

**Lettres de Byblos**  

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**Letters from Byblos**

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THEODOR HANF (ED.)

**Power Sharing: Concepts and Cases**

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## Lettres de Byblos / Letters from Byblos

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# FOREWORD

THEODOR HANF

The roots of the democratic separation of powers lie in mistrust of unrestricted authority of an individual and of the concentration of power in one office. The separation of powers was already practised in the ancient Roman Republic: two consuls elected annually jointly exercised the highest authority, each with the same rights, including a veto.

By ethnicity, language and religion the people of the Roman Republic was homogeneous. Political cleavages and conflicts took place between individuals and between patricians and plebs. However, all of the parties to the conflicts were Roman citizens. When the city grew into an empire and Rome conquered Gauls, Germans, Greeks, Carthaginians, Judaeans and Egyptians without giving them citizenship, the Republic, and with it the separation of powers, collapsed. The empire was ruled by emperors free of any control by their subjects.

Later empires encompassed various ethnic, linguistic and religious groups and were for the most part monocratic - from the Byzantine Empire and its orthodox, later Soviet, successor states in Russia, through the Ottoman Empire, to the colonial empires of the nineteenth and twentieth centuries. Does heterogeneity always go hand in hand with monarchy? Or to put it the other way round: is democracy possible only in homogeneous societies?

There is something to be said for answering these questions in the affirmative. Iceland, one of the oldest democracies, has a completely homogeneous population. In France, democracy emerged after the monarchy had already established religious uniformity by revoking the Edict of Nantes and expelling Protestants. The United States attracted immigrants who were prepared to subordinate differences in origin to their interest in a new identity as equal citizens in a new state. Whether homogeneous by circumstance, coercion or choice, the absence of ethnic, linguistic or religious cleavages appears to be conducive to democracy.

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But democracies have also emerged in eminently non-homogeneous states such as the Swiss confederation, the successor states of the Holy Roman Empire and those created out of the former colonial empires. One common feature of their histories is the failure of attempts to create homogeneous states, often after bloody warfare, or the lack of any such attempt in the first place. These states learned to live with diversity, give it political expression, and in some cases even appreciate it. In doing so, they went beyond forms of separating powers to sharing power. The majority does not rule; rather, all communities, whether defined by ethnicity, language, religion or even ideology, participate in government on the basis of proportional or even equal representation. Important decisions can be taken only by mutual agreement - each community has a right of veto, as the Roman consuls of yore.

Political systems based on power-sharing were long sidelined by mainstream political science and not paid much attention. This changed in the 1960s when Arend Lijphart and Gerhard Lehmbruch separately proposed treating these systems as a unique type of democracy distinct from majority democracy. Since then, various theoretical concepts have been developed to explain this "new" type and numerous case studies presented. As so often in the history of science, political science trailed behind political developments. The break-up of the colonial empires and later the Soviet Union, led to the creation of so many non-homogeneous states that nowadays non-homogeneous states are the rule rather than the exception.

Arend Lijphart took the crucial step from description to prescription: power sharing is the best, if not the only, possible form of democracy for non-homogeneous societies. This view seems to find growing support in the international community, which increasingly insists on systems of power sharing as a means of regulating ethnic conflict. A few days before this book went to press Kofi Annan urged the conflict parties in Kenya to share power.

At the same time, however, there are signs of crisis in established power-sharing systems. A constitutional crisis in Belgium was treated in a dilatory manner for months while a deal is still pending. In Switzerland the country's largest political party is not any more represented in government, precipitating questions about the survival of consociational democracy in that country. In Lebanon the government and opposition have been testing the limits of their mutual veto powers for well over a year.

Taken together, the situations outlined above give ample grounds for reviewing the concept of power sharing, for perusing old examples and studying new ones. The articles in this volume, originally presented at a seminar organised by the *International Centre for Human Sciences* in Byblos and sponsored by the Friedrich Ebert Foundation's Beirut Office, should be viewed as a contribution to this undertaking.

Arend Lijphart's concepts have defined the international debate in political science in this field for decades. Tamirace Mühlbacher-Fakhoury analyses his conception with a view to identifying weak points and substantiating suggestions for further theoretical study.

Gerhard Lehbruch's research interest has long been focused on the historical conditionality of power sharing. In Byblos he once again presented his exhaustive exploration of the roots of negotiated democracy in the successor states of the Holy Roman Empire, which has shaped their political culture down to the present day.

Michael Kerr shows how - after several unsuccessful attempts - the conflict in Northern Ireland was regulated by power sharing. Of particular interest is his analysis of the international influences that made this result possible.

Karim El Mufti investigates the spectacular case of externally imposed power sharing in Bosnia and Herzegovina. He illustrates that its acceptance by the different population groups is fragile and predicated on continued external pressure.

Dominik Hanf studies the European Union as a complex system of consensus. One particularly interesting finding is the willingness of member states to forgo taking decisions by qualified majority, even if this is permissible under the treaties.

Finally, Richard Norton's essay on Lebanon is as timely now as it was when written almost a year ago: the blockade of the Lebanese system continues, as does co-existence within it; no group can dominate and none can be excluded.

One conclusion that can be drawn from these case studies is that power sharing is a civilised form of ceasefire. It is often the result of bloody wars. In its most civilised application it is introduced to prevent war. Even if power sharing leads to stalemate, this is preferable to war.

Finally, it should be pointed out that the two grand old men of the field have summarised their work in two books<sup>1</sup> that can be emphatically recommended to all interested readers.

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<sup>1</sup> Gerhard Lehbruch, *Verhandlungsdemokratie. Beiträge zur vergleichenden Regierungslehre*, Opladen: Westdeutscher Verlag 2003; Arend Lijphart, *Thinking About Democracy. Power sharing and majority rule in theory and practice*, London & New York: Routledge 2008

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# A Review and Critique of Consociational Democracy

TAMIRACE FAKHOURY-MÜHLBACHER

The search for a democratic model that helps stabilise and pacify deeply divided societies has inspired a plethora of writings which redefined traditional meanings of democracy and system typologies. In these writings, assumptions that democracy could only be reconciled with majoritarian models were revisited and challenged.

Considered as harbingers of a new democratic typology, eminent studies have argued - especially from the 1960s on - that it was possible to engineer stability in inherently unstable and deeply divided societies, and that the quintessence of democracy in such societies could be safeguarded through a balanced division of power and through ingrained modes of coalescence.<sup>1</sup>

According to these studies commonly based on the concepts of consociation,<sup>2</sup> power-sharing and negotiation, Western-style models and majoritarian party-systems do not fit multi-ethnic states divided along ethnic, linguistic or religious lines. This is why an alternative model, which bridges the gap between fragmentation and stability, should be applied to these fragmented societies.

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<sup>1</sup> For an account on the evolution of the consociational approach, see Hans Daalder "On the Origins of the Consociational Democracy Model," *Acta Politica* 19 (1984): 97-116.

<sup>2</sup> Defined in Webster dictionary (1913) as "intimate union; fellowship; alliance; companionship; confederation; association; intimacy".

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While Lorwin used the expression “segmented pluralism”<sup>3</sup> to describe this approach, Lehbruch called this peculiar form of democracy “proportional” or “concordant” democracy.<sup>4</sup> The most popular expression “consociational democracy” was developed by Lijphart as an alternative typology to centripetal and centrifugal democracies.<sup>5</sup>

Defined as a political mode in which political elites aim at establishing a political culture characterised with accommodation, consociational theory purports that stability can be reached in divided societies through the adoption, development and institutionalisation of a power-sharing model which aims at taming and restructuring intrinsic fault lines.

It is noteworthy that the smaller European countries - the Netherlands, Belgium, Switzerland, and Austria - constituted at first the crux of consociational studies. These territories first considered as unexplored territories were depicted later on as fortunate examples of power-sharing democracy.

The power-sharing model was later extended to plural societies in the Third World, such as Lebanon, Malaysia, South Africa, Ghana and India. This theory acquired with time a universal and prescriptive touch, and was analysed from different angles.<sup>6</sup>

First, power-sharing was depicted as a pattern related to the nature of cleavages and communal segmentation in a plural society. The analysis of segmental pillars and their cleavage lines sheds light on aspects of division and integration in a segmented society.<sup>7</sup> Second, consociationalism was directly linked to elite behaviour and to what Lijphart calls ‘the self-negating prophecy’. Aware of underlying centrifugal threats, political elites can purposefully create channels of cooperation and manage destabilising structures that threaten to fling the system into unruly waters. In other words, elites develop and internalise conflict-regulating strategies so as to counteract the dangers of division.

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<sup>3</sup> Val R. Lorwin, “Segmented pluralism,” *Comparative Politics* (1971): 141- 175.

<sup>4</sup> Gerhard Lehbruch, *Proporzdemokratie: politisches System und politische Kultur in der Schweiz und in Oesterreich* (Tübingen, Ger.: Mohr, 1967); “A Non-competitive Pattern of Conflict Management in Liberal Democracies: The Case of Switzerland, Austria and Lebanon” in *Consociational Democracy: Political Accommodation in Segmented Societies*, ed. Kenneth McRae (Toronto: McClelland and Stewart, 1974) 90-97.

<sup>5</sup> See for example Arend Lijphart, “Consociational Democracy,” *World Politics* 21(1969): 207-225.

<sup>6</sup> See for example Andre Kaiser, “Types of Democracy: From Classical to New Institutionalism,” *Journal of Theoretical Politics* 9 (1997): 419-444.

<sup>7</sup> See Lorwin, “Segmented Pluralism.”

Third, the consociational mode has been associated with past patterns of bargaining and accommodation. Thus, power-sharing trends can be traced back to traditions of negotiation embedded in history.<sup>8</sup>

Despite the multiplicity of approaches, Lijphart's model based on elite behaviour has been considered as one of the most popular theoretical benchmarks adopted by consociationalists. It should be however underlined that the writings of other consociational theorists<sup>9</sup> deserve equal attention if sufficient light is to be shed on the theory and the multi-faceted variables that serve to define it.

According to Lijphart, the voluntary variable of elite coalescence replaces the variable of political culture in a consociational model. Defining this democratic genre as a "government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy,"<sup>10</sup> Lijphart was praised for introducing the factor of political engineering through which segmental leaders could deliberately alter the course of events and transform cleavages into pillars of integration.

For consociational democracy to succeed, Lijphart outlined four prerequisites based on elite active behaviour and accommodation: Leaders should be aware of the dangers lurking beneath the system, they should commit to preserving the system, they should be able to surpass segmental cleavages at the top, and they should be able to work out appropriate solutions to various communal problems.

Lijphart also came up with a list of favourable factors to consociational democracy which he considered as tentative. According to him, these favourable conditions could contribute to the genesis and sustenance of a power-sharing democracy, yet even if they are absent, the model could develop. These factors hinge on the number of ethnic groups, their size, their degree of fragmentation, the impact of external dangers, overarching loyalties, socio-economic differences and traditions of compromise on internal cohesion.

Consociational democracy is generally defined in terms of four broad power-sharing devices: a grand executive coalition representing different societal segments, a mutual veto which allows groups to reject decisions detrimental to their interests, proportionality rules as the governing principle in political representation, civil service

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<sup>8</sup> See Hans Daalder, "On Building Consociational Nations: The Cases of the Netherlands and Switzerland," in *Consociational Democracy: Political Accommodation in Segmented Societies* edited by Kenneth McRae, 107-124. Toronto: McClelland and Stewart, 1974; "The Consociational Democracy Theme," *World Politics* 26 (1974): 604-621.

<sup>9</sup> I cite particularly Lehmbruch's differentiated approach to consociational democracy and his concentration on historical factors and negotiation patterns as well as sustaining requisites that help preserve consociational trends in deeply divided societies.

<sup>10</sup> Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, New Haven: Yale University Press, 1977.

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appointments, and allocation of public funds, and segmental autonomy in educational, linguistic, cultural and legal affairs.

In his recent writings, Lijphart considers grand coalition and segmental autonomy as the two core components of consociational democracy, and argues that proportionality and mutual veto act as complementary characteristics which improve the quality of power-sharing and enhance inter-communal cooperation and cultural autonomy.

Consociational prerequisites, factors and tools help delimit and differentiate the model, which, in spite of these indicators, remains a flexible typology able to take on different institutional and political structures.

Lijphart also highlights that consociational democracy does not aim at reducing pluralism but at recognising it so that it evolves into a constructive element of democracy. Even though he first concentrated on the Dutch example of pillarisation, he tackled later various consociational cases in Europe and in deeply divided societies of the Third World. Arguing in 1977 that the consociational approach should be considered as a serious option for multi-ethnic societies, he identified Lebanon's and Malaysia's power-sharing model as yardsticks against which prospects for the emergence of power-sharing democracy in other societies could be assessed.<sup>11</sup>

With time, Lijphart's model acquired a normative, empirical and prescriptive value which conferred to the model a universal and 'absolutist' touch. Hence, one of Lijphart's most famous arguments is that consociational democracy becomes necessary in extremely fragmented states as no other democratic alternative could be seriously taken into consideration.

## **A critique of the consociational model: Flaws and ambiguities**

Even though the consociational approach is considered as an ambitious typological construct applicable to unstable societies usually threatened by internal discord, war or partition, the model has been severely criticised for various methodological, theoretical and empirical reasons. These critiques have obliterated the value of the model and drew attention to its impractical and inoperable sides.

The most damaging criticism revolves around Lijphart's 'self-negating prophecy'. It is generally argued that the enlightened role of the elite is amplified beyond bounds. Furthermore, the variable de-emphasises historical and structural determinants which might play a more decisive role when it comes to establishing the power-sharing model. Various analysts have thus pondered whether some cultures are internally pre-

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<sup>11</sup> See Lijphart, *Democracy in Plural Societies*.

disposed to power-sharing and whether there are multi-ethnic configurations in which consociational solutions are inevitably doomed to collapse.

The consociational model has also been criticised for its lessened democratic element. Some observers questioned whether the power-sharing model built on elite supremacy and predominance over the followers really takes into consideration important democratic criteria.

Furthermore, controversial debates hover around the normative and prescriptive values of the model. Successful consociational cases, in which solid links between stability and democracy have been empirically tested, are indeed rare. This draws one's attention to the limited and narrow margins of the model's applicability.

Another reservation is that the adoption of power-sharing devices may exacerbate inter-segmental conflicts and tensions instead of dampening and pacifying them. This critique applies for instance to the deeply divided Iraqi society in which the enforcement of federal structures after the 2003 war without an efficient and parallel approach to conflict-regulation has exacerbated and politicised inter-religious animosities

Moreover, the claim that elites are always enlightened and that they act in the best interest of their society is controversial. Hence, Lijphart's variable of elite engineering cannot provide a sufficient tool for crafting stability in a deeply fragmented society. An arising question is whether consociational models only work when inter-segmental conflicts and hostilities are not acute. In this case, it is not the elite variable that facilitates consociational engineering but the existence of deeply embedded mechanisms of inter-communal bargaining.

Besides, a power-sharing democracy seems to function only when the surrounding environment is relatively tranquil. In deeply divided societies situated in agitated regions, consociationalism is more bound to external variables than to domestic dynamics. The example of Lebanon in which domestic allegiances are manipulated by external affiliations in a highly turbulent region is telling.

A supplementary critique hinges on the relevance of consociational democracy as an independent typology. The fact that consociational elements in countries such as Netherlands and Austria have withered makes the model tantamount to a temporary and intermediate arrangement. In addition, the fact that there are many democracies which have power-sharing features but which do not fully approximate the consociational model makes one wonder whether consociational democracy is a stable typology or whether it is a transient 'political mode'. A challenging question is whether scholars should stop considering the consociational model as a pure type in political taxonomy and study rather power-sharing features in democratic systems.

Furthermore, Lijphart's argument that deeply divided societies have the option between consociational democracy and no democracy at all has been challenged by

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various political scientists. Some have advanced the thesis that a kind of 'control model' whereby one group dominates could also induce stability.<sup>12</sup> Others argue that increasing overarching loyalties and introducing vote-pooling cooperative measures could enhance inter-segmental cooperation, and stabilise the society without introducing the consociational model per se.

Although the consociational theory is indeed a breakthrough in system typologies on the one hand and in the art of conflict-regulation on the other, it fails to meet scientific criteria. Thus, its equivocal semantic field can be ascribed to several interpretations. For instance, no thorough and consistent terminological definitions have been elaborated when it comes to differentiating cleavage lines and their impact on consociationalism. It is also difficult to define the boundaries between a plural and a deeply divided society in consociational literature.

Also, the power-sharing theory has been criticised for its exaggerated use of impressionistic notions that have not been tested empirically. Many analysts argue that Lijphart's model is not really reliable, and that the case studies he chose to verify his claims remain selective. Because of the weak scientific character of the model, consociational theory lacks precise tools of verifiability and has a rather restrained predictive potential.<sup>13</sup>

A major inconsistency in the consociational theory is the unclear relationship between Lijphart's favourable factors and the model itself. The conjectural and unbinding character of these factors makes them devoid of meaning and applicability. Upon examining a certain case, one cannot really ascertain to what extent favourable factors have contributed to the emergence and maintenance of consociational models, for these factors, according to Lijphart, may or may not have been decisive.

What adds confusion to the status of the favourable factors is that various scholars emphasised different conditions or prerequisites which determined consociational experiences. In addition, unlike Lijphart who argues that these favourable conditions are not binding, others lay emphasis on the determining character of the conditions, and assert that these factors are necessary to fashioning power-sharing.<sup>14</sup> These analysts downplay Lijphart's voluntaristic stances that rely on the elite variable, and elaborate on the crucial and determinative status of prior or concomitant conditions without which the 'self-denying prophecy' might falter. An additional confusing question relates to the vague positioning of the elite variable. If favourable factors, as Lijphart

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<sup>12</sup> Ian Lustick, "Stability in Deeply Divided Societies: Consociationalism Versus Control," *World Politics* 31 (1979): 325-344.

<sup>13</sup> For a sharp critique of Lijphart's method, see M. P. C. M. van Schendelen, "The Views of Arend Lijphart and Collected Criticisms," *Acta Politica* 19 (1974): 19-55.

<sup>14</sup> See Adriano Pappalardo, "The Conditions for Consociational Democracy: A Logical and Empirical Critique," *European Journal of Political Research* 9 (1981): 365-390.

claims are not binding, how does one predict elite behaviour or motives in order to evaluate the prospects for consociationalism?

In short, the fact that there are no reliable indicators to measure and evaluate the feasibility and performance of consociational democracy weakens the application of power-sharing models.

The relationship between democracy and consociationalism is another controversial aspect that needs to be addressed. The theory does not say much on the democratic components of consociationalism and on the dynamics of power-sharing trends. In most studies, democracy is taken for granted as an accompanying feature, yet it is well known that there could be consociational elements in a non-democratic regime. Additionally, it is noteworthy that consociational theory remains a static theory in comparison to more recent theories on democratisation and system transition. In fact, there are no precise tools in consociational literature to assess whether a consociational system is democratic or not. Consociational democracy ends up being a catch-all term that does not differentiate between democratic and power-sharing aspects in a particular system. For more conceptual and empirical clarity, it is essential that the interrelationships between democratic and consociational components in the system be defined.

In the light of these critiques, one is compelled to revisit the prescriptive potential of power-sharing democracy, and its applicability to deeply divided societies. The danger of portraying the model as the only solution to post-conflict fragmented states should be taken into consideration. Also, more scientific and empirical analysis needs to be invested in order to investigate the link between different kinds of cleavage lines, their degree of intensity and consociational outcomes in different divided societies. Additional suggestions would be to study more diligently how different actors (e.g. counter-elites, the masses, interest groups) and intra-communal divisions in various case studies shape the consociational configuration. In the final analysis, it might be more fruitful - both on the theoretical and empirical levels - to analyse the structural features that make up and influence consociationalism from below instead of considering the model as an elite-imported choice from above and dwelling on the variable of elite behaviour at the top and in the institutional realm.

### **A concluding remark: Consociational democracy as a tailored solution**

These critiques notwithstanding, consociational solutions remain efficient political forms that could promote inter-communal coexistence and mitigate severe post-conflict sequels. They can also help stabilise extremely divided societies that have otherwise no chances for steadfastness. In societies ravaged by serious identitarian struggles and organised along steep cleavages, a power-sharing democracy could

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help to some extent transmute stigmatising differences into elements of integration - even if temporarily. Moreover, the flexibility of the model which lays emphasis on elite crafting leaves much room for political creativity and engineering. This is why it is advisable to recommend consociational democracy - not as a universal elixir for all plural societies - but as a tailored solution applicable to specific cases.

# Quasi-consociationalism in German politics

## Negotiated democracy and the legacy of the Westphalian Peace

GERHARD LEHMBRUCH

### Abstract

Germany, although it was never included among the „classical“ cases of consociational democracy, can nevertheless be categorized as “semi-“ or “quasi-consociational“. This does not just mean that Germany might be located somewhere on a scale measuring the degree of consociationalism with the established criteria of the earlier literature. It also presupposes reconsidering the notion of consociationalism itself, as a conceptual tool for comparative politics.

### Redefining consociational democracy

In the last thirty years we have learnt that classical “consociationalism” was a transitory phenomenon, and this insight permits us to place our earlier analyses into a larger evolutionary framework. What once was described as „consociational democracy“ is a specific manifestation, during a distinct historical period, of a particular repertoire of conflict management. But it often has deeper roots going back to the process of state-building. One of the big challenges in that process often was the existence of deep cultural cleavages. In some instances, such as in the French model case, the state

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undertook the suppression of such cleavages by the techniques of absolutist rule but the preliminary condition for such a strategy was the existence of a powerful central authority. Where this condition did not obtain, these cleavages excluded an absolutist solution.

This was then full of consequences in a later stage of development, namely, the process of mass democratization and political mobilization. Strong cleavages made it difficult to adopt patterns of political organization that favored the emergence of majoritarian democracy. The original response to democratization thus consisted in the formation of organizations that were linked, often through interlocking elite directorates, into highly integrated interorganizational networks segmented from each other along cultural lines. The so-called „pillarization“ was thus a specific (and transitory) stage in the development of non-majoritarian systems. However, path-dependencies generated in the state-building process favored the survival of non-majoritarian regimes even after the „de-pillarization“ which was so often described in the second wave of writings on consociational systems.

The evolutionary approach sketched out will be helpful to locate Germany in relation to the familiar universe of consociational countries. Consociational democracy was often described as a specificity of smaller countries, and it is hence not surprising that Germany was not included in the first writings on the subject.<sup>1</sup> Reconsidering the German case three decades later we have to take into account that, on one hand, „classical“ consociationalism has undergone deep changes and at least in some respects is now a matter of the past. About this there is undoubtedly widespread agreement. But on the other hand it has also become fairly obvious that consociational democracy can still fruitfully be analyzed as one specific variety of the alternatives to „classical“ majoritarian democracy, particularly of the „Westminster“ type. In such an analytic perspective, Germany is a particularly salient case because it does not neatly fit into a dichotomous classification: It has, on the one hand, a party system dominated to a large degree by bipolar competition. On the other hand, there are not only some residual elements of former „consociational“ practices; moreover the specific institutional framework results in patterns of policy formation where the majoritarian aspects are often more or less eclipsed in favor of „quasi-consociational“ power-sharing and bargaining. There is, in particular, a close relationship between the „quasi-consociational“ patterns, on the one hand, corporatist interest group politics, and the particular German variety of federalism, on the other. In turn these different patterns, which I subsume under the concept of *Verhandlungsdemokratie* (negotiated

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<sup>1</sup> This is true not only of Arend Lijphart's contributions but also of my own where I emphasized the differences from contemporary West German coalition politics. It was not by chance, however, that my first papers and published work on the subject (Lehmbruch 1966; Lehmbruch 1967b; Lehmbruch 1967a) were published in the beginnings of the West German „Grand coalition“ of Christian Democrats and social Democrats (1966-1969), and the title of my „Proporzdemokratie“ (1967) explicitly referred to the language of the West German political debate of that time.

democracy), operate in constant tension with the model of competitive democracy (*Konkurrenzdemokratie*), the other important element of the German political system. The modern German polity can thus be described as a hybrid of different repertoires for the management of political conflict.

### **Three German models of conflict management: Hierarchical leadership, competitive and negotiated democracy**

Consociationalism in the narrow sense was one historically specific component of a „model“ of politics which today has become more important in German politics than it has often been in the past. This model, which in an earlier article I have labeled *korporative Verhandlungsdemokratie* (Lehmbruch 1996), is important for understanding not only the consociational legacy of Germany but also of German corporatism and federal policy formation. In brief, consociationalism, corporatism and interlocking federalism (*Verbundföderalismus*) are the three important manifestations of the model. Of these, the first has clearly declined in importance while the second and third continue to play an important or (in the case of federalism) even a dominant role. But not only are their action logics closely related, they can also be described as the outcomes of one important path of development in the process of state formation in Germany.

*Verhandlungsdemokratie*, or „negotiated democracy“, is a term which I introduced in my analysis of German federalism (Lehmbruch 1976) as a typological construct opposed to *Konkurrenzdemokratie* (competitive democracy in the sense of Schumpeter and of the „Westminster model“).<sup>2</sup> The adjective in the term *korporative Verhandlungsdemokratie* stresses the importance of organized, or corporate, social groups as the core actors in such as system. In an ideal-type fashion corporative negotiated democracy can be contrasted with *Konkurrenzdemokratie* (competitive democracy) as the two strategic models of policy formation competing in the present German system.

In a larger developmental perspective, these two models have been competing with a third alternative model which in the past was the most salient: This was hierarchical leadership in a strong state. The choice between these models, in the process of forming a national state, was determined by the way the cleavage structure of German society was perceived by the dominant (liberal as well as conservative) elites. Since the formation of the German Empire under Bismarck the prevailing perception increasingly was that of a society riddled with deep ideological, social and regional cleavages, and hence menaced by disintegration. The existence of the

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<sup>2</sup> I should mention that the term *Verhandlungsdemokratie* was used already some years before in Leonhard Neidhart's insightful book on the consequences of the Swiss referendum (Neidhart 1970).

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Catholic and socialist subcultures contributed most to this perception. In Bismarck's eyes both were *Reichsfeinde*, enemies of the Imperial system. For their part, the liberal elites, although they (and to some degree even Bismarck) were impressed by the capacity of the British parliamentary system to produce strong leadership, were concerned that in Germany a parliamentary regime based on a competitive two-party system would have disintegrating effects by giving a key influence to „political Catholicism“ and socialism, and would threaten the liberals' cultural hegemony. Hence many of them became convinced that strong hierarchical leadership was required to hold together the potentially disintegrating conflict structure of German society. And with the breakthrough of mass politics the idea also took root that such leadership needed a charismatic legitimacy. The most outspoken defender of such a position probably was Carl Schmitt. But even Max Weber, although he favoured the introduction of party competition and parliamentary rule, wanted to counterbalance it by a strong hierarchical authority personified by the *Reichspräsident* to substitute monarchical authority. The „dictatorship paragraph“ (article 48) of the Weimar constitution was the clearest institutional consequence of this view. Tragically, such ideas later also opened the way for Hitler's seizure of power. In consequence, the hierarchical model of strong leadership was completely discredited after the defeat of the Nazi regime and did no longer play a role in organizing post-World War II German politics.

Another model, which now in a sense came to replace the model of strong hierarchical leadership, was bipolar party competition for power. An important condition for its rise was the fusion of the erstwhile „political Catholicism“ with conservative and liberal Protestantism that led to the founding of the Christian-Democratic Union (CDU). This was an important step on the way toward „de-pillarization“. In the first *Landtag* (state diet) elections of 1946/1947 CDU and SPD emerged as the two strongest parties, and it was a logical consequence of this changed configuration of the party system that both finished by considering themselves as the potential, but rival contenders for political hegemony. To contemporary political observers this may not have been immediately apparent because at that time most *Land* governments were led by bureaucrats turned politicians who continued to consider grand (or even all-party) coalitions as the most appropriate way to run a country devastated by war (Foelz-Schroeter 1974). However, the two emerging national leaders, Kurt Schumacher, on the one hand, and Konrad Adenauer, on the other, both discovered the new strategic logic inherent to the new party configuration and successfully educated their respective parties to embrace bipolar competition as the basic option.

In this context Adenauer, just as Helmut Schmidt two and half decades later, explicitly stressed the prototypical importance of „Westminster democracy“ for re-launching West German democracy. However, Bonn came to diverge from Westminster by the necessity to include smaller coalition partners, so that alternating coalitions took the place of alternating party government. This signified the insertion of coalition bargaining as a „nested game“ (Tsebelis 1990) into the bigger game of bipolar competition.

## Religious peace and the origins of a consociational repertoire in German politics

The key concept of Germany's quasi-consociationalism is *Parität*. Its origins can be found in the peculiar pattern of state building in Germany, and it was developed by state actors to cope with fundamental social cleavages. That the process of state-building in Germany differed from the classical absolutist trajectory is often overlooked. To be sure, when attention is focused on the major German territories (as is often done), it is obvious that Austria, Prussia, and part of the smaller principalities followed the path of absolutist state-building. But it is easily neglected that the Empire, as the overarching political unit, never became a state in the "modern" sense (as defined, e.g., by Max Weber). The attempt of the Habsburg emperors (notably Charles V.) to extend hierarchical control beyond their Austrian domain to include the Empire hurt the interests not only of the protestant princes but also of the dominant continental powers of that time, France and Sweden, and therefore was defeated in the Thirty Years War. The resulting stalemate had important institutional consequences because it paved the way for a new type of rules to deal with fundamental social conflicts. The impact of the religious conflict on the formation of the modern state since the 16th and 17th century thus set Germany clearly apart from the other larger European nations.

In the majority of cases, as we know, the absolutist state settled this conflict by privileging one of the churches (Catholicism in France or Spain, Protestantism in Sweden or England) and discriminating against other rival beliefs. In Germany, similar attempts of the Habsburg Emperor were frustrated, and so a historical compromise had to be struck in the Empire. The peace treaty concluded in 1648 in the Westphalian cities of Münster and Osnabrück - which served as the constitution of the „Holy Roman Empire“ until its destruction by Napoleon - granted privileges to three denominations (Catholicism and the Lutheran and Calvinist varieties of Protestantism) and established the representation of Catholics and Protestants as corporate bodies (*Corpus Catholicorum* and *Corpus Evangelicorum*, as representatives of the catholic and protestant territories) in the constitutional organisation of the „Holy Roman Empire“ (Schilling 1989).<sup>3</sup>

One may suggest that the settlements of the religious conflict in the 16th and 17th century, through the processes of collective learning that they set into motion, served as models which determined to a remarkable degree how modern states would continue to handle fundamental societal conflict. Reformation and counter-reformation were the first important societal conflict that could not be mitigated or suppressed in

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<sup>3</sup> Some basic rules of the religious peace had already been elaborated in the peace treaty of Augsburg (1555), but at that time Calvinists were still excluded. Even after the Westphalian Peace, however, the corporate privileges granted to the three established denominations continued to be refused to other religious minorities, in particular to the Anabaptists.

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the traditional ways. Lipset and Rokkan have taught us in their classical study how this had far-reaching consequences for the emergence of „cleavage structures“ (Lipset and Rokkan 1967) which became „frozen“ to determine the pattern of party politics for later centuries. But one may go one step farther and suggest that these conflicts also prefigured later strategies of “cleavage management”, through the invention of specific models of political conflict resolution that exhibited remarkable variation across nations, but also remarkable, path-dependent persistence over time.

How such variable patterns of religious conflict management came into being was the object of an important comparative study of the religious peace settlements in France, Switzerland and Germany due to the French historian Olivier Christin (Christin 1997). His cross-national comparison of these different cases sheds an important light on the origins of different paths of institutional development leading to clearly delineated national models of conflict regulation. One might - in a stylized fashion - distinguish a statist model of conflict regulation that emerges with the French variety of religious peace treaties whereas Switzerland and subsequently Germany innovate by combining federalist and corporatist devices to limit the applicability of the principle of majority decisions.

The first important innovation in this field was the first Swiss Landfrieden of 1529. In the *Tagsatzung* (diet), the majority was held by Catholic cantons, but the powerful Protestant canton of Zürich got its way with the demand that for specific religious matters decisions were no longer taken by majority voting (Christin 1997, 136 ff.). This meant the introduction of a decision mode which subsequently was called *amicabilis compositio* (amicable settlement).<sup>4</sup> The institutional basis of *amicabilis compositio* was clearly the veto potential of strong minority actors within a federal system. So far, the majoritarian principle which had taken root with the adoption of Roman law had been the normal way of conflict regulation, but now it became recognized that certain essential interests of the minority had to be protected by suspending majority voting. These Swiss innovations were attentively studied in the neighbouring countries and adopted also in Germany, first in the religious peace agreement concluded at Augsburg in 1555, and finally in the Westphalian Peace of 1648. The *Instrumentum Pacis Osnabrugense* complemented *amicabilis compositio* with two additional institutional devices, *Parität*, and *itio in partes*. As fundamental rule for the relationship between Catholics and Protestants the peace treaty specified the principle of Parität (parity), that is, the strict equality of the established religions. The Imperial Diet (*Reichstag*) was divided into two religious bodies, the *Corpus Catholicorum* and the *Corpus Evangelicorum*, and controversial claims could not be decided by majority vote

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<sup>4</sup> In *amicabilis compositio*, matters are to be settled over which parties continue to disagree. “Amicable settlement” is hence a lexically more precise translation than „amicable agreement“ (as Jürg Steiner has put it in earlier writing).

but only by *amicabilis compositio*, or „amicable settlement“.<sup>5</sup> The treaty even stipulated that these *corpora* might convene in separate assemblies (*itio in partes*) to determine their respective positions when their corporate interests were at stake before issues subject to the rule of *amicabilis compositio* were submitted to the plenary assembly (Heckel 1978).<sup>6</sup> *Parität*, in turn, meant that offices had to be filled with representatives of both religions, normally in equal strength. This concerned in particular the Imperial Courts (*Reichskammergericht* and *Reichshofrat*).

In contrast to Germany, in France the principle of majority decisions continued to apply on the local level, and although it was often used to outvote the religious minority (Christin 1997, 142 ff.), it permitted also personal and collective choices

for affirming a logic that differed, or was even superior, to exclusively denominational logics, and that facilitated the elaboration of compromise solutions which were then imposed in the name of the public good - in one word, for rendering politics autonomous (sc. from religion) (Christin 1997, 145).

Yet the most important institutional solution in the French case was the transformation of the royal authority into an arbiter capable of „de-confessionalizing“ the issues of religion and subordinating them to a new understanding of the *bonum commune*. This idea of a common good to be upheld by an authority transcending the religious quarrels was in particular put forward by Michel de l'Hospital and the legal scholars known under the significant name of the *Politiques*, and it became also the basis of Bodin's doctrine of sovereignty. However, the revocation of the Edict of Nantes by Louis XIV in 1685 made clear that the absolutist, „statist“ formula of religious peace was not a self-stabilizing regime and could degenerate. It was different with the federalist formula that prevailed in Germany and - after more than a century of conflicts - finally permitted the establishment of a stable religious settlement.

At the time of the Westphalian Peace the principles of *amicabilis compositio* and of *Parität* were a historical compromise that applied to the level of federal organization, but not to the internal organization of the member territories. Except for a certain number of Imperial Cities (*Freie Reichsstädte*) for which the principle of *Parität* had been explicitly introduced, within the territories of the Federation the princes originally had the power to determine the religion of their subjects (the principle of *cuius regio eius religio*), and those individuals who did not want to ply themselves were only left with the right to emigrate.<sup>7</sup> The same mix of principles for the resolution of religious conflicts applied in the *Ancien Régime* of Switzerland.

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<sup>5</sup> "In causis religionis omnibusque aliis negotiis, ubi status tanquam unum corpus considerari nequeunt, ut etiam catholicis et Augustanae confessionis statibus in duas partes euntibus, sola amicabile compositio lites dirimat non attenda votorum pluralitate" (Instrumentum Pacis Caesareo-Suecicum Osnabrugense V 19).

<sup>6</sup> To be sure, this procedure (called *itio in partes*) was little used.

<sup>7</sup> The peace treaty, however, explicitly froze the religious affiliation of territories as it had existed in 1642 - which meant that the princely power to determine the religion of the

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The system established by the *Instrumentum Pacis Osnabrugense* was remarkably successful. As Christin emphasizes, the traditional reproach made to the combined devices of *Parität* and *itio in partes* of having paralyzed the institutions of the Empire is not well founded. In the limited number of cases where these provisions applied, they played an appeasing role and helped the Empire to experience a long period of religious peace, in spite of the tensions persisting for considerable time (Christin 1997, 142). I definitely subscribe to this author's conclusion that,

... d'une manière générale, les structures étatiques de type fédéraliste, sans État central fort, paraissent avoir mieux géré le défi de l'éclatement confessionnel et, surtout, mieux su trouver les compromis qui ont assuré à des territoires très divers une assez longue période de paix commune (cantons suisses, Pologne, Empire...). Faut-il rappeler que jamais la paix d'Augsbourg ne fut abolie dans l'Empire, y compris pendant la guerre de Trente Ans, et que les traités de 1648 ne firent qu'en reprendre et en développer les principes fondamentaux? La faiblesse même de l'État central, l'importance des entités devenues plus ou moins souveraines en matière religieuse (États princiers, cantons, villes...) et l'existence de procédures institutionnelles de négociation et d'arbitrage ont ouvert la voie à des équilibres politiques et des systèmes de pacification complexes, combinant reconnaissance des particularismes et préservation de l'intérêt général défini en termes très larges, et donc à ce qu'il faut définir comme des États de droit (Christin 1997, 203 f.).

### **From religious peace to „negotiated democracy“ (*Verhandlungsdemokratie*): The career of *Parität* in the strategic repertoire of German politics**

Since the 16th century, *Parität* began a long and remarkable development. Originally, it was a rule that applied mainly at the federal level of the Empire. As is well known, the larger member territories of the *Reich* adopted the then predominant constitutional model of absolutist rule, and consequently the monist solution of the religious conflict prevailed within their boundaries while the rule of religious parity governed the relations between the different German territories. This system underwent a profound transformation with the Napoleonic age. Indeed, one of the most important interventions of the victor into the institutional makeup of Germany was the radical re-drawing of its internal borders (1803 to 1806) which was later sanctioned and completed by the Congress of Vienna (1815). Many of the smaller territories lost their autonomy within the Federation and were integrated into larger states (Prussia, Bavaria, Württemberg, Baden, Saxony). As one consequence, however, the surviving enlarged territories lost their erstwhile religious homogeneity that had been due to the

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subjects was limited to maintaining that affiliation but did no longer involve the right to change it.

principle of *cuius regio eius religio*.<sup>8</sup> After the French revolution, this principle had become obsolete and religious freedom could no longer be seriously challenged. Most of the new states now had to accommodate members of different denominations, and this was done by a modernizing adaptation of the principle of *Parität*. *Parität* was reformulated as meaning the corporate equality of the established religions within the individual member states of the German Confederation or (in later times) of the new German *Reich*. It was hence no longer a rule governing federal relationships but rather transmuted into a basic principle determining the constitutional position of the (established) religious minorities within the territories. It is important to distinguish this principle from religious tolerance. To be sure, such tolerance which left the individual the free choice to practice whatever religion he wanted (or none at all) was progressively introduced during the early nineteenth century. But alongside this the state continued to privilege the churches which had been recognized by the treaty of Westphalia, that is, the Catholics and the Protestants. *Parität* in this context meant the legal equality of the established churches.

As a legal principle, however, corporate *Parität* did not really involve equal treatment of the individual members of the established churches. In Prussia, in particular, Catholics found themselves strongly discriminated against as far as access to public office was concerned. So the Catholic organizations that sprung up since mid-19th century for their part redefined *Parität* as a principle guaranteeing the equality of established religions also in political patronage (Bachem and Hankamer 1897; Hunt 1982; Baumeister 1987). The long fight of the Catholics for *Parität* in Prussia (and later also in the wilhelminian Empire) - notably for „paritary“ access to the civil service - contributed strongly to the development of this institutional formula. On the background of religious „pillarization“, *Parität* became the German equivalent of con-

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<sup>8</sup> A significant exception is Brandenburg-Prussia which, as one of the largest states, had already earlier undergone significant transformations in a somewhat similar direction. First, since the adoption, in 1613, of Calvinism by the elector Johann Sigismund, the Hohenzollern monarchs did no longer share the Lutheran creed of their subjects. Because of the stipulations of the Westphalian peace (fn. 7) and of the stiff resistance of the established Lutheran church, they were unable to carry their subjects with them and instead pursued a strategy of attracting non-Lutheran immigrants (the French Huguenots being the most famous example). Second, by a series of peaceful acquisitions and of military conquests of Catholic territories, Prussia came to include a sizeable Catholic minority. After the conquest of Silesia, for his new Catholic subjects Frederick II („the Great“) even built a Catholic cathedral in his capital city, Berlin, but he also expressed his readiness to eventually accommodate Muslims. The Prussian code of 1794 (*Allgemeines Landrecht*) made a distinction between four types of “religious societies” (*Religionsgesellschaften*) as they were now called. Illicit were religions challenging the public morality, undermining the obedience to the law and to government, and lacking deference to the deity. A second category were the tolerated religions (Mennonites and Jews), a third one the “licensed” (but not privileged) immigrant minority religions (like the Herrnhuter). The Lutherans, the Calvinists and the Catholics constituted a fourth category, the privileged religions, whose ministers had the status of public servants.

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sociationalism, with the connotation of the state performing the functions of arbiter and guarantor for the equality of established denominations.

The Catholic campaign for *Parität* was not without success, as Max Weber has repeatedly stated. Increasingly, Catholics made tangible progress within the bureaucracy. And it is safe to assume that in the perception of organized Catholicism and Catholic bureaucrats, *Parität* had become a key concept within a strategic repertoire. However, the idea had an impact reaching far beyond the Catholic camp.

The further development of the concept of parity since the late 19th century in the language of German politics has not yet been sufficiently elucidated. But there are good reasons to conjecture that the concept of religious parity was the model for the later quest for *Parität* in labour relations and social policy and became a key formula for historical compromises in social conflict. *Parität* has indeed become a key formula employed by the German state and other corporate actors for the institutional pacification of industrial relations (Teuteberg 1961; Rabenschlag-Kräusslich 1983), for the social security system and for the public health system. And at the time when this development of the concept began as a „peace formula“ in the domain of social politics, the original meaning must still have been vividly present in the minds of contemporaries. Significantly, at the beginning of the 20th century, Imperial Germany obtained control of the Imperial administration of social security and later (in the Weimar Republic) of the ministry of Labour, and social policy became in consequence strongly impregnated by the principles of social Catholicism. The high-ranking Catholic bureaucrats that were responsible for social policy must have been aware that their advancement was due to the successful Catholic lobbying for *Parität* in the civil service.

But the breakthrough of *Parität* came with the democracy of the Weimar Republic. *Parität* was one important element in the development toward corporatist labour relations that began with the integration, in 1916, of organised labour in the war effort (*Hilfsdienstgesetz*, see Feldman 1966), and with the Stinnes-Legien agreement of 1919 about the establishment of the *Zentrale Arbeitsgemeinschaft* of employers and labour unions (ZAG) to cope with the post-war crisis (Feldman 1981; Feldman and Steinisch 1985). As Franz Leopold Neumann (1937; engl. transl. in Neumann 1957) put it persuasively, the Weimar Republic was based upon a series of social compacts between the big forces of German society: “Hence, the Weimar democracy rested to a decisive degree on the idea of parity - a parity between social groups, between *Reich* and states, and between the various churches” (Neumann 1957, 49). The “old Federal Republic” revived this idea, and it became a pivotal element of the corporatist repertoire of strategies. The program of a *Bündnis für Arbeit* (alliance for work) is the most recent manifestation of this strategic tradition.

But *Parität* can also be established in a top-down strategy by the state, as it was largely the case in the social insurance systems since Bismarck. In these systems *Parität* is employed to delegate the implementation to representatives of social groups constituted and empowered by statute, and one may speak of “corporatisation” as an

administrative strategy.<sup>9</sup> Bargaining relationships between these partners are limited in their scope because essential parameters continue to be controlled by the state, and the state can intervene strongly in situation of crisis.

*Parität* can thus be said to have different, but closely related connotations or meanings. In the context of university reform it related to a strategy of involving the representatives of different corporate groups in decision-making. The university was thus transformed into a negotiation system (*Verhandlungssystem*). Another aspect is that this representation is not based upon relative numerical strength but governed by a specific formula which in some cases may mean strict numerical equality but in others may diverge from that criterion. The denotation which the term had for „political Catholicism“, equal representation of corporate groups in patronage, is then a specific instance which has lost in importance compared to the newer usage just discussed. But all these usages can somehow be traced back to the Westphalian Peace when all these elements, the equal representation of corporate groups and also the establishment of a federal negotiating system suspending the use of the majority principle, were part of its meaning.

The development of *Parität* is thus a history of historical compromises between corporate social groups. The emphasis of traditional historiography on the authoritarian tradition in German political history has for long time somewhat eclipsed the importance of these historical compromises. In Germany, after all, it had not been Bodin's and Hobbes' sovereign absolutist ruler who managed to guarantee peace between the warring religious groups. Rather, it was the proto-consociational and federalist formula of the Treaty of Westphalia that demonstrated how critical social conflicts could be peacefully settled. And when the authoritarian model collapsed in the catastrophe of Hitler's war, the countervailing consociational principle of *Parität* - together with the closely related principle of federalism - gained in importance. German quasi-consociationalism thus grew out of a specific institutional strategy for coping with social cleavages, and one which distinguished the process of state-building in Germany from that of other larger European countries: And the "parity" of corporate social groups to which representational monopolies had early been granted became a central element of a strategic repertoire for managing conflicts of interests between such groups.

## **Cultural segmentation and quasi-consociational elements in the modern German polity**

The second German Republic - the „old Federal Republic“ of Germany as it emerged after the second World War<sup>10</sup> - is thus characterized by several features which

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<sup>9</sup> The term *Korporatisierung* has been coined by Marian Döhler and Philip Manow (1992).

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reminded observers of „consociational“ practices as they had been described for a number of smaller European countries. But Germany does of course not neatly fit the typological construct of consociational democracy, in particular because of the importance of bipolar party competition. „Grand coalitions“ as they had existed in most *Länder* in the immediate post-war period did not long outlast the formation of a federal government led by the Christian Democrats and opposed by the Social Democrats (Jun 1994). The only example of a „grand coalition“ on the federal level lasted for less than four years (1966-1969), and it remains very much a neglected subject in accounts of the historical development of the Federal Republic (Lehmbruch 1999). This neglect seems to indicate that such a coalition is now considered as somewhat anomalous, at best as a transitory stage before the advent of the „social liberal“ coalition. Analyses which pointed to „consociational“ elements in this coalition were rather exceptional (Lehmbruch 1968).<sup>11</sup>

However, there was one interpretation of the „old“ Federal Republic that for some time was highly influential and anticipated some patterns of the consociational model, although it did so in rather derogatory manner. This was Dahrendorf's „Society and Democracy in Germany“ (Dahrendorf 1967, first German edition in 1965) which described German society in terms of *Versäulung* („pillarization“) and of a „cartel of elites“. Dahrendorf's terminology referred to the Dutch concept of *verzuiling*, introduced by the sociologist J.P. Kruijt, which at that time was also taken up by the consociational literature and used more or less interchangeably with „segmented pluralism“ (Lorwin 1971). Ironically, one can doubt whether around 1965 *Versäulung* was still a valid description of contemporary German society. It is true that German society had indeed been pretty much „pillarized“ in the late 19th and early 20th century although there were significant differences from the Dutch model case of *verzuiling*. But the socialist „pillar“ as such had only partially reemerged after the end of nazism, and in the early 1960's the first signs of erosion of the catholic pillar had become visible.

At the same time, another influential sociological analysis of German party politics employed a conceptualization strikingly similar to the notion of „segmented pluralism“ (Lepsius 1966). On the one hand, M. Rainer Lepsius' extremely insightful article anticipated the idea of "freezing" cleavages (to be developed shortly afterwards by Lipset and Rokkan), when he argued that the German party system, at the end of the Weimar Republic, had „a fixation on conflict situations which existed at its formation,

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<sup>10</sup> The term „alte Bundesrepublik“ was introduced by to distinguish the Federal Republic before German unification from the post-1990 period (Blanke and Wollmann 1991).

<sup>11</sup> My own first version of the consociational model (Lehmbruch 1966; Lehmbruch 1967b) was written at the time when this coalition came into being, and although it did not directly refer to the German case, it was implicitly developed on that background, including the choice of the title „Proporzdemokratie“ which intended to give a neutral descriptive meaning to a term that so far was used by the critics of the grand coalition with a clearly disparaging intention. For a re-assessment of the Grand Coalition of 1966-1969 and its importance for the development of negotiated democracy in West Germany, see Lehmbruch (1999).

but had already lost much of their importance in the 1890s, and had become obsolete after the first World War“. On the other hand Lepsius described the parties as being no more than the „political action committees“ of relatively closed „social-moral milieus“ with a complex internal structure which he defined as „social units shaped by a coincidence of several structural dimensions such as religion, regional tradition, economic situation, cultural orientation, and stratification of intermediary groups“. The most salient case was in his view the role of the Center Party as the „political committee“ of a dense network of Catholic associations („Political Catholicism“, in the political language of the time). But the Social Democrats had a similar pillarized structure (first discussed by Robert Michels in his classic *Soziologie des Parteiwesens*). Lepsius' description of these organizational networks could as well have been applied to the Austrian Lager as I portrayed them in my first papers on „*Proporzdemokratie*“ (Lehmbruch 1967b). The essential difference was that in Germany a dominant (Protestant, liberal to conservative) culture which tended to identify itself with the “national” values whereas the Catholic and the socialist camp were organizing minorities into networks of cultural defense. In Austria, on the other hand, the „national“ organizations (those who continued to adhere to the *großdeutsche* tradition) constituted not a dominant culture but a third *Lager* very similar in its structure to the two others.<sup>12</sup> The German situation can thus to some degree be likened to that of Switzerland, where the dominant culture was liberal and Protestant while Catholics and socialists formed minorities.<sup>13</sup> (The main difference was that in Switzerland the cross-cutting linguistic and regional cleavages and the institution of the referendum could often lead to changing alliances across the ideological boundaries).

The problems arising from the cultural segmentation of German society were among the major preoccupations of German social scientists in the latest stage of Imperial Germany. We can in Germany even to some degree speak of a quasi-consociational „pact“ between the liberal wing of the dominant culture, on the one hand, the Catholic and socialist *Lager* on the other and that was at the basis of the formation of the Weimar Republic. As Charles Maier once put it, Weimar was in a sense a „social compact“ of political and social forces rather than a „state per se“ (Maier 1982). However, unlike in the Netherlands or post-WW II Austria, the Weimar compact did not consolidate into a stable regime. It became soon subject to strong strains and gradual erosion under the combined impact of a lost war and economic crisis. But as long as the Weimar institutions lasted - in particular in the largest *Land*, Prussia -, they comported a lot of consociational arrangements (such as proportional sharing of political patronage). I will come back later to the historical background on which the Weimar „compact“ had developed.

Quite a lot of this institutional legacy was then revived in the Federal Republic. But these consociational traits were integrated into a competitive party system no longer

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<sup>12</sup> The classic description was given by Adam Wandruszka (1954).

<sup>13</sup> See the rich analysis of Gruner (1969).

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based on coalition governments between parties of more or less similar strength and oscillating around the center but on two large parties with hegemonic vocation. The concept of a possible „grand coalition“ still survives as an element of strategic blueprints in the discussions of party leaders. But it runs contrary to the logic of bipolar competition and has become increasingly difficult to realize.

Moreover, the original consociational model has lost its importance for German politics for the same reason that the model is largely outdated in the once classical consociational countries such as the Netherlands or Austria: „De-pillarization“ has largely emptied the original societal basis of quasi-consociational compacts. Not only have Catholics since a long time lost their former minority status in German society and become fully equal. Above all, religion has lost much of its political salience. The same is true of „class consciousness“ on the part of the traditional working class, once the main support of the former Social Democratic *Lager*. The important role which Catholic organizations continued to play as a recruiting field for CDU activists is declining, and the CDU is more and more becoming a quite normal secular party. And in the SPD public sector employees have now largely taken the dominant place traditionally held by qualified blue-collar workers.

All this, moreover, applied only to the „old“ Federal Republic. After re-unification, in East Germany not even a slight trace of the former *Lager* culture has reappeared as far as CDU and SPD are concerned. To be sure, the CDU here still has disproportional support from the activists in the small Catholic minority, but many of its voters are not even baptized any more and hold no religious beliefs. The SPD, on the other hand, is a party of cadres recruited from the Protestant church and from the technical intelligentsia, and the traditional working-class subculture has completely disappeared during the lifetime of the „first German state of workers and peasants“. Only the post-socialist PDS is still somewhat rooted in a „social-moral milieu“ as defined by Lepsius, and thus supported by a network of organizations, but this is certainly not a milieu representing in any sense the working class. To the degree that East German politics still is biased toward large coalition-building (in particular on the local level) this is an institutional legacy of the „Round Tables“ of the transition period but by no means a vestige of former consociational elements.

### **Negotiated democracy in the Federal Republic: Corporatism, the „German model“, and interlocking federalism**

After the second World War, the developments just outlined were important preconditions for the development of the „German model“ (*Modell Deutschland*), or the *capitalisme rhénan* (Albert 1991). Its core, one might say, is a corporatist system of industrial relations characterized by the dual principles of social partnership and co-

determination. I mentioned already that the roots of the corporatist system can be found in Imperial Germany, but the first World War and its outcome gave it a big push, notably with the formation of the *Zentralarbeitsgemeinschaft* of the peak associations of employers and labor in 1919. These first attempts at institutionalizing an autonomous social partnership collapsed under the impact of the crisis of the early 1920's, and what survived was mandatory arbitration of industrial conflicts by the government. These experiences, however, left a legacy of mixed feelings in the ranks both of business and of labor, which became particularly vivid after the defeat of Nazi Germany. In the early post-war period, both sides of industry agreed to establish a system of collective bargaining without interference from the state (*Tarifautonomie*). This system has so far operated in a pretty much coordinated fashion. It cannot be ruled out that this coordination (which gradually came into being in the first post-war decades) will yield to a more decentralized bargaining system. However, for the moment it looks like the principle of a representational monopoly of strong peak associations is successfully defended against the (admittedly) mounting criticism.

The system of *Tarifautonomie* and of collective bargaining of strong peak associations is one of the cornerstones of the „German model“. The other element is co-determination (*Mitbestimmung*) which - different from collective bargaining - is a system based on law and thus established by the state. It is one of the important manifestations of the tradition of *Parität* discussed above, and thus can be linked to the corporatist institutions which govern the system of social security and the public health care system (*gesetzliche Krankenversicherung*). All these institutions are thus closely related to the model of negotiated democracy.

Another institutional layer of *Verhandlungsdemokratie* is the federal system. Again some important roots can be traced back to 1648 since the Westphalian Peace also created the conditions for the emergence of modern German federalism as a negotiation system. It strengthened the position of the territorial rulers in the federally organized Empire such that in Germany the rise of absolutism and of the modern state (as defined by Max Weber and Otto Hintze) took place not on the national, but on the sub-national level of the larger principalities. The Empire itself - until its dissolution in 1806 - did not develop the structures of a modern state, and this distinguished Germany from France and England. But from the outset German federalism was also different from that of the United States and of Switzerland. For most of the modern times, neither the Swiss cantons nor the American states developed similar bureaucratic structures of political organization as the larger German territories did. Taking this peculiar institutional legacy into account in establishing the constitutional framework of modern German federalism, Bismarck engineered a historical compromise between the centralizing idea of the national state and the quest of *Länder* bureaucracies for the preservation of their organizational domain. This historical compromise was reaffirmed with force after the second World War since both the temporary suspension of the central government as well as the dissolution of hegemonic Prussia by the Allied powers strengthened the organizational autonomy of the *Länder*, while on the other hand the political and administrative elites overwhelmingly

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confirmed their intention to maintain the strong degree of economic and administrative integration to which Germans had become accustomed. Therefore the transformation of German federalism toward a sort of US style „dual federalism“ promoted by the American occupation representatives turned out to remain, by and large, an ephemeral experiment. What developed instead of it was *Verbundföderalismus* (compound federalism) or *Politikverflechtung* (interlocking federalism), a system of policy-making involving federal and Länder executive agencies.

We can distinguish three institutional layers which all contribute to the predominance of decision-making by negotiation: First, there is the layer where Länder participate in federal legislation, with the *Bundesrat* (Federal Council) being the focal institution. Second, it is the *Länder* bureaucracies who implement most federal legislation and continually negotiate with the Federal government (and eventually among themselves) the details of policy. Finally, there is the cooperation in the fields which belong to the domain of the *Länder* and involve agreements among them or including the Federal government. This layer is characterized by dense interorganizational linkages (*Politikverflechtung*) where joint decision-making (with high thresholds for consensus) is often unavoidable.

*Verbundföderalismus* is particularly visible in fiscal federalism where Germany is worlds apart from that „fiscal equivalence“ and „subsidiarity“ dear to theorists of public finance: Most taxes are „joint taxes“ with returns divided between federal and state governments, and this gives the *Länder* (who have few tax sources of their own) a right of veto about most important tax legislation. The history of revenue sharing (*Finanzausgleich*) is therefore a story of almost continuous haggling about (often more or less short-lived) compromises in an elaborate negotiation system (for details, see Renzsch 1989; and, for most recent developments, the insightful paper of Ziblatt 2001).

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# From Sunningdale to St Andrews

## Dealmakers and Dead-Lock Breakers in Northern Ireland's Political Process

MICHAEL KERR

'Ian Paisley and Gerry Adams are meeting for the very first time in their lives - the DUP, the Democratic Unionist Party, and Sinn Féin. This is something that defies the word breakthrough, it's never happened before. And if they do proceed, and if they have agreed or find a way of agreeing, then they will be able to lock in their own form of power-sharing government rather than me, as past governments have done, imposing something'.

Northern Ireland Secretary of State, Peter Hain, 26 March 2007<sup>1</sup>

On 26 March 2007, the leaders of Northern Ireland's two largest political parties, the Democratic Unionist Party (DUP) and Sinn Féin, sat together in public for the first time, albeit, at opposing corners of a press conference table. Signalling a major breakthrough in its political process, the Rev. Ian Paisley and Gerry Adams announced that the two parties would form a government with the Social Democratic and Labour Party (SDLP) and the Ulster Unionist Party (UUP) at Stormont on 8 May 2007.<sup>2</sup> Paisley reinforced the newfound harmony in Irish politics, on 4 April 2007, with a public handshake for Irish Prime Minister Bertie Ahern on an official visit to Dublin. These

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<sup>1</sup> Statement by Peter Hain to the BBC, 26 March 2007.

<sup>2</sup> *Belfast Newsletter*, 27 March 2007.

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meetings were a measure of just how successful British and Irish governments had been in their joint conflict regulation approach to Northern Ireland over the previous decade. By abandoning the centre ground parties and promoting a revamped agreement through the DUP and Sinn Féin, they had finally locked all the main Northern Ireland parties into a democratic consociational system. Northern Ireland completed the political journey it had begun in 1974 under the Sunningdale Agreement, when an executive comprising Ulster Unionists, members of the constitutional nationalist SDLP and the cross-community Alliance Party came into existence on New Year's Day. The formation of this coalition was facilitated by the sophisticated diplomacy of Northern Ireland's first British Secretary of State, William Whitelaw, and modelled on Lebanon's inter-confessional system.<sup>3</sup> Accord was achieved through the exclusion of anti-agreement unionists and paramilitary groups of both traditions.<sup>4</sup> The Sunningdale executive did not last long, however, collapsing under opposition from anti-agreement unionists and sustained republican violence within five months of taking office.<sup>5</sup>

Thirty-three years later, what surprised most commentators was the cordial transfer of power between London and Belfast when the DUP and Sinn Féin sat in government together for the first time. It was in marked contrast to the fractious and fragmented executives that emerged during the first attempts to implement the Belfast Agreement between 1998 and 2005. It was amendments to that agreement,<sup>6</sup> proposed in 2006 at St Andrews, Scotland, that led to the restoration of devolved government. This time around it was not simply 'Sunningdale for slow learners', but Sunningdale turned inside out as Northern Ireland's most intransigent opponents inherited its political process from the moderate forces of unionism and nationalism. Ironically, the first joint action conducted by Northern Ireland's new first and deputy first ministers designate, DUP leader Ian Paisley and Sinn Féin's chief negotiator, Martin McGuinness, was to co-author a letter to the fifteenth Secretary of State for Northern Ireland, Peter Hain, asking him to vacate his Stormont offices in preparation for the arrival of Northern Ireland's new executive. Former IRA leader McGuinness joked that the DUP and Sinn Féin were operating a peaceful 'Brits out' strategy from the old unionist parliament at Stormont.<sup>7</sup>

By 2007, the traditionally anti-establishment DUP and Sinn Féin had replaced the old UUP/SDLP elite, which negotiated the Belfast Agreement in 1998. Historical

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<sup>3</sup> PREM15/486, Meetings between the Prime Minister and Mr. Lynch, Doc. 14, 3 September 1971.

<sup>4</sup> For analysis of the Sunningdale Agreement see Michael Kerr, *Imposing Power-Sharing: Conflict and Coexistence in Northern Ireland and Lebanon*, (Dublin: Irish Academic Press, 2006) Chapter 2.

<sup>5</sup> The Sunningdale Communiqué, (London: HMSO, 1973).

<sup>6</sup> The Belfast Agreement, (London: HMSO, 1998).

<sup>7</sup> [http://news.bbc.co.uk/1/hi/northern\\_ireland/6518929.stm](http://news.bbc.co.uk/1/hi/northern_ireland/6518929.stm)

antagonisms between these two parties suggest, however, that the long-term task of stabilising devolution will be no intergovernmental formality. There will, no doubt, be difficulties ahead in maintaining devolved government in Northern Ireland, but the process will not be fraught with emotionally laden symbolic issues such as police reform, the release of paramilitary prisoners and arms decommissioning. Equally, it will not be undermined by the intra-segmental rivalry that hobbled the executives headed by former UUP leader David Trimble. Promoting the two hard-line unionist and nationalist parties does, however, come with a significant health warning. The two governments may have achieved 'the result they wanted' in Northern Ireland's 2007 assembly elections, as Ulster Television's Ken Reid put it, but they may 'come to regret rigging the rules of the political game' in giving the two parties that kept Northern Ireland so polarised for so long such a soft political landing in government.<sup>8</sup> Other sceptics put it more bluntly, branding the DUP-Sinn Féin approach to devolved government 'splitting power' rather than 'sharing it'.<sup>9</sup>

Reflecting on previous attempts to regulate political conflict in Northern Ireland, this chapter examines the prospect of establishing stable devolved government under Northern Ireland's new executive. It argues that the success of consociational arrangements in Northern Ireland have been dependent on the 'tie-breaking' and 'deal making' role of exogenous political actors. Building on the paramilitary ceasefires brought about by the 1993 Downing Street Declaration, domestically stable governments in London and Dublin, under the leadership of Tony Blair and Bertie Ahern, began to act in unison to regulate Northern Ireland's ethnic conflict through a fully inclusive internationalised peace process. Victory in the 2007 Assembly election for both the DUP and Sinn Féin brought a measure of intra-segmental stability to the Northern Ireland party system. The role of the two governments in policing the agreement, however, will remain crucial to the success of power-sharing in Northern Ireland. The extent to which the British Government manages to reduce its involvement in the executive's decision making process, now that the major transitional issues of inclusivity, police reform, prisoner releases and paramilitary disarmament have been addressed, will be a gauge of how successful the Belfast Agreement has been in ending recent political violence in Northern Ireland.

In 2007, the words 'Northern Ireland' prompted the appearance of a padlocked textbox when entered into web-based encyclopaedia, Wikipedia, which read: '*This page is currently protected from editing until disputes have been resolved over its content*'. Over the previous decade, the Northern Ireland peace process was often deadlocked, as public disputes raged amongst the different parties over whether or not the Belfast Agreement should be accepted and how it should be interpreted. When it was negotiated in 1998, many commentators viewed its 'constructive ambiguity' as central to creating a political climate wherein most unionist and nationalist parties

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<sup>8</sup> Adrian Guelke, 'As good as it gets?', *Fortnight*, March 2007, No. 451, p. 8.

<sup>9</sup> Ruth Dudley Edwards, *Daily Telegraph*, 27 March 2007.

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could accept and support an accord, which entailed considerable political and ideological compromises for them.<sup>10</sup>

Following inter-party talks on 11-13 October 2006, the British Government amended the 1998 Belfast Agreement in a number of aspects, through the Northern Ireland (St Andrews Agreement) Act 2007.<sup>11</sup> This concluded an agreement, known as the Comprehensive Proposals, which was reached between the DUP and Sinn Féin in December 2004.<sup>12</sup> The timing had not been right for a return to power-sharing, however, as Paisley's priority had been to defeat the UUP at the next Westminster General Election. On 24 November 2004, he dashed hopes of an early return to devolved government, when he declared that the IRA should wear 'sack cloth and ashes' in atonement for its sins.<sup>13</sup>

## Downing Street's Deadlock-Breaker Role

So why was an agreement to repackage the 1998 accord reached between the DUP and Sinn Féin in Scotland? Following the final acts of IRA decommissioning on 26 September 2005, a general consensus existed amongst all the main Northern Ireland parties over the need to restore devolution.<sup>14</sup> This was in stark contrast to 1998, when no consensus existed within unionism over the settlement, opposition to it from almost half its elected representatives and no common understanding between the main pro-agreement parties on how they would actually work together within a power-sharing administration. At eighty-one years of age, having finally swept aside all pro- and anti-agreement rivals, Paisley had far too much to lose politically, economically, electorally and constitutionally, if he were again to reject power-sharing. Had a refusal to share power with republicans resulted in the imposition of 'joint authority' or formalised direct rule from London and Dublin, Paisley would have shouldered the blame in the

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<sup>10</sup> James Dingley, 'Constructive Ambiguity and the Peace Process in Northern Ireland', *Low Intensity Conflict and Law Enforcement*, Vol. 13, No. 1, Spring 2005, pp. 1-23; Interview with Sinn Féin special advisor, Jim Gibney, Belfast, 5 April 2007.

<sup>11</sup> Agreement at St Andrews, (London: HMSO, 2006). The Northern Ireland (St Andrews) Act 2007 modified the 2006 legislation on 27 March 2007 enabling the 2006 Act to be extended for six weeks and to avoid dissolution of the assembly due to the failure of the parties to meet 26 March deadline.

<sup>12</sup> Proposals by the British and Irish Governments for a Comprehensive Agreement (London: HMSO, 2004).

<sup>13</sup> Speech by Ian Paisley to the North Antrim DUP association's annual dinner, 27 November 2004.

<sup>14</sup> *Report of the IICD*, 26 September 2005.

unionist community for bringing it about. In a sense his whole career had been based on defeating the UUP and, having achieved this goal, replacing them at the negotiating table seemed the logical conclusion to his political life.

For the British Government, the restoration of Northern Ireland's power-sharing institutions ensured its beleaguered leader left 10 Downing Street on a high note. UK foreign policy in the Middle East was at a turning point in 2007, following the failure of the 2003 US-led invasion of Iraq and Blair's support for the unpopular Israeli invasion of Lebanon in 2006. Therefore reaching agreement between the DUP and Sinn Féin before leaving office was a political imperative for the outgoing prime minister. In terms of a positive political legacy, aside from making Labour an electible political force, successfully ending political violence in Northern Ireland is what he will likely be best remembered for. The British Government has long sought to reduce its involvement in Northern Ireland in most areas. Having invested more time and political capital in the Irish question than any other prime minister in British history, Blair's successor Gordon Brown may distance himself from the minutiae of Northern Ireland's administration. A more aloof incumbent in 10 Downing Street might well force a measure of responsibility and reasonableness on the new coalition partners.

Veterans of the Belfast Agreement's first Executive were quick to argue that the St Andrews amendments were essentially alterations that suited the ascendant anti-establishment parties, granted essentially in return for their compliance in forming a 'stable inclusive partnership government'. Prior to this development, Paisley had consistently promised the unionist electorate that his party would replace the Belfast Agreement by negotiating a 'fair deal' with the British Government, one that excluded 'terrorists'.<sup>15</sup> Therefore, 'getting it right' in 2007 meant negotiating a deal that was politically marketable to the wider unionist community.<sup>16</sup> For the DUP, a 'fair deal' needed to be symbolically distinguishable from the agreements Trimble previously entered into with Sinn Féin. Paisley finally played his role as the king's food taster in front of an ever sceptical unionist population.

Structurally, the Belfast Agreement lacked strong mechanisms for locking parties into or excluding them from its consociational framework and the DUP sought to address this problem at St Andrews. There was no clear provision for proceeding with government in the event of a party breaking its commitments under the accord and, in practice, power-sharing had to be fully inclusive. Consequently, the process became reliant on the mediation of 10 Downing Street, with Blair repeatedly acting as its principle deadlock breaker. Addressing this issue, Section 11 of the St Andrews amendments made it clear that both British and Irish premiers were 'determined that default by any one of the parties following the restoration of the executive should not be allowed to delay or hinder political progress in Northern Ireland'.<sup>17</sup> This was as far

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<sup>15</sup> DUP 'Fair Deal Manifesto 2003: It's Time for a Fair Deal' [www.dup2win.com](http://www.dup2win.com)

<sup>16</sup> DUP 2007 Assembly Election Manifesto: 'Getting it Right' [www.dup.org.uk/](http://www.dup.org.uk/)

<sup>17</sup> Agreement at St Andrews, (London: HMSO, 2006).

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as proposals went towards addressing the 'default' issue and could be read essentially as a statement of their personal determination, rather than a provision that reinforced the agreement.

In reality, the two governments remained flexible despite their hard-hitting rhetoric. After threatening to dissolve the assembly if the Northern Ireland parties failed to meet 26 March deadline, Hain rushed emergency legislation through parliament when it lapsed.<sup>18</sup> This granted the DUP leader a symbolic political victory over the British Government, having publicly declared that he would not meet the secretary of state's ultimatum. In fact, Hain seemed to be deliberately setting himself up as a target for the DUP and Sinn Féin to join forces against as they sought public support for a return to power-sharing. His threats to impose water rates in Northern Ireland and terminate the salaries of Assembly members, should the deadline slip, were designed to make power-sharing seem like a better alternative to direct rule amongst the public and political class alike.<sup>19</sup> This was but one example of the summitry, political nous and spin that the domestically powerful British and Irish governments brought to bear on Northern Ireland's peace process.

Recent changes to the Northern Ireland party system raise an interesting question regarding the long-term outlook for devolution in Northern Ireland. Do coalition governments dominated by moderate parties but lacking intra-segmental stability - such as the executives headed by Faulkner and Trimble - function better than administrations dominated by hard-line parties operating in the absence of intra-segmental instability? Whilst many commentators predicted the early collapse of power-sharing under the DUP and Sinn Féin, the confidence with which the party leaders approached political developments in 2007 might suggest otherwise. With the political field clear for the promotion of devolution, failure to ensure the success of power-sharing would likely cost both the DUP and Sinn Féin at the polls. Such an equation might justifiably lead one to make an optimistic prognosis regarding Northern Ireland's latest power-sharing venture.

Critical decision-making in the Trimble led executives was largely conducted via 10 Downing Street rather than 'Room 21' at Stormont, where the executive sat.<sup>20</sup> Downing Street's day-to-day deadlock breaker role deeply frustrated Deputy First Minister Seamus Mallon and this was a consequence of Trimble's increasing dependency on Blair. The Prime Minister's 'hands on' approach to the process was crucial to bringing the majority of Northern Ireland's political parties to agreement in 1998. The forces of pro- and anti-agreement unionism were then roughly balanced, but the domestic stability and political commitment of the two governments helped Trimble initially carry a fragmented party and a divided community with the agreement. This was in contrast to Faulkner's unenviable predicament in 1973, when the unionist

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<sup>18</sup> *The Irish Times*, 26 March 2007.

<sup>19</sup> *The Guardian*, 23 March 2007.

<sup>20</sup> Martina Purdy, *Room 21: Stormont Behind Closed Doors*, (Brehon Press Ltd, 2005).

leader was pressured into accepting an agreement that he could not sell to his constituency, by a British government that collapsed within weeks of the executive taking office. Perhaps learning lessons from Heath's approach, Blair appeared sensitive to the difficulties Trimble faced in selling the Belfast Agreement. However, when the UUP leader was no longer seen as the best vehicle for carrying unionism within the process, he became a victim of the Prime Minister's resolve to bring closure to Northern Ireland's power-sharing question and the IRA's modern campaign of violence. As he did so, the DUP and Sinn Féin positioned themselves to inherit the peace.

## Inheriting Power-Sharing in Northern Ireland

When Arend Lijphart published his seminal work *Democracy in Plural Societies* in 1977, Sunningdale's agreements had been consigned to history and the idea of using consociation in Northern Ireland rejected.<sup>21</sup> Indeed Sunningdale remained the only incidence of power-sharing Northern Ireland experienced for a quarter of a century. When Heath introduced the concept to Northern Ireland, Faulkner won twenty-four seats to the seventy-eight member assembly, which was elected by STV on 28 June 1973.<sup>22</sup> However, he entered a coalition government with fewer assembly seats than his anti-agreement rivals and rebels within his own party forced him to resign its leadership on 7 January 1974 - a week after the executive had taken office at Stormont.<sup>23</sup> Faulkner jointly held the position of Unionist Party leader and Chief Executive of Northern Ireland's power-sharing administration for a mere seven days. In contrast, but with an ever-decreasing circle of support within unionism, Trimble survived as UUP leader for more than seven years after the Belfast Agreement was negotiated. This transition period, although fraught with difficulties, allowed the idea of fully inclusive power-sharing between Northern Ireland's two main communities to firmly take root.

Faulkner's coalition government had been reasonably effective before it collapsed fourteen days into a political strike, organised by the Ulster Workers' Council (UWC) in May 1974.<sup>24</sup> The UWC had no official veto over the political process but the loyalist

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<sup>21</sup> Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration*. (New Haven: Yale University Press, 1977).

<sup>22</sup> Sidney Elliott, & W. D. Flakes, *Northern Ireland: A Political Directory 1968-1999* (Belfast: Blakstaff Square, 1999), p. 533.

<sup>23</sup> *The Irish Times*, 8 January 1974.

<sup>24</sup> Michael Kerr, *Imposing Power-Sharing*, 2005, pp. 41-72; Robert Fisk, *The Point of no Return: The Strike that Broke the British in Ulster*, (London: André Deutsch, 1975).

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leadership, under the guise of the United Ulster Unionist Council, acted as if they had a legitimate right to exercise one, having been excluded from the political process. In doing so, Faulkner's opponents exacerbated a split within the unionist community over whether or not to accept a power-sharing settlement with an Irish dimension. Following the *coup*, direct rule was re-imposed and subsequent efforts to initiate a more voluntary form of power-sharing failed. The turning point for the Sunningdale executive was when Heath announced a snap general election, to be held on 28 February. Eleven of Northern Ireland's twelve MPs were returned to Westminster on an anti-Sunningdale platform, while Heath's Conservatives returned to opposition. Incoming Labour Prime Minister, Harold Wilson, who had invested no political capital in Sunningdale, did little to save the executive once the stoppage got underway.

Prior to the Sunningdale negotiations and at one of the most critical junctures in the history of Northern Ireland, Heath recalled Whitelaw to London to take over as Secretary of State for Employment. As Heath's dealmaker in Northern Ireland, Whitelaw deserves great credit for reconciling Faulkner's unionists and the SDLP with the idea of power-sharing. As it turned out, the two governments had pressured Faulkner into accepting a deal with nationalists that he became incapable of selling to the unionist community. As the then-secretary to the Executive, Sir Kenneth Bloomfield put it, for Heath power-sharing was probably the price Faulkner had to pay for maintaining the union with Britain.<sup>25</sup> Whilst much of what was presented at Sunningdale had already been negotiated and agreed between Whitelaw and the pro-agreement parties during the Belfast Castle Talks the previous month, he would likely have sensed Faulkner's increasing difficulty with the Council of Ireland, influenced its presentation and hastened its renegotiation. On the Irish side, there was a clear inability on the part of the coalition government to amend Articles Two and Three of the Republic's constitution and clear up the ambiguity over its position towards Northern Ireland's 'status' after the Sunningdale Communiqué was challenged in the courts. Furthermore, the Irish Government appeared unwilling to make the rapid progress on extradition and cross border security that the executive needed to stabilise politically and draw public attention away from its blatant powerlessness in the face of republican and loyalist violence.

So how close was Northern Ireland's first power-sharing agreement to Lijphart's consociational formula?<sup>26</sup> The agreement did contain the main elements of his power-sharing model: a coalition government with strong links to its legislature, proportional representation for electing the assembly, a mutual veto on the Council of Ireland, and increased measures for safeguarding against political and religious discrimination. The agreement lacked official provisions for enhancing segmental autonomy and proportional representation for the public sector. As it was fundamentally an exclusive accord, there were no seats at the table for the anti-agreement unionist parties, should

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<sup>25</sup> Interview with Sir Kenneth Bloomfield, Belfast, 23 August 2001.

<sup>26</sup> Arend Lijphart, *Democracy in Plural Societies*, 1977, p. 1.

they have altered their intransigent attitude towards the concept of power-sharing. Sunningdale was obviously not as sophisticated as the Belfast Agreement in terms of its consociational constitutional engineering. It was an agreement to break up the Northern Ireland party system,<sup>27</sup> forge a government around a moderate centre ground, reduce political violence by gaining nationalist support for policing and isolate extremists on both sides.

Crucially, a majority of Northern Ireland's political leaders lacked sufficient motivation in 1973-74 to engage in power-sharing and take the tough decisions conducive to inter-ethnic political accommodation.<sup>28</sup> Faulkner was not free to negotiate and lead his constituency towards a settlement containing a two-tier Council of Ireland with executive functions. Moreover, a multiple balance of power did not exist between Northern Ireland's two main communities or intra-elite political stability within them.<sup>29</sup> Sunningdale also lacked consistent positive exogenous pressures providing sufficient incentives for both elites to accept and support consociational government. Strong Anglo-Irish relations were lacking and Sunningdale can be viewed as the testing ground for the formula to which the two governments would eventually return in their search for a constitutional settlement in Northern Ireland.

Over a quarter of a century later, administrations headed by Trimble and Mallon, and subsequently by Trimble and Mark Durkan after he replaced Mallon in 2001, repeatedly broken down over the decommissioning issue - which became central to political progress - and Sinn Féin's ambiguous position towards fully putting IRA arms beyond use.<sup>30</sup> To resolve the issue, Blair and Ahern called upon the assistance of former US Senator George Mitchell, who had presided over the negotiations that led to the Belfast Agreement.<sup>31</sup> Mitchell's mediation proved an important exogenous tier to the political process and part of the supportive role US President Bill Clinton played.<sup>32</sup> Clinton helped pave the way for an IRA ceasefire in 1994 by granting US visas to Sinn Féin leaders. Practising an open-door policy to the White House for the Northern Ireland parties, he facilitated international momentum for agreement, granted Sinn

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<sup>27</sup> W. Whitelaw, *The Whitelaw Memoirs*, (London: Aurum Press 1989), p. 114.

<sup>28</sup> John McGarry & Brendan O'Leary, *Explaining Northern Ireland, 1995*, pp 338-44.

<sup>29</sup> Ibid.

<sup>30</sup> See Dean Godson, *Himself Alone: David Trimble and the Ordeal of Unionism*, (London: Harper Collins, 2004).

<sup>31</sup> George Mitchell, *Making Peace*, (Berkeley: University of California, 2000).

<sup>32</sup> On the neglected role of external actors in the promotion and operation of consociational settlements see Michael Kerr, *Imposing Power-Sharing*, 2005, pp. 179-97; John McGarry & Brendan O'Leary, 'Consociational Theory, Northern Ireland's Conflict, and its Agreement. Part 1: What Consociationalists can learn from Northern Ireland', *Government and Opposition*, 2006, pp. 43-63.

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Féin political legitimacy, and visited Northern Ireland three times in efforts to shore up pro-Agreement support.<sup>33</sup>

On 6 September 1999, Mitchell undertook a review of the political process, which aimed to address the ongoing crisis over IRA decommissioning.<sup>34</sup> In a subsequent statement, the IRA indicated that it would 'appoint a representative to enter into discussions' with General John de Chastelain's Independent International Commission on Decommissioning (IICD) once an executive was formed.<sup>35</sup> On 2 December 1999, prior to any acts of IRA decommissioning, a Northern Ireland executive was created, unambiguously including Sinn Féin and the UUP. The same day, the Republic of Ireland amended its constitution by removing its territorial claim to Northern Ireland and the British Government revoked the Anglo-Irish Agreement of 1985. Blair's closest political ally, Northern Ireland Secretary of State, Peter Mandelson, had assured the UUP that the British Government would take the power to suspend the executive if the IRA failed to decommission.<sup>36</sup> It was Mandelson's view, however, that there was no possibility of 'seeing a start to decommissioning if the institutions were not up and running'.<sup>37</sup> Requiring devolution to work for the maintenance of his political position, Trimble made a drastic u-turn on his party's 'no guns - no government' policy. The UUP famously 'jumped first', entering an executive with Sinn Féin prior to decommissioning. The IRA appointed a 'go-between' to meet the IICD but disarmament was not readily forthcoming. Trimble lamented that his party had 'jumped first' and 'jumped alone'.<sup>38</sup> Consequently, direct rule was re-imposed on 11 February 2000 under the Northern Ireland Act 2000, which provided for the suspension of the assembly and its executive.<sup>39</sup> Mandelson's predecessor, Mo Mowlam, also acted as Blair's dealmaker throughout the Belfast Agreement negotiations. At one stage, she even entered Northern Ireland's Maze prison to negotiate personally with loyalist prisoners.

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<sup>33</sup> See Michael Kerr, *Imposing Power-Sharing*, 2005, pp 91-92; Paul Arthur, *Special relationships: Britain, Ireland and the Northern Ireland Problem*, (Belfast: Blackstaff, 2000); Michael Cox, 'Bringing in the "International": The IRA Ceasefire and the end of the Cold War,' *International Affairs*, 73:4, 1997, pp. 671-93; Adrian Guelke, 'The United States, Irish Americans and the Northern Ireland Peace Process,' *International Affairs*, 72:3, 1996, pp.521-36; Conor O'Clery, *The Greening of the White House*, (Dublin: Gill & Macmillan 1996).

<sup>34</sup> Michael Kerr, 'Internationalising the Arms Issue: The Politics of Decommissioning in Northern Ireland and Lebanon', in A. Edwards and S. Bloomer Eds., *Transforming the Peace Process in Northern Ireland: From Terrorism to Democratic Politics*, (Dublin: Irish Academic Press, 2008).

<sup>35</sup> *The Irish Times*, 18 November 1999.

<sup>36</sup> *The Times*, 2 December 2000.

<sup>37</sup> Interview with Peter Mandelson, Westminster, 2 July 2001.

<sup>38</sup> *The Irish Times*, 14 February 2000.

<sup>39</sup> Northern Ireland Act 2000 (London: HMSO, 2000).

Devolution was again restored in May 2000, but decommissioning did not occur until October 2001. The UUP's three ministers resigned on 18 October 2001, placing a week's deadline on the process before the assembly would collapse. The IRA announced that it had decommissioned weaponry, the amount of which the IICD described as 'significant'.<sup>40</sup> However, Trimble failed to get re-elected as first minister in the assembly as two UUP rebels crossed the floor of the house to vote against him. To break the deadlock, on 6 November 2001, three Alliance Party assembly members re-designated themselves as unionists, thereby securing Trimble's re-election alongside Durkan.<sup>41</sup> The executive then functioned acrimoniously before direct rule was reimposed, on 14 October 2002, following allegations that a republican spy ring had been operating at Stormont, police raids on Sinn Féin's offices and the resignation of the DUP's two non-sitting ministers.<sup>42</sup> Finally, in 2003, a political deal between the UUP and Sinn Féin collapsed at the last minute due to a lack of transparent decommissioning and Trimble's forlorn efforts to sell the idea of power-sharing with Sinn Féin to his community. By this stage, the UUP appeared incapable of carrying the political process forward and republicans unwilling to assist its efforts to do so.

The issue of weapons, be it the procurement of arms or the maintenance of a paramilitary arsenal, came to be seen by many commentators as a red herring in the political process,<sup>43</sup> the issue of political trust that decommissioning symbolised, however, was most certainly not. For Trimble, the arms imbroglio forced him to repeatedly risk his political position to make the devolved institutions functional. After the Executive was set up, he needed the Belfast Agreement to work in order to secure his own party political position. In that sense, the UUP was reliant on Sinn Féin fulfilling its commitment to ensure IRA arms were put beyond use. Trimble was blamed for the

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<sup>40</sup> [http://news.bbc.co.uk/onthisday/hi/dates/stories/october/23/newsid\\_2489000/2489099.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/october/23/newsid_2489000/2489099.stm)

<sup>41</sup> *Belfast Newsletter*, 7 November 2001.

<sup>42</sup> [http://news.bbc.co.uk/1/hi/northern\\_ireland/2319781.stm](http://news.bbc.co.uk/1/hi/northern_ireland/2319781.stm)

<sup>43</sup> On the decommissioning of paramilitary arms see Kirsten Schulze, 2001. 'Taking the gun out of politics: conflict transformation in Lebanon and Northern Ireland', in John McGarry, ed., *Northern Ireland and the Divided World*, (Oxford University Press, 2001), pp. 253-275; Kirsten Schulze, and M. L. R. Smith, 'Decommissioning and Paramilitary Strategy in Northern Ireland: A Problem Compared', *Journal of Strategic Studies* 23:4, 2000, pp. 77-106; Colin McInnes, 'A Farewell to Arms? Decommissioning and the Peace Process,' in Michael Cox, Adrian Guelke & Fiona Stephen (Eds.), *A Farewell to Arms? Beyond the Good Friday Agreement, Second Edition*, (Manchester: Manchester University Press, 2006), pp. 154-69; Roger MacGinty, 'Issue Hierarchies in Peace Processes: The Decommissioning of Paramilitary Arms and the Northern Ireland Peace Process. Lessons for Ending Civil Conflicts,' *Civil Wars*, Vol. 1, No. 3, 1998, pp. 24-45; Eamonn O'Kane, 'Decommissioning and the Peace Process: Where did it come from and why did it stay so long?' *Irish Political Studies*, Vol. 22, No. 1, 2007, p. 81-101; Michael Kerr, 'Internationalising the Arms Issue: The Politics of Decommissioning in Northern Ireland and Lebanon', in Aaron Edwards and Stephen Bloomer (Eds.), *Transforming the Peace Process in Northern Ireland: From Terrorism to Democratic Politics*, (Dublin: Irish Academic Press, 2008).

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'fudging' of this issue, by internal and external unionist critics,<sup>44</sup> but he had in fact pressured the British Government to adopt powers to exclude parties from the Northern Ireland executive and suspend its devolved institutions. The British Government set up an Independent Monitoring Commission (IMC) to evaluate the level of paramilitary activity at different junctures in the political process. For Trimble, the objective had been to force the government to put some 'steel' into the agreement during its implementation process.<sup>45</sup> Whilst these were significant political amendments, they were not enough to save his leadership.

On 26 September 2005, the IICD announced that it was satisfied that the IRA had fully decommissioned its entire arsenal of weapons.<sup>46</sup> The final acts of IRA decommissioning came independently of any direct unionist pressure and unionist division over the issue actually enabled the IRA to trade its arms in the process for a far higher political price than their military value.

By April 2007, many of the variables that had undermined Northern Ireland's first and second power-sharing executives had considerably changed. Although ultimately ending in failure, the administrations headed by Trimble further embedded the concept of power-sharing in Northern Ireland's political culture. It was divisions within unionism, the electoral rise of Sinn Féin and the failure of paramilitary organisations to promptly decommission weapons that saw the process repeatedly breakdown. The British government's 'twin track' approach to implementing the Belfast Agreement became apparent in this period of direct rule, as it continued to apply the demilitarisation aspects of the accord with Sinn Féin.

After 2003, the two governments changing track towards the idea of promoting power-sharing between the DUP and Sinn Féin. For Ahern, this was a more problematic approach, as his government was deeply concerned with the prospect of Sinn Féin developing a significant electoral constituency in the Republic of Ireland. All of the major political and constitutional issues at the heart of Northern Ireland's conflict had to a large extent been addressed. After Trimble's party suffered its worst ever general election performance in 2005, reduced to one seat at Westminster and 17.7 per cent of the popular vote, the DUP became established as Northern Ireland's dominant unionist force.<sup>47</sup> Whilst holding three seats in that election, the SDLP's vote share slipped behind that of the UUP to 17.5 percent as their republican rivals gained at their expense. Whilst sectarian tension and political division remained at all levels of society, by 2007, intra-segmental stability strengthened the prospect of the Belfast Agreement working through the dominance of the DUP and Sinn Féin. Furthermore,

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<sup>44</sup> Interview with Jeffrey Donaldson, Lisburn, 14 August 2001.

<sup>45</sup> Interview with David Trimble, Westminster, 8 June 2005.

<sup>46</sup> *The Irish Times*, 27 September 2005.

<sup>47</sup> Michael Kerr, *Transforming Unionism: David Trimble and the 2005 General Election*, (Dublin: Irish Academic Press, 2005).

the parties appeared to be operating in an environment where there was a public appetite for political progress after years of inertia.

What gave Paisley comfort in accepting power-sharing in 2007, in contrast to Trimble in 1998 and Faulkner in 1973, was the fact that he was the only significant obstacle to it. But in response, Jim Allister, the DUP's Member of the European Parliament, quit the party for the second time,<sup>48</sup> prompting his colleague, the Rev. William McCrea, to brand the notion of power-sharing with republicans 'obnoxious' in a House of Commons debate.<sup>49</sup> Whilst timed to maximise political damage to Paisley's *volte-face* over entering government with republicans, Allister declared he was resigning because of the absence from the St Andrew's amendments of any provision requiring the IRA army council to disband prior to executive formation.<sup>50</sup> Allister and a small number of other DUP rejectionists, claimed this issue was a 'tiebreaker'. He argued that the lack of any default mechanism in the Belfast Agreement or its St Andrews amendments, for the exclusion of parties that renege on their responsibilities in government, remained a serious weakness at the heart of Northern Ireland's power-sharing arrangements.<sup>51</sup>

Allister's exit was reminiscent of former UUP MP Jeffrey Donaldson's eleventh-hour walkout during the negotiations that led to the Belfast Agreement. Seeking to weaken his party leader's position, Donaldson objected to the absence in the text of any requirement for paramilitaries to decommission illegally held weapons prior to executive formation and any means of excluding them from government should they fail to do so. At St Andrews, the DUP did seek provisions to exclude parties that failed to honour their commitments under the Belfast Agreement, but Sinn Féin refused to support any such amendment.<sup>52</sup>

Adams and McGuinness had long since prepared the republican constituency for entry into government with the DUP. They illustrated their tight party management skills, on 28 January 2007, when they secured 90 per cent approval for a motion to support policing in Northern Ireland at a special party conference. The significance of this issue should not be underestimated, as the SDLP did not publicly endorse and support the Royal Ulster Constabulary before taking its seats on the Sunningdale executive in 1974. This does not, of course, mean that paramilitaries will not threaten a future power-sharing executive in Northern Ireland. Sinn Féin stressed that they were working hard in their constituencies to address the danger dissident republicans still

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<sup>48</sup> *Belfast Newsletter*, March 28 2007.

<sup>49</sup> House of Commons Hansard, Column 1346, 27 March 2007 (London: HMSO, 2007).

<sup>50</sup> 'Response to the St Andrews Agreement', letter by Jim Allister, *Belfast Newsletter*, 17 October 2007.

<sup>51</sup> <http://www.u.tv/newsroom/indepth.asp?pt=n&id=77360>

<sup>52</sup> Interview with Mark Neil, UUP special advisor, Belfast, 4 April 2007.

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posed to the process.<sup>53</sup> While problems continue to exist, assembly elections on 7 March left the DUP and Sinn Féin in positions of mutual strength, with solid mandates to form Northern Ireland's third power-sharing executive. They enjoyed electoral dominance in comparison with the tenuous position of the SDLP and UUP after the June 1998 assembly elections. In a referendum the previous month, 71.2 per cent of the Northern Ireland electorate voted in favour of the agreement, as did 95 per cent of the electorate in the Republic of Ireland. The UUP and SDLP gained 28 and 24 seats respectively in the 108 member assembly. However, a large unionist anti-agreement vote rewarded the DUP with third place and problems of internal party management consistently hindered Trimble's progress following his split with Donaldson. Winning three seats less than Trimble's UUP, anti-agreement unionists were unable to prevent the power-sharing institutions being set up, but well placed to disrupt the executive's ability to function under them.

In contrast, victory in the 2007 assembly elections saw the DUP and Sinn Féin consolidate their respective positions as Northern Ireland's dominant political forces ahead of intergovernmental efforts to restore power-sharing. The DUP gained six seats, giving them a total of 36, whereas Sinn Féin picked up another four, bringing their total to 28. Not only did the DUP further squeeze the UUP, who were reduced to 18 seats after losing 9 from their 2003 campaign, it eliminated the last vestiges of anti-agreement unionism, as UKUP leader Robert McCartney failed to outflank Paisley in his continued opposition to inclusive government.<sup>54</sup> An anti-agreement unionist vote of 2.2 per cent and an anti-agreement republican vote of 1.2 per cent (total 3.4 per cent) was not much of an electoral platform with which to challenge the system. In contrast to 1974 and 1998-2005, the most likely threat to power-sharing came from within, not without. Further reinforcing the DUP's electoral position was the fact that any future gain made by the UUP would need to be matched by a swing away from Sinn Féin to the SDLP if unionists were to retain the first minister's position in a future assembly and avoid it passing to republicans. The possibility of such a scenario was one consequence of changes to the rule requiring cross-community support for the joint election of the First and Deputy First Ministers.

In the assembly, the three centre ground parties might form a coalition that opposes a 'divide and rule' approach by the two dominant parties. Competition for centre ground votes in both the 2005 and 2007 elections, however, saw the UUP and Alliance increasingly at odds. Furthermore, the sophistication with which the DUP and Sinn Féin party machines squeezed the SDLP and the UUP between 1998 and 2007 left both parties reduced to its core vote. A side effect of having won the political debate over power-sharing in Northern Ireland was that the UUP and SDLP subsequently felt

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<sup>53</sup> Interview with Jim Gibney, Sinn Féin special advisor, Belfast, 5 April 2007.

<sup>54</sup> DUP gains and UUP losses both include the three seats held by UUP MLAs defecting to the DUP in 2004: Jeffrey Donaldson, Arlene Foster and Norah Beare. Beare was unselected by the DUP in 2007.

obliged to support the DUP and Sinn Féin in their first steps to share power. Furthermore, filling the political vacuum that had existed in Northern Ireland since the suspension of the assembly in 2002 provided the SDLP and UUP with a chance to rebuild their parties and find a role in a new assembly. So what changes did the agreements reached in Scotland make to the Belfast Agreement and how might they stabilise devolved government in Northern Ireland?

## The St Andrews Proposal

In practical terms, Annex A of the St Andrews amendments addressed issues relating to the three strands of the Belfast Agreement: Strand 1 dealt with the institutional mechanisms of power-sharing internal to Northern Ireland, whilst Strands 2 and 3 touched upon the intergovernmental north-south and east-west dimensions. The key amendments to the Belfast Agreement regarding Strand 1 sought to reduce the independent powers of individual ministers, increase checks and balances between the executive and the assembly, and strengthen its consociational veto provisions.

Firstly, Section 2 provides for arrangements to ensure that, 'where a decision of the executive could not be achieved by consensus and a vote was required, any three members of the executive could force it to be taken on a cross community basis'. Should consensus on the executive break down regarding a political issue over which there is sectarian or inter-communal tension - such as the removal of academic selection from Northern Ireland's education system - both the DUP and Sinn Féin have enough ministerial seats to bring governmental decision making to a standstill through the application of this provision. Theoretically, then, either of the two main parties can collapse the whole system. If no consensus can be found on issues such as education or policing and justice, then there is nothing in the agreement to prevent parties from grandstanding and consequently deferring to the British and Irish governments for arbitration. Any three ministers in the executive can trigger the cross-community vote provision jointly. Therefore, it can also be used by a coalition of the three UUP and SDLP ministers in order to block executive decisions, which might further polarise Northern Ireland's two main communities. The UUP, SDLP and Alliance have all voiced fears that the DUP and Sinn Féin want to politically 'carve up' Northern Ireland between them. A government dominated by the two hard-line parties may become 'a battle a day', as DUP deputy leader Peter Robinson forecast in the weeks leading up to agreement.<sup>55</sup>

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<sup>55</sup> Peter Robinson speaking on BBC Radio Ulster's Inside Politics, 3 March 2007: [http://news.bbc.co.uk/1/hi/northern\\_ireland/6414637.stm](http://news.bbc.co.uk/1/hi/northern_ireland/6414637.stm)

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Section 3(i) provides for 'discussion of, and agreement on, issues which crosscut the responsibilities of two or more ministers, including in particular those that are the responsibility of the minister of finance and personnel', within the provisions of a wider ministerial code. In practice, this could mean chronic governmental deadlock as almost any ministerial decision can be brought before the executive and put to a cross-community vote. Section 4 goes further, providing for 'discussion and agreement on any issue which is significant or controversial'...and 'clearly outside the scope of the agreed programme of government'. A further check, inserted at the DUP's insistence, was the provision in Section 6, that thirty members of the assembly may initiate a 'referral' on a decision taken by the executive, within seven days, on issues of 'public importance'. Local issues, such as contention over abolishing the 'eleven-plus' academic selection system or maternity hospital provisions appeared to be the main reason the DUP pushed for this.

St Andrews also amended some of the consociational aspects of Strand 1. The Belfast Agreement provided for a fully devolved one hundred and eight-member assembly, which was to be elected by STV from Northern Ireland's existing Westminster constituencies. An executive was chosen using the *d'Hondt* electoral formula,<sup>56</sup> with ten ministers appointed on the respective strength of each party in the assembly. This was headed by a dual premiership of First and Deputy First Ministers, who were jointly elected through the mutual consent of at least fifty percent of both nationalist and unionist members of the assembly, reliant on each other for the maintenance of their respective positions, and of equal political standing. Assembly members had to designate their identity as 'nationalist, unionist or other', and cross-community support was required for all key decisions including the election of the First and Deputy First Ministers. Such support was provided by either 'parallel consent' - a majority of those designations present and voting, including a majority of unionist and nationalist members present and voting, or a 'weighted majority' - sixty percent of members present and voting, including at least forty percent of each of the nationalist and unionist designations present and voting.<sup>57</sup> Thus, the agreement entailed tight minority veto rights on all key decision-making in the assembly.

One of the attractions of the *d'Hondt* system was that it facilitated executive formation and the allocation of ministerial portfolios without the parties having to reach any specific consensus.<sup>58</sup> On 2 April 2007, Northern Ireland's parties met in private to determine which ministries they would acquire in the executive when the *d'Hondt*

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<sup>56</sup> See Brendan O'Leary, 'The Nature of the British-Irish Agreement', *New Left Review* 233, 1999, pp. 95-6; Brendan O'Leary in John McGarry (Ed.), *Northern Ireland and the Divided World*, (Oxford: Oxford University Press: 2001), pp 69-81.

<sup>57</sup> The Belfast Agreement, (London: HMSO, 1998) pp. 14-21.

<sup>58</sup> See Brendan O'Leary, 1999 'The Nature of the British-Irish Agreement, *New Left Review* 233, pp. 66-96.

system was triggered for the second time.<sup>59</sup> The first time it was successfully run, on 29 November 1999, ten ministers were nominated: three UUP, three SDLP, two DUP, and two Sinn Féin,<sup>60</sup> not including the First and Deputy First Ministers. However, the DUP refused to physically take up their seats on the executive, occupying them instead from outside of the government. Deputy First Minister Mark Durkan described the arrangement as 'government by correspondence',<sup>61</sup> but the use of this tactic meant that the DUP were in government, but not of it. The logic behind this was to ensure the DUP's refusal to sit in government with Sinn Féin did not result in its ministerial portfolios being reallocated to other parties under the *d'Hondt* rule. It therefore allowed the DUP to both exercise power and maintain its policy of not publicly speaking to, negotiating with or entering into government with Sinn Féin.

Section 9 altered the rules for the appointment of First and Deputy First Ministers. This enabled the two positions to be nominated by the largest and second largest assembly parties, removing the requirement for joint election through a cross-community majority vote. This meant nationalists did not have to elect Paisley as First Minister, nor unionists McGuinness as Deputy First Minister.

Section 15 amended the rules regarding 'community designation'. This prevented assembly members from changing political designation for the whole of an assembly term unless they also switched party membership. Only members who defect from one party to another can now change communal allegiance in the assembly, thus preventing tactical designation changes used principally to shift the balance of cross-community voting. This was a direct result of Alliance re-designating in 2001 to assist Trimble's re-election as First Minister.

The new Northern Ireland Executive took office on 8 May 2007, comprising four ministers from the DUP, three from Sinn Féin, two Ulster Unionists and one SDLP member. As the largest party, the DUP secured its first choice department, finance and personnel, while Sinn Féin took up the education portfolio for the second time. In this respect, the DUP sought to micro-manage executive decision-making through its control of the ministry of finance and personnel. On the surface, the St Andrews amendments appeared to have strengthened the requirement for ministers in the executive to take decisions collectively. For the DUP, these provisions were a political 'safety net' to be used in the event of individual ministers attempting to act

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<sup>59</sup> Method of party list proportional representation named after 18th century Belgian mathematician Victor d'Hondt, which favours large parties and multiparty coalitions.

<sup>60</sup> D'Hondt was triggered on 15 July 1999, after a meeting of the assembly to nominate ministers for the executive collapses as the UUP refuses to attend over Sinn Féin's stance on decommissioning. Seamus Mallon resigned as deputy first minister after an executive was nominated that could not last as it held no unionists. See Martina Purdy, *Room 21*, 2005, p. 71.

<sup>61</sup> *Ibid*, p. 302.

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autonomously of the executive on matters of inter-communal importance.<sup>62</sup> Some parties regard this new ministerial coda as judicially enforceable, with decision-making open to legal challenge should ministers flout the requirement for executive consensus. The DUP placed a great deal of emphasis on these amendments, whereas Sinn Féin viewed them as minor alterations to the structures put in place in 1998. Republicans believed that ministerial decision-making would function in much the same way as it had under previous executives. The UUP viewed the St Andrews provisions as a sort of 'nuclear option', locking in ministerial accountability for use in the event of the deterioration of inter-party relations.<sup>63</sup> Like the two main nationalist parties, they expected very little to change in terms of the practical functioning of government. However, given the lack of trust that exists between the DUP and Sinn Féin, and the fact that they have never shared power before, both parties appear happy to have provisions in place that enable them to hold the other to account. Whether or not these veto powers will be used recklessly will be a test of their political maturity and how seriously they both want devolution to work.

Having insisted on a statutory ministerial code, with increased checks and balances aimed at enhancing executive accountability, the DUP are concerned to prevent the possibility of any ministry functioning as a governing body outside the executive's control, as its tactic of taking up ministerial posts but not physically sitting in government amounted to. Having learnt from Trimble's misfortunes and mistakes, the DUP sought to ensure executive collapse should Sinn Féin attempt to continue running its ministries independently of the executive following executive deadlock. Furthermore, in a worst-case scenario, to prevent an administration becoming split between different unionist and nationalist ministerial blocs, which effectively ran as separate administrations.

## Conclusion

While Northern Ireland has no history of power-sharing that predates Sunningdale, the intergovernmental management of its ethno-national conflict may now be viewed as a 'best practice' case in international conflict regulation. It appears to have stabilised ethno-national divisions that political scientists previously regarded as intractable. This merely represents a case of 'best practice', firmly situated in the democratic first world, where relatively few conflicts of this nature persist. Disagreement continues over how effective the consociational model has been and how its success or failure can be

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<sup>62</sup> Interview with DUP special advisor, Stormont, 4 April 2007.

<sup>63</sup> Interview with Mark Neil, UUP special advisor, Stormont, 4 April 2007.

measured.<sup>64</sup> The Northern Ireland example suggests that exogenous variables played a key role in determining whether its seemingly intractable ethnic conflict could be regulated through power-sharing. This external dimension makes it particularly difficult for researchers to judge the extent to which internal variables (such as a history of power-sharing between elites) impinge upon those experiments. The external variables that influence or shape the implementation of power-sharing accords vary according to international strategic concerns, but remain central to any understanding of how successful consociation may be in managing divided societies. In Northern Ireland's case, it is clear that intervening 'dealmakers' and 'deadlock' breakers were, and will likely remain, crucial to its success.

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<sup>64</sup> John McGarry & Brendan O'Leary, 'Consociational theory, Northern Ireland's conflict, and its agreement. Part 1: What Consociationalists can learn from Northern Ireland', *Government and Opposition*, 2006, 41:1, pp. 43-63.



# Power Sharing Imposed

## The Case of Bosnia and Herzegovina

KARIM EL MUFTI

The Republic of Bosnia and Herzegovina was one among the six other republics constituting the ex-Socialist Federal Republic of Yugoslavia (SFRY) which broke apart in 1991-1992 during a new Balkan war, after Slovenia and Croatia proclaimed their independence. Most of this conflict actually took place on the Bosnian territory between 1992 and 1995, during which three ethnic groups were striving for their own specific nationalist project to prevail. The Bosnian Serbs (backed by Serbia of Slobodan Milosevic), the Bosnian Croats (supported by Croatia of Franjo Tudjman) and the Bosnian Muslims (with no ethno-political outreach in neighboring entities) fought each other pursuing an exclusive nation-building project, with the nation (or constituent people) here connoting an unshared belonging to one of the three main communities. Burdened by religious cleavages (the Serbs being Orthodox, the Croats Catholic and the Muslims followers of Islam) and political divisions (through competing nation-building visions<sup>1</sup>), the Bosnian *plural* or *multinational* society reached the point

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<sup>1</sup> On the nationalist projects of each Bosnian community and its historic and political development, cf BANAC, Ivo, *The National Question in Yugoslavia. Origins, History, Politics*, Cornell University Press, Ithaca and London, 1984, 452p., BOUGAREL, Xavier, *Bosnie: Anatomie d'un conflit*, La Découverte, Paris, 1996, BOKOVOY, Melissa K. (ed.), *State-Society relations in Yugoslavia 1945-1992*, Mac Millan, 1997, 375p., KUBLI, Olivier Ladislav, *Du nationalisme yougoslave aux nationalismes post-yougoslaves*, L'Harmattan, Paris, 1998,

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where the « *cement cracks [and] the edifice collapses* » to use one of Donald Horowitz's expressions for ethnic conflict<sup>2</sup>.

The outcome of the Bosnian conflict was devastating for the country, as ethnic cleansing, forced displacements massacres and internment torture camps have led to the absence of a comprehensive reconciliation process between the communities. Still, an agreement was fomented and the Dayton Agreement was signed in November 1995, supervised by the international community who could reach a minimum compromise between the warring parties in order to end the war.

The Dayton Agreement (also referred to later on as 'Dayton'), designed a complex statecraft for the Bosnian post-war state, needing to compose with ethnic and political internal balances. At the end of the war, the country was divided on the ground into two parts, a situation which was consecrated by the Dayton's peace treaty when it established two equal sized entities forming the Republic of Bosnia: the Croat and Muslim Federation (gathering most of the Croat and Muslim population) and Republika Srpska (the Serb Republic, where live most of the country's Serbs). Both are held together by a - weak - central State in which Dayton introduced power sharing mechanisms. Hence, power is shared between the three communities through a complex multilayered institutional system dissolving the political power across all three constituent peoples at the different institutional levels (the Federation, Republika Srpska and the State).

Furthermore, a deadlock breaking institution was created (imposed) by the international community to avoid decision-making paralysis in the country through the High Representative figure, a foreign senior delegate empowered by the international community to provide security and stability in Bosnia and Herzegovina (BiH). In the conduct of his mission, the High Representative was given the power to impose legislation and dismiss Bosnian politicians who would not abide by Dayton, with the support of NATO troops (the Stabilization Forces - SFOR, today EUFOR) and the International Police Task Force (IPTF), and a number of international organizations such as the OSCE, the UN Mission in BiH or the European Commission Office who were actually in charge of post-war reconstruction and reforms.

Through Dayton, the international community intended to provide some kind of political framework in which the three ethnic groups could share power without resorting to violence and, at the same time, push Bosnian political elites in direction of the European Union path and NATO membership as a way to consolidate the pacification of the country and the Balkans region as a whole. In that regard, it is worth noting that Bosnia's integration to both EU and NATO represents the ultimate goal for

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253p., COHEN, Lenard J., *Whose Bosnia? The politics of nation building*, in *Current History*, vol. 97, n°617, March 1998, pp.103-112, GOSSIAUX, Jean-François, *Pouvoirs ethniques dans les Balkans*, Paris : PUF, 2002, 217 p.

<sup>2</sup> HOROWITZ, Donald, *Three Dimensions of Ethnic Politics*, in *World Politics*, vol. 23, n°2, Jan. 1971, p. 234.

the ethnic political entrepreneurs of the country, but the struggle between the three communities for the control of the essential keys of political and economic power often led them to triggering political crises, despite the power sharing system in place.

In a first phase, we will offer an attempt of raising the features of the Bosnian power sharing before drawing the main lines of confrontation between the Croats, Serbs and Muslims of Bosnia and elaborate on the 'imposed' character of the way Bosnian politics is conducted.

## Features of Bosnian Power Sharing

Dayton produced a complex and multi-layered federalism splitting power between the three demographically unequal groups. The Muslims represent the largest community with 48% of the population, followed by the Serbs (30%), with the Croats forming the numerically smallest constituent people of BiH with 12% of a total population of 4.5 million people. Regardless of the demographic unbalance, the Dayton agreement recognizes for each one of the three groups to defend their vital interests, giving each ethnic community a veto power that can block legislative decision-making at the State level.

However, the real power center does not lie within central institutions, but within the two entities, the Federation and Republika Srpska, each having their own presidency, cabinet and parliament. Another asymmetry can be observed when comparing both entities, as RS is ethnically homogeneous (holding 90% of Serbs) and contains a strong political and economic center in Banja Luka, as opposed to a hybrid Federation where power is furthermore diluted between Muslims and Croats and where Sarajevo and Mostar compete as political and economic centers. Moreover, unlike RS, the Federation is divided into ten cantons each owning its own government and municipal council.

In that, it is worth noting the institutional density of the Bosnian political system. With a total of 13 governments and more than 300 ministers, power is scattered along the numerous layers of institutions, the main objective of such complex design being to prevent the ascendancy of any of the three communities, through the principle « *reciprocity as guarantee* », as expressed by Jean-Louis Quermonne<sup>3</sup>.

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<sup>3</sup> QUERMONNE, Jean-Louis, Le problème de la cohabitation dans les sociétés multicommunautaires, in *Revue française de science politique*, vol. 11, n°1, 1961, p. 47.

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Hence, many elements of the consociational power sharing theory as brought forward by Arendt Lijphart<sup>4</sup> can be identified in the Bosnian political system set up according to the Dayton Agreement. In practical terms, a veto power lies in the hands of the nationalist political parties representing the ethnic communities, as mentioned earlier. Furthermore, the parity principle is applied across the political landscape of the country. For instance, the State is headed by a collegial presidency of three presidents belonging to each of the three constituent peoples. At the RS level, the Bosnian Serb president is seconded by two vice-presidents who represent the other two communities and the same goes for the Federation where the presidency is generally given to a Muslim but along with two vice-presidents of the other two groups. Additionally, the lower house of the State Parliament (the House of People) contains 15 seats, equally divided between the three ethnic groups. It is worth noting how perfect parity is applied despite the demographic variety of the three, the Bosnian Croats being the smallest community and still, benefit from « *over-representation as an additional guarantee of protection* », as explained by Theodor Hanf<sup>5</sup> whereas Lijphart calls it « *disproportionality in favour of minorities* »<sup>6</sup>.

In addition to parity, proportionality is also guaranteed to the different ethnic groups, especially in the electoral law which distributes seats in the upper houses in the State, Federation and Republika Srpska according to a proportional ratio after having secured a minimum of compensatory mandates for the political parties representing the three constituent peoples<sup>7</sup>.

In other occasions, these parties also have to submit to the rotation principle, namely within the collegial presidency where the position of president of the collegial presidency body is subject to a six month rotation. The Council of Ministers of the

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<sup>4</sup> LIJPHART, Arend, *Democracy in plural societies. A comparative exploration*, New Haven, Yale University Press, 1977. LIJPHART, Arend, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven, CT, Yale University Press, 1984. LIJPHART, Arendt, The Power Sharing Approach, in MONTVILLE, Joseph V. (eds.) *Conflict and Peacemaking in Multiethnic Societies*, Lexington, Mass, Lexington Books, 1990, pp. 491-509. LIJPHART, Arendt. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven, Yale University Press, 1999. LIJPHART, Arendt, Constitutional Design for Divided Societies, in *Journal of Democracy*, vol. 15, n°2, April 2004, pp.96-109.

<sup>5</sup> HANF, Theodor, MESSARRA, Antoine, REINSTROM, Hinrich, *La société de concordance, approche comparative*. Actes du Symposium organisé par le Goethe-Institut sur « la régulation démocratique des conflits dans les sociétés plurales », Beyrouth, Libr. orientale, 1986, p. 23-24.

<sup>6</sup> LIJPHART, Arendt, Consociational democracy: The examples of Belgium and the Netherlands, in HANF, Theodor, MESSARRA, Antoine, REINSTROM, Hinrich. *Op. cit.* p. 40.

<sup>7</sup> In the Bosnian electoral system, at least four representatives of each ethnic group have to be present in each legislative chamber of the three institutional levels (State, Federation and Republika Srpska).

Bosnian State used to be also subject to an eight month rotation, but this procedure was abolished in 2002 by the High Representative.

Last but not least of the power sharing mechanisms preventing the emergence of a unilateral ethnic political pole in the country, is the formation of an elite coalition (Lijphart calls it 'grand coalition') between different political parties driven by ethnic markers in order to organize governing blocs. But this issue has appeared as the weak point of the Bosnian power sharing system as the nationalist parties revealed some reluctance to cooperate and form alliances. In fact, the power sharing mechanisms introduced in post-war Bosnia actually froze the decision-making process which reached a point of « *powerlessness* » as elaborated by Sumantra Bose<sup>8</sup>, instead of empowering a healthy political process that would have been protected by the multiple power sharing safeguards offered by Dayton. Instead, between 1995 and 2000, Bosnia can be considered as having lived through the rule of the High Representative, a phase that many observers consider as being « *international state-building* »<sup>9</sup>. From the national Bosnian flag, anthem, symbols, currency, passports and even license plates, the High Representative imposed the strategic - and usually sovereign - decisions, officially to provide security and stability to the Bosnian context and avoid sterile nationalist disputes between ethnic entrepreneurs that could have led the country back to civil war.

In that way, the High Representative became the central actor of the Bosnian political system, especially after he was granted in 1997 what is referred to as the *Bonn powers* which increased the political leverage of the High Representative and that were understood as unlimited authority to impose laws at any constitutional level and to dismiss Bosnian elected representatives, political party officers and public officials. Hence, more than 100 laws and binding decisions were imposed and 57 public officials dismissed from their posts between 1997 and 2000. Marcus Cox observes in the beginning of 2001 how « *remarkable [the fact is that] little opposition has been offered by the nationalist parties of the Bosnian public to the new role of the High Representative* »<sup>10</sup> and explains how the nationalist parties were in fact « *relieved from having to make difficult political decisions* »<sup>11</sup> and cooperate between each other.

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<sup>8</sup> BOSE, Sumantra, *Bosnia after Dayton: Nationalist Partition and International Intervention*, New York, Oxford University Press, 2002, 295p.

<sup>9</sup> Cf European Stability Initiative, *International Power in Bosnia*, March 2000. KNAUS, Gerald, MARTIN, Felix, Lessons from Bosnia and Herzegovina, *Travails of the European Raj*, in *Journal of Democracy*, vol. 14, n°3, July 2003, pp. 60-74. SOKOLOVIC, Djemal, BIEBER, Florian, *Reconstructing Multiethnic Societies: the Case of Bosnia and Herzegovina*, Ashgate, Aldershot, UK, 2001, 224p. David Chandler takes the argument even further and accuses the international community of « *faking democracy* » in Bosnia; cf CHANDLER, David, *Bosnia: Faking Democracy After Dayton*, Pluto Press, London, 2000, 2nd ed, 254p.

<sup>10</sup> COX, Marcus, *State-Building and Post-Conflict Reconstruction: Lessons from Bosnia*. Paper at the Centre for Applied Studies in International Negotiations, Geneva, 2001, p.13. Despite little opposition from Bosnian political formations, there are voices from Bosnian opinion

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It was not until the year 2000 that a first serious form of coalition was shaped in post-war Bosnia through the constitution of the 'Alliance for Change'. The latter managed to win the general elections and ruled most of the country (State and Federation level) from 2000 to 2002, driven by a multiethnic party, the SDP<sup>12</sup>. Despite the multiethnic character of the coalition and the support of the international community, it failed to sustain politically and nationalist parties from all three ethnic groups returned to a dominant position in the 2002 general elections.

Nonetheless, the 'Alliance for Change' experience has led to a new phase in Bosnian politics, as it represented the starting point of a more cooperative behavior from nationalist parties who returned to power in October 2002. This new style was in fact imposed by the new High Representative of that time, Paddy Ashdown, who strategically took advantage of the SDP's psychological 'cliquet effect' to bring the different ethnic political representatives to a more consensual form of politics, i.e. associating them to the decisions that were to be taken to reform the country and meet with the EU and NATO membership conditions.

Still, the High Representative position and role was not the only element in initiating cross-communal cooperation between ethnic entrepreneurs. What also triggered a trend to more conciliatory behavior was the increase of intra-ethnic political competition that has started during the rule of the 'Alliance for Change'. Hence, rival parties were challenging the dominant position of each political formation that used to comfortably represent its constituent people. The nationalist Bosnian Muslim party, the SDA<sup>13</sup> of late Alija Izetbegovic (first president of independent BiH), considered by the community as their hero while fighting for Muslims' rights during the civil war, was rivaled by Bosnian Muslim SBIH<sup>14</sup> of Haris Silajdzic, ex-Prime Minister of Bosnia and long time rival of late Izetbegovic. The Bosnian Croats' dominant party, the HDZ<sup>15</sup> (replicate of Croatia's HDZ of late Franjo Tudjman), had to cope with the rise of a new Croat formation, the HDZ-1990, who proposes an alternative to defend Bosnian Croats' interests in Bosnia. Last but not least, the Bosnian Serbs endured the same

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leaders and academics who actually openly criticized the international community's decisions in the country. Editoralist in the Bosnian daily *Oslobodjenje*, Gojko Beric wrote on 26 avril 2002: « *What we call today the State of BiH, and that does not really look like a serious State, is not the work of its citizens or its politicians but exclusively the child of the West. It is the West that writes its Constitution, establishes its currency, decides on its national symbols and passports; it is the West also which maintained this ill-conceived and badly built house throughout the recent years while it was searching for a way to correct its mistakes* ».

<sup>11</sup> *Idem*.

<sup>12</sup> The Social Democrat Party. The Alliance for Change is a patchwork of coalitions and political marriages of convenience gathering more than a dozen parties across the regions and levels of governments.

<sup>13</sup> Party for Democratic Action.

<sup>14</sup> Party for Bosnia and Herzegovina.

<sup>15</sup> Croat Democratic Community.

phenomenon, where the usually powerful SDS<sup>16</sup> (replicate of Serbia's SDS of late Slobodan Milosevic) has been out-flanked by Milorad Dodik's party, the SNSD<sup>17</sup>.

Moreover, the rise of such counter-elites to the traditional nationalist parties who fought the civil war can be observed through concrete illustrations in recent developments of Bosnian politics. For instance, the failure of the Bosnian officials to vote on the constitutional reforms in April 2006 was mainly due to the strong opposition of the SBIH and some cracks that occurred within SDA ranks as a parliamentarian from the Muslim nationalist formation voted against his party's instructions. In the process, the SDA was allied with both the HDZ and the SDS in order to pass the reforms, which failed to break through, showing a trend of cooperation dynamics between ethnic formations. In addition, intra-ethnic splits were furthermore consolidated, as challengers were actually rewarded for their bold political action during the general elections of 2006 (see table below) where traditional nationalist parties were forced to share the votes with their challengers.

Results of the General Elections of October 2006 concerning the Chamber of Representatives of the State level		
Ethnic group	Main political parties	Electoral Results State level (42 seats) +/- = evolution since 2002 elections.
Bosnian Muslim	SDA	9 seats (-)
	SBIH	8 seats (+)
Bosnian Serb	SDS	3 seats (-)
	SNSD	7 seats (+)
Bosnian Croat	HDZ	3 seats (-)
	HDZ 1990	2 seats (not present in 2002)
Multiethnic	SDP	5 seats (+)

Therefore, both centrifugal dynamics of inter and intra-ethnic competition has led for consensual modes of regulation between ethnic formations to become more present, strengthening the power sharing culture in Bosnia. In the dawn of the new century, power sharing became an integrated political compass within the country. After the 2006 elections which reshaped the internal political balance of power, the Prime Minister of the State of Bosnia (usually occupied by Bosnian Muslim SDA official), was given for the first time to a Bosnian Serb from the SNSD.

<sup>16</sup> Serb Democratic Party.

<sup>17</sup> Serb National Social Democrat Party.

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Such political developments contributed in generating political crises which never really disappear from the Bosnia spectrum, along with blockades and paralysis, despite the power sharing mechanisms in place. Different issues continue to divide the Bosnian political elites in their struggle for each constituent people's interests to prevail.

## The Main Lines of Political Confrontation

The main cleavage between the political ethnic formations of the country lies in the 'State vs Entity' pattern. The « *internal international actors* », as Sokolovic and Bieber<sup>18</sup> call the international organizations that are in charge of setting the pace of reforms, have developed a political orientation based on strengthening the central State at the expense of the two entities. This direction is supported by a part of Bosnian formations (mainly Bosnian Muslims) but others oppose such vision for the future of the Bosnian institutions, especially Bosnian Serb nationalist parties in Republika Srpska, the Serbian entity of the country. Here lies the sharpest factor of division within Bosnian politics up until today.

The centrifugal dynamics in favor of the political center in Sarajevo was strongly supported by the international agencies in Bosnia, and in particular by the successive High Representatives. We can point to a number of measures that illustrate that trend like the establishment of the State Border Service, in charge of border surveillance<sup>19</sup> and, more spectacularly, the achievement in January 2006 of the fusion of the three armies of the country into one single Bosnian army under the control of a single ministry of defense at the state level. Until then, each entity was responsible of its own brigades under the supervision of separate ministries of defense in each entity. Furthermore, it was decided to increase the resources of the central institutions by initiating taxes (VAT) collected at the State level. In addition, a new Central Election Committee was in charge of supervising the elections of October 2006. In the same stream, one of the most recent developments of State institutions is the establishment of a State High Court Justice.

Looking into these reforms and measures, the implementation of each one of them was not free from political crises and confrontation between the nationalist parties. It is important to stress that the High Representative had in fact to impose most of them, in the absence of a functional decision-making process between the main political stakeholders. Moreover, the movement of transfer of additional prerogatives from the

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<sup>18</sup> SOKOLOVIC, Dzemal, BIEBER, Florian, *Reconstructing Multiethnic Societies: the Case of Bosnia and Herzegovina*, Ashgate, Aldershot, UK, 2001, p.78.

<sup>19</sup> The SBS recently changed its name to State Border Patrol (SBP).

entities towards the state is a factor of division between Bosnians on at least two levels: this orientation is strongly and radically opposed by Bosnian Serbs of the Republika Srpska who are very attached to the political autonomy they are enjoying in their entity. For them, these reforms' goal is to dismantle the Republika Srpska and weaken the Serbian position within the country. Next to the Bosnian Serbs, Bosnian Croats are also worried of the reinforcement of the State. In the current statecraft configuration, the Bosnian Croats are controlling two out of the ten cantons that form the Croat Muslim Federation and they fear that with the centralization process benefiting the central institutions, they would lose political leverage to the Muslim community and become marginalized.

The political conflict between pro-state and pro-entities groups materialize at each and every occasion a formation has the opportunity of scoring points against the competing political line. For instance, the national holiday of Bosnia (imposed by the High Representative because of lack of consensus) which occurs on every 25th of November is not celebrated by Republika Srpska's political establishment. Therefore, each year, both Bosnian Croat and Muslim members of the collegial presidency of the State attend the national ceremony without their Bosnian Serbian colleague.

Convinced that the building of a viable state in BiH necessarily goes through consolidating the state and dismantling the entities, the international stakeholders developed strategies to break opposition to this political orientation within both Bosnian Croat and Bosnian Serb elites. From the Bosnian Croat side, HDZ president and member of the collegial State presidency, Dragan Covic was removed from office by the High Representative in March 2005 due to corruption suspicions. Covic response to his removal was to revive ethnic mobilization through fear by claiming he was « *in the way of those who want BiH without Croats* »<sup>20</sup>. On the Bosnian Serb side, the High Representative directed a big coup in 2002 against the (at the time) leading nationalist SDS by dismissing its major cadres and leaders and pushing them aside the electoral process. In 2003, SDS president of Republika Srpska, Mirko Sarovic, was also dismissed by the High Representative in the aftermath of the Orao scandal<sup>21</sup>. More recently, in November 2006, the Bosnian Constitutional Court ruled that the RS entity's symbols were discriminatory and unconstitutional, ordering for them to be changed.

The international strategy of preventing nationalist Bosnian Serbs to reach power or remain in office succeeded and contributed into opening the path for new elites in Republika Srpska, namely the SNSD of Milorad Dodik. However, as a reaction to such anti-entity policies, this party which used to be a Bosnian Serbian progressive formation, shifted to a more nationalist position. SNSD leader, Milorad Dodik took strong stands against any further security reforms pushed forward by the High

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<sup>20</sup> Interview with Vecernji List, 21 March 2005.

<sup>21</sup> Orao is the place of a weapons' firm in Republika Srpska that was accused of having sold arms to Iraq despite the international embargo.

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Representative aiming this time to abolish entity police, after giving in the entity's ministry of defense. Hence, the peak of Dodik's political reaction occurred when he opened the Pandora box, waving to the possibility of an RS secession from Bosnia through a unilateral referendum if the « *calls for abolition of RS continues* », something even radical nationalist SDS never dared to raise in post-war Bosnia. The timing of Dodik's provocative declaration<sup>22</sup> (in June 2006, a few months before the general elections) gave him the image of a strong Bosnian Serb figure defending his community from « *anti-RS political maneuvers* », which led him to winning high scores at the elections, namely in the RS Assembly (47 seats, compared to the 17 seats of the SDS distantly coming second). At the State level, the SNSD obtained 7 seats closing behind the score of Muslim nationalist SDA (9 seats). Today, the SNSD emerges as one of the most influential parties in Bosnia with a political motto based on defending the existence of the Bosnian Serbian entity which is guaranteed by the Dayton agreements. For Dodik, « *BiH will and can only exist as long as Republika Srpska exists* » (June 2006).

Such rise of an ethnic based formation has created political unbalance in the country which is worrying the other two ethnic groups; especially that the acting High Representative, Christian Schwarz-Schilling did not sanction Milorad Dodik for the threat he had posed on the integrity of Bosnia and Herzegovina which is guaranteed by the Dayton Agreement. At the same time, Bosnian Muslims see the RS as the result of the Serbian ethnic cleansing during the war and wish for its abolition. On the other hand, Bosnian Croats regard the emergence of provocative Dodik as an injustice, since their own ethnic leadership was sanctioned for less bold initiatives a few years back. In March 2001, HDZ president Jelavic was dismissed by the High Representative for having symbolically proclaimed the creation of a third entity for Bosnian Croats, which aimed at strengthening the Bosnian Croats leverage in the game of « *interethnic diplomacy* »<sup>23</sup>.

A direct consequence of unsanctioned SNSD nationalist move by threatening to organize a secessionist referendum has led to additional ethnic mobilization and nationalist views to counter Bosnian Serbian influence in the country. Campaigning for the general elections, HDZ president Covic reiterated his predecessor's stances by promising in August 2006 that « *in one year, Croats will have their own entity* », counting on Bosnian Croats votes. But this strategy did not succeed and the HDZ had

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<sup>22</sup> Milorad Dodik speech on 7/6/2006 stressed that « *if Sarajevo constantly sends up the same message that is that the RS should not exist because it is an entity born from genocide, we will give them a response called 'the people' and 'referendum'* ». Posing as self-assured of winning any coming referendum, Dodik compared RS with Montenegro saying that « *on the Montenegro issue, the minimum required [by the international community] was 55% of the votes; I tell them, set the minimum to 90% and you will see how the people in RS are in favor of independence* ».

<sup>23</sup> The expression was used by ethnicity theorist Donald Rotchild, in ROTHCHILD, Donald, Ethnicity and Conflict Resolution, in *World Politics*, vol. 22, n°4, July 1970, p. 606.

to split the number of seats with the rival Bosnian Croat party, the HDZ-1990 (see table *supra*).

The opposition between those supporting a unique center in Bosnia or a mono-centered Bosnia (mainly the Bosnian Muslims) and those who struggle to maintain a multi-centered Bosnia is still dividing Bosnians. Moreover, a wider political cleavage can be identified, this time on the future of the Dayton Agreement and the institutional framework of the country.

Since the tenth anniversary of the Dayton treaty, consensus has emerged within the international community that the peace agreement needed to be amended. The view through which Dayton is in fact protecting the continuity of the entities was consolidated in the foreign capitals that decided to draw a reform route taking Bosnia beyond Dayton<sup>24</sup>. This was supported by many political formations in the country. Despite their rivalry, SBIH and SDA both agree on reforming Dayton despite respective nuances and specific partisan interests. As for the SNSD reply, it called Bosnian Muslims to « *disregard utopian ideas* » and has welcomed favorably the proposition of a Western think tank (the European Stability Initiative) of establishing a Federal Bosnia in which RS would constitute one of the federal units<sup>25</sup>. As for the HDZ which is under the pressure of intra-ethnic competition, its new position has been to let go of the idea of a third entity, and to push for four multiethnic units forming Bosnia, in which Bosnian Croats would have sustainable political representation.

It seems difficult given the current political configuration, where Bosnian Serbs stand as leading actors of Bosnian politics, to witness the emergence of a post-Dayton phase oriented against the entities. Still, another institutional debate has flared up in Bosnia concerning the future of the High Representative. This new orientation was the result of converging factors, first of which was the declaration of Lord Paddy Ashdown that he would be the last High Representative when he took office in 2002. Even though he finally passed the flare to a new international delegate, Christian Schwarz-Schilling, the low profile character of the new High Representative and his reluctance of using the Bonn powers confirmed an international trend towards the closing down of this institution. Moreover, it was decided that the High Representative would leave the way to a new European Special Representative (EUSR) in 2007.

The end of the High Representative era is not a consensual idea among the Bosnian political formations. RS leaders are in favor of ending the protectorate chapter

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<sup>24</sup> Richard Holbrooke, former US envoy to the Balkans, considered as the father of the Dayton, Agreement, wrote on 21/3/2007 in the Washington Post that « *it was time to change Dayton* ».

<sup>25</sup> For the full paper, cf *Making Federalism Work: A Radical Proposal for Practical Reform*, ESI, 8 Jan. 2004. Another paper was produced by ESI gathering the reactions of different Bosnian blocs and parties to their proposal: *Waiting for A Miracle? The Politics of Constitutional Change in BiH*, ESI, 3 Feb. 2004. All papers can be retrieved from [www.esiweb.org](http://www.esiweb.org).

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whereas Muslims and Bosnian Croats fear from political unbalance that could benefit the SNSD in the absence of a High Representative they consider as a safeguarding tool. Editorials even appeared in Muslim press calling for the High Representative to remain. The debate also divides international think tanks where ESI supports the ending of the « *raj* »<sup>26</sup> period during which ruled the « *evangelical belief in progress from above* », whereas the International Crisis Group calls for maintaining the High Representative Office or at least handing the EUSR the same kind of leverage to impose reforms<sup>27</sup>.

It is in this unstable context that the international actors in Bosnia have started working to open a new round of constitutional talks which will test once again the consensus-building capacities of the broader political spectrum in Bosnia. Despite premises of inter-ethnic political cooperation, it is important to point out that multiple signs of mistrust and lack of confidence continue to undermine the Bosnian political system. Muslims view Republika Srpska as the principal obstacle to the installment of a central State they would mostly control and fear the grip of Bosnian Serb nationalists on Sarajevo; Bosnian Croat ethnic entrepreneurs have endured a new blow when they lost the collegial presidency seat for Bosnian Croats during the 2006 elections to an SDP affiliated Croat candidate. As a result, the new Bosnian Croat member of the collegial presidency, Zeljko Komsic, was not recognized by the HDZ establishment as really representing Bosnian Croats and the nationalist establishment feels more even more marginalized now that it has lost a high level political position it used to run. Last but not least, Bosnian Serbs regard the international reforms agenda as targeting their entity.

In order to conciliate these ongoing contradictions, Bosnians have to manage and regulate their divisions and concentrate on engineering a balanced genuine statecraft model which would suit the multiethnic society they live in. The question remains whether this could be achieved through inter-ethnic political consensus, along with a sustainable ownership process, or whether it will have to be imposed - once again - from the outside.

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<sup>26</sup> KNAUS, Gerald, MARTIN, Felix, Lessons from Bosnia and Herzegovina, Travails of the European Raj, in *Journal of Democracy*, vol. 14, n°3, July 2003, pp. 60-74.

<sup>27</sup> Cf ICG Report, *Ensuring Bosnia's Future: A New International Engagement Strategy*, ICG, Balkan Report n°180, Sarajevo/Brussels, 15 February 2007.

# The European Union

## A consensus-based federation<sup>1</sup>

DOMINIK HANF

### Introduction

Convinced European federalists may still regret the failure of the European Defence and the European Political Community in 1954. Nevertheless, the European Union that gradually emerged from the subsequent process of integration was and is an extraordinarily successful system of conflict regulation and conflict prevention. As intended by its founding fathers, it has contributed to peace and welfare in Western Europe. Furthermore, it has played a remarkable role in easing a peaceful political and economic transition of numerous countries in Central and Eastern Europe - despite the manifold conflicts inherent to such a complex transition that could have easily been exploited by “ethnic engineers” of all types.<sup>2</sup>

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<sup>1</sup> A first version of this essay has been published in: Peter Molt & Helga Dickow, *Kulturen und Konflikte im Vergleich - Comparing Cultures and Conflicts*. Festschrift für Theodor Hanf, Baden-Baden: Nomos 2007.

<sup>2</sup> Suffice to mention the ethnic Hungarians in all countries surrounding Hungary and the problem of the Russian minorities in the Baltic States. It is probably safe to assume that the accession perspective offered to these countries contributed greatly to preventing the breakout of conflicts such as occurred in former Yugoslavia. At any rate, one can observe that where a clear accession perspective is lacking transition is noticeably slower, both economically and politically (and far more violent). This explains the main weakness of the

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Yet, the European Union is not “ordinary” international conflict prevention and regulation. In setting up a new kind of institutional system, its founding fathers aimed to progressively establish some sort of political union based on the gradual integration of national economies into one common market.<sup>3</sup> This long-term objective has been partly achieved, at least in terms of trade, economic regulation and monetary policy: the Union (into which the three economic Communities were merged in 1993) increasingly makes decisions which often have a substantial impact on citizens and states, be they inside or outside the EU. Moreover, the Union tends to extend, although at a slower pace, its internal and external activities to non-economic policy fields (internal security, immigration and some aspects of foreign and security policies).

Since the beginning, the particular - and evolving - character of the Union has puzzled observers who have sought to understand and conceptualize this new “political animal”. The fact that it does not fit into the traditional categories of public law and political science has given rise to numerous different explanations.<sup>4</sup> These categories and theories, applied to the whole picture or to parts of it, are intellectually challenging and sometimes rewarding - although empiricists tend to treat them cautiously. The common ground is the description of the Union as an organization “*sui generis*”: more than a confederation and less than a (federal) state, more than an international regime, but not a full-blown political system.

This paper seeks to make a modest contribution to these theoretical debates. I shall start by briefly summarizing the major characteristics of the Union that make its classification difficult, although not impossible; then try to demonstrate that consensus is a key to understanding the Union’s structure and functioning; and, finally, argue that any further evolution, including further “federalization”, will have to take into account and preserve the mainly consensual character of the Union.

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Union’s “New Neighbourhood Policy” and the willingness of the Union to continue to offer, despite “enlargement fatigue” among some of its members, such a perspective for the Balkan countries. On “ethnurgy” see Th. Hanf, “Ethnurgie - Überlegungen zu analytischem Nutzen und normativem Mißbrauch des Paradigmas ‘ethnische Identität’”, in: W. Jäger, H. O. Mühleisen, H.O.Veen (eds), (Paderborn 1994), 133 ff., [English translation: “Ethnurgy: On the Analytical Use and Normative Abuse of the Concept of ‘Ethnic Identity’”, in: Keebet von Benda-Beckman & Maykel Verhuyfen (eds), Nationalism, Ethnicity and Cultural Identity in Europe (Utrecht 1995), 40 ff.] See also Th. Hanf, “The Sacred Marker: Religion, Communalism and Nationalism”, 41 (1991) *Social Compass* 1, 9 ff.

<sup>3</sup> Schuman Declaration (1951): “La mise en commun des productions de charbon et d’acier assurera immédiatement l’établissement de bases communes de développement économique, première étape de la Fédération européenne ...”; Preamble of the EEC Treaty (1957): “déterminés à établir les fondements d’une union sans cesse plus étroite entre les peuples européens ...” (emphasis added).

<sup>4</sup> These vary not only by observers’ specializations, but also by era (the first theories date back to the 1950s) and perspective (“grand” vs. “middle range” theories). A good overview provides D. N. Chrysochoou, *Theorizing European Integration* (Sage, London 2001).

This approach risks disappointing lawyers and political scientists alike. Nevertheless, I hope that *Theodor Hanf*- who “crossed not only borders of states, but also of disciplines”<sup>5</sup> - will enjoy reading it.

## The European Union - A Federation

Even a superficial look at the formal foundations of the European Union reveals that it lacks one feature generally considered essential for a federal state: the possibility to change the constitutional foundations by means of a (qualified) majority. The Union’s basic document - an international agreement (the EU Treaty)<sup>6</sup> - can only be modified if all member states reach agreement after a demanding amendment procedure.<sup>7</sup> This rather rigid<sup>8</sup> requirement makes sure that the states remain, as public lawyers like to put it, the “masters of the treaty”: any extension, or reduction, of the Union’s scope of powers - including the decision to admit new members<sup>9</sup> - has to be accepted by all states. Formally, they have not relinquished their sovereignty.<sup>10</sup>

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<sup>5</sup> P. Molt (see n. 1).

<sup>6</sup> Which, as such, does not bother constitutionalists: the United States and Switzerland were founded on the basis of international treaties. For an interesting analysis of the US-American case see E. Zoller, “Aspects internationaux du droit constitutionnel. Contribution à la théorie de la fédération d’Etats”, in: 294 (2002) *Recueil des cours de l’Académie de droit international de la Haye*, 43 ff.

<sup>7</sup> Article 48 EU Treaty requires that it can only be amended by (i) a unanimous agreement of the member state governments established at an intergovernmental revision conference and has (ii) to be ratified by all member states in accordance with their internal constitutional requirements (parliamentary assent or referendum).

<sup>8</sup> These “rules of change” exceed by far the requirements of most international treaties and national constitutions. See on this B. de Witte, “Rules of Change in International Law: How Special is the European Community?”, in: *Netherlands Yearbook of International Law XXV* (1994), 299 ff.

<sup>9</sup> In addition to the general requirements, the assent of the European Parliament is also required; see Article 49 EU Treaty.

<sup>10</sup> Despite several proposals to “soften” the requirements. See on this B. de Witte (n. 8 above) and, from the same author, “The Process of Ratification of the Constitutional Treaty and the Crisis Options: A Legal Perspective”, Paper presented at the Asser Institute Colloquium on European Law, The Hague, October 2004, published as EUI Working Paper Law 2004/16. This reluctance is also clear in one feature of the mechanism created by the Treaty of Amsterdam in 1997 that allows a group of member states to engage, within the Union, into so-called enhanced cooperation. Such cooperation has been strictly confined to the limits of the EU competences (Art. 43 EU Treaty) and can therefore not be used for integration in those fields which have still not been included - unanimously by all member states - in the

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A look at the substance confirms that impression. Political scientists have no difficulties in pointing out that the Union is far from replacing the states in essential policy fields. The states remain central actors in matters of external and internal security, fields in which they cooperate merely on an intergovernmental basis. This is mirrored by the fact that the Union has no coercive powers: there is no European police or army; the Union rests on the states' administrative and judicial enforcement mechanisms. It has no, or only very limited, means to influence substantively those policies which are commonly held to be crucial for any process of "identity-building" (education, culture, media or sport).<sup>11</sup> Even in the field of economic policies, which fall under the scope of the more effective "Community method", the states retain their responsibility for "big issues" such as fiscal and redistributive policies (including social welfare).<sup>12</sup> Finally, the Union's greatest powers<sup>13</sup> are limited to the field of market regulation (removal of trade barriers) and, within the slowly expanding euro-zone,<sup>14</sup> of monetary policy.

Despite these apparently clear findings, academics and politicians are constantly tempted to treat the Union as - or at least to compare it with - a federal state. This has always been the case when actors and observers described the perspectives, or the *finalité*, of the Union. Increasingly, however, the federal measure was also applied when assessing the current state of integration. In times of fading Euro-enthusiasm, this is best illustrated by the widespread perception that Brussels (like Washington in the US) is involved too deeply in too many policy areas considered as belonging to the states' *domaine réservé*. An extreme version of this view could be observed in some of

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realm of EU powers. See on this P. Demaret/D. Hanf, "Le projet «Pénélope»: un «Federalist Paper»? Quelques observations sur l'entrée en vigueur du nouveau traité constitutionnel et le futur des clauses de coopération renforcée" in: A. Mattera (ed.), «Penelope» Projet de Constitution de l'Union européenne (Editions Clément Juglar 2003), 89 ff. and D. Hanf, The Treaty Establishing a Constitution for Europe: A Flexible Constitution? in: P. Demaret/I. Govaere/ D. Hanf (eds), 30 Years of European Legal Studies at the College of Europe - Liber Professorum (PIE/Lang, Berne/Brussels 2005), 68 ff.

<sup>11</sup> Although these matters are not immune from Union influence, the latter has only the power to "support, coordinate or supplement the action of the Member States", to use the terms of Article I-12 of the (proposed, although not ratified) "Treaty Establishing a Constitution for Europe" signed in Rome on 29 October 2004 and published in the EU Official Journal No. C 310, 16 December 2004 (hereafter referred to as "Constitutional Treaty" or "Constitution"). See on this D. Hanf/T. Baumé, "Vers une clarification de la répartition des compétences entre l'Union et ses Etats Membres? Une analyse du projet d'articles du Présidium de la Convention", in: (2003) Cahiers de droit européen 135 ff.

<sup>12</sup> This is reflected by the fact that Union action requires unanimous decision-making within the Council.

<sup>13</sup> Still seminal is V. Constaninesco, *Compétences et pouvoirs dans les Communautés européennes: contribution à l'étude de la nature juridique des Communautés* (LGDJ, Paris 1974).

<sup>14</sup> When Slovenia adopts the euro in 2007, it will be the currency of 13 member states.

the new member states where the “federal” constraints of Union membership have been compared with those of the Soviet federation.<sup>15</sup>

More careful analyses have also led observers to draw parallels between the Union and federal states. They all rest on the observation that the Union increasingly constrains the states, both legally and politically. National (and regional) governments and parliaments regularly find that Union requirements can exclude some policy options and even determine the substance of national policies. This is particularly true for economic policies, including product (and increasingly labour) standards, state aid and other privileges granted to private and public enterprises. Constraints can, however, also be felt in other fields, such as environmental and social policy and to some extent research policy.<sup>16</sup> Moreover, with the introduction of a common currency<sup>17</sup> the states have accepted serious limitations on their spending powers and the fact that market integration frequently has a considerable impact on national, non-economic, policy choices.<sup>18</sup> Finally, one can observe that even measures adopted in the weaker framework of intergovernmental cooperation can have similar effects.<sup>19</sup>

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<sup>15</sup> This led to the formal recognition in the Constitutional Treaty of a right to leave the Union. Although this Treaty is unlikely to be ratified, this “secession clause” settles an old academic debate on the very possibility to leave the Union.

<sup>16</sup> For instance, some states, although banning some forms of research using human stem cells, may have to co-fund EU projects promoting precisely this kind of research. On the compromise achieved for the funding period 2007-2013 see “EU to fund embryonic stem cell research”, *Financial Times*, 24 July 2006 and “EU findet Kompromiss zur Stammzellenforschung”, *Frankfurter Allgemeine Zeitung*, 24. Juli 2006. On the legal aspects see D. Hanf/T. Baumé (n. 11 above), p. 148 f.

<sup>17</sup> This entailed the loss of the ability to set monetary policy, which is now entrusted to an independent Central Bank, and the observance of a strict budgetary discipline. In decentralized countries this led to some debate on how to share these budgetary constraints between the different internal levels of government.

<sup>18</sup> The case law of the European Court of Justice relating to the so-called economic freedoms (movement of goods, services, labour and capital) is a rich source of examples. States had to accept that these principles can often conflict with domestic rules in various domains such as product standards, advertising, professional rules and qualifications, access to and funding of university studies, taxation, and reimbursement of health-care services by social security systems. Although the Union only requires members to abolish the restrictive effects of national rules on the inter-state movements, this amounts in practice either to deregulation (negative integration) or, if the Union legislator manages to adopt common rules, to re-regulation at the Union level (positive integration). Note, however, that “regulatory gaps” can also arise when the ECJ strikes down national rules that apply in areas in which the Union has no - or only limited - powers to act as e.g. in the field of access to university studies (education) or maintenance grants (social policy). Such instances are likely to multiply as result of the creation of the “Union citizenship” (Articles 17 and 18 EC Treaty), see D. Hanf, “Le développement de la citoyenneté de l’Union européenne”, *College of Europe Research Paper in Law 1/2006*, <http://www.coleurop.be/file/content/studyprogrammes/law/studyprog/>

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The federal analogy is particularly tempting from a legal point of view. This is due to the fact that the Union's legal order has some special characteristics laid down in essence in the founding treaties and subsequently fleshed out by the European Court of Justice (ECJ). Unlike traditional international law, the interpretation of Union law is to a large extent centralized with a compulsory supranational jurisdiction.<sup>20</sup> Union law can apply directly in the legal systems of the states<sup>21</sup> and often prevails in the case of conflict with national law<sup>22</sup> - which has, in turn, entailed the need for, and the

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pdf/ResearchPaper\_1\_2006\_Hanf.pdf (to be published in D. Hanf/R. Munoz (eds), *La libre circulation des personnes* (Lang, Berne/ Brussels 2006).

- <sup>19</sup> This is clear for issues dealt with in the third pillar, at least for those states which accept the jurisdiction of the ECJ in this field (see ECJ, case C-105/03 Pupino, ECR 2005, not yet reported, and the problems met by Germany in transposing the Common Arrest Warrant, see Federal Constitutional Court's judgment of 18 July 2005, English Summary at: <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg05-064en.html>. In addition, the various old and new forms of coordination, which today are called "open method of coordination", can to some extent influence the states' behaviour in fields such as economic policies (as a complement monetary union), employment and social policies (the so-called Lisbon Process) or in the field of higher education (the so-called Bologna Process) - although the effectiveness and the legitimacy of such coordination is questionable. For an interesting assessment of these practices, comparable with many critiques of "cooperative federalism" in federal states like the US and Germany, see V. Hatzopoulos, "Why the Open Method of Coordination (OMC) is bad for you: a letter to the EU", College of Europe Research Paper in Law 5/2006, [http://www.coleurop.be/file/content/studyprogrammes/law/studyprog/pdf/ResearchPaper\\_5\\_2006\\_Hatzopoulos.pdf](http://www.coleurop.be/file/content/studyprogrammes/law/studyprog/pdf/ResearchPaper_5_2006_Hatzopoulos.pdf) (to be published in the *European Law Journal* 2006).
- <sup>20</sup> Exceptions of this rule apply to foreign and security policy (pillar II) and to justice and internal affairs, albeit to a lesser degree (see Article 35 EU Treaty and Article 68 EC Treaty).
- <sup>21</sup> This was clearly stated in the founding Treaties for secondary law (Regulations and Decisions, see Article 249 EC Treaty) and has subsequently been extended by the ECJ to primary law (Case 26/62 Van Gend & Loos, ECR 1963, 3) and, progressively and subject to certain conditions, to directives which states fail to transpose (Case 41/74 van Duyn, ECR 1974, 1337). The states have made clear that they did not wish to see this principle extended to (similar) framework-decisions of pillar III (Article 34 EU Treaty).
- <sup>22</sup> See Case 5/64 Costa/Enel, ECR 1964, 1161. The question of primacy is not resolved as far as acts on the basis of the intergovernmental pillars are concerned. It could only arise (at Union level) in case of the latter in which the ECJ limited jurisdiction. Note that the ECJ considers that the supremacy of Union law stems from the Treaties while the states' supreme courts derive it from the - national - ratification acts. This interesting difference, which points to the classical question of whether the states have relinquished (parts of) their sovereignty, does not need to lead to conflict in practice, see on this D. Hanf, *Der Vertrauensschutz bei der Rücknahme rechtswidriger Verwaltungsakte als neuer Prüfstein für das „Kooperationsverhältnis“ zwischen EuGH und BVerfG. in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 59 (1999), 51 ff.

incremental development of, a bill of rights by the Community judges.<sup>23</sup> Ensuring that the states observe Union law is not a task only of the Commission (and their fellow states),<sup>24</sup> but has also been entrusted to individuals: by granting them both direct and indirect access to the ECJ,<sup>25</sup> they also act as agents of the Union' interest.<sup>26</sup> The "federal" character of Union law<sup>27</sup> has been reinforced by the progressive development of additional mechanisms, such as state liability, aimed at ensuring the states' compliance with Union law.<sup>28</sup> Although these principles do not apply equally to all fields of Union activities,<sup>29</sup> it is safe to conclude that the states can in principle not (legally) escape from their obligations under Union law. Furthermore, such obligations result not only from decisions approved by all states,<sup>30</sup> but increasingly also by a majority of them, and then normally backed by a majority of directly elected members of the European Parliament,<sup>31</sup> interacting in a complex institutional setting which has

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<sup>23</sup> This development, partly due to the pressure of the Italian and German Constitutional Courts, started with the ECJ's judgment in Case 29/69 *Stauder/Stadt Ulm*, ECR 1969, 419 and has been formally recognized in Article 6 EU Treaty by the Treaty of Maastricht. The Charter of Fundamental Rights of 2000 can also be seen as codification of these developments. Although its formal incorporation into the Treaties (also foreseen by the authors of the Constitutional Treaty) has not yet been realized, it is legally not irrelevant; see the recent Case C-540/03 *European Parliament v. Council*, 27 June 2006 (not yet reported), points 38 and 58.

<sup>24</sup> Articles 226 (Commission) and 227 (states) EC Treaty.

<sup>25</sup> See D. Hanf, "Talking with the "pouvoir constituant" in times of constitutional reform: The European Court of Justice on Private Applicants' Access to Justice", in (2003) *Maastricht Journal of European and Comparative Law* 265 ff.

<sup>26</sup> Article 234 EC allows any national court (and obliges the states' supreme courts) to directly request the interpretation of EC law. Interested individuals and common judges were hence allowed to "bypass" national judicial hierarchies - a mechanism which proved to be an extraordinary efficient tool for the enforcement and development of Union law.

<sup>27</sup> Which has been chiefly developed by judicial means - based on both concrete Treaty provisions (Articles 249 and 234 EC), teleological arguments and the general "loyalty" clause laid down in Article 10 EC - but also confirmed by various Treaty revisions. Note that the states planned to codify these developments in Article I-6 of the Constitutional Treaty.

<sup>28</sup> Case 6/90 *Francovich*, ECR 1991, I-5357 and Case 46/93 *Brasserie du Pêcheur*, ECR 1996, I-1029. Since 1993, the ECJ has been entitled to impose, at the request of the Commission, lump sum penalties on states which fail repeatedly to implement Union law (see Article 228 EC Treaty) - a sanction which has been applied several times (see e.g; Case C-387/97 *Commission v. Greece*, ECR 2000, I-5047).

<sup>29</sup> In this context, one can argue that intergovernmental cooperation is also taking place in many federal states. See the remarks in n. 19 above.

<sup>30</sup> In those cases in which a Union act requires unanimous approval in the Council.

<sup>31</sup> In case of qualified majority voting in the Council, normally coupled with the co-decision procedure (Article 251 EC Treaty).

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some striking parallels with internal political systems.<sup>32</sup> Taking these elements together,<sup>33</sup> it is difficult to deny that the Union bears some federal features.<sup>34</sup>

Can the complex nature of the European Union as outlined above be described in a single definition? On a general level, it appears to be merely an international organization mastered by all member states which, although dealing in a rather effective manner with market integration, remains a (quite sophisticated) form of intergovernmental cooperation. However, looking to the numerous political and legal constraints membership entails for the states, in particular in the fields governed by the “Community method” of decision-making and judicial review, it could be perceived as a federal (or multi-level) system (but not a federal state). Apart from this paradox, and the particular dynamics of European integration,<sup>35</sup> the classification of this new system is further complicated by another problem: the categories used were developed in a different political and historical context and had to be adapted or further developed to the Union.<sup>36</sup>

A definition of the Union encompassing all of its facets has, hence, necessarily to remain general. Such a definition should, however, also stress that Europe has developed a new and unique form of gathering, organising and using public power. As a constitutional and European lawyer, I have great sympathy with those who perceive

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<sup>32</sup> See S. Hix, *The Political System of the European Union* (2nd edition, Palgrave, London 2005).

<sup>33</sup> To which one has naturally to add the powers of the Commission to act without the formal consent of the Council and/or the Parliament, in particular in the field of competition policy.

<sup>34</sup> In my view, the lack of own executive and/or military forces is not necessarily an argument against such a conclusion since, on the one hand, decentralized implementation of federal laws exists in some federal states and, on the other hand, an effective use of federal force to ensure compliance (see e.g. Article 37 of the German Basic Law, which defines the possibilities of federal coercion [“Bundeszwang”]) would quite probably mark the end of a federal state.

<sup>35</sup> In the past five decades, the Union has managed to expand its substantive scope (“deepening”) and - even more so - its geographical scope (“widening”), although it remains difficult to assess the exact impact of these developments on each other.

<sup>36</sup> This appears clearly from V. Constantinesco, “Vers quelle Europe? Europe fédérale, Confédération européenne, Fédération d’Etats-nations?”, in: 298 *Cahiers français* (2000), 80 ff. who concludes, however (pp. 88/89): “...: l’avenir de l’Union et des Communautés européennes ne passe pas par la construction d’un Etat, fut-il fédéral, mais par l’invention de structures inédites, appuyée par la méthode communautaire, entées sur la matrice institutionnelle communautaire, qui n’ont pas véritablement de précédent, ni dans l’expérience étatique ni dans la coopération internationale organisée. [...] ... si l’Union doit inventer son propre modèle, qu’elle ne se laisse pas paralyser par des étiquettes!” - One can also draw stimulating parallels one can draw between the Union and the - decentralized, consensus-based and by definition supranational - Holy Roman Empire. For a recent attempt see J. Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (OUP, Oxford 2006).

the Union as a *federation*.<sup>37</sup> This term makes clear that the Union is more ambitious than international organizations and uses many federal-type mechanisms and decision-making procedures - without being a federal state in the making. It also underscores the fact that we are dealing chiefly with a federation of (nation) states - without overlooking the progressive inclusion of its peoples.<sup>38</sup> Finally, the term federation neither implies nor determines a particular form of *finalité* of the integration process.<sup>39</sup>

## The role of consensus in the European Union

Although the founding documents of the Union do not use the term consensus,<sup>40</sup> this novel federation is a striking example of a non-majoritarian system. While this is obvious for the constitutional issues and the fields still governed by the intergovernmental logic, this is less evident at its supranational - "quasi-federal" - level.

Fundamental decisions have to be approved by all states<sup>41</sup> - and require, hence, consensus.<sup>42</sup> The following enjoy constitutional status: revisions of the Treaties,<sup>43</sup> the

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<sup>37</sup> Increasingly used in the political debate, the term federation can be theoretically understood as a distinct category of political organization which goes beyond the classical, sovereignty-based pattern confederation/(federal) state. See O. Beaud, "Fédéralisme et Souveraineté. Notes pour une théorie constitutionnelle de la Fédération", *Revue du droit public* 1998, 83 ff., which is based on Carl Schmitt's short, thought-provoking, remarks on the nature of federations in his *Constitutional Theory* of 1928. This source might explain Beaud's reluctance to apply that category to the Union, qualifying it as mere "fédération économique" (see "Propos sceptiques sur la légitimité d'un référendum européen ou plaidoyer pour plus de réalisme constitutionnel", in: A. Auer/J.-F. Flauss, *Le référendum européen* (Brylant, Brussels 1997, pp. 177/178).

<sup>38</sup> Which has been formally acknowledged by the creation of a Union citizenship (for details see D. Hanf, n. 18).

<sup>39</sup> One might also point out that this term was used in the Union's first "basic document", the Schuman Declaration (see n. 3).

<sup>40</sup> An (in the present context irrelevant) exception is Article 111 EC Treaty which uses the term in the context of possible exchange-rate agreements between the Union and third countries.

<sup>41</sup> Unanimity among the states can take different forms. The most rigid version is the "common accord" which implies an explicit approval of a decision by all government representatives. This applies e.g. to Treaty revisions (Article 48 EU Treaty) and appointments of central bankers and judges (Articles 112, 223 and 224 EC Treaty). A Council decision can also be unanimous if no state objects (Article 205.3 EC, see also Article 23 (1) and 7 (2) EU Treaty); the abstaining state agrees to be bound by the Council's decision. Except in the field of foreign policy (Article 23.1 EU Treaty), this consequence of abstention cannot be avoided.

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use of simplified revision procedures,<sup>44</sup> the admission of new members,<sup>45</sup> the imposition of drastic sanctions against a member state,<sup>46</sup> the adoption of a uniform procedure for the elections to the European Parliament,<sup>47</sup> the choice of languages in the institutions,<sup>48</sup> and the budget<sup>49</sup> - but also issues such as the location of the institutions<sup>50</sup> and many appointments.<sup>51</sup> Moreover, to make progress in “sensitive” policy fields,<sup>52</sup> be it within the looser framework of intergovernmental cooperation<sup>53</sup> or the

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Occasionally, the unanimity rule may be suspended until a state explicitly requests its application (Article 23.2 EU Treaty for implementation of foreign policy measures).

<sup>42</sup> There is no recognized legal definition of consensus. In international law, it frequently refers to “non-objection procedures” as opposed to majority voting (see E. Suy, “Consensus”, in: R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Volume I (1992), 759 ff.). According to this standard, all versions of the unanimity requirement in EU law qualify as consensus-based decision-making mechanisms (see previous n.). From the perspective of EU law, one has, however, to state that unanimity is defined as a non-objection procedure (Article 205.3 EC Treaty). Consequently, consensus would refer to the more demanding unanimity procedure of the “common accord” - a conclusion drawn by some observers with respect to Article I-21 of the Constitutional Treaty, according to which the European Council decides, in principle, “by consensus”.

<sup>43</sup> Article 48 EU Treaty.

<sup>44</sup> This refers to so-called “passerelle-clauses” which allow for e.g. the transfer of matters from the intergovernmental framework to the Community pillar or the shift from unanimous decision-making to qualified majority voting (see Article 42 EU Treaty and Article 67.2 EC Treaty).

<sup>45</sup> Article 49 EU Treaty.

<sup>46</sup> Article 7 EU Treaty. This provision allows the suspension of the voting rights of a member state in serious and persistent breach with the Union’s founding principles. Note that the decisive vote of the Council requires unanimity “without taking into account the vote of the representative of the government of the Member State in question”.

<sup>47</sup> Article 190.4 EC Treaty.

<sup>48</sup> Article 290 EC Treaty.

<sup>49</sup> Article 269 EC Treaty (own resources) and Article 279.1 EC Treaty (budget, although a qualified majority will apply here as from 2007).

<sup>50</sup> Article 289 EC Treaty.

<sup>51</sup> E.g. for the European Central Bank (Article 112 EC Treaty) and the European Court of Justice (Articles 223 and 224 EC Treaty). A notable exception is the appointment of the European Commission which requires, since the entry into force of the Nice Treaty, only a qualified majority vote within the Council (Article 214.2 EC Treaty).

<sup>52</sup> Although the unanimity rule can also be used to protect Treaty provisions against “regressions”, see e.g. Article 57.2 EC Treaty (capital movements in relation to third countries), Article 72 EC Treaty (transport policy) and Article 88.2 EC Treaty (state aid).

<sup>53</sup> Common foreign and security policy (Art. 23.1 EU Treaty) and police and judicial cooperation in criminal matters (Article 34.2 EU Treaty).

more integrated Community pillar,<sup>54</sup> the Union is obliged to adopt a compromise to which all its members can agree.

Although the role of the states remains important, the Union distinguishes itself from traditional intergovernmental organizations not only with respect to its broad (and ambitious) objectives. The Union also has certain - "supranational" - features limiting, sometimes severely, the individual states' discretion when common rules are adopted and enforced. As already noted, they allow, to some extent, a comparison between the Union and federal states and the perception of a (new form of) federation. These "quasi-federal" elements do not, however, follow a majoritarian logic. The Union's institutional configuration and decision-making mechanisms require and depend heavily on the capacity to build consensus - although not unanimity<sup>55</sup> - among the different (mainly but not exclusively national) interests.

The Union's original institutional configuration, the so-called Community model, was an attempt to overcome the shortcomings of classical intergovernmental cooperation in which short-term interests often prevail over long-term perspectives. Decision-making is, hence, not left to government representatives alone - acting either within the European Council or the Council of Ministers. Instead, it is "channelled" by an independent, "supranational" institution (the Commission) vested with the necessary powers to broker compromises.<sup>56</sup> These also include the right to enforce policies and decisions once they have been adopted.<sup>57</sup> This particular function as broker and

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<sup>54</sup> This concerns mainly taxation (Article 93 EC Treaty), social security (Article 42 EC Treaty) and the conclusion of commercial agreements insofar as they also relate to fields within the powers of the states (Article 133.6 EC Treaty).

<sup>55</sup> See n. 42 above. Note that the assembly which was charged by the European Council to elaborate the Union Charter of Fundamental Rights, and which decided to name itself "Convention", refrained from voting in favour of an "iterative consensus-seeking process" approach in order to strengthen the legitimacy of their work - without, however, accepting formal veto rights. See F. Deloche-Gaudez, "The Convention on a Charter of Fundamental Rights: a method for the future?", *Etudes de Notre Europe*, Paris 2001 (<http://www.notre-europe.asso.fr/IMG/pdf/Etud15-en.pdf>), p. 23 ff. This influenced the working method of the (second) Convention on the Future of Europe, which laid down the groundwork for the Constitutional Treaty signed in 2004. Significantly, precisely those proposals of the Convention relating to the institutions, which were imposed by the assembly's chairmen rather than based on consensus, were subject to considerable changes in the subsequent inter-governmental conference.

<sup>56</sup> The Commission is not only an agenda-setter but also a veto-player thanks to its so-called "monopoly on initiative": without a legislative proposal of - and after withdrawal of such a proposal by - the Commission, the Council of Ministers cannot take any decision.

<sup>57</sup> Although the Commission has limited, but not insignificant, legislative and executive powers, it enjoys extensive supervisory powers ("guardian of the Treaties", see Article 226 EC Treaty). As to the effects of Community law in the national legal orders, see nn. 27 and 28 above.

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gate-keeper, reflected in the rules relating to its nomination and composition,<sup>58</sup> distinguishes the Commission both from a mere secretariat of the states and from the executive of a (bicameral) legislature. In contrast to classical intergovernmental organizations or federal states, the Community decision-making model requires the support of the three institutions representing the states' governments (Council), the people (Parliament) and the "common interest" (Commission). The Community model combines, therefore, inter-institutional competition with the constraint to achieve compromises. Such a setting implies that institutions make cautious use of formal competences in order to avoid harmful clashes.<sup>59</sup> Furthermore, together with other factors, it accounts for a culture that encourages non-majoritarian decision-making within each individual institution.

The consensual character of the Union also appears in the concept of majority voting in the Council, traditionally a source of constant and fierce debate<sup>60</sup> given the loss of the states' (formal) decision-making powers it implies.<sup>61</sup> Yet, these debates should not obscure the fact that majority voting requires a high degree of convergence within the Council<sup>62</sup> - which is further reinforced by the considerable weight given to the smaller states.<sup>63</sup> Numerous attempts (generally championed by the bigger states)

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<sup>58</sup> Traditionally, the members of the Commission were nominated by the states in "common accord"; since the entry into force of the Treaty of Nice, the Commissioners can (theoretically) be appointed by a qualified majority vote. Since the Treaty of Maastricht, the European Parliament has progressively acquired powers of co-decision in this field. The crucial role of the Commission also explains the fierce (and in fact still unresolved) debate concerning the question of whether or not every state should have the right to appoint "its" Commissioner.

<sup>59</sup> The best example is the Commission's monopoly of initiative: although it theoretically allows this body to set the content and timing of the legislative agenda, such an agenda would be unlikely to succeed without substantial support from the other two legislative branches.

<sup>60</sup> I refer here to the so-called Luxembourg and Ioanina Compromises and the difficult negotiations relating to the definition of a qualified majority in the context of an enlarged Union during the intergovernmental conference which prepared the Treaty of Nice (2000).

<sup>61</sup> These have also overshadowed much of the latest constitutional reform of the Union. As noted in n. 55, the Convention failed to elaborate an entirely consensual solution; a compromise was finally achieved by the intergovernmental conference after several difficult rounds of negotiation (see n. 65 below).

<sup>62</sup> According to the present rules as defined by the Treaty of Nice, a qualified majority vote has to have the support of more than 70% of the (weighted) votes of the states representing more than 60% of the total EU population. If the measure has not been proposed by the Commission, at least two-thirds of the states must vote for it. In practice, abstentions are tantamount to a "no" vote.

<sup>63</sup> This is particularly obvious since the latest enlargement: the 15 smallest states have a combined population equal to about only two-thirds Germany's population, yet together have almost four times as many votes as Germany.

to reform the rules so as to better reflect each country's population<sup>64</sup> have not had much success.<sup>65</sup> Furthermore, the Council's voting history confirms its highly consensual mode of operation: only about 25% of the decisions technically subject to majority voting are contested<sup>66</sup> - a figure that ignores objections which reflect not differences in substance but domestic political considerations.<sup>67</sup> Although the absence of a veto right may in some cases indeed facilitate decision-making,<sup>68</sup> states clearly do not wish be marginalized or to marginalize other states.<sup>69</sup>

In addition to the voting system, the following factors can explain this non-majoritarian behaviour of the states within the Council. The first relates to the powers of the Union: mainly functional, they include various less controversial regulatory issues and, furthermore, allow more divisive questions to be dealt with more "technically" or "apolitically"; moreover, in a power system which to a great extent leaves implementation to the states,<sup>70</sup> non-consensual solutions are likely to reappear

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<sup>64</sup> See for an interesting "mathematical" proposal made by a group of students from the College of Europe is "Making Europe Work: A Compromise Proposal on Voting in the Council", Natolin/Warsaw 2004 (available at: <http://www.coleurop.be/pdf/Making%20Europe%20Work.pdf>)

<sup>65</sup> The Constitutional Treaty establishes in Article I-25 that a majority vote must, on the one hand, be backed by 55% of the (non-weighted) state votes representing 65% of the Union population and, on the other hand, not be opposed by more than three states.

<sup>66</sup> According to empirical studies, only 75-80% of decisions subject to majority voting are contested. See F. Hayes-Renshaw/W. Van Aken/H. Wallace, "When and Why the EU Council of Ministers Votes Explicitly", *Journal of Common Market Studies* 44 (2006), 161 f. See also D. Heisenberg, "The institution of 'consensus' in the European Union: Formal versus informal decision-making in the Council", 44 (2005) *European Journal of Political Research* 65 ff.; M. Mattila, "Contested decisions: Empirical analysis of voting in the European Union Council of Ministers", 43 (2004) *European Journal of Political Research* 29 ff.

<sup>67</sup> In particular federal states frequently experience problems finding and maintaining a common position within the dynamic context of permanent negotiation in which Council decision-making takes place, as the Brussels bonmot of the "German vote" testifies. There are numerous cases of governments agreeing with the content of a decision but voting against it to accommodate hostile domestic opinion.

<sup>68</sup> In contrast to the unanimity rule which grants states a formal veto right, the possibility of majority voting obliges state representatives to engage actively in deliberations in order to minimize the risk of marginalization.

<sup>69</sup> This explains also why the Council rarely votes explicitly and the limited practical significance attributed by the Council to the so-called "Luxembourg compromise": "The fact that the Treaty provides in many cases for adoption by majority does not prevent Members of the Council from endeavouring, as a general rule, to narrow their differences before the Council votes." (Council Reply to written parliamentary question no. 317/96, *Official Journal of the EC* 1996, no. 217, p. 22, point 2).

<sup>70</sup> This is reflected in the fact that implementation of Union regulations is frequently entrusted to committees meeting under the auspices of the Commission, but composed of national

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as problems of compliance and, hence, prove to be rather short-lived.<sup>71</sup> The second factor promoting a non-majoritarian culture within the Council relates to its internal organization, which also follows a functional logic: on the one hand, all decisions are prepared - and de facto to a large extent also decided - in a permanent, "non-political" body made up of diplomats with their own sophisticated negotiation style<sup>72</sup>; on the other hand, the Council meets in specialized formations, which often promotes solidarity among representatives in charge of the same portfolios; finally, the rotating presidency of the Council probably promotes consensus-building: "leading" states that want successful presidencies will have to demonstrate both the strong commitment of their bureaucracies to Union matters and highly developed mediation skills - a discipline generally better mastered by smaller members, which are more aware than the "big" states of their relative weakness.

Formally, the Commission can take decisions by a simple majority.<sup>73</sup> In reality, the College barely votes.<sup>74</sup> This is not just the result of quite effective internal decision-making procedures,<sup>75</sup> but of a sheer political necessity within Union institutional system. An internally divided Commission - sidelining regularly one or several of its members on national and/or ideological grounds - would provoke opposition by the states and parliamentarians who appointed them and consequently never succeed in shaping the Union's decision-making. The members of the Commission, although individually not neutral, are therefore fated to permanently negotiate positions which are on the whole acceptable to all its members.<sup>76</sup>

Finally, the third institution of the Union's decision-making triangle, the European Parliament, is to a considerable extent also obliged to build strong majorities in order to be influential. This relates, on the one hand, to the formal decision-making rules which are frequently quite demanding in that they require absolute majorities of all

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bureaucrats and experts. An interesting reading of "comitology" is proposed by G. Majone, "Deregulation of Regulatory Powers in a Mixed Polity", 8 (2002) *European Law Journal* 319 ff.

<sup>71</sup> The developments mentioned on sanctions, etc. represent a major drawback: their implementation takes time - and binds the scarce resources of the Commission and the ECJ.

<sup>72</sup> Eighty-five percent of agreements are reached in the Committee of the Permanent Representatives (Coreper) and formally approved without discussion within the Council.

<sup>73</sup> Article 219 EC Treaty.

<sup>74</sup> Votes are taken on less than one percent of the decisions; see Commission, *A Constitution for the Union*, COM (2003) 548 final, Annex I.

<sup>75</sup> Namely the written procedure, the expedited written procedure, and delegation to particular Commission members.

<sup>76</sup> Together with the appointment procedure, which requires large majorities in the European Council and European parliament, this ensures that the Commission remains a "neutral" institution, although each Commissioner is a national and political appointee.

members (and not just relative majorities of the votes cast),<sup>77</sup> On the other hand, the Assembly has more than 700 members from more than 150 national and regional parties, most of whom are newcomers and unfamiliar with the Union's political culture. Since parties can offer their representatives few incentives in the form of appointments or sanctions, absenteeism is high. Together, these factors impel the Parliament to escape the majoritarian logic and to constantly develop positions that will find widespread consensus.

In sum, we consensus is a key element for an understanding of the Union - not only of its intergovernmental features but also, more interestingly and in a more sophisticated way, of its "quasi-federal" supranational features.<sup>78</sup> In this context an observer has characterized the Union as "an extreme form of 'consensus democracy'" in which "compromise is not only a 'behind the scenes practice', concealed by the power game, but the essence of the power game."<sup>79</sup>

## A consensus-based federation

Based on consensus, the Union shares - and amplifies - both the virtues and the shortcomings of consensual political systems. On the one hand, although restraining its members' sovereign powers, the institutional system of the Union makes sure that no state can be systematically marginalized and that all states' vital interests are duly taken into account. This tends to strengthen both the Union and the states. The latter benefit from truly common policies (e.g. trade policy), but also from the economic and political "safety net" provided by membership, which in some countries arguably helped to ease difficult economic as well as political transformations, including granting

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<sup>77</sup> On legislative procedure, see Articles 251 and 252 EC.

<sup>78</sup> It may be pointed out that there are also consensual elements in the institutional arrangements of the European Court of Justice. Although decisions require normally only a simple majority (except when only three judges are on the bench, in which case decisions have to be unanimous, Article 17 of the Statute of the Court), deliberations are kept secret (Article 35 of the Statute) and judgments are issued in the name of all the judges who took part (Article 36 of the Statute). This excludes the possibility of minority opinions. Although this rule probably aims to protect individual judges (who can be re-appointed) from political pressures, it also obliges the judges to subsume differences of opinion as much as possible in a common decision instead of cultivating dissenting opinions. Note that such opinions have found an interesting equivalent in the institution of the Advocate General, whose task is to provide a preliminary assessment of the cases submitted to the Court in the light of previous case law.

<sup>79</sup> P. Maignette, *What is the European Union? Nature and Prospects* (Palgrave, Houndmills, 2005), p. 125.

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greater internal autonomy to regions and ethnic or linguistic minorities.<sup>80</sup> On the other hand, the Union suffers from the typical shortcomings of consensus-based systems. Cumbersome procedures, opaque and fast-changing negotiation strategies driven by elites, and the multitude of players (and pressure groups) at the various stages of decision-making have been at odds with the idea of transparency since the Union's inception and - despite the considerable extension of the Parliament's powers - continue to fuel debate about the "democratic deficits" of the Union.<sup>81</sup>

Hence, most reform debates concentrate on remedying these shortcomings in the name of efficiency, transparency and democracy: extension of majority voting, more accurate reflection of demography in the composition and decision-making rules within the institutional triangle, a permanent instead of rotating (European) Council presidency, attribution of the right of initiative to the Parliament, etc. Concrete reforms - including the recent project of a Constitutional Treaty, which only at first sight proposes fundamental changes - have, however, left the Union's institutional system described in the previous section largely intact. On closer inspection, this is not at all surprising since bold remedies for the Union's traditional deficits would amount to replacing consensual with majoritarian elements - which would, in turn, imply a true "federalization",<sup>82</sup> which is not desired by the states. Hence, constitutional reforms have not taken the "majoritarian highway",<sup>83</sup> but instead stuck fairly closely to consensual side-roads - further proof that non-majoritarian systems are quite resistant to fundamental change. It is safe to assume that this will not change in the foreseeable future.

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<sup>80</sup> For the case of Belgium, see D. Hanf, "El proceso de integración europea en Bélgica: Premisa y marco de la federalización de un antiguo Estado unitario", (2003) *Revista Española de Derecho Europeo* 253 ff.

<sup>81</sup> One could ask to what extent the Union's consensual character is not simply the result of the fact that it is only an - albeit sophisticated - international organization. This appears indeed to be the conclusion drawn by those observers who analysed the Union from a "consociative" angle. See e.g. P. Maignette (n. 79 above); O. Costa/P. Maignette, "The European Union as a Consociation? A Methodological Assessment", *West European Politics*, 26 (2003) 1 ff.; M. Bogaards/M.M.L. Crepaz, "Consociational Interpretations of the European Union", *European Union Politics* 3 (2002) 357 ff.; P. Taylor, "Consociationalism and federalism as approaches to international integration", in: A.J.R. Groom/P. Taylor, *Frameworks for International Cooperation* (Pinter, London 1990), 172 ff.; and O. Costa/F. Foret, "The European Consociational Model: An Exportable Institutional Design?", *European Foreign Affairs Review*, 10 (2005) 501 ff.; and the respective references. This refers back to the question discussed above in Section 1 in which I explained that the Union exhibits both features of a (special) international organization and mechanisms of federal states. The term federation of states and its citizens captures this particular aspect of the Union. In my opinion, this observation and description is not affected by the fact that the Union operates on a consensual mode.

<sup>82</sup> In the sense that the Union is the focus of power and citizens' loyalty.

<sup>83</sup> On this point, see R. Dehousse, "Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue", 18 (1995) *West European Politics* 3, 118 ff.

Constitutional reforms will therefore remain confined to improving the existing institutional system launched in the 1950s and incrementally developed over the years. Although less exciting (and less spectacular) than building grand constitutional highways, a gradual improvement of the consensual side-roads with the aim of adapting their size to the increased traffic in the Union after its recent enlargements is both more realistic and more promising. This includes many measures outlined in the Constitutional Treaty which are, hence, likely to be raised in a new form after this document's likely demise after its rejection in the French and Dutch referenda. Significant developments include in particular progressive extension of the "Community method" to those fields still covered by intergovernmental cooperation and the gradual replacement of the veto rights of individual states by - "consensually" defined - majority votes.<sup>84</sup> In the context of a considerably enlarged Union (with four times as many members as the founding Communities) such measures do not alter its non-majoritarian character but set incentives to keep it working.

It goes without saying that the proper working of the Union - and possible extensions of its scope of action - will chiefly depend upon the willingness of its members. This is particularly true for the field of foreign and security policy, in which the Union's weaknesses are most apparent to a larger public. As in the case in many federal and multicommunal states, the Union has proved its ability to act under internal and/or external pressure requiring common approaches. A good (although at occasions questionable) recent illustration of this mechanism is the considerable development of common policies in justice and internal affairs - a field vigorously defended by the states as *domaine réservé* before September 2001.

Globalization offers many chances - of which the Union has so far managed to take a lion's share - but also promises challenges stemming from more intense conflicts about the allocation of natural, economic and human resources. Thus, it is not impossible that even an enlarged Union will soon develop common policies in fields its states consider today as core elements of their national sovereignty.<sup>85</sup> However, it is on balance unlikely that this *mixtum compositum* - a consensus-based federation of states and its people - will be governed according to the principles of a majoritarian democracy.

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<sup>84</sup> But also the possibility to use flexible tools like the "enhanced" or "structured cooperation" created and improved by the Treaties of Amsterdam and Nice, respectively.

<sup>85</sup> See e.g. the recent developments in the field of energy policy.

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# The Lebanese Formula Revisited

AUGUSTUS RICHARD NORTON

Non-Lebanese are often incredulous to learn that sectarian sentiments were more pronounced in Lebanon following the civil war that ended formally in 1989, as opposed to during the civil war. In contrast, Lebanese, especially those who lived through the civil war, are inclined to nod in agreement (polling data shared by Theo Hanf also confirms the increased recent salience of ta'ifi sentiments). One of the reasons that Lebanese so often despair of politics is because of the vitality of confessionalism years after the civil war ended.

While there were phases of the civil war when people were tortured or slaughtered simply because they were named Michel or Mahmoud, much of the fifteen year war was not simply fought sect against sect, and particularly not Christian versus Muslim. Indeed, the most vicious killing was often intra-sectarian, as in the late 1980s when Shi'i battled Shi'i and Maronite combated Maronite.

Equally important, external forces were also major contestants in the civil war, including Iran, Israel, Syria, the PLO, various European states, and the United States. The civil war ended, in fact, in 1990, when Syria, with an approving nod from the U.S., established more or less undisputed control over Lebanon. Since the U.S. was assembling an international coalition to confront the Iraqi occupation of Kuwait in 1990, a premium was placed on symbolic Arab participation in the coalition. Moreover, there was concern in Washington that General Michel Aoun, who was one of two rival presidents as a result of the failure of a U.S.-brokered attempt to find a presidential successor to President Amin Gemayel in 1988, was receiving arms from Iraq. Aoun's forces were crushed by the Syrians, and the firebrand general fled into exile in France. Much like Raymond Edde in the earlier generation endured as a symbol of opposition and a beacon of hope for a free Lebanon, so Michel Aoun's reputation as an exemplar of an independent and reformed Lebanon prospered in exile.

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Syria has usually played a balancing game in Lebanon, content to insure that no single force or political coalition could rest easy and in control. Syria's balance of power game, from 1990 forward (as before), was marked by a pattern of encouraging rivalries within communities, as well as fostering compliant political clients to protect its interest. The classic case of the former was agreeing to Iran's tutelage of Hizbullah as a means to insure that Amal remained compliant to Syrian interests. As for the latter, namely promoting local leaders as clients, one needs to look no further than the Lebanese presidency and the example of Emile Lahoud, whose extra-constitutional three-year extension in office in September 2004 was intended to insure that Syria's interests in Lebanon would be dutifully attended.

Although Damascus miscalculated the external and internal response to Lahoud's extension, the motive for the Syrian diktat was first and foremost to insure that independent voices among Lebanon's diverse Christian communities remain fragmented.

For compliant Lebanese politicians, including some in the present ruling coalition, playing ball with Syria was a route to personal enrichment, provided that Syrian pro consuls and a variety of other officials, both in uniform and mufti, were able to keep their generous "cut".

Lebanese politicians frequently intone that "Lebanon's weakness is its strength". In recent years, the merit of weakness as a strategy has been brought to question. Nonetheless, it is certainly true that the Lebanese political system has typically been dominant at the margins, and weak at the center. Syria's approach to Lebanon helped to sustain the weakness of center by promoting the fragmentation of political authority.

While there may be merits to Lebanon's laissez faire economic fetish, the reality for most Lebanese is that there is little, if any safety net for people in need of assistance. This insures that many people often have to seek the assistance of confessional patrons in times of despair.

Among the intrinsic factors that have enhanced confessional sentiments in post-civil war Lebanon are the following:

- \* Patterns of residential settlement have changed. During the worst phases of the civil war many people fled or were driven from their homes. The result is that Lebanese are today less likely today, as compared to 20 years ago, to live in a socially heterogeneous community. Many people who were displaced forcefully years ago have not chosen to return permanently to their confessionally-mixed villages and towns. A clear and obvious example is West Beirut, which has lost many of its Christian residents. Pioneering work has been done by Salim Nasr on confessional residential patterns.
- \* When the civil war ended in 1990, there was great hope that an economic recovery would ensue propelled by the resurgence of Lebanon's services sectors, especially in banking and tourism, as well as by momentum toward a comprehensive Arab-Israeli peace. Instead, these hopes have been frustrated.

- \* The great burden of government debt that Lebanese confront today is testament to the fact that Lebanon spent comparatively enormous amounts to rebuild its infrastructure in anticipation of the arrival of the peace train. The wager did not pay off, of course. Instead, by the mid-1990s the progress toward a resolution in the Arab-Israeli conflict came more or less to a halt.
- \* The fact that the rebuilding of infrastructure was ridden with corruption, profiteering and other shady dealings further diminished the standing of the central government, and validated the centrality of *wasta* and corruption in the political system. While the late Rafiq al-Hariri was in certain respects a proponent of meritocracy, once he came to office he discovered that the other two members of the triad, the Speaker and the President were first and foremost committed enlisting clients not recruiting able civil servants. He once told me, "half of people in my government should be in jail, but I can't do anything about it." I inferred that he was referring to Syria's satisfaction with the system as it was.
- \* Al-Hariri was perfectly adept at playing the confessional card, of course, and he unquestionably Riyadh's favorite Sunni (he held Saudi citizenship). In the mid-1990s, he was responsible for extending Lebanese citizenship to tens of thousands of people, most of whom were Arab Sunnis.
- \* Given the difficult economic conditions in Lebanon, the shortage of employment opportunities, the increasing tax burden necessitated by debt servicing by the government, many Lebanese have become more, not less dependent on sectarian politicians *qua* patrons. Conceivably, if Lebanon's economy were healthier, sectarianism would be eroded but in present condition it is bolstered.
- \* Concurrently, this context has enhanced the importance of religious institutions, such as the Patriarchy, the Mufti, the Ja'afari Mufti al-Mumtaz, and so on. It is instructive to recall the attempt of former President Elias Hrawi to promote secular marriage in the mid-1990s. Hrawi's initiative was met by a chorus of protest from religious leaders who all seemed to singing the same tune, namely the threat posed by de-confessionalizing marriage to the moral fiber of Lebanon (and, one might add, to their own *raison d'être*).
- \* Meantime, Israeli continued to occupy southern Lebanon until the Israeli army finally withdrew, unilaterally, in May 2000. When Israel invaded Lebanon in 1982, it did so expecting that a government friendly to Israel would emerge in Beirut. This did not occur, and rather than withdrawing from Lebanon, Israel continued its occupation of Lebanon for eighteen years. In the early 1980s, the most dynamic and important force in Lebanon was Amal, the Shi'i reformist movement. The provocation of the Israeli occupation naturally lent momentum to militant groups that would mount resistance operations. As a result the Shi'i community was predictably radicalized.

Of course, the assassination of al-Hariri in 2005 and the July war of 2006 have further exacerbated sectarian sentiments. Israel's war campaign was read by many of

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Lebanon's Shi'a, and not inaccurately in my view, as transparently targeting the Shi'i community. The unintended but obvious result was an increase of Shi'i political solidarity.

It would certainly suit the purposes of U.S. foreign policy for Hezbollah and the Shi'i to stand isolated from Lebanon's other sects. Instead, Hezbollah has found a structurally coherent and durable alliance with Michel Aoun's predominantly-Christian Free Patriotic Movement (FPM). This alliance has not only been important in thwarting western attempts to dominate Lebanon politically, but it also reveals a critique of a political formula that privileges *wasta* and patronage. While the life style choices of Hizballahi and FPM adherents are no doubt quite different, both constituencies share a critique of the Lebanese political system. In terms of socio-economic status, it is demonstrable that Hezbollah and the FPM attract better educated members, who are equipped and qualified to compete in a dynamic economy. An instructive comparison is to contrast Hezbollah to Amal, and the FPM to the Lebanese Forces. In both pairings, the more impressive membership is in the opposition groups. In recent syndicate (*niqaba*) elections, FPM members have had a particularly strong showing, winning the Engineers syndicate elections in the spring of 2007, and coming in a close second in the Doctors' election in June.

Considering the on-going crisis, I would like to make several points, which I think are essential: the massive demonstration of March 14, 2005, include many, many Aounists, who are now in opposition. While it is technically correct to speak of the government as the majority, since they hold a majority of seats in the parliament, it is not hard to demonstrate that the opposition probably accounts for a majority of politicized Lebanese. Consider that the opposition includes Hezbollah, the FPM, Amal, the SSNP, the Lebanese Communist party, some Sunni factions (followers of Omar Karami, for instance), a variety of pro-Syrian Christians (for instance Franjeh's al-Marada in the environs of Zgarta). Were there to be a new election for parliament it is by no means given that the majority would retain its control of the government. I doubt that it would.

The well-worn motto of conflict resolution in Lebanon is "no victor, no vanquished." Of course, following this dictum the confessional character of Lebanese politics is bound to continue, but I see no feasible alternative as I suspect the U.S. will soon be discovering.

In any case, no single sect can dominate Lebanese politics, at least for very long, nor, short of extermination, can any sect be eliminated from the political game. While the Ta'if accord does envisage de-confessionalizing Lebanese politics, little that has happened in recent decades establishes that that goal is anything but wistful.