

Developing Democracy in Europe

An analytical summary of the Council of Europe's *acquis*

Lawrence Pratchett and
Vivien Lowndes
Local Governance Research Unit
De Montfort University, United Kingdom

Integrated project “Making democratic institutions work”

Council of Europe

French edition:

Faire évoluer la démocratie en Europe – Résumé analytique de l'acquis du Conseil de l'Europe

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic (CD-Rom, Internet, etc.) or mechanical, including photocopying, recording or any information storage or retrieval system, without the prior permission in writing from the Publishing Division, Communication and Research Directorate.

Cover design: Graphic Design Workshop, Council of Europe
Council of Europe
F-67075 Strasbourg Cedex

©Council of Europe, 2004
Printed at the Council of Europe

EXECUTIVE SUMMARY

There is a sense that democracy has reached a significant point in its development in Europe. The institutions of democracy are more widely accepted and practised across the continent than ever before. More Europeans live in democracies and more Europeans subscribe to the values of democracy in their day to day lives than ever before. At the same time, however, there is also a perception of democratic atrophy. Mistrust of political institutions, declining turnout in elections and the rise of terrorism as a major threat to democratic practices are all challenging the conventional wisdom of a comfortable political consensus around core institutions.

Developing democracy in Europe – an analytical summary of the Council of Europe’s acquis examines the Organisation’s activities to enhance democratic institutions, in particular through adopted texts and their support material. In summarising the Council’s *acquis* in the field of democracy, it provides both a stock take of what the Council thinks in this area and an analysis of the problems and opportunities that face European democracy.

Problems, challenges and opportunities

It is important to recognise the problems, challenges and opportunities that face European democracy, because it is these issues that provide the context in which the Council of Europe is seeking to make democratic institutions work.

Problems. The most apparent problem is the perception of an increasing democratic deficit in both established and newer democracies. Participation in formal political institutions continues to decline while the attention of the politically active is increasingly shifting towards issues that are beyond the control of nation-states and take place outside of the traditional institutions of collective politics. Faced with changing patterns of political engagement, the legitimacy of traditional institutions of democracy is called into question. This issue is compounded by a second problem: that of political mistrust. Although some scepticism is healthy for democracy, declining trust in both politics and political institutions is a threat in so far as it encourages even greater distance between citizens and governments. Even if such mistrust was not an issue, however, the extent to which various groups are

systematically excluded from political life and effectively disenfranchised, represents a third problem for contemporary European democracy. Whether perceived or real, disenfranchisement is a problem for democracy because it strikes at one of its core principles, that of political equality. Finally, a fourth problem for democracy is the absence of effective civic infrastructures and the active participation of NGOs in political and democratic life in many countries. The organisations of civil society are widely acknowledged to be an important intermediary between citizens and the state in effective democracies. Their absence, therefore, is a fundamental problem for democracy which may inhibit the effective working of its institutions.

Challenges. The challenges to democracy come from outside of its institutional structures or procedures and revolve around broader socio-economic and political pressures. First, an awareness of globalisation frames the limitations of individual nation-states in responding to shifting economic and demographic patterns. While not a new phenomenon, globalisation is currently challenging for Europe because, for the first time, democracy is the dominant mode of political organisation across the continent, making responses to new challenges more complex than in previous eras. Second, the consolidation of various pan-European bodies adds to these challenges. In particular, the challenge is one of concomitant convergence around core beliefs, rules and institutions while, at the same time, seeking to protect and encourage local, national, regional and local differences and identities. As the only body to which all European democracies accede, the Council of Europe has an important role to play in balancing these challenges.

Opportunities. Europeanisation, of course, also represents one of the great opportunities for democracy across Europe. As well as achieving consensus on particular issues, the umbrella of the Council of Europe provides a strong institutional framework for co-operation, learning and policy transfer across Europe. This opportunity is particularly evident in relation to the adoption of new technologies to support or enhance democracy. The Council recognised this opportunity early on and has taken a number of steps to support the effective use of technologies.

Core principles

The *acquis* is a complex base of knowledge that has emerged over time and through a sophisticated process of debate. However, its main points can be distilled into five core principles.

1. Parliamentary democracy – the Council remains committed to the formal structures of democracy that enforce a separation of powers and a range of means through which opinions can be formulated and articulated. The existence of elected assemblies, in the form of parliaments, remain fundamental to this institutional structure. Parliaments, in this vision, represent a microcosm of the full spectrum of socio-economic and political interests found in the wider community and act as the centre for political debate and deliberation. However, the relationship of parliaments with other attempts to involve citizens directly in the policy process, beyond voting in periodic elections, has not been fully thought through in the *acquis*.

2. Representation – for parliaments to realise this ambition it is necessary for them to be truly representative of the communities they serve. The Council has focused on three important issues that support this representative process. First, it has supported the principle of a plurality of political parties as forming the foundation of effective democratic politics. Concerns with party financing and the need to prevent corrupt funding of political parties by private interests is significant in this respect. Second, the Council has vigorously promoted good practice in electoral matters through both the definition of standards and the monitoring of procedures. As well as promoting generally high standards across the process, the Council has also focused on issues of disenfranchisement among ethnic minorities and has concentrated particularly upon promoting gender equality as a fundamental feature of democracy. Finally, the Council has also been active in supporting the development of new instruments to support representation.

3. Transparency, responsiveness and accountability – While there are a potentially wide range of issues that might be addressed in relation to transparency, responsiveness and accountability, the Council has concentrated its efforts in three main areas. First, it has sought to define and enforce the ethical standards that all public servants, whether paid

functionaries or directly elected, should be expected to observe. Second, it has developed a range of instruments aimed at tackling corruption at all levels, from local government through to international crime and corruption. In seeking to codify the corrupt activities that should be criminalised, the Council has established an important benchmark for inhibiting anti-democratic corruption. Third, the Council has devoted much of its efforts to supporting a free and active media as one of the building blocks of democracy. Linked to this has been a concern with media pluralism as the best way to ensure freedom of expression. It is only by preserving and enhancing all three of these components that political institutions can be seen to be transparent, responsive and accountable.

4. Sub-national democracy and subsidiarity – the European Charter of Local Self-Government has defined the role of local government in a broader democratic polity. However, despite its widespread adoption among member states, the practice of local democracy remains heavily circumscribed in many countries. In particular, the principle of subsidiarity, which requires that decisions be taken at the level closest to the citizen, has not always been observed. The problem is a complex one, not least because no two member states have the same institutional structures at national or sub-national level. However, the principle remains important to democracy and fundamental to the Council's vision for European democracy.

5. Participation and civic society – the Council, through many of its adopted texts and activities, promotes the principles of participation and civic society. Participation is focused especially around encouraging the engagement of otherwise marginalised groups: young people, ethnic minorities, immigrants and so on. The need for balanced gender representation has also featured prominently in this area. Support for civic society has focused more upon how NGOs can receive official recognition for their contribution to democracy and gain some degree of political legitimacy. However, the relationship between this principle and those more specifically concerned with the institutions of representative democracy, remains underdeveloped.

The development of these principles must also be acknowledged. Given that democracy is an intemporal and incomplete project, it is necessary to acknowledge that the democratic principles that the Council articulates have emerged through an incremental and responsive process, rather than a coherent and stable activity of deliberation. The articulation of

particular principles has occurred in response to particular problems or events. The decline in electoral turnout and the perception of a democratic deficit is one such problem. The transition to democracy in Central and Eastern Europe and the accession of a number of states with very different social and political histories is one such event which has significantly altered the path of democratic development. It is not surprising, therefore, to observe that the principles highlighted above are not always mutually consistent and give rise to a number of tensions in the democratic project of the Council. In different contexts these principles often compete with each other in shaping institutional developments. Nevertheless, they underpin much of the work that the Council undertakes in the area of democratic institutions and, as such, provide a base from which to understand the democratic trajectory of Europe.

Making democratic institutions work

From an analytical standpoint, the term “institution” refers to the rules of the game which politics observes in a particular context. Rules may be formal (constitutions, directives or organisational structures) or informal norms and conventions, which may vary from country to country. Rules are more codified, and the latter are unwritten codes and customs. Political institutions determine how the vast range of political actors behave. Institutions, or the rules of the game cannot be said to determine outcome, but they do provide a framework for political action and strategies. They provide a set of specific constraints and opportunities for the practice of democracy.

The Council is implicitly involved in designing democratic institutions and explicitly involved in seeking to make them work. Effective institutional development requires designs that are both revisable and robust. The Council already recognises these requirements: its formal treaties give scope for variation in the way different member states develop democracy. Its adopted texts seek to reinforce principles while, at the same time, allowing a degree of reflection upon various issues. Monitoring of democratic developments adds to both the revisability and robustness of various national and local institutions. However, there is also a danger that, in its desire to respond to contemporary problems, rise to specific democratic challenges and grasp potential opportunities, the Council may ignore both the forces of institutional inertia and the need for sensitive institutional design.

In seeking to make democratic institutions work more effectively, the Council needs first to establish the values that it is seeking to articulate through particular institutional forms. The principles set out above begin that process by clarifying the different principles that are embedded in the *acquis* and by highlighting the possible tensions that exist within and across them. It is only by surfacing these values that the current rules of the game can be clarified and the embedded positions of different actors understood. Second, in making recommendations for institutional reform, the Council must remain sensitive to the complexities of democracy in different member states, the power relationships that are embedded in particular institutional forms and the influence of history in shaping existing institutional structures. There is little value in making recommendations or establishing commitments to institutional practices that do not reflect these issues and allow institutional variation accordingly. Third, the Council should not approach institutional design from the perspective of a perfect or “ideal-type” model, but should seek to realise its democratic values and ambitions through a combination of different institutional forms that can be adapted to suit different political and cultural circumstances.

Perhaps the biggest contribution of the Council of Europe to the development of democracy across its members states lies in its role as a third party enforcer. Because it is not part of the “institutionalised interaction”, it is able to offer reforms that reflect an awareness of competing power relationships but which are not part of them. Through both its powers of initiation of institutional reform (treaties, recommendations and so forth) and its monitoring and support activities, the different organs of the Council are able to encourage and enforce institutions that are both robust and revisable. They can be robust in so far as they can reflect the core values of European democracy and articulate a consensus across the continent. They can also be revisable in so far as they can be flexible, allowing learning across countries and institutions, and allow for variation in institutional form and practice. Finally, the Council is in a unique position to make the institutions of democracy extendable to other tiers and policy areas. It is only by consciously focusing upon institutional design procedures that the Council can continue to have an impact upon the institutional development of democracy in Europe.

CONTENTS

Chapter 1: Defining democracy in Europe

Introduction

Classifying the *acquis*

Chapter 2: Problems, challenges and opportunities

Democratic problems

Democratic challenges

Democratic opportunities

Conclusions

Chapter 3: The core principles of European democracy

Parliamentary democracy

Representation

Transparency, responsiveness and accountability

Sub-national democracy and subsidiarity

Participation and civic society

Conclusions

Chapter 4: Making democratic institutions work

How do democratic institutions do their work?

Challenges in making democratic institutions work

Principles for good institutional design

Conclusions

Chapter 5: Tensions in developing European democracy

Convergence or divergence?

Stability or change?

Conclusions

CHAPTER 1

DEFINING DEMOCRACY IN EUROPE

Introduction

What does democracy across Europe mean and what steps has the Council of Europe undertaken to support and improve democratic practice? These two fundamental questions lie at the heart of this document. This document is about the Council of Europe's *acquis* in the field of making democratic institutions work. In other words, it is about the Council's own understanding of what democracy is and how it can be enhanced. The arguments presented here, therefore, are not abstract concepts drawn from political theory, nor are they diffuse empirical observations about the development of democracy across Europe. Rather, this document draws upon the Council's adopted texts to consider the democratic problems and challenges that greater Europe faces, the underlying principles and values that it is seeking to support, and the broader themes and issues that emerge from its activities in the field of making democratic institutions work.

The background to this study is the Council's first integrated project "Making democratic institutions work". Since January 2002 this project has worked across the various organs of the Council to pull together the different democratic strands of the latter's work. It has also taken the lead on a number of issues and produced a series of analytical publications that provide a focus for the Council's contemporary thinking on a range of issues affecting democracy in its forty-five member states. This report builds upon the work already undertaken by the project to provide a comprehensive analytical summary of the Council's activities in building and supporting democratic institutions. It also links to the project's Green Paper on "The future of democracy in Europe".¹ This analysis has informed the deliberations of the high-level group that produced the Green Paper and, in turn, has been shaped by their questions and observations.

1. *The future of democracy in Europe – trends, analyses, reforms* (forthcoming, November 2004) Strasbourg: Council of Europe Publishing.

The purpose of this report is to analyse the activities of the Council of Europe in making democratic institutions work. It focuses particularly upon the adopted texts of the Council and their supporting material, in order to analyse the Council's understanding of democracy and the way in which various institutions support it. While this process inevitably looks backwards to what the Council has already adopted or implemented the emphasis of the report is upon looking forward to how different instruments of institutional changes may enhance democracy across Europe. In analysing the Council of Europe's *acquis*, therefore, this report is concerned especially with how democracy works and how it can be enhanced by the Council. The primary source for this analysis is the Council's own deliberations and outputs, related to a wider understanding of democratic development in Europe. Consequently, the focus of the analysis is upon what the Council is doing or thinking in relation to democratic institutions, rather than the activities or behaviour of individual member states (although, inevitably, there is some significant interplay between these actors).

Three important points underpin the analysis that follows and must be emphasised from the start. First, it is important to recognise that the Council of Europe is not responsible for democracy in Europe: it simply provides one arena in which democratic practices can be debated and developed. It has a role to play in encouraging democratic development in individual states and, indeed, across the continent, but it has no responsibility for the failure of individual states to live up to democratic ideals. This point may seem somewhat obvious but its consequences are significant and should not be overlooked. The resources open to the Council to influence democratic trajectories are limited and its relationships with the development of democratic institutions in individual nation-states are, therefore, complex. The *acquis* reflects not only the democratic ideals that the Council hopes will be adopted within all forty-five member states but, also, the *realpolitik* of pan-European democratic relations and the limitations that this imposes upon the realisation of democratic ideals. Consequently, where the Council's ambitions may seem limited, modest proposals may well reflect the recognition of what can be achieved given existing circumstances, more than a lack of democratic ambition on behalf of the Council. The Council of Europe should be recognised for its democratic achievements rather than criticised for the democratic inadequacies of some member states.

Second, democracy is not a tangible outcome that can be reached by all forty-five member states of the Council of Europe but is, rather, an incomplete project which is continuously

under development in all nations that strive for democracy. Within this context, it is not possible to define either an individual nation's progress towards democracy or, indeed, greater Europe's progress, although it is possible to recognise specific democratic achievements in terms of institution building. There exists, therefore, an element of intemporality in which it is not possible to identify what stage Europe has achieved in building democracy. Instead, it is only possible to point to the institutions that support democracy and the ways in which they enhance democratic practice. The Council of Europe's *acquis* must be understood in the context of this intemporality. This report will not seek to analyse the *acquis* against a discrete model or a set of democratic metrics but, instead, will analyse progress towards institutional design and development. Consequently, the latter part of this report sets out the institutional framework that helps to understand the way in which the Council of Europe is making democratic institutions work in the context of such intemporality.

Third, and linked to the recognition of intemporality, it is necessary to recognise that democracy is not a settled idea or set of institutions. In political theory, arguments persist over what the defining principles of democracy are and what the ideal model of democratic practice should be. In practice, the constitutional basis and political enactment of democracy continues to develop in all nation states. Rather than conceive of democracy as one form of best practice, or even as an ideal type to which imperfect political systems strive, it is necessary to see democracy as a complex of values and principles which interact in different ways in various contexts. Equally, different democratic instruments will have contrasting impacts depending upon the socio-economic and political environments in which they are introduced. The diverse economic and political histories of the various European nations provide a sophisticated context for democratic innovation and a range of opportunities for democratic enhancement. At the same time, specific democratic instruments, such as referendums, participation initiatives and so on, will have differing effects in each nation. The institutions of democracy are essentially different in each of the forty-five member states, reflecting national socio-economic and political cultures and, indeed, historical trends. These differences do not necessarily make some institutions of democracy better than others or, indeed, some nations more democratic than others. A focus upon democratic institutions, therefore, must be sensitive to such differences and leave room for interpretation. For example, the significance of local self- government and the promotion of subsidiarity beneath the level of the nation-state have very different institutional and practical implications,

depending upon whether the focus of attention is upon Europe's largest territorial state (the Russian Federation) or its smallest (San Marino). The focus on democratic institutions adopted here, consequently, seeks to be comparative rather than absolute in its analysis.

These three points are fundamental to the analysis that follows not only because they highlight the limitations of what can be expected from the Council of Europe but also because they indicate the diversity which can be part of the democratic vision for Europe. Indeed, once accepted, these three points highlight the diverse opportunities and strengths that European democracy can build upon.

Classifying the *acquis*

The analysis developed in this document is based, primarily, upon the Council of Europe's own documentation. As already stated, the purpose is to analyse the Council's *acquis* in order to summarise its knowledge and understanding of democracy and the way democratic institutions function and change over time. It is also concerned with the way in which the Council can contribute to European democracy by making democratic institutions work better. While the document draws upon other evidence to support the development of core themes, therefore, the primary source for this analysis is the Council's own conventions, recommendations, reports and other publications that it has produced since its inception in 1949.

The Council offers a complex array of documents which contribute to its *acquis* in the field of democratic institutions. Some of these have full legal status and directly shape the functioning of democracy in member states: others are more discursive in their nature and have only an informal influence on democratic practises. Between these two extremes are a range of other documents which vary in their formality and significance to democratic institutions. Before the analysis can be developed, therefore, it is necessary to clarify the status of the various documentary sources and the way in which they are used in this report.

The term "*acquis*" refers to the established body of knowledge that underpins existing understanding in a given area: that which is often taken for granted in day-to-day discussions. This knowledge normally remains unarticulated and is not open to question in daily

activities. The problem with such knowledge is that its detail often remains implicit and can be subject to multiple interpretations by different actors. This document endeavours to unpick this established body of knowledge in the Council of Europe's approach to democratic institutions, to highlight its main features, to identify any potential contradictions and to provide a sound basis from which further developments can be built. The term *acquis* can also be used to refer to the principles and knowledge that are conventionally agreed upon, around which a consensus has emerged and on which all major disagreements have been settled. While democracy as a general value for Europe can be considered a settled concept around which there is a high level of consensus, there remain significant differences of opinion within the Council of Europe and its member states over the way in which different democratic institutions should work and the priorities for future democratic development. Indeed, part of the rationale for this analysis is that such disagreements should be highlighted. Consequently, this analysis seeks both to identify the Council of Europe's *acquis* in the field of democratic institutions and to make explicit the tensions that exist in its current knowledge base. It is only from such a basis that the Council can consider its own role in developing the future of democracy.

The potential sources of the Council's *acquis* are multiple, the most important of which are:

- Council of Europe conventions, treaties and charters;
- Committee of Ministers recommendations;
- Parliamentary Assembly recommendations, resolutions, opinions and orders;
- Congress of Local and Regional Authorities of the Council of Europe recommendations, resolutions and opinions;
- reports of other organisations operating under the Council of Europe umbrella, including the European Commission for Democracy through Law (the Venice Commission) and the Group of States against Corruption (GRECO);
- various background reports and publications that support the activities of the Council of Europe, including background reports to recommendations, resolutions and opinions, and the outputs of cross-cutting projects such as those of the integrated project “Making democratic institutions work”.

Each of these categories has a potentially different status and will shape the *acquis* in different ways. This section will briefly outline the implications of each of these categories

for the development of the *acquis* by focusing upon three types of document: treaties, proceedings, and reports and general publications

Treaties: conventions, protocols and charters

The main source of the Organisation's *acquis* is its 193 treaties, stretching from its initial statute in 1949 through to the most recent conventions on such issues as cybercrime (2001) or contact concerning children (2003). While there are technical differences between conventions, protocols and charters, they have a similar legal status and are collectively termed "treaties" for the purposes of this analysis. Treaties are normally opened for signature and ratification among member states, with an expectation that those ratifying its content will then take appropriate action by, for example, amending domestic legislation in line with its provisions. This *acquis* continues to build as charters, conventions and protocols are added or revised by the Council. Furthermore, as different member states accede to various treaties or sections of them, so their significance and European-wide acceptance increases. Consequently, it is a fluid and dynamic *acquis* that has over fifty years of historical development and the input of some forty-five European democracies but, nonetheless, remains relevant to modern democratic practices.

Some treaties are fundamental to the Council's existence and continued development. Although there is no set list of conventions that every country has to ratify as a basis for accession to the Council, the Parliamentary Assembly gives an "opinion" on all accession applications which set down the minimum requirements for membership. While the "opinion" is different for every acceding country, the requirements placed upon some of the most recent countries to join the Council provide a good indication of the minimum requirements. Armenia's accession in 2001, for example, was conditional upon it signing and ratifying within one year the European Convention on Human Rights (and significant protocols that have followed), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Charter for Regional or Minority Languages and the European Charter for Local Self-Government. A longer two- to

three-year timetable was proposed for other conventions related to cross-border criminal activities and for the signing of the European Social Charter.²

Box 1: The minimum standard for accession

(Armenia as an example: Parliamentary Assembly Opinion No. 221 (2000))

The requirements for accession to the Council of Europe vary between countries. The Parliamentary Assembly gives an opinion on each application which sets the standard. Armenia's 2001 accession is fairly typical of the standards now being expected. Armenia was required to undertake the following:

- to sign the European Convention on Human Rights (ECHR), as amended by Protocols Nos. 2 and 11 thereto, and Protocols Nos. 1, 4, 6 and 7;
- to ratify the ECHR and Protocols Nos. 1, 4, 6 and 7 thereto during the year following its accession;
- to sign and ratify, within one year of its accession, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its protocols;
- to sign and ratify, within one year of its accession, the European Charter for Regional or Minority Languages;
- to sign and ratify, within one year of its accession, the European Charter of Local Self-Government;
- to sign and ratify, within two years of its accession, the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities and its additional protocols, and the Council of Europe conventions on extradition, on mutual assistance in criminal matters, on laundering, search, seizure and confiscation of the proceeds from crime, and on the transfer of sentenced persons, and in the meantime to apply the fundamental principles contained therein;
- to sign the European Social Charter within two years of its accession and ratify it within three years of accession, and to strive forthwith to implement a policy consistent with the principles of the Charter.

Many countries also sign the Framework Convention for the Protection of National Minorities before accession.

While not all these treaties are directly related to democracy, their combination provides a strong underpinning for the Council's work in this area.

Like many countries, Armenia had also signed the Framework Convention for the Protection of National Minorities in advance of accession, thereby including it in its list of European accession agreements (See Box 1 above). These requirements were similar for other recent accession countries, such as Latvia (1995), and so provide a good basis for establishing the minimum standards expected of member countries.

Not all treaties contribute to the Council's *acquis* in the field of democratic institutions. Indeed, many have only passing relevance to democracy while others have an important but indirect influence on democracy. This report proposes a threefold classification of the treaties

2. Parliamentary Assembly Opinion No. 221 (2000) on Armenia's application for membership of the Council of Europe.

that the Council offers for signature and ratification, according to their relevance to democracy and the development of democratic institutions.

Pre-conditional treaties are those which establish the pre-conditions by which democracy and its wider values and principles can be realised. These treaties articulate the core principles that would be expected in modern democracies and include, among others, the Council's conventions on human rights, social rights and welfare, and freedom of speech. They also include those conventions and charters which confirm the rule of law, such as treaties addressing corruption, transborder co-operation and privacy issues. The common feature of these treaties is that they articulate or enact broad principles that underpin democracy rather than address democratic institutions directly.

Institutional treaties, by contrast, are those which are directly concerned with establishing particular institutional structures or practices concerned with democracy, or with relationships between democratic institutions. These treaties include the European Charter of Local Self-Government and proposed charters on urban government and regional self-government. These treaties are central to the *acquis* on democracy.

Extraneous treaties are those which address other issues of European values or the rule of law but which have no direct bearing upon democratic institutions or practices. These treaties are important in establishing stability and maintaining co-operation between nation-states but have only indirect relevance to the development of democratic institutions in Europe.

It is the institutional treaties that are the most significant for the *acquis* although it is also necessary to note their relationship with the pre-conditional treaties at various points. The focus of this document will be primarily upon institutional treaties, although it will also draw upon pre-conditional treaties where they have a bearing upon institutional practices or development.

Proceedings: Committee of Ministers, Parliamentary Assembly, the Congress of Local and Regional Authorities of the Council of Europe

While treaties provide the legal basis for defining the *acquis*, the development of democratic institutions is addressed more directly in the proceedings of the various organs of the

Council: the Committee of Ministers, the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe (the Congress). The deliberations of these three bodies provide both an interpretation of the formal understanding of democracy and an indication of the issues that contemporary democracies in Europe are facing. These deliberations also provide clues to the democratic priorities of the Council and the directions in which democracy is being developed.

The proceedings of the Committee of Ministers vary across a range of different texts, from decisions and declarations on particular issues through to recommendations to particular bodies or countries, resolutions on particular concerns, and replies to recommendations or questions put to it by the other pillars of the Council (the Assembly and Congress). From the perspective of the *acquis* on democracy, the recommendations of the Committee of Ministers to member states on matters for which it has agreed a common policy are particularly significant. Where they refer to democracy, these recommendations not only highlight the key democratic problems and solutions that the Committee is identifying, but also the broader direction in which it is aiming to take democracy. The Committee also exercises a role in monitoring the adoption or implementation of its recommendations among member states. The extent to which it has monitored the implementation of recommendations that affect democracy is also indicative of the significance it attaches to particular democratic institutions or practices.

Similarly, the proceedings of the Parliamentary Assembly vary across a number of categories. The Assembly adopts four types of texts: recommendations to the Committee of Ministers on proposals that member states might adopt; resolutions that reflect the Assembly's agreed position on a particular issue or question that it has identified and concluded on its own; opinions on questions put to it by the Committee of Ministers and; orders to its committees. These texts make an important contribution to the *acquis* because they reflect the deliberations of parliamentarians from all forty-five member states and are, therefore, grounded in a recognition of the democratic issues and opportunities that exists across Europe. However, they need to be treated with some caution in so far as not all texts receive substantial input across the full membership of the Assembly. The main requirement is that recommendations or resolutions must be tabled by ten or more members of the Assembly belonging to at least five national delegations. It is possible, therefore, for some of these texts to represent regional concerns or the interests of a particular category of countries

which are not representative of the whole of Europe. Consequently, while they have not necessarily been opposed by other member states, it would be incorrect to assume that all of these texts have the full endorsement of all countries. Nevertheless, once they are adopted by the Assembly, they do form part of the *acquis* and contribute to the Council's interpretation of democracy, not least because they have been officially adopted by the Assembly through its statutory processes.

The Congress has three main types of text that it adopts. Its recommendations are normally addressed to the Committee or the Assembly but can also be directed at individual member states, encouraging a particular course of action. Its resolutions often follow the same subject as recommendations but are addressed to local or regional authorities and invite them to undertake particular activities. Finally, it also develops non-binding charters that it encourages local and national governments to adopt. These texts are particularly important to the development of the *acquis* because they often address specific elements of democracy (such as the participation of young people in political life) and focus especially upon institutions that support democracy, particularly at the sub-national level. Like the Assembly, however, the extent to which adopted texts are widely discussed across members varies on different topics.

Reports and general publications

To support the development of adopted texts, the various organs of the Council also produce a range of reports and publications that set out in more details the evidence and reasoning behind particular recommendations, resolutions and so on. These reports provide a valuable means of understanding the arguments behind decisions made by the various organs. They also give an indication of how recommendations and resolutions should be interpreted and the way in which they relate to other adopted texts. Such reports and publications are not restricted to the three main pillars but are also found in other elements of the Council's work. The Venice Commission and GRECO both provide important sources of evidence and guidance that contributes to the *acquis*. However, in analysing the contribution of these organisations it is necessary to bear in mind that these bodies represent partial agreements to which not all member states of the Council of Europe are signed up. Finally, many activities of the Council also produce documents and reports that seek to clarify or strengthen aspects of democratic practice. The outputs from the integrated project "Making democratic

institutions work”, of which this document is part, are particularly important here. A number of conference reports and publications provide a synthesis of the Council’s position on specific topics of relevance to democracy in Europe. Again, these outputs provide valuable direction to the *acquis*.

None of these reports and other outputs has a formal status in relation to the work of the Council of Europe in so far as they are not part of the statutory outputs of any of the Council’s organs and have not been adopted as a text by any of them. However, for the purposes of this analysis they are included in the *acquis* because they provide the background and sense of purpose that is not always overtly apparent in the formally adopted texts of the main pillars.

The Council has not developed in isolation from other pan-European and international bodies. Most significantly, the institutions of the European Union (especially the European Commission, European Parliament, Committee of the Regions and the European Convention on the Future of Europe) the Organisation for Security and Co-operation in Europe (OSCE), the Organisation for Economic Co-operation and Development (OECD) and the United Nations, have all interacted with the Council to both shape and be shaped by the Council’s activities. On the one hand, for example, the Council has had to be sensitive to its relationship with the various organs of the European Union, which have significantly affected its interpretation of how democratic institutions should work. On the other hand, the Council has also led other international bodies in many of its institutional recommendations and activities: for example, the draft world charter of local self-government has been “modelled very closely on the European Charter of Local Self-Government”.³ While the work of these other bodies does not directly form part of the Council of Europe’s *acquis*, it nevertheless has significant implications for the development of the Council’s knowledge and thinking about democratic institutions over time. Where relevant, this document will also make reference to such relationships.

3. Congress of Local and Regional Authorities of Europe, Opinion No. 12 (1999) on the initial draft world charter of local self-government (section III).

CHAPTER 2

PROBLEMS, CHALLENGES AND OPPORTUNITIES

The context in which the Council of Europe is seeking to shape democratic institutions and practices is a complex one. Beyond the obvious recognition of forty-five member states encompassing some 800 million citizens there is also the identification of a number of problems, challenges and opportunities facing European democracy in the 21st century. This chapter draws upon the adopted texts of different Council organs to briefly explore three factors that set the context in which democratic institutions operate. First, it considers the perceived *problems* that the Council recognises and seeks to address through various institutional interventions. These problems are primarily internal difficulties with the way in which democracy works in particular countries or in particular institutional contexts. Second, it considers the wider *challenges* that the Council is responding to in its various activities. These challenges emerge from changing economic, demographic, social and political behaviours that the Council has observed. Finally, the chapter briefly considers some of the *opportunities* that the Council is seeking to grasp, particularly in relation to the exploitation of new technologies to support democracy across Europe.

Democratic problems

Much of the work of the Council of Europe is concerned with addressing perceived problems in the way that democracy works across Europe or in specific countries. It is neither desirable nor sensible to seek to address here all of the problems that the Council has identified in its work. Instead, this section deals briefly with four broad problems that are prevalent in the Council's contemporary thinking⁴ and which are consequently guiding its democratic ambitions.

4. See especially Parliamentary Assembly Document 9951 on the future of democracy: strengthening democratic institutions.

First, like many other national and international organisations, the Council has become increasingly concerned with the growing democratic deficit in Europe. The 2003 Parliamentary Assembly resolution on the future of democracy sums it up as follows:

The Assembly is conscious that participation in elections at local, regional and national levels in several member states is often characterised by relatively low turnouts and considers this as alarming, although abstentions in elections may also be conscious expressions of a popular will.⁵

The problem here is primarily a crisis of political and democratic legitimacy. Participation in elections and a wider engagement in political life are often perceived to be proxy measures for the efficacy of democracy. While there are conceptual and practical problems with an over-emphasis upon such measures, they are nevertheless indicative of citizen involvement with the issues being addressed by governments. Moreover, by participating in elections and other aspects of mainstream politics, citizens tacitly legitimise the institutions and processes of democratic government and accept the validity of policy outcomes, even where they may personally disagree with the ideological basis of particular governments or the content of particular policies. Conversely, non-participation is often taken to represent, at best, apathy on the part of citizens or worse still, a tacit rejection of the legitimacy of governing institutions and processes. The concern with young people's lack of participation in politics and the fear that disengagement is a generational rather than life-cycle effect is particularly symptomatic of this problem. If disengagement represents a tacit rejection of governing institutions and processes, especially among young people, then it is storing up a major crisis of democratic legitimacy for the future. Of course, this thesis of tacit rejection is only one explanation for the observed phenomenon and may exaggerate a problem that is better explained by wider socio-political and cultural change.⁶ However, it does help to explain the Council's concern with the democratic deficit.

The problem is not new to the Council. A 1997 recommendation of the Committee of Ministers highlighted the need to foster greater involvement of young people in civic life,

5. Parliamentary Assembly Resolution 1353 (2003) on the future of democracy: strengthening democratic institutions, paragraph 8.

6. See P. Norris, *Democratic phoenix: reinventing political activism*, Cambridge: Cambridge University Press, 2002.

especially at the local level.⁷ Among other measures, it recommended the development of European networks to foster greater youth participation. Furthermore, a subsequent recommendation in 1998 recognised the importance of children's participation in family and social life as a precondition for developing broader democratic cultures in society. Among other principles, it argues that:

Participation [of children] is a decisive factor for securing social cohesion and for living in a democracy in accordance with the values of a multicultural society and the principles of tolerance; Participation of children is crucial in influencing the conditions of their own lives, in that participation is not only involvement in institutions and decision making but above all a general pattern of democracy relevant to all areas of family and social life;⁸

Consequently, it goes on to recommend that member states should:

Encourage local authorities and municipalities to promote children's participation, as well as parents and child participation, in as many areas as possible of municipal life, as a way to develop community responsibility, and make citizenship a real-life experience for children; [and] encourage the development of forms of children's participation at the local, regional and national levels.

More recently, the Committee of Ministers has also been concerned about the gender balance in political participation and the need to ensure that women are properly represented in the institutions of democracy. Among its more significant proposals is a recommendation that representation of either women or men in any decision-making body in political or public life should not fall below 40%.⁹ Despite these recommendations, however, participation remains a significant problem for member states.

A second identified problem in much of the Council's work also offers an alternative explanation for political disengagement and the democratic deficit, in as far as it is concerned with the supposed absence of trust that citizens have in political institutions and processes.

7. Committee of Ministers Recommendation No. R (97) 3 on youth participation and the future of civil society.

8. Committee of Ministers Recommendation No. R (98) 8 on children's participation in family and social life.

9. Committee of Ministers Recommendation Rec(2003)3 on balanced participation of women and men in political and public decision making.

Mistrust has several causes. One cause is the evidence of continuing corruption that pervades governments, from allegations of nepotism in the European Union through to the failure of a number of Council of Europe member states to accede to the Council's agreement that establishes GRECO.¹⁰ It should be noted, however, that allegations of corruption are by no means restricted to a few identified countries or, indeed, to any particular tier of government. While the scale of the problem may vary, allegations of corruption occur in all European countries from time to time. It is for this reason that the Council has been concerned with establishing and enforcing a range of democratic standards, from electoral processes¹¹ through to ethical standards for public servants.¹²

An additional cause of political mistrust stems from the increasing professionalisation of politics and the apparent absence of transparency in many political processes. Despite the wealth of information that existing and new media generate on government practices, there remains a sense that much of government is secretive and self-serving. Furthermore, there is a concern that many governments seek to control, manipulate or suppress public debate on particular topics, particularly in their behaviour towards the media.¹³ This latter problem is of particular concern, not least because it goes to the very heart of the fundamental democratic principle of freedom of expression. As a consequence, the Council has continuously supported a free and pluralistic media as both a watchdog for government, thus increasing transparency, and as a wider embodiment of the principle of free speech. The Council's ongoing concern has been that either or both of these roles are being threatened within certain European countries.

While the cause and response is varied, all of these activities are seeking to address a perceived problem of declining trust in political institutions. An absence of trust in politics generally and scepticism towards the institutions of democracy in particular, is implicitly deemed to be a threat to democracy. In identifying distrust as a problem, therefore, the

10. A full list of non-compliant countries is offered in Parliamentary Assembly Recommendation 1629 (2003) on the future of democracy: strengthening democratic institutions, paragraph vi.

11. For example Parliamentary Assembly Resolution 1264 (2001) on the code of good practice in electoral matters; Committee of Ministers Declaration on the Code of Good Practice in Electoral Matters (13 May 2004).

12. See, for example, Committee of Ministers Recommendation No. R 2000 (10) on codes of conduct for public officials; Congress of Local and Regional Authorities of Europe Recommendation 60 (1999) on political integrity of local and regional elected representatives.

13. *Guarding the watchdog: the Council of Europe and the media*, Strasbourg: Council of Europe Publishing, 2003.

Council is seeking to address what it perceives as a major cause of democratic failure in Europe.

A third problem revolves around the issue of suffrage and the potential for disenfranchisement of citizens: both real and perceived. Real disenfranchisement refers to the corrupt, illegal or unethical practices that prevent some individuals from exercising their right to participate in political and democratic processes. This problem includes the practice of family voting and the systematic exclusion of ethnic minorities or immigrants from the political process.¹⁴ It has become a major theme in the Council's work, especially with the increased membership of the Council and the increasing trans-border migration that has become a feature of much of Europe. Perceived disenfranchisement refers to the feeling of many citizens that any participation on their part, either through the ballot box or in other ways, will have no effect upon government. In many respects, this problem relates to the arguments of "relative deprivation" theories which suggest that "the gap between citizens' expectations and states' capacity to solve the problems is widening".¹⁵ However, it also refers to the experiences of particular socio-economic and demographic groups that feel systematically under-represented among the political elite and remain, therefore, disengaged from formal politics. Again, much of the work that the Council is involved in is not only seeking to redress actual disenfranchisement but is also seeking to encourage greater political participation among those groups who perceive a degree of exclusion from democratic politics.¹⁶

A final problem concerns the role of non-governmental organisations in contributing to a democratic culture and the broader development of a civic society in countries where such associational life has been discouraged or actively prevented. Attention to this problem is closely related to the concept of "associative democracy"¹⁷ and the introduction of social

14. See *Women's individual voting rights: a democratic requirement*, Strasbourg: Council of Europe Publishing, 2002; Parliamentary Assembly Document 8916 (2000) on the participation of immigrants and foreign residents in political life in Council of Europe member states.

15. Parliamentary Assembly Document 9951 (2000) on the future of democracy: strengthening democratic institutions, paragraph 6.

16. See the Convention on the Participation of Foreigners in Public Life at Local Level, European Treaty Series No. 144; the European Charter for Regional or Minority Languages, European Treaty Series No. 148; Committee of Ministers Recommendation No. R (94) 9 concerning elderly people.

17. P. Hirst, *Associative democracy: new forms of economic and social governance* Cambridge: Polity Press, 1994.

capital concepts¹⁸ to the policy debate. As the 2002 Citizens' Forum organised by the project "Making democratic institutions work" recognised, non-governmental organisations not only provide services beyond the state but also provide an integrative role, especially at the local level.¹⁹ Indeed, they may also have a role to play in developing community trust and reciprocity, even in relation to political institutions. However, the range and type of NGOs varies considerably across Europe and, in the transition countries in particular, there is a general absence of such community-based organisations. Given that such organisations foster social cohesion, trust and reciprocity and are widely equated with effective democracy,²⁰ their absence in some countries is a major problem. It seems likely that this is an issue that is likely to tax the Council for a number of years.

As noted at the outset, these problems are neither unique to European democracies nor the only ones facing the Council of Europe: other problems, such as the rise of extremist, racist or xenophobic parties across many European countries, also feature prominently in contemporary discussions. Equally, the threat to democracy from terrorism and the ability of these threats both to strengthen the hand of racist and xenophobic parties in individual states and to justify secretive or repressive behaviour by organs of the state is becoming a concern.²¹ However, these four problems of political and democratic legitimacy, mistrust, disenfranchisement and the absence of a civic society infrastructures in some countries, do represent the core of issues that are attracting much of the Council's attention and driving its current activities.

Democratic challenges

The challenges facing European democracy are related to the problems noted above but are different from them in that they emerge from factors that are largely external to the institutions of democracy. In some respects, they are also shaping the problems identified by the Council and the patterns of responses that are available. Again, the challenges are wide and varied. However, many of them can be captured by reference to three broad themes.

18. R. Putnam, *Bowling alone: the collapse and revival of American community*, New York: Simon and Schuster, 2000.

19. Integrated project "Making democratic institutions work", document IP1 (2003)57E, "Proceedings of citizens' forum: NGOs – Key players in democratic governance".

20. R. Putnam, *op. cit.* (n. 18).

21. Address by Walter Schwimmer, Secretary General of the Council of Europe, "The Council of Europe at the dawn of the 21st century".

First, the theme of globalisation is recognised as being significant in affecting the development of democracy and the behaviour of citizens within it. As the Parliamentary Assembly's 2003 resolution on the future of democracy recognised:

The growing globalisation of trade, economies and financial markets poses challenges to national governments and parliaments which are beyond their control through national law and policies, provoking a feeling of insecurity and uncertainty within society, and requiring the reinforced multilateral co-operation of states.²²

While the concept of globalisation remains contested by competing definitions and meanings, from the Council of Europe's perspective globalisation is a challenge because it threatens the sovereignty of nation-states over a range of economic and social issues. Economic and social changes are enforced upon nations, often despite their best efforts to resist them. This threat, in turn, also leads to the problem of decreasing legitimacy for parliaments and governments. Of course, the significance of contemporary globalisation is often overstated and, in some respects at least, differs little from previous periods of global economic and social change: it is simply that the patterns of financial accumulation and power are shifting across nations. However, it is also a new challenge for the Council of Europe because democracy is now the dominant mode of political organisation, at least within Europe. Because globalisation requires co-ordinated responses across nation-states which all have their own distinct democratic foundations and legitimacy, the challenge is more complex and sophisticated than previously experienced. There are concomitant patterns of greater convergence across Europe around core principles, such as the protection of fundamental human rights, and divergence as countries seek to protect their own national or regional heritage and economies. Developing consensual and co-ordinated responses to the challenges of globalisation within a framework that not only seeks to sustain democratic practice but also to extend it, is a fundamental challenge for the Council.

Second, and related to the issue of globalisation, is the challenge of Europeanisation. Various pan-European institutions have expanded significantly in the past two decades. Most notably, the Council of Europe has more than doubled its membership since 1989, from twenty-two in 1988 to forty-five by 2003, while the European Union admitted ten new states in May 2004

22. Parliamentary Assembly Resolution 1353, paragraph 6, *op. cit.* (n. 5).

and is expected to expand further in the next few years. Despite references that these organisations make to a common European heritage,²³ in reality their expansion encompasses a wide range of ethnic, religious and cultural differences which need to be accommodated in their various institutional developments. Indeed, the linguistic challenges of bringing together forty-five countries that are so geographically varied, from Iceland through to Azerbaijan and the Russian Federation through to Portugal, poses a fundamental problem for developing a common European identity and understanding of democracy. Some go as far as to question whether Europe can survive the ignorance of other languages in Europe. The expansion has also increased the mobility of citizens, creating new challenges for local and regional democracy. Consequently, the challenge of Europeanisation is twofold. On the one hand, it is the challenge of defining a common set of standards and democratic practices which can accommodate the very different practices and cultures of individual member states. On the other hand, it is also the broader challenge of defining a common understanding of Europeanisation and its meaning to democracy, especially in the context of some political and social cultures that are resistant to any form of closer European co-operation and sceptical of Europe-wide institutions.²⁴

The third challenge is concerned more with the broader social and political trends that can be observed across many different democracies and, particularly, the change in political behaviour that can be observed among citizens. Pippa Norris, in a paper for the Council's symposium on young people and democratic institutions, refers to the dual issues of changing repertoires and agencies of political activity as the basis for understanding broader changes in political behaviour.²⁵ By repertoires she means the actions used for political expression and notes a generational move from conventional politics organised around the work of political parties, to cause-oriented repertoires focused more around single issue politics and involving more direct forms of action. Her observations are supported by other research which shows a higher level of individualisation and issue-focus in contemporary political engagement.²⁶ By

23. Statute of the Council of Europe, European Treaty Series No. 001 (1949); The European Convention CONV 850/03, draft treaty for establishing a constitution for Europe (2003).

24. See P. Taggart and A. Szczerbiak, "Contemporary euroscepticism in the party systems of the European Union candidate states of Central and Eastern Europe", *European Journal of Political Research*, 43:1, 2004, pp. 1-28.

25. P. Norris, "Young people and political activism: from the politics of loyalties to the politics of choice?", paper given at the Council of Europe symposium "Young people and democratic institutions: from disillusionment to participation" (Strasbourg 27-28 November 2003).

26. See C. Pattie, P. Seyd and P. Whiteley, "Citizenship and civic engagement: attitudes and behaviour in Britain", *Political Studies* 51:3, 2003, pp. 443-68.

agencies she means the collective organisations that mediate and direct political engagement. Again she notes a move away from engagement with traditional organisations such as churches and unions and a greater propensity, especially among young people, to join new social movements and issue based organisations. As she argues:

Instead today it seems clearer to distinguish between citizen-oriented actions, relating mainly to elections and parties, and cause-oriented repertoires, which focus attention upon specific issues and policy concerns, exemplified by consumer politics (buying or boycotting certain products for political or ethical reasons), petitioning, demonstrations, and protests.²⁷

In many respects her empirical evidence adds substance to the changing patterns of engagement that have been widely observed across European democracies. Interestingly, she argues that there is little evidence of declining youth participation: “the political energies among the younger generation in post-industrial societies have diversified and flowed through cause-oriented activism, rather than simply ebbed away into apathy”.²⁸

The changing pattern of political repertoires raises an important democratic challenge for the Council of Europe not only because it means that the Council must recognise and respond to differing mechanisms for political participation but, also, because these changing repertoires have significance for the established institutions of democracy. The difference between the repertoires is not only one of behaviour but also of focus. Traditional patterns of political participation were mostly focused around attempts to directly or indirectly influence representative government. Indeed, much of the conventional literature on political participation adopts this position as the means of defining and distinguishing political participation from wider social or economic behaviour.²⁹ By contrast, new or emerging repertoires of political participation, particularly among the young, are focused on more nebulous targets and see the institutions of representative democracy as only one point of influence. New social movements are often more concerned with the behaviour of multi-national companies or are focused upon particular issues that cut across national boundaries. The nation-state and its institutions of national and sub-national governance are often deemed

27. P. Norris, *op. cit.* (n. 25) p. 6.

28. *Ibid.*, p. 27.

29. See G. Parry, G. Moyser and N. Day, *Political participation and democracy in Britain*, Cambridge: Cambridge University Press, 1992; S. Verba, K. Schlozman and H. Brady, *Voice and equality: civic voluntarism in American politics*, Cambridge: Harvard University Press, 1995.

peripheral or irrelevant in these wider struggles, especially where global economic or environmental issues are the focus of attention. If the argument that there is a generational shift towards these new repertoires of political engagement is correct, then the Council of Europe faces a significant challenge in making existing institutions of representative democracy relevant to emerging issues and patterns of political behaviour. Unless democratic institutions can respond to this challenge they run the risk of becoming increasingly irrelevant to the political interests of large parts of society. Ultimately, a failure to rise to this challenge may lead to further atrophy of democracy across Europe.

The Council, of course, has already begun to respond to these problems and challenges. After all, the identification of these issues has emerged from the Council's own adopted texts, including the recommendations and resolutions of various organs within it and it seems likely that they will continue to drive many of the specific activities of the Council.

Democratic opportunities

While the range of responses to these problems and challenges is wide and varied, both within the Council and among individual member states, there are two key opportunities which the Council is seeking to grasp: the opportunities offered by expanding Europeanisation and the role of new technologies in sustaining and adapting democratic practices. This final section will briefly set out these opportunities.

Despite recognising the multiple challenges that Europeanisation raises for the Council it is also necessary to acknowledge the opportunities that it affords democracy. Events since 1989 have seen democracy become the overwhelming mode of political organisation across Europe, with democratic institutions in the transition countries being shaped especially by the activities of the Council of Europe and other European-wide bodies such as the European Union and the Organisation for Security and Co-operation in Europe (OSCE). The massive expansion of both Europe as a coherent political body and democracy as its dominant mode of organisation offers a number of opportunities. Most obviously, it enables a degree of co-operation across all forty-five member countries of the Council of Europe that never seemed possible even twenty years ago. This co-operation and unity was uppermost in the thoughts

of the 10 founding countries when they established the Council's statute. In the preamble to the statute they state:

Believing that, for the maintenance and further realisation of these ideals and in the interests of economic and social progress, there is a need of a closer unity between all like-minded countries of Europe; Considering that, to respond to this need and to the expressed aspirations of their peoples in this regard, it is necessary forthwith to create an organisation which will bring European States into closer association ...³⁰

However, in 1949 these aspirations must have seemed unattainable on the scale that they are now being achieved by the Council. As Walter Schwimmer, the Secretary General of the Council has argued:

[T]he Council of Europe remained an essentially Western European organisation until the gradual dismantling of the regimes in Central and Eastern Europe which were based on different political structures and values. This process started in 1989 when the Berlin Wall came down. The revolutions of 1989 brought the Council of Europe back to its original objectives. The Council of Europe had always the aim to cover the whole of Europe. Only the political, military and ideological division of Europe prevented the Organisation from fulfilling its statutory objectives. The political "new deal" in Europe, which followed the development of 1989, gave the Council of Europe a chance to deploy its potential to the full as a pan-European co-operation structure, as well as an essentially peace building and conflict prevention organisation.³¹

Its ever expanding membership to encompass almost every European state and principality provides a unique opportunity to promote a common basis for democracy across the continent and beyond. Only two European countries, Monaco and Belarus, remain outside of the Council of Europe umbrella. Both applied for membership, but only Monaco is a candidate country today.³² Indeed, Monaco is likely to accede very soon, following a favourable opinion from the Parliamentary Assembly in April 2004.

30. Statute of the Council of Europe, op. cit. (n. 30) preamble.

31. Address by Walter Schwimmer, op. cit. (n. 21).

32. Belarus is not longer a candidate for membership because its current political regime is not deemed to be democratic.

As well as co-operation and a sense of European unity the Europeanisation project also allows two related democratic developments to emerge. First, it enables the development of a common set of democratic principles and standards that can be promoted across Europe. The following chapter is particularly concerned with identifying the common principles that lie at the heart of European democracy. The sense of co-operation and unity fostered by the Council encourages both the Council and its member states to identify democratic failings in particular countries and to exercise their influence to raise democratic standards and practice. The instruments for achieving this range from the 193 legally binding European treaties that members are expected to sign up to, through to monitoring exercises established by the Committee of Ministers in relation to specific countries.³³ In this respect, expanding Europeanisation is a virtuous circle that continuously raises opportunities to enhance European democracy. However, the notion of “variable geometry” which enables differing democratic practices to be accommodated within the overarching remit of the Council also poses some problems for this virtuous circle. As Peter Schieder, the President of the Parliamentary Assembly observed in a 2003 speech (“Building one Europe”, September 2003):

[Europe] ... is an idea, a vision of a peaceful and prosperous continent, based on ever closer co-operation between all its peoples, and governed by a common set of values of democracy, human rights and the rule of law... When it comes to the most fundamental principles of our societies freedom, democracy, human rights, human dignity, tolerance, justice, the rule of law there cannot be more than one Europe. We cannot allow à la carte values, where authorities, national or others, are allowed to pick and choose the norms of decent conduct which suit them. We share the responsibility to prevent this from happening.

The Council faces some significant challenges in realising this opportunity.

Second, Europeanisation offers the opportunity for wider learning and policy transfer between countries, especially in the context of enhancing democratic institutions and practices. The harmonisation of democratic standards seeks, in general, to gain best practice from across member states and to reinforce democracy. In the context of a diverse range of member states, the opportunities for experiential learning are immense. Contrasts between large and

33. For an example of a recent monitoring report, see Committee of Ministers, Ministers’ Deputies Information Documents on the honouring of commitments by Bosnia and Herzegovina: report of the GR-EDS delegation on its visit of 20-23 October 2003 (Cm/Inf(2003)50).

small states, between geographically homogenous and geographically diverse countries, between old and new democracies and between ethnic, cultural and linguistic differences, all provide opportunities for different experiences to emerge and different lessons to be learned. Member states may learn from others with which they share similar characteristics in terms of scale, geography or demography. On the other hand, differences between countries may also act as a mirror in some instances, especially when comparing the practices of old and new democracies. For example, freedom of the press is widely assumed to be a fundamental feature of democracy and one that needs to be actively promoted among newer democracies. However, French press law dating back to 1881 is highly restrictive and although not applied in practice, nevertheless remains on the statute books.³⁴ Expanding Europeanisation, therefore, offers opportunity not only for the development of a core set of beliefs but, also, for all member countries to reflect upon how their democracy works and how it might be improved.

The other opportunity that the Council has sought to exploit has been in the area of new information and communication technologies (ICTs) and the potential that they offer democracy. The project “Making democratic institutions work” has been particularly important in focusing the Council’s work in this area. Walter Schwimmer, the Secretary General of the Council of Europe, confirmed the Council’s commitment to this opportunity in his foreword to a 2003 review of the Council’s legal texts and publication in the field of ICTs:

... it is a priority of the Council of Europe to fully exploit the potential of ICTs as a means of improving people’s direct participation in shaping the democracies they live in ... Work on these new themes is being carried out in the framework of the Europe-wide standards for ICT as a tool to uphold and develop democracy which have been set by the Council of Europe on such issues as data protection, access provision for rural areas, training for women and girls, the development of cultural activities and the dangers of cybercrime and cyber hate-speech.³⁵

This recognition of the importance of ICTs to the democratic future of Europe is not only an acknowledgement of how new technologies may be used to enhance some democratic

34. Parliamentary Assembly Recommendation 1589 (2003) on freedom of expression in the media in Europe, paragraph 11.

35. *Highway to democr@cy – the Council of Europe and the information society*, Strasbourg: Council of Europe Publishing, 2003.

engagement but also an understanding of how technological developments cut across other aspects of the Council's work. Although this report will return to the relationship between ICTs and democracy a number of times in the chapters that follow, this section will briefly outline two opportunities that the Council appears to anticipate from the exploitation of ICTs.

First, the Council seeks to exploit ICTs to support or enhance the institutions of contemporary democracy by bringing about changes in democratic practice. In many respects, this is what Trechsel et al., in their study of e-democracy across all twenty-five current and acceding countries of the European Union, refer to as the latest "technology of democracy".³⁶ They argue that the mechanisms by which democratic principles have been articulated have changed greatly throughout democracy's history, from the Greek Agora to contemporary systems of representative government. In the dynamic development of democracy, each transition to a new set of democratic institutions has been dependent upon the adoption of particular technologies. In this context, ICTs are simply the latest technology to be applied to democracy. Of course, depending upon how it is adopted, this latest technology holds profound implications for contemporary institutions. The role of the Council in supporting or developing standards in particular ICT applications, therefore, is significant for the way in which these technologies enhance, or otherwise change, democratic practices. In particular, the Council appears to want to protect core democratic principles when ICTs are implemented.

The Council has been involved in promoting the take-up of new technologies both in general across Europe and, more specifically in relation to the "Making democratic institutions work" project, to support or enhance identified democratic processes.³⁷ While the impact of ICTs in Europe has been a long standing concern for the Council, however, the potential of ICTs as a new "technology of democracy" is a relatively recent interest. The Council has adopted a number of conventions and texts on aspects of the information society, ranging from data protection through to European wide responses to cyber crime, demonstrating a

36. A. Trechsel, R. Kies, F. Mendez, P. Schmitter, "Evaluation of the use of new technologies in order to facilitate democracy in Europe: E-democratising the parliaments and parties in Europe", European Parliament, STOA, Directorate-General for Research.

37. Highway to democr@cy, op. cit. (n. 36).

long and ongoing concern with the different impacts of these new technologies.³⁸ However, it was not until 1997 that the Parliamentary Assembly began to express a particular desire to investigate the ways in which ICTs might support the democratic process with two linked resolutions that explored the representative and participatory potential.³⁹ Following these resolutions the Committee of Ministers adopted a declaration that welcomed:

the opportunities offered by the new information technologies to promote freedom of expression and information, political pluralism and cultural diversity, and to contribute to a more democratic and sustainable information society

and recognised

the potential of new information technologies to improve openness, transparency and efficiency at all levels – national, regional and local – of the governance, administration and judicial systems of member states and hence to consolidate democratic stability.⁴⁰

Such a declaration not only acknowledges the democratic potential of ICTs but exhorts member states to adopt and adapt technological developments to support specific democratic goals. In particular, it encourages the adaptation of e-government tools to enhance the effectiveness, transparency and responsiveness of democratic institutions.

Since the 1999 declaration countries across Europe and beyond have become interested especially in remote e-voting and a number of experiments have been conducted in various member states.⁴¹ Through the integrated project, the Council has responded by developing an e-voting stream within its activities that supports the development of pan-European standards and protocols for e-voting systems. While there remain concerns over the technical, social

38. Committee of Ministers Resolution 22 (1973) on the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector; Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, European Treaty Series No. 108 (1981); Convention on Cybercrime, European Treaty Series No. 185 (2001).

39. Parliamentary Assembly Resolution 1120 (1997) on the impact of the new communication and information technologies on democracy; Parliamentary Assembly Resolution 1121 (1997) on the instruments of citizen participation in representative democracy.

40. Committee of Ministers Declaration on a European policy for new information technologies (1999).

41. See A. Trechsel and F. Mendez, *The European Union and e-voting. addressing the European Parliament's internet voting challenge*, London: Routledge; N. Kersting and H. Baldersheim (eds.) *Electronic voting and democracy. A comparative analysis*, Basingstoke: Palgrave Macmillan.

and legal environments in which e-voting can emerge,⁴² the Council is leading the way in setting trans-national standards for the way in which such difficulties can be addressed. In this area, in particular, it is grasping the democratic potential of ICTs and seeking to mitigate the supposedly negative impact that technologies might have on democracy.

The second opportunity that new ICTs offer democracy is less tangible but nonetheless significant. Because the technologies have an affect upon the institutions of democracy they inevitably lead to the expression of particular values. An emphasis upon a particular technology to support a particular democratic process or activity explicitly articulates the underlying values and principles of that aspect of democracy. For example, e-voting seeks to extend the principles of political equality by making it easier for all citizens to vote (although, without addressing the digital divide it may have the opposite effect in the short term). Conversely, allowing anti-democratic values to be pursued through ICTs implicitly accepts the abandonment of particular democratic principles. The Council's work in seeking to prevent the development of "hate speech" on the Internet gives substance to its broader work on balancing freedom of speech with anti-racist and xenophobic activities.⁴³ In pursuing such concerns the Council is not only expressing its disquiet about particular uses of ICTs but is also giving voice to its own deep-rooted values and principles. In this respect ICTs afford an opportunity to reinforce and articulate the values and principles that the Council stands for. Sometimes this reinforcement may reflect a positive use of the technology while, at other times, its use may be more negative. However, the significant point is that ICTs offer such an opportunity.

This reinforcement is not based upon an argument of technological determinism. There does not appear to be an assumption in the Council's *acquis* that technologies have implicit impacts upon democracy or lead inexorably to particular democratic futures. Rather the Council recognises the potential changes that are occurring across Europe and the opportunities that the harnessing of particular technological developments may offer democracy.

42. See L. Pratchett with S. Birch, S. Candy, N. Fairweather, S. Rogerson, V. Stone, R. Watt and M. Wingfield, *The implementation of electronic voting in the UK*, London: Local Government Association, 2002.

43. Committee of Ministers Recommendation No. R (97) on "Hate Speech".

Conclusions

It is important to recognise the problems, challenges and opportunities that face European democracy, because it is these issues that provide the context in which the Council of Europe is seeking to make democratic institutions work. The most apparent problem is the perception of an increasing democratic deficit in both established and newer democracies. Participation in formal political institutions continues to decline while the attention of the politically active is increasingly shifting towards issues that are beyond the control of nation-states and take place outside of the traditional institutions of collective politics. Faced with changing patterns of political engagement, the legitimacy of traditional institutions of democracy is called into question. This issue is compounded by a second problem: that of political mistrust. Although some scepticism is healthy for democracy, declining trust in both politics and political institutions is a threat in so far as it encourages even greater distance between citizens and governments. Even if such mistrust was not an issue, however, the extent to which various groups are systematically excluded from political life and effectively disenfranchised, represents a third problem for contemporary European democracy. Whether perceived or real, disenfranchisement is a problem for democracy because it strikes at one of its core principles, that of political equality. Finally, a fourth problem for democracy is the absence of effective civic infrastructures and the active participation of NGOs in political and democratic life in many countries. The organisations of civil society are widely acknowledged to be an important intermediary between citizens and the state in effective democracies. Their absence, therefore, is a fundamental problem for democracy which may inhibit the effective working of its institutions.

The challenges to democracy come from outside of its institutional structures or procedures and revolve around broader socio-economic and political pressures. First, an awareness of globalisation frames the limitations of individual nation-states in responding to shifting economic and demographic patterns. While not a new phenomenon, globalisation is currently challenging for Europe because, for the first time, democracy is the dominant mode of political organisation across the continent, making responses to new challenges more complex than in previous eras. Second, the consolidation of various pan-European bodies adds to these challenges. In particular, the challenge is one of concomitant convergence

around core beliefs, rules and institutions while, at the same time, seeking to protect and encourage local, national and regional differences and identities. As the only body to which all European democracies accede, the Council of Europe has an important role to play in balancing these challenges.

Europeanisation, of course, also represents one of the great opportunities for democracy across Europe. As well as achieving consensus on particular issues, the umbrella of the Council of Europe provides a strong institutional framework for co-operation, learning and policy transfer across Europe. This opportunity is particularly evident in relation to the adoption of new technologies to support or enhance democracy. The Council recognized this opportunity early on and has taken a number of steps to support the effective use of technologies.

The problems, challenges and opportunities set out in this chapter are, of course, only an overview of the main issues that the Council recognises. There remains a wide range of other issues that this chapter has not explored. However, understanding the issues in terms of specific problems, wider challenges and emerging opportunities allows the developing principles of the Council to be explored in more detail. These principles are the subject of the next chapter.

CHAPTER 3

THE CORE PRINCIPLES OF EUROPEAN DEMOCRACY

To understand the effectiveness of the Council's democratic activities it is necessary to address the direction in which democracy is evolving across Europe and the principles that the Council, and related organisations, are seeking to promote. Some of these principles are self-evident and have been clearly articulated in a range of documents throughout the life of the Council. Others remain more implicit and need further elaboration. This chapter provides an analysis of the main democratic principles that the Council of Europe is seeking to promote across its member states. In particular, it highlights the Council's own understanding of these issues and principles, as set out in its various texts. It will also examine the main instruments that it uses to pursue these activities.

This exercise is, by necessity, a critical one. While there is common agreement across Europe that democracy faces some significant challenges, the causes of these challenges and possible solutions to them is more contentious. Even where an overarching approach to particular challenges is shared, the problems identified and solutions implemented are likely to vary between countries. The widespread experimentation that has taken place with e-voting across Europe provides an illustrative example of such contiguous convergence and divergence. One of the main justifications for introducing e-voting in different countries has been to address the widely experienced problem of declining electoral turnout. However, implementation strategies for e-voting vary considerably, from a publicly-procured generic package in the Netherlands through to a programme of locally organised and highly differentiated experiments in the United Kingdom.⁴⁴ The implementation of e-voting is also raising different challenges in various countries. In the French town of Vandoeuvre-lès-Nancy, an Internet voting experiment for the 2002 Presidential election caused considerable concern for security because the election data was initially to be processed by an overseas company in New York, even though this same company (election.com) was already

44. N. Kersting, *op. cit.* (n. 42).

providing Internet voting facilities for many other European countries.⁴⁵ In Spain, it is the technical capacity to ensure the security of the individual vote that appears to be causing the most concern.⁴⁶ Understanding democratic challenges at a pan-European level, therefore, is complex: even where countries are apparently adopting the same tools or technologies in response to supposedly similar challenges, the implementation strategies and political responses vary considerably. Working through this complexity of political and cultural diversity is a significant challenge for pan-European organisations.

Discussions of democracy add to this complexity. Despite a common philosophical and cultural heritage that is, arguably, shared by all Europeans, democracy has emerged in different historical contexts in each country and has been developed through varying institutional forms. Institutional structures and the importance of particular conventions or practices reflect the past experience of politics in individual countries. Despite an expanding literature on policy learning across countries, the significance and operation of particular institutional forms owes more to the developments within a country than to learning from the experiences of other countries. Consequently, there is no single form of democracy that dominates the European horizon and there remains considerable divergence in both the conceptualisation and enactment of democracy across Europe.

Having recognised the complexity and considerable diversity of Europe's democratic practice, however, it is also necessary to recognise the extent of convergence that the Council of Europe, the European Union and other pan-European bodies have encouraged in the past half century. Many countries have developed new democratic forms despite the absence of democratic practices in their recent history. Longer-standing democracies have also evolved during the same period. As a consequence, there is a degree of harmonisation across these various countries in terms of both the democratic principles that they are seeking to enact and the standards and practices that are embodied in their various institutions. Moreover, they are all being subjected to similar experiences that raise similar challenges. While the way in which particular institutions mediate these challenges may vary, there remains a shared experience that can be shaped and developed through organisations such as the Council of

45. Délibération No. 02-022 de la Commission nationale de l'informatique et des libertés (demande d'avis No. 796151) www.clic-droit.com.

46. Luis Guijarro Coloma "E-voting in the region of Valencia (Spain)" in A. Trechsel and F. Mendez, *The European Union and e-voting: addressing the European Parliament's internet voting challenge*, London: Routledge, 2004.

Europe. This chapter analyses the way in which the Council has helped individual countries to recognise the challenges and to articulate the core principles of democracy.

Box 3.1: General principles of democracy

The Council's Statute

(Statute of the Council of Europe (1949) ETS No. 001)

Democracy as a fundamental component of European life is enshrined in the Council's statute, which both commits member states to general democratic principles and establishes an operational structure based upon the institutions of democracy among member states. Its opening statements emphasise that democracy is based upon:

individual freedom, political liberty and the rule of law.

These principles are constantly reaffirmed in the Council's *acquis* and form the basis of every instrument that follows.

Operationally, the Statute creates a Committee of Ministers as the executive decision-making organ of the Council (the Foreign Minister of each member state) and a Consultative Assembly (the Parliamentary Assembly) as the deliberative organ (with members appointed from the elected parliaments of each state). This structure builds on the democratic structures that are anticipated in each member state and encourages a form of democratic practice based upon a separation of powers.

The European Convention on Human Rights

(Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS No. 005; and First Protocol to the Convention (1952) ETS No. 009)

The European Convention on Human Rights sets out a number of fundamental rights and freedoms: right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination. It also establishes an international enforcement machinery, the European Court of Human Rights in Strasbourg, to rule on individual petitions and to give advisory opinions concerning the interpretation of the Convention and protocols.

All of the Convention's rights might be considered necessary in a modern democracy. However, some are particularly pertinent to the working of democracy:

- Article 9: the right to freedom of thought, conscience and religion;
- Article 10: the right to freedom of expression;
- Article 11: the right to freedom of association;
- Article 3 of Protocol No. 1: the right to free elections.

Democracy is not a coherent or stable set of principles that can be easily realised, especially not in a cross-national analysis. Indeed, it is one of the truisms of political theory that

democracy is an essentially contested concept.⁴⁷ While there are a range of principles that are frequently offered,⁴⁸ their precise combination and the relative importance of different values is often open to interpretation. Indeed, in some respects, abstract principles are less meaningful than the context in which they are elaborated. The abstract principles of democracy are elaborated by the particular institutional forms that make democracy work. The institutional embodiment of different principles and their practice in various contexts gives them meaning. The enactment of democracy⁴⁹ at different trans-national, national and sub-national levels not only gives meaning to such principles but also highlights their relative significance to democratic practice. For example, while the principle of political equality may appear to be fundamental to most theories of democracy, many institutions of democracy undermine the possibility of it being realised, often because they are addressing structural inequalities in society. If positive measures are directed specifically at marginalised groups, they have the dichotomous effect of both redressing existing inequalities and, potentially, creating new inequalities. Furthermore, democracy must be seen as a dynamic set of principles in which the relative importance of potentially competing values changes over time in response to both internal challenges to its concepts and external influences. To understand the underlying principles of European democracy it is necessary to analyse the process of change to which European democracies are continually being subjected.

The Council of Europe's approach to democracy is based upon an assumption that there is a shared understanding of the principles and values that constitute democracy. A significant proportion of conventions and charters begin by recognising the common heritage that is shared by all member states. This common heritage includes the core principles elaborated in the Council's statute, in which all members reaffirm their "devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy".⁵⁰ These principles are central to everything that the Council undertakes, whether it is in relation to individual human rights or in relation to improving democratic

47. J. Loughlin, *Subnational democracy in the European Union*, Oxford: Oxford University Press, 2001.

48. Saward selects four: political equality, inclusion, expressive freedom and transparency, although he uses these as illustrative rather than definitive principles. See M. Saward, "Enacting democracy", *Political Studies* 51/1, 2003, pp. 161-79.

49. This is an expression that Saward (*ibid.*) uses to refer to the way in which democratic procedures are sequenced.

50. Council of Europe, *op. cit.* preamble (n. 23).

institutions. Being at such an abstract level, however, they leave wide scope for interpretation.

Europe's common heritage is a recurring theme that reflects a wide engagement with the philosophical and historical development of democracy across different nation states. As Loughlin⁵¹ recognises, this common heritage includes such concepts as a belief in the "exalted role of the individual", the institutional separation of powers, the Rousseau-inspired belief in the existence of a "general will", and the notion of citizenship and the rights and responsibilities that go with it. In effect, the common heritage is one of liberal democracy, even if its values are institutionalised in different ways in different countries. The common heritage may provide a guide to what to expect from European democracy but it does not anticipate either a common starting point or a consensus around the future development of democracy.

This section goes beyond the vague and ambiguous assertions of a European common heritage to explore five key principles that inform the Council of Europe's approach to democracy in general and the assertion of democratic standards in particular. While derived from democratic theory these principles are not necessarily consistent with those normally advanced within that discipline. Instead, they are the principles that populate the various texts of the Council and which feature prominently in the debates and arguments advanced in its various publications. While not all of them are articulated as being fundamental principles, we argue here that they are the most recurrent and distinctive features of the Council's activities. Collectively, therefore, they offer a potential definition of democracy from the Council of Europe's own documents.

These five principles are set out below, partly to give greater emphasis to them as the defining features of European democracy as promoted by the Council, and partly to allow an analysis of democratic development and enactment across Europe. Democratic principles can only be understood in institutional contexts. Consequently, it is necessary not only to set out the principles and the documents in which they are expressed but also to consider the ways in which these principles are enacted through particular institutional forms.

51. J. Loughlin (2001) *op. cit.* (n. 48).

Parliamentary democracy

Box 3.2: The primacy of parliamentary democracy

The European Convention on Human Rights – First Protocol (ETS No. 009)

Article 3 of the First Protocol establishes the right to free elections in all member states that underpins a parliamentary structure of democracy:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

This article establishes, in law, the principle that Parliament is the voice of the people.

Parliamentary Assembly Resolution 800 (1983) on the principles of democracy

This resolution highlights the main features of an effective representative system of democracy:

- free and secret elections to Parliament, enjoying universal suffrage;
- public engagement and consultation beyond the ballot box;
- division of power across institutions, including some form of decentralisation where appropriate;
- a plurality of responsive and representative political parties;
- legal standards and the rule of law as the basis of all political and administrative activity.

Other resolutions that have a bearing on the implementation of these principles include:

Parliamentary Assembly Resolution 980 (1992) on citizens' participation in politics;

Parliamentary Assembly Resolution 1121(1997) on instruments of citizen participation in representative democracy;

Parliamentary Assembly Resolution 1154 (1998) on the democratic functioning of national parliaments;

Parliamentary Assembly Resolution 1353 (2003) on the future of democracy: strengthening democratic institutions.

Probably the most fundamental feature of the Council of Europe is its enduring commitment to representative democracy as the defining principle from which all other democratic characteristics follow. This principle is embodied in the Council's own statute,⁵² which established two principal organs at its heart: a Committee of Ministers composed of the foreign ministers (or their representatives) of each member state; and a Consultative

52. Statute of the Council of Europe, op. cit. (n. 23).

Assembly (renamed the Parliamentary Assembly in 1994) comprising elected representatives from the member states' parliaments. While the statute does not make any explicit reference to the need for parliamentary democracy as the basis for membership of its organisation, it contains a number of implicit requirements for representative practices. Indeed, much of its democratic standards are about ensuring adequate and appropriate representation in elected assemblies.

The primacy of representative democracy has been reaffirmed a number of times by the Parliamentary Assembly. Its 1983 resolution on the principles of democracy argues:

Free elections, with secret ballot and universal suffrage, at reasonable intervals, *to parliaments, enjoying a large measure of sovereignty and composed of representatives of political parties* with freedom to organise and express themselves, remain the irreplaceable core of democratic political life.⁵³

The Council often equates representative democracy with an emphasis upon parliamentary democracy. This link is evident in the quote offered above but is even more apparent in the Parliamentary Assembly's assertion of the importance of parliamentary democracy. Several times, the Assembly has felt it necessary to give renewed emphasis to the primary importance of parliaments as the cornerstone of democracy, especially in a perceived context of democratic atrophy and parliamentary shortcomings across Europe. A 1992 resolution observed:

Denunciation of the shortcomings of parliamentary democracies does not call into question attachment to the representative system considered to be "the best and only one acceptable" ... only parliamentarians in their legislative capacity represent general interest.⁵⁴

The importance of parliaments representing the general will and being able to strike the balance between competing citizen interests was further articulated in a 1997 resolution:

53. Parliamentary Assembly Resolution 800 (1983) on the principles of democracy, section 6*Bi* (emphasis added).

54. Parliamentary Assembly Resolution 980 (1992) on citizens' participation in politics, paragraph 6-7.

The harmonisation of mostly contradictory and conflicting needs of citizens or groups of citizens, dictated by the general interest, can be achieved only through parliamentary deliberations.⁵⁵

A 1998 resolution reaffirmed its commitment to parliamentary democracy and set out its justification:

Parliament is the expression of the will of the people and the public interest. To fulfil this role, it performs functions which form the core of European parliamentarianism: it makes the law, establishes the rules of positive law, and sets the legal rules which govern our society; through a number of procedures, it acts as a watchdog as regards the executive and, by virtue of this power, the government must command the confidence of the Chamber elected by universal suffrage.⁵⁶

In other words, parliaments enshrine the Council's commitment to political liberty and the rule of law. More recently, in its resolution on the future of democracy in Europe, the Assembly has also pointed out that:

Parliamentary democracy is one of the values that are the basis of, and reason for, the Council of Europe's work towards greater European unity. By reaffirming their devotion to the ideals and values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law – principles which form the basis of all genuine democracy – all member states have committed themselves under the Statute of the Council of Europe to guaranteeing free and pluralist Parliamentary democracy.⁵⁷

In many respects it is not surprising that the Parliamentary Assembly should want to reinforce the role of parliaments as residing at the very heart of democracy. After all, the Assembly is, itself, composed of parliamentarians from the forty-five member states. However, the defence and justification for parliaments as the embodiment of representative democracy and the arbiters of the general will lies not only in the positions of past or existing members of the Assembly, but also in the wider role that parliaments play in democracy. As well as acting as a check on the power of the executive, the Assembly also offers the

55. Parliamentary Assembly Resolution 1121(1997) on instruments of citizen participation in representative democracy, paragraph 6.

56. Parliamentary Assembly Resolution 1154 (1998) on democratic functioning of national parliaments, paragraph 1.

57. Parliamentary Assembly Resolution 1353, paragraph 1, op. cit. (n. 5).

argument that in an effective democracy, parliaments should be the primary focus for political debate. This argument has been particularly expressed in relation to a concern that parliamentary debate is now shaped by media interests and has been greatly weakened as a result.⁵⁸ Even worse, a concern exists that parliaments could “lose to the media their role as a focus for debating and determining questions of national interest”.⁵⁹ This role of parliaments as a focus for national debate offers a convincing justification for their continued primacy in modern democracy.

The continuous reaffirmation of this primacy, however, poses a number of challenges for the democratic future of Europe and the role of the Council in making democratic institutions work. From the assertion of parliamentary democracy follows a number of significant practices that are fundamental to the understanding of how democracy should work. These practices include the operationalisation of the concept of political equality through universal suffrage, the implementation of rigorous and effective electoral law, the institutionalisation of parliamentary practices, the delivery of governmental transparency and the application of wider legal frameworks to prevent corruption. Such practices, however, do not necessarily fit comfortably with many of the contemporary challenges facing democracy or, indeed, many of the democratic initiatives and priorities being pursued by member states or the organs of the Council.

The emphasis upon greater citizen participation beyond voting in periodic elections is one example of the discordant relationship between the defence of parliamentary democracy and the development of new democratic instruments. Support for greater citizen participation in the affairs of the government, either as individuals (for example, through referendums)⁶⁰ or as collective bodies (for example in the form of NGOs)⁶¹ is premised on an assumption that such engagement will redress current citizen disaffection with institutionalised politics and enhance engagement with the formal democratic process of elections.⁶² Furthermore, it is a popular and widely supported measure not only within the Council but also across individual member states. As will be argued below, much of the Council’s discussion around greater participation focuses upon the development of civil society and the strengthening of

58. Parliamentary Assembly Resolution 1142 (1997) on parliaments and media.

59. Parliamentary Assembly Resolution 584 (1975) on the broadcasting of national parliamentary debates.

60. Parliamentary Assembly Resolution 1121 (1997) *op. cit.* (n. 56).

61. Parliamentary Assembly Resolution 980 (1992) on citizens’ participation in politics.

62. Parliamentary Assembly Resolution 1353, paragraphs 7 and 9, *op. cit.* (n. 5).

participation as a democratic end in itself: a move towards a model of what has become known as “strong democracy”.⁶³ However, the concomitant defence of parliamentary democracy being offered by the Assembly and other organs of the Council is focused much more upon the “realist” model of democracy espoused by Joseph Schumpeter and others, which recognises parliaments as the centre of democracy and calls for a division of labour between elected politicians and the citizens they serve. In Schumpeter’s words:

The voters outside of parliament must respect the division of labour between themselves and the politicians they elect. ... they must understand that, once they have elected an individual, political action is his business and not theirs. This means that they must refrain from instructing him about what he is to do ... attempts at restricting the freedom of action of members of parliament – the practice of bombarding them with letters and telegrams for instance – ought to come under the same ban.⁶⁴

The various attempts that the Assembly has made to defend parliaments as the focal point of political debate in societies⁶⁵ or to restore citizen confidence in traditional institutions that support parliamentary democracy⁶⁶ implicitly accept this division of labour. The Venice Commission’s concern with such issues as parliamentary immunity is a similar expression of this division.⁶⁷ Consequently, the Council is caught between two fundamentally opposing beliefs that are linked to potentially contradictory models of democracy. On the one hand, there is a desire to defend parliaments as the home of representative democracy and to protect their primacy as the centre of political debate and deliberation. On the other hand, in the face of declining parliamentary legitimacy across Europe, there is a desire to find new modes of political engagement, new political spaces and new spheres of political deliberation. While the aim might be to defend representative democracy and its institutional home – parliament – the consequence could be to further undermine the legitimacy of the very institutions that such measures are seeking to protect.

63. B. Barber *Strong democracy: participatory politics for a new age*, Berkeley: University of California Press, 1984.

64. J. Schumpeter, *Capitalism, socialism and democracy*, London: Routledge, 1943 (reprinted 2000), p. 295.

65. Parliamentary Assembly Resolution 1142, op. cit. (n. 59).

66. Parliamentary Assembly Recommendation 1516 (2001) on the financing of political parties; Venice Commission, “Guidelines and report on the financing of political parties”, document CDL-INF (2001) 8.

67. Venice Commission, “Report on the regime of parliamentary immunity”, document CDL-INF (1996) 007e.

We are not arguing here that the Assembly is wrong to place parliamentary democracy at the centre of its activities. Neither is it wrong to seek greater engagement of citizens in the working of democracy nor to foster more inclusive forms of participation. However, it is important that attention is drawn to the potential contradictions in these two models. The enactment of democracy requires a commitment to particular processes and institutions and the Council must consciously address the direction in which it wants to take democracy in Europe.

Representation

It follows from the Council's emphasis upon parliamentary democracy that it also attaches great importance to the different mechanisms that ensure effective representation: in other words, those institutions that deliver representative democracy and which give political legitimacy to parliaments. There are several features of the Council's activities that are relevant here. First, there is the Council's ongoing concern with supporting the work of political parties under its wider commitment to "pluralist parliamentary democracy".⁶⁸ These concerns include an increasing interest in securing adequate state funding for political parties. Second, there are the Council's activities in setting election standards, especially for adoption by new democracies but also in ensuring high standards of electoral practice among older democracies. Finally, the Council has supported a range of electoral innovations, including standards and practice around e-voting. These innovations have the potential to change and develop the nature of representative democracy across Europe. At the same time, however, they raise questions over whether new forms of representative practice are responding to social and political change in member countries or simply reacting to it.

The role of political parties in sustaining representative democracy is well established. A plurality of political parties is often seen as the basis of representative democracy and the only way in which modern democracy can work effectively:

Political parties are the main actors in the political process. ... [they] aggregate demands into coherent policy packages – a process that gives voters a choice in elections. Political parties

68. Parliamentary Assembly Resolution 1353, paragraph 1, op. cit. (n. 5).

form governments and act as opposition in legislatures. ... [they] are the major actors in representative democratic systems when it comes to solving societal problems.⁶⁹

In accepting this principle, the Council has become increasingly concerned with the potential for corruption in political parties. In particular, there is concern across different organs of the Council that the increasing cost of election campaigns has led to too great a dependence upon private funding for political parties and a concomitant loss of confidence among citizens in the behaviour of those parties. The 2001 recommendation of the Parliamentary Assembly on the funding of political parties expressed this concern succinctly:

Citizens are showing growing concern with regard to corruption linked to political parties' gradual loss of independence and the occurrence of improper influence on political decisions through financial means. The Assembly, *stressing that political parties are an essential element of pluralistic democracies*, is seriously preoccupied by this situation ... In order to maintain and increase the confidence of citizens in their political systems, Council of Europe member states must adopt rules governing the financing of political parties and electoral campaigns.⁷⁰

Their concern is backed up by a Venice Commission report which observes that although “the issue of political party funding is a relatively recent phenomenon”⁷¹ it is causing considerable concern across many countries. Interestingly, the research for their report recognises problems in both transition countries and long established democracies. Their proposals are supported by the Assembly's 2001 recommendation, which seeks to establish a European-wide framework for ensuring a balance of party political funding between the state and private donations. It also establishes the principle of a ceiling on the level of funding that any one individual or organisation should be able to give to a political party. Subsequently, the Committee of Ministers has also reinforced this message through a 2003

69. H. Klingeman, R. Hofferbert and I. Budge, *Parties, policy and democracy*, Boulder: West View Press, 1994, p.5.

70. Parliamentary Assembly Recommendation 1516, paragraphs 1 and 3, emphasis added, op. cit. (n. 67).

71. Venice Commission, “Guidelines and report on the financing of political parties”, document CDL-INF (2001) 8, section 1A.

recommendation.⁷² The problem of the financial transparency of political parties is also an issue at the sub-national level.⁷³

This focus and activity in the area of party political funding is interesting not only for the problems and solutions it identifies but also because it highlights the Council's concern with effective representation. As the intermediaries between citizens and the state the political parties are the primary focus for political activity. Reduced confidence in the activities of political parties, therefore, will reflect also upon the legitimacy of elected parliaments. Political parties are fundamental to the electoral process.

The Council places great emphasis upon the electoral process as the starting point for democratic representation. This principle is enshrined in the First Protocol added to the Convention for the Protection of Human Rights and Fundamental Freedoms, which requires all contracting parties "to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".⁷⁴ The right to free elections and the exercise of high electoral standards to ensure that this right is realised by all citizens, have been vigorously promoted by the Council through a number of routes. As well as publishing electoral standards⁷⁵ the Council also supports a process of election observers to ensure that elections are free and fair. These observation and monitoring processes have a high international profile, as was demonstrated by the Council's activities in the 2003 Georgian elections.

As well as promoting generally high standards of electoral practice, the Council has been particularly concerned to protect the principle of universal suffrage. Various adopted texts have been concerned with the disenfranchisement of particular social and ethnic groups because of failings in the electoral practices of particular countries.

72. Committee of Ministers Rec(2003)4 on common rules against corruption in the funding of political parties and electoral campaigns.

73. Congress of Local and Regional Authorities of Europe Recommendation 86 (2000) on the financial transparency of political parties and their democratic functioning at the regional level.

74. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series No. 009, Article 3.

75. For example, Parliamentary Assembly Resolution 1264 (2001) on the code of good practice in electoral matters; Committee of Ministers Declaration on the Code of Good Practice in Electoral Matters (13 May 2004).

Box 3.3: Making democracy work

Code of good practice in electoral matters

(Venice Commission, Opinion No. 190/2002; Parliamentary Assembly Resolution 1320 (2003); Congress of Local and Regional Authorities of Europe Resolution 148 (2003); Declaration by the Committee of Ministers (13 May 2004))

Developed by the Venice Commission in response to a request from the Parliamentary Assembly, (Resolution 1264 (2001)), the *Code of good practice in electoral matters*, provides the detailed criteria against which free and fair elections in Europe can be measured. In particular, it establishes the criteria for ensuring five principles are upheld:

- universal suffrage: including the minimum age, nationality and residence criteria;
- equal suffrage: including the principle of one person one vote, the rights of national minorities and equality of the sexes;
- free suffrage: including the freedom of voters to form an opinion, express their wishes and combat electoral fraud;
- secret suffrage: including the secrecy of individual ballots and the prevention of family voting;
- direct suffrage: ensuring direct election of representatives at national and local levels.

Both the Committee of Ministers declaration and the Parliamentary Assembly's resolution call upon member states to bring their electoral law into line with these criteria. They will also form the basis of the Council's future election observation and monitoring activities.

Instruments of direct democracy

(Committee of Ministers Recommendation No. R (96) 2 on referendums and popular initiative)

In this recommendation, the Committee of Ministers lays down conditions for the holding of local referendums and popular initiatives. Stressing that representative democracy must remain the basis of local democracy, the Committee of Ministers acknowledges that the right of citizens to have their say in major decisions on long-term or virtually irreversible commitments is one of the democratic principles common to all member states of the Council of Europe.

Financing of political parties

(Venice Commission (2001) "Guidelines and report on the financing of political parties" (doc. CDL-INF (2001) 8); Committee of Ministers Recommendation Rec(2003)4E on common rules against corruption in the funding of political parties and electoral campaigns (8 April 2003); Congress of Local and Regional Authorities of Europe Recommendation 86 (2000) on the financial transparency of political parties and their democratic functioning at the local level)

Having surveyed member states on the ways in which political parties are funded and the possibilities of corruption where parties are too dependent upon private finance, the Venice Commission established criteria for public financing of political parties. These have been built upon by the Committee of Ministers' common rules which establish the following basic rules:

- public and private financing of political parties is acceptable, as long as conflicts of interest are avoided, all donations are transparent and political parties remain independent;
- the state should ensure that there are rules governing donations to political parties, including a ceiling on the maximum donation acceptable from any individual or legal entity;
- donations from foreign governments or enterprises should be prohibited or regulated;
- electoral campaign expenditure should be limited and the rules for recording and auditing it clear;
- states should provide for independent monitoring in respect of the funding of political parties and electoral campaigns, including the monitoring of accounts.

The Council has been especially concerned to ensure that ethnic minorities, immigrants and foreign residents are treated equally and fairly through the electoral process.⁷⁶ A more recent concern has been the practice of family voting in some countries and the need to protect women's individual voting rights.⁷⁷ The problem is neatly summarised by Walter Schwimmer in his foreword to a 2002 publication on the issue:

“Family voting” is when a male family member votes with or for one or more women relatives or when family members vote together in the open, often facilitated by polling officials. This undermines the political rights of women and implies failure to comply with both international and national legal instruments. ... [It] amounts to the disenfranchisement of women, a lack of respect for fair electoral proceedings, and leaves the door open to electoral fraud.⁷⁸

In many respects, this new focus on the problem of family voting can be seen as a continuation of the Council's work in defending free and fair elections. However, it also raises a significant point about the development of representative democracy across Europe. Pulling together election observer reports from the Council's own activities and those of the OSCE (Organisation for Security and Co-operation in Europe), the research of the Congress identifies the problem as being associated almost entirely with the new democracies in Europe, where, with relatively new democratic political structures and unlike in older democracies, the individual right to vote is not always well established, particularly in rural areas.⁷⁹

This concern is, arguably, symptomatic of the Council's wider concern with ensuring that those members that have joined the Council since 1989 live up to the same supposedly high democratic standards as the founding member states. While such concerns may have substance in relation to some new democracies, they are patently not true in relation to all of them. Moreover, they create an artificial distinction between old and new democracies, and pose problems for the future development of democratic practices in the established

76. Parliamentary Assembly Recommendation 1500 (2001) on the participation of immigrants and foreign residents in political life in the Council of Europe member states. See also Committee of Ministers Recommendation No. R (81) 18 concerning participation at municipal level; Committee of Ministers Recommendation No. R (2001) 19 on the participation of citizens in public life.

77. Congress of Local and Regional Authorities of Europe Resolution 134 (2002) on women's individual voting rights: a democratic requirement.

78. *Women's individual voting rights: a democratic requirement*, Strasbourg: Council of Europe Publishing, 2003.

79. *Ibid*, p.10.

democracies as well as those in transition. In response to declining electoral turnout a number of established democracies have introduced postal voting as an option for all citizens, or even as a mandatory practice in some elections. Remote voting of this nature removes the opportunity for election officials or impartial observers to prevent family voting. The push towards remote e-voting via the Internet or other technologies compounds the threat of family voting.⁸⁰ The problem of family voting could return to old democracies, as well as the new, if remote voting either by post or electronically becomes the norm.

Consequently, there is a potential clash in the Council's activities. On the one hand, it is advancing the principles of a secret ballot as being at the heart of representative democracy. On the other hand, it is helping to define the standards for experiments and developments in e-voting. While the Council's motivation for this involvement is to ensure that the principles of democratic elections are respected, the consequence of e-voting may be that the privacy of voting may be undermined in many contexts. The assumption that family voting only occurs within transition democracies which suffer from "cultural practices that reflect the dominance of patriarchy over democracy"⁸¹ is a bold and possibly misplaced one. While the problem may not be as widespread in established democracies it is still easy to imagine circumstances where dominant individuals will exercise voting on behalf of others in their household, especially when they can do so from their homes. Given the opportunity, family voting will occur in some households, even in the most stable and developed democratic cultures. Moreover, it will be difficult for the Council to argue against the extension of remote voting practices into those countries currently identified as being particularly guilty of allowing family voting, if it is promoting it in other countries as a solution to the democratic deficit.

Through a range of mechanisms the Council is seeking to sustain and develop representative democracy and to reconfirm the legitimacy of parliaments. In so doing, it is responding to both the challenges of widened democratic practices and the opportunities that new technologies and other innovations can offer. However, at the same time the Council needs to balance the development of democracy with the establishment and protection of its core principles.

80. S. Birch and B. Watt, "Remote electronic voting: free fair and secret?", *Political Quarterly* 75:1, 2004, pp. 60-72.

81. *Women's individual voting rights: a democratic requirement*, op. cit. (n. 79) p.10.

Transparency, responsiveness and accountability

Issues of transparency, responsiveness and accountability of elected politicians are a perennial problem in models of representative democracy.⁸² Transparency, in particular, has taxed the Council in its deliberations. Attention has focused especially upon the role of the media as an independent watchdog of democracy and as a safeguard for freedom of expression. From this perspective, a free and critical media is fundamental to achieving transparency of the political process, ensuring that politicians are responsive to popular will and that governments are properly accountable for their policies and actions. One of the most pressing concerns is that without effective transparency and accountability, politics is prone to corrupt and oligarchic tendencies. The setting of ethical standards for individuals in public office and the monitoring of their behaviour, therefore, provides an important focus for democratic developments.

Transparency, responsiveness and accountability covers a multitude of different democratic features, ranging from the role of elections in holding individuals to account through to the responsiveness of governments to the “general will” and the transparency of internal processes to ensure that individuals are not making unfair personal gain through public office. While all of these remain significant, the Council has been particularly concerned with three institutional features that underpin such practices. First, there has been an emphasis upon defining and enforcing the ethical standards to which public servants should be bound. These standards build upon a long history of public service ethics and provide a minimum standard by which all public organisations should be judged across Europe. Second, and linked to this first point, the Council has been anxious to address corruption at all levels of government across Europe and, indeed, the wider problems of organised crime and corruption and its threat to democracy. Finally, the role of a free and active media as a vital institutional component of an effective democracy has been extensively promoted by the Council. In many respects, this third feature makes the most important contribution to the transparency, responsiveness and accountability of governments not only by identifying government failure or corruption but, also, by providing a pluralistic public space in which the “general will” is deliberated. Furthermore, the very existence of an active free press may discourage corruption and mitigate the oligarchic tendencies of all governments. Each of these three concerns will be dealt with in turn.

82. See D. Judge, *Representation: theory and practice in Britain*, London: Routledge, 1999.

Public service ethics have a long tradition in democratic practice.⁸³ Its core principles are widely accepted and include the belief that: holders of public office should act in the “public interest” and not seek to make personal gain from their office; they should not accept gifts from others seeking advantage or place themselves under an obligation to any individual; they should avoid any conflicts of interests and take steps to remove themselves from decisions where such conflicts arise; they should act objectively, making decisions on the merits of each individual case; their activities should be transparent and open to public scrutiny; and they should remain accountable for their actions.⁸⁴ These principles are reaffirmed in a Committee of Minister’s recommendation on codes of conduct for public officials.⁸⁵ They are also widely accepted and practised across many European countries.

Given the maturity of many democracies in Europe, it seems surprising that the Council needs to continue to focus upon public service ethics. However, the ongoing promotion of ethical standards across all levels of government is seen as being fundamental to maintaining public confidence in the institutions of democracy. High standards of public service are necessary not only among national governments but must also be present at the local level, where public servants are not only more visible but, also, where the opportunities for corrupt or unethical behaviour are equally high. It is for this reason that the Steering Committee for Local and Regional Democracy (CDLR) has produced a model initiatives package on public ethics at the local level.⁸⁶ While not a legal instrument it nevertheless provides model examples of how public service ethics are maintained and monitored in various countries, and the relationship between standards in public life at central and local levels. Consequently, it not only reaffirms the principles set out in the Committee of Ministers recommendation on codes of conduct for public officials but, also, provides various examples of the institutional and organisational frameworks in which these values can be embedded.

83. R. Chapman (ed.), *Ethics in public service for the new millennium*, Aldershot: Ashgate, 2000; A. Hondeghem, (ed.) *Ethics and accountability in a context of governance and new public management*, Amsterdam: IOS Press, 1998; T. Cooper, *Handbook of administrative, ethics*, New York: Marcel Dekker, 1994.

84. A. Lawton, *Ethical management for the public services*, Buckingham: Open University, 1998.

85. Committee of Ministers Recommendation No. R (2000) 10 on codes of conducts for public officials.

86. *Model initiative package on public ethics at the local level*, online publication, Congress of Local and Regional Authorities of the Council of Europe.

The fight against unethical or corrupt behaviour in public service, however, cannot be constrained to the behaviour of public officials, whether elected or appointed. The Council has been concerned with the broader problems and effects of corruption wherever it occurs. As the preamble to the Committee of Ministers resolution on corruption states:

corruption represents a serious threat to the basic principles and values of the Council of Europe, undermines the confidence of citizens in democracy, erodes the rule of law, constitutes a denial of human rights and hinders social and economic development.⁸⁷

Thus, corruption not only affects the immediate institutions of democracy but is also an attack on democratic principles (for example, where there is corruption it is impossible for all citizens to have political equality) and the underlying institutions that sustain democracy (such as the rule of law). The existence of two European-wide conventions on corruption⁸⁸ and the creation of two bodies that focus on the rule of law⁸⁹ and the monitoring of corruption⁹⁰ demonstrate the importance that the Council attaches to this problem. Indeed, measures to fight corruption are central to much of the Council's activities. The conventions not only provide a concrete definition of corruption and by default, therefore, a statement of its unacceptability, but also a set of legal and institutional measures that member states are expected to take in order to combat it. The Venice Commission and GRECO, in different ways, provide external monitoring and reporting of nation state's effectiveness in stamping out corruption, although it should be noted that not all European countries are members of these bodies. Consequently, the Council's activities to combat corruption provide an important underpinning for democracy.

All of these efforts, so far, have been focused upon the ways in which government should be organised and the ways in which high standards of public service can be maintained. However, the Council of Europe also recognises the role of the media in promoting transparency, responsiveness and accountability of government. Three related issues have been central to its concerns for several decades. First, the issue of freedom of expression as a fundamental feature of democracy is upheld in various aspects of the Council's work. For

87. Committee of Ministers Resolution (97) 24 on the twenty guiding principles for the fight against corruption.

88. See the Criminal Law Convention on Corruption, European Treaty Series No. 173 (1999); Civil Law Convention on Corruption, European Treaty Series No. 174 (1999).

89. The European Commission for Democracy through Law (the Venice Commission)

90. The Group of States against Corruption (GRECO).

example, a 1978 recommendation of the Parliamentary Assembly reiterates “its conviction that freedom of the press and television, as a fundamental component of freedom of expression, is a prerequisite for a democratic political system”.⁹¹ This assertion develops from Article 10 of the European Convention on Human Rights which, among other rights, includes the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”.⁹² The defence of this right in relation to the media has been deemed so important that the European Court of Human Rights has given over 100 judgments on Article 10 since 1960, developing a substantial case-law on the issue.⁹³ Despite both the case-law and the Convention, however, the Parliamentary Assembly recognises that “serious violations of freedom of expression” persist across Europe and the rest of the world,⁹⁴ and recommends that the Council expands its monitoring activities in this area. In particular, it highlights the concern that “recent terrorist attacks can provide a pretext for introducing new restrictions to freedom of information”.⁹⁵ While media freedom is effectively embedded in the Council’s *acquis*, therefore, there remain concerns about the extent to which governments constrain or attack such freedom. Of particular concern is the harassment and intimidation of both journalists and the media more generally by particular states.

Second, and linked to the notion of freedom of expression, the Council has been concerned with media pluralism and the real independence of different forms of media from political influence. The particular concern here is the concentration of the media in the hands of a few individuals and the deliberate manipulation of the media to suit a few vested interests. In the preamble to its 1999 recommendation on measures to promote media pluralism, the Committee of Ministers emphasised that:

the public service broadcasting sector should enable different groups and interests in society – including linguistic, social, economic, cultural or political minorities – to express themselves ...

91. Parliamentary Assembly Recommendation 834 (1978) on threats to the freedom of the press and television.

92. The Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Article 10, paragraph 1.

93. *Guarding the Watchdog*, op. cit. (n. 13).

94. Parliamentary Assembly Recommendation 1589 (2003) op. cit. (n. 35) paragraph 2.

95. *Ibid*, paragraph 14.

[and] that the existence of a multiplicity of autonomous and independent media outlets at the national, regional and local levels generally enhances pluralism and democracy.⁹⁶

Consequently, attention is both upon those who seek to control the media by restricting pluralism and those whose interests remain ignored because of a lack of media pluralism. In particular, the rights and cultures of national minorities and migrant workers are considered to be under particular threat where media pluralism is restricted.⁹⁷

Third, the Council has developed a converse concern with the ethics of journalism and the need to regulate the media to ensure that it acts fairly towards individuals. This concern focuses upon the objectivity and neutrality of the media and, particularly, “the right of reply to any individual citizen who has been the subject of an allegation”.⁹⁸ Consequently, the Council recognises the need for regulation of the media, especially with the exploitation of new technologies providing additional avenues for media development. However, it also recognises that balancing regulation with the protection of freedom of expression and media pluralism is a complex problem that is not easily resolved. It is for this reason that monitoring of member states and their relationships with the media remains important.

All of these concerns are, in essence, an acknowledgement that the media provides strong support for transparency, responsiveness and accountability in government. Wherever the media is investigating government policies, holding individuals or governments to account for their actions, or providing an expression of public concern or interest, it is making an important contribution to democracy, even though governments may not necessarily welcome their interventions. In particular, an effective media can help in the promotion of ethical standards among public servants and the wider battle against corruption. However, there remains a paradox at the heart of this principle. Transparency, responsiveness and accountability are fundamental to strong democratic institutions in that they encourage trust in those institutions. At the same time, however, effective policies and instruments that expose failing standards or corruption in government serve to undermine trust in those same institutions. There are instances where distrust of democratic institutions is healthy, especially where governments are systematically abusing their powers. However, there are

96. Committee of Ministers Recommendation No. R (99) 1 on measures to promote media pluralism.

97. See, for example, Parliamentary Assembly Recommendation 1277 (1995) on migrants, ethnic minorities and the media.

98. Parliamentary Assembly Recommendation 1215 (1993) on the ethics of journalism, paragraph 5.i.

other instances where minor failings are given too much emphasis and lead to a breakdown in trust among citizens which is out of proportion with the seriousness of the offence. Scepticism is a healthy feature of democracy that is enhanced through measures to ensure transparency, responsiveness and accountability but it also needs to be balanced with attempts to preserve the legitimacy of democratic institutions.

Box 3.4: Transparency, responsiveness and accountability

The conduct of public officials

(Committee of Ministers Recommendation No. R (2000) 10 on codes of conducts for public officials)

The code of conduct for public officials establishes the standards of behaviour expected of public officials in a democracy. It specifies that:

- conflicts of interests should be avoided. Public officials should declare any potential conflicts and take steps to avoid them;
- public officials should avoid engagement with any activities outside of public life that are incompatible with their position or function;
- public officials should not demand or accept gifts or seek personal gain for either themselves or their family or friends;
- misuse of public office is not acceptable;
- administrative and legal frameworks should provide facility for the reporting of any activities that are inconsistent with the code.

Committee of Ministers Recommendation No. R (98) 12 on supervision of local authorities' action specifies ways for making the systems of supervision evolve in a way favourable to local self-government without endangering their effectiveness.

Twenty guiding principles for the fight against corruption

(Committee of Ministers Resolution 97 (24))

Aware that corruption poses a serious threat to democracy, the Committee of Ministers adopted a resolution in 1997 that, among other principles, encourages national and international initiatives to fight corruption, including criminalisation and the seizure of the proceeds of corrupt practices; limits immunity from investigation and prosecution; encourages transparency in public procurement; and reaffirms the independence of the media in highlighting corrupt practices.

Conventions on corruption

(Criminal Law Convention on Corruption, ETS No. 173; Civil Law Convention on Corruption, ETS No. 174)

The Criminal Law Convention on Corruption aims to co-ordinate criminalisation of a large number of corrupt practices including:

- active and passive bribery of domestic and foreign public officials;
- active and passive bribery of national and foreign parliamentarians and of members of international parliamentary assemblies;
- active and passive bribery in the private sector;
- active and passive bribery of international civil servants;
- active and passive bribery of domestic, foreign and international judges and officials of international courts;
- active and passive trading in influence;
- money-laundering of proceeds from corruption offences;
- accounting offences (invoices, accounting documents, etc.) connected with corruption offences.

It provides for enhanced international co-operation (mutual assistance, extradition and the provision of information) in the investigation and prosecution of corruption offences. As soon as they ratify it, states which do not already belong to GRECO will automatically become members.

The Civil Law Convention on Corruption is the first attempt to define common international rules in the field of civil law and corruption. It requires contracting parties to provide in their domestic law “for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage” (Art.1).

Sub-national democracy and subsidiarity

Box 3.5: Sub-national democracy and subsidiarity

(European Charter of Local Self-Government, ETS No. 122; Committee of Ministers Recommendation No. R (95) 19 on the implementation of the principle of subsidiarity)

The charter establishes the basic rules guaranteeing the political, administrative and financial independence of local authorities. It provides that the principle of local self-government shall be recognised in domestic legislation and, where practicable, in the constitution. It also requires local authorities to be elected in universal suffrage.

Under the charter, local authorities are able to regulate and manage public affairs under their own responsibility in the interests of the local population, subject to legal limits. Consequently, the charter introduces the principle of subsidiarity, stating that public responsibilities should be exercised preferably by the authorities closest to the citizens, the higher level being considered only when the co-ordination or discharge of duties is impossible or less efficient at the level immediately below. To this end, it sets out the principles concerning the protection of local authority boundaries, the existence of adequate administrative structures and resources for the tasks of local authorities, the conditions under which responsibilities at local level are exercised, administrative supervision of local authorities' activities, financial resources of local authorities and legal protection of local self-government.

The Committee of Ministers Recommendation No. R (95) 19 on the implementation of the principle of subsidiarity specifies further how the core set of powers pertaining to each level of local and regional authorities should be established and exercised.

The institutions of sub-central government are particularly important to the Council of Europe. This importance is illustrated by a number of concrete steps that the Council has taken to support the development of local and regional government and to ensure that these institutions remain central to its work. First, the creation of the Congress of Local and Regional Authorities of the Council of Europe in 1994 as a consultative body, itself a development from the Council's original Standing Conference of Local and Regional Authorities in Europe, has raised the voice of local government in European affairs to a much higher status than is found in many European states. The Congress is regularly consulted by both the Committee of Ministers and the Parliamentary Assembly, making it a significant part of the Council's work. In addition, it has successfully brought forward a number of conventions and charters that support the development of democracy in member states. Second, the European Charter on Local Self-Government, adopted in 1985, has become a significant instrument with which to promote and evaluate the role of local and regional government in national democratic structures and to monitor central-local government relations more generally. As already noted, the principles enshrined in this charter are forming the foundations of a United Nations world charter on local self-government. Furthermore, as will be shown below, the charter has become a defining standard for

democracy. Finally, the Council has adopted a number of other charters and conventions which focus especially upon sub-central issues and which promote the work of local or regional authorities. Consequently, the Council has demonstrated a strong commitment to the institutions of democracy beneath that of the nation state.

Given that the other statutory organs of the Council are comprised primarily of representatives from state-level governments and parliaments, it seems unusual that the Council should provide such an emphasis to sub-central institutions. To explain this emphasis and to analyse the role played by these institutions, it is necessary to begin by examining the Council's understanding of local democracy in relation to democratic theory. Democratic theory holds a special place for local democracy and its institutional embodiment, local government. Traditional justifications for the existence of local government include pluralist arguments that the institutions of local democracy provide for a diffusion of power within society, arguments that local democracy supports diversity and difference in the face of an otherwise constrictively uniform set of central policies, and arguments that local government can be more responsive to citizen needs than remote central governments.⁹⁹ More recently, there has also been a revival of interest in the role of local democracy in facilitating and encouraging political participation as part of a broader democratic polity. This argument has its roots in 19th century political thought and maintains that local institutions of democracy are the most accessible locations for political skills to be acquired and practised. J. S. Mill argued in 1861 that local democracy not only provided greater opportunities for political participation but that it was an instrument of social inclusion:

But in the case of local bodies, besides the function of electing, many citizens in turn have the chance of being elected, and many, either by selection or by rotation, fill one or other of the numerous local executive offices ... It may be added, that these local functions, not being in general sought by the higher ranks, carry down the important political education which they are the means of conferring, to a much lower grade in society.¹⁰⁰

Similarly, Alexis de Tocqueville, in his study of democracy in America, was struck by the capacity for democratic self-government among small communities, even where wider state

99. For a wider discussion see G. Stoker, "Introduction: Normative theories of local government and local democracy", in D. King and G. Stoker (eds.) *Rethinking local democracy*, Basingstoke: Macmillan, 1996.

100. J. S. Mill *Considerations on representative government*, Oxford: Oxford University Press, 1991 (originally published 1861) p. 413.

institutions were failing to provide democracy.¹⁰¹ These theories have been built upon in recent decades to support the belief that democracy is intrinsically dependent upon effective institutions of local democracy to support a wider democratic culture and practice.¹⁰² Without local democracy, democracy at a national (or indeed, international) level cannot thrive.

These beliefs are given substance in the European Charter of Local Self-Government.¹⁰³ In the preamble to the charter, the Council commits itself to many of the principles set out above. It states that “local authorities are one of the main foundations of any democratic regime”, confirms the “right of citizens to participate in the conduct of public affairs” and argues “that it is at the local level that this right can be most directly exercised”. Consequently, the charter emphasises the principle of subsidiarity in which “public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen”.¹⁰⁴ It also commits signatory countries to developing a power of general competence for local authorities and establishes, among other things, the principle that local authorities should have legal remedies where they can demonstrate undue interference by central governments in the “free exercise of their powers”.¹⁰⁵ The charter, therefore, establishes an important set of principles which are concerned with protecting local democracy as a fundamental feature of national democracy.

The charter has been widely accepted across Europe. By November 2003 only four countries had not signed the treaty¹⁰⁶ and a further three had yet to ratify it.¹⁰⁷ For the other thirty-eight countries, therefore, it seems that the concept of local self-government and the principles enshrined in the charter are widely accepted and implemented. However, this overview ignores the distinction between commitment and action. In 1998 the Congress observed that many countries that had ratified the charter had not incorporated its principles into domestic law, thereby denying local authorities the capacity to appeal to the courts where national

101. A. de Tocqueville, *Democracy in America*, London: Fontana, 1968 (originally published 1835).

102. See L. Pratchett, “Local autonomy, local democracy and the ‘new localism’”, *Political Studies*, Vol. 52, 2004, pp. 358-375.

103. European Charter of Local Self-Government, European Treaty Series No. 122.

104. *Ibid*, Article 4.3.

105. *Ibid*, Article 11.

106. Andorra, San Marino, Serbia and Montenegro and Switzerland – and with a population of just 28 000, sub-central government is an irrelevance in San Marino.

107. Belgium, France and Georgia.

legislation or regulations were in breach of the charter.¹⁰⁸ The monitoring reports of the Congress on local and regional democracy in individual member states paint a much more complex and even less satisfactory picture. While few states are directly criticised for failing to support local democracy, many are criticised for only implementing some aspects of the charter or for failing to always act within its spirit. Central governments in many states are still resistant to extending political legitimacy and financial powers to local or regional governments, despite their commitment to the principles set out in the charter. In this respect, the charter and its ratification provide a starting point for realising the Council's local democracy and subsidiarity ambitions, rather than an end point. While the Council remains committed to local democracy, it has considerably more work to do to encourage member states to deliver it.

The activities of the Council in this area are not restricted exclusively to concerns with local democracy: the Council has developed a number of other charters and conventions that focus on aspects of sub-central government. In particular, the European Charter for Regional or Minority Languages, and the Convention on the Participation of Foreigners in Public Life at the Local Level, both emphasise an important complementary role for sub-central government. Both of these treaties recognise that regional and local governments may provide a much better focus for protecting minority rights and cultures than nation states. In this respect, regions are seen as being a response to globalisation and are associated with cultural diversity in the context of the increasing internationalisation of political and economic interests. It is such concerns that lie behind the Congress recommendation to strengthen the activities and promotion of regions with legislative powers¹⁰⁹ and its focus on sustainable regions under global rules.¹¹⁰ Moreover, the logical extension of this focus has been the development of a European Charter on Regional Self-Government which sets out “the general frame of reference for the fundamental powers to be granted to all regions and at the same time opens up areas of latitude for differentiation and organisation so that specific

108. Congress of Local and Regional Authorities of Europe Recommendation 39 (1998) on the incorporation of the European charter of local self-government into the legal systems of ratifying countries and on the legal protection of local self-government.

109. Congress of Local and Regional Authorities of Europe Recommendation 118 (2002) on regions with legislative powers (see also Congress Report CPR (9) 5).

110. Congress of Local and Regional Authorities of Europe Recommendation 138 (2003) on sustainable regions under global rules (see also Congress Report CPR (10) 5).

regional interests according to types of region may be taken into account'.¹¹¹ While consensus has not been achieved on this issue and the charter remains in draft format, its significance for further promoting sub-central government as a means of protecting the democratic interests and cultures of minorities remains an important aspect of the Council's work.

The focus on regional and local democracy is not simply aimed at the development of democratic institutions but also supporting democratic practice. The Council, and particularly the Congress, recognises that local and regional democratic institutions also provide much greater opportunity for political engagement among those groups that are traditionally marginalised from politics at the level of the nation state. Thus, the European Urban Charter, in its declaration of urban rights, includes participation as a fundamental component of life within European cities.¹¹² While this charter is somewhat idealistic and lacking in concrete recommendations to member states, it nevertheless articulates a vision of cities that includes local democracy. Similarly, the Charter on the Participation of Young People in Municipal and Regional Life (1992), revised in 2003, sets out guidelines to encourage young people to play their part in decisions affecting them and to be actively involved in social changes in their neighbourhood, municipality or region. The Congress has provided an institutional home for the debate and development of local and regional government and, therefore, for the promotion of local democracy. There can be little doubt that the Council accepts the argument that local democracy is a fundamental component of a vibrant and healthy national and European democracy. However, the other pillars have also been actively engaged in promoting local and regional democracy. Since 1979, the Committee of Ministers have made over twenty recommendations to member states in the field of local democracy, including significant recommendations on citizen participation,¹¹³ local government finance,¹¹⁴ and the

111. Congress of Local and Regional Authorities of Europe Resolution 161 (2003), Congress Report CPR (10) 2, on the draft European Charter of regional self-government : progress of work for its adoption as an international convention.

112. Congress of Local and Regional Authorities of Europe, European Urban Charter.

113. Committee of Ministers Recommendation No. R (81) 18 concerning participation at municipal level; Committee of Ministers Recommendation R (2001) 19 on the participation of citizens in local life.

114. See Committee of Ministers Recommendation No. R (92) 5 on borrowing by local and regional authorities; Committee of Ministers Recommendation No. R (96) 3 on local authorities budgetary deficits and excessive indebtedness; Committee of Ministers Recommendation No. R (2000) 14 on local taxation, financial equalisation and grants to local authorities.

implementation of the subsidiarity principle.¹¹⁵ These recommendations show an encouraging level of engagement from the Committee of Ministers in sub-central government. It is evident that for wider benefits to accrue from developments in local democracy it is necessary for the other pillars of the Council of Europe to continue to be closely engaged in supporting and enhancing it.

Participation and civic society

Box 3.6: Civil society

The legal status of international NGOs

(European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, ETS No. 124)

The convention establishes the definition and criteria for legal recognition of an international non-governmental organisation (NGO). To achieve recognition, NGOS must:

- have a non profit-making aim of international utility;
- have been established by an instrument governed by the internal law of a party;
- carry on substantive activities in at least two parties;
- have its statutory office in the territory of a party and central management and control in that state or in another party.

The convention establishes rules on the proof to be furnished to the authorities in the party where the recognition is sought, and sets out exceptional cases in which a party may refuse recognition, for instance where activities of the organisation in question contravene national security, public safety, or is detrimental to the prevention of disorder or crime.

The convention paved the way for the formal recognition of NGOs as one of the four pillars of the Council of Europe.

Status of non-governmental organisations in Europe

(Fundamental Principles on the Status of Non-governmental Organisations in Europe, 13 November 2002)

Considering that the existence of many NGOs is a manifestation of the right of their members to freedom of association and of their host country's adherence to principles of democratic pluralism; and recognising that the operation of NGOs entails responsibilities as well as rights, this document puts forward the following:

Basic principles

NGOs come into being through the initiative of individuals or groups of persons. The national legal and fiscal framework applicable to them should therefore permit and encourage this initiative.

All NGOs enjoy the right to freedom of expression.

NGOs with legal personality should have the same capacities as are generally enjoyed by other legal persons and be subject to the same administrative, civil and criminal law obligations and sanctions generally applicable to them.

Any act or omission by a governmental organ affecting an NGO should be subject to administrative review and be open to challenge in an independent and impartial court with full jurisdiction.

115. Committee of Ministers Recommendation No. R (95) 19 on the implementation of the principle of subsidiarity.

The role of the organisations of civic society in underpinning democracy has long been recognised in political theory. Alexis de Tocqueville recognised the importance of civic organisations in supporting democratic practice in 19th century America.¹¹⁶ More recently, interest in social capital as a fundamental component of successful democracies, has reinvigorated debate about how social networks and organized society can contribute to democratic practice. Robert Putnam's metaphor of Americans "bowling alone"¹¹⁷ has had particular resonance not only in the United States but also in Europe, not least because it has highlighted the relationship between governments, citizens and the organisations of civic society. In particular, the recognition of changing repertoires of political engagement highlighted in the previous chapter, which has seen citizens move away from the conventional organisations of politics towards more single issue, consumerist or cause oriented styles of engagement, creates a dilemma for governments.¹¹⁸ On the one hand, governments are turning towards new ways of directly engaging with citizens, or groups of citizens, in order to redress the decline in conventional political participation. On the other hand, the organisations of civil society, especially those that focus upon the issues that most concern citizens or which directly confront governments, are becoming of increasing significance to policy making. Governments can have a significant role in shaping the opportunities for engagement and encouraging participation, both directly through government sponsored participation initiatives and indirectly through the plurality of civil society organisations.

The Council of Europe has been involved on both sides of this dilemma. Some of its activities have explored the different opportunities for reconfiguring or stimulating political participation, especially among conventionally-marginalised demographic, socio-economic or ethnic groups. More significantly, however, the Council has sought to involve the organisations of civil society more directly in its activities, originally by defining a legal status for international non-governmental organisations (NGOs)¹¹⁹ and, later, by developing

116. A. de Tocqueville, *op. cit.* (n. 102).

117. R. Putnam, *Bowling alone: the collapse and revival of American community*, New York: Simon and Schuster, 2000.

118. P. Norris, *op. cit.* (n. 25).

119. European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, European Treaty Series No. 124 (1986).

consultative status for a range of international NGOs.¹²⁰ Indeed, these NGOs have now developed their role within the Council to the point where they are now recognised as being one of the four principal organs of the Council, alongside the Committee of Ministers, the Parliamentary Assembly and the Congress for Local and Regional Authorities in Europe. The organisations of civil society, therefore, have an important role to play in both the activities of the Council and its development of democracy.

Box 3.7: Citizen participation

(Convention on the Participation of Foreign Residents in Public Life at Local Level, ETS No. 144; Committee of Ministers Recommendation No. R (97) 3 on youth participation and the future of civil society; Committee of Ministers Recommendation No. R (98) 8 on children's participation in family and social life)

The Council has adopted a number of instruments that seek to ensure the political participation of potentially marginalised groups.

The Convention on the Participation of Foreign Residents in Public Life at Local Level provides that member states undertake to guarantee to foreign residents, on the same terms as to its own nationals, the "classical rights" of freedom of expression, assembly and association, including the right to form trade unions. They are also encouraged to make efforts to involve foreign residents in processes of consultation on local matters. Under some conditions provided by law, the rights of freedom of expression and of assembly may be restricted.

The convention opens the possibility of creating consultative bodies at local level elected by the foreign residents in the local authority area or appointed by individual associations of foreign residents.

The convention provides also that the parties may undertake to grant to every foreign resident the right to vote in local elections, after five years of lawful and habitual residence in the host country, and to stand for election.

Other instruments address the involvement of young people in political life. See especially:

- Committee of Ministers Recommendation No. R (97) 3 on youth participation and the future of civil society;
- Committee of Ministers Recommendation No. R (98) 8 on Children's participation in family and social life
- Revised European Charter on the Participation of Young People in Local and Regional Life (adopted by the Congress of Local and Regional Authorities of Europe on 21 May 2003)

In addition, Committee of Ministers Recommendation No. R (2001) 19 on the participation of citizens in local public life contains a wealth of ideas for reinforcing local democracy as one of the cornerstones of democracy in Europe.

The Council has introduced a number of instruments that seek to promote direct participation of citizens beyond voting in periodic elections, or which exhort governments in member states to introduce such measures. These range from the Venice Commission's definition of the principles on which referendums should be based¹²¹ through to Parliamentary Assembly resolutions on how member states can enhance participation opportunities through

120. Committee of Ministers Resolution 93 (38) on relations between the Council of Europe and international non-governmental organisations.

121. Venice Commission, "Guidelines for Constitutional Referendums at National Level", document CDL INF (2001)10.

consultation and engagement exercises.¹²² In addition, the Committee of Ministers has made a recommendation to member states on establishing balanced participation between women and men in political and public decision making.¹²³ The rationale behind these initiatives is the recognition of the democratic deficit identified earlier. In addition, the background report that underpins the Assembly's 1997 resolution on citizen participation goes beyond the acknowledgement of democratic failings to suggest new opportunities for engagement that emerge from increasing levels of education among citizens and the potential of new technologies to engage them:

... two new factors tip the scales in favour of enhanced opportunities for citizen participation: the generally higher level of education and the increasingly powerful information and communication technologies now available.¹²⁴

Much of the Assembly's debate around new modes of citizen participation, however, is focused around the conventional dichotomy of direct *versus* representative models of democracy. Consequently, its resolution that encourages governments to adopt referendums also emphasises caution and the development of a balance between citizen participation and the exercise of political responsibility:

A prior observation is necessary to prevent a misunderstanding, with potentially weighty implications, and which tends to set direct democracy against representative democracy. The harmonisation of mostly contradictory and conflicting needs of citizens or groups of citizens, dictated by general interest, can be achieved only through parliamentary deliberations. The use of direct democracy must be regarded as a complement. Even in Switzerland, an exemplary country in the area of direct democracy, 95% of decisions are taken by parliament ... Abuse of referendums must not obscure their real aim which is to render representative democracy more participative and in so doing to consolidate it and to serve as an antidote to the current malaise undermining it.¹²⁵

122. See Parliamentary Assembly Resolution 980 (1992) on citizens' participation in politics; Parliamentary Assembly Resolution 1121 (1997) on instruments of citizen participation in representative democracy.

123. Committee of Ministers Rec(2003)3 on balanced participation of women and men in political and public decision making.

124. Parliamentary Assembly Document 7781 on instruments of citizen participation in representative democracy.

125. Parliamentary Assembly Resolution 1121 (1997) on instruments of citizen participation in representative democracy, paragraphs 6 and 13.

In seeking to develop this balance, the debate returns to the relationship between representative democracy and other modes of political engagement. In reasserting the primacy of parliamentary democracy and the responsibility of politicians, the Assembly clearly moves towards the Schumpeterian “realist” view of democracy, in which parliaments are and should remain the proper location for sovereign power. However, such assertions sit at odds with many of the other activities of the Council which are trying to find new ways of engaging marginalised groups around particular policy areas. For example, the Committee of Ministers has promoted the involvement of citizens in the decision-making process affecting health care.¹²⁶ The Congress has encouraged the creation of consultative bodies at the local level to ensure the participation of foreign residents in local political life,¹²⁷ which complements the existing convention on the same issue.¹²⁸ Other instruments have encouraged special measures to enhance the participation of the elderly, young people and ethnic minorities.¹²⁹ These initiatives not only seek to promote new modes of political participation, they also seek to enhance the political efficacy of particular groups that are marginalised from conventional politics or from influence in relation to particular policy areas. In so doing, these initiatives are seeking to redress perceived political inequalities and to enhance the political power of particular groups. Inevitably, therefore, they develop a tension between the expression of parliamentary sovereignty and citizen participation.

This tension is far from being resolved in political theory let alone in democratic practice. However, one way of understanding the relationship is to consider democratic instruments as fulfilling different functions:¹³⁰

– some instruments, such as voting, are intrinsically *numerical* in their approach and seek simply to aggregate preferences from individual citizens in order to reach a majority decision;

126. Committee of Ministers Recommendation No. R (2000) 5 on the development of structures for citizen and patient participation in the decision-making process affecting health care.

127. Congress of Local and Regional Authorities of Europe Resolution 141 (2002) on the participation of foreign residents in local public life: consultative bodies.

128. Convention on the Participation of Foreign Residents in Public Life at Local Level, European Treaty Series No. 144 (1992).

129. See Parliamentary Assembly Recommendations 1428 (1999) on the future of senior citizens: protection, participation, promotion, and 1492 (2001) on the rights of national minorities.

130. See *The future of democracy in Europe*, op. cit. (n. 1).

- others are intrinsically *negotiative* in their approach and, recognising the plurality of interests that are present in society, seek compromise across different interests;
- finally, some instruments are *deliberative* in their approach and encourage citizens to reflect upon competing views in the process towards preference formation. Deliberation reflects the understanding that preferences are not fixed but can develop through a process of enquiry and discussion.

Distinguishing democratic instruments in this way is important, because it allows the relationship between citizens, governments and civil society organisations to be considered in a more systematic way. The formal instruments of representative democracy are primarily *numerical*: electoral systems are premised upon various methods of aggregation of votes to produce winners. Similarly, Parliamentary decision-making systems use numerical aggregation to determine policy, where parliamentarians vote on issues. However, much of the activity of conventional politics has also been about supporting a *negotiative* process. Whether building parliamentary coalitions around particular policies or bargaining across organisations to produce support for initiatives, politics is often about trading between interests. Indeed, it is this negotiative politics that lies at the heart of pluralist visions of democracy and on which the support for NGOs in playing a role in democratic government is premised. *Deliberative* processes are important, however, in so far as much political activity is about persuading citizens to support particular causes or to reflect upon particular ideas. Where mechanisms consciously encourage deliberation, they implicitly recognise that preferences are not preformed but require elements of information and reflection in advance of a decision.

In reality, many mechanisms cross over these distinctions. Decisions made within representative democracies often have elements of all three. Referendums, for example, are explicitly numerical in the way in which they arrive at a policy decision. However, they may also involve negotiation between political parties or other interested groups to establish political support in favour or against the referendum question. In the process of presenting competing arguments, interested parties will also encourage a process of deliberation among citizens. The question for existing and developing institutions of democracy, therefore, is what emphasis do they want to give to these different functions? Parliaments in deliberative

mode need to behave differently than in a negotiative mode. Moreover, the aggregative function may need to be reassessed where deliberation is becoming more effective.

The significance of this discussion is that it sheds light upon the way in which different instruments may combine to make democracy effective. Consequently, it offers a set of criteria against which the activities of NGOs and state sponsored public participation initiatives can be judged. Only formal voting methods can really deliver politically-equal numerical democracy. While surveys, opinion polls and other forms of consultation give insights into citizen preferences they are not a reliable form of numerical aggregation. However, a plurality of interest groups and organisations is vital, if negotiative democracy is to be explored. Such plurality is also vital for deliberative democracy to develop, although deliberation can also be sustained through state sponsored initiatives.

Box 3.8: Women in political life

Balanced participation of women and men

(Committee of Ministers Recommendation Rec (2003) 3 of the Committee of Ministers on balanced participation of women and men in political and public decision making)

The Committee of Ministers recognises that democracy can no longer afford to ignore the competence, skills and creativity of women but must become gender sensitive and include women with different backgrounds and of different age groups in political and public decision making at all levels. It recommends that representation of either women or men in any decision-making body in political or public life should not fall below 40%. It recommends that the governments of member states:

- commit themselves to promote balanced representation of women and men by recognising publicly that the equal sharing of decision-making power between women and men of different background and ages strengthens and enriches democracy;
- protect and promote the equal civil and political rights of women and men, including running for office and freedom of association;
- ensure that women and men can exercise their individual voting rights and, to this end, take all the necessary measures to eliminate the practice of family voting;
- review their legislation and practice, with the aim of ensuring that the strategies and measures described in this recommendation are applied and implemented;
- promote and encourage special measures to stimulate and support women's will to participate in political and public decision making;
- consider setting targets linked to a time scale with a view to reaching balanced participation of women and men in political and public decision making;
- ensure that the recommendation is brought to the attention of all relevant political institutions and to public and private bodies, in particular national parliaments, local and regional authorities, political parties, civil service, public and semi-public organisations, enterprises, trade unions, employers' organisations and non-governmental organisations;
- monitor and evaluate progress in achieving balanced participation of women and men in political and public life, and report regularly to the Committee of Ministers on the measures taken and progress made in this field.

The problem that the Council of Europe faces is that the mechanisms of numerical democracy are relatively easy to promote across all member states. Indeed, the activities around election standards and monitoring are fundamental to delivering this form of democracy. The structured support that the Council has created for the countries in transition to democracy are one of its great democratic successes. However, developing a strong civic society through a network of NGOs which are, by definition, independent of the state, is a longer-term and more subtle process. In those countries where civil society was largely discouraged or controlled through the state, NGOs are still insufficient in their number and support to achieve the full pluralist vision. Moreover, the historical suppression of a political culture that encouraged deliberation or negotiation also hinders the development of such practices in these newly established democracies. While the understanding of how such organisations might contribute to democracy is becoming embedded within the Council's *acquis*, the ability to strengthen democracy through such concepts remains limited in many European countries.

Conclusions

This chapter has concentrated upon identifying and analysing the core democratic principles that are established by the Council's *acquis* in the field of democracy. This *acquis* is a complex base of knowledge that has emerged over time and through a sophisticated process of debate. Its five key principles merit summary here.

Parliamentary democracy. The Council remains committed to the formal structures of democracy that enforce a separation of powers and a range of means through which opinions can be formulated and articulated. The existence of elected assemblies, in the form of parliaments, remain fundamental to this institutional structure. Parliaments, in this vision, represent a microcosm of the full spectrum of socio-economic and political interests found in the wider community and act as the centre for political debate and deliberation. However, its relationship with other attempts to involve citizens directly in the policy process, beyond voting in periodic elections, has not been fully thought through in the *acquis*.

Representation. For parliaments to realise this ambition it necessary for them to be truly representative of the communities they serve. The Council has focused on three important

issues that support this representative process. First, they have supported the principle of a plurality of political parties as forming the foundation of effective democratic politics. Concerns with party financing and the need to prevent corrupt funding of political parties by private interests is significant in this respect. Second, the Council has vigorously promoted good practice in electoral matters through both the definition of standards and the monitoring of procedures. As well as promoting generally high standards across the process, the Council has also focused on issues of disenfranchisement among ethnic minorities and has concentrated particularly upon promoting gender equality as a fundamental feature of democracy. Finally, the Council has also been active in supporting the development of new instruments to support representation.

Transparency responsiveness and accountability. While there are a potentially wide range of issues that might be addressed in relation to transparency, responsiveness and accountability, the Council has concentrated its efforts in three main areas. First, it has sought to define and enforce the ethical standards that all public servants, whether paid functionaries or directly elected, should be expected to observe. Second, it has developed a range of instruments aimed at tackling corruption at all levels, from local government through to international crime and corruption. In seeking to codify the corrupt activities that should be criminalised, the Council has established an important benchmark for inhibiting anti-democratic corruption. Third, the Council has devoted much of its efforts to supporting a free and active media as one of the building blocks of democracy. Linked to this has been a concern with media pluralism as the best way to ensure freedom of expression. It is only by preserving and enhancing all three of these components that political institutions can be seen to be transparent, responsive and accountable.

Sub-national democracy and subsidiarity. The European Charter of Local Self-Government has defined the role of local government in a broader democratic polity. However, despite its widespread adoption among member states, the practice of local democracy remains heavily circumscribed in many countries. In particular, the principle of subsidiarity, which requires that decisions be taken at the level closest to the citizen, has not always been observed. The problem is a complex one, not least because no two member states have the same institutional structures at national or sub-national level. However, the principle remains important to democracy and fundamental to the Council's vision for European democracy.

Participation and civic society. The Council, through many of its adopted texts and activities, promotes the principles of participation and civic society. Participation is focused especially around encouraging the engagement of otherwise marginalised groups: young people, ethnic minorities, immigrants and so on. The need for balanced gender representation has also featured prominently in this area. Support for civic society has focused more upon how NGOs can receive official recognition for their contribution to democracy and gain some degree of political legitimacy. However, the relationship between this principle and those more specifically concerned with the institutions of representative democracy remains underdeveloped.

These five principles, and the different institutional practices that bring them to life, are central to the Council of Europe's *acquis* on democracy. However, in setting out these principles we are not arguing either for exclusivity or coherence. Other principles are occasionally articulated that complement these fundamental ones. These principles are simply those that recur frequently in the Council's treaties and adopted texts.

The development of these principles must also be acknowledged. Given that democracy is an intemporal and incomplete project, it is necessary to acknowledge that the democratic principles that the Council articulates have emerged through an incremental and responsive process, rather than a coherent and stable activity of deliberation. The articulation of particular principles has occurred in response to particular problems or events. The decline in electoral turnout and the perception of a democratic deficit is one such problem. The transition to democracy in Central and Eastern Europe and the accession of a number of states with very different social and political histories is one such event which has significantly altered the path of democratic development. It is not surprising, therefore, to observe that the principles highlighted above are not always mutually consistent and give rise to a number of tensions in the democratic project of the Council. In different contexts these principles often compete with each other in shaping institutional developments. Nevertheless, these principles underpin much of the work that the Council undertakes in the area of democratic institutions and, as such, provide a base from which to understand the democratic trajectory of Europe.

CHAPTER 4

MAKING DEMOCRATIC INSTITUTIONS WORK

Understanding the way democracy can be developed in Europe requires an explicit focus on democratic institutions and the way in which they work. Since its inception, the Council of Europe has been engaged in seeking to design or shape the development of democratic institutions among its member states, originally among established democracies and more recently in the new and emerging democracies. The integrated project “Making democratic institutions work” reflects this general commitment but also turns attention towards the practical challenges of institution building within diverse and complex contexts. It is through institutional devices that democratic principles – such as representation, participation and accountability – are enacted and given meaning.¹³¹ In assessing the uptake of standards among members states, the project is concerned both with the health of existing democratic institutions and with the design of new institutions to serve democratic goals (for example e-voting and gender mainstreaming).

An analytical summary of the *acquis* (upon which the project is based) requires a framework that is able to specify: first, how democratic institutions do their work; second, the challenges for the Council of Europe in making democratic institutions work; and third, the principles for good institutional design. This chapter will address each of these themes in turn.

How do democratic institutions do their work?

In an analytical context the term *institution* refers to the rules of the game which politics observes in a particular context. Some of these rules are formal, such as constitutions, directives or organisational structures; others are informal norms and conventions and have developed because that is the way politics operates in a particular country. The former are consciously designed and clearly specified, while the latter are unwritten codes and customs – but no less effective because of that. Political institutions work by shaping the behaviour of political actors: politicians, civil servants, interest groups, and individual citizens. The rules

131. M. Saward, “Enacting democracy”, *Political Studies* 51/1, 2003, pp. 161-79.

of the game do not determine outcomes (think of a game of football), but they do provide the framework within which actors select and pursue their strategies. Political institutions provide a set of specific constraints and opportunities for the practice of democracy.

Rules create “positions” (such as elected representative, executive member, committee chair, partner status); they determine how participants enter or leave these positions (election, appointment, patronage, contract); what actions they are permitted to take (decision, petition, veto); and what outcomes they are allowed to affect.¹³² While formal rules identify specific procedures, incentives and sanctions, informal rules determine what is considered “appropriate” in different situations, expressing values and identities. Sometimes informal rules reinforce formal strictures, sometimes they override them, representing shadow or parallel institutions (“the way things are *really* done”).

It is important to remember that it is political actors and not the institutions themselves who do the “work” in building, sustaining and improving democracy. Institutions are no more than paper (or website) statements, or concrete and glass buildings, unless the structures they express are “instantiated” in the behaviour of individuals.¹³³ It is political actors who make and remake institutions on a daily basis. It is politicians, public servants and citizens who match situations to rules, and who make their own decisions about following, breaking or bending these rules.

Indeed, at the present time the number and range of political actors involved in European democracy is increasing. Democratic debate and decision making increasingly involve roles for NGO and private-sector actors. We need an analytical framework that focuses upon the rules of the democratic game rather than upon the particular organisations of the state. Most democratic innovations involve rules and conventions that shape the behaviour of many different actors and organisations, acting both individually and in partnership. The democratic process can no longer be seen as synonymous with the operation of formal state structures – whether at the national, sub-national or supra-national level. Democracy in Europe is being institutionalised in new ways, although old institutions (like legislatures, elected assemblies and local councils) remain important. To continue the football analogy, it

132. E. Ostrom, “An agenda for the study of institutions”, *Public Choice*, Vol. 48, 1986, pp 3-25.

133. A. Giddens, “Elements of a theory of structuration” in A. Elliot (ed.) *Contemporary social theory*, Oxford: Blackwell, 1999.

is necessary to look at how the game itself has developed, and not at the fate of any particular club (however influential).

Making democratic institutions work is a multi-stage process. Not only do appropriate formal rules have to be *created*, but they also need to be *recognised* by the diverse political actors involved, and then *embedded* over time. Finally, they must be *monitored* in order to establish whether formal rules are effectively shaping political behaviour and decision making, and have achieved some measure of fit with dominant political conventions. It is a strength of the Council of Europe's approach that these stages are all accorded significance within the *acquis*, as shown in the following four examples.

First, binding conventions and non-binding recommendations both play a part in the creation of democratic institutions. For example, as has already been demonstrated earlier, while the European Charter on Local Self-Government specifies the formal rules for central-local government relations, the monitoring reports of the Congress clearly demonstrate differences in national responses to it.

Second, training and awareness programmes and the provision of policy guidelines are important in achieving the recognition of new institutional rules. The work of various parts of the Council in helping transition countries train politicians and embed institutional forms is a significant step in this direction.

Third, the embedding of democratic institutions is served by expert assistance relating to the implementation of instruments. The various conferences and other activities of the project are part of this process.

Last, the Council of Europe is also engaged in monitoring member states' compliance with commitments related to the establishment and functioning of democratic institutions. These monitoring activities not only highlight inadequacies or problems in implementation, they also articulate institutional values that the Council is concerned with.

Overall, therefore, democratic institutions work because they combine formal constitutional rules with informal patterns of behaviour and expectation. Democracy is perceived to be particularly effective where both the formal and informal rules are widely understood and

accepted across the polity. Conversely, where the formal institutions are relatively new, informal norms and customs may still be under development or negotiation and may not have the same high level of recognition. In these circumstances, the informal norms that oil the wheels of democracy are absent, posing challenges for its effective operation.

Challenges in making democratic institutions work

There are clearly many external variables that may affect Council of Europe interventions regarding democratic institutions: these might include levels of education, economic conditions, social conflict, demographic developments and so on. Our concern here is with the challenges that arise out of the very character of democratic institutions.

First, it is important to recognise that democratic institutions are nested within complex institutional environments – political and non-political – over which institutional designers may have very little control. Institutional arrangements that may be targeted by a particular Council of Europe intervention – local councils, regional assemblies, national governments – are nested within wider institutional frameworks that exist above, below and alongside them. Local democratic institutions, for example, are shaped by rules that emanate from higher tiers of government, including national legislation. National governments, on the other hand, are influenced by “institutional templates” that may not be specifically political but circulate in the wider society and economy through the media, education and business channels (inspired by, for example, commercial management styles, models of corporate governance, ideas about the “IT revolution”, or campaigns against sleaze or corruption). Democratic institutions are also shaped by locally-specific cultures and conventions (“how things are done around here”), whether at the national, regional or local level.¹³⁴ The rise of new public management across OECD countries and beyond, the focus on e-government, and other such developments, are all examples of institutional templates that not only shape government institutions but which are also adapted to be locally specific.

Second, power relationships shape the way that institutions develop over time. Institutions are inherently political, because rules create patterns of distributional advantage.¹³⁵

134. V. Lowndes and D. Wilson, “Balancing revisability and robustness? A new institutionalist perspective on local government modernisation”, *Public Administration*, Vol. 81, No. 2, 2003.

135. J. Knight, *Institutions and social conflict*, Cambridge: CUP, 1992.

Institutional change is never a purely technical matter, because any challenge to existing institutional settlements is likely to be met by resistance. Indeed, shifting power relations may be one of the goals of institutional reform (such as empowering legislatures vis-à-vis executives, local vis-à-vis national government, NGOs vis-à-vis business lobbies, or simply citizens vis-à-vis bureaucrats and politicians). The Parliamentary Assembly's interest in other forms of citizen engagement, coupled with its continued assertion of the primacy of parliaments, is one example of its awareness of how power relations may change with new democratic practices. Purposive attempts at institutional change are hard to achieve. New rules may be hijacked by powerful actors and adapted to preserve their interests. New rules may exist in name only while the old rules retain their hold at an informal, but no less effective, level.¹³⁶ For reformers, *de*-institutionalisation may present an even greater headache than the crafting of new rules, although it is an issue rarely discussed. Interestingly, Paul Kirby, a former high-ranking official with the British Audit Commission, recently argued for greater attention to be paid to undoing old practices and conventions. He captures this in the slogan: "Stop is the new Go".¹³⁷

Third, history matters when we look at making democratic institutions work. The "soft" version of this argument is simply that democratic institutions are influenced by their "inherited world".¹³⁸ Current practice and perceptions of future possibilities are constrained by the traditions that are expressed in both formal rules (constitutions and terms of reference, for example) and informal conventions (of paternalism, or deference, for example). History is a source of diversity as well as uniformity within democratic institutions, as traditions vary across places. Indeed, the very different democratic structures in place across Europe can be treated to this historical dimension to explain not only difference in process but, also, why they are appropriate and effective in each context.

The "hard" version of the argument concerns "path-dependence". The basic idea is that, once institutional designers have started down a particular path (however arbitrary the initial choice), the costs of changing direction are high. Path dependency rests upon a conception of increasing returns or positive feedback. The relative benefits of sticking with one design

136. V. Lowndes and D. Wilson, "Social capital and local governance: exploring the international design variable", *Political Studies*, Vol. 49, 2001, pp. 629-647

137. *Local Government Chronicle*, 30 May 2003, Emap Publications, United Kingdom.

138. J. Stewart, *The nature of British local government*, Basingstoke: Palgrave, 2000.

compared with switching to another option increase over time; the costs of exit rise.¹³⁹ Path dependency creates a powerful cycle of self-reinforcing activity. The cycle, however, may be virtuous or vicious. There is no reason to assume that the option which becomes “locked in” is superior to the alternatives that were foregone. In fact, over time, this becomes progressively less likely, given the barriers that are produced to innovation and to adaptation to changing environments. Positive feedback effects are particularly powerful in political institutions, given the legally binding nature of the rules that delineate a chosen path, and the absence of a competitive market mechanism to stimulate learning and reward risk-taking.¹⁴⁰

Given that much of the Council’s work is seeking to change democratic institutions, to make existing ones more effective or, more radically, to introduce new institutional forms, an understanding of institutional constraints is essential. It is only by considering these challenges that the Council can hope to make democratic institutions work better.

Principles for good institutional design

In the context of these constraints, what principles are best pursued in seeking to influence the functioning of democratic institutions?

Interventions should be seen more in terms of redesign than design, and as indirect rather than direct mechanisms for securing change.¹⁴¹ *Redesign* is important because reformers are inevitably constrained by past inheritances and the pull of path dependency. An *indirect* approach is important because reformers need to steer or frame the interventions of dispersed political actors, rather than seek to impose a single set of rules. Goodin counsels against “The Myth of the Intentional Designer” and argues that the goal should be “designing schemes for designing institutions”¹⁴² – that is, setting boundaries within which the “everyday makers” of political institutions can operate.¹⁴³ We can only seek to make democratic institutions work

139. For a succinct but thorough and critical review of the application of path-dependence models to political processes, see P. Pierson, “Increasing returns, path dependence, and the study of politics”, *American Political Science Review*, Vol. 94, No. 2, 2000, pp. 251-261.

140. *Ibid*, p. 257.

141. The analysis here is heavily influenced by Goodin’s seminal essay on institutional design; see R. Goodin, “Institutions and their design” in R. Goodin (ed.) *The theory of institutional design*, Cambridge: CUP, 1996.

142. *Ibid*, p. 28.

143. On the concept of the “everyday maker”, see M. Bevir and R. Rhodes, *Interpreting British governance*, London: Routledge, 2003.

through influencing the behaviour of reflexive political actors on the ground. Interventions in institutional design need to exploit rather than frustrate the creative efforts of those who make and remake democratic practice on a daily basis.

Conventionally, good design is regarded as guaranteed by a combination of internal consistency and “goodness of fit” with the external environment. It may be more helpful, however, to see good design as secured by clear values rather than functional necessities, and by a capacity for learning and adaptation rather than environmental “fit”. Because institutions inevitably embody values and power relationships, institutional design is inescapably a normative project. There needs to be clarity about the values being promoted (and challenged) within institutional reform programmes. Shifting “old” values is one reason why institutional change is hard to effect; at the same time, it is this normative dimension that makes institutional design so important – and so alluring to every generation of politicians.¹⁴⁴ In institutional design, guiding values should not only be clear but “publicly defensible” – that is, legitimate in the eyes of the wider citizenry.¹⁴⁵ The values that inform institutional design need to be understood and critically debated amongst the citizenry. As John Dryzek has argued: “No institution can operate without an associated and supportive discourse”.¹⁴⁶

A “one-best-way reflex” in institutional design should be avoided; rather than seeking the universal application of a particular model, or the maximum spread of “best practice”, it is important to sustain a “variety engine” within institutional design.¹⁴⁷ Tolerating, even promoting, variability within institutional design is a way of building in a capacity for innovation and adaptation to changing environments. But democratic institutions need to be flexible, not “brittle”: they need to be able to *adapt* to new circumstances, without being *destroyed* by them. As Goodin notes: “We want to have the capacity, sometimes, to bind ourselves to a certain course of action and to ensure that we (or our successors) resist any temptations to deviate from it”.¹⁴⁸

144. Bo Rothstein has written eloquently on this point in: B. Rothstein “Political institutions: an overview” in R. Goodin and H. Klingemann (eds.) *A new handbook of political science*, Oxford: OUP, 1996, pp.133-166.

145. R. Goodin op. cit. (n. 142) pp. 41-42.

146. J. Dryzek, “The informal logic of institutional design” in R. Goodin (ed.) *The theory of institutional design*, Cambridge: CUP, 1996.

147. C. Hood, *The art of the state*, Oxford: Clarendon Press, 1998, p. 69.

148. Goodin, op. cit. (n. 142) p. 40.

Indeed, it is a defining characteristic of all institutions that they are “triadic” – that is, “established and enforced by “third parties” who are not part of the institutionalised interaction”.¹⁴⁹ The role of third party enforcers is to supply “arguments as to why an institutionalised status order is to be held valid and hence deserves to be adhered to”.¹⁵⁰ The sophistication of these arguments is an important contribution to institutional robustness. Goodin argues that institutional design must be “sensitive to motivational complexity”. The most effective enforcement mechanisms may be those that cultivate trust and embody “a direct appeal to moral principles”, rather than those that seek simply to control the behaviour of actors assumed to be self-interested and prone to “defection”.¹⁵¹ The success of institutional design depends as much upon the “institutional software” of persuasive arguments and convincing discourses, as upon the “hardware” of rules, rights and operating procedures.¹⁵² This message is particularly important to the monitoring activities of the Council, which can have the most impact in this area. Good institutional design should, therefore, be both robust and revisable.¹⁵³

Robustness can be operationalised in relation to two criteria: first, the clarity of the values informing institutional design; and second, the nature and effectiveness of “third party enforcement”.

Because institutionalisation is an ongoing process (institutions are not once-and-for-all creations), it is not sufficient to examine the values and enforcement approach embodied in the original design. We need also to look at the extent to which value clarity is maintained over time, and at the ongoing development of enforcement strategies. By “enforcement” we mean ensuring that new institutional designs “stick” - that they shape actors’ behaviour in desired ways and give rise to new and specific “logics of appropriateness”. Approaches to enforcement may rely more or less on direct control or on commitment building among actors.

149. C. Offe, “Designing institutions in East European transitions” in R. Goodin (ed.) *The theory of institutional design*, Cambridge: CUP, 1996, p. 199. 203.

150. *Ibid*, p. 204.

151. Goodin *op. cit.* (n. 142) p. 41.

152. Dryzek *op. cit.* (n. 147) p. 204.

153. For a fuller discussion of robustness/revisability criteria, see Lowndes and Wilson, *op. cit.* (n. 135).

Revisability can be operationalised in relation to two further criteria: first, flexibility, meaning the capacity within institutional designs for adaptation over time, and for capturing the benefits of “learning by doing”; and second, variability, meaning the extent to there is tolerance (even encouragement) of different design variants in different locations.

In short, revisability seeks to ensure that institutional arrangements can operate in different local environments and changing circumstances, and that there is a capacity for innovation and learning.

Conclusions

Much of the argument set forth in this chapter is already implicitly recognised in the various activities of the Council. Its formal treaties give scope for variation in the way different member states develop democracy. Its adopted texts seek to reinforce principles while, at the same time, allowing a degree of reflection upon various issues. Monitoring of democratic developments adds to both the revisability and robustness of various national and local institutions. However, there is also a danger that, in its desire to respond to contemporary problems, rise to specific democratic challenges and grasp potential opportunities, the Council may ignore both the forces of institutional inertia and the need for sensitive institutional design.

In seeking to make democratic institutions work more effectively, the Council needs first to establish the values that it is seeking to articulate through particular institutional forms. The principles set out in the previous chapter begin that process by clarifying the different principles that are embedded in the *acquis* and by highlighting the possible tensions that exist within and across them. It is only by “surfacing” these values that the current rules of the game can be clarified and the embedded positions of different actors understood. Second, in making recommendations for institutional reform, the Council must remain sensitive to the complexities of democracy in different member states, the power relationships that are embedded in particular institutional forms and the influence of history in shaping existing institutional structures. There is little value in making recommendations or establishing commitments to institutional practices that do not reflect these issues and allow institutional variation accordingly. Third, the Council should not approach institutional design from the

perspective of a perfect or ideal-type model, but should seek to realise its democratic values and ambitions through a combination of different institutional forms that can be adapted to suit different political and cultural circumstances.

Perhaps the biggest contribution of the Council of Europe to the development of democracy across its members states lies in its role as a third party enforcer. Because it is not part of the institutionalised interaction it is able to offer reforms that reflect an awareness of competing power relationships but which are not part of them. Through both its powers of initiation of institutional reform (treaties, recommendations and so forth) and its monitoring and support activities, the different organs of the Council are able to encourage and enforce institutions that are both robust and revisable. They can be robust in so far as they can reflect the core values of European democracy and articulate a consensus across the continent. They can also be revisable in so far as they can be flexible, allowing learning across countries and institutions, and allow for variation in institutional form and practice. Finally, the Council is in a unique position to make the institutions of democracy extendable to other tiers and policy areas. It is only by consciously focusing upon institutional design procedures that the Council can hope to have an impact upon the institutional development of democracy in Europe.

CHAPTER 5

TENSIONS IN DEVELOPING DEMOCRACY

This document has developed an analysis of the Council of Europe's understanding of democracy as articulated in its *acquis*. As part of that analysis it has sought to understand not only the various values that underpin the *acquis* but also the strengths and weaknesses of its current texts in supporting and developing democracy. One of the key conclusions from this analysis is that the *acquis* is not a settled and finished product that the Council can now put to one side. Indeed, far from this position, the analysis recognises the intemporal nature of democracy and the need to continually renew its institutions to guard against democratic atrophy or redundancy. The development of democracy has reached the point at which the Council, and other pan-European and national organisations, need to take some important decisions on the direction that democracy should evolve. This chapter raises some of the questions and tensions that need to be reflected upon as part of that decision-making process.

There are clearly tensions and contradictions in the *acquis* as presented in earlier chapters. Indeed, such tensions and contradictions are inevitable given the rich development that it has been through and the changing nature of democratic practice among a rapidly expanding membership. However, even if there are tensions and an element of incoherence within the *acquis* there is, nevertheless, clearly some general understanding of the core principles that underpin the Council's work in the area of democratic standards. A significant proportion of conventions, charters, recommendations, resolutions and other adopted texts begin by reiterating the Council's belief in a common heritage that is shared by all member states. The problem occurs when the discussion of democracy moves beyond these core principles to the process of enactment through various instruments. Two potential problems exist.

First, different pillars of the Council of Europe, different conventions and charters, and different working groups, are all seeking to define the "democratic problem" and to address it in their own way. For some it is a problem of legitimacy in relation to the activities of representation. For others, there is a crisis in citizenship which relates to the institutional opportunities at the local level. For yet others, the problem is one of social or political

exclusion of particular groups and an absence of adequate opportunities for engagement. The responses to such problems are equally diverse, ranging from an emphasis upon ethical standards for public administrators through to citizenship education and the development of enhanced participation opportunities using new technologies. None of these definitions, or their solutions, is necessarily problematic for the development of democracy in Europe. Indeed, the wide range of initiatives is a clear demonstration of the importance of democratic enhancement to the Council's work. However, there is a clear need to pin down the different definitions of democracy that are being used within the Council if the future direction of democracy in Europe is to be considered. Understanding the problems that different democratic institutions are facing is part of the first step in "surfacing" the values of European democracy.

Second, there is a potential problem around the way in which different democratic instruments of the Council of Europe are interpreted in different nation states. Differences in political cultures and expectations may lead to different instruments gaining priority and different interpretations being placed upon the meaning of some resolutions. The Council's *acquis* includes a wealth of information on compliance with conventions and charters and wider democratic practice. However, this documentation does not reveal any overarching or thematic exploration of differences in interpretation that may lead to very different practices in different democracies. Indeed, reports often assume an ideal type model that countries are failing to live up to, even though it is evident that such an ideal type has not been clearly articulated or thought through.

In many respects, this second problem is one that arises from the realistic acceptance of "variable geometry". It is revealed, for example, in the development of the regional charter on local self-government. The background papers to the draft charter recognise that different states have different forms of regional government: indeed, some even have different systems within their own borders. However, under the auspices of the Congress of Local and Regional Authorities of the Council of Europe there is now a growing movement of "regions with legislative assemblies" to have their own rights and powers within the Council of Europe's framework. While not necessarily challenging any of the other democratic practices that the Council promotes, these regions will have different opportunities from others without legislative powers, providing a potential area of cleavage in the future.

This second broad problem is really one of interpretation and enforcement. To what extent should democracy be recognisably similar in all member states of Europe, how much should democratic laggards or leaders change what they are doing, and how much should the Council be pushing the democratic boundaries? These are questions that can be explored through two tensions that remain implicit in the Council's work: convergence or divergence in relation to particular democratic standards and practice; stability or change in relation to the impact of particular innovations and their effect on democratic values. These tensions are not necessarily dichotomous, although they are presented in this way here, because they represent decisions for the builders of democratic institutions in Europe.

Convergence or divergence?

Although the Council of Europe has existed for over fifty years, more than half of its membership has joined in the last two decades. There is an important but, often, implicit distinction between the old and established democracies that are long standing and influential members of the Council on the one hand, and newer democracies that have joined more recently on the other. Such a distinction raises questions about the direction that the Council is taking towards democracy. Is the purpose of the various charters, resolutions and recommendations adopted by the Council's organs to apply a common standard across all of Europe's democracies (the lowest common denominator) or is it to shape the direction in which democracy is evolving?

Of course these two scenarios are not necessarily in competition with one another. It is perfectly feasible to consider some countries to be establishing a minimum base of democratic practice while others are rapidly extending their democratic possibilities. Indeed, in some respects, it is necessary for newer democracies to go through this process, in order to establish the informal civic infrastructure and institutional norms that sustain established democracies. Furthermore, the problems faced by different countries are not the same and do not require the same responses. Some established democracies may need to take different steps from newer democracies. However, in so far as the various countries across Europe learn from one another and take cues about what is appropriate, then there are potential clashes of interest. One example is in relation to secrecy of the vote, a principle enshrined in Article 3 of the First Protocol to the European Convention on Human Rights. Experiments

with remote voting (either by post or electronic form) potentially compromise the ability for individuals to vote in private, thereby protecting the secrecy of the vote. While the problem is notionally the same in all communities, in practice it is likely to have very different consequences according to the socio-political culture in which remote voting is being introduced. In this instance, and many others like it, the tension between convergence and divergence is potentially profound.

Related to this question is a converse problem of whether the standards being applied to newer democracies are being met by the established ones. Electoral practice in many established democracies, for example, does not meet the standards which are prescribed under the Council of Europe and to which they are signatories. Electoral law in the United Kingdom, for example, does not allow for the independent monitoring of elections by outside bodies unless the returning officer in each constituency provides consent. Such consent is at the discretion of the returning officer. This secrecy would be deemed an illegal and highly suspicious practice in many of the newer democracies. The expectation that there should be convergence around particular standards or practices, therefore, cuts both ways. Older democracies also need to assess their activities and the extent to which they live up to the standards that they prescribe for newer democracies.

In reality, the tension between convergence and divergence is a false dichotomy. In setting out democratic standards, the Council and other European-wide bodies are inevitably encouraging a degree of convergence. At the same time, a degree of divergence is not only accepted but expected in the development of effective democratic institutions. The point being made here, however, is that those interpreting the *acquis* or designing further institutional reforms should be attentive to these potential contradictions and be aware of both the limitations of convergence and dangers of too much divergence.

Stability or change?

Building from this attention to convergence and divergence, there is a concomitant need to be aware of the relationship between stability and change in the development of democratic institutions. There is a tendency to see institutions, especially those, such as democracy, with a long historical evolution, as being relatively stable entities. Change, in this context, is

gradual and incremental. The problem with this perception of democratic institutions is that it ignores the impact of external events on the institutions of democracy. In particular, this tension is concerned with how much the practice of democracy and the standards by which it is judged are being subject to systemic or deliberate change.

The problem here relates to the one around convergence or divergence in so far as it is concerned with the extent to which the Council and other pan-European bodies should be promoting a settled vision of democracy and its institutions. Political and democratic practices vary greatly across the forty-five member states, reflecting the different socio-economic, political, demographic, cultural and geographic features of Europe. These different countries face a number of democratic problems, many of which are common but all of which are subject to local variation and present themselves in different ways accordingly. Establishing stability in such an environment is complex and unadvisable: it also does not reflect the intemporal nature of democracy and the need to periodically reinvigorate democratic institutions.

As the previous chapter demonstrated, however, deliberate or conscious institutional change is not easily achieved. While there are certain design principles that can mitigate the problems of institution building, these do not guarantee success. However, a focus on conscious reform which recognises the drivers of change and builds institutions based upon a conscious articulation of values and objectives is preferable to change which is simply driven by, and responsive to, external forces. The danger of unconscious institutional change is that it leads to the emergence of transient and unsustainable institutional structures. Successful democratic institutions are those that reinforce the underlying principles of democracy and are sustainable over more than simply a short period of time. It is such criteria that should form the basis of any longer-term evaluation of democracy.

Conclusions

Democracy is, in many respects, the *raison d'être* of the Council of Europe. Indeed, it is a fundamental criterion of membership that states subscribe to broad democratic values and are based upon sound democratic institutions. The Council is also the only body at the pan-European level that is focused explicitly upon democracy: while other organisations support

democratic developments, their focus is more upon security, economic and political co-operation across states. The Council, therefore, is uniquely placed as the primary vehicle to support, sustain and develop democratic institutions both within and among member states.

Despite never having previously spent time reflecting directly upon its contribution to democracy, the Council of Europe has developed an impressive *acquis* that makes an important contribution to the daily practice of democracy in all forty-five member states. This *acquis* establishes both the fundamental principles that different instruments are seeking to enact and the direction of reform that it is taking. While there remain tensions and contradictions in aspects of this *acquis*, its broad thrust and important contribution should not be ignored. In summarising and analysing the *acquis*, this document provides both the opportunity for the Council to reflect on the breadth of its achievements and to think more carefully about how it wants democracy in Europe to work in the future.

OTHER PUBLICATIONS IN THIS SERIES

Going for gender balance (2002)
ISBN 92-871-4901-1

Women's individual voting rights – a democratic requirement (2002)
ISBN 92-871-5040-0

Highway to democr@cy – the Council of Europe and the information society (2003)
ISBN 92-871-5137-7

Guarding the watchdog – the Council of Europe and the media (2003)
ISBN 92-871-5249-7

Financing political parties and election campaigns – guidelines (2004)
ISBN 92-871-5356-6

Local consultative bodies for foreign residents – a handbook (2004)
ISBN 2-871-5455-4

Integrated project: “Making democratic institutions work”
Website: <http://www.int/democracy>

To order:
Council of Europe Publishing
F-67075 Strasbourg Cedex
Tel.: 33 (0)3 88 41 25 81
Fax: 33 (0)3 88 41 39 10
E-mail: publishing@coe.int
Website: <http://book.coe.int>

Most Council of Europe texts may be accessed via the Council's website (<http://www.coe.int>). For texts from the Committee of Ministers, the Congress of Local and Regional Authorities of the Council of Europe, and the Parliamentary Assembly, click “Institutions” and then the relevant body. For the European Treaty Series, click “Legal Affairs”, then “Treaty Office”. Texts from the Venice Commission are also found under “Legal Affairs”.