Autonomic Community's' Using here a federal technique we find a prevalence, preeminence or supremacy of State law (Lex Superior) able to repeal community laws and the importance of the State's interests over those of the Autonomic Communities.

2. The problems of control by the State and the guarantees of the Autonomic Communities: the role of the Constitutional Court.

It is precisely in the area of concurring competencies between the State, to whom it corresponds to establish the legislation and basic principles, and the Autonomic Communities who will develop, adapt, etc. the State's legislative bases to their own norms where conflicts would be found.

The laws of harmonization which allow the Central Administration to intervene in the competencies of the Autonomic Community will provide the greatest source of conflict. The Constitutional Court will be in charge of viewing and resolving conflicts which arise in relation to shared competencies.

The Organic Law of the Constitutional Court distinguishes between State-Autonomic Community (or communities) conflicts and conflicts between communities (Art. 161.1c of the Constitution) and regulates the phenomena of usurping or invasion of competencies from one entity to another (positive conflicts) and the refusal of competencies (negative conflicts). The former are posed in relation to Autonomic Community dispositions or acts that do not respect the order of competencies

established in the Constitution, Statutes of Autonomy and laws. The Constitutional Court sentences responsibility for the specific competency and, when necessary, the cancelation of the disposition, resolution or act that originates the conflict. The following can bring the positive conflict of competency before the Constitutional Court: 1) the government[21] after previous notification to the Autonomic Community (Art. 63 of the mentioned organic law) and 2) the Autonomic Community when the conflict affects its own area.

The Constitutional Court also has control of reglamentary power and of non-normative acts, meaning dispositions not considered laws in the Autonomic Community[22] giving the government faculties to contest them. The procedure to contest is that established by the conflicts of positive competencies (Arts. 62-67 of the Organic Law of the Constitutional Court). "Contesting causes immediate abeyance of the disposition or resolution under appeal but the Court in turn must ratify or rescind it within no more than five months". (Art. 161.2, second part). Neither the Constitution nor the Organic Law of the Constitutional Court establishes whether contesting will be based on reasons of constitutionality of autonomic rulings and acts or on reasons of opportunity which would come to mean a political control.[23] This control has been interpreted by the Constitutional Court as compelementary to that exercised by the Administrative Contentious Jurisdiction, denouncing the injustice of dual controls which should be left to the reglamentary norms of this jurisdiction. The Organic Law of the Constitutional Court has confirmed this existing duality between jurisdictional control which the government can exercise even if the ultimate decision in the last case pertains to the Constitutional Court.

On considering the controls of the central powers over the Autonomic Communities, we dare not omit reference to

Art. 155 of the Constitution inspired by the Fundamental Law of Bonn. If the harmonization laws can be both a preventive measure (foreseeing problems and establishing basic principles for the future legislation of the Autonomic Communities) and a corrective measure for situations already unbalanced. the article mentioned provides the government with faculties to intervene "if any of the Autonomic Communities do not fulfil obligations imposed by the Constitution or other laws or if they acted seriously against the general interests of Spain. The government, after previous notification to the President of the Autonomic Community and in the case of non-compliance, can, with approval of the absolute majority of the Senate, adopt the necessary measures to oblige the community to forcefully comply with its obligations or in order to protect the stated "general interests". In section two it finishes: "for the execution of the measures foreseen in the previous section, the government can instruct all authorities of the Autonomic Communities".

In practice it is foreseeable that the government will use the faculties recognized in the article referring to the protection of the general interest as a means of politically controlling autonomic activities and of the State's tutelaging the autonomic communities. This idea is backed by the legal vagueness of the meaning of non-compliance with obligations, as well as the possibility of "forced compliance" or adopting measures of execution. The sanctioning capacity of the government, with the absolute majority approval of the Senate (Art. 155 is the only case in which the Senate has certain faculties in relation to the Autonomic Communities) is all-embracing.

Besides the already mentioned limits on Autonomic Community activity, two more must be pointed out: reform of the Autonomy Statutes which require approval of Parliament through an Organic Law (Art. 147.3) and the requirement for

Parliament's authorization of cooperation agreements between Autonomic Communities (Art. 145.2).

Having reached this point it might be interesting to question the guarantees given to the Autonomic Communities as a counterbalance to the power exercised by the State over its activities through its central organs. There are two kinds:

1) Guarantees of a jurisdictional order: the unconstitutionality appeal against laws and normative dispositions with the power of State law, for which the registered executive organs of the Autonomic Communities, and in its turn, their Assemblies are legitimate.

2) Recognition of the Autonomic Community Assemblies' right to legislative initiative in the State sphere (Art. 87.2), as well as the demand that absolute majority in the Senate in order to adopt extraordinary administration formulas although given the correlation of strengths in the Senate it does not seem overly operative especially in the Autonomic Communities which are governed by nationalist parties (Catalonia and the Basque Country).

Having carefully analysed the theoretical-constitutional aspects of Center-Periphery relations it would now be interesting to see some concrete examples. The most well-known, controversial and the best embodiment of the present state of Center-Periphery relations, is undoubtedly, the Organic Law for the Harmonization of the Autonomic Process, better known as the LOAPA. But first let's quickly explore the scheme of conflicts between the Center and the Peripheries that have been brought before the Constitutional Court since approval of the LOAPA Bill (30 June 1982) and more specifically between August 1982 and the present (March 1983).

Center Vs. Periphery ~~relations~~ conflicts.

-Five inconstitutionality appeals initiated by the President of the Government, two against laws from the Catalonian Autonomic Parliament and two against the Basques.

-Seventeen competency conflicts initiated by the Government against peripheral government decrees or orders, eight against the Catalonian and Basque and one against the Valencians.

-The Government contests the President of the Generalitat.

This means that the sum of these actions totals 23, eleven against Catalonian institutions, eleven against the Basques, and one against the executive of the Valencian community.

Periphery Vs. Center ~~relations~~ conflicts.

-Two previous unconstitutionality appeals each against the LOAPA Bill initiated by the Catalonian and Basque executives, another yet by the Basque government and one by a group of deputies make a total of six (three by the PNV and two by Catalonia).

-Eight positive competency conflicts initiated by the peripheral executive against the center (six Catalonian and two Basque).

The sum totals of actions initiated by the peripheries against laws and norms of the center is fourteen while those initiated by the center against the peripheries is twenty-three. The slowing activity of the Center seems to be greater than the peripheries' innovation activity judging from these facts but the simple quantification of conflicts is not enough evidence to allow us to establish this conclusion. Although everything leads us to see a more and more accentuated "defensive" attitude on the part of the peripheries vs. a

center prepared to regain control of a decentralizing process that seemed to have slipped through its fingers at the time of the autonomist explosion and proliferation following the approval of the 1978 Constitution. The nucleus of this counterofensive is without a doubt the LOAPA.

3. Protagonism recovered by the Center. The Organic Law of Harmonization of the Autonomic Process (LOAPA).

The LOAPA Bill was approved by a plenary session of Congress on the 21, 22, 23, 28, 29, and 30th of June 1982 and was already, on 5 August 1982 subject to five unconstitutionality appeals, brought before the Constitutional Court by the Parliaments and Executive of the Autonomic Communities of Catalonia and the Basque Country as well as by fifty deputies. These appeals were duly brought about following Art. 79.1b of the Organic Law of the Constitutional Court and meant the immediate suspension of the course of the Bill as stated in Art. 79.2 of this Law.

What causes the LOAPA (or more correctly the Bill) to create such oppositon? It puts forward the recommendations of the Commission of Experts and develops, as stated, the autonomic pacts signed one year earlier (July 1981) between UCD and PSOE. It proposes the generalization of a singular process (as compared to the bilateral State-Autonomic Community agreements) providing homogeneous patterns (with the same rules) for the relation between them, transfers should be made in similar blocks for all the communities simultaneously, a fixed calendar of transfers, periodical meetings of the sectorial commissions of all the communities ("so that the Catalonians can be aware of Andalusian problems" stated one pro-LOAPA politician). The enthusiastic support (UCD and PSOE) or the strong rejection on the part of nationalists and the PCE

hid behind mutual accusations and clichés.

Those in favor considered the LOAPA to be fundamental to organize the State while being faithful to the principles of unity, autonomy and solidarity by rationalizing and developing Title VIII of the Constitution. Those against the LOAPA accuse the Bill of unconstitutionality since the prevalence of State norms can only override the exclusive autonomic competencies when there are concurring ordenations. (What seems quite clear to me is that the LOAPA uses all the possibilities offered it by the Constitution (example: Art. 138) even to the point of stretching some, to emphasize the prevalence of the State over the Autonomic Communities). This accusation is denied by those in favor on the basis that it not only does not void the exclusive competencies of the Autonomic Communities but it is subordinate to the Autonomy Statutes. Insistence on general interest and national solidarity by some is counterbalanced by the affirmation of Roca i Junyent, an important leader of CiU, according to whom democracy and autonomy are the two sides of the coin: a consolidated Spanish democratic system and the LOAPA destroys autonomy by modifying the constitutional spirit.

Mario Fernández, vicepresident of the PNV Basque government is more radical yet: "LOAPA is a reflection of the system's general involution as there have been no competency transfers but rather a recession in the autonomic area". Since the socialist government took power in October 1982, there have been no significant transfers. At any rate the delay is previous. Let's not forget that the UCD-PSOE pacts are due to the need not to excessively aggravate those centrally minded military men for whom unity and homogeneity are synonyms. But to what degree is the military not an excuse for Spain to cut

back some of the attributions already given to basically Catalonia and the Basque Country and included in their Statutes? Time -and the Constitutional Court- have the answer to a degree. If LOAPA is declared unconstitutional we shall have to accept the thesis of it being an excuse and re-evaluate more fairly nationalist criticism. If, on the other hand, it is declared constitutional, those who must apply it (executives of the Autonomic Communities) resist accepting a law in which they never participated. And that is a criticism to be made of the majority parties, whose arrogance (derived from the numeric majority of the Chambers) caused them not to include the peripheral nationalist parties governing Catalonia and the Basque Country. Whatever the result of this sentence the fact of having to bring it before the Constitutional Court is a great liability which indicates the inability of the political forces to agree on the guidelines of a model for a politically decentralized State.

## IV. THE SOCIO-POLITICAL DIMENSION

> "Spain today is a state for all Spaniards, a Nation-State for a large part of the population, and only a state but not a nation for important minorities".
>
> Juan J. Linz

In this section we shall try to explore some of the sociological implications of the above written statement. We shall briefly deal with the attitude of Spaniards vis-a-vis the problem under consideration here: "the building of territorial political subsystems within the Democratic Spanish State".

The majority of Spaniards identify with the symbolism of Spain as a Nation-State. For an important part of them the political aspirations of the peripheral nationalities are not only unintelligible but are, furthermore, perceived as a threat. Let's see some major points concerning:

1) objective territorial differences between sub-units.

2) the multidimensional character of the regional-nationalist identity sentiment.

3) the presence, in the most important peripheries, of regional-nationalist parties competing with the Spanish Statewide party system and the different voting rationality according to the constituency in which the elections take place.

Analysing them in certain detail we find:

1) Objective differences across the territory. They encompass a variety of domains: cultural, linguistic, economic, etc. Let's take only two indicators, language and per-capita income: More than 60% of Spaniards speak only Castillian whereas 38% affirm speaking other languages as well, divided as follows: 16% Catalan, 11% Valencian (linguistically similar to Catalan), 9% Galician and 2% Basque. (FOESSA, 1981).

If 100 is the mean Spanish per capita income for the period 1955-75, we have regions like Extremadura, Galicia or Andalusia reaching only 60.8, 76.3, and 71.2 respectively and areas like Madrid (136.3). Basque-Navarre (132.0) or Catalonia (127.5) all way above the mean. The economic cleavage divides urban industrialized and modern Spain from its more rural and underdeveloped part.

2) The multidimensional character of the identity consciousness. In a statewide survey (JIMENEZ BLANCO, et al

1977) taken in 1976 on the Spanish regional consciousness, the authors reached the conclusion that there are four fundamental dimensions: administrative management, language, economy and politics. Not all subunits rated equally. The factors for subjective community identification differ substantially. Here are the four highest (all above Spanish mean) in each dimension.

a) administrative management by the Center. The most acute grievances were held by Barcelona, the Basque Country and Navarre, Asturias and finally, Galicia, in that order.

b) language grievances: Barcelona, Galicia, the Basque Country and Navarre, the rest of Catalonia and Balearic Islands.

c) economic grievances: Galicia, Andalusia, Murcia and Madrid.

d) political grievances: the Basque Country and Navarre, Barcelona, Galicia and the Canary Islands.

Education, income, metropolitan habitat and leftism are the most discriminating variables favoring national-peripheral identification. Whereas age, rural or intermediate type of habitat and conservatism strongly correlates to centralism. These findings were basically in agreement with the studies carried out by DATA, S.A. According to the latter the percentage of centralists (C), autonomist (A), federalists (F) and peripheral separatists (I) or independentists, runs for the whole of Spain as follows (in rounded %):

| | 1977 | 1978 | 1979 |
|---|---|---|---|
| C | 42% | 29% | 33% |
| A | 42% | 49% | 41% |
| F | 9% | 14% | 11% |
| I | 3% | 3% | 8% |
| NA | 5% | 3% | 8% |

Between 1977 and 1978 two fundamental events had taken place: the celebration of the first General Democratic elections held in forty years (June 1977) and the debates over the new Constitution in Parliament.

Again we find high correlations between centralism/conservatism, center-left/autonomism and extreme left/peripheral nationalism. Thus in 1978, 23% of the centralists identified with the continuers of franquism and 16% with conservatism. Whereas 15% of the autonomists identified with social democrats and 34% with socialists. The federalists identified with socialists (38%) and communists (17%) although some liberals, christian-democrats and social democrats affirm to be federalists also. Those in favor of independence (a minority) labled themselves as "revolutionaries" (27% vs. 4% of the population), socialists (28%) and communists (15%).

The percentages (1977), broken down by units, are as follows:

| | Centralism | Autonomy | Federalism | Indepen. |
|---|---|---|---|---|
| Galicia | 34 | 41 | 7 | 3 |
| Catalonia | 23 | 52 | 17 | 5 |
| Valencia | 34 | 48.5 | 10.2 | - 1.9 |
| BAsque Country-Navarre | 16 | 48.5 | 16.2 | 13.7 |
| Spain | 41.6 | 41.8 | 9 | 3 |

(Source of charts: FOESSA, 1981).

3) Peripheral parties versus Spanish Party System.

If the periods of authoritarianism and intolerance have usually been marked in Spanish contemporary history, by forceful centralism contemptuous of the different subunits, the periods of tolerance and freedom have always been coupled with a tendency towards respect for and recognition of the different peripheries. In this way during the decade of the 1960's autonomism became a synonym of antifrancoism. The repression of the regime, heavily felt in the universities, the 1968 student revolts and the revolutionary movements in third world countries are all elements contributing to the formation of peripheral nationalist parties in the last two decades. How much weight do these parties actually have?

10.35% of the votes cast in the Spanish legislative elections of 1979 went to these parties, which means: 1,889,362 votes. It has been argued that still almost nine out of ten Spanish voters chose Spanish Parties instead of peripheral ones and that even though the most clearly pro-autonomist communities represent 40% of the electorate and 44.6% of the voters, only 12.4% of the vote in those communities went for peripheral parties. One should not be confused by these percentages. A further level of analysis needs to be introduced here.

First of all the presence of those parties has not only encouraged the autonomistic strategies of the, otherwise, reticent Spanish, or centralist, parties but has pushed them to re-think their role in the subunits in terms of the needs of the community and not only of the party elite in Madrid. Secondly, when we consider such cases as Catalonia and particularly the Basque Country, we see that: in the 1979 legislative elections 49.48% of the total votes went for Basque parties (505,075 votes out of a total of 1,021,159 cast, or eleven out of twenty-one seats in the Madrid Congress went for

Basque parties). The percentages are lower but still significant for the other communities: Catalan parties 22.14% (nine out of forty-seven seats), Canary Islands 12.60%, Galicia 11.07%, Andalusia (PSA) 10.94%, etc. It is implied that the rest of the votes were won by the Basque, Catalan, etc. branches of Spanish parties in most cases strong advocates of autonomism.

Thirdly, the radicalism of the nationalist-separatist vote. This is particularly true in the Basque case where 14.78% of the electorate voted in 1979 for Herri Batasuna, an extreme left coalition advocating rejection of the Spanish State (its three congressmen refused to go to Madrid) and it is considered ideologically close to ETA. What kind of support do they actually find in the Basque Country? A survey carried out in October-November 1979, after the Referendum that approved the Basque Autonomy Statute showed that 17% of the people interviewed in the three Basque provinces considered ETA militants as patriots, 33% as idealists, 29% as manipulated, 8% as crazy, 5% as criminals and 14% did not answer. (FOESSA, 1981). There seems to be a great deal of sympathy (or fear?) towards the violent strategy of ETA in the Basque Country and a significant percentage of support although it seems to be steadily declining. Last, but not least, the change of voting patterns of Spaniards according to the territorial level of the election: local, regional/community or statewide, has indicated a substantial increase of support for nationalist parties in both the Basque Country and Catalonia in the 1980 elections in the autonomic communities. In both communities their respective center-right nationalist parties (PNV and CiU) have formed non-coalition governments. PNV (37.58%, 9.95% more than in 1979) and CiU in Catalonia 27.72% (increasing 11.28 over the previous contest).

4. A further consideration of the Basque Case.

The violent situation in the Basque Country is serious as evidenced by the more than four hundred terrorist victims of ETA in recent years with numerous bomb attempts and kidnappings (including a militant of the PNV). From the ransom money and the payments of the "revolutionary tax" demanded from the Basque industrialists, ETA finances its activities. But perhaps the most serious issue lies in the vacilating attitude of PNV, the governmental party there, which in the face of such violence, sets conditions to collaborate with the PSOE in the pacification of the Basque Country: withdrawl of the LOAPA, the demand to supress the figure of civil governor as the central power's representative and a quick transfer of competencies with a large budget. The PNV's motto on the "Basque Patriots' Day" held on April 3, 1983: "Our country: Euzkadi. Our language: Euskera", as well as the 20.000 demonstrators that the radical nationalist party, Herri Batasuna, was able to unite the same day in Pamplona (capital of Navarre) with the slogan "We're a people" compared to the mere 5.000 that one week earlier gathered in San Sebastian having been convoked by all the parties (except the HB independentists) as a protest against ETA's terrorism, is but a symptom of the current process of nationalist escalation (seen in the attack made on the autonomous Basque police's barracks, stealing uniforms and 200 pistols, etc.). The PNV finds itself in the dilema of having to condemn its ideological children for their radical strategies when it actually favors the aspirations for government by allowing it to pressure Madrid[24] even when it makes its own job as governing party in the Basque Country, more difficult.

Criticism of the obstructive policies of the PSOE in autonomic matters are not lacking either and the president of the PNV has threatened to call out all Basques in ~~Madrid~~ the street to defend the Law on Euskera which the PSOE has brought before the

## V. IN THE GUISE OF A CONCLUSION

We see (April 1983) how clearly the previous text reflects the autonomic fever symbolically initiated 23 February 1981 with the attempted coup d'Etat and how it has permitted the government to regain its protagonism, lost in 1978, in leading the process of political decentralization of the State. Not only do we find ourselves in a moment of ebb but also in a period of waiting, with a LOAPA in hybernation before the Constitutional Court and for that reason the best time to reflect freely, and with unbiased criticism, on what the Autonomic Process has meant so far in the Spanish Autonomic Process. In the first part of this conclusion I shall try to do just that and in the second I shall examine the theoretical possibilities of another perhaps more rational but politically less viable model. At the time I proposed it (1980) I was advisor to a project titled "STructure of the Spanish State 1990" at the National Institute of Future Studies, in the hopes that the exercise is not entirely useless I shall reproduce a summary of it here:

1) Analysis and General criticism. Without intending to achieve great rigour we can divide the time of transition from Franco to democracy (regarding the nature of C-P conflicts) into three phases.

a) the political phase was initiated at the dictator's death in November 1975 (which does not, in any way, mean that the presence and weight of autonomy and nationalist parties does not, at times, come from way back) and ended with the Promulgation of the Constitution in 1978. This phase was marked by large support movements for autonomic grievances especially in the "historical nationalities". In this phase the electoral support of "centralists" and "nationalists" are known and the nationalist parties in Catalonia, the Basque Country, Andalusia and Galicia crystalize.

2) juridical-legislative phase (between 1978-1983) which spans the period of the writing, negotiation and approval of the Autonomy Statutes and the posing of conflicts between Center and peripheries as a consequence of the ambiguities and deficiency of the constitutional approach to the autonomic subject; corollary, in turn, of a political pact between the major parties that left the specific model to be adopted, up to the subsequent organic laws. This last section ~~will~~ has received most of our attention as it is the most complex and relevant to Center-Periphery relations.

3) Socio-economic phase? If the political phase supposed a test to measure the relative weight of each contending power, and the juridical-legislative one refers to institutional development, it is quite possible (and desireable) that the present phase be socio-economic, achieving (or at least approximately) the ideals of equality and solidarity among the different Autonomic Communities in the same way as in the previous two and especially the juridical-legislative phase where at least on paper, the constitutional ideals of unity and autonomy ~~existed.~~ were emphasized. The Organic Law on Financing the Autonomic Communities would be a fundamental instrument of this phase.

As a matter of fact there are presently elements of the three in differing proportions according to the Autonomic Community we are studying. In this way, in the Basque Country there are, perhaps more than in any other, political (and ideological) features due to the existence of radical and separatist groups (Herri Batasuna) that cannot accept the fact that Spain has changed fundamentally since 1975 and continue to act against the socialist government in Madrid with the same violent means (and the same political logic) as with those used against Franco.

However, for the majority of autonomist (nationalists or not) the ideas of democracy and autonomy have always been united so that:

1) the first consequence to extract is that since the political decentralization process of Spain is felt to be inseparable from that of democracy and liberties, it is irreversible and the Constitution makes it very clear.

2) This process permits two possible interpretations a) an optimistic one which evolves from the need to interpret autonomism as a <u>modernizing movement</u> (which would make a French style centralized State more characteristically Spanish) and including a profound reformation of the State's Administration which is rather inefficient and unmanageable, so that it would not mean too great a rise in bureaucracy as well as the cost it would suppose for tax-payers, above all if it is not equally balanced by an improvement in efficiency and services.

b) a negative or pessimistic interpretation according to which the autonomic phenomenon basically proves interesting only to the political elites of the peripheries who create and develop bureaucracies maximizing its own power at the expense of the Central Administration. The facts tend to cause us to opt for this more pessimistic interpretation which leads us to...

3) A characterization of Center-Periphery relations where political elites are confronted with different interests, means, support and electoral spheres. The existence of peripheral parties that are not integrated in the State party system contributes to

4) little mobility and permeablility between central and peripheral elites. Its corollary is

5) The "political class" inability to agree on a political decentralization model of the State which

table to all. This in turn, leads to

a) bringing decisions, which should be political, before juridical spheres (Constitutional Court) and producing an unnecessarily intricate juridical-political sustem which is a delight to jurists but is inefficient in solving C-P problems.

b) considering that the problems cannot be solved in the positive juridical sphere. Extremely interesting laws can evolve, from a juridically technical point of view, but they'll be laws that are "respected but not obeyed". Even more so when considered that in more than a few cases those in charge of enforcing them are completely against them (example: PNV and CiU). Spain is becoming victim to a certain underdevelopment in its political culture -to a great degree the inheritance from the previous regime- characterized by the practical absence of statesmen and the lack of good politicians as well as the "inflation" of jurists turned politicians.

The previous considerations lead us to the following proposals:

1) the need to deeply reconsider the C-P issue, - uniting autonomy and democracy as desired by peripheral politicians but also uniting autonomy and profound reformation of the administration as desired by the majority of the population.

2) In order to do so it is necessary to emphasize the need to generate a cooperative (and not confrontation) model of State ~~construction~~ building, understanding that one cannot - affirm the whole and deny the parts in the manner of the most recalcitrant jacobinists nor vice versa: affirm the parts (or one of them) and deny the whole like the radical nationalists, without achieving separatism and dismembering the State, which does not seem advisable. It must be understood that the whole and the parts compose a dialectical relation in such a way that the Autonomic Communities need the State and

vice versa, especially when the construction of one (autonomic state)and the others are carried out simultaneously as in the case of Spain.

3) Many conflicts could have been avoided if a cooperative rather than a confrontive C-P model had been selected. In order to do so the political elites needed to understand previously that the Spanish society is a territorially and culturally segmented society and that in such societies the principle of numerical parliamentary majorities does not operate, and secondly they needed to have enough immagination to arbitrate a proper formula for the Spanish situation as well as the political will to apply it. Unfortunately our politicians, in general -so brilliant at solving other problems- did not seem to find, at the critical moment, the right dosis of understanding the problem, of imagination to formulate new ideas nor the political will to apply them. In this case the circumstances surpassed them and the result is Title VIII of the Constitution.

## 2. The "DEPARTECON" model of Center-Periphery Relations.

I would like to begin by recognizing that I do not have the magic potion (nor do I believe anyone does) to solve the immensely complex C-P problem in Spain. Once this idea is clear I think it would be useful to speculate as to what some of the characteristics of a model considering the specific case of Spain could be.

A lot has been written about the growth of State complexity as a consequence of its need to satisfy its own demands as well as those of different social and political groups in a more and more interdependent and complex world; but much less has been written about the State constituting, as well, a system implying the existence of an island or sphere of restricted or controlable complexity in the face of

to supply a variety of answers; at least as wide a variety of answers as the meaningful occurences in the environment. The capacity of social systems, and therefore of the political system, to reduce the complexity of environmental phenomena is a "sine qua non" condition for the preservation of its autonomy and existence. A political system that is incapable of reducing environmental complexities will, little by little, lose its autonomy until it is finally absorbed by the environment. From this we can deduce that the greater the complexity of the environment, the greater the complexity of the system to reduce the effects should be. Reducing complexity was an important cultural concept in Luhman's theory of society, according to which complexity equals plurality, a superabundance of possibilities. But here we are interested in self-determined and controlled organized complexity, which is by no means incompatible with a polycentric structure whose regulation is not the result of the action of some specific components but rather the interaction of them all, This, obviously, conflicts with a State that is a decision and action unit with a fundamentally monocentric structure in which the subject of self-determination is found in the higher political spheres and - even for some sectors and subsystems, in the corresponding territorial or functional adminstrative authorities or spheres.

Returning to the case of Spain and plainly stated, the problem of Autonomic State structuring resides, in essence, in making the "right to be different" which, in so many words, is existence, compatible with with the promotion of solidarity or, in other words, compatibilize the creation of autonomic subsystems within a political system capable of tolerating alternatives, variation, disagreement and conflict from within, with the idea of ensuring coordination thanks to which plurality can be effectively integrated into a unit of previously and consciously posed results.

The issue is not simple because we are in the presence of dialectical tension having antithetical interests:

| | | |
|---|---|---|
| decentralization | Vs. | integration |
| democracy | Vs. | efficiency |
| freedom | Vs. | authority |

Tension in which

1) the thesis could be formed thus: the objective of integration is to achieve efficiency through homogenizing authority.

2) the antithesis: the objective of decentralization is self-determined democracy through freedom.

The synthesis must aim at finding a balance between them. Researching this synthesis is precisely what I propose to do with these suggestions for a theoretical model which could be called ~~Departecon~~ DE.PAR.TE.CON (Democratic-participative-territorial-consociational).

Let's begin with the territorial-consociational dimension. Its basic premise conceives of Spain as a territorially segmented society and is based on the hypothesis that its difficult to successfully apply the liberal parlamentarian model (useful and efficient in homogeneous and highly developed societies) in plurally segmented or multinational societies like Spain. This system is surpassed here by the environmental complexities. It is necessary to supplement these deficiencies (especially in a country where it is difficult to obtain stable parliamentary majorities) with the celebration of meetings between peripheral and central elites where they can solve their contentions through compromise along the guidelines of State policy. Lijphart established four requirements to achieve this:

1) Awareness of the dangers inherent to a fragmented society.

2) Commitment to the need and will to maintain the system; in the case of a multinational state, the unity of the country.

3) The ability to transcend the limited horizons of group and interests in order to reach agreements that bind the community they represent.

4) The ability to find adequate solutions that are relatively satisfactory to the parts involved and that are technically viable.

The aim persued with the introduction of these new patterns would be:

1) Maintain free and pluralistic institutions.
2) Progressive social equity as a consequence of regional economic poli_cy.
3) Growing economic efficiency (aim pf state policy).
4) Creation of a cultural policy based on patterns of solidarity and co-operation more than on competition and peculiarities respecting the promotion of the cultural and linguistic wealth of each community.

It can be observed that the route followed by Spanish political elites, and especially those of some peripheries, is not exactly in line with this cooperative model.

The Democratic-participative aspect, complementary to representative democracy, (which it does not substitute) should aim primarily at surpassing the profound gap that exists in Spain between juridical norms and reality.

Participation requires: 1) an increase in the flux of information which is based on a more open system and 2) the possibility of controlling political decisions at all levels beginning with the municipality. The State should only exercise a legal control over local corporations and Autonomic Communities that is compatible with autonomy. It should not be permitted control over opportunity nor tutelage which would be the antithesis of autonomy.

The territorial-consociational aspects refer to the beahviour of the elites who should be mature and responsible while the democratic-participative aspects aim at the common citizen.

I believe that with the correct application of this Departecon model (today utopical) the three features that, according to S. Hungtington, separate ancient politics from modern politics: absorption, massive political participation and the creation of new institutions to face new problems, would be fulfilled, producing a rationalization of authority that, in this case means combining the dialectics of antithetical but complementary interests. In other words, the territorial-consociational aspects of integration, efficiency and authority on one hand with compromises along the guidelines of State policy between central and peripheral political forces which would proport continuity and stability supposedly achieving growing economic efficiency and contributing to the reduction of uncertainty while on the other hand the aspects of decentralization, democracy and freedom would be able to achieve progressive social equity, providing the Spanish community with dynamic and progressive elements.

## FOOTNOTES

[1] Cfr. S. Muñoz Machado. El Derecho Público de las Comunidades Autónomas. Civitas. Madrid. 1982. (p. 138).

[2] ibid. (p. 167).

[3] In the Constitutional text the term "state" refers to the complete juridical-political organization of the Spanish nation including all the different territorial organizations (example: Arts. 156; 137). In other cases State means only the general or central Administrative agencies and their peripheral organs versus all autonomous communities (example: Arts. 3.1, 149 and 150).

[4] Art. 143 of the Constitution, dealing with Autonomic Communities, reads as follows:

1. In the exercise of the right to autonomy as recognized in Art. 2 of the Constitution, bordering provinces with common historical, cultural and economic characteristics; insular territories and provincies with historical regional identity can acceed to self-government and can constitute Autonomic Communities according to the provisions of this Title and the respective Autonomy Statutes.

2. The initiative of the autonomic process corresponds to all interested county councils or the corresponding interinsular organ and two thirds of the municipalities whose population it represents, the majority of the electoral census of each province or island. These requirements must be fulfilled within a period of six months from the first agreement adopted in this respect by any of the interested local corporations.

3. The initiative, if it fails, can only be repeated after five years have elapsed.

Article 151 states:

1. It will not be necessary to wait five years as stated in Section 2 of Art. 148 when the initiative of the autonomic process is agreed on within the time period of Art. 143.2 as well as through the county councils or corresponding insular organs, by three quarters of the municipalities of each one of the affected provinces which represent, at least, the majority of the electoral census of each one of them and said initiative be ratified through referendum and approval of the absolute majority of the electors of each province in the terms established by an organic law.

2. In the case foreseen in the previous section, procedure for elaboration of the Statute will be as follows:

1) The Government will convoke all Deputies and Senators elected in the constituencies within the sphere of the territory intending to accede to self-government so that they can constitute an Assembly, with the sole intention of elaborating the corresponding Bill for the Autonomy Statute which will be agreed upon by the absolute majority of its members.

2) Once the Bill for the Autonomy Statute has been approved by Parliament it will be sent to the Constitutional Commission of Congress which, within a two month period, will examine it (in the presence and assited by a delegation from the proposing Assembly) to determine through mutual agreement its definite formulation.

3) If said agreement is reached the text will be submitted to referendum by the electoral body of the provinces composing the territorial sphere of the Statute.

4) If the Statute Bill is approved in each province by the majority of valid votes, it will be sent to Parliament The plenary sessions of both chambers will decide on the text through a ratification vote. Once it has been approved the King will sanction and promulgate it as law.

5) In the case that the agreement referred to in Section 2 of this number is not reached, the Statute Bill will be processed as a law before Parliament The text approved by it will be submitted to referendum by the electoral body of the provinces composing the territorial sphere of the State. If it is approved by the majority of valid votes in each province, it will be promulgated in the terms of the preceding paragraph.

3. In the cases of paragraphs 4 and 5 of the previous section, lack of approval of the Statute Bill by one or several provinces will not stop the others from constituting the projected Autonomic Community as established by the Organic Law provision of Section 1 of this Article.

5 Autonomous Community institutions are as follows:

-Legislative Assembly: elected by universal suffrage following a system of proportional representation

-An Executive Government with executive and administrative functions

-A President who directs the government and represents the State in the Autonomic Community.

-A Supreme Court of Justice.

[6]The most notable case is that of Andalusia where the campaign against having to follow Art. 143 (proposed by the government) succeeded but not due to the popularity of the PSA nationalists and leftist Spanish parties (PSOE,PCA) whose merits are not at issue here, but rather due to the tactical errors of UCD which provoked a popular outcry,in turn stimulated and intelligently exploited by the opposition.

[7]Cfr. S. Muñoz Machado. op.cit. (pp 145ff).

[8]The case of the province of Segovia is quite paradigmatic due to its refusal to integrate into the Castille-Leon Autonomic Community and since it could be compelled by Parliament to integrate through Organic Law.
The text of Art. 144 states:

Parliament. through organic law can, for reasons of national interest:

a) authorize the constitution of an Autonomic Community when its territorial sphere is not greater than that of one province and it does not meet the conditions of Section 1 of Article 143.

b) authorize or accord, whichever the case, an Autonomic Statute for territories that are not integrated in provincial organization.

c) substitute the initiatives of local Corporations referred to in Section 2 of Article 143 (see footnote nº 4).

[9]Art. 148.2 reads:

"Once five years have elapsed and through reformation of its Autonomy Statute, the Autonomic Community can succesively broaden its competencies within the guidelines established in Article 149."

[10]Cfr. S. Muñoz Machado. op.cit. (p.144).

[11]ibid. (pp 150-153).

[12]Hardly any relation at all exists between the Autonomic Parliaments and the Spanish one in spite of the fact that the latter strongly influenced the reglamentary procedure and norms of the former.

[13]"Leyes de Relación entre el Estado y las Comunidades Autónomas", Paper presented to Discussion on Autonomies. Spanish Political Science Association. University of Granada. December 1982.

[14]Cfr. G. Trujillo. "Federalismo y regionalismo en la Constitución Española de 1978" in Federalismo y regionalismo. G. Trujillo (ed.). Centro de Estudios Constitucionales. Madrid. 1979. (pp 15ff).

[15]Cfr. Luciano Parejo. La Prevalencia del Derecho Estatal sobre el Regional. Centro de Estudios Constitucionales. Madrid. 1981. (pp 75ff). Also Muñoz Machado. "La interpretación estatuaria del sistema constitucional de distribución de competencias" in Revista del Departamento de Derecho Político. UNED. Nº 5. (pp61-2).

[16]Quoted in Luciano Parejo. op.cit. (p.76).

[17]Cfr. L. Cosculluela Montaner. "La determinación constitucional de las competencias de las Comunidades Autónomas" in RAP Nº 89. (p. 29) as well as T.R. Fernández, "La Organización territorial del Estado y la Administración Pública en la nueva Constitución" in the collective volume Lecturas sobre la Constitución Española. T.R. Fernández (ed.). Faculty of Law. UNED. Second edition . Madrid. 1979 and E. García de Enterría (ed.). La distribución de las competencias económicas entre el poder central y las autonomías territoriales en el Derecho Comparado y en la Constitución española. I.E.E. Madrid. 1980.

[18]Such is the case of basic legislation on the protection of the environment (Art. 149.1 nº 23).

[19]Example: public security "without jeopardizing the possibility of creating a police force for the Autonomic Communities as established in the respective statutes within the framework of an Organic Law".

[20]Underling is mine.

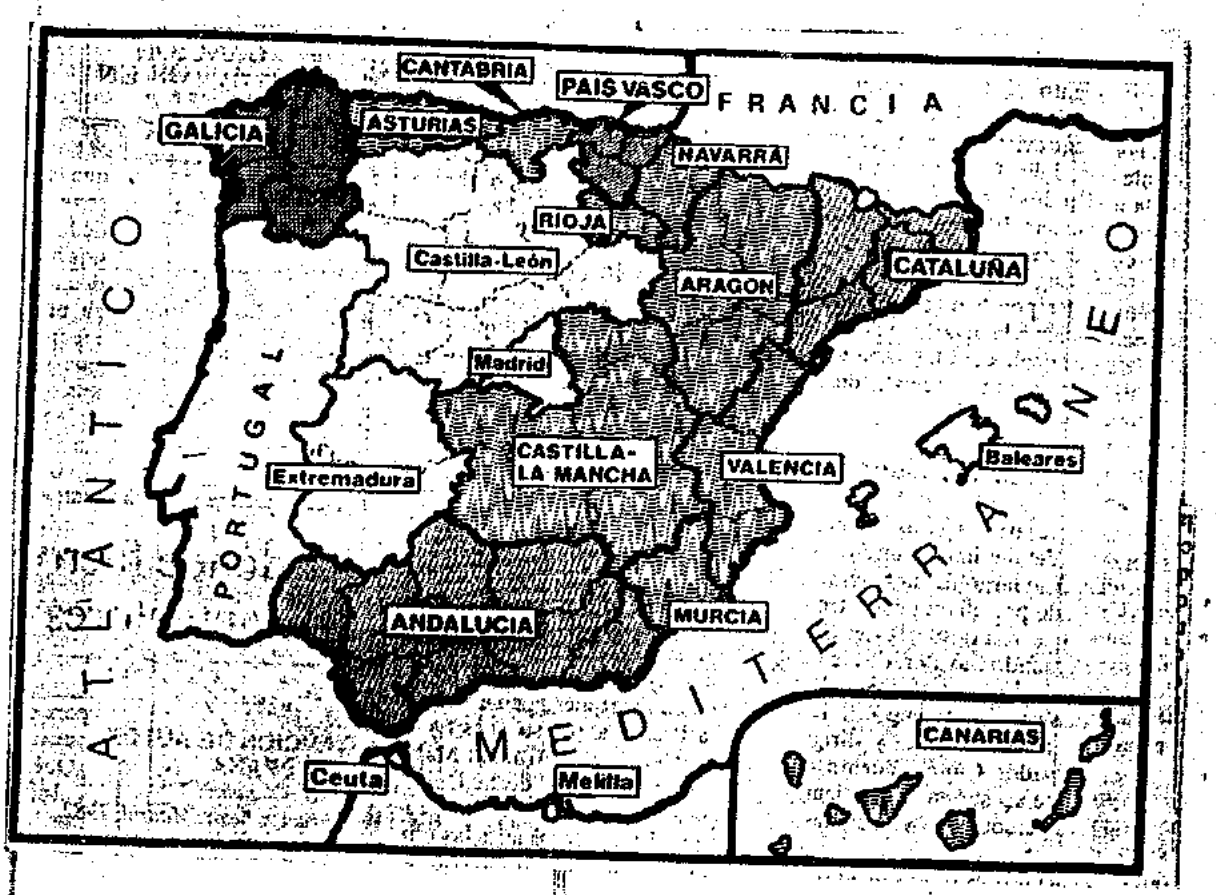
[21]The government can invoke Article 161.2 of the Constitution: "The government can contest dispositions and resolutions adopted by organs of the Autonomic Communities before the Constitutional Court, producing suspension of the appealed disposition or resolution but the Court, in turn, must ratify or rescind it within no more than five months".

[22]Cfr. Title V of the Organic Law of the Constitutional Court developed in Article 161.2 of the Constitution.

[23]Cfr. M. Martínez García-Barbón. "El Control de la actividad de las Comunidades Autónomas". Mimeographed. Madrid. 1980 (pp 10ff).

[24]Ambiguity recorded in a talk by the President of the PNV on 3.4.83: "One thing is clear: Madrid wants us to finish them (ETA) off and then they (Madrid) will finish us off".

[25]Cfr. El País. 4 April 1983. (p. 11).


CANTABRIA
PAIS VASCO
FRANCIA
GALICIA
ASTURIAS
NAVARRA
RIOJA
Castilla-León
ARAGON
CATALUÑA
Madrid
ATLANTICO
PORTUGAL
Extremadura
CASTILLA-
LA MANCHA
VALENCIA
Baleares
MEDITERRANEO
ANDALUCIA
MURCIA
CANARIAS
Ceuta
Melilla

UNIVERSITAT DE BARCELONA
FACULTAT DE DRET

SEMINARI DE DRET POLITIC

# CENTRAL VS. PERIPHERAL NATIONALISMS IN BUILDING DEMOCRACY

## THE CASE OF SPAIN

by Xavier Arbós
(Universitat de Barcelona)

Paper prepared for the workshop on 'Centre-periphery structures and the revival of peripheral nationalism in western democracies' at the Annual Conference of ECPR, Barcelona, 1985

## 1.- The conceptual setting

Rokkan and Urwin (1) developed the analysis of the relationships centre-periphery introducing two variables that are interesting for the spanish case: the membership space and the territorial space.The first refers to the membership of a group culturally defined, while the second takes into account the identification of the group with the State under whose authority it is and in whose space it is located.If the membership space prevails, we find a potential variety of centres, or in Rokkan and Urwin's terms, a situation of policephality.Monocephality is the characteristic of territorial space predominance, typical situation of the nation-state pattern in which political centralization and cultural standarization have possibilities of achieving success.In the first case, it will be very difficult to talk about a sole centre, about a single source for political and economical decisions and for cultural production.In the second, the periphery finds itself subordinate to a single centre.Combining the two variables, four patterns of nation building are possible: Territorial space predominant, territorial space dominant with strong membership characteristics, membership space dominant with territorial space characteristics and membership space predominant.

Years before -in 1973- Stein Rokkan referred the centre-periphery paradigm to four central tasks: formation of a boundary-defining State, the building of institutions for socialization into a territorial political identity, the institutionalization of channels of participation and opposition and the creation of territorial economic solidarity (2).The territorial integration which results could generate in our opinion, the mentioned "territorial space" dimension of Rokkan and Urwin: the identification with the State, characteristic of the nation-state pattern (3).If we look at Spain from this perspective, it is easy to perceive that all the tasks to which Rokkan referred

have not been achieved perfectly.Due to the strength of independentism in the Basque Country and catalan and basque moderate nationalism, renewed in the elections for the autonomic parliaments, the statement made by Linz also in 1973 seems valid: "Spain today is a state for all Spaniards, a nation-state for a large part of the population and only a State but not a nation for important minorities".(4) If we think of Italy, we remember the sentence of an italian patriot in the last century: "Italy is built, it only remains to make the italians".We must not forget, however, the peculiarities of the italian unification process. It was formally supported by plebiscites and associated to a liberal project, in spite of the particularisms and cultural plurality (5).

But, returning to Spain and following Rokkan, we observe that the definition of boundaries -leaving aside the loss of the colonies and the Gibraltar question which dates from the XVIII century- can be considered settled several centuries ago.The centralized state unity was formed in the XVIII century and was only softened in democratic periods during the XX century: the short and troubled life of the 1931 Republic, which was interrupted by the civil war from 1936 to 1939, and the present period.The latter begins with the Constitution of 1978, which was preceded by the first democratic elections since 1936 in June 1977 (6).Under the political history an uneven economical development has taken place.This development can explain the recent history to a great extent.Far from the political and bureaucratic centre of Madrid, the only industrialized nucleus were located in the periphery until the sixties of the present century: they were the Basque Country and Catalonia (7).Moreover, political institutions have not allowed participation due to the predominance of authoritary systems.There hasn't been either an efficient, egalitarian and public educational system like the one urged in France by Jules Ferry.Certainly, one cannot speak of discrimination because of geographic origin in the

recruitment of militar and civil bureaucracy, but the fact remains that their members usually come from the less developed regions which are homogeneously spanish-speaking.This doesn't give rise to the acceptance of policies which tend to strengthen cultural identities different to the one that has traditionally considered as spanish . The language which is called spanish abroad, tends to be known as castilian inside Spain -language of Castille-.There are even legal texts in which certain regions are mentioned as being "among the most characteristic of Spain" (9) as if there were less characteristic regions.

Maybe this explains the results of a public opinion inquiry about the spaniards' attitude towards the autonomies, made in 1981 (10).The point in which the expectatives were considered more disfavourable was that of labour movility.It is obvious that bilingualism, which is a right for some people, can be perceived like a discriminatory obstacle by others.But after this we must bring the piece of information from another inquiry made during the working out of the Constitution.It was about the acceptance the innovations the text proposed might have.And we see (table 1) that bilingualism is accepted by the majority: 80% agree.It is noticed also that the smaller percentage of acceptance -75%- appears among the right-wing voters

To deal with nationalism in this context, and with spanish nationalism, needs some previous considerations.We are not satisfied with Deutsch'sdefinition (11) which says that "it is the state of mind implying preferences in favour of the 'own' people".We are more interested in the political dimension of nationalism than in the state of mind that can precede or even explain it.In Spain, and possibly in othe western countries, centre-periphery conflicts are included in what is the strength of nationalism as ideology (12).Following Gellner, we think that "nationalism is primarily a political principle which holds that the political and the national unit should be congruent" (13).In

5

TABLE 1

"Castilian is the official language of the State. All the other languages shall be official in the Autonomous Communities."

| | | Vote June 1977 | | | | |
|---|---|---|---|---|---|---|
| | | Alianza Popular (Right) | Unión de Centro Democrático (Center) | PSP/PSOE (Socialists) | PCE (Communists) | All other parties (It includes catalan and basque nationalist parties) |
| YES | 80.0 | 75.7 | 77.7 | 87.7 | 89.9 | 93.6 |
| NO | 11.4 | 18.8 | 13.4 | 8.6 | 6.7 | 5.6 |
| Don't know | 6.7 | 4.3 | 7.4 | 2.7 | 2.5 | 0.0 |
| Don't answer | 0.8 | 0.0 | 0.8 | 0.1 | 0.8 | 0.7 |
| Indifferent | 0.9 | 1.4 | 0.6 | 0.5 | 0.0 | 0.0 |

Source: La Vanguardia, 6 aug. 1978

Sample: 1995
Error margin: ± 2%
13, 14, 15 July 1978

the spanish case, two classes of nationalism appear: the first, which defends that the spanish State, the existent political unit, must maintain the congruence with the existent national unit: that is, the Spanish nation.It will admit more or less ample forms of devolution of powers to the territories which compose it, but not till the point in which it is considered that the State is destroyed.It will admit even less the discussion of the existence of the basic principle: the very existence of the spanish nation.The second type is that of vindicative nationalism: it states the existence of a nation, the same as spanish nationalism, but in this case it is a different nation, not the spanish one.It believes in the existence of a national unit and it will try to secure a political congruent institutionalization for it.If it is moderate, it will accept not to arrive to the limit in the demand of what it considers a right -autodetermination and independence- and it will accept some sort of selfgovernment.But it will defend the recognition of its national identity, that which it considers its distinctive signs -such as the language.

Under these cricumstances, that which concerns the nation is basically a political question, to legimate the power.Rostchild remembers that "a State's legitimacy depends heavily on the population' perception of the political system reflecting its ethnic and cultural identity" (14).And certainly Europe presents a scene (15) in which tensions appear because of the lack of coincidence between state units and politcal units.But if we discard the nation-state pattern as imposition of homogeneity, it seems possible a political organization that allows the living together of diverse national identities inside a State, that secures their development without imposing one in particular: the consontiational formula that Daadler mentioned refering to Holland and Switzerland (16).

In our case, and operating already with some of the patterns proposed by Rokkan and Urwin for the nation-building process, it seems to us that the membership space dominant but with strong territorial characteristics is the one that applies better to Spain. "The idea of a covenant, with the acceptance and toleration of diverse identities prevails" (17).But only, we add, after the 1978 Constitution which recognizes the right to selfgovernment for the "nationalities and regions" in its second article.Moreover, the idea of covenant must be accepted with reserve.It is not a covenant to which previously independent nations arrive in a federation process from below.It is a covenant among political forces which accept the possibility and the limits of de-centralizing the power.And we must not think that they did so ignoring the special sensibility of the spanish army towards these matters in a new-born democracy.The tensions appear in the working out of the Constitution.The covenant doesn't obey to defensive reasons in front of an external menace.It replies to an internal reason, that of solving an historical problem and allowing a wider and generalized support in all Spain towards the democratic system.Certainly, it is a strategy to solve these problems if the centre admits particular identities in the periphery and proceeds to de-centralize the power (18). But it is also true that in sectors of the opposition against franquism democracy wasn't conceived without some kind of selfgovernment, at least for Catalonia, the Basque Country and Galicia.And this covenant in terms of state-building, can be fitting with what Rokkan and Urwin call mechanical federalism "introduced, as it were, from above, by constitutional means" (19).Let's take a look at the importance of spanish nationalism and the opportunity of these constitutional means.

2.- Public opinion

Centre-periphery relationships cannot be explained in Spain without mentioning the nationalist phenomenon.There are nationalist movements like the basque or catalan which have a long tradition in the fight for autonomy.The adjective "nationalist" won't be discusse in this case: it is the central vindication of selfgovernment from a group considered "nation".But maybe it is not so common to qualify as "nationalist" the opposite tendency: by the same criterium of national legitimacy of political power there are tendencies which defend the maintenance of political power in the centre.Nationalism in the periphery is centrifugal: it claims for recongnition of national identity for its own group and its selfgovernment -even independence.It seems reasonable to consider nationalist also the struggle to keep -not to obtain- the political power of a nation which is associated with an existent state.

In the democratic transition some changes have ocurred whic affect these questions (20).Democracy has brought with itself a new state pattern in which the power has been considerably de-centralized. "Autonomous communities" have legislative powers that can be compared advantageously with those of the italian regions.This means -because of its generalization to all the territories- an important change in the french-inspired centralist tradition that prevails in Spain from the XVIII century.But it is not only a question of changes in the location of the making of decisions.The ideological environment of this distribution of power has been modified also.The second article of the 1978 Constitution says:"The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible fatherland -Patria- of all Spaniards, and recognizes and guarantees the right to self-government of the nationalities and regions of which it is compose and solidarity among them all". The mention of the word "nationalities" was the subject of a great discussion that we shall refer to later on (21).In the mention of the unity and indivisibility of the spanish

nation is in perfect agreement with a centralist position, the reference to the nationalities seemed a step won by peripherical nationalisms."Nationality" calls up the same sociological characteristics as "nation", that if we don't consider them as synonyms.The absence of state is often mentioned: nationality is nation without state.In any case, to admit the condition of nationality means to recongnize some form of national legitimacy to autonomist aspirations.And in the same line, in spite of the initial proclamation of the mentiones second article,to introduce doubts about the national legitimacy of the very spanish state.We will consider in this work the opposition to the recognition of nationalities as an expression of nationalism.

It is useful to take a look at table 2 to start with the problems tied to the process of de-centralization.We can see in it the background to the discussion of the Constitution (1978) and the devolution processes to the Basque Country and Catalonia (1979).Global percentages are mentioned, those of the regions that stand out because of their autonomic vindications -long ago in the past and in more recent periods-, Madrid and those of the other regions.It catches the eye what concerns to an identified position with spanish nationalism, centralism as a political option is always a minority except in Andalucia and the regions without autonmist background in 1977.In another analysis, from the same Informe sociológico from which we have taken Table 2, we observe that those who indentify themselves with the most conservative positions are the ones who support centralism -data from 1977.Thus, 75% of those who wanted to continue with franquism, 57% of the Falangis and the same percentage of conservatives (pp. 515 and 516).Confronted with a concrete proposition of "autonomy for the nationalities and regions", the inquiry about the Constitution proposals gave a high percentage of favourable attitudes, 70,5% -which was lower in those who had voted right-wing in the 1977 elections -Table 4-.Another inquiry -table 3- posed a more generic option of autonomy for "the regions that form Spain", and it also gave a global favourable majority.The analysis

TABLE 2

ATTITUDES IN FAVOR OF CENTRALISM, AUTONOMY, FEDERALISM AND INDEPENDENCE IN 1977, 1978, 1979 (%)

| | Total | | | Basque Country & Navarra | | | Catalonia | | | Galicia | | | Valencian Community | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1977 | 1978 | 1979 | 1977 | 1978 | 1979 | 1977 | 1978 | 1979 | 1977 | 1978 | 1979 | 1977 | 1978 | 1979 |
| Centralism ... ... | 42 | 29 | 33 | 16 | 18 | 14 | 23,5 | 19 | 22 | 35 | 34 | 44 | 34 | 19 | 39 |
| Autonomy ... ... | 42 | 49 | 41 | 48,5 | 45 | 25 | 52 | 44 | 41 | 41 | 49 | 40 | 48,5 | 65 | 41 |
| Federalism ... ... | 9 | 14 | 11 | 16 | 17 | 22 | 17 | 25 | 16 | 7 | 10 | 7 | 10 | 8 | 5 |
| Independence ... ... | 3 | 5 | 7 | 14 | 15 | 32 | 5 | 11 | 15 | 3 | 3 | 3 | 2 | 2 | 4 |
| D.K./D.A.* ..... | 5 | 3 | 8 | 5 | 5 | 7 | 2 | 2 | 7 | 14 | 4 | 6 | 5 | 6 | 11 |

| | Andalusia | | | Madrid | | | Canary Is. | | | All other regions | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1977 | 1978 | 1979 | 1977 | 1978 | 1979 | 1977 | 1978 | 1979 | 1977 | 1978 | 1979 |
| Centralism ... ... | 55 | 35 | 30 | 43,5 | 30 | 34 | 31 | 28 | 19 | 58 | 34 | 43 |
| Autonomy ... ... | 37 | 41 | 46 | 44 | 54 | 50 | 58 | 63 | 51 | 32 | 45 | 41 |
| Federalism ... ... | 3 | 15 | 8 | 8 | 9 | 7 | 5 | 4 | 2 | 4 | 11 | 6 |
| Independence ... ... | 0,5 | 2 | 2 | 2 | 4 | 5 | 4 | 1 | 6 | 1 | 3 | 3 |
| D.K./D.A.* ..... | 4 | 7 | 14 | 2,5 | 3 | 4 | 3 | 4 | 22 | 5 | 7 | 6 |

*Don't know/ Don't answer

Source: INFORME... Sociológico sobre el cambio político en España: 1975-1981
Euramérica, Madrid, 1981, p. 514

by regions gave no adverse majority

TABLE 3

"Reading the press one can deduce that the political parties have not reached an agreement on the constitutional organization of the autonomous communities yet: Are you in favour of giving autonomy to the different regions that form Spain?"(Results in %)

| | | |
|---|---|---|
| YES | 59.6 | Sample 1371 |
| NO | 31.1 | April 1978 |
| Don't know, don't answer | 9.3 | |

Source: Gaceta Ilustrada June, 18th 1978

It seems rather evident that public opinion accepted some kind of autonomy.But one of the arguments more often repeated against de-centralization is that it endangers Spain's unity.In more common terms, "regionalism" comes to be regarded as synonym of "separatism" by 5% of the population that answered openly to the question -made in 1976- "What do you understand for 'regionalism?" (22).6% gave answers with negative connotation that the investigators grouped under the concept of "fanatism".Only 7% gave answers that could be grouped under the political-administrative concept of "autonomy".It must be pointed out that "separatists" is a qualification used to answer an open question in which the people interviewed were asked to describe the inhabitants of the different spanish regions.Specifically, it was only applied to catalans and basques with a frecuency of 17 and 18% respectively.(23).Thus, we see that separatism is not perceived as a politica opinion or activity, but rather as a feature of the character.But, in spite of these prejudices, during the constitutional process it was asked: "Do you believe that the concession of autonomy to the different regions of the country can endanger Spain's unity?" 45.5% answered no, and 38.4% yes.In the analysis by regions, it is noticed that the three regions with more fear to autonomy affecting Spain's unity -Castille, Extremadura, Asturias and Madrid- are exactly those regions more oppose

to/the

to the setting up of a system of autonomies (24).

3.- Ideological debate and constitutional means

More than the existence of the autonomies, the focal point of the discussion was the admission of the term "nationalities". The inclusion of this word in the constitutional text was a radical novelty in spanish political history, and the spanish conservative and nationalist forces demonstrated against it repeatedly.Not to quote the franquist or fascist press (25) an editorial from the newspaper ABC from Madrid -conservative- from october, 30th 1977 entitled "Yes to autonomies, no to nationalities" can be given as a piece of information.And above all, the long journalistic controversy that broke out about the acceptance of "nationalitites" and that had its centre in the public opposition of the conservative philosopher Julián Marías.It was opened with his article "Nation and 'nationality'" (La Vanguardia 18-I-78) and it lasted practically during all 1978.In relation with this, we can quote the poll of september 1978 in which 40.9 of the people consulted were against the introduction of the term -33.6 in favour, don't know, don't answer 25.6- (Blanco y Negro, 5-XII-78). (25.a) These data must be related to those of table 4, in which we observe that 70.5% give yes as an answer to the proposal of autonomy for "nationalities and regions".

However, it can't be assumed from this that it was simply accepted the fact that Spain was a plurinational State.During the period of the discussion of the Constitution, the leaders of the main parties constantly made public statements of support to Spain's unity as an important political value.Manuel Clavero Arévalo, minister for the regions then for the Unión de Centro Democrático government, said in a press conference in december the 12th 1977: "This unity of Spain I feel it more than anyone, but I believe that it is by not giving autonomy when the people really want it that we endanger our unity(...) I believe also that there is danger for the unity when autonomy is given in excess".(26)General Gutierrez Mellado, Minister of Defense in

12

TABLE 4

"It is recognized the right to autonomy to the nationalities and the regions"

Vote June 1977

| | | Alianza Popular (Right) | Unión de Centro Demoorático (Centre) | PSP/PSOE (Socialists) | PCE (Communists) | All other parties (It includes basque and catalan nationalist parties) |
|---|---|---|---|---|---|---|
| YES | 70.5 | 37.6 | 66.3 | 83.2 | 92.4 | 87.3 |
| NO | 13.6 | 53.6 | 14.4 | 8.3 | 6.7 | 10.5 |
| Don't know | 13.2 | 7.2 | 16.4 | 7.7 | 0.0 | 1.4 |
| Don't answer | 1.7 | 0.0 | 2.0 | 0.3 | 0.8 | 0.0 |
| Indifferent | 0.8 | 1.4 | 0.8 | 0.3 | 0.0 | 0.7 |

Source: La Vanguardia, 6 aug, 1978

Sample 1995
Error margin ± 2%
13, 14, 15 July 1978

the same government, showed about the same question a point of view that reveals the spanish army uneasiness in front of anything that could remind of "separatism": "It is not words that worry me, but facts.With or without nationalities, there will be no breaking of Spain's unity" (27).The conservative leader Fraga Iribarne, on his part, never concealed his opposition to the admision of the term "nationalities": "Spain's unity is in great danger" he said in may 1978. and less tan one month before the constitutional referendum he qualified the word of "inadmissible".On the left wing, things were not very different among spanish leaders.The controversy about the word was considered trivial by Felipe Gonzáles, who added: "Nobody doubts about the existence of the spanish nation which comprehends all the other nationalities"(29)Another socialist personality -Gregorio Peces Barba- stated clearly that "Spain's unity is a fundamental value" (30).Finally, the Chairman of the Communist Party at that time, proclaimed in a meeting: "We are the party of Spain's unity, for which we have so much affection; much more than the extreme right forces who consider Spain and its flag as its sole property".(31)

Thus, in contrast with Italy, the regionalization process had ideological connotations of principle about Spain having or not a national character.In the Constitution preamble it is stated that the Spanish Nation proclaims its will to "protect all Spaniards and peoples of Spain in the excercise of human rights, of their cultures and traditions, and of their languages and institutions".Somethin that can be understood as a protective function of diversity is only pointed out in this introduction to the Constitution.The key point, the one that allows to connect with the mechanical federalism pattern is that of the distribution of competences, established in Title VIII.

The maximum limit of the State's exclusive competences is fixed in this Title -art. 149-, this limit can be theoretically surpassed if -art. 150- the Parliament decides to transfer some of them to one or all the Autonomous Communities (33) Also -art.148-

the Autonomous Communities' competences, as they themselves establish in their own statutes.Those competences not mentioned neither in art. 149 nor in art. 148 can go also to the Autonomous Communities.But depending on the way in which they have acceded to autonomy.In the first place: the way of what are known as historical nationalities -Catalonia, the Basque Country and Galicia- which had already achieved autonomic statutes in the past through plebiscite,and the way of those communities -such as Andalucia- that pass special procedures like an initiative referendum -art. 151.In both cases, autonomy has no more limit than the exclusive competences of the State.All other competences, mentioned or not in art. 148, can be inmediatly assumed by the Autonomous Community.In the second place: all the other communities, that will have during the first five years art.148 as the maximum limit.The will to answer sooner to the stronger and more traditional demands of autonomy can be a reason for the differences in rythm, leaving a slower process for all of the other communities.In any case, and in spite of the system's theoretical flexibility -we must not forget that according to art. 150 any competence can be transferred to the Autonomous Communities- the practice is that of avoiding any possible autonomic overflowing. Suspicions seem to be more common in front of the possible excesses ofthe autonomies than in front of the centralist inertia. In the Constitutional Court's activities we have proofs of the successive central governments' zeal in front of the possible excesses of the periphery.

But we have already said that it is not only a technical problem.We must not forget that Title VIII was the development of the controverted art. 2 which recognized the right to autonomy of the nationalities and regions, apart from making a reiterative statement of the unity and indivisibility of the spanish nation.To the extent to which the subjects of the autonomy were the nationalities, meant -in the opinion of some people- that the famous principle of the nationalities: the right to autodetermination and secession was being almost touched.This was too much for spanish nationalists, who thought

of unity as a supreme value which is maintained by giving nobody inside the boundaries the condition of titular to the right of autodetermination.And too little for peripheric nationalists -catalans or basques- who neither accepted the sole national condition of the spanish State nor its indivisibility.Thus, art. 2 was attacked from basque and catalan nationalist radicalism (34).And it was also attacked from the right.Manuel Fraga (35), former minister of Information with gneral Franco, and Antonio Carro, former minister of Interior also with general Franco (36) both spoke against it from their parlamentary seats.

The intervention of a member of Unión de Centro Democrático, Rafael Arias Salgado is, in our opinion, the best summary of the top limits to which the introduction of the term "nationalities could arrive.We believe it is worth to reproduce a part of it, in spite of being a little bit long.

"That is why the word "nationality" in art. 2 isn't and can't be the base for an independence process that would attempt against spanish unity; it isn't and can't be the base for the right to constitute a State, but only for the right to have an autonomous government regime; it isn't and can't be the base to legitimate a sovereign authority, because sovereignty is an exclusive patrimony of the spanish nation; neither can it be the base to claim the nationalities principle application nor the autodetermination principle, because Spain's historical reality as national political unity where there are no minorities or peoples under ~~(illegible)~~ colonial designation (ni denominación) is superimposed.

The term "nationalities" in art. 2 simply implies the recognition of the existence of sociohistoric formations which are given a right to autonomy whose impassable principle limit lays precisely in the sovereignty of the political unit that embraces them and whose contents limit is fixed in the constitutional text" (37).

And the socialist spokesman was clear stating the PSOE position:

" It is clear that the existence of different nations or nationalities doesn't preclude, but on the contrary, makes much more real and possible the existence of that nation which is basic for us, the nation called Spain which is the ensemble of all the others". (38)

The proof of the operativity of the autonomies system came with the discussion and approval process the Autonomy Estatutes for Catalonia and the Basque Country all along the year of 1979.The public debate wasn't as important as that of the Constitution and terminological discussions didn't come to the fore: both communities consider themselves as "nationalitiees".But it is interesting to know wether the worries that appeared in the Constitution debate really arrived to the public opinion.(39)

Centro de Investigaciones Sociológicas

The [redacted] of Spain -an official organization- published in the Revista española de investigaciones sociológicas (nums. 6 and 7 in 1979, and num. 9 in 1980) a series of investigations about public opinion condition which included references to autonomies in the crucial year of 1979.Among other things, the people interviewed were asked to decide among a list of "matters that people are worried about today" which were the first and the second in importance.Among seven or eight issues (40) autonomies always come in the two last positions alternating with references to morality and habits.Let's mention also that among those issues doesn't appear centralism.It is also curious that it is asked wether the autonomies problem will "get better, remain the same or get worse".We don't know the utility of the data obtained, because it is not specified what "get better and get worse" mean.Get better doesn't have the same meaning for a centralist than for an independentist.Maybe it would have been interesting, apart from asking about autonomies as a problem, to find out if the lack of autonomy was perceived as a problem when the system hadn't been generalized yet.

Tables 5 and 6 offer the opinion about the possible result of negotiations on Basque Country and Catalonia statutes.It catche the eye that about one third of the people interviewed don't know or don't answer.Among the rest, another third believes thata there might be problems -this belief almost reaches 60% in the Basque Country. If we dettach it by political positions, the belief that unity is in danger is greater among the right-wing, and specially in the Basque Country case.Finally, table 7 shows the answer to a question that we consider problematic.What is the meaning of a "strong" position or to give way "at maximum"? The actors of the process are parliament members and, from the constitutional point of view, the executive doesn't have to adopt any specific position.We must not forget that the problem was not to surpass the limit of the State's exclusive competences.If the maximum meant arriving to that limit, Catalonia and the Basque Country had the right to do so.A strong position, if it meant ... cuts to that right, might have political reasons, but not a constitutional justification.

The data are revealing of certain attitudes, anyway.Some of these attitudes are already known, like confirmation that the right-wing is much less autonomist than the left.And others confirm the autonomic positions strength in the Basque Country: 75% are of the opinion that the government should yield at maximum.We must notice, however, the high percentage of basques that don't give their opinion.

4.- A possible conclusion

Perharps we can see better now to what extent Rokkan and Urwin pattern can be applied to the spanish case.Diverse identities coexist, but it is not easy to qualify some of them as territorial identites and the others as membership identities.They don't refer some of them to the State as an institution and the others to the group. Coexistence -and conflict- come between those who identify their national group with Spain and those who think that Spain is not a nation,

TABLE 5

"At present, it is being discussed in Parliament and outside the subject of the autonomies for the Basque country and Catalonia. Do you think that the discussion of this subject in the Basque country can lead to...? And in Catalonia?

Basque country?

| | General | Catalonia | Basque country |
|---|---|---|---|
| Agreement without problems | 14 | 21 | 18 |
| Agreement with problems | 36 | 38 | 60 |
| Jeopardize the unity | 17 | 12 | 2 |
| Don't know/ don't answer | 34 | 31 | 20 |

(%)

Catalonia?

| | General | Catalonia | Basque country |
|---|---|---|---|
| Agreement without problems | 23 | 22 | 16 |
| Agreement with problems | 33 | 34 | 58 |
| Jeopardize the unity | 11 | 12 | 2 |
| Don't know/ don't answer | 34 | 33 | 24 |

Source: Revista española de investigaciones sociológicas, "Barómetro de opinión pública. Junio-Julio 1979" num. 6, abr. jun. 1979, pp. 235-307, pp. 290, 291 and 293

TABLE 6

Basque country?

Political self-identification

| (%) | Extreme left | Left | Center | Right | Extreme right | Don't know | Don't answer |
|---|---|---|---|---|---|---|---|
| Agreement wihtout problems | 32 | 22 | 11 | 16 | 8 | 5 | 8 |
| Agreement with problems | 42 | 47 | 41 | 31 | 46 | 21 | 23 |
| Jeopardize the unity | 17 | 13 | 19 | 31 | 25 | 15 | 15 |
| Don't know/ don't answer | 4 | 18 | 28 | 23 | 21 | 59 | 54 |

Catalonia?

Political self-identification

| (%) | Extreme left | Left | Center | Right | Extreme right | Don't know | Don't answer |
|---|---|---|---|---|---|---|---|
| Agreement Without problems | 58 | 35 | 21 | 28 | 17 | 6 | 15 |
| Agreement with problems | 29 | 39 | 40 | 31 | 42 | 22 | 20 |
| Jeopardize the unity | 4 | 9 | 11 | 19 | 17 | 12 | 10 |
| Don't know/ don't answer | 8 | 18 | 28 | 22 | 25 | 60 | 55 |

Source: Revista española de investigaciones sociológicas, "Barómetro de opnión pública. Junio-Julio 1979" num. 6, abr.-jun. 1979, pp. 235-307, pp. 290 and 291

TABLE 7-

"Do you think that the government, when discussing those subjects, has to keep a firm position or has to cede at maximum to the demands (in the text exigencias) for autonomy?

| (%) | General | Catalonia | Basque country | Political self-identification: Extreme left | Left | Centre | Right | Extreme right | Don't know | Don't answer |
|---|---|---|---|---|---|---|---|---|---|---|
| Keep a firm position | 39 | 43 | 11 | 21 | 32 | 48 | 74 | 83 | 24 | 30 |
| Cede at maximum | 25 | 24 | 65 | 75 | 41 | 24 | 8 | 4 | 13 | 16 |
| Don't know/ don't answer | 36 | 33 | 24 | 4 | 26 | 27 | 18 | 8 | 63 | 54 |

Source: Revista española de investigaciones sociológicas, "Barométro de opinión pública. Junio- Julio 1979", num. 6, abr.-jun. 1979, pp. 235-307 pp. 291

but that their nation is another, the basque or catalan.Maybe, we could talk about conflict between membership identities better than between a territorial identity and several membership identities. From data of 1978 and 1979 refering to Catalonia and the Basque Country, the following results were published about the autoidentification of the people interviewed -9% in Catalonia and 3.9% in the Basque Country were not classified.

TABLE 8

Catalonia

| (%) | | |
|---|---|---|
| | Spaniard | 31.0 |
| | More Spaniard than catalan | 6.5 |
| | As spaniard as catalan | 35.7 |
| | More catalan than spaniard | 11.8 |
| | Catalan | 14.8 |

Basque Country

| (%) | | |
|---|---|---|
| | Spaniard | 14.5 |
| | More spaniard than basque | 5.8 |
| | as spaniard as basque | 27.4 |
| | More basque than spaniard | 21.7 |
| | Basque | 39.7 |

INFORME...Sociológico sobre el cambio político en España 1977-1981
Euramérica, Madrid, 1981, p. 519

Thus, it is a conflict between national identities, which can have their expression through nationalisms confronted in the maintenance or in the securing of an institutionalized political power. From this point of view, we can understand that an apparently terminological problem -the inclusion of the term "nationalities"- causes a great controversy.The high number on amendments to the Constitution project in this point and the correlation between the vote against it in the referendum and the centralist position are proofs of it.(41). But at the same time all the inquiries show the acceptance of some kind of self-government and even of bilingualism.This is surprising,

after decades of dictatorship which builds Spain's unity as supreme value and opposes to autonomy (42).

The constitutional formula is not very clear -nation/nationalities- and the value of spanish unity is constantly repeated by important leaders from all political tendencies.They also try to explai clearly that recognition of "nationalities" is not an acceptance of the right to autodetermination.Neither does the public opinion perceive -in high percentages- that the autonomies construction process might endanger unity.If we add to this the scarce autonmic tradition of many of the spanish regions, that now have their own selfgovernment institutions, it seems clear that the institutional pattern of 'mechanical federalism' can also be applied.As much as for being done from above by constitutional means, as for the keeping of a strong central power. This central power has a level of competences that make it exaggerated to talk of federalism.Thus, the judicial power is one, and public order and police forces depend basically on the central government.The spanis senate isn't a federal chamber and finally, the constitutional reform process is done without the intervention of the autonomous communities.

All this process of power distribution has taken place during democratic transition, as a result of the agreements and decisions of political forces.Though they are obvious, some points must be remembered.First, autonomy demands were not addressed to neutral interlocutors, but to people who participated in particular conceptions of Spain's national characteristics and of unity as value.There was, and ther is a central nationalism, in the same way as there existed and exists a peripehrical nationalism.Second, the years of democratic transition are very important, but they are few for processes such as state-building or nation-building.The history of State in Spain is as long as that of any other modern european state.And there are peripherical nationalist movements opposed to it, with as long a tradition as any nationalist movement -successful ~~triumphant~~ or not.Institutions, same as attitudes have their basic structures built on centenary foundations.Opportunities are not for social engineers, but for politics and political men

have their basic structures built on centenary foundations.Thus, opportunities are not for social engineers, but for politics and politicians in charge of a plural spanish society but with a higher tolerance level than what we might expect.

NOTES

1.- ROKKAN, Stein and URWIN, Derek W.: "Introduction: Centres and peripheries in Western Europe", in ROKKAN, Stein and URWIN, Derek W.: The politics of territorial identity, Sage, London and Beverly Hills, 1982, pp. 1-17

2.- ROKKAN, Stein: "Centre-formation, nation-building and cultural diversity: Report on a UNESCO programme", in EISENSTADT, S.N. and ROKKAN, Stein: Building states and nations, Sage, London and Beverly Hills, 1973, 2 vols., vol. I, pp. 13-38 (p. 29)

3.- ROKKAN and URWIN, op. cit., p. 8

4.- LINZ, Juan: "Early state-building and late peripheral nationalisms against the State: the case of Spain", in EISENSTADT and ROKKAN, op. cit., vol. II, pp. 32-116 (p. 99). Also GINER, Salvador: "Ethnic nationalism, centre and periphery in Spain", in ABEL, E. and TORRENTS, N. (eds.): Spain, conditional democracy?, Croom Helm, London, 1984, pp. 78-99 (p. 79)

5.- See the Introduction in WEIBEL, Ernest: La création des régions autonomes à statut spécial en Italie, Droz, Genève, 1971

6.- For an historical overview, see SETON-WATSON, Hugh: Nations and States. An inquiry on the foundations of nations and the politics of nationalism, Methuen, London, 1977, pp. 49-60

7.- On Catalonia, see VILAR, Pierre: La Catalogne dans l'Espagne moderne. SEVPEN, Paris, 1962. On Basque Country, AZAOLA, José Miguel: Vasconia y su destino, Revista de Occidente, Madrid, 1972 y 1976, 2 vols.

8.- LINZ, Juan: "La crisis de un Estado unitario, nacionalismos periféricos y nacionalismo" in ACOSTA ESPAÑA, R. et al.: La España de las autonomías. Pasado, presente y futuro, Espasa-Calpe, Madrid, 1981, 2 vols., vol II, pp. 651-752 (pp. 743-748). LINZ, Juan: "La sociedad española: pasado, presente y futuro" in LINZ, Juan et al (I) and GARCIA DE ENTERRIA, Eduardo et al. (II): España: un presente para el futuro, Instituto de Estudios Económicos, Madrid, 1984, 2 vols., vol. I pp. 59-96 (pp.69-70)

9.- "Real Decreto-ley 11/1978, de 27 de Abril (Jefatura), por el que se aprueba el régimen preautonómico para Andalucía": "Andalusia is one of the most wide and most representative regions of Spain" Boletín Oficial del Estado

num. 101, 28 de abril de 1978, p. 10042
"Real Decreto-ley 20/1978, de 13 de junio (Jefatura), por el que se aprueba el régimen preautonómico para Castilla y León": "Castilla and León is one of the most wide and representative parts of Spain" Boletín Oficial del Estado, num. 155, 30 de junio de 1978, p. 15578. I thank Jaume Vernet for those referenoes.

10.- El País, 2-VIII-1981

11.- DEUTSCH, Karl W.: "On nationalism, world regions and the nature of the West" in TORSVIK, Per (ed.): Mobilization, center-periphery structures and Nation-building, Universitetsforlaget, Bergen, 1981, pp. 51-93 (p.52)

12.- CONNOR, Walker: "Ethnonationalism in the First World: the present in historical perspeotive" in ESMAN, Milton (ed.): Ethnic confliot in the Western World Cornell University Press, London, 1977, pp. 19-45 (p. 43)

13.- GELLNER, Ernest: Nations and nationalism, Basil Blackwell, London, 1983, p. 1

14.- ROTHSCHILD, Joseph: Ethnopolitics. A conceptual framework, Columbia University Press, New York, 1981, p.14

15.- See ALLARDT, Erik: "Implications of the ethnic revival in modern, industrialized society. A comparative study of the linguistic minorities in Western Europe" Comentationes Scientiarum Socialium, num. 12, 1979 (monographic). Also KREJCI, Jaroslav and VELIMSKY, Viteslav: Ethnic and political nations in Europe, Croom Helm, London, 1981

16.- DAADLER, Hans: "Building consontiational nations" in EISENSTADT and ROKKAN op. cit. vol. II, pp. 14-31

17.- ROKKAN and URWIN op. oit. p. 10

18.- PADDISON, Ronan: The fragmented state. The political geography of power Basil Blackwell, London, 1983, pp. 90-91

19.- ROKKAN and URWIN op. cit. p. 11

20.- GINER, op. cit.

21.- See SOLOZABAL ECHAVARRIA, Juan José: "Nación, nacionalidades y autonomías en la Constitución de 1978. Algunos problemas de la organización territorial del Estado" Sistema, num. 38-39, oct. 1980, pp. 257-281

22.- JIMENEZ BLANCO, José et al.: La conciencia regional en España, Centro de Investigaciones Sociológicas, Madrid, 1977, p. 33 and 143. See also LOPEZ-ARANGUREN, Eduardo: La conciencia regional en el proceso autonómico español, Centro de Investigaciones Sociológicas, Madrid, 1983

23.- SANGRADOR GARCIA, José Luis: Estereotipos de las nacionalidades y regiones de España, Centro de Investigaciones Sociológicas, Madrid, 1981, p. 62

24.- Gaceta Ilustrada, 18-VIII-78

25.- For example, Gonzalo Fernández de la Mora, a former minister of Franco, written in the extreme-right El Imparcial 1-XII-78 that the main reason for his vote against the constitution in the referendum was their term "nationalities"

25a.- Sample 1275; Error margin ± 2.5%; Seotember 1978

26.- CLAVERO AREVALO, Manuel: "Autonomías regionales" in CONSTITUCION... autonomía y regiones, Ibérico Europea de ediciones, Madrid, 1978, pp. 383-394. Lecture of 19-XII-77

27.- El correo catalán, 15-XI-78

28.- Arriba, 16-V-78 and La Vanguardia, 15-XI-78

29.- Tele-exprés, 7-II-78. See also this statement in the first interview he was made when he took office as premier of Spain: "Do you know what is being said about the new government in the United States? They say we are a group of young nationalists. And they are quite true. I think it is necessary to recuperate the national sentiment, the signs of identity of the Spaniard..." (El País; 12-XII-82)

30.- El País, 26-II-78

31.- Hoja del Lunes (Barcelona), 24-IV-78

32.- See FERRARI, Pierre: Les régions italiennes, PUF, Paris, 1972 and PEDRAZZA GORLERO, Maurizio: Le variazioni territoriali delle regioni. I. Regioni storiche e regionalismo politico nelle scelte dell'Assemblea costituente Cedam, Padova, 1979

33.- MODERNE, Frank and BON, Pierre: Les autonomies régionales dans la Constitution espagnole, Economica, Paris, 1981. GERPE LANDIN, Manuel: "Las Comunidades Autónomas en la Constitución española de 1978" Revista Jurídica de Cataluña num. 2, abr.-jun. 1979 pp. 295-328

34.- Diario de Sesiones del Congreso de los Diputados (DSCD) num. 60, 8-V-78 p. 2079, speech of Heribert Barrera and the one of Francisco Letamendía in pp. 2084 and 2085

35.- DSCD, num. 59, 5-V-78, pp. 2043 and 2044

36.- DSCD, num. 66, 12-V-78, p. 2279

37.- DSCD, num. 66, 12-V-78, p. 2269

38.- DSCD, num. 61, 9-V-78, p. 2107

39.- About those questions, see DAVISON, W. Phillips: "Application of opinion research to conflict resolution" in DAVISON, W. Phillips and GORDENKER, Leon: Resolving nationality confliots. The role of public opinion research, Praeger, New York, 1980, pp.190-210

40.- They are: Energy crisis, Social inequalities, Morality, Unemployment, Social Security, Foreigne relations of Spain, Law and Order (Orden público) Regional autonomies, and, in one poll (oct. 1979) Prices

41.- INFORME... Sociológico sobre el cambio político en España 1975-1981, Euramérica, Madrid, 1981 (also known as INforme FOESSA), p. 55

42.- ARBOS, Xavier and PUIGSEC, Antoni: Franco i l'espanyolisme, Curial, Barcelona, 1981. COLOMER, Josep Maria: Espanyolisme i catalanisme. La idea de nadió en en el pensament polític català, L'Avenç, Barcelona, 1984. MERCADE, Francesc et al.: Once tesis sobre la cuestión nacional en España, Anthropos, Barcelona, 1983.

(Provisional draft,
not to be quoted)

# THE VICISSITUDES OF EUROPEAN POLITICAL COOPERATION

## Some theoretical reflections

by Alfred Pijpers

(Europa Institute, University of Amsterdam/
Department of Political Science, Leyden University)

Paper presented at the

European Consortium for Political Research
Joint Sessions of Workshops
Barcelona, 25 - 30 March 1985

Workshop: The EEC as an international actor: policy process
and international impact.

Caja 15

## 1. Introduction

Compared with the 1970's when the procedures as well as policies of European Political Cooperation (EPC) experienced a steady, albeit modest, development - culminating in for instance the Declaration of Venice (1980) the London Report (1981) or the Genscher-Colombo Plan (1981) - in recent years political cooperation among the Ten has rather been characterized by stagnation if not regression. After the famous fact-finding missions in the Middle East hardly any sustained diplomatic initiative has been taken, either in that region or elsewhere. More important, EPC has been virtually denied a security role beyond the provisions of the London Report and the Declaration of Stuttgart, and is in these matters definitely loosing ground to fora like the West European Union (WEU), the Independent European Programme Groupe (IEPG), the Franco-German framework, and to NATO. It seems to become more difficult to get the Ten on one line even on a simple declaratory level (witness the Greek dissidence after the shooting down of the Korean Boeing), and the larger member states tend increasingly to coordinate their policies bi- or trilaterally, rather than à Dix.

Though the artificial gulf between the EC and EPC has narrowed in some respects (increasing participation of the Commission; more frequent use of Community instruments; linkages between external economic and political topics), institutionally as well as legally, but also on many issues, the activities of EPC still remain markedly distinguished from the vast domain of the Community's external relations and policies. In any case despite all lofty and solemn declarations, the Ten have certainly not succeeded in putting their foreign policy cooperation on a structurally higher level since its take-off a decade and a half ago.

The purpose of this paper is, firstly (par.2) to review some of the main tendencies in and around EPC in recent years, and secondly (par.3) to investigate which theories might be of help in explaining the vicissitudes of common European foreign

policy-making. This part is primarily prompted by the fact that so far any clear theoretical orientation is conspicuously lacking in the literature on Europe's political role in world affairs.

## 2. EPC in the 1980's: some tendencies

The decline, or at least stagnation in the scope as well as the impact of EPC in recent years can best be illustrated by a brief review of the two policy areas where the Nine's cooperation efforts proved to be most prolific in the 1970's: the Middle East and the Conference on Security and Cooperation in Europe (CSCE).

Apart from further enhancing the political status of a Palestinian identity and the role of the PLO, the most interesting and controversial paragraph of the Venice Declaration concerned the intention of the Nine 'to play a special role' and 'to work in a more concrete way towards peace' (par.2). This clear ambition for a more pronounced European contribution to a Middle East settlement was - under Arab pressure - prompted by a real concern over especially the deadlocked autonomy talks and the developments in Iran (sparking off the second serious oil crisis and threatening stability in the region at large), and also over the unsteady direction of American Middle East diplomacy, apparently failing to effectively control events.

The purpose fo the Nine, spearheaded by Britain, France, and Italy, was not to mount an independent peace initiative next to the Camp David process, but to investigate the possibilities of narrowing the diverging viewpoints of the parties concerned, to convince the US to take due note of the more moderate Arab and Palestinian claims, and to show the Arab world a bit of European independence.

However, leaving apart some rather frustrating fact-finding sessions, the Nine/Ten very soon encountered the limits of their would-be diplomacy. Government as well as opposition in

Israel rejected the Venice Declaration, and Begin's re-election could only stiffen the Israeli instransigence in this regard. The Arab side on the other hand was not very forthcoming either, when, to the perplexity of European diplomats the Fahd Plan, and hence the possibility of an Arab recognition of Israel, was defeated at the Twelfth Arab Summit at Fez (November 1981). Furthermore, the Reagan Administration sought to cement, at a time of increasing East-West competition and tension, a more unified and consistent Western policy towards the Middle East, and to re-establish American predominance in this (and not only this) area. The American government strongly disliked the European interference and more or less forced Western Europe to take part in the multinational Sinai force (MFO), and thus to support visibly an essential part of the Camp David process.[1] Also, growing internal discord in the Arab world and the glut on the world oil market, diminished the possible threat of Arab sanctions in the early 1980's, and hence the need for a pronounced European role. Finally, the Greek waywardness undoubtedly contributed to making common positions of the Ten more difficult.[2]

These unfavourable circumstances for a European role continued during and after the Lebanon War. The Reagan Plan trumped the European ideas about the political status of a future Palestinian entity, and marked once again the American determination to take the lead in the Middle East. Besides, the Palestinian factor temporarily eclipsed after the fate of the PLO in Lebanon. The Arab countries proved themselves completely powerless to support the PLO beyond mere words, and could of course hardly press the EPC to be more forthcoming in this regard. Leaving apart the ritual denouncements of Israeli occupation practices (in 1982 backed up by a postponement of the signing of the second financial protocol between Israel and the EC), attempts to

further elaborate the Venice Declaration failed, as did the attempts to re-vitalize the Euro-Arab Dialogue. Only the French, Italian, and British participation in the multinational force around Beyrouth might be considered as a common European presence of some sort[3]. But for the rest 'Europe' was mainly represented by specific national (especially Greek and French) policies. In other words, the relative favourable international constellation for common European Middle East activities has lapsed in recent years, and the Venice Declaration should not be considered as a starting point for new policies in the 1980's, but rather as the culmination of policy co-ordination in the 1970's. With some notable exceptions, like the Ten's performance during the Falklands crisis[4], the same holds true for European policies in other regions as well.

Another example of the diminishing role of EPC is related to the CSCE process. Compared with the stimulating and policy-initiating part the Nine played at the Multinational Preparatory Talks and the Helsinki Conference (1973-1975), their performance in Madrid (November 1980 - September 1983) and now at the Stockholm Conference, is far less conspicuous.

The relative success of the Nine in the early CSCE stages was due to several factors. Firstly, EPC was still in its infancy when the CSCE process took off, and eager to test the new cooperation machinery. Secondly, the military dimension of the Conference would be quite restricted and not affect the supposed 'civilian' character of political cooperation. Furthermore, the United States was not particularly interested in the proceedings. In the early 1970's American diplomacy was highly pre-occupied with South East Asia, the Middle East and SALT (not to mention domestic troubles like Watergate) and Washington made no objections to the EC taking the lead. NATO was not very active either. The North Atlantic Council considered it unnecessary to establish a kind of secretariat

at the Conference, and so lacked an infra-structure which could be useful in the drafting of common proposals and reports. Finally, the performance of the Nine was favoured by détente, creating more space to manoeuvre for the junior members of the Atlantic bloc.

Though the structure of West-European cooperation at the subsequent Review Conferences remained basically the same, the political role of the Nine has nevertheless diminished in recent years, beginning in Madrid. Firstly, because by the end of the 1970's, the once favourable tide of détente had turned completely in an opposite direction, with superpower competition on the rise and hence less room for West-European manoeuvring. At the same time, the United States dramatically stepped up its interest in the CSCE-process, since it came to realize that the review of implementation in Madrid provided a convenient platform to expose Soviet behaviour. Furthermore, an important part of the Madrid proceedings was devoted to Confidence Building Measures and the convening of a Conference on Disarmament in Europe, subjects more in the province of NATO than of EPC. Hence, the main point of Western co-ordination, certainly after the first two years of the Madrid Conference, gradually shifted from the EC to the NATO caucuses. Though the NATO machinery in Brussels remained aloof, and though the Sixteen in Madrid lacked a focal point like the EC/EPC Presidency, for overall strategy and major decisions NATO came to by-pass the Ten during the last phases of the Conference.[5)]

At the present CDE Conference in Stockholm Western co-ordination is almost completely monopolised by NATO. In Brussels, a special machinery is designed to monitor the proceedings and to draft policy proposals for the Political Committee and the higher NATO echelons. The sixteen Heads of Delegation reularly meet in Brussels to discuss with the NATO Council results and further policy options, and are less thrown on their own resources than before. The United

States also takes an active interest in the Conference, particularly since the CDE was the 'only game in town' after the suspension of the other East-West disarmament negotiations (INF, START, and for a while MBFR). EPC has hardly any coordinating task in Stockholm, and no representatives of the Commission are participating.

So we see that as soon as more sensitive (military) issues cropped up in the CSCE process, the main point of Western coordination was shifted from EPC to NATO. This development is symptomatic for EPC's non-involvement in matters of defense and security, even at a time when many factors work in the direction of closer West European co-operation in this field.

Among these factors are: (a) The fear of a gradual American decoupling from Europe, due to strategic parity and bilateral American-Soviet deals in nuclear armaments, as well as to the repeated calls for American troops withdrawal, and to an increasing American interest for the Pacific area. (b) Tendencies of neutrality in the smaller countries and the Federal Republic. (c) Increasing relevance of out-of-area problems for the (economic) security of Western Europe. While the Community has steadily expanded its interests in the Third World, the military strength of quite a number of states in South-East Asia, Latin America and the Middle East has considerably increased, and so has the Soviet capacity for overseas intervention. Since these issues by definition fall outside the military scope of NATO, and since American and European interests often diverge in this respect, security problems below the Tropic of Cancer pre-eminently constitute a challenge for West European defense co-operation of some sort. (d) A fourth factor is an increasing need for Western Europe to co-operate in arms procurement in order to compete more effectively with the US armament industry, and also to keep pace with the technological im-

imperatives posed by Emerging Technologies and Reagan's Strategic Defense Initiative. This factor has more to do with strategies for industrial policy than with security as such, but it nevertheless creates a strong impetus for West European cooperation in the sphere of arms production and trade.

The combination of these factors has sparked off a galaxy of plans and measures for closer West European defense cooperation, ranging from calls for a security dimension of the EC in the European Parliament, to more concrete forms like a re-activation, or better activation of the WEU; a new impetus to the IEPG, as marked by the first ministerial meeting of this body in The Hague (November 1984), and to the Eurogroup; or to closer French-German military collaboration

EPC is lacking in this enumeration since the virtual defeat of the Genscher-Colombo proposal, especially due to Danish and Greek resistance to an EC Council of Defense Ministers. Though the Ten keep discussing the political and economic aspects of security, the more substantial issues have been shifted to the WEU, at least for the time being. Apparently, this framework has some advantages over EPC: it is based upon a treaty with explicit competences in defense and security, and with a close link to NATO; Greece, Denmark and Ireland with their rather deviating defense priorities are not a member; the Treaties of Brussels and Paris contain specific provisions for discussing security problems outside the NATO area, and the WEU Assembly has a long standing tradition in this regard.

## 3. The functionalist fallacy

Though some attempts have been made to put developments in European foreign policy in some kind of theoretical perspective[6)], there does not exist anything like an adopted

theoretical framework in this regard. On the contrary, students in the field have explicitly rejected current approaches like neo-functionalism, communications theory or traditional foreign policy analysis[7], and are as yet uncertain about the course theorizing might take.

This incertitude has several causes. One frequently mentioned is the less tangible character of a 'European foreign policy'; what is 'European', what are 'European' interests, to what extent is Western Europe to be regarded as a proper international actor? Due to the sometimes bewildering number of policy levels, national, common, and mixed instruments, formal and informal international organisations, European foreign policy is considered to defy immediate categorization, let alone theorizing.[8]

Perhaps more basically for the confusion, however, is the rather unfortunate turn taken in international integration theory in the early 1970's. As by that time the EC got increasingly affected by stagnation and recession, and protectionism and renationalisation processes came to replace whatever still was left of the 'logic expansion of sector integration', not only neo-functionalism was dropped, but also the focus on regional integration theory. Theorizing about European integration either lapsed, or became pursued outside the narrow confines of regional integration theory.

At about the same time a number of more or less new approaches like linkage politics, entered the field of international relations. By and large these approaches argue that modernization and interdependence have transformed contemporary world politics in some crucial ways, and made traditional models obsolete.

The world stage, so runs the argument, is not only populated by states and governments, but by important



transnational relations, international regimes,

(sometimes more important) non-state, transgovernmental and transnational actors as well. Moreover, the quest for welfare, prosperity, economic and financial security and other 'low-political' issues like monetary, agricultural, environmental affairs etc. have come to dominate or even to replace traditional concerns of power and military security in foreign policy and international relations. As Edward Morse has put it: 'Two of the chief characteristics of foreign policies under modernized conditions are then: (1) their predominantly cooperative rather than conflictual nature, and (2) the change in goals from power and position to wealth and welfare - or, at least, the addition of these goals to the more classical ones'.[9] The hierarchy among issues has disappeared, and domestic and foreign policy have become increasingly interwoven. Under such circumstances the use of military force has virtually become obsolete. In the words of Keohane and Nye: 'Relatively intense relationships of mutual interdependence and influence are developing on a global level in which force is ruled out as an instrument of policy. Among many of these states economics is becoming increasingly the main substance of policy, as politics and economics (as in regional integration) become intertwined. This is an historic change of great magnitude, which we will not be able to properly understand by applying traditional politico-military models of world politics'.[10]

These ideas apparently offered a suitable alternative for students of European integration to fill in the gap left by the demise of neo-functionalism.[11] The central organizing concept of 'interdependence' better catches the true nature of parts of the West European system than does

'integration', and the new approaches could also deal with phenomena like transnational decision-making and coalition formation, or the regime-like character of the EC's political authority. Moreover, they were able to see developments in the EC as part of wider network of Western economic cooperation and world-wide interdependence, and hence to take better account of the external determinants of European policy-making than formerly did regional integration theory.

However, the interdependence model of the EC indirectly has had a negative effect on a better understanding of the developments in Europe's foreign policy. In the first place because the new approaches are mainly descriptive and unsuitable to properly grasp the dynamics of European cooperation. In particular they lack the kind of if-then hypotheses which made neo-functionalism so interesting, and nothing is said about the conditions favouring or not favouring the coming into being of a common foreign policy.

More important, by putting the EC in a world-wide 'cooperative', low-political setting, the military, strategic, and power-political dimension of European foreign policy has completely disappeared as well. This rather 'peaceful', pseudo-functionalist perspective, however, is fallacious in several respects. Firstly, the transnational system is mainly confined to the Western, Atlantic world, and not based upon modernization or interdependence, but on the stability provided for by American military power since the Second World War. Secondly, whatever the economic substance of international relations between the West and other regions, i.e. the Soviet bloc and the Third World it is hard to see to what extent the security-dimension has

disappeared in this respect, considering the profound strategic character of East-West relations, and the numerous wars in the Third World (often with Western intervention). And these are exactly among the major issues Western Europe should address itself to.

Hence, by placing European integration in a transnational setting and by linking its external dimension too closely to the trade, aid, and association concerns of the EC, distinctive features of West Europe's foreign policy, like its loose organization with recurrent shifts from one framework to another, its position in NATO, its handling of arms control and out-of-area problems etc., easily tend to remain underexposed. It might be useful, therefore, to redress some of the imbalances created in international theory, and to see whether after all the traditional state-centered approaches and concepts are as obsolete as the functionalist advocates wanted us to believe.

## 4. The case for a traditional approach

The most fundamental tenet in traditional international theory is that due to the absence of an effective central authority or an equivalent thereof in the international system, states have to take care for their own security and defense, be it by building a strong military force, through alliances or through neutrality, by seeking protection, or through whatever combination of these and related precautions. States are continuously pre-occupied with developments which directly or indirectly could impair their security and power positions, and international politics is before anything else concerned with the preservation of the balance of power, alliance formation,

the delimitation of spheres of influence, arms control and peace negotiations, armaments, crisis management and related issues. Sure enough, within certain areas like Western Europe or the Atlantic system, where a bloc leader or a more or less dominant coalition is performing some of the stabilizing functions of a central authority, such issues may recede into the background, and the political process may assume a more regulated character, like in decent national states.

In any case, whatever the internal characteristics of integrated Communities, their foreign relations remain part of a non-integrated larger international system, and are likely therefore to be basically concerned with defense and security. The same holds true for Western Europe, despite the lack of military integration.

This, however, has of course nothing to do with the EC being primarily an economic or 'civilian' actor, but simply with the fact that most West European countries still feel themselves effectively protected behind the NATO shield, and realize that a strong unified Europe with an independent nuclear force might seriously impair the transatlantic relationship, as well as upset the East-West military balance. As long as the US still provides sufficient protection, it is simply not a common or national European interest to become a nuclear superpower, or to step up dramatically its foreign policy posture. In other words, the low key performance of EPC is primarily induced by two distinctly 'high-political' motives: a concern for West European security, and the preservation of the balance of power between East and West.

Most if not all EPC activities virtually remain within the limits set by these two motives, and so does European cooperation in the field of security and defense.

The paragraph about crisis management in the London Report for instance was not prompted by a desire to have an independent European capacity in this regard, but rather by a need for better West-West coordination in cases like 'Afghanistan' or 'Poland'. Likewise, whatever the rhetoric, the scope of defense cooperation in the WEU-framework will probably remain quite restricted. In this sense it is a bit fallacious to suggest that European defense integration could make a big leap forward if only troublemakers like Greece or Denmark were kept out. After all, political and military cooperation among the former Six was not that successful either. Differentiated common foreign policies (à trois, quatre, or sept) might be helpful to bypass the idiosyncracies of some member states and to more quickly react in times of crisis, but in principle they will have to cope with the same political basic conditions as the Ten. Carrington's attempt at mediation in Afghanistan, the MFO, and the multinational forces in Lebanon are cases in point.

These findings already indicate that at least the basic properties of European foreign policy are primarily determined by the structure of the international system, and that all kind of internal 'domestic' European factors are not of direct importance in this respect. This too is in line with traditional international theory, where domestic factors only count in so far as they have a bearing upon the power of a state. It also corresponds with the comparative study of foreign policy, where it is found that all kinds of domestic variables, like economic policies, decision-making structure, open or closed regime hardly have any influence on the more structural properties of foreign policy behavior, like degree of international participation, conflict involvement etc.[13] This also seems

to hold true for our subject, where in several respects we see a marked separation between the internal fate of for instance the EC and the vicissitudes of European foreign policy.

It is often assumed that a true common foreign policy is ultimately a matter of sufficient internal integration and of establishing effective institutions at a federal or central level. However, political unification does not necessarily mean that the actor concerned will indeed come to play an active role in international affairs. There are many historical examples of centrally organized states and imperia, which during shorter or longer periods, self-chosen or forced, remained virtually outside the whirlpool of international politics. One could think in this regard of for instance the U.S. or Japan in the 19th century, China during the Cultural Revolution, Birma and Albania at the present moment. Conversely, there are countless historical examples of poorly integrated states, or only temporary coalitions of states, with a strong and successful foreign policy. The former United Dutch Provinces are a case in point. It was a leading power in the seventeenth century, though it consisted of seven sovereign states, with decision-making as 'national' as in EPC. However, by the time it had become a centrally organized United Kingdom in the nineteenth century, its foreign policy capacity had sharply diminished. The operations of the Allied powers during the Second World War provide another example of successful common foreign policy-making without any prior internal integration whatsoever.

In other words, a European Union might establish some institutional and legal prerequisites for a common foreign policy, but these are in itself not sufficient for a dramatic enhancement of Europe's international role.

So it remains doubtful whether the Spinelli or Dooge proposals, even if adopted, could realize very much in this regard. A legal underpinning of EPC and the establishment of a Political Secretariat may improve procedures, but one wonders to what extent. The WEU after all is also treaty-bound, and in the possession of a Secretariat.

The separation between 'domestic' and foreign policy becomes most visible when we consider the link between the EC and EPC. Though the former artificial boundaries between the EC and EPC have disappeared, and the Commission has steadily become closer involved in EPC affairs, the two spheres remain surprisingly separated in institutional, legal, as well as political respects.

In the 1970's, political cooperation seemed hardly affected by the persistent crises around the budget, agricultural policies, steel or whatever, with their damaging effects on internal policy-making and the functioning of the internal market. On the contrary, EPC was considered the Musterknabe of the Communities, and sometimes deliberately used to show the world the better side of European unification. It is true that the deepening of the EC crisis in recent years now seems also to have affected the spirit of European leaders to proceed enthusiastically with political cooperation, but the issues they encounter within the Community are often different from the ones they have to face in the Middle East, Eastern Europe or Central America, and a cure for the internal problems is not necessarily a panacea for a common foreign policy.

To what extent political cooperation is decoupled from the proper EC conerns (even from its external relations) is well illustrated by the history of the WEU. Whenever political or military cooperation failed to materialize in a Community framework, it was transferred to the WEU, just like an ill-fitting lid is put on another pan. This happened for the first time when after the defeat of the EDC, German re-armament (and a British defense contribution) became realized through a modification of the Brussels Treaty. Then it happened again when after the defeat of the Fouchet proposals and De Gaulle's veto against British entry, political cooperation among the Six plus British participation was channeled through the WEU. And recently, re-vitalization of WEU has been proposed to obviate the virtual defeat of the Genscher-Colombo Plan and in its wake an EC Council of Defense Ministers.

Though political consultations among the Ten continue (including discussions about the political and economic aspects of security), the recurrent shifts to the WEU show that EPC should less be regarded as the diplomatic machinery of the EC, promoting specific Community interests abroad, than as one platform (among others) for West European countries to coordinate the pursuit of their extra-European national interests. And these latter too are much in the province of traditional international theory.

## 5. Concluding observations

The principal purpose of this paper was to redress some of the imbalances created in international theory by contemporary functionalism, and to give some arguments to explore more systematically (than just referring to 'intergovernmentalism') the suitability of traditional concepts and approaches for an understanding of the basic features of European foreign policy.

Starting from the fundamental security problem in international politics, and using ideas like the balance-of-power (according to Kenneth Waltz the most distinctively political theory of international politics[13]), seems the best approach to explain the restrictive scope, the lack of instruments, the major issues, and the dynamics of European political cooperation. Likewise, systemic properties, like the degree of bipolarity, seem to determine to a large extent Europe's room for manoeuvring in for instance the Middle East or at the CSCE.

Furthermore, traditional analysis is of help in selecting and separating the more relevant internal variables from the less relevant ones. The financial crisis in the EC has hardly affected political cooperation; stagnation in the one field seems unrelated to stagnation in the other. The restrictive scope of EPC, its lack of instruments etc. is not due to internal discord among the member-states, but rather to a common interest in keeping a low profile in their collective diplomacy. And Europe's foreign policy structure should not be judged by the standards of a superpower or of a European Union, but by the degree to which it succeeds in realising the national and common interests of its constituents.

(to be completed)

Notes

1. See my article about the MFO in David Allen, Alfred Pijpers, eds., European Foreign Policy-Making and the Arab-Israeli Conflict (The Hague: Martinus Nijhoff, 1984), pp.211-223.

2. See Ilan Greilsammer, Joseph Weiler in David Allen, Alfred Pijpers eds., op.cit. pp.153-155.

3. Cf. the French and British contribution to American naval manoeuvres near the Gulf after the outbreak of the Iran-Iraq War in 1980, and later the West European contribution to the mine-hunting operations in the Red Sea (1984).

4. See Geoffrey Edwards, 'Europe and the Falkland Islands Crisis 1982', Journal of Common Market Studies, Vol.XXII No.4 (1984), pp.295-313.

5. See my article 'European Political Cooperation and the CSCE process' Legal Issues of European Integration, 1984, No.1, pp.144-5.

6. One of the few explicit, but not very satisfactory attempts is Gunnar Sjöstedt, The External Role of the European Community (Westmead: Saxon House, 1977).

7. David Allen, Reinhardt Rummel, Wolfgang Wessels, European Political Cooperation, Towards a Foreign Policy for Western Europe (London: Butterworths, 1982), p.16.

8. David Allen, 'Foreign Policy at the European Level: beyond the nation-state?', in: W.Wallace, W.E. Paterson, eds., Foreign Policy-Making in Western Europe (Westmead: Saxon House, 1978), p.135

9. Edward Morse, Foreign Policy in Gaullist France p.383.

10. R. Keohane, J. Nye, 'International Interdependence and Integration' in: F.I. Greenstein, N.W. Polsby, eds., Handbook of Political Science (Reading, Mass., 1975), p.389.

11. Cf. Carole Webb, 'Theoretical Perspectives and Problems' , in: H. Wallace, W.Wallace, C. Webb, eds., Policy-Making in the European Community (Chichester: John Wiley, 1983), pp.32-37.

12. Cf. R.J. Rummel, The Dimensions of Nations (Beverly Hills: Sage, 1972), p.350; P.J. McGowan, H.B. Shapiro, The Comparative Study of Foreign Policy: A Survey of Scientific Findings (Beverly Hills: Sage, 1973), pp.108, 113-4; J. David Singer, 'Accounting for International War: The State of the Discipline', Journal of Peace Research, Vol. XVIII, Nr.1 (1981), p.7.

13. Kenneth N. Waltz, Theory of International Politics Reading, Ma.: Addison-Wesley, 1979), p.117.

- - -

* ho és a la llista de participants d'aquest seminari

EUROPEAN CONSORTIUM OF POLITICAL RESEARCH

JOINT SESSIONS OF WORKSHOPS, BARCELONA, MARCH 25-30 1985

WORKSHOP ON CONFIDENTIALITY, PRIVACY AND DATA PROTECTION

(Director: Mr C.D.Raab)

# The Boundaries of the Private Sphere: the Press and the Individual Citizen

by Jennifer Bell and Martin Bulmer, Department of Social Science and Administration, London School of Economics and Political Science.

Caja 16

Address correspondence to: Martin Bulmer and Jennifer Bell, Department of Social Science and Administration, London School of Economics and Political Science, Houghton Street, London WC2A 2AE

In recent years, privacy has become the focus of general attention by social scientists in the context of data protection and computerisation of information. There is no doubt that the computer revolution in particular has altered qualitatively the scale of the problem and the potential for invasion of privacy in the sense of assembly and disclosure of information without the subject's knowledge or consent. It is worth recalling, however, that the concept of privacy can be traced back, in its modern form, at least to Warren and Brandeis's famous article in the Harvard Law Review in 1890. They observed that

> (t)he intensity and complexity of life, attendant upon advancing civilisation, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. (Warren and Brandeis 1890:196)

Their concern was normative, to formulate a new legal "right" to privacy, but the sense in which they used the term recurs in sociological approaches to privacy. There the focus is somewhat broader than the question of data and the conditions under which it is collected and controlled. Edward Shils, for example, suggests that privacy may be defined in terms of the individual

maintaining control of what belongs to him. This would include information about the individual, but it includes much more.

> The "social space" around an individual, the recollection of his past, his conversation, his body and its image, all belong to him. He does not acquire them through purchase or inheritance. He possesses them and is entitled to possess them by virtue of the charisma which is inherent in his existence as an individual soul - as we say nowadays, in his individuality - and which is inherent in his membership in the civil community. (Shils 1975:344)

The focus is upon control of social interaction with those with whom one is not intimate; both in the sense of whether to interact at all, and if interaction takes place, what limits are placed upon it by the individual. Particularly in close-knit societies or groups, a high degree of social interaction may co-exist with the very definite drawing of boundaries between private and public spheres. The boundaries may be drawn differently in different situations, but definite boundaries exist. These boundaries are maintained by the individual controlling his own "social space". One relevant example of this phenomenon are relations between neighbours. (cf. Kuper 1953; Bulmer, forthcoming) Neighbours, particularly next door neighbours, can see a good deal of each other in casual social intercourse. Yet very clearly most neighbours draw firm lines between what is to be shared and what is to be kept private in such social exchanges. Certainly control of information is one part of that, but so is control of the extent, nature and location of interaction. There are connections, too, between

preservation of privacy and phenomena of primary group relations such as gossip and rumour, means by which members of such groups seek to circumvent the barriers which are erected.

General characterisations of "privacy" are perhaps of limited use in sociology. Some sociologists find the concept a slippery one to handle. This paper therefore explores some of the issues raised by the broader sociological definition of privacy in one particular context, privacy and the press. This returns to the theme of the famous 1890 article, which was provoked by a newspaper story about a private party held by one of the authors. To be sure, press intrusions upon privacy involve the spread of information which might otherwise be kept private. But the collection and verification of such information involves social interaction in which the boundaries as defined by the journalist may be at variance with the boundaries of the private as defined by the subject of the story. As a focus for analysis, the social construction of the boundary in journalism between private and public will be examined, using several examples of "human interest" stories, and their treatment by the British national daily and Sunday newspapers.

"Human interest" stories are the product of the popular press which came into being in Britain towards the end of the 19th century. The essential characteristic of such stories is that

they deal with individuals rather than institutions or issues. They therefore naturally relate more to the private than the public sphere. It is because "human interest" stories concentrate on personalities rather than policies that the questions raised are those of personal privacy rather than secrecy or freedom of information. These stories deal mainly with personal relationships; they cover areas such as sex, money and health which are inevitably the most sensitive for the individuals concerned. While not totally excluded from the more serious type of newspaper, they are most common in the popular tabloid Fleet Street dailies and especially the Sunday papers such as the News of the World and the Sunday Mirror. Their popularity is beyond doubt, as the circulation figures for these newspapers clearly demonstrate.

Many human interest stories involve individuals who are in any case in the public eye and therefore expect to be the subject of media attention. Indeed some public figures court press interest and welcome flattering human interest stories, for example about their happy domestic life. The Royal Family is the most obvious example, but politicians, sportsmen and media personalities all fall into this category. However the popular press - and its mass readership - tends to be much more interested in the unsavoury and unhappy side of their private lives. It is when unfavourable stories appear in the press that public figures

protest about invasion of privacy. There have been numerous recent examples of complaints about press behaviour towards people in the news, and especially harassment and hounding by journalists who tend to camp in large numbers outside the homes of prominent personalities hoping to snatch a few words of comment or a photograph through a long-distance lens. The Royal Family has tried to enlist the cooperation of Fleet Street editors in establishing some guidelines for press behaviour to obtain some privacy, for example on family holidays, but so far with little success. Politicians who have suffered from press interest in their private lives include John Profumo and Cecil Parkinson. Other public figures find themselves beseiged by reporters for a variety of reasons. Signs of deviant behaviour are bound to attract press interest as in the case of Commander Trestrail, the Queen's bodyguard or more recently the former footballer George Best.

Many human interest stories however involve ordinary members of the public from all social classes who become the subject of press interest, often just for a short time. They may themselves be involved in court cases, or they may be friends and relatives of defendants. Victims of a crime or an accident often merit press interest as do those involved in a medical advance such as an organ transplant. Whatever the cause of press interest, private individuals often find themselves and their families

subject to intense pressure from reporters and photographers at a time which would in any case be exceedingly stressful for them. Intrusion on the bereaved is the classic example. Unlike public figures, these people are not used to dealing with the media, and often suffer far more than those who are sophisticated in the use of news management techniques.

Even journalists agree that all individuals, whether they are public figures or private citizens, have a right to some sort of private life. But in a democratic society a free press needs to have access to a wide range of information if it is to perform its "watchdog" role with any success. The question to be discussed here is how the boundary between the public and the private sphere is constructed. Who decides what is of legitimate public interest, and what constitutes intrusion? What methods of newsgathering are legitimate, and in what circumstances ?

Historical cases

The behaviour of the press sixty years ago was rather different from what it is today. The era after World War One ushered in commercial journalism on a larger scale than ever before, but the nature of the transgressions of privacy complained of seem mild compared to those of the 1980's. In 1922 for example, the son of Lord Ampthill alleged at his divorce trial that his wife had

committed adultery with two named men and another unnamed man who was the father of her child. This was reported in the press and led to complaints and suggestions that the reporting of divorce cases be restricted, a view which the National Union of Journalists and the Institute of Journalists supported. A decade later, in 1933, both organisations again passed resolutions instructing their members to avoid intruding after Lady Ellerman complained about intrusion by newspaper photographers at her home and later the cemetery where her husband was buried. Other cases which were the subject of complaints involved the Lindberg's visit to Britain in 1935, intrusion upon members of families of people killed in a Dutch air crash and the telephoning of the widow of a socially prominent suicide victim at 1.00a.m. Such cases suggested that the popular press were gradually becoming bolder in their willingness to pursue "human interest" stories, but that there were still powerful social norms which inhibited the investigation and reporting of private information. In 1929 there was correspondence in the pages of the Times about "Sneak Guests", as the earlier embodiments of gossip columnists were perjoratively called. The first letter maintained that they represented "a new and dangerous tendency in our social life". Concluding a lengthy exchange of letters, a Times leader observed that "intimacy and affectation of intimacy are a feature of modern freedom of manners". This in turn produced "an increase in gossip in general and a disregard for old notions of

privacy and privilege". (Pratt,1979:73-85)

A touchstone of changing ideas about privacy is the treatment of the private lives of public figures, a sensitive issue in modern times. Privilege was a powerful influence restraining the press from publishing potentially intrusive information, as two cases demonstrate. From the war years onwards, Lloyd George maintained a liaison with his secretary, Frances Stevenson, which went far beyond the infatuation of an older man for a younger women. This "second love" was a very important support to Lloyd George both in his years as Prime Minister and later, and near the end of his life, after his first wife died, they married. For many years he maintained his family home in North Wales and a home with Frances Stevenson in the Home Counties. The relationship was known to a relatively small circle, but it did not affect Lloyd George's political career because it was never made public. The private life of a public figure was treated as private. (Grigg,1984; Taylor,1975; Stevenson,1978)

The other case where the press behaved circumspectly was Edward VIII's attachment to Mrs Simpson in the mid-1930's. Here one witnessed the British media behaving with decorum and respect for privacy while newspapers in America and on the continent exploited the relationship in sensationalist terms, a pattern which has continued up to the present even though the British

press is nowadays less decorous. For nearly a year after his accession in January 1936 nothing was said about their romance in the British press. Writing to an American correspondent in December 1936, Tom Jones the Cabinet Secretary reported that "There was a 'gentleman's agreement' which kept the affair out of our Press while it was raging with you and elsewhere". Even "the Daily Worker was behaving properly". As a consequence, Jones estimated that millions had never heard of Mrs Simpson, still less were aware of the constitutional crisis which burst upon an unsuspecting public. (Koss, 1984:563)

Not all public figures enjoyed the self-enforced discretion of the press during this period, as the curious case of Edwina, Lady Mountbatten, showed. She led a freewheeling life as a brilliant London socialite, interspersed with journeys to remote parts of the world, in the late 1920's and early 1930's. While Mountbatten was serving with the Fleet in Malta, she formed attachments with Leslie Hutchinson, a popular night-club singer and Paul Robeson, the black American actor. Neither was ever mentioned in print in connection with Edwina for fear of libel actions, but in May 1932 the People newspaper led its gossip column with a story headed "SOCIETY SHAKEN BY TERRIBLE SCANDAL", referring to "one of the leading hostesses of the country", a woman highly connected and immensely rich". It went on:

> "Association with a coloured man became so marked that they were the talk of the West End. Then one day the couple were

caught in compromising circumstances.

> "The sequel is that the Society woman has been given the hint to clear out of England for a couple of years to let the affair blow over, and the hint comes from a quarter which cannot be ignored."

This last was a reference to King George V and Queen Mary, and when they were shown the article, the Palace required the Mountbattens to institute libel proceedings to deny both that Edwina was having an affair with a coloured man and that the Palace had told her to go and live abroad. The libel case was heard in July in the Lord Chief Justice's court at the unusually early hour of 9.30 a.m., and the case was over before anyone, including the press, knew about it. In effect it was held <u>in camera</u>. The prosecution put Edwina in the witness box, where she denied that she had ever met the man referred to. For the defence, Sir Patrick Hastings offered an unqualified apology and withdrawal. The prosecution sought no damages. In effect the case was dealt with by agreement between the parties to assuage the Palace. The story attracted much attention, and millions of people heard of the case who would not otherwise have done so. The private life of a leading member of society retreated behind a smokescreen of collusion and untruth. Lady Mountbatten herself was enraged by the covertness, hypocrisy and censoriousness of the whole affair, became a strong anti-monarchist as a result and switched her newspaper reading from the <u>Daily Herald</u> to the <u>Daily Worker</u>. Paul Robeson came off worst, and saw it as

evidence of the deep colour prejudice of the English, apart from the personal betrayal. He believed for the rest of his life that the proceedings were taken because of the colour of his skin. (Hough 1983:124-9) From the point of view of privacy, the case illustrates both the developing tendency of the popular press to intrude upon the private lives of the elite, and the steps which a family with links to the Royal Family were obliged to take to counter publicity reflecting unfavourably upon their private behaviour. The sharp line between public and private lives were maintained - and Mountbatten's naval career did not suffer - but at a considerable cost.

Twenty years later both the outlook of the Palace and the press climate had changed out of all recognition. When the names of Princess Margaret and Group Captain Peter Townsend were first linked in 1953, the Daily Mirror polled its readers on the suitability of the match and stood by their approach in editorials. In 1955, when their names were again linked the Sunday People claimed in a leader that "(i)n matters of this kind, the Royal Family have no private life". Later in the year, Clarence House, Princess Margaret's official residence, issued an enigmatic press notice which asked press and public to respect Princess Margaret's privacy. Intrusion was justified by the press because of the constitutional issues raised by the person third-in-line as heir to the throne marrying someone who had been

previously married. But it went well beyond that, into matters which in any ordinary family would have been regarded as falling in the private sphere. Despite Press Council cautions and a censorious Times leader, it was clear that press standards in treating the Royal Family had changed dramatically in the direction of intrusion. (Pratt,1979:102-108) The different notions of "the public interest" and "of interest to the public" were used, in Princess Margaret's case, interchangeably to justify rolling back the boundary between the public and private lives of a leading public figure.

Contemporary cases

The nature of the boundary between public and private spheres has been posed sharply in a number of recent cases involving members of the British Royal Family, politicians in the public eye, and their offspring, and others who have become the focus of newspaper attention. Most of these stories will be familiar to British newspaper readers; some may be less familiar to those from other countries, so some detail is given. The point of considering them is for the light which they may throw on how the private lives of public persons become the subject of detailed scrutiny, despite their objections. (Bulmer and Bell, 1985)

The British Royal Family, as the case of Princess Margaret and

Group Captain Townsend showed, has been keenly observed by the British press in their private as well as their public lives. In recent years the popular press has pushed back the boundaries of privacy by publishing photographs gained by intrusive methods, stories based on speculation rather than fact, and memoirs of former royal associates. The Palace has made vigorous attempts to limit the activities of the press, by physically restricting their access to private settings such as the royal estates at Sandringham and Balmoral, by a conference of newspaper editors at the Palace, (Evans, 1983:313-16) by an appeal from the Queen's press Secretary (and in one case the Queen herself) direct to newspaper editors, and in one instance an injunction to prevent the continued publication in the Sun of the memoirs of an ex-servant.

Intrusive photographs of royalty are not new. In 1964 a freelance photographer named Bellisario took surreptitious photographs of the Queen and Princess Margaret picnicking and water-skiing at Sunninghill Park which were published in the Daily Express and Sunday Express. The Press Council condemned the editors concerned, who apologised and said they believed them to have been taken in a public place. Twenty years later the paparazzi have made royal-watching a speciality. The most intrusive example was when two competing photographers followed Prince Charles and the five-month's pregnant Princess Diana to the West

Indian island where they were holidaying. They took photographs of her on the beach in a red bikini using cloak-and-dagger methods reminiscent of the maquis, and sent them back to London for publication in the Sun and the Star. Publication was followed by a furore, considerable evidence of public disapproval, and an apology by the papers concerned. (Keay.1983) But the fact that the pictures were published at all was a sign of how times had changed. Those associated with royalty, as well as royalty themselves, could expect to receive attention. Diana before and during her engagement, and Prince Andrew's girlfriend Koo Stark, were both pursued and harassed by the press in search of newsworthy photographs. The latter was also the subject of the servant's memoirs in the Sun headlined "World Exclusive: The astonishing inside secrets of the fun-loving Royals" and "QUEEN KOO ROMPS AT THE PALACE", which led to the seeking of the injunction.

The boundary between fact and speculation was crossed in stories of the state of health of Princess Diana after her marriage. The Sun, for example, speculated whether she might suffer from anorexia nervosa. This tendency to invent stories is a more general tendency of the popular press (cf Porter,1984) but one to which younger members of the Royal Family are particularly liable.

Some intrusive stories about the Royal Family appear simply because of their prominent public position rather than because they are gained by unacceptable methods. Two stories about the Queen illustrate this. When it was revealed that a burglar, Michael Fagan, had entered Buckingham Palace early one morning, found his way to the Queen's bedroom, and spent ten minutes talking to her before the police arrived, the popular press had a field day. Not only did it reflect on Palace security - for example, the duty policemen whom the Queen phoned to remove the intruder delayed his arrival while he smartened himself up - but it revealed unpublished information about the Queen's private apartments.

A different case a year later concerned the resignation of Commander Trestrail, the Queens's personal bodyguard, when it was revealed that he was a homosexual. This aroused sharp press comment. Sir John Junor in the Sunday Express described him as guarding the Queen by day and chasing queens by night, a charge which Commander Trestrail's solicitor refuted and said plumbed "the very depths of scurrility, poor judgement and bad taste". The News of the World suggested that there was a gay community among the Queen's staff, sheltered by senior officials with public school backgrounds, an allegation which was also refuted. The story illustrates the characteristic way in which stories connected with royalty receive front-page prominence and also the

way in which the popular press embroider them and make them larger than life in order to appeal to their readers.

The extent of press interest in the Royal Family is usually justified in two ways. One is the public's interest in their doings, and the extent of news coverage that they receive in any case. To cover their private lives is merely a small extension of this. This is related to the second, the public character of the Royal Family. Harry Arnold, a journalist who covered the Royal family for the Sun, is quoted as saying:

> I write royal gossip and I write them as I find them. You've got to. I'm a royalist, but I can't censor my stories. I think the British public has a right to know as much as they can about the Royal Family. If they are up there and accept all the privileges that go with the job, they must accept it. They can't have one without the other. The Prince of Wales is a Prince 24 hours round the clock, and so is the Princess.
>
> I don't believe the Royal Family suffers from quite the invasion of privacy that the British public is led to believe. When they want to be alone they can be. They manipulate the press in a way that only they know how. It's almost an art form. (Junor, 1982)

The claim is clearly made here that appeals to privacy are a means of concealing what the public has a legitimate right to know. There is a corresponding reliance by journalists such as Arnold upon "private sources" and "close friends", which include staff in royal service willing to talk to journalists off the record.

Invasion of the privacy of public figures can, however, go beyond this into active intrusiveness. This was shown in the case of Mark Thatcher, son of the Prime Minister, and the Sunday Times story which revealed that fees received for consultancy work which he was doing in Oman (which his mother had just visited) were being paid into a bank account for which his father, Denis, was a co-signatory. Controversy centred upon the undercover methods used by the journalists involved to obtain private information about the bank account of Mark Thatcher's company. Whether or not they impersonated others or used deception to obtain information, the case attracted widespread condemnation, and suggests that investigative journalism may be less acceptable in Britain than in countries with a less inhibited press like the United States.

Other cases of politicians whose private lives have been investigated by the press include Ken Livingstone (Carvel, 1984:105-109), parliamentary candidate Peter Tatchell (Tatchell 1983:102-111) and former Labour MP Maureen Colquhoun. The latter was the subject of news stories when she left her husband and set up home with another woman. Following her complaint, the Press Council ruled that

> (w)hat was published....in this case, both as fact and innuendo would undoubtedly have been an unacceptable invasion of the privacy to which a private person is entitled.... MPs are entitled to a degree of protection in their private lives. But it is not all, and the factor which in the opinion of the Council takes the case just over the border into what

> is permissible is that she is a Member of Parliament who has taken a very strong stand on feminist issues and has not been loath to publicise her views on them.... this brought [the matters reported] into the area of those matters which the public is entitled to know as being capable of affecting the performance of her public duties or affecting public confidence in her views as an MP (Press Council,1977).

At the same time, the Council condemned the newspaper concerned for harassing her friend because she was a private individual and not a public figure. This illustrates the paradoxes involved in trying to draw a line between what is public and what is private.

In this case, publicity had an adverse effect on the subject's career, as it did in the case of Conservative minister Cecil Parkinson. His involvement with his political secretary, Sarah Keays, by whom he fathered a child, received considerable public attention in the press just before the Conservative party conference in 1983. It appeared that Mr Parkinson had weathered the storm of the initial revelations when Miss Keays took the unusual step of giving an interview to the Times in which she questioned Mr Parkinson's version of events and his veracity. His resignation from office followed immediately. In this case, one of the participants chose to be further exposed to the public glare to present what they saw as the truth.

There are a number of other cases which could be cited of people in the public eye receiving unwelcome attention from the press. The most notorious recent example in Britain was the "Yorkshire

Ripper" case, when members of the family of the accused, Peter Sutcliffe, and of one of his victims were subjected to considerable harassment by journalists. The Press Council issued a special report on the subject (Press Council,1983) which documented the harassment in detail and showed that correspondence to Mrs Sutcliffe from at least one newspaper contradicted evidence previously given to the Press Council on the subject by that newspaper.

In two other cases, publicity in the popular press about a well-known broadcaster, Isobel Barnett, convicted of shoplifting, and a university professor in charge of a laboratory where a smallpox outbreak ocurred, Henry Bedson, was linked with their subsequent suicides. These cases show that the pressures which can be put upon private individuals not used to sustained press attention can have serious effects.

## SOURCES FOR BOUNDARY DEFINITION

Concern over press intrusion upon privacy has led over the years to various proposed ways of controlling the proclivities of the press to enter into the private domain. There is some interest in examining these and comparing them, however remotely, with data protection measures taken in western countries in recent years.

Although the comparison is not a close one - "human interest" stories are very different from statistical data stored in a data bank - there are definite parallels in terms of the question of how the holding and dissemination of information about private citizens is controlled, and how its passage into the public domain may be limited if this is thought desirable. There are also more general issues of principle in common, notably how for purposes of regulation the "private" and the "public" may be defined, and by whom.

All journalists in Britain operate within the same legal framework, and all are subject to the same non-legal sanctions - adjudications by the Press Council and their trade union. But the behaviour of journalists in relation to privacy varies considerably depending on their attitude to these and other constraints. There are pressures on both sides, some leading to greater intrusion, others restricting their behaviour. The behaviour of the individual journalist, and particularly the editor who has the final say over what will be published, depends to a large extent on the nature of the story. But it will also vary with his own perception of his role and that of his newspaper. The influence of superiors and colleagues is extremely important in the rather closed world of Fleet Street. Attitudes vary between newspapers. There is in Britain a major difference of emphasis, especially in relation to"human interest" stories,

between the "serious" newspapers such as the Times, the Guardian and the Observer, and the popular press. Within each group some editors are traditionally prepared to take greater risks than others.

Although there is no privacy law as such in Britain there are numerous legal restrictions on journalists, some of which limit their ability to find and/or print information about the private lives of individuals. The laws of libel and contempt and restrictions on the reporting of court cases all place limits upon what can be printed in particular circumstances. A few public figures, including members of the Royal family, have been able to use the law on breach of confidence to obtain injunctions preventing the publication of embarassing details about their private lives. But the outcome of such proceedings is by no means certain and judges are reluctant to exercise "prior restraint" except in the most clearcut of cases. The criminal law can be used to deal with theft, trespass and harrassment by journalists. But none of these laws was enacted specifically to prevent press intrusion and there is considerable confusion surrounding their application in privacy cases. Prosecutions of journalists have been relatively few and far between and have by no means always followed obvious contraventions of the law. For example the failure to prosecute for what were clearly serious contempts of court in the Yorkshire Ripper case, led to much

criticism of the Attorney General in a subsequent House of Lords debate. (Hansard, 1983)

In one area, that of the reporting of minor court cases, the law specifically requires the publication of personal details such as the names and addresses of defendants - a practice which is far less common in the rest of Europe. The extensive coverage which newspapers have traditionally given to court proceedings was in the past regarded as beneficial both because it was believed to have some deterrent effect and because it provided a check on the behaviour of magistrates. However, today's court reporting tends to be both sensational and random. Publication depends on whether a reporter happens to be in court at the time and whether he regards a story as newsworthy. The suffering caused to some minor offenders by the newspaper publicity they receive can be far greater than any penalty which the court might impose and in effect constitutes a double punishment for one crime. For private individuals the effect may be limited to their local area, but for public figures the effect of a minor charge can be devastating. The case of Isobel Barnett is a recent example. There are legal restrictions on the reporting of domestic proceedings and those involving children which were introduced to prevent the publication of sordid and salacious court reports and to protect the interests of minors. But the Committee on Privacy (the Younger Committee) though

recognising the "punitive and haphazard" effect of the reporting of minor court cases decided not to recommend further legislation. The most recent Royal Commission on the Press considered a study by Dr Marjorie Jones which argued that the identification of defendants was unnecessary for deterrent sentencing. She advocated the introduction of a voluntary system such as that operating in Scandinavia where the press hardly ever identifies defendants in the lower courts. (Jones, 1974) Members of the Commission were divided as to the best course of action and recommended that urgent consideration should be given to the subject by a specialist committee. So far there has been no response from Government. (Royal Commission on the Press, 1977)

The confused and contradictory state of the law in this area does not help journalists to decide where to draw the line in their attempts to gather news. Most journalists today have some sort of formal training and this includes a study of newspaper law. But the legal textbooks designed for journalists give little guidance on privacy issues. They tend rather to reflect the general attitude of the industry which is that journalists in Britain face more legal restrictions than their colleagues in other democratic countries, and that there is some virtue in a somewhat cavalier attitude towards the newspaper law. journalists should be prepared to "publish and be damned" if the story is worth it. "The newspaper's role in exposing wrongs is an

extremely important one...it is a job which frequently cannot be done without risk and therefore without a considerable degree of courage on the part of the journalists involved". (McNae, 1982)

This is no doubt a laudable attitude when the wrongs to be exposed are matters of real public concern and affect the "public interest", but the same attitude often seems to prevail when the "wrongs" are private and exposure, however fascinating, can hardly be said to be in the public interest. The freedom of the press is an important right in a democratic society, but when it becomes a licence to intrude on individual privacy it must be questionable whether the same considerations apply. The newspaper industry has always used the arguments of press freedom in resisting attempts at legislation to prevent press intrusion on privacy. The introduction of a privacy law has been considered on a number of occasions by Parliament, by successive Royal Commissions on the Press and by the Younger Committee. In the end however the demands for legislation have always been rejected partly due to a reluctance to impose further restricions on the freedom of the press and partly because of concern about the practical difficulties of framing and administering a law which would have to permit publication on matters of public interest while preventing unwarranted invasions of personal privacy. However the possibility of legislation has again been raised by recent press behaviour. In

the Lords debate on the Yorkshire Ripper case, Lord Elton winding up for the Government warned, "We cannot rule out the possibility of statutory controls in this field if serious public dissatisfaction with the conduct of newspapers persists and if that concern is not adequately met by the present arrangements." (Hansard, 1983)

The alternative to legislation is self-regulation by the journalists themselves.The newspaper industry has on numerous occasions been exhorted to take greater responsibility for maintaining and improving the professional ethics of its journalists - to "put its house in order" if legal sanctions are to be avoided. While young journalists do study the law relating to newspapers, there is little evidence of much consideration of ethics on journalists' training courses, which tend to be devoted to more practical subjects such as shorthand and typing. There are however two sources of formal guidelines for journalists in the form of the Press Council's Declaration of Principle on Privacy and the Code of Conduct of the main journalists' union, the National Union of Journalists.

Concern about press intrusion, especially on the bereaved, was one of the main reasons for the establishment of the Press Council in 1953. There is some evidence that the Council did help to improve press behaviour in the 1960's, but it has in

recent years been regarded as a weak and ineffectual body both within and outside the newspaper industry. The Council has a duty to hear complaints such as those of press intrusion, but it has no "teeth" and has to rely on the newspapers themselves to give publicity to its judgements. There has been continuous criticism of the Council's structure and inefficiency and it suffered a severe blow to its credibility when the NUJ voted to withdraw from it in 1980 on the grounds that it was "wholly ineffective" and "incapable of reform".

The Press Council did however issue a Declaration of Principle on Privacy in 1976 which lays down basic guidelines for journalists in this area. The Declaration states that: "The publication of information about the private lives or concerns of individuals without their consent is only acceptable if there is a legitimate public interest overriding the right of privacy...The public interest relied on as justification for publication or inquiries which conflict with a claim to privacy must be a legitimate and proper public interest and not only a prurient or morbid curiosity". (Press Council, 1976)

Journalists are urged to act with sympathy and discretion in dealing with bereaved or distressed people. But the Declaration specifically permits the invasion of privacy by deception, eavesdropping or technological methods "when it is in pursuit of

information which ought to be published in the public interest and there is no other reasonably practicable method of obtaining or confirming it".

The National Union of Journalists' Code of Conduct is couched in similar terms: "A journalist shall obtain information, photographs and illustrations only by straightforward means. The use of other means can be justified only by over-riding consideration of the public interest. The journalist is entitled to exercise a personal conscientious objection to the use of such means. Subject to justification by over-riding considerations of the public interest, a journalist shall do nothing which entails intrusion into private grief and distress". (NUJ Members' Handbook)

The NUJ has only started to make a serious attempt to enforce its code of conduct since leaving the Press Council, but the Council itself has been hearing complaints of invasion of privacy for over thirty years. As the wording of the Declaration indicates, the Council bases its judgements on the interpretation of the concept of public interest in deciding whether to condone or condemn the behaviour of journalists. Some cases it sees as straightforward. Recent judgements for example have upheld complaints against newspapers involved in publishing photographs of media personalities such as Brigitte Bardot

and David Niven taken without their consent and with long-range telephoto lens. The Council is normally quick to jump to the defence of the Royal Family. The Sun newspaper was condemned recently for publishing the story by the former royal servant about Koo Stark's "romps" at the Palace.

However the Council also rejects a large proportion of complaints on public interest grounds. One of the most controversial examples was that of Labour MP, Maureen Colquhoun described above. The Press Council, as the body charged with hearing complaints against the press has perhaps some claim to have established boundaries between the private and public spheres. But its reputation has dropped so low in recent years that it cannot be accurate to describe it as the effective authority on newspaper ethics. In practice the effect of the Council's pronouncements on the everyday attitudes of working journalists seems to be minimal. Several newspapers have recently failed to co-operate with the Council's investigations, and a few have refused to publish its adjudications. In a number of interviews carried out with journalists on popular Fleet Street newspapers, it became clear that they have little respect for the Press Council. To be called before it was regarded as a nuisance rather than a disgrace. The main deterrent seemed to be the amount of paperwork involved in appearing to answer a complaint. One interviewee had not even heard of the Council's Declaration

on Privacy. The NUJ in the long-term might have a greater impact, in that it can expel offenders from the union. This could prevent a journalist from working, because of the closed shop in many newspapers. One of the reporters interviewed had been taken before a recent NUJ disciplinary hearing following an allegation of intrusion. She said that she took the proceedings more seriously than a Press Council hearing both because she felt she was being judged by her peers, and because she feared losing her union card.

Much more important than any formal code of conduct in influencing the behaviour of journalists on privacy issues is the attitude of colleagues and superiors. Many of the general reporters who cover human interest stories are relatively young and inexperienced, they usually come to Fleet Street from the rather less demanding environment of provincial newspapers. They have adapt to the demands of the competitive national newspaper scene by learning what is acceptable and expected behaviour. Although there are no formal house rules on behaviour, what is expected is usually made clear quite quickly to young journalists by their superiors. Young reporters remain in close contact with the newsdesk and are given close guidance on how to proceed on a story. Although there may be some chance for discussion if, for example, reporters are told to do something they disapprove of, in practice it is the news editor who has the

final say. As a number of the interviewees made clear, if they want to succeed in the job, they have to learn to conform to the attitudes which prevail both on their own paper and in Fleet Street generally.

Recent battles for circulation have undoubtedly led to commercial pressures, and these are having a greater impact on the behaviour of journalists than in the past. While none of the interviewees admitted to themselves intruding unduly, they all knew of other journalists who did so. Several admitted to severe pressure from editors on occasions and found that they were expected to behave in ways which they found distasteful. As one reporter on a Sunday newspaper explained: the newsdesk would never actually give you an instruction to break the law, they would just tell you to "get the story at any cost".They thus absolved themselves of any responsibility and left the decision to the reporter on the ground.

However journalists are also influenced by the attitudes of their colleagues. Jeremy Tunstall has decribed the ambivalent competitor-colleague relationship between Fleet Street journalists who work together on a day-to-day basis. ( Tunstall, 1971) Although his study was of specialist journalists, much the same is true of the general reporters and photographers who normally cover human interest stories. A journalist

graphically described reporters on the dailies as "hunting in packs". One of the major reasons for the complaints of press harassment is the sheer number of pressmen involved in following a major stories. What may be acceptable behaviour on the part of a single reporter becomes unacceptable if there are dozens involved in seeking the same information.

Without exception all the interviewees agreed that "doorstepping" (ie waiting for hours outside the home of a person in the news) is one of the worst jobs they have to do. There is some evidence that reporters will cooperate in their own interests to avoid pressure from their newsdesks on such stories if they think there is unlikely to be a successful outcome to their vigil. They know that if their colleagues are still there, the newsdesk will not let them go home in case a rival paper gets the story. So they may well cooperate to "cover" for each other or, as one interviewee confessed, each of them rings their news editor and says the others have been ordered home. There is also a certain amount of cooperation between reporters in sensitive situations, for example they may agree to send one representative to interview a bereaved relative. However as one interviewee pointed out in such situations care needs to be taken in the selection of the representative, as the competitive instinct may triumph over cooperation whenthat reporter is faced with the chance of an "exclusive". Group norms may also operate against

individuals who want to overstep the mark in trying to get a story or a picture. One example was when a journalist suggested putting a ladder against the side of a prominent personality's house in order to take pictures through an upstairs window. He was dissuaded by his colleagues who thought this was going too far.

However competition is still a driving force for the typical journalist who as a former editor of the News of the World put it, "has a duty to reveal unpalatable truths". (Somerfield, 1979). Partly this is based on the myth of the hard nosed reporter who gets his story at any price and fears nothing for the consquences. But it also reflects the real commercial demands of a market which appears to desire ever more sensational revelations. Professional pride also plays its part; the greatest achievement for reporters is still to seetheir name over an exclusive story on the front page of tomorrow's paper. How they get the story, and who is hurt in the process, seems to matter little when deadlines are approaching and the editor is demanding the story. Each individual has to judge how far to go in the particular circumstances. Some are more prepared to intrude than others. The journalists interviewed clearly took a different approach to public figures and private individuals. Public figures they regarded with some cynicism as "fair game" and well able to look after their own interests. They had few

qualms about intruding upon their private life if they had courted favourable publicity in the past. They were prepared to be more sympathetic (in theory at least) to private individuals who found themselves unexpectedly in the news. In that case, they said, individuals are free to draw the line between the public and private sides of their lives. If they refuse to answer reporters' questions and failed to succumb totheir talent for persuasion, they would in most cases be left alone. There is some evidence that the worst offenders are freelances whose livelihood depends much more directly on being able to sell their stories or pictures. But the differences in attitude between journalists was quite apparent in a television programme which posed hypothetical fictitious situations to journalists from all branches of the media and asked them how far they would be prepared to intrude to get an important story. (Lapping, 1980) While some, for example, were prepared to trespass in order to gather information others were reluctant to do so for fear of the legal consequences.

According to the formal pronouncements on privacy, journalists should make their judgements on the grounds of public interest. If they think a story is of sufficient importance almost any behaviour will be excused. The boundaries are defined by the outcome, in a very real sense the ends justify the means. The question of defining the public interest - as opposed to

what is of interest to the public - is one of the major reasons why legislators in Britain have been deterred from introducing legal sanctions to prevent press intrusion. In the present situation where the law is unclear and the Press Council ineffective, it is the newspapers themselves which seem to have taken responsibility for defining the limits of acceptable behaviour. The only effective constraints seem to be those of the market-place. Despite the outrage expressed over much press behaviour, it is clear that the majority of the newspaper-buying public likes to read about the details of other people's private lives. As a young reporter on Britain's best-selling popular newspaper remarked, there was far more outcry from the "establishment" than from the general public over press harassment in the Yorkshire Ripper case. It is the public who judge the methods a newspaper uses to get its stories, and the public suffers little from intrusion by the press. One man's invasion of privacy may be another man's investigative journalism. But a newspaper is a commercial concern, it is there to provide what the public wants. As long as people want to read sensational and bizarre stories about private lives, the newspapers will feel justified in stretching the boundaries of acceptable behaviour ever further and they will vigourously oppose any attempt to impose restrictions on their ability to do so.

BIBLIOGRAPHY

Bulmer, M. and Bell, J. (1985) "The Press and Personal Privacy - has it gone too far?" The Political Quarterly 56(1) (January - March):5-22

Bulmer, M. (forthcoming) Neighbours: the work of Philip Abrams (Cambridge: Cambridge University Press)

Carvel, J. (1984) Citizen Ken (London: Chatto and Windus, The Hogarth Press)

Evans, H. (1983) Good Times, Bad Times (London: Weidenfeld and Nicolson)

Grigg, J. (1984) Lloyd George: From Peace to War 1912 - 1916 (London: Methuen)

Hansard (1983) House of Lords Official Report, 20 July, Mr Peter Sutcliffe: Press Council Report (Vol. 443 No. 17 Cols. 1159-1170, 1176-1194)

Hough, R. (1983) Edwina: Countess Mountbatten of Burma (London: Weidenfeld and Nicolson)

Jones, M. (1974) Justice and Journalism (London: Barrie Rose)

Junor, P. (1982) "We are not amused about some stories about the Royals..." The Guardian, 27 July

Keay, D. (1983) Royal Pursuit: The Palace, The Press and the People (London: Severn House)

Koss, S. (1984) The Rise and Fall of the Political Press in Britain: Volume 2: The Twentieth Century (London: Hamish Hamilton)

Kuper, L.(ed) (1953) Living in Towns (London: The Cressett Press)

Lapping, B. (ed)(1980)The Bounds of Freedom (London: Constable)

McNae, L.C.J. (1982) Essential Law for Journalists 8th edition revised and edited by Walter Greenwood & Tom Walsh (London: Butterworths)

National Union of Journalists Members' Handbook (London: National Union of Journalists)

Porter, H. (1984) Lies, Damned Lies and Some Exclusives: Fleet Street Observed (London: Chatto & Windus, The Hogarth Press)

Pratt, W.F. (1979) Privacy in Britain (Lewisburg, Pennsylvania: Cranbury University Press)

Press Council (1976) The Council's Declaration of Principle (London: The Press Council)

Press Council (1977) The Press and the People 24th Annual Report of the Press Council (London: The Press Council)

Press Council (1983) Press Conduct in the Sutcliffe Case: a report by the Press Council (London: The Press Council)

Royal Commission on the Press (Chairman: Lord Macgregor) (1977) Final Report Cmnd. 6810 (London: HMSO)

Shils, E. (1975) "Privacy and Power" in Center and Periphery: Essays in Macrosociology (Chicago: University of Chicago Press), pp.317-44

Stevenson, F. (1978) The Years that are Passed (London: Hutchinson)

Tatchell, P. (1983) The Battle for Bermondsey (London: Heretic Books)

Taylor, A.J.P. (ed) (1975) My Darling Pussy: Letters of Lloyd George (London: Weidenfeld and Nicolson)

Tunstall, J. (1971) Journalists at Work (London: Constable)

Somerfield, S.(1979) Banner Headlines (Shoreham by Sea: Scan Books)

Warren, S.D. & Brandeis, L.D. (1890) "The Right to Privacy" Harvard Law Review 4 (5) (December):193-220

Younger Committee (1972) Report of the Committee on Privacy (chairman: Sir Kenneth Younger) Cmnd.5012 (London: HMSO)

# PUBLIC ADMINISTRATION OF INFORMATION CONFLICTS AN ATTEMPT AT A FUNCTIONAL EVALUATION OF INFORMATION LAW

Herbert Burkert (1)

Gesellschaft für Mathematik und Datenverarbeitung
Arbeitsgruppe für Wirkungs- und Programmstudien
St.Augustin
Schloß Birlinghoven
Federal Republic of Germany

ABSTRACT:
Information and communication technology and their applications have made society re-aware of its inherent power conflicts. This time these conflicts are expressed as information conflicts. This change of coding has been realized by the political system as well as by the administrative system and has led to the creation of information law (data protection, freedom of information and comprehensive laws). This body of law produces information on information (meta-information) which is administered by administrative subsystems, the information agencies. While these subsystems are designed to administer information conflicts between the social and the administrative system, most efficient use is made of them by the administrative system itself. Conflicts arising from the implementation of information law may lead to a stronger involvement of the social and political system by reformulating information conflicts as political conflicts.

---

1) Herbert Burkert, GMD/AG.WPS, Postbox 1240, D-5205 St.Augustin 1, FRG,tel.: 02241.142-671 The views expressed in this paper do not necessarily reflect the position of GMD.

CONTENTS



## 1.INTRODUCTION

Information conflicts are old conflicts, not necessarily tied to a specific technology; we experience them every day. Secrecy, openness and confidentiality considerations accompany the ways in which we communicate. Information conflicts are also not new to the law. While many of the information aspects of everyday life and of law had largely been unnoticed for a long time, this changed with a social, economic and technical development which led to the widespread use of information and communication technology. In order to use this technology effectively and efficiently we have learnt to apply information and systems analysis to our environment. These efforts created patterns of perception like information resources, information flows, distribution of information, information quality etc.

A cluster of motives, which will not be discussed in this paper, has led to concern about the way in which the administrative system made use of information and communication technology (2). This concern has been adopted by the political system and has led to the development of information laws. This development will be discussed here in terms of a **functional** model (3).

---

2) This paper concentrates on aspects of information law with regard to what is known in the context of information law as the public sector. An analysis of the effect of information law on the private sector would more suitably be undertaken by using an 'economics of law' approach, see MACKAAY, E.,The Economics of Information and Law, Boston 1982

3) With regard to this approach see: LUHMANN, N., Funktionale Methode und Systemtheorie, in: Soziale Welt 15 (1964), pp. 1-25; LUHMANN, N. Rechtssoziologie, Reinbek 1972; GÖRLITZ, A., Politische Funktionen des Rechts, Wiesbaden 1976; KRAWIETZ, W., Das Recht als Regelsystem, Darmstadt 1984

Functional models have their limitations (4) and the model used here is of low complexity. It is intended merely as a heuristic tool to help to analyse common structures and functions behind the variety of regulations on information handling.

Social systems have developed political systems to provide for and to negotiate political goals; administrative systems seek to influence their environment according to these goals, react upon changes in the environment to optimize the fulfilment of these goals. In order to maintain their functioning in a highly complex environment the administrative system creates model worlds of its surrounding world and seeks to steer its environment by means of the model. The success of this method depends on the information obtained for and from the model. Bureaucratic administrative systems ('bureaucratic' used as a descriptive not as an evaluative term), because of this method, have early recognized information as a power resource. The concept of control of power, however, in democratic societies implies the need for information on information. Information control is both needed to control the administrative system from the inside as well as from the outside: Meta-information is necessary for the political system and the social system to control the administrative system, but it is also important for the administrative system to optimize its functions and to preserve itself at its boundaries against demands from both the social and the political system. Against this background information law developed.

---

4) See LUHMANN,N. ,HABERMAS, J., Theorie der Gesellschaft oder Sozialtechnologie - Was leistet die Systemforschung, Frankfurt 1971; MACIEJEWSKI, F. (ed.), Theorie der Gesellschaft oder Sozialtechnologie, Beiträge zur Habermas - Luhmann - Diskussion, Frankfurt 1973; MACIEJEWSKI, F. (ed.), Theorie der Gesellschaft oder Sozialtechnologie, Neue Beiträge zur Habermas - Luhmann - Diskussion, Frankfurt 1974; GIEGEL, H.J., System und Krise, Beitrag zur Habermas - Luhmann - Diskussion, Frankfurt 1975; LUHMANN, N., Soziale Systeme, Frankfurt 1984

## 2. THE DEVELOPMENT OF INFORMATION LAW

Information law developed in three stages: data protection, access to information and comprehensive approaches.

In the struggle for control of the administrative system and in view of the extended use of information and communication technology by the administrative system, the social system took primarily a defensive approach at first. This resistance was adopted by the political system which, with regard to a specific segment of social information, personal information, produced data protection regulations to make the use of new technology more acceptable since, for the fulfilment of its general objectives, the political system relied on the use of these technologies by the administrative system. These regulations created (mainly static) inventories of information processing in administrative subsystems, submitted the administrative system to a process of legitimization with regard to information demands on the social system and established procedures of solving information conflicts which mainly resulted from the intention of the social system to withhold information from the administrative system.

This debate helped to revitalise another set of regulations which in part already existed in the non-electronic environment: access to information regulations. There were several reasons for this new interest in a legislative area older than data protection: most of the access regulations were still orientated towards the traditional paper file environment and had to be modernized. In some cases it was also feared that the administrative system might use the defensive line of the social system (data protection as a source of legitimacy for withholding information) for its own protective interests. Finally, one of the elements to provide acceptance in the context of data protection laws had been transparency, and this principle developed its own dynamics which could no longer be confined to the segment of personal information.

So the number of laws increased which demanded inventories not only of personal information but of information held by the administrative system in general, submitted the administrative system to a legitimization process with regard to information flows which were not intended to be directed to the social system and established procedures for solving information conflicts between the social and the adminstrative system by either involving the political or the judicative system.

In most cases this legislative development did not take place with the same rationality which this ideal-type description suggests. Hardly having solved frictions in both sets of information law, frictions resulting from too close an orientation towards technical appearance, or too little

use of analysis of social information flows, frictions occurred between both sets of regulations as well (5).

Since law has to provide, at least at medium range, some stability for decision making, in particular in an area with high investment costs, attempts were and are being made to create comprehensive legislation.

At this stage of information law development, which again has not been reached everywhere, a complete order of information flows between the social and the administrative system is envisaged, which makes optimal use of the information resources, creates procedures which produce consent to the provision of information, ensures acceptance of the technology used, allocates responsibilities, guarantees transparency, and seeks to establish controllability and security for information channels. The order should allow for a rational analysis of information conflicts, deciding them according to functional criteria (Which information is necessary for the propper functioning of which administrative (sub)system? Which information is necessary for the proper functioning of the social subsystem as a whole? How can information quality be guaranteed? How can information handling be optimized?)

During this development which was not everywhere as sequential and as stringent as described here, the political system, although envisaging information problems of its own with regard to both the administrative and the social system (6), usually tried to accommodate the interests of the social system and the administrative system without taking into account too strongly its own information interests. The political system usually assumed that its own interests were best served by a smooth functioning of the administrative system.

---

5) For details see BURKERT, H., Freedom of information and Data Protection EEC Joint Study on Data Security and Confidentiality (II), Volume F, Manchester 1983.

6) See f.e. BURKERT, H. Representative Democracy and Information and Communication Technology. The Malady, the Cure and its Effect. In:
Proceedings of Can Information Technology Result in Benevolent Bureaucracies, edited By SIZER, T.R.H., YNGSTROEM,L., BERLEUR,J., LAUFER, R., Amsterdam 1985

## 3. THE EFFECTS OF INFORMATION LAW

The main purpose as expressed in the motivations for the various information law activities had been improved control over the administrative system's information handling.

Control, however, is also necessary to the administration: Information and communication technology provided administrations with a tool to create and treat models of the real world. The quality of these models is -inter alia- dependent on information. The discovery of the helpfulness of the technology was also a discovery of dependence. To master the dependence bureaucracies increasingly needed information on information and information handling practices. Bureaucracies needed to know who, for which purposes, in which quantities, of which qualities, under which risks handles information in order to assign internal responsibilities, to evaluate their own 'information digestion' capacity and capability and to optimize their decision making processes within their organizational constraints.

In the course of the implementation of information laws information agencies have been created which usually fulfil the following functions: to provide oversights on those who handle information, to identify responsibilities, to control information processing purposes, to reduce information quantities, to observe and improve information quality, to observe and improve security. These functions coincide with the meta-information needs of the administrative system stated above.

Also the scope of the meta-information extended gradually: Not only information on the handling of personal information became relevant: in some cases personal information by definition includes information on legal persons. Non-personal public information is included via access to information or access to information and information protection legislation. As far as access information legislation affects information given 'in trust' to public authorities also this private sector information is included into the concept. And finally, at least partly, also procedural information (the right to know about and understand programs f.e.) is covered by some of the regulations. So information on information extended into all these areas.

The administrative system could profit from the meta-information provided by information law and from the extended scope of this information, because the information agencies had been designed as administrative subsystems, although with particular safeguards to defend their independence. There are reasons for such a solution which need not to be

discussed here (7), but as a result information laws, although addressed, so to speak, from the social and political system to the administrative system for external control purposes, seem to have served the need for self - preservation of the administrative system.

It has, of course, not been the main expressed purpose of these legislations to solve information dysfunction problems of bureaucracies by creating subsystems handling meta-information. But even with regard to the main intention of data protection regulations, i.e. to protect the informational self-determination capability of the individual (the goal of the social system), it can be stated that this capability in itself serves an optimization purpose: To the degree in which this capacity is furthered, the authenticity of the information provided and thus the quality of the information will increase. Furthermore this capacity has to be strengthened to maintain the communicative motivation in a process where communication is increasingly technically subsisted.

Access to government information regulations, too, although less affected by the technologically induced 'communication crisis', function as tools to improve information quality: they encourage information exchanges between the political system and the electorate by rationalizing information filters (the rule to legitimize secrecy with regard to specific communication processes) and they encourage administrations to take up an information resource management approach with regard to all kinds of information, not only personal information.

It is not an undesired effect of information law that the administrative system undertakes measures to check on its own information activities. A number of regulations explicitly demand f.e. internal administrative measures and procedures for these purposes. But these internal provisions would not be efficient without the activities of the meta-information agencies. It is the internal competition between administrative subsystems and the subsystem which specializes in meta-information, the information agency, which results in effective self-control of the administrative system.

This effectiveness in meta-information handling increases the difficulties for the social and the political system to check on the administrative system in an information and communication environment inspite of the existence of information laws. Although not all the administrative subsystems have reached the same degree of this effectiveness, this adoption of information law purposes to the advantages of the administrative system seems to be an inherent trend.

---

7) For details see: BURKERT, H.,Organization and Methods of Operation of Data Protection Agencies, EEC Joint Study on Data Security and Confidentiality (I), Manchester 1980

## 4. THE PROBLEMS OF INFORMATION LAW

This description is, of course, of an 'ideal type' nature. There has been resistance by the administrative system against the implementation of information laws. These frictions may be regarded as indicators of power conflicts between the social and political system on the one side and the adminstrative system on the other side, as well as indicators of conflicts within the administrative system between 'information conscious' and 'less information conscious' subsystems of public administration.

### 4.1 CONFLICTS WITHIN THE ADMINISTRATIVE SYSTEM

It seems to be the experience of many of the information agencies that it is easier to negotiate conflicts arising from their meta-information tasks with such agencies which are highly aware of the value of information and are familiar with information and communication technology than with 'less advanced' agencies. Partly, it seems because the advanced agency and the information agency are able to communicate in the same information power orientated code.- 'Easier to negotiate', however, does not mean 'easier to convince'. Since advanced agencies are information power orientated they know what they fight for when they resist meta-information control. But since the negotiation process with advanced agencies (in which functional arguments are often used instead of the publicly expressed intentions) allows to identify the nucleus of the conlict more clearly and faster, conflicts can be effeciently transferred to the appropriate system for decision. In most cases this decision will be taken within the administrative system. Only rarely and only after additional safeguards and filtering it will be transferred to the political system.

This is the result of the administrative strategy that in view of the importance of meta-information, the creation and control of such information should be kept within the administration as a whole, even when it is to be shared with the specialized information agencies.

There is, however, also a tendency of these specialized agencies to segregate from the administrative system and to establish themselves in a sphere between the political and the administrative system. This is a result of the fact that their functions serve both systems and that they develop their own strategies of power and influence. It is the political system which most likely could profit from this process. Even if the administrative system or at least its most advanced subsystems are more apt in profiting from these functions, the political system in most information

regulations is already connected to the flow of meta-information created by these agencies (f.e. it receives and may order reports). In some cases the political system is represented within the agency (f.e. within its board). In other cases the political system can, at least initially, influence on the choice of its responsible agents.

The outcome of this segregation process which will be crucial for the balance of information power in society is not altogether clear (8). For the time being it seems that the information agencies may still be viewed, although as a special, but nevertheless inherent part of the administrative system.

## 4.2 CONFLICTS BETWEEN THE ADMINISTRATIVE AND THE SOCIAL AND POLITICAL SYSTEM

While difficulties occur between less advanced administrative subsystems and the meta-information administrative subsystems because of different degrees of information consciousness, a similar problem occurs in the relationship between the administrative system as such and the social and political system.

Information laws in their present format do not sufficiently create procedures in which the political content of information power conflicts is being debated. There is the danger that the political contents disappears behind a screen of legal technicalities which then are eagerly 'administered' by the information agencies.

At first sight this may seem helpful to avoid painful confrontation and dysfunction. This seems to be particularly useful in a time when the economic system is increasingly dependent on information and communication technology and when the dissociation of this technology from political conflict may help to smooth its implementation. In the long run, however, the de-politicalization of information conflicts by information laws in their present form creates a long-term risk of discrepancy between the demands of the social and the political system which rely on the the model world of the administrative system. It may thus lead to dysfunctions even more difficult to handle and which finally affect the economic system as well.

---

8) See BURKERT,H., Datenschutzbehörde als Kontrollinstanz der Information? Einige informationspolitische Anmerkungen zur Rolle der Datenschutzbehörden in den 80er Jahren.In: österreichische Gesellschaft für Informatik (ed.), Informationssysteme für die 80er Jahre, Linz 1980, Vol. I, pp.354-363

## 5. PERSPECTIVES

There is a development towards 'second generation information laws' (9) in an era of fifth generation computing. The structure of this new generation of laws is not clear yet. Information law will still generally have to reach the stage of the comprehensive approach. Some indications of the new possible structure, however, already seem to be visible.

The political system will more strongly be involved in information control. While it had been content with transforming demands of the social system into frame conditions for the administrative system, it gradually discovers its own demands for meta-information to strengthen its position in relation to the administrative system (10). The political system may therefore develop an interest to reformulate information conflicts as political conflicts. This interest may coincide with the interest of the social system to be more often and more strongly involved in the consensus process with regard to the implementation of administrative information systems. The accentuation of the 'purpose' in recent data protection debates following the Council of Europe's Recommendation on data protection, seems to be an indicator of this development. Current difficulties with this concept by administrations, including the meta-information agencies, seem to indicate that the functional performance of the political system is needed. In this context it is probable that information law will increasingly provide procedures in which the implementation of information systems intended by the administrative system is debated in a way which ensures that the consensus intended and reached is a result of the political rather than the adminstrative process.

As internal information control mechanisms will develop further within the administrative system, the present internal competition between the administrative subsystems specialized in information and the other administrative systems may reach a degree at which these information agencies will more strongly seek the contact with the political system even if there is danger that they may be isolated from their administrative environment. This development will also depend on their position with regard to the economic system, i.e. their involvement in producing

---

9) See RODOTA,S., The Social Challenge of Information Technologies, Position Paper (Position 2) for the Working Session 2 : Vulnerability of the Individual and of Society, 1984 and beyond, International Conference organized by the Government of the Federal Republic of Germany in Cooperation with the OECD, Berlin 1984

10) Only very few information regulations contain provisions affecting the information relationship between parliament and the executive.

meta-information on private sector information handling. There seem to be indications that where information agencies had such a mandate at all they are withdrawing from this area to concentrate on the administrative 'power game'.

Finally the technological development should not totally be neglected: The administration of information conflicts is itself open to the application of information and communication technology. Applications are feasible which would give the f.e. the individual a more direct control (via terminal f.e.) over the personal information handled by organisations. New media services may also be used as new and contents rich communication channels between the social, political and administrative system and may thus contribute to individualize the exchange of meta-information and lower the demand for specialized agencies.

The political system will seek its share in controlling the outcome of this development, so in all we may experience, in spite of the 'information age' a reformulation of 'information conflicts' as 'political conflicts'.

# TOWARDS A REDEFINITION OF PRIVACY

Katherine J. Day
Department of Sociology
University of Edinburgh

March 1985

I am fully aware of the need to justify the search for another definition of privacy when more than two hundred can be culled from Anglo-American sources alone. Are we not already suffering from a glut of formulations, and anyway how much does the way in which privacy is delineated really matter? To accept these legitimate questionings of the enterprise would be however to overlook the importance and ramifications of conceptualization and articulation. The form of words chosen to describe privacy determines whether the phenomenon is readily and accurately identifiable, frames perceptions of how the world works, and lays down the terms in which policy discussions will be conducted. If it turns out that existing definitions are not entirely satisfactory in their encapsulations of privacy or the world, and often fail to facilitate the debate and resolution of pressing practical issues, then strong grounds are provided for wanting to move towards a redefinition of privacy. This paper suggests that such compelling reasons do exist and puts forward for consideration a new and perhaps more adequate version of privacy.

Before entering upon the implications of particular formulations, attention should be given to claims that the definitional task is in itself unnecessary, doomed to failure, or a diversionary tactic. Since privacy is a familiar term in everyday use, there is a real temptation to regard the expression as self-explanatory. But when supposedly common understandings are formalized differences of opinion as to the meaning of privacy soon emerge, so that the onus is firmly and squarely put on those setting out to explore the subject to be explicit and

terminologically unambiguous. Otherwise misapprehensions will undoubtedly arise and discussions are likely to be carried on at cross-purposes. Yet some observers, among those persuaded of the desirability of definition, find themselves with little confidence that it can be done and have been led to conclude that the mission is impossible. Worries are expressed that privacy cannot be 'captured' because it is a catch-all rubric devoid of core properties, arouses strong emotions, and is unduly subject to normative change. In the face of these misgivings some optimism can be salvaged by noting the distinction between the enunciation of a legal entitlement and of a precept which are equally challenging but not the same proposition nor beset by identical difficulties. Whilst a legal formulation would have to grapple directly with the issues raised, the problems of describing privacy's domain centre on identifying consistencies and allowing for variabilities, so as to provide a delineation that combines an ample enough ambit with a sufficiently sharp cutting edge. A risk attendant upon involvement in any type of definitional task is that of getting semantically entangled and not progressing any further. In Alfred Cobban's view,(1) the weakness of much social thought is the tendency to become preoccupied with packing a bag

---

(1) See Alfred Cobban, **The Social Interpretation of the French Revolution** (Cambridge: Cambridge University Press), 1964, p.23.

or with working out a general theory about the way a bag should be packed for a journey which is never actually taken. As regards the topic of privacy though, the trouble seems to have been rather differently located in that all too many journeys have been taken before the conceptual baggage has been properly inspected.

Once convinced that definition does constitute a worthwhile undertaking, a closer inspection of the specific ways in which privacy has been conceptualized can begin. Among the array of definitions collected the majority are inclined as anticipated, to endorse the Westinian approach, projecting privacy as the right, freedom or claim of the individual to self-determination in respect of when, how, and to what extent, personal affairs are exposed to others. There are variants on the theme and though very much moulded by the traditions of classic liberalism, not all are outright Hobbesian. Indeed Westin himself seems to vacillate somewhat, generally allowing for "only extraordinary exceptions [to privacy] in the interests of society"(2) which would suggest society is opted into whilst occasionally implying an opting out by construing privacy as "the

---

(2) Alan F. Westin, **Privacy and Freedom** (London: Bodley Head), 1967, p.42 "this is the core of the 'right to individual privacy' - the right of the individual to decide for himself, with only extraordinary exceptions in the interests of society, when and on what terms his acts should be revealed to the general public".

voluntary and temporary withdrawal of a person from the general society".(3) In view of the differently shaded stances taken and signs of some internal consistency, it would be misleading to make out the Westinian-type definitions to be monolithic, by exaggerating its standardization and dominance. But there is no getting away from the individualistic thrust, as regards the realization of privacy and the constitution of society, behind what is a common and popular interpretation. At its most extreme, it is as if privacy were (or should be) a unilateral accomplishment invokable at will without the acquiescence or cooperation of others. This makes me uneasy because the evidence indicates that, while individual discretion operates at the point of choice as to when and whether to avail oneself of privacy, the existence and character of privacy options are socially conditioned and interpersonally negotiated. Privacy does represent release from the power of others' knowledge and influence, yet is a pro-tem disengagement more of a 'time-out' which carries no threat of severance and allows for ready reincorporation because community affiliation continues on. The beneficiary is dependent on the forbearance of confederates, prepared to grant amounts and kinds of privacy according to their

---

(3) **Ibid.**, p.7, "Privacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve".

reading of what is warranted by the details of the occasion. The view I prefer to take of privacy should not be thought of as altogether consensual since there is plenty of scope for conflicts to arise. But it is at odds with the image of autonomous agents battling over and against the demands of a society which would otherwise encroach. As long as such images are maintained, the see-sawing arguments about what pertains to the individual and what to society, with which much of the privacy debate is riddled, will continue to be waged. Moreover, when commitment to privacy is incorporated into a definition, adherents are discouraged from even-handedly discussing the merits and disadvantages of specific types of privacy obtaining between particular parties. There is a tendency to get hung up on defending a 'right' come what may, instead of getting down to examining the important policy questions of whether privacy boundaries are being appropriately drawn and where the determining power does or ought to reside. Rather than asking "in which ways are we individuals and in which ways are we social beings", the more productive question proposed by Alan Dawe is "how do we communally provide for which versions of individuality?".(4)

Having made clear the sources of my dissatisfaction with one set of definitions, it is time to consider versions which make

--- --

(4) Alan Dawe, "Theories of Social Action", in **A History of Sociological Analysis**, eds. Tom Bottomore and Robert Nisbet, 1979, 362-417, p.410.

different, and in many cases more congenial, assumptions or assertions about the nature of privacy and society. The fact that a goodly number of dissenting accounts already exist, may well come as a surpriseto those not on the look out for alternative formulations, especially because ranges of definitions are rarely assembled and subjected to scrutiny. The literature on privacy tends to be multi- rather than inter- disciplinary, with surprisingly little cross-fertilization of ideas or integration of findings. In any event the somewhat reluctant conclusion reached, after combing through and assessing the remaining assortment of definitions, was that ready-made would not do. None quite measured up to what I was looking for in order to get a good handle on privacy. There was something wrong, be it a 'sin' of commission or omission, with their form, coverage or contents. Of course there were elements in many descriptions which reminded me of what was worth stressing or alerted me to features that ought to be included and combined anew in a redefinition. As regards the form taken by representations of privacy, the most successful find some middle way between terseness and fulsomeness. The attractive economy of short, sharp, synonymous expressions for example, is outweighed by disappointment that, because no further identification rules are given they assert too much and tell too little. On the other hand, a definition cannot afford to be very elaborate if it is to gain currency. The other balance which an efficient portrayal has to strike, and which entails similar trade-offs, is between the exclusiveness and inclusiveness of its coverage. Writers intent on activating public concern about a particular aspect

often depict privacy too restrictedly by treating one facet, such as the transfer of information between individuals and organizations, as if it were privacy's only arena. Other commentators are over expansive and resort to making open-ended claims about privacy's scope that are equally misdirected. When it comes to evaluating the content of definitions in terms of what they do or do not say about privacy, the touchstone is of course such empirical knowledge as we have. Also involved are choices as to which of many phenomenological characteristics should be definitionally highlighted. What I picked out as especially valuable from among the contributions made by existing definitions, will become apparent when my version is presented and will be justified then. But some observations about what I thought was generally lacking, will help explain how the definition finally arrived at came to be forged.

In particular, none of the available definitions gave me a strong enough sense of the way privacy is at one and the same time both highly problematic and patterned. The problematic quality exists at cultural normative and personal levels. The privacy precept is by no means always part of the behavioural repertoire, for certain features of social organization and perception may be unconducive to its establishment or endorsement. If culturally 'in play' the availability of privacy is conditioned by the appropriateness of the prevailing circumstances and the kinds of options that exist will be normatively shaped. Expectations aroused have to be endorsed by the participants

concerned and only when interpersonally sanctioned is privacy realizable. There is thus nothing automatic about privacy outcomes, but by the self-same token that they are socially nested, neither are they random events. Even though the causal connecting up that goes on in definitions or for which definitions prepare the ground is sometimes suspect, it usefully emphasizes that the occurrence of privacy is not haphazard. When my thesis turns to investigate the factors which account for privacy's incidence, the 'findings' dispute only the details not the reality of their systematic patterning effects. The investigation of privacy's cultural supports, for example, conducted both theoretically and through a case study of British experiences, questions whether the frequent linkage of the viability of privacy to society being 'civilized' or 'modernized' tallies with the evidence. Privacy is not unknown in 'undev loped' habitats nor always well regarded in 'developed' settings. The counter suggestion made is that the possibility of privacy is provided for by a modicum of differentiation between people and between spheres of activity which is not ideologically discouraged. In discussions of how the distribution of the privacy option and the forms it takes are shaped by aspects of people's identities, relationships, and environs, the problematic yet patterned character of privacy surfaces once again. A definition could call attention to these somewhat neglected attributes by specifying criteria which must be met in order for privacy to obtain. But most definitions fail to do so, setting me to wonder whether prospects might be improved by posing and responding to the question 'when' is privacy. The idea of

switching from asking 'what' is privacy to locating the 'when' of privacy, is advocated by Constance Fischer, who insists that "our description of privacy must take the form of Privacy is, when: (such-and-such a matrix exists)". Apart from avoiding the dangers of essentialism, the interogative shift puts the emphasis where it is wanted, on the distinctive characteristics of the phenomenon and not the status of the term. Definition makers themselves often shy away from bald 'privacy is' pronouncements, substituting verbs and phrases such as entails, has to do with, implies, includes involves, represents, refers to. The adoption of 'when' concentrates the mind on detailing the dimensions along which and the limits within which, privacy can vary without becoming something else. It elicits explication of the circumstances that give rise to the precept becoming available and that influence the forms taken by the option.

This is my point of departure from customary approaches to privacy and it is clearly unfair to go on picking holes in the definitions already on offer without being prepared to bring forward and support what I would put in their place. The search has been for a definition whose partiality and bias help rather than hinder the effective pinpointing of privacy in ways compatible with what is known about privacy and conducive to the expansion of understandings, both about the phenomenon and how best to tackle practical problems concerning privacy. This is a tall order and, though convinced that what I have come up with improves sufficiently on its predecessors to be worth presenting

it is submitted very much as a focus for discussion, another formulation to critique. For a large part of my purpose has been to provoke us into examining the strengths and weaknesses of whatever representations we are wedded to. My contention is that privacy can be accurately and usefully thought of as when access **between persons and contextual outsiders is intentionally and acceptably restricted.** By briefly explaining what the key words are intended to convey, the claims made about privacy and society at large will become evident and the formulation will be rendered more amenable to critical evaluation.

The use of **access** to describe what is regulated when privacy obtains is meant to cover all types of contact and communication, direct and indirect, involving stimuli transmitted by any of the senses to, from or about the target person. Restrictions are placed on the egress or ingress of written and verbal information, the sight and sound of activities, which would otherwise occur whether face to face or via some intermediary. This comprehensiveness accords with the great variety of transactions that can be blocked in different ways by the implementation of privacy. The insistence that privacy is when access is **restricted**, the accompaniment of techniques to reduce access and make some potential accessories non-participant is a reaction against more equivocal accounts. Attempts are sometimes made, especially by commentators who equate privacy with 'choice', to either extend or convert privacy from an exclusion to a sharing mechanism. The insulation that privacy effects is thereby confused with the sharing of intimacies with unaffected others

that may well be enjoyed as a consequence. The actual restriction of access can be realized whether alone or in company, by any practically and conventionally available means of disengagement, physical or symbolic. The option and sometimes obligation to restrict access in these varied ways, is said to reside with those socially recognized as **persons**, as distinct from those who have not attained or have forfeited the status. It affects relationships with other parties who accept their classification as **contextual outsiders**, so that boundaries are constantly being drawn and redrawn between legitimate insiders and excluded outsiders, according to the deta is of the occasion. The cutting off of outsiders from access to the person or of the person from the impingement of outsiders, is **intentionally** sought and achieved, a conscious experience rather than a passive, unintended state of being. We speak of privacy, as Shils points out,(5) when there is a feasible alternative, where actions or words can be withheld or disclosed spaces can be inviolate or intruded upon, situations can be disregarded or observed. There is a creative deliberateness about the realization of privacy, which is sustained only in circumstances and for so long as the parties concerned are prepared to accept it as legitimate. For

---

(5) See Edward A. Shils, "Privacy: Its Constitution and Vicissitudes", **Law and Contemporary Problems**, 31, Spring 1966, 281-306, p.281. John P Sisk, "In Praise of Privacy", **Harper's Magazine**, 250, February 1975, 100-107, p.107, makes a similar point when he says that "privacy assumes the existence of other options not taken up and against which it defines itself".

implementation depends on the collusion of the excluded inasmuch as their forbearance provides personally mediated validation of social legitimacy, based on perceptions that the who, what, when, where, how, and why particulars warrant the abridgement of access. Hence the stipulation that when privacy exists access is acceptably restricted, be it enthusiastically or grudgingly, according to readings of whether or not the kind of privacy mooted is appropriate in view of the specific conjunction of the people and interactions affected, the timing and the setting, the means utilized and the likely purposes served.

The whole formulation arises out of a conception of privacy as an exceptional event, providing for dissociation that because of how it is brought about makes reference to the social basis of human existence. Privacy which has to do with being incommunicado and out of touch reinforces interpersonal involvement by its socially sanctioned character. In this sense the portrayal of privacy is unabashedly sociological and just as I take the uncompromisingly interactionist stance adopted to be one of its prime virtues, these could be the very grounds on which others would want to reject it. There are a couple of other reasons which might well be advanced for not favouring the definition. The first echoes my own reservations as to whether in the process of being pared down so that it will be an economical tool, the formulation has become too dense. There is a case to be made that the distillation has been taken a stage too far, so that the loaded meanings of each constituent have been submerged. If a gloss is needed to make it clear, for example, that

'acceptable' should not be taken to imply a consensus view, then further reworking is required so as to 'decode' the definition. The other question of whether the conceptualization of privacy along the lines suggested would reorientate discussion of practical matters as beneficially as anticipated, cannot be settled in advance. It seems that the notion of contextual insiders and outsiders, and thinking about where the authority to draw distinctions between them is presently lodged, would spotlight the power related issues which lie behind much of the privacy debate. All I can vouch for is its usefulness in the historical and more analytical investigations of the concomitants of privacy's incidence pursued in my thesis. When exploring, for instance, how and why certain structural and affective features influence privacy practices within various types of relationships, the insider/outsider framework proved a powerful explanatory lever. Moreover, nothing discovered in the course of those investigations cast doubt on the reasonableness of viewing privacy as when access between persons and contextual outsiders is intentionally and acceptably restricted. It is certainly not hard to justify interpreting privacy more widely than physical seclusion (by describing the symbolic means routinely employed in our own and ther societies), or linking privacy entitlements to definitions of personhood (by showing how those not so recognized are unlikely to be accorded privacy or shown deference by others exercise of it). But I will wait to see what else you think needs to be defended ...

# Limiting Governmental Surveillance and Promoting Bureaucratic Accountability: The Role of Data Protection Agencies in Western Societies

## ABSTRACT

This essay argues that data protection agencies promote bureaucratic accountability and limit government surveillance with respect to personal information practices in the public sector. Data protection agencies have been created to oversee the implementation of data protection (privacy) legislation. They promote bureaucratic accountability by reporting on information practices of the bureaucracy to the legislature and the public; and they limit governmental surveillance by ensuring that personal information is only used within the terms of data protection laws. Analysis of the operations of data protection agencies identifies four key variables: the nature of the legislation, the operating style of their personnel, the willingness of government to restrict its information practices, and, most importantly, the extent to which data protection and privacy remains a significant political issue.

The author concludes that where data protection legislation gives the agency an appropriate mandate, where agency personnel have an activist perspective, where government does not face pressures to misuse personal information, and where the public recognizes data protection to be a valuable activity, that the agencies will continue to perform their important tasks.

by
David H. Flaherty

Professor of History and Law
Privacy Project
University of Western Ontario
London, Canada N6A 5C2

European Consortium for Political Research, Workshop on Confidentiality, Privacy and Data Protection, Barcelona, March 25-30, 1985.

This is a revised version of a paper prepared for delivery at the 1984 Annual Meeting of The American Political Science Association, Washington, D.C. August 31, 1984.

> There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was conceiveable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live - did live, from habit that became instinct - in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.
>
> Orwell, Nineteen Eighty-Four, p. 6.

## 1. Introduction

Every Western society is undergoing an extraordinary process of rapid developments in the application of technology to the processing and transmission of personal information. Computers, telecommunications equipment, satellites, cable and telephone wires, and fibre optics are becoming inextricably linked. One product of these technological changes is a vast growth in capacity of both the public and private sectors to collect, store, and exchange personal information. The introduction of new applications of the technology and of new uses for automated personal information systems is a commonplace occurrence. One of the most significant responses to these innovations is the continuing expression of concern by the general public about the fate of their personal privacy in an information age.[1] Even given the amorphous character of the concept of privacy that most people hold, it regularly emerges in public opinion surveys and general discussions as the all-encompassing word that individuals use to express their anxieties about computers. Information technology poses a significant challenge to the desire of individuals to be left alone and to control the uses of information about themselves.

Faced with the widespread introduction of computers, the general public has been expressing concern since the late 1960s about the fate of privacy as a fundamental value. The primary initiative of legislatures in Western Europe and North America in the last fifteen years has been to enact privacy and data protection laws and to create privacy and data protection agencies or agents to oversee the implementation of the legislation in the public sector and, sometimes, in Western Europe, for the private sector as well.[2]

This essay will evaluate the institutional role of data protection agents and agencies (in which term I include Privacy Commissioners and Privacy Protection Commissions) in the process of promoting bureaucratic accountability and limiting surveillance of the population by means of overseeing governments' personal information practices. The analysis presented here is based upon research on data protection practices in Western Europe and North America, begun in the mid-1970s, which has been relatively intensive in six countries since 1980.[3] Since, among the countries I have studied, only Sweden, West Germany, and France have had at least five years' experience with data protection agencies, my findings depend mainly on experience there, coupled with the negative experience of the lack of a full-fledged federal data protection agency in the United States. The essay examines the strengths and weaknesses of the data protection agency approach to promoting accountability and limiting

surveillance and concludes that the long-term success of such a positive approach is in no way assured.[4]

## 2. Definitions

Promoting bureaucratic accountability in data use and limiting governmental surveillance of the population are at the heart of the functions of data protection agencies. With respect to accountability, bureaucrats tend to be sheltered from direct electoral sanction and at times from effective executive, ministerial, or legislative oversight, due to such factors as bureaucratic control over information, the workload of elected representatives, and the tenure in office of senior civil servants. The issue of accountability vis-à-vis information is critical, because bureaucrats seek data on individuals to design programs, to monitor implementation of programs, to evaluate programs, to augment their prestige/power, and, as a product of a technological imperative, simply for the sake of utilizing fancy hardware and software programs. Bureaucrats, thus, tend to be a major source of government initiatives in information collection.[5] Accountability with respect to limiting governmental information surveillance means that bureaucrats must in one way or another answer to the data protection agency when making decisions about information collection and use, as a means to guarantee the individuals' right to control the uses of information about themselves.

Surveillance is understood to mean supervision or close observation. This definition is too narrow to give a meaningful description of governmental surveillance, because information management in the age of automation means that detailed surveillance of individuals can be carried out either at the time of applying for or complying with a program or on an **ex post facto** basis. The personal histories of individuals are thus available for immediate scrutiny at any time, and aspiring bureaucrats are constantly inventing new ways of using existing data for other administrative purposes, whether to enforce existing mandates of an agency or in response to new governmental or legislative directives. Thus surveillance in the context of this essay should be thought of more generally as a multi-stage process of information acquisition, storage, transfer, and use. Data protection agencies seek to influence all four stages of surveillance by promoting accountability.

## 3. Data Protection Agencies

The West German state of Hesse passed the first general data protection law in 1970, followed by Sweden with the first national statute in 1973.[6] The censuses of population around 1970 had produced the most overt manifestations of public concern for privacy, primarily in response to census questions that were regarded as overly intrusive or clumsy collection mechanisms, such as that of the U.K. which required tenants to give their completed forms to a landlord.[7] Between 1970 and 1975 such countries as Sweden, the U.K., the United States, Canada, and France launched national study commissions to evaluate the apparent problems of "computers and privacy." All of the resulting reports, which were more reassuring than alarmist in character, led to national legislation, in the following order: Sweden (1973); United States (1974); Federal Republic of Germany (1977); Canada (1977); France (1978); and the United Kingdom

(1984).[8] Such laws have either been revised at least once (Sweden, Canada), or the complex process is now underway (West Germany).[9]

Data protection legislation was not passed in response to significant public pressure for laws, but in response to general expressions of concern. Episodes, such as Le Monde's reporting on March 21, 1974 of the government's plans for "Safari: or the Hunt for Frenchmen," a type of national data bank, alarmed the public and led the French government to create a study commission, but the primary impetus to legislation was the recognition by a select group of legislators and specialists in data processing and law that a general problem seemed to exist concerning "privacy and computers" and that it should be dealt with in a responsible and anticipatory fashion. That Sweden has a built-in mechanism of study commissions for identifying and evaluating such problems helps to explain its leading initial role and continuing influence on the international movement for data protection. The current director of the Swedish Data Inspection Board (DIB), Jan Freese, has been active on this issue since the late 1960s. The Canadian Parliament took its time revising the privacy provisions in Part IV of the Canadian Human Rights Act of 1977, because the public pressure on politicians to create what became the Privacy Act of 1982 was negligible.

Other than the fact that the public favors improved privacy protections, if asked, data protection in its origins and implementation is a complicated and specialized issue. The 1982 Canadian Privacy Act, like its predecessor, is primarily a product of lawyers in the Department of Justice, influenced by the 1974 American legislation.[10] The U. S. Privacy Act of 1974 has not been revised, despite its manifest deficiencies in implementation, because of the perception of federal politicians and Congressional staff that no national constituency exists to support such an enterprise, especially after the failure of President Carter's privacy initiative in Congress and the advent of a conservative administration in 1981. Thus, one problem for data protection agencies is that they have been created without major public pressure, and yet they are highly dependent upon the threat of appeals to the general public to fulfil their mandate in, for example, countering a government or legislative initiative that poses a major threat to personal privacy. Effective implementation is critical to good data protection, yet even legislators pay inadequate attention to the results of this process. The general public presumes that the existence of a Privacy Act and, especially, a Privacy Commissioner means that their privacy is being adequately protected.

Although it is commonly accepted that a data protection law should fit the constitutional model of a particular country, the resemblances among the various laws are greater than the differences. They generally treat personal information practices in the public sector, incorporate a code of fair information practices, and create an institutional mechanism to implement the law. The latter is the most critical element of the legislation, as evidenced by the results of the failure of the United States Congress in 1974 to include the Senate's proposal of a Privacy Protection Commission as a continuing oversight agency in the compromise version of the Privacy Act.[11] The data protection agent or agency is generally granted considerable independence from the government and a mandate to oversee its personal information handling practices through

regulatory or advisory powers. In Canada and West Germany this power to intervene is advisory; in Sweden, France, and the United Kingdom the agency has either licensing or registration power over all automated and, in some cases, manual information systems.

All data protection laws share a central core of goals, which are encapsulated by the term "fair information practices." The influential OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980) summarize the basic principles of data protection in the following terms: collection limitation, data quality, purpose specification, use limitation, security safeguards, openness, individual participation, and acountability.[12] One critical point is that governments should only collect essential personal information and use it for approved purposes.

## 4. The Role of Data Protection Agencies: Promoting Bureaucratic Accountability

Bureaucrats are rarely directly accountable to the data protection agency for their information-handling practices. For example, they do not always have to notify the data protectors about plans for data collection, unless, as in France, the agency has to render an opinion on a government proposal to create new information systems. The head of a government agency usually has the legal responsibility for ensuring compliance with data protection laws within his or her own bailiwick; but the data protection agency can either intervene to license, register, or advise on information systems or to ensure that a ministry is complying with the law. Data protectors in Canada and West Germany, for example, initially take unresolved problems to the head of an agency and attempt to deal with the issue through further negotiation. Data protectors also submit annual reports to the legislature and may make special reports if their usual process of negotiated compromise fails to resolve a particular problem. If the law does not permit the data protectors to regulate, the legislature may have to intervene to settle a particular case. This process is most evident in West Germany where any personal data collection requires a special detailed law.

Thus, bureaucrats know that failure to comply with the law or negotiate in good faith with the data protectors will come to the attention of the legislature, to which they are accountable, in one way or another.[13] To date, data protectors have used their annual reports as the primary vehicle for analyzing the state of data protection. The annual reports of the Federal Data Protection Commissioner in West Germany and his eleven state counterparts are excellent models in this regard. Significantly, the power to make special reports on an ad hoc basis is rarely used, except in reporting on a specific complaint. Both the regulators and the regulated want to avoid a public test of this sort, because of the potential political ramifications. Since data protection involves balancing competing interests, such as efficiency and privacy, there is a real risk in any particular case that the government or the legislature will not be as favorable to privacy as data protectors are likely to be.

Data protectors, especially those that lack regulatory power, have to rely heavily on the threat of appeal to the public through the media in

order to make themselves effective in difficult situations with either a government department or the legislature. During the "honeymoon" phase in each country, which appears to last at least five years, appeals to public consciousness have been successful, to the extent that they have encouraged the civil service to comply with data protection directives rather than risk overt accusations of non-compliance. Data protectors have enjoyed good relations with the media in the first years. For example, the brief first annual report of the Canadian Federal Privacy Commissioner under the 1982 Privacy Act was front-page news across Canada in early July 1984.[14]

Data protectors have enjoyed very good relations with their legislative masters during the first years, which has added to their credibility within the bureaucracy. The fights of data protectors are primarily with the government and its civil servants, not the legislature. Bureaucrats and their political masters tend therefore to be vulnerable to appeals to the public, because the media attention associated with the issue of protecting privacy makes it attractive for opposition politicians to adopt and difficult for government ministers to ignore. Just as the general public vaguely fears the end of privacy, so it appreciates politicians who draw attention to its erosion. Thus incumbent governments tend to be sensitive to such charges, while the media find allegations of invasion of privacy to be newsworthy.

Another way in which data protection laws and agencies promote bureaucratic accountability is to permit and facilitate access by individuals to data about themselves in government hands. French data protectors refer to this activity as promoting the "transparency" of governmental activity. By granting people access to their own data, the process of data protection promotes open government. Data protectors normally maintain and/or publish, or at least ensure the accuracy of, indexes to systems of personal records maintained by government agencies. Individuals seeking access to their own data can seek general guidance from the data protection agency, or appeal refusals of access to the data protection agency and ultimately to the courts, as under the Canadian Privacy Act of 1982.[15] Data protectors also publicize the relevant statute and their services, as in the widely-circulated German pamphlet on The Citizen and His Data. Data protection experts at the Bellagio conference in April 1984 strongly agreed that the right of individual access to personal information was an important mechanism for data protection: "The salutary affect that the mere existence of access rights is likely to have on record-keepers, the importance of such rights to persons who are concerned or suspicious at the possible content of government records concerning themselves, and the importance of access rights to those who are the subject of administrative decisions were all mentioned as rationales for continuing emphasis on this aspect of data protection."[16]

It is rare that bureaucrats are required to justify operational decisions in public; data protection laws often mean that courts will back the legal right of citizens to an accounting. Both the American and Canadian approaches envisage litigation in some cases of non-compliance with the legislation; European models differ. The remedies they provide involve one or more of the following: criminal penalties for refusal to observe the terms of the law, civil liability for damages resulting from non-compliance, and the general right to appeal administrative decisions.

Thus, such public access tends to make the bureaucracy accountable to the public for the quality and use of records in its possession.

## 5. The Role of Data Protection Agencies: Limiting Surveillance

The OECD Guidelines are an apt summary of the ways in which data protection laws and agencies can contribute to the restriction of governmental surveillance of individual citizens.[17] Perhaps most important in this respect is principle 7, which states that "there should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject." Principles 9 and 10 require that personal data should only be collected and used for purposes that are specified at the time of collection.[18] National statutes frequently restate these principles in an even stronger form. For example, section 4 of the Canadian Privacy Act states: "No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution." The insistence on informed consent by data subjects is another critical concept. The OECD principles further require that data practices should be publicly known and that reasonable security measures should protect data from unauthorized use or access. Thus the bureaucracy faces various controls on personal information practices.

More generally, because data protection agencies can bring sensitive information acquisition and management schemes to the attention of the press and the public, it can be very difficult for a government, from the outset, to establish the technological superstructures that such new schemes require. Thus, even though data protection agencies may lack the authority to stop government information collection on their own, they do draw the attention of the legislature and the public to the information surveillance activities of the government, thereby limiting the political feasibility of such activities.

## 6. How Data Protection Agencies Fulfill their Statutory Roles

The primary activity of data protection agencies is reviewing the collection and use of personal information by government agencies. This takes the form of regulatory and/or advisory powers. In Sweden and France all systems of personal information in both the public and private sectors need to be licensed in effect by either the DIB or the National Commission on Informatics and Freedoms (CNIL). The original Data Act mandated universal licensing for Sweden; the 1982 revisions fall back from this position to more selective licensing and registration. In France the government presents proposals for new information systems to the CNIL for its advice and approval, which approximates a licensing system. The 1984 British law opts for a system of registration of information users rather than licensing, although the practical differences between the two approaches seem modest. The critical factor in the U.K. will be whether the Data Registrar adopts a passive or active approach implementation; such a critical choice will be deeply influenced by the background, experience, and philosophy of the incumbent.

An alternative model to licensing exists in West Germany and Canada, where data protectors have only the right to give advice on personal information use. Thus the Federal Data Protection Commissioner in West Germany has the duty to see that the provisions of the 1977 law are observed, but his power is restricted to making "recommendations for the improvement of data protection," and advising the federal government, individual ministers, and other public authorities.[19] The Canadian Privacy Commissioner primarily advises, audits, and reports to the legislature and the general public.

Because it was fear of computers that led to their enactment, data protection laws tend to concentrate on automated systems, although critics argue, correctly, that manual records can be equally invasive of personal privacy. The failure to include manual records, as in the 1984 British Data Protection law, is primarily a pragmatic decision based on the heavy workload involved in registering users of automated personal data. Fortunately, the incentives to automate are so pervasive that this particular problem of manual records is becoming increasingly moot, except perhaps for the most sensitive applications involving small numbers of people. Because of the large numbers involved, major administrative data systems almost have to be automated for reasons of efficiency. The prospect of officials maintaining sensitive data in their own personal computers is simply an example of another type of problem facing data protectors in their efforts to control information use in a rapidly-expanding technology.

The role of the data protection agency in reporting to the public, the government, the legislature, and the press has been discussed above. In addition, data protection agencies are required to act as information ombudsmen to receive specific complaints about data-handling practices from the general public or from legislators. Although complaints have not tended to be numerous, they serve as a safety-valve for the concerned public and a guide to the overburdened agency as to the timely expenditure of its limited resources in certain areas. Bureaucrats are aware that they risk audits and investigations launched by citizen complaints; however amicable the approach, government agencies dislike either detailed scrutiny or intervention by data protectors, if it can be avoided. Citizens who perceive that they are subject to "unjust" surveillance have a source for redress of their perceived grievances. Even if a complaint falls outside the mandate of the data protection agency, it is in a position to make informed referrals to other sources of assistance, as in the standard ombudsman model.

An especially critical function of the data protection agency is the conduct of independent investigations, inspections, and audits of government information practices. This has proven to be an outstanding trait of data protection in West Germany, where the regulators are not swamped with the task of reviewing and "licensing" all systems, which has been the bane of such activities in Scandinavia and France and is likely to prove the case under the 1984 British Data Protection act, which requires the Data Protection Registrar to receive registrations of all users of automated data banks in the public and private sectors, but critics charge that the resulting paperburden and the limited powers of the Registrar to do much more may render the scheme ineffective.

One critical function of good data protectors is to check in detail on actual compliance by examining the personal data actually held on a computer system and how it is obtained, stored, used, and transfered. This is also the most neglected aspect of data protection in experience to date. For example, external inspections to ensure compliance hardly exist under the Privacy Act in the U.S., in part because the Office of Information and Regulatory Affairs of the Office of Management and Budget has neither the political will nor the staff resources to do the job.[20]

Generally, data protection agencies do not have an intervenor role to play in litigation arising out of data protection. Individual citizens are generally reliant on their own resources in the exceptional cases where they decide to take a government agency to court to protest an information-handling practice. Such litigation is rare in any event, except perhaps in cases of refusals of access to one's own data; the model presupposes no litigation if a data protection agency does its job. The national exception is the United States, which does not have a data protection agency comparable to the creations of other countries treated in this essay. A citizen aggrieved with the use of his personal data by the federal government has to bring suit under the Privacy Act; the testimony of experts suggests that such litigation is a relatively fruitless exercise.[21]

In fulfilling their role, data protection agencies quickly recognize that the "powers" available to them in exercising their functions are relatively limited in terms of the countervailing powers of bureaucratic agencies, a theme which is refered to below. Thus data protectors rarely choose to bargain by means of threats of "sanctions" but instead emphasize a generally conciliatory and cooperative approach to bargaining with the regulated. In general this approach assumes that good data protection is a learning experience on both sides and that improvements in information practices will be incremental in character for the most part. West German practice is the leading illustration of the merits of such an approach. The federal data protection staff specialize by types of government information systems and, over time, have learned enough to be able to discuss legal, administrative, and technological issues on an informed basis with the civil servants in question, including the police and the security services. Good working relationships have developed over time, after some adversarial beginnings in certain cases.

## 7. Analysis of the Data Protection Agency Approach: Successes and Failures

The problem of protecting privacy in the face of widespread automation of public sector information systems seems to be much more tractable than many other types of public policies. Although the behavior to be regulated is spread throughout every government body, the response to date of the regulated has been ultimately positive. For the most part the requisite amount of behavioral change has coincided with the self-interest of the agency in improving the efficiency and public acceptability of data-handling activities. The individual data protection laws have coherently structured the process of implementation, primarily by charging regulatory bodies with the responsibility. During the first years, the latter have received adequate resources to perform their statutory tasks. Their initial decisions and advisory opinions have underscored support for

the objectives of the statute. The data protection agencies in existence have developed a strong commitment to their assigned tasks. Both the relevant executive and legislative bodies have lent sufficiently strong support to data protection, which has been seen both as an activity that continues to be important for society and one that has broad public support for the most part.

The non-legal variables affecting the application of the data protection laws have remained primarily directed towards support of implementation during the first years. Strains in the political process have only begun to appear, especially in a country like Sweden, as economies endured hard times during the early 1980s. The anticipated stages in the implementation of the individual laws have also proceded in a successful manner. Thus the story of implementing data protection to date is primarily a positive one. Data protection agencies in Sweden and West Germany can point to some major successes in limiting governmental surveillance of the population through controlling the collection and use of personal information. The French experience has been of more limited accomplishments. The CNIL, which implements the data protection law of January 6, 1978, highlights the fact that it succeeded (at least temporarily) in killing the plans of the Ministry of Health to subject all newborn children to compulsory physical examinations during the first several years of existence in order to identify children at particular risk of various types of medical and social problems. But Project Gamin, as it was called, was an initiative of technocrats functioning in the data processing methods division of the ministry, as opposed to a major agency-sponsored proposal. The computer system was designed to handle 2.5 million health certificates per year. The CNIL did not have to contend with such powerful forces as those behind the creation of data bases for such Socialist government measures as the capital tax on great fortunes and controls on expenditures by French residents travelling abroad.

The essential weakness of data protection agencies becomes evident when a government and/or a legislature really wants to create any type of information system to subject a selected segment of the populace to surveillance, including record linkages by computer matching, especially if the target group resides among the powerless or the unpopular, such as welfare recipients, prisoners, or fathers not supporting their families.

The Swedish and West German data protectors have successfully resisted government efforts at data collection and use, but the French ask whether they should or could have the power to resist any government initiative that seems unpalatable. One response is that the CNIL was created in order to do exactly that, instead of being so sensitive in its decisions to the trends of political power in French society. A corollary is that data protectors who never disagree with or fight with the government or the legislature are probably not doing their job well, just as those that are constantly at war with the regulated have probably acquired an exaggerated conception of what they can actually do, or at least an erroneous view of how best to do it.

West German data protectors played a critical role in the court hearings in response to the public uprising in the spring of 1983 against the law on the census of population, but they very much joined a movement

that several citizens had started by launching a suit on privacy grounds in the Federal Constitutional Court. The Bundestag had unanimously passed the 1982 census law, and, in effect, ignored some specialized demands for additional changes in the law by the data protectors, who were in effect ignored or no longer listened to at a particular point in the legislative process. They had also made only limited progress in obtaining changes to the law for the introduction of machine-readable identity cards for use at border crossings, until the major decision of the Federal Constitutional Court on the census in December 1983, which data protectors directly influenced, granted constitutional status to data protection as an individual's right to self-determination about information use and thereby allowed the data protectors to reopen the discussion over necessary controls in the use of identity cards. Data protection in West Germany is a highly legalistic activity, involving continuous debates over the meaning of articles and words in data protection and data collection statutes, and subsequent efforts to shape special laws, as in the cases of the census and identity-cards. If data protectors had previously worried about their continuing abilities to do their tasks in the face of a less hospitable political climate, the Federal Court's December 15, 1983 decision has reinvigorated the data protection movement in every way, because each citizen can now claim a constitutional right to data protection under the court's interpretation of the Basic Law of 1949, and data protection agencies have acquired a constitutional basis to do their work.

It is a matter of debate among students of the subject whether data protectors actually need regulatory power to perform their statutory tasks effectively. As noted, West Germany and Canada rely solely on advisory powers to achieve the necessary balance between prvacy interests and efficiency in the operations of government. On the other hand, certain agencies with greater regulatory power, such as the CNIL, have tended to decide in favor of government proposals, even though the process of negotiation usually results in some modifications in favor of data protection interests. Sweden's Data Inspection Board has used regulatory power effectively, even though it frequently found itself at loggerheads with the Social Democrats since their return to power in September 1982. The Sewdish law permits an appeal from a licensing decision of the DIB to the government, but this has rarely occurred.

One possible drawback to granting agencies direct regulatory powers is that they may not be able to adapt to technological change. This has not been the experience to date, except for the issue of the recent widespread introduction and use of personal computers. This point is perhaps reflected in the Swedish move away from their initial mandatory licensing provisions for all personal data banks in the public and private sectors in the revised Data Act of 1982. Now only the most "sensitive" systems require a license and permission from the DIB. At the same time, some Germans are now talking about the need for licensing certain types of sensitive public-sector information uses in a revised federal statute. Fortunately, the implementation of data protection is accepted as a learning experience requiring periodic legislative attention. The Canadian Privacy Act, for example, wisely mandates continued monitoring of its administration by a parliamentary committee and a comprehensive review of its provisions and operation by the same committee within a three-year period.[22]

A risk at least exists that data protectors will in fact use their review powers to serve as legitimators of new forms or uses of information technology, such as automated identity cards or "smart" cards, because they lack the will, the power, or the resources to resist successfully, and yet appear to have participated fully in the decision-making process. Data protectors have to strive for and obtain adequate compliance over time with fair information practices and avoid becoming routinized bureaucrats. Perhaps it should be admitted that available technology is going to be used, whether it is electronic mail or two-way cable and videotex services, and that the essential task of the data protectors is to insist on fair information practices. A contrasting example involves experience with the novel practice of record linkages, whereby computers link or match diverse bodies of data in order to uncover some form of alleged wrongdoing, such as tenants in state-subsidized apartments whose income in fact exceeds the maximum for qualification, or physicians who overbill the state for therapeutic abortions on the same person. Such procedures are only really possible with computers, and there are obvious societal interests at stake in preventing illegal activities. In Sweden, the DIB has strongly challenged such record linkages, primarily on the grounds of poor record quality, and both won and lost in its specific efforts. In the U.S., computer matching has become a sensitive political issue in the last two years. Because, in my view, there is no real data protection agency at the federal level, computer matching has been occuring without adequate built-in measures for protecting individual privacy interests.[23]

Another issue in making data protection effective relates to the lack of definition in the goals of the legislation and the breadth of the mandate assigned to the oversight agency. Both legislators and academic experts have failed to produce adequate analyses of the concept of personal privacy and how it can be suitably protected by data protection laws. Section 3 of the Swedish Data Act of 1982 simply directs the DIB "to grant permission to set up and keep a personal file if there is no reason to assume that, with due observance of the regulations issued pursuant to Sections 5 and 6, undue encroachment upon the privacy of registered persons will occur;" the latter phrase is not a very helpful set of standards for understanding the meaning of privacy. Some Swedish critics charge that as a result of this lack of definition, the DIB has overstepped its mandate in interfering with certain types of information systems, such as data banks maintained by researchers. Neither the U.S. nor Canadian Privacy Acts provide a definition of "privacy." Thus, the lack of defined standards for the concept of "privacy" in national legislation is an endemic problem, and a source of risk of abuse of powers when data protection agencies conduct their monitoring activities. Several recent Swedish academic studies have not been able to identify a coherent set of principles or an emerging jurisprudence of data protection in the decisions of the DIB.[24] If data protection agencies appear somewhat weak at a distance, their actual contact with a specific agency conveys an opposite impression of power. Determining the detailed meaning of data protection interests to be protected should not rest solely within the ambit of data protection staff.

A different kind of problem in making data protection effective is asking a data protection agency to do too much. A favorite example is the CNIL, which has been assigned oversight over informatics, data banks, and freedoms (in the plural) under the law of January 6, 1978. Article 1

states: "Data processing shall be at the service of every citizen. It shall develop in the context of international co-operation. It shall infringe neither human identity, nor the rights of man, nor privacy, nor individual or public liberties." Such goals clearly go beyond the scope of data protection in other countries. It is not evident on the basis of more than six years' experience in France how a small agency like the CNIL with a staff of less than thirty-five can in fact fulfil this enormous mandate. The presidents of the CNIL and its excellent annual reports continue to discuss the mandate in terms of the language of Article 1, but the documented record of the CNIL's accomplishments is considerably more modest.

There is a perhaps natural tendency to assign many aspects of developing on information policy for a society to the purview of the data protection agency, but it should be resisted. One strength of data protectors in West Germany, for example, is that they have become experts in personal information flows in society and are consulted as such by system planners. The general risk is that a small agency will acquire too broad a mandate which may mean no mandate at all, at least for the privacy interests of individuals that data protection is designed to protect. Working to make data protection effective is in itself a significant contribution to a coherent information policy in any society.

The kinds of real and potential problems discussed in this section have not been adequately addressed to date in revised data protection laws or by data protectors themselves. One reason is that solutions are often a question of acquiring the courage and capacity to make implementation of existing laws effective. Data protectors themselves have not been noteworthy for introspection; Professor Hans Peter Bull, the Federal Data Protection Commissioner from 1978-83 in Germany, is a major exception, as is Professor Spiros Simitis, the Data Protection Commissioner in Hesse since 1975.[25] The annual international meetings of data protectors consist of descriptive accounts of recent national events and some focus on international issues, such as the regulation of Interpol. The degree of interest in how anyone else tries to make data protection effective seems very limited. Finally, individual data protection agencies are simply very busy with existing tasks; reflective analysis of the relative effectiveness of data protection has a low priority.

## 8. Analysis of the Data Protection Agency Approach: Political Issues

The creation of data protection agencies has placed a considerable amount of power in independent hands, which raises important questions whether such agencies are really independent, have enough power and authority to compete with the strong agencies of governments, and, as noted earlier, whether any government initiative to collect, use or transfer personal data can really be resisted or controlled. These are difficult questions and, in fact, not enough experience exists to give other than qualified answers to them. Yet data protection is such an essential activity today that these questions need to be addressed while the political will still exists (at least in certain countries) to correct imbalances in existing legislation, and while data protection agencies still have an opportunity for re-invigoration, like the CNIL in France, or are still in early, formative stages of operations, like the Canadian

federal Privacy Commissioner, whose duties were considerably enhanced under the Privacy Act which went into effect on July 1, 1983.

Some data protection agencies, as in West Germany, have exercised their powers with independence and indeed considerable courage. A leading example is Professor Hans Peter Bull in West Germany. At the end of his statutory term in 1983, a newly-elected government, which has more conservative inclinations than the Social Democrats who appointed Bull, chose not to offer him a second term, leading to his return to the University of Hamburg. Bull and his staff of talented civil servants had in fact taken strong stands in implementing data protection for the police and security services, which are areas of considerable sensitivity in every country. Bull's experience raises the critical issue of whether a Data Protection Commissioner will act in a truly independent manner, if he or she has no assurances of continued future employment. It is obvious that natural tendencies to conformity and to avoid controversy will affect the behavior of ambitious people, including those pursuing a career in the public service.

A particular model of how data protectors should do their job relates to the sensitive issue of the successful exercise of independent power. An oversight agency must articulate privacy interests on a continuing basis in particular situations, so that the needs of the citizens have an informed advocate in the corridors of power when applications of information technology are being considered. On the one hand, there is the enormous pressure on governments to deliver services, to promote efficiency, and to cut costs; all of these promote the automation of existing personal information systems; career rewards for government employers also lie in this direction. On the other hand, there is the desire of individual citizens to retain an element of personal privacy in their relationships with government. Here privacy advocates play an essential role. But the model does not require them to win all of the time; it simply requires an institutional mechanism for privacy interests to receive systematic articulation and consideration in the process of helping to balance the various interests that are at stake in any such situation.

Perhaps the essential need for making data protection effective in any country is to find dedicated and talented persons to perform these important activities in the best interests of society. Once a country has created institutional arrangements for data protection (which every Western nation, except the U.S., has done or is doing), the issue of the degree of energy and commitment of personnel actually working for data protection agencies becomes critical. The standard expectation is that the job will shape the occupant, which is of course partly true for data protectors. But the choice of a leader and his staff is especially significant in this case, because of the novelty and importance of the subject matter, the cross-cutting responsibilities for data protection in all government departments, and the complexity of applying fair information practices in specific situations. To be truly effective, data protectors have to be activists. Data protection has been successfully introduced in Sweden and West Germany, because of the talents and commitment of the data protectors. These countries have highly dedicated and experienced public servants who know how to go about their assigned tasks. The situation of the French CNIL has been different, at least from 1978 to 1983, since most

of the staff were not professional civil servants, while seventeen part-time Commissioners were making all of the decisions on the basis of staff work. This experience suggests that, to date, individualistic direction of data protection has been more effective than collective efforts, although the DIB is something of an exception with its representative board and a strong Director General.

A related issue in making data protection effective concerns the overt commitment of the current generation of data protectors to avoid bureaucratization themselves in the course of accomplishing their tasks. They have expressed their own sense of the deregulatory movement of the late 1970s and early 1980s by consciously avoiding excessive staff sizes. The largest data protection agencies at national and state levels have less than thirty-five total staff at present. Given the concerns of the general public about government spending, such controls are admirable, but they raise a series of different questions. Can data protection agencies keep up with a burgeoning workload, can they accomplish their tasks effectively with such numbers, and can they monitor the explosive developments in information technology? Again, qualified answers are called for, since there are grounds for both optimism and pessimism.

It is very difficult in the first instance to measure whether or not implementation of data protection laws has in fact been effective. In one agency, the Commissioner may think that his or her office is especially effective, while staff worry about the critical issue of giving only the illusion of data protection to the general public, since they perceive the responsibilities of office to be so onerous. For example, in Hesse the staff of the data protection office are supposed to monitor the use of personal information in all health-care systems in hospitals, including research and operational activities. Even if general guidelines are produced for this area, the actual burden of conducting inspections and investigating complaints is very heavy and indeed complicated, requiring staff specialization in various types of systems. Yet a state like Hesse with a population of about six million has a total staff of less than ten, although some consideration is being given to enlarging these numbers, after the December 1983 decision of the Federal Constitutional Court further increased the workload of data protectors, who have to analyze the implications of this constitutional decision for all aspects of their work. In Sweden complaints are heard that even under the revised Data Act, the burden of licensing on an annual basis and the attempt to collect licensing fees is hindering other important DIB activities, such as careful inspections of actual conditions in information systems. Meanwhile, state budgetary restrictions make it difficult for the staff of the DIB, who, like German data protectors, were primarily educated in law, to keep up with developments in information technology by attending training courses

Data protectors in countries with data protection agencies are generally sensitive to the issues discussed above. A number of the leaders are strong individuals with an understanding of the legal, administrative, and political complications of data protection. Most of them, especially in countries or states with a single leader, as opposed to a board or commission, have a strong commitment to data protection. Some incumbents are new to their tasks and are still learning how best to achieve the goals of the legislation.

## 9. Conclusion: The Future of Data Protection Agencies

It is evident that data protection agencies are at the end of a first "generation" of experience since 1970, but considerable differences of opinion exist about the stage that has been reached, as a discussion at the Bellagio conference indicated.[26] One participant prepared this statement:

> Data protection has reached a plateau, a time for consolidation and assessment. It is now fully accepted as a necessary feature on the legal and institutional landscape: the last few developed countries are just joining the club. The enthusiasm of the early pioneers has become transmuted into the steady job of learning how to make data protection work--and how well it works still varies from place to place.

Although this description encountered considerable support on the grounds that the instruments of data protection are indeed now in place in many countries and have scored certain important successes, it also provoked valuable responses. Some participants pointed out the considerable risks of an event or occurrence changing the current positive direction of data protection, such as new outbreaks of terrorism, a return to a negative economic situation, or further growth in the anti-regulatory movement.

Others argued that data protection had in fact reached a slippery slope rather than a plateau. The original statement did not take account of the central issue of how far personal data collection should be allowed to develop. Furthermore, data protectors have to assert social control over technology and to re-assert human rights. They need to promote a more private world for citizens, take a more critical view of certain types of sensitive information systems, and try to measure the growth in the rate of surveillance of the population.

As the foregoing analysis in this essay suggests, the future success of data protection as a means to ensure bureaucratic accountability and limit government surveillance rests on the extent to which data protection continues to be a significant political issue. Although the public may not have demanded a data protection law, it is arguable that a threat to repeal one would provoke resistance. Yet public awareness of data protection agencies is such that government initiatives to vitiate the effectiveness of data protection, for example by cutting its budget, may not become hot public issues. The assured exception is countries where the agency has now become well known, such as all of the Data Protection Commissioners in West Germany (because of the 1983 census controversy) and the Swedish DIB (because of Jan Freese's extraordinary capacities as a publicist for data protection.)

Data protection agencies can claim a sound history of reasonable accomplishments to date, even though the new laws in recent years in English-speaking countries like Canada and the U.K. means that we still lack experience in measuring the effectiveness of implementation.[27] The problems of data protection will probably become even more acute in the public sector as the political will to support this innovative activity continues to evaporate, as governments emphasize economic issues. Yet the Swedish experience of the last decade suggest that good data protectors can adapt sucessfully to changing political and economic climates without

vitiating their central goals.

How will data protection agencies look by the year 2000? Will contemporaries look back upon this initiative as a quaint effort to cope with an overpowering technological tide or as a fruitful exercise in promoting the coexistence of competing human and societal values? Whatever one's personal hopes, both scenarios are possible. The central thrust will clearly be the technological imperative of integrated communications devices and computers. The electronic office will be fully in place, and distributed data processing will have made the concept of a data bank even more outmoded than it already is. Personal computers will be interlinked and on every desk. The resulting burden for creative lawmaking and effective implementation of data protection laws by oversight agencies is already evident and will only increase in future years. But, in my present judgment, the existing model of how a data protection agency can and should articulate privacy interests has long-term validity, despite the problems discussed in this essay. Moreover, data protection agencies are unlikely to become archaic institutions in the forseeable future, even if they are splendidly successful in fashioning strong, special data protection measures for every kind of personal information system in government hands. The combination of technology and government needs will produce a continuing series of challenges to privacy interests, in response to which data protection agencies will have to be vigilant, articulate, and resourceful in fashioning acceptable solutions in the public interest. In sum, the first generation experience with data protection has created reasonable expectations of a positive and active future for data protection agencies. Even if they ultimately fail, their existence is both desirable and essential.

Endnotes

*I particularly wish to thank Peter Harte of the University of Western Ontario Law School for his assistance in the drafting of this essay and Robert Young of the Dept. of Political Science for his helpful comments. It is also appropriate to acknowledge the generous financial support of the Ford Foundation, the Social Sciences and Humanities Research Council of Canada, and the Academic Development Fund of the University of Western Ontario.

1. See Louis Harris and Associates, Inc. and Alan F. Westin, The Dimensions of Privacy. A National Opinion Research Survey of Attitudes Toward Privacy (New York: Garland, 1981); Louis Harris and Associates, Inc., The Road After 1984: The Impact of Technology on Society (New Haven, Ct.: Southern New England Telephone, 1983); and Neil Vidmar, Privacy and Two-Way Cable Television: A Study of Canadian Public Opinion (Downsview, Ontario: Ontario Ministry of Transportation and Communications, 1983); and Vidmar and David H. Flaherty, "Concern for Personal Privacy in an Information Age," Journal of Communication, forthcoming.

2. Data protection refers to that aspect of concern for personal privacy that arises from the collection and use of personal information. Thus the U.S. Privacy Act of 1974 is basically a data protection law since it has no direct relevance to significant aspects of protection of privacy. The Privacy Commissioner in Canada is in fact a Data Protection Commissioner; even though he can do little more than be sympathetic to problems outside his statutory jurisdiction, the title means that he serves as a focal point of concern for privacy in Canada. The British wisely called their 1984 statute a Data Protection Act.

3. The countries are Sweden, West Germany, the United Kingdom, France, Canada and the United States. In this essay, I am painting with a broad brush and not indicating every exception in law or practice to a particular generalization.

4. There has been little serious analysis of data protection to this point. But see the works of Herbert Burkert, Hans Peter Bull, Jon Bing, Peter Seipel, Frits Hondius, and Herbert Maisl cited in David H. Flaherty, ed., Privacy and Data Protection: An International Bibliography (London: Mansell, 1984). The introduction to this volume traces current developments in data protection.

5. Clearly, if politicians have demanded programs, bureaucrats are not the effective cause of data collection and use. They must also evaluate programs, in part to protect their political masters from criticism. Politicians, however, are subject to direct electoral sanction should their actions prove to be unpopular. These examples raise the sensitive issue of how data protectors can, as creatures of legislatures, successfully resist proposals for invasive information use that come from the legislature.

6. Special provisions on data protection have long existed as key elements of special legislation on data collection in such fields as the census, statistics, income taxes, and sensitive health records, but these have rarely offered a coherent approach to confidentiality across government departments or for both automated and manual records. A key role

of data protection agencies is to improve the quality and comprehensiveness of these specialized provisions on confidentiality in legislation for specific types of information systems.

7. See David H. Flaherty, Privacy and Government Data Banks. An International Perspective (London: Mansell, 1979), pp. 40, 42-43; and Donald Madgwick and Tony Smythe, The Invasion of Privacy (London: Pitman, 1974), pp. 87-97. Many such censuses since 1970 have occurred without controversies over privacy, but the West German and Swedish census debates in 1983 are a reminder that population censuses are a flashpoint for public concerns over privacy, since responses are mandatory and cover the entire population. Since no government agencies can match the levels of concern for confidentiality of statistical agencies, I continue to regard current census concerns as symbolic protests.

8. Sweden: "Data Act" given in the Palace of Stockholm May 11, 1973. SFS 1973: 289; United States: "The Privacy Act of 1974," Pub. L. 93-579, 5 U.S.C. 552a, 93rd Cong., 2nd Sess., January 4, 1974; Germany: "Act on Protection Against the Misuse of Personal Data in Data Processing," (Federal Data Protection Act - BDSG) of January 27, 1977 Bundesgesetzblatt I. p. 201; Canada: "The Canadian Human Rights Act," Part IV, Statutes of Canada 1976-77, c. 33; France: "Law 78-17 of 6 January 1978 on data processing, data files and individual liberties," Journal Officiel de la Republique Française 7 Janvier 1978, 227; and United Kingdom: "An Act to regulate the use of automatically processed information relating to individuals and the provision of services in respect of such information," Data Protection Act 1984, c. 35 (U.K.).

9. Sweden: "Data Act" as amended with effect from July 1, 1982; Canada, "Privacy Act" Statutes of Canada 1980-81-82-83, c. 111, Schedule II. Most Western nations now either have data protection laws or are in the process of drafting them. See Rodolfo Pagano, "Panorama of Personal Data Protection Laws," in Council of Europe, Legislation and Data Protection: Proceedings of the Rome Conference on problems relating to the developmentand application of legislation on data protection, Annex II, (Rome: Camera dei Deputati, 1983), pp. 236-348, for a useful review of the data protection legislation of twenty-five western nations and four international bodies. There are also strong state laws in all of the West German states, such American states as New York ("Protection of Personal Privacy in Public Records Act," New York Laws c. 652.), and the Canadian province of Quebec ("Law 65. An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information," Statutes of Quebec 1982, c. 30.) My principle focus will be on data protection laws at the national level in the countries listed in note 3.

10. The Privacy Act is especially complex, because it is integrated in the same law with provisions for public access to government (non-personal) information (what is often referred to as freedom of information). Only the federal government in Canada and the province of Quebec have managed to achieve such a feat. The U.S., France, and Sweden have data protection and open government laws passed at different times; thus there have been conflicts in the interpretation and application of these laws.

11. See David H. Flaherty, "The Need for an American Privacy Protection Commission," Government Information Quarterly, I, No. 3 (August, 1984), pp. 233-58; and Oversight of the Privacy Act of 1974, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 98th Cong., 1st Sess., June 7 and 8, 1983 (Washington, D.C.: U.S. Government Printing Office, 1983).

12. Organization for Economic Co-operation and Development, Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (Paris: OECD, 1981), pp. 10-11. See also Michael D. Kirby, "Transborder Data Flows and the 'Basic Rules' of Data Privacy," Stanford Journal of International Law, XVI(1980), pp. 27-66; and Peter Seipel, "Transborder Data Flows of Personal Data: Reflections on the OECD Guidelines." Transnational Data Report, IV(January, 1981), pp. 32-44.

13. The chain of accountability may be complex. It is perhaps fairer to say that elected government officials are responsible to the legislature and that unfavorable reports on data protection create difficulties for them, with repercussions on their civil servants. However, there are elements of direct accountability of bureaucrats in most countries, because data protectors communicate directly with the relevant civil servants on particular issues, normally through officials within a government department who have specific internal responsibility for data protection and act as a liaison with the data protection agency. Such officials exist in the United States, Canada, West Germany, and France. See the informed discussion of bureaucratic resistance to mechanisms to promote accountability in Priscilla M. Regan, "Personal Information Policies in the United States and Britain: The Dilemma of Implementation Considerations," Journal of Public Policy, IV (1984), 19-38.

14. See Privacy Commissioner of Canada, Annual Report, Privacy, Commissioner, 1983-84 (Ottawa: Minister of Supply and Services Canada, 1984).

15. Canada, "Privacy Act," s. 41.

16. David H. Flaherty, Final Report of the Bellagio Conference on Current and Future Problems of Data Protection: Nineteen Eighty-Four and After, (London, Ontario: Privacy Project, University of Western Ontario, 1984), p. 12. The conference was held from April 9-13, 1984 at the Rockefeller Foundation's Bellagio Study and Conference Center, Lake Como, Italy. Hereafter cited as Bellagio Report. The report is printed in Flaherty, "Nineteen Eighty-Four and After," Government Information Quarterly, I, No. 4 (November, 1984), 431-41.

17. See also the increasingly influential formulation of similar principles in Council of Europe, Explanatory Report on the Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data (Strasbourg: Council of Europe, 1981).

18. The "Guidelines" are not as cut and dried as the forgoing references thereto would suggest. The "Explanatory Memorandum" accompanying the Guidelines (pp. 13-36) indicates that the objective is to give priority to the principles of data protection in dealing with information issues such as privacy and access to information. See also Seipel, "Transborder Data

Flows of Personal Data: Reflections on the OECD Guidelines."

19. "Act on Protection Against the Misuse of Personal Data in Data Processing," (Federal Data Protection Act - BDSG) of January 27, 1977 Bundesgesetzblatt I. p. 201, ss. 19(1), 20.

20. U.S. Committee on Government Operations, Government Information, Justice, and Agriculture Subcommittee, Who Cares About Privacy? Oversight of the Privacy Act of 1974 by the Office of Management and Budget and by the Congress. 98th Cong., 1st Sess. (Washington, D.C.: U.S. Government Printing Office, 1983).

21. See "Testimony of Ronald L. Plesser on the Privacy Act," in Oversight of the Privacy Act of 1974, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 98th Cong., 1st Sess., June 7 and 8, 1983, (Washington, D.C.: U.S. Government Printing Office, 1983), pp. 225-26, 240-42.

22. Canada, "Privacy Act," s. 75. Although the Act entered into force on July 1, 1983, Parliament only created a review committee at the end of 1984 by assigning the duty to an existing committee.

23. Oversight of Computer Matching to Detect Fraud and Mismanagement in Government Programs, Hearings before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate. 97th Cong., 2nd Sess., December 15 and 16, 1982. (Washington, D.C.: U.S. Government Printing Office, 1983).

24. Annette Kavaleff, God personregistersed? En undersökning av datainspektionens styrelsebeslut (Fair Practices in Personal Data Registers? A Study of Data Inspection Board Decisions.) IRI-rapport 1983:4 (Stockholm: Institutet för Rättsinformatik, Stockholms Universitet, 1983); and Sten Markgren, Datainspektionen och skyddet av den personliga integriteten. (The Data Inspection Board and the Protection of Personal Privacy.) (Lund: Studentlitteratur, 1984).

25. Hans Peter Bull, Datenschutz oder Die Angst vor dem Komputer (Munich: R. Piper, 1984); and Spiros Simitis, "Data Protection - A Few Critical Remarks," in Council of Europe, Legislation and Data Protection, pp. 171-77.

26. Bellagio Report, pp. 13-14.

27. Of course, the experience of a country like the United States, which does not have a data protection agency at any level, except in New York state, creates problems of an entirely different sort.

PAPER FOR THE ECPR WORKSHOP ON 'CONFIDENTIALITY,

PRIVACY AND DATA PROTECTION, BARCELONA 1985.

# THE CONTINUING STORY OF PRIVACY PROTECTION IN HOLLAND

JAN HOLVAST
SOCIAL SCIENCE INFORMATICS
UNIVERSITY OF AMSTERDAM

FIRST DRAFT

# THE CONTINUING STORY OF PRIVACY PROTECTION IN HOLLAND

Jan Holvast
Social Science Informatics
University of Amsterdam

Abstract

In Holland the public privacy debate started in October 1970. Two incidents are responsible for this debate: the census of 1970 and the introduction of a personal registration number.
Alarmed by the public disobedience which was the result, the government asked a state commission to prepare a proposal for a privacy law. In 1976 the report of the commission is published and it took another five years before the proposals were sent to parliament. The political discussion and the deregulatory movement made that the proposals are rejected. A new official commission is asked to prepare new ones. In November 1984 this commission has finished and the prediction is that the newest law will be sent to parliament in summer 1985.
During all these years a Foundation Personal Registration Alert is active in Holland in informing the public on privacy-issues. In spite of the work and ideas of this Privacy Protection Movement the privacy in this technological age is not optimal protected.

*Introduction*

In a time of growing automation and lack of regulation the political climate in Holland is changing. There is a growing demand for 'law and order'. The social-economic crisis is calling for a better control of the financial circuits, especially since not long ago a governmental commission showed that there is a growing misuse of the benefits of the welfare state and that the 'black money' circuit is large. The criminality too is growing and government and parliament are requiring for a better control of the citizen. For these controls the technological means are appropriate and when they are not, new and better ones are being introduced.

Since 1982 Holland has its own datanetwork (DN-1) developed by the Dutch PTT. This datanetwork will be used by the police and for the automation of the population register. A personal registration number is allocated to almost every citizen and everywhere the public authorities are arguing the efficiency of this number for other goals, particularly for tracing people. The government is introducing a new number for the linkage between the databases of finance and social security for the controlling of payments and earnings. The registrations of the police are centralized and automatized with linkages to the registrations in other countries. The intelligence services are more active than ever. In 1984 (!) the Minister of Justice (!) suggested the introduction of a personal identity card, something that is unknown in Holland since the last World-War. In February 1985 the same suggestion is made by a small working group of one of the parties in the government, which is preparing the elections of 1986. The motivation for introducing this card is that it is easier for the police to fight crime. In European connection a new machine-readable passport will be introduced. There are experiments with the Electronic Fund transfer with Points-of-Sale and the use of telebanking, teleshopping, telecorresponding and Viewdata.

A psychological and political climate is raising in which all the organizational and telemetical innovations are introduced and used without almost any political discussion. The holy goal of efficiency and control seems more important than a political discussion about the means and the consequences for the privacy of the individual.

As this brief history of the continuing story of privacy protection in Holland will show, fortunately the *public* interest in the privacy problem is growing and it seems that after the quiet period during the end of the seventies, the mass interest will be as large as it was in 1970.

*The rising interest in the privacy-problem*

Until the beginning of the sixties the questions surrounding privacy received little attention nationally as well as internationally. Abroad, particularly in the United States, some court cases related to privacy have been held. But in these cases the indictment was mostly for an intrusion of ownership, for example because someone's photo was used for advertising purpose or because equipment for eavesdropping had been placed in a private house. Only in the second part of the fifties and the beginning of the sixties attention was given to the problem of privacy in relation with registration of personal data. Books like Vance Packard's 'The Naked Society' (1964), Myron Brenton's 'The Privacy Invaders' (1964), Gross' 'The Brain Watchers' (1963) and Dash' 'The Eavesdroppers' (1959) pointed to a new development: with the help of psychological tests and eavesdropping devices it became possible to penetrate into the private life of individuals. It looks like George Orwell's predictions becoming reality. At the same time the attention is focused on the storage of personal data in a computer. The result is Westin's famous definition of 'informational privacy' (Westin, 1967:7).
In the years before 1970 there is little interest in Holland for the privacy-problem. A few lawyers pay attention to it in relation to some specific law, related to the use of data by the police and the use of the data of the population registration. In 1966 some social scientists make a start with more theoretical problems when, independently from each other, two sociologists and a psychologist told of their experiences in the United States. They are especially influenced by Bates (1964), Packard and Ruebhausen and Brim (1965). In general the remark of Cope is also true for Holland:

> 'With only one or two exceptions, mainly American, the subject of privacy has not received much attention from sociologists and social psychologists. Until very recently, there has been a surprising disparity between the public concern and debate and the level of academic analysis. The overall neglect of the topic is true *a fortiori* in Britain.' (Cope, 1978: 187).

In 1970 the interest for privacy changed radically, although the scientists neglected it again. The idea to introduce a personal registration number and to establish a Central Personal Administration (CPA) together with the census of 1971 leaded to a wave of protests. These two 'incidents' are responsible for that from that time on there is increasing interest in registration and privacy in general. We will first go into these two 'indicents'

*The census of 1971*

In March 1970 parliament accepts, without much attention and with only three votes against, a law which lay down that on February 28th 1971 there will be held the forteenth Census annex House-Counting. As usual the census-taking

is not anonymously, because one of the aims is checking the population register. Co-operation is obliged and refusal is punishable with a maximal fine of 500 Dfl. or imprisonment of 14 days.
There are more than 100 questions about home, health, education, occupation and - in global categories - income. New is

- the data will be optical read, stored and processed automatically
- the registration form is a kind of a machine read punch-card with a pastedown on which everyone has to fill in name, address, domicile and birth-date
- for the first time a number will be punched through the registration forms so that afterwards, when necessary, a link can be made between the pastedown and registration forms.

Until October 1970 the public and press show no interest in this census. Suddenly thereafter many protests are appearing in the press. The main arguments are against the obligation to cooperate, the non-anonymity and the uncertainty about the use of the data, especially now the computer is employed. In a first reaction the general-director of the Central Bureau for Statistics (CBS), the governmental institution which is responsible for the census, accuses the press of launching a 'fear-psychosis for the computer'.
The unrest is growing and opinion polling in the beginning of February 1971 predicts a possible non-response of 25%. The figure and the political unrest are for the parliament the motive to initiate a new parliamentary debate. As a result, the - in 1970 accepted - law some minor points are changed (the time during which the data may be stored is reduced, all data are destroyed after some time, Jews and other victims of Second World War may legally refuse, but the majority of parliament agrees again with the census on February 28th. This debate has as a result that suddenly the public discussion almost disappears. Nevertheless it is shown afterwards that the protests have lead to the actual refusal to cooperate with the census of by and large twentysix thousand people, despite the fine or imprisonment. An even larger number of people (250.000) passively resisted by not being at home at the time of the counting or by making the registration forms unusable.
Obviously the census was sabotaged, the results came later (1977) than expected and appeared to be almost useless for scientists and managers. The reason for the delay was the aim of the CBS to present reliable data. They filled in by hand a part of the registration form for the people that refused, they checked - as far as possible - the missing or false data and there was a failure in the colour of the machine-readable cards, so that one million cards could not be read and had to be written over by hand.
The number of refusers (26.000) was large enough for the court not to pro-

secute and in December 1971 the Minister of Justice gave a general pardon. The failure of the 1971 census and the call for better safeguards for the privacy were the most important arguments in parliament to pass a motion in which is laid down, that there will be no census in Holland, unless there is a privacy-law. This motion made that in 1979 the decision is taken to adjourn the planned census of 1981.

*Personal Registration Number*

In the middle of the sixties the storage and processing of personal data signalled a new phase in the development of the computer. In 1966 it was proposed to automatize on the level of communities the population registration in the Netherlands. This occasion could be used to give every citizen a personal registration number. At the same time the idea was considered to create a central institute where parts of the population registration would be stored with the purpose to pass on changes to a number of governmental organizations. In 1967 the government - without consulting parliament - accepted the proposals and from that time on the first numbers were distributed. At the same time a state commission is formed who has to advise about the use of the numbers and the structure of the central organization.
In spring 1970 a report appears in which this central body is called Central Personal Administration (CPA). The report is also positive about the personal numbers, because they facilitate the communication between communities and the CPA *and* between CPA and a number of governmental agencies. The possibility also is considered that, once every citizen has this number, the system could be put at the disposition of private organizations like insurance companies, the banks and governmental institutions like the PTT and for the censusses in the future.
Just like with the census almost no one showed interest in this report. This changed during the discussion about the census and a link was made between the numbers on the forms of the census and the registration number. Although this link showed to be false, it brought the privacy discussion on a new level and poured oil on the flames.
The unrest during the census was a warning signal too for those who wanted to implement this number. During the debates about the budget for internal affairs in the autumn of 1971 the ideas for a CPA are criticized by the leftist parties in parliament. They presented a motion demanding to stop the introduction of these numbers. First a law regulating the organization of a CPA and the privacy of the individual should be presented. This motion was rejected by the parties supporting the government, because of the promise of the government

to present such a law quietly. A proposal appeared in 1975, but this one has never been treated in parliament. In 1982 a new proposal of a law appears in which, comparing with 1975, a few minor changes are made. This proposal is discussed in the special commission of parliament and especially the centralized position of the CPA is criticized. Almost all parties agree with the personal registration number. In 1984 the CPA is changed in a GBA, what means that instead of a centralised agency the task is taken over by about twenty decentralized bodies, who are connected by the national datanetwork DN-1.

This last report makes clear that already 12 million of the 13 million citizens have the personal registration number. A new proposal for a law will probably appear in 1986.

The public feeling regarding this number is a feeling of powerlessness: the process is irreversible and when ever there will be a discussion about this number, the outcome is clear: parliament can only make a choice between yes and yes.

*Privacy Commission*

The discussions during 1970 and spring of 1971 made clear that the registration of personal data can have consequences for the privacy of the individual and there was a continuous outcry for a privacy-law. The composition of the commission is rather diverse; besides representatives from Philips, Unilever and the banks there were also members with a more critical stand against registration of personal data.

In 1974 a first draft of the report appears for discussion and opinion formation. The report contains only a number of basic ideas. At a hearing that year the report could be criticised and it became clear that public authorities and trade and industry did not agree. The first accused the second of intruding the privacy, like the second is accusing the first of the same. Both stipulate that for themselves there is no need for a privacy law. Only a few persons and organizations criticize it because it does not go far enough. They propose a license system like in Sweden.

The remarks made during the hearing and the numerous written comments are used by the state commission for their Final Report that appears in fall 1977. This Final Report contains a brief overview of the privacy problem in Holland and the developments in other countries as well as a proposal for a law.

The law is applicable to all automized databanks with the exception of the intelligence services (a minority of the commission does not agree with this exception) and there is no difference between the databanks of public-authorities and those of trade and industry. The proposals are not dealing with the

collection of data, only the storage and use of data is controlled by the law. That's why the commission does not label it a privacy law, but a Law on Personal Registration.

The three main themes are comparable with those in other countries, although the details differ:

- the first is that a number of rights of the individual are being regulated, like the right to see one's own file, the right to correct the data when they are false and the right to indemnation;
- the second principle is that those organizations who keep personal data must submit to three different obligations, depending on the data stored and the use that is made of it:
  - . those who merely have to announce that they have an automized registration
  - . those who must make a reglementation in which is laid down the working of the databank, the stored data, the individuals from whom data are stored and the way the privacy is protected
  - . those who need a license.

A licence is needed when the data stored are 'sensitive'(political, criminal, psychological, sexual and medical data, and data related to race, skin and religion) or when data are passed on to others. This license is needed before the system can be put into operation and everyone can protest against the giving of a license.

An announcement is sufficient when the data stored are 'innocent' and are not passed on to other organizations or persons. This holds for example on members-, subscriptions- and salary registrations.

All other databanks need a reglementation.

- the third principle maintained in the report concerns the control on the application of these regulations by a more or less independent body, called the 'Registratiekamer'. This board consists of a chairman, 10 members and about 50 to 60 employees. Another task is forming a registration of databanks in a public register.

The first reactions on these proposals are negative. The general impression is that the law is made terrible complicated through the use of three kinds of obligations depending on 'sensitive' data and 'others'. Also the centralized and bureaucratic position of the 'Registratiekamer' is highly criticized. Nevertheless there is hope that in a short time the parliament will, with some changes, accept the proposals and introduce the law. With an evaluation of the law after a few years, all kinds of adaptations will probably make it possible to have a better law and a better control of the data protection in Holland.

Already in the first draft the state commission has asked databankholders to make regulations in accordance with the main ideas she proposed. In 1975 this 'self-regulation' is started. The government issues guide-lines for the approximately 120 governmental registers to set up statutory regulations before December 31, 1975. New registrations may only introduce automatization after a statutory regulation has been adopted. Although the idea is seen as positive, the lack of control makes the process is going very slowly. On the named date less than 20% of the registers has adopted a regulation, at the end of 1976 it is about 30% and the end of 1979 about 75%. The idea of 'self-regulation' is later adapted by the local communities, the health and care services and, hesitatingly, by trade and industry.

The state commission made her suggestion of self-regulation because she feared that it would take some years before a law is introduced and accepted in parliament. Even this rather pessimistic view turned out to be too optimistic. After the Final Report appeared in 1977 it stayed quiet for a long time. In December 1981 the definite proposal for a law is sent to parliament. This proposal is, compared with the Final Report, almost the same, although there is one important difference: the registers of the police form an exception. These are dealt with a new Law on the Police Registers.

In 1983 a special commission out of parliament is discussing the law and the general impression is very negative: too detailed, bureaucratic, complicated, centralized and only applying to the automatized databanks. Without changes the law will not be accepted.

At the same time the deregulatory wave is storming over Holland. The philosophy behind it is that the economic crisis can only be solved when there are less barriers for trade and industry. A special governmental commission gets the task to check all (new and old) laws that are in conflict with this outlook. The commission also checks a look on the Law on Personal Registration. This law is criticized for her complicated structure and especially the procedure for getting a license is commented. A shorter and less complicated regulation is suggested.

Confronted with this advice and the opinions from parliament the Minister of Justice declares in February 1984 that he will withdraw that proposal. He asks a small official commission to present a report before the end of 1984. The commission succeeds in this and in November 1984 a new proposal for a law is sent to the 'Raad van State', the governmental board who is advising about new laws. Although the report will not be published before this advice is given, enough is known to compare the new ideas with the old ones. The fundament of the new regulation is a combination of regulation and 'selfregulation', a distinction which parallels the difference between the public

authorities and those who are put in par, are obliged to make a reglementation like in the old proposals. The databanks of trade and industry are obliged to announce, although they must at the same time fill in forms with more detailed information about their databanks. The rights for the individual are almost the same and with regard to the control, the organizational structure of the Registratiekamer has drastically changed, although the amount of centralization is the same. New in the proposal is that the law applies to all databanks, automatized and not-automatized. The second impression is less positive. An important element of the law is that the individuals has to take action to show that data are misused and not the databankholder has to show that he is acting correctly. A necessity for it is the transparancy of the databanks, but this is, because of the many exceptions less. The first group of exceptions are the databanks not falling under the law: policeregisters, databanks of intelligence services and those of churches and religious communities. The second group of exceptions is inside the law. Many registrations have neither the obligation of reglementation, nor the obligation of announcement: members-, scriptions- and salary administrations, financial registrations, personal registers and all registrations only comprising name, address, community, postal code/zip code and numbers for communication. The expectation is that the advice of the 'Raad van State' will appear in April 1985 and that some time later the new proposal will be sent to parliament. It is my impression that these proposals will pass the parliament without many changes, despite the growing interest for the privacy debate.

*New developments*

After 1970 the automation of personal data is being introduced in various sectors of society. To mention a few:

- the population register
- several systems on the level of the government, under which the tax-collection, the defense registration, the PTT
- several registrations of the police
- child protection and social welfare
- registration of psychiatric patients
- various student- and pupil registrations
- medical registrations
- credit- and data of the banking system.

Increasing protests, especially from groups directly effected by data registration (like psychiatric clients, medical workers and other service organizations) has led to the process of selfregulation. Alarmed by the prospects of computer

stored data, also the non-automatical systems are receiving more attention, like for example various files and mechanical registrations. Various sections of society are paying now attention to the problem of privacy and publish reports: universities, libraries, the medical service sector, social welfare, the direct mailing.
These activities, to-gether with those mentioned in the introduction, fall in a period where nothing concrete is known about a definite regulation and, even worse, without any form of control and feedback.
Fortunately, the public disagreement with these developments is increasing again.

*The protest movement*

During the 'roaring sixties' Holland was overwhelmed with several protest movements: the movement against America's role in the Vietnam war and the movement for democratic citizens participation, especially at universities. The causes of these movements are found in feelings against authoritarian structures. The results are occupations of university buildings and the forming of new political parties (Democrats 1966, The Green Party, Provo), while in the old parties new factions emerge (Red Women, New Left). As a small political result in 1968 the compulsory voting is abolished.
Although the storm passed over in 1970, it is in this climate that the government is planning a compulsory census and the introduction of registration numbers. The soil is fertile for protests and in October 1970 the Committee Consensus Alert is founded.
In no time it got the public interest and the Committee built a decentral network to furnish the people everywhere in Holland with information. Thousands and thousands of people attended the meetings, watched the televisions, heard the radio and read the newspapers and other periodicals on the topic of privacy. Although it was the first aim of the Committee to inform, soon it was obliged to tell the people what they had to do on the day of the census. The advice became to boycot it. The results are known: numerous people refused to cooperate and the first post war public disobedience was a protest against registration and automation without safeguard for privacy.
When the census was over the Committee remained active and gave the refusers juridical advices. She also formed a small workgroup with the instruction to make a framework for a new privacy law. After the general pardon and the installation of the state commission the Committee fell asleep with the idea that was done what had to be done and it had reached its aims. When in 1974 the first draft of the state commission appeared the Committee woke up roughly; she saw that in essence nothing had changed: the proposals for privacy

protection were meager and government did not stop the distribution of the registration numbers. With broader goals the Foundation Personal Registration Alert is founded. Although the reactions in the media are less intensive than in 1970, the general impression this new committeee made is positive, as is the public interest. One of the first activities of the new organization is to distribute a Quarterly Privacy and Registration ('Kwartaalschrift Privacy en Persoonsregistratie') in which a non-scientific way the public is informed about the state of the art in privacy. Articles appear about the registration number, comments are made on the Final Report and on the new law in relation with the census in 1981 and more articles are written about the situation in other countries and on specific topics like applying for a job, the use of cameras and so on. Lectures are given to different groups: housewives, students, political parties and the citizens are advised when he or she gets in trouble with registration. The activities are carried out by a small group of activists who are doing this work in their leasure time. No money is paid and no professionals are in service.

Since 1981 the work is enlarged and the work cannot be done with a few people in leasure time alone. The fear of a Computer State, as Burnham (1984) described it, is becoming more general, and the Foundation is working now with a small bureau and some twenty participants on a part-time base. Although these people are not paid for their work, there is enough interest from unemployed, volunteers and students. The bureau houses a small documentation center and a library with literature about privacy and registration. Regularly, there are meetings to inform the people about the privacy problem in Holland and for schools a special educational program is made, for which the interest is high: about ten to twenty schoolmeetings a month. The interest of the media and press is enormous. After every new development the people of the Foundation are asked to give comment and interview after interview is appearing. In 1984, the year of George Orwell, the Foundation had her tenth anniversary, and the various media had attention for this fact.

It looks like everyone feels that it is now or never. In a period in which the information technology increases the role of this small group is becoming more important. It has the knowledge and the confidence of many people. This last fact is important because even the different political parties are asking for comment on things that happen.

One advice she gave these last years has scored a great success. On numerous occasions she always proclaimed a decentral system for control on the use of data. In the scope of selfregulation it is seen that groups of databanks (communities, medical registrations, psychiatry) have a socalled decentral Privacy Commission, in which also one or more representatives of the indivi-

dual, the clients or patients are sitting. The Foundation has proposed this to control databanks with personal information, as close as possible to the UTILIZATION of the information. This means that almost every registration with personal information must have its own 'privacy control board'.
In case of a company one can think of the workscouncil (Ondernemingsraad), in case of the registration centers of cities one can think of the city council, in case of more general databanks one can think of consumers-organizations, to fulfill the controling task towards a databank with data.
One of the great advantages of this approach is that the control is situated close to the possible act of privacy-intrusion. In this model the controling task is fysically close to the system.
This means that:

1. the members of the privacy control board have enough knowledge of the substance and the use of the data to estimate the possible misuse of these data.
2. the members of the privacy control board are emotionally bounded to the system by the simple fact that their own private data are stored in the (computer)system. This means that they are rather sensitive towards misuse.

If one chooses to organize the control of possible privacy-intrusion on a rather central level one misses the substantial and emotional concern which is so typical for the feeling of privacy. Especially the emotional concern is an essential part of privacy.
The tasks of such a privacy board could be:

1. Controling the regulations which are to be made for every registration with personal data.
2. Controling - if necessary with the aid of specialists - the documentation of the computersystem. In this documentation the input and output possibility of the system has to be described as well as the software, as well as the security measures and the period of storage of personal data.
3. Controling the application or misapplication of the examination and correction right and the removal of out of date data
4. Authorization of not in the regulation mentioned people or institutions.

*Concluding Remarks*

Holland, of course, is not an isolated island from the rest of the world. It is influenced by the technological developments in other countries as well as by privacy movements and discussions. Nevertheless there are some differences regarding to other countries.

Compared with the USA, automation and privacy discussion started about ten years later and was primarily directed on what wrongly is called 'computer-privacy'. Only later the interest was concerned on the collection of data and the use of data in non-automatized systems. A difference with several European countries is that Holland, although it had a continuous privacy debate, has not yet a privacy law and the discussion about content and range is still going on. The reasons for this retarding are diverse and difficult to show, but a careful analysis learns that it is a strive for perfection in combination with political desinterest in the privacy problem. The first proposals which are published in 1977 are theoretically almost perfect, but because of the perfection not applicable. Although in the years between 1970 and 1985 there always has been a public interest, the political interest in the problem was always minimal. Now and then the topic is discussed in parliament and motions are passed, but this parliament was reassured when the responsible minister said that 'soon' the law will be presented. And, with exception of the census debate in 1970, the public interest was too small to wake up parliament. This political interest made it for government and officials easier to slow up the regulation. Especially these officials are important, because of the fact that they always have a fear for transparancy of their work. The Law on Free Flow of Information, which is introduced in 1980, is for the same reason not a success.

This all has a result that in Holland there is up till now only a kind of self regulation, which makes that the right to privacy is only a privilege, although the right itself is since 1984 a part of the Constitution. A result is too, that where in other countries the law is adapated, the content and the range of the law in Holland are subjected to the new political climate of economic crisis, fight crime and fraud, and dergulating. The privacy is getting a lower priority than ever before.

Compared with other (European) countries there are too a lot of similarities. The proposed law is n ot applying at the databanks of police and intelligence services and these institutions are increasingly using informationtechnologies. For this use there is not only a political call, but also a kind of technological necessity: society is becoming more and more vulnerable. Nuclear plants and computer centers have to be protected and the use of information technology for surveillance is needed (Westin, 1979; Jungk, 1977). It seems that the statement of Fromm in relating to his first law of the technological society is becoming reality. 'The first maxim is that something *ought* to be done because it is technically *possible* to do it.' (Fromm, 1968: 33). New and old technologies are used in a way, which some years ago would be recketed.

All these developments show that the problem of control is more important than ever. Nelkin (1977) has proposed three kinds of control: reactice (laws), participatory (citizen) and anticipatory (technology assessment) control. When we are looking at the control in Holland, a similarity with other countries is becoming clear: almost all effort is directed to the reactive control. For a good privacy protection all three forms of control are equally important. With this in mind there is one positive and optimistic development in Holland, but also in other countries (Germany, for example). In the last years there is a growing public interest in the problem of privacy. Trade unions, consumers organizations and organizations of patients are getting involved in the privacy problem. This interest shows that probably Naisbitt is right, when he states:

'What happens is that whenever new technology is introduced in society, there must be a counterbalancing human response - that is, *high touch* - or the technology is rejected. The more of high tech, the more high touch' (Naibitt, 1982: 39).

*Literature*


Bates, Alan P. (1964), Privacy - A Useful Concept?, in Social Forces, vol. 41, no. 1, May 1964, pp. 429-435.

Brenton, Myron (1964), The Privacy Invaders. New York: Coward-McCaan Inc., 1964.

Burnham, David (1984), The Rise of the Computer State. New York: Vintage Books, 1984.

Cope, David R. (1979), Census-taking and the Debate on Privacy: a Sociological View, in Martin Bulmer (Ed.), Censusses, Surveys and Privacy. London and Basingstoke: The MacMillan Press, Ltd,, 1979, pp. 184-199.

Dash, Samual, Richard F. Schwartz, Robert E. Knowlton (1959), The Eavesdroppers, New Brunswich, New Jersey: Rutges University Press, 1959.

Fromm, Erich (1968), The Revolution of Hope, Toward a Humanized Technology. New York: Bantam Books, 1968.

Gross, Martin L. (1963), The Brain Watchers. New York, 1963.

Jungk, Robert (1979), The New Tyranny: How Nuclear Power Enslaves Us. New York: Grosset & Dunlap, Fred Jordan Books, 1979.

Naisbitt, John (1982), Metatrends, Ten New Directions Transforming Our Lives. New York: Warner Books, 1982.

Nelkin, D. (1977), Technology and Public Policy, in Ina Spiegel-Rösing and Derek de Solla Price (Eds.), Science, Technology and Society, a Cross-Disciplinary Perspective. London and Beverly Hills: Sage Publications, 1977, pp. 393-443.

Packard, Vance (1964), The Naked Society, Middlesex, Englang: Penguin Books, 1964.

Ruebhausen, Oscar M. and Orville G. Brim jr. (1965), Privacy and Behavioral Research, in Columbia Law Review, vol. 65, 1965, pp. 1184-1211.

Westin, Alan F. (1967), Privacy and Freedom. London: The Bodley Head, 1967.

Westin, Alan F. (1978), Nuclear Proliferation and Safeguards, in The Review International Commission of Jurists, no. 20, June 1978 , pp 50-63.

# ACCES AUX DOCUMENTS ADMINISTRATIFS , INFORMATIQUE ET VIE PRIVEE : QUELQUES REFLEXIONS A PARTIR DE L'APPROCHE FRANCAISE

par Herbert MAISL

Professeur à l'Université de Paris X
Conseiller Juridique de la Commission Nationale de l'Informatique et des Libertés (CNIL)
Membre de la Commission d'accès aux documents administratifs (CADA)

oOo

1. Les progrès de la transparence administrative sont un fait marquant de la fin du XXème siècle; à cet égard, la technologie, et tout spécialement l'informatique, joue un rôle essentiel dans la diffusion de l'information. Le style des relations entre l'administration et les administrés se modifie dans nos démocraties industrielles occidentales. Un équilibre se cherche entre le droit à l'information administrative, le nécessaire secret administratif et la protection légitime de la vie privée.

2. Dans un pays comme la France, le secret administratif a longtemps été un trait dominant. L'administration classique est secrète; la "puissance publique" agit par la technique de la décision exécutoire, acte unilatéral non motivé. L'administré doit exécuter la décision, il la subit jusqu'à l'intervention du juge. En effet, "il ne saurait être question d'introduire de la démocratie à l'intérieur même des mécanismes par lesquels s'élabore la décision administrative puisque celle-ci est par essence réalisation de la souveraineté du peuple (...) L'individu est un citoyen à l'égard du pouvoir politique; il est appelé à l'exercice de la souveraineté par des représentants élus. En revanche, face au pouvoir administratif, il n'est qu'un sujet" (Jean RIVERO). Il suffit que l'administration soit contrôlée par le législateur et le juge.

.../...

3. Tout fonctionnaire est lié par l'obligation de discrétion professionnelle pour tout ce qui concerne les faits et informations dont il a connaissance dans l'exercice ou à l'occasion de ses fonctions; tout détournement, toute communication de documents administratifs sont formellement interdits.

4. La délivrance d'une information administrative est purement discrétionnaire sauf, quelques rares exceptions. Ainsi, dès le XIXème siècle, la commune est le banc d'essai de la transparence administrative : l'habitant, le contribuable de la commune a le droit de savoir comment les affaires sont gérées; de même, assez tôt, le fonctionnaire acquerra un droit à la communication de son dossier.

5. La communication du dosier au fonctionnaire date en France de I905. Cette réforme est issue d'un scandale provoqué par une affaire de fiches,dans l'armée : la hiérarchie utilisait des informations recueillies par la Franc-maçonnerie et les fiches portant pour l'essentiel sur la pratique religieuse aidaient à fonder l'appréciation sur chaque officier. Les socialistes conduits par JAURES proposèrent le "droit pour tout fonctionnaire à la communication automatique de son dossier". Certains craignirent qu'ainsi on introduise l'anarchie dans l'administration. On lia donc la communication à la mesure disciplinaire et ce lien subsistera jusqu'à ce qu'en I978, on reconnaisse un droit général d'accès.

6- Si l'administration est opaque, le citoyen veille jalousement à la défense de sa vie privée, du moins celui à qui une certaine aisance matérielle et sociale permet de jouir véritablement de sa vie privée. Il a un droit d'être laissé tranquille dans son intimité et ce droit est d'autant plus fort, qu'il ne demande rien à l'Etat cantonné dans des fonctions de "gendarme" garant de l'ordre public; ainsi il a peu d'informations personnelles à fournir à l'administration.

.../...

7. C'est cette situation que la seconde moitié du XXème siècle a remise en cause. Le XXème siècle voit le passage de l'Etat gendarme à l'Etat providence. L'individu demande à l'Etat des prestations de plus en plus nombreuses;en contrepartie, l'Etat va collecter sur chacun des données personnelles de plus en plus abondantes et variées. Le citoyen qui a favorisé cette tendance va toutefois s'inquiéter du rôle tentaculaire pris par l'Etat et des dangers d'une fin de la vie privée si l'Etat peut tout savoir sur chacun. D'où, une première revendication de transparence: l'extension du droit de communication du dossier au fonctionnaire en un droit général d'accès de chacun à ses dossiers personnels. Une seconde revendication parallèle va également se faire jour pour que l'administration ne garde plus par devers elle toutes les études, tous les rapports, tous ces documents de toute sorte qu'elle produit. Le niveau culturel de la société s'est élevé; le citoyen ne regarde plus l'administration comme la puissance publique, mais comme une entreprise, certes d'une forme particulière; il veut qu'elle adopte un style de communication plus ouvert. Cette transparence administrative au profit de tous est réclamée avec d'autant plus d'insistance que les contrôles classiques, contrôle parlementaires et juridictionnels semblent en crise.

8. L'informatique, nouveau mode de traitement de l'information, n'a été à notre sens, qu'un révélateur de problèmes que l'on voyait déjà poindre. La masse d'informations à traiter rend l'informatique indispensable. Ces traitements automatisés comportent-ils des spécificités ? La question des fichiers et de leurs secrets s'est toujours posée (voir notre ouvrage, le secret des fichiers, Paris I976 ed. Cujas). On peut même considérer que l'informatique apporte, par ses sécurités, une garantie supplémentaire de condidentialité; elle développe les moyens du secret et la volonté de les utiliser. En revanche, il est vrai qu'aucune sécurité n'est parfaite

.../...

et que si une fuite se produit, ses conséquences se situeront à plus grande échelle... Le changement d'échelle qui caractérise l'informatique est important. Cette technique bouleverse les modes de traitement de l'information et permet d'entreprendre rapidement des opérations jusqu'alors irréalisables. L'ordinateur est instrument de pouvoir, il est un prodigieux instrument d'aide à la décision. Des données sont collectées ; l'ordinateur facilite leur tri et permet de dessiner le profil de comportement de l'individu. L'ordinateur est-il neutre ? Le traitement informatique en conduisant à la standardisation et à une certaine normalisation en catégories regardées comme indiscutables n'est-il pas facteur de passivité et d'un ordre qui peut être excessif ?

9. Dès lors, le contrôle de la gestion administrative des données personnelles automatisées s'est imposé; il a même été étendu aux données gérées sur support manuel. La défense de la vie privée a été, à cet égard, la préoccupation première. Mais, parallèlement, on a vu proclamer un principe général d'accès aux documents administratifs, qu'ils contiennent des données nominatives ou non nominatives. L'objectif dépassait la stricte défense de la vie privée. Il nous semble que s'il y a là deux approches différentes de la transparence administrative, à terme, c'est un statut de l'information qui devra être défini quel que soit le support : ainsi un équilibre se trouvera entre l'information et le secret, le communicable et le non communicable.

## I- LES DEUX APPROCHES DE LA TRANSPARENCE ADMINISTRATIVE :

IO. En France, ces deux approches se sont traduites par deux lois. La peur de l'interconnexion généralisée des fichiers de l'administration à partir d'un identifiant unique, le numéro de sécurité sociale et, partant, d'un repérage permanent de l'individu, a conduit à l'adoption de la loi du 6 janvier I978, relative à l'informatique, aux fichiers et aux libertés qui organise un contrôle des traitements automatisés d'informations nominatives. Six mois plus tard, la loi du I7 juillet I978 proclame la liberté d'accès aux documents administratifs.

## A- Le contrôle des traitements automatisés d'informations nominatives

### 1. Les principes de contrôle :

11. Six principes sont mis en oeuvre, on les retrouve dans la plupart des pays qui se sont inspirés des travaux du Conseil de l'Europe et de l'O.C.D.E.: principes de loyauté, d'exactitude, de finalité, de publicité, de sécurité, de l'accès individuel. Sous-tend ces principes, l'exigence de défense de la vie privée; le respect de cette exigence se vérifie par la transparence des traitements au profit de l'instance de contrôle, par l'accès des personnes à leurs propres données. D'autre part, il est veillé à ce que chaque gestionnaire n'utilise que les données strictement nécessaires à l'exercice de sa mission; certaines données sensibles qui font apparaître les origines raciales ou les opinions politiques, philosophiques ou religieuses ou les appartenances syndicales des personnes, font l'objet d'une protection particulière: elles ne peuvent être recueillies qu'avec l'accord exprès de l'intéressé, sauf pour certains traitements de police...

12. Une caractéristique essentielle de ces législations tient à ce que le contrôle s'exerce non seulement par l'accès individuel mais également, par le canal d'une institution d'un type nouveau, telle la Commission Nationale de l'Informatique et des Libertés (C.N.I.L.). Ce phénomène mérite attention. On aurait pu songer à un mécanisme comportant quelques règles législatives, l'accès individuel et le contrôle des tribunaux. L'apparition d'une institution de médiation est à retenir. Elle semble liée au développement de nouvelles technologies dont l'encadrement juridique classique est malaisé et qui paraissent davantage justiciables d'une déontologie, de règles de conduite souples élaborées en concertation; aussi a-t-on voulu lui donner une place à part dans l'administration qui puisse asseoir son autorité : elle est qualifiée d'autorité administrative indépendante; sa composition est originale. Elle repose davantage sur l'élection par différentes instances que par la désignation gouvernementale, le poids des parlementaires contribue à renforcer son indépendance, son autonomie et à la faire

connaître de l'opinion. On notera qu'à une période de crise de l'institution parlementaire classique, individuellement, les parlementaires tentent de suivre les interactions des libertés et des nouvelles technologies dans des institutions spécifiques.

2. Le contrôle de la création des traitements publics :

13. Pour la CNIL, il y a une transparence totale des projets de création de traitements. Notamment, par ses avis, elle négocie des modifications des projets. Il serait sans doute délicat pour la CNIL de s'opposer de front à des projets auxquels un gouvernement tient. Eternel problème des organes de contrôle face à des décisions politiques... Le plus souvent, les avis de la CNIL sont émis après que les modifications du projet initial ont été obtenues en cours d'instruction et que des réserves ont été formulées dans l'avis. A l'inverse, dès lors que l'avis a été rendu public et que les médias l'ont commenté, le Gouvernement est incité à en tenir compte... (cf. notre article avec N. LENOIR, Actualité juridique droit administratif I983, p. 645).

14. En ce qui concerne l'identifiant unique, la CNIL s'est opposée à sa banalisation et a invité les administrations à se doter d'identifiants spécifiques. La Commission a d'autre part examiné les fichiers de police, en tenant compte, à chaque fois, de la nature de la population concernée et des dangers qu'elle peut ou non présenter pour la sûreté de l'Etat, la défense et la sécurité publique; elle autorise certaines dérogations aux principes de la loi du fait de la dialectique inévitable existant entre raison d'Etat et droits individuels En I984, elle s'est prononcée sur l'informatisation de toute une administration, en l'occurrence celle des impôts, à travers l'ensemble de ses fichiers: là également, une conciliation a été opérée entre la défense de la vie privée et les exigences de la lutte contre la fraude fiscale. La vie privée est de moins en moins un absolu; elle doit céder devant certaines contraintes de la vie en société, contraintes

variables suivant l'époque et la société en cause. Si les recensements généraux de la population sont une nécessité comme l'a reconnu le Tribunal constitutionnel de Karlsruhe, en revanche, la CNIL estime que la question traiditionnellement posée sur l'union libre était inutilement indiscrète. Dans le même souci de préserver l'intimité de la vie privée, elle a estimé que la facturation détaillée de leurs communications téléphoniques, délivrée aux usagers, devait comporter les numéros d'appel moyennant l'occultation des quatre derniers chiffres, afin de protéger le secret de la correspondance des tiers appelés.

I5. Le principe de finalité est donc une référence majeure de la C.N.I.L. pour la protection de la vie privée; il doit y avoir adéquation des données enregistrées à la finalité de traitement dès lors que celle-ci est jugée légitime. La Commission veille également au respect de l'identité humaine; ainsi elle a repoussé un système qui comportait l'édition à partir des certificats de santé obligatoires à la naissance, de fiches de signalement d'enfants devant faire l'objet d'une surveillance médicale et sociale prioritaire. Le tri s'opérait au moyen de la modélisation de multiples facteurs, pour la plupart très incertains.

3. Le contrôle de la gestion des traitements publics :

I6. Ce contrôle est d'abord assuré par la CNIL qui détient d'importants pouvoirs d'investigations,tant à l'égard des fichiers manuels qu'automatisés. Elle développe de plus en plus les contrôles du suivi des avis qu'elle rend en matière de création de traitements. A la suite de plaintes ou spontanément, elle opère également des contrôles sur la gestion de certains traitements. Jusqu'à présent, elle a peu utilisé l'arme pénale, préférant manifestement celle de la publicité de ces observations, souvent plus adaptée.

.../...

17. De son côté, le citoyen a un droit d'accès aux informations le concernant. Il peut se faire communiquer, en langage clair, ces informations, puis les contester en exerçant un droit de rectification si elles sont inexactes, incomplètes, équivoques, périmées ou si leur collecte, leur utilisation, leur communication ou leur conversation est interdite. Cette relation directe entre le ficheur et le fiché n'est pas aisée à faire entrer rapidement dans la pratique, tant les fichés hésitent, seuls, à faire valoir leurs droits et tant les ficheurs sont tentés d'abuser de leur position.

I8. Pour les fichiers de police, l'administré doit passer par la CNIL, qui délègue un de ses membres ayant la qualité de magistrat. Celui-ci exerce les mêmes pouvoirs que le titulaire du droit d'accès. Au terme de ses investigations, il se borne à notifier à l'intéressé qu'il a été procédé aux vérifications demandées. Peut-on encore parler de droit d'accès ou ne s'agit-il pas plutôt d'une forme de contrôle de la CNIL ? Ce droit d'accès indirect est caractéristique de la voie moyenne qui peut seule être pratiquée à l'égard de ces fichiers.

I9. De même les informations à caractère médical ne sont communicables que par l'intermédiaire d'un médecin désigné à cet effet par l'intéressé.

20. Dès la collecte des informations, il est précisé à la personne quels seront les destinataires des informations et l'existence d'un droit d'accès. Toutefois, la constitution de banques de données épidémiologiques pose problème au regard de cette exigence d'information de l'individu. Tel est le cas, par exemple, pour les registres du cancer....

.../...

B- La liberté d'accès aux documents administratifs:

1. Le principe de la liberté d'accès :

21. Parallèlement au droit d'accès de chacun à ses propres données, une exigence plus générale de transparence administrative s'est manifestée avec la loi du I7 juillet I978 au profit des documents administratifs de caractère non nominatif : désormais, sont communicables les dossiers, rapports études, comptes rendus, traitements automatisés d'informations non nominatives.....

22. La finalité est moins celle de la défense de la vie privée que l'instauration d'une démocratie administrative pour des citoyens considérés comme adultes; la participation des citoyens doit pouvoir s'appuyer sur une information complète. Une telle loi bouleverse une tradition de secret administratif profondément établie en France, elle rejoint d'autres grandes lois comme les lois scandinaves ou la loi américaine.

23. Le droit d'accès s'accompagne ici, non pas d'un droit de rectification, mais d'un droit de réponse : toute personne a la droit de connaitre les informations contenues dans un document administratif dont les conclusions lui sont opposées; sur sa demande, ses observations sont consignées en annexe.

24. Le principe est donc la transparence, assorti de quelques exceptions. Là encore, entre l'administration et les administrés, a été placée une instance de médiation, la CADA (Commission d'accès aux documents administratifs); celle-ci , en cas de difficultés, est saisie par les citoyens et elle dit, dans un avis, si le document en cause est ou non communicable La CADA a sans doute une dimension plus modeste que la CNIL; cependant, on y trouve également des élus du suffrage universel à côté de hauts fonctionnaires et de magistrats.

Ses avis ont un rôle surtout pédagogique: persuader l'administration de communiquer un document; ils ont, en définitive, une valeur "moralement contraignante".

2. Les exceptions au principe :

25. Une liste de secrets figure dans la loi qui rendent des documents administratifs non communicables. On y trouve en particulier des secrets définis dans l'intérêt de l'administration elle-même : secret des délibérations du Gouvernement, secret de la défense nationale ou de la politique extérieure, par exemple; d'autres secrets protègent l'individu lui-même, notamment, le secret de la vie privée, des dossiers personnels et médicaux: on ne peut laisser communiquer à un tiers un document administratif qui comporterait des appréciations dont la divulgation porterait atteinte à la vie privée de la personne concernée, transparence administrative certainement,mais également, respect de la confidentialité et de la vie privée; on retrouve par un autre biais l'une des préoccupations des lois informatique et libertés.

3. Pratique et évolution :

26. La loi du I7 juillet, initialement prévue pour l'accès aux documents administratifs non nominatifs, a été complétée peu après pour donner également un droit d'accès aux documents nominatifs. Cette loi rejoint ainsi la loi informatique et libertés qui avait déjà institué un habeas data. Conçue pour asseoir la démocratie administrative la loi du I7 juillet I978, dans pratiquement deux tiers des cas, va être utilisée pour l'accès à des dossiers personnels de la part de citoyens soucieux de contrôler leurs informations et de défendre leur vie privée. En revanche, l'accès de groupements, associations, partis politiques, à des documents généraux, accès qui a paru indispensable pour qu'ils puissent étayer leur argumentation, est encore peu fréquent.

27. D'un autre côté la CADA ne s'est guère penchée, à la différence de la CNIL, que sur l'accès à des documents gérés sur support manuel; elle n'a pas encore réfléchi à l'accès aux banques de données administratives non nominatives et portant sur les grandes questions économiques, sociales, culturelles....

28. A partir de deux approches différentes, on retrouve les mêmes interrogations : doit-on gérer différemment l'information nominative et l'information non nominative ? les règles de gestion sont-elles les mêmes selon que l'information est portée sur support manuel ou informatique ? quel équilibre définir entre le droit à la vie privée, qui impose la confidentialité, et le droit à l'information ou droit de savoir ? Toutes ces questions semblent bien relever d'un statut unique de l'information administrative qui reste encore à déterminer.

## II- VERS UN STATUT UNIQUE DE L'INFORMATION ADMINISTRATIVE :

29. Les approches différentes engendrées par ces deux lois ont fait surgir des contradictions. Sans doute, celles-ci ne doivent-elles pas être exagérées, mais elles appellent un dépassement qui pourrait prendre, à terme, la forme d'un statut unique de l'information.

### A- Les premières contradictions nées de deux approches.

30. Les deux approches conduisent tout d'abord à des appréciations différentes de ce qu'est une information nominative. Dans la loi de protection des données personnelles automatisées, c'est une acception très large qui prédomine : sont réputées nominatives les informations qui permettent, sous quelque forme que ce soit, directement ou non, l'identification des personnes physiques auxquelles elles s'appliquent. Dans cette optique, toute information nominative doit relever de la protection de la vie privée. Au contraire, dans l'approche de l'autre loi, la définition est restrictive pour ne pas limiter abusivement la liberté d'accès des tiers aux documents administratifs (voir, sur ces deux approches, notre note avec

C. WIENER au Recueil DALLOZ 1983 p. 546) : ne sont considérées comme nominatives que les informations qui contiennent "une appréciation ou un jugement de valeur sur une personne physique nommément désignée ou facilement identifiable". Ainsi, un fichier de permis de construire sera qualifié par la CNIL de fichier nominatif et verra son accès limité; la CADA ne le définira pas comme document nominatif et, dès lors, dira qu'il est communicable ...

31. Il est vrai d'autre part que la réflexion de la CNIL porte surtout, bien que pas exclusivement, sur des informations automatisées, alors que la CADA se prononce sur la communicabilité d'un document manuel. On l'a dit, il existe sans doute une certaine spécificité de la gestion informatique, due surtout au changement d'échelle qu'elle implique. Cependant, est-il raisonnable d'envisager deux jurisprudences donnant deux définitions de ce qui est ou n'est pas communicable, selon la nature du support ? Une telle solution serait d'autant moins raisonnable que la distinction entre le manuel et l'informatique ne cessera de s'estomper. Déjà, lorsqu'a été votée la loi informatique et libertés, il a été proposé d'étendre les règles de collecte, d'enregistrement et de conservation des informations nominatives, ainsi que les règles d'accès aux fichiers manuels, pour éviter la coexistence d'un régime strict et d'un régime souple. Mais aujourd'hui, les deux types de gestion sont de plus en plus inextricablement mêlés puisqu'on voit des traitements automatisés devenir des fichiers de références renvoyant à des dossiers manuels. C'est bien sûr un régime uniforme qui devrait s'appliquer à cette information indissociable. Au surplus, l'administration ignorera le plus souvent sur quel support sont gérées telles catégories d'informations le concernant.

../..

32. Enfin, on ne peut, organiquement, séparer la matière de l'information entre une Commission chargée de défendre la vie privée et une autre ayant pour mission de renforcer le contrôle démocratique des citoyens sur les pouvoirs publics et l'administration. Il y a un arbitrage et une conciliation à opérer constamment entre la protection de la vie privée, le droit de savoir de l'administration et l'information des tiers.

B- Le dépassement des contradictions.

33. Dans les années 70, on a vu poindre une inquiétude à l'égard du développement incontrôlé de l'informatique aux mains de quelques-uns appelés à détenir un grand pouvoir sur les individus. Depuis lors, trois faits doivent être relevés : la maîtrise de la gestion des données personnelles automatisée a progressé grâce, en particulier, à l'action des autorités de contrôle; on s'est aperçu, d'autre part, des dangers propres aux fichiers manuels, mal mis à jour, et qui enregistrent souvent, dans des conditions douteuses, des personnes qui, à vie, apparaîtront comme des suspects. Enfin, la micro-informatique entraîne une dispersion des détenteurs de données automatisées et une certaine déconcentration, voire décentralisation de l'information.

34. Les institutions de médiation ont un rôle irremplaçable à jouer en amont du contrôle juridictionnel pour aider le citoyen isolé, pour conseiller l'administration. La formule d'une magistrature morale dans laquelle siègent des parlementaires est à conserver. Mais l'on pourrait regrouper les commissions pour que ce droit à l'information administrative et ce droit au secret trouvent leur équilibre. Une Commission unique découperait son champ de compétences autour de deux axes :

1. Les questions de constitution des fichiers et de leur accessibilité.

35. Une activité de réglementation doit consister à définir les règles de constitution des fichiers nominatifs : apprécier la finalité du traitement, la liste des destinataires des informations et la nature des informations collectées; règles de collecte, d'enregistrement et de conservation des informations nominatives.

36. A cet égard, on sera conduit à s'interroger sur l'évolution inéluctable des formalités préalables à la création des traitements, alors que leur nombre ne cessera de croître; face à une loi générale comme la loi française et les lois européennes, à la différence des Etats-Unis, une déontologie sectorielle doit se préciser. Cette magistrature morale doit, sous le contrôle des tribunaux, en concertation avec les intéressés et en recourant, le cas échéant, à débat public, opérer cet arbitrage entre les différentes libertés en cause; la vie privée est souvent à concilier avec d'autres exigences.

2. Les refus de communication.

37. Un autre axe d'activité consiste à régler ponctuellement les refus d'accès à des documents nominatifs et non nominatifs. Encore faut-il s'accorder sur la définition du terme nominatif et sur la liste des secrets à opposer. La Commission doit assurer ce rôle d'intermédiaire entre administration et administrés, et dire ce qui est et ce qui n'est pas communicable. Trois autres séries de questions méritent également réflexion.

../..

38. La notion de tiers autorisé : Si les lois de protection des données prévoient que soit fixée la liste des destinataires des informations nominatives, il est des cas où ce droit de communication semble automatique. Ainsi, l'administration fiscale traditionnellement a des pouvoirs d'investigation très larges, mais l'informatique transforme-t-elle ce droit d'investigation ponctuel en un droit beaucoup plus général de communication de bandes magnétiques sur les contribuables ? S'il existe dans les lois de protection des données un droit à l'oubli, on peut penser qu'il n'est pas opposable aux Archives qui doivent, de droit, être destinataires de toutes les informations. Enfin -et ce point maintenant est connu- la protection de la vie privée et le principe de finalité ne doivent pas avoir pour conséquences de rendre plus difficile l'accès des chercheurs aux informations.

39. Droit de rectification et droit de réponse. Le droit de rectification a été conçu pour corriger une erreur qui se serait glissée dans un traitement. Mais la rectification, c'est-à-dire la suppression ou la modification de l'information peut-elle toujours être imposée à l'Etat ? Le droit de réponse ne concilie-t-il pas parfois mieux le contrôle de l'administré sur ses informations et la rédaction que l'administration a donnée elle-même ?

40. Droit individuel et droit collectif. Le droit d'accès aux données personnelles est un droit individuel; pour les données non nominatives, c'est un droit aussi bien collectif que personnel. Mais l'on peut penser que ce droit individuel reste souvent bien formel et de portée limitée. Le contrôle de l'information et des systèmes d'information ne peut qu'être collectif pour être efficace. C'est le rôle des commissions

../..

du type CNIL; ce devrait être le rôle des comités de personnels et d'usagers que de porter une appréciation sur les systèmes d'information à mettre en oeuvre. C'est également la tâche des médias et du mouvement associatif que de faire des suggestions et d'ouvrir le débat. Il y a des choix de systèmes d'informations à faire; rien ne doit être subi. Les choix ne sont pas sans conséquence sur le modèle de société qui se développe et sur la part respective faite aux différentes libertés. Le concept de vie privée ne peut plus conserver un sens purement négatif; il faut le replacer dans le cadre plus général d'un modèle de société et d'une démocratie confrontée aux nouvelles technologies. Il est alors une variable , essentielle sans doute, mais une variable seulement parmi d'autres. Comme le dit la loi française sur l'informatique et les libertés : "L'informatique doit être au service de chaque citoyen (...). Elle ne doit porter atteinte ni à l'identité humaine, ni aux droits de l'homme, ni à la vie privée, ni aux libertés individuelles ou publiques". Les démocraties industrielles occidentales dans lesquelles ces lois sont nées ont des réponses, sinon identiques, du moins de même nature; elles se dégagent peu à peu. En revanche, dans les autres sociétés, les questions sont à peine posées ...

Mars 1985.