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RESPECT FOR COUNCIL OF EUROPE STANDARDS AS A MEANS OF EUROPEAN INTEGRATION

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REPORT

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1. Introductory Remarks

Albert Einstein, was once asked «How come the human brain which analyzed the structure of the atom finds it impossible to devise those political institutions that will prevent that same atom to destroy us". He responded: "The answer is very simple, my friend, the study of politics is a much more complicated affair than that of physics."[1] Albert Einstein was not alone to compare politics to natural sciences. Thomas Khun, in his book *The Structure of Scientific Revolutions*[2] develops a theory of the evolution of natural sciences inspired by political revolutions. He argues that unlike the traditional conception of a linear, accumulative, evolution of scientific knowledge, in reality, sciences progress through scientific revolutions. He calls "Dominant Paradigm" the established "truth" as to what is "scientific" and what is not, the rules that should guide the conduct of proper scientific research and the appropriate standards for the verification and evaluation of the findings. When that paradigm starts showing signs of strain and becomes unable to provide solutions to social/scientific needs there ensues a succession struggle among other alternative paradigms. Eventually, after a period of "anarchy" one of those alternative paradigms will win the confidence of the scientific community and rise to power as the new Dominant Paradigm. The notion of mingling of politics with sciences ceased to be symbolic or educational and affected, in quite concrete ways, the evolution of the former. During the Cold War era social scientists, in many parts of the globe were discouraged or even threatened not to adopt non Marxists Paradigms in their field. The reverse practice was not totally unknown although the means of persuasion were more subtle. The study of International Law and International Politics, in particular, mirrored rather accurately the division of most of the globe to two antagonistic blocs.

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[1] John Herz *International Politics in the Atomic Age* (N. York: Columbia University, 1962), p. 214.
[2] Thomas Khun *The Structure of Scientific Revolutions* (Chicago: Chicago University Press, 1969).

In the European continent, the Council of Europe was the regional organization best equipped to institutionalize the revolutionary shift from state socialism to liberalism and, thus, unify the continent under the Dominant Paradigm of Politics and Economics. The Council of Europe was created in May 1949, in the difficult years of the post WWII period. Its continuous operation since that time makes it the oldest European organization. Although the founders of the European Movement had conceived the Council of Europe as an institution serving the entire European continent reality provided otherwise. State socialism, as practiced by the Soviet Union and the other members of the Eastern Bloc, was deemed incompatible with the Council's most sacred values, i.e. "the rule of law" and the "enjoyment… of human rights and fundamental freedoms". Therefore, during bipolarity the Council of Europe served as the ideological stronghold of the Western world which also included Austria and Switzerland, Europe's traditional neutrals. It retained its appeal as the principal guardian of democracy and human rights long after the European Communities, with some of the Council's founding members at the helm, was set in course to transform the dream of European economic and political integration into a reality.

2. Political and Institutional Adjustments to the Challenges of a New Era.

The disintegration of the Eastern bloc and the ultimate collapse of the Soviet Union itself led to a totally new era of domestic and international politics. In that new era the principal concerns were not deterrence, credible second-strike capabilities and the strife among incompatible models of politics and economics at all levels of society. Instead, at least in the early years of the era, the major objectives (or, to put it in the familiar terminology, the subject-matter of "high politics"), were the consolidation of the peaceful transformation of formerly state-controlled societies and centrally planned economies into genuine democracies and open markets.

For the Council of Europe this could imply considerable upgrading of its role: from an ideological bastion of a segment of one of the two antagonistic blocs with little input in international politics to an institution that would address the major security concerns of the new era and make irrevocable the transition to a new global reality, where human and minority rights and freedoms, the rule of law and pluralist democracy were dominant features.

The Council of Europe had always been consistent in excluding from its ranks states which have failed to uphold at least the formal appearances of a democracy. Greece, under the Colonels (1967-1974) as a result of the combined pressures of the Assembly; the European Commission of Human Rights and finally the Committee of Ministers itself, was forced to withdraw from the organization (December 1969) [3]:. Portugal, a member of NATO, was admitted to the Council only after the fall of the Salazar Dictatorship (22.9.76) and Spain after the end of the Franco regime (24.11.77). Certainly tolerance in the past towards Turkey and its "military-supervised democracy" had been an embarrassment[4] of the Council.

Nevertheless, given its more or less consistent record and a Statute that sets as prerequisites for membership neither the performance of the economy nor security considerations but democracy and human rights, it was rational that the Council of Europe would be the first formerly "Western European" organization that the formerly "Eastern Europeans" would turn their attention to. First the unification of Germany on October 1990 "enlarged" overnight the

[3] D. Constas, *The "Greek Case" before the Council of Europe 1967-69* (Athens, Papazissis, 1976) – in Greek.
[4] D. Constas, *The "Greek Case" before the Council of Europe 1967-69* (Athens, Papazissis, 1976) – in Greek.

Council's member Germany with 17 million East Germans. Then, in November 1990, Hungary became the first former Warsaw Pact and Comecon member to join the Council of Europe. Poland was admitted on November 1991; then Bulgaria (7.5.1992), Estonia, Lithuania and Slovenia (14.5.1993); the Czech Republic and Slovakia (30.6.1993), Romania (7.10.1993); Latvia (10.2.1995); Moldova (13.7.1995); Albania, the Former Yugoslav Republic of Macedonia and Ukraine (9.11.1995), the Russian Federation (28.2.1996) and Croatia (6.11.1996). (Andorra, a small state with a different background joined the Council in October 1994.)

Thus in the course of seven years, the membership of the organization more than doubled: from 23 to 40 states. Enlargement proceeded one more step with the addition of the Caucasian republics, first Georgia (27.4.1999) and then Armenia and Azerbaijan (25.1.2001). Finally, membership reached a total of 46 members. If the accommodation of so many new states should lead to the weakening of the system of the Council of Europe the benefit both for older members and newcomers would be questionable. Therefore, the challenge for everyone was and remains to combine enlargement with strict, well-defined, prerequisites to complete whatever domestic reforms were necessary to adjust to Council of Europe standards within a specified period of time.

To respond to this challenge a procedure known as "monitoring" of obligations was introduced to the vocabulary and working methods of the organization. Official stipulation of this new policy first took the form of an Order of the Assembly (June 29, 1993) providing that specific commitments on issues related to the Council of Europe basic principles entered into by candidate states should, in the future, become a condition for the participation of parliamentary delegations of the new member states to the Assembly's work. The Political Affairs and the Legal and Human Rights Affairs Committees should monitor closely and report to the Bureau of the Assembly every six months until all obligations had been honored (10.11.1994). A little more than a year later, the Committee of Ministers with its "Declaration on Compliance with Commitments Accepted by Member States of the Council of Europe" provided the legal basis for a permanent, intergovernmental procedure of monitoring.

Both the parliamentary and intergovernmental procedures became crystallized in April 1995. First, on April 20, the Committee of Ministers decided it would conduct its monitoring through factual reports on all member-states of the Council of Europe prepared by the "monitoring unit" of the Secretary General, in pre-selected areas of concern. The whole procedure would be confidential, conducted in special closed-door meetings. However, on 26 April 1995, the Assembly adopted a new Order, supplementing that of 1993 in two important aspects: the Assembly, as the Committee of Ministers, would monitor *all*, not just new member states; and the Committees on Political Affairs and on Legal Affairs and Human Rights would report directly in plenary session. Thus, every member state's compliance would become a matter of public debate.[5]

On 8-9 October 1993 an unprecedented event took place in Vienna: the first Summit of 32 Heads of State and Government of the Council of Europe. Besides its symbolic significance, the Summit took three concrete steps to make the Council more relevant to the needs of a

[5] Denis Huber *A Decade which made History The Council of Europe 1989-1999* (Strasbourg; Council of Europe Publishing, 1999.

"new Europe". First, it decided to open for signature, in May 1994, Protocol N°11 to the ECHR, setting up a single Court. Second, it set up an ad hoc Committee to draft a framework Convention for the Protection of National Minorities, also open to non-member states. The Convention adopted in November 1994, was opened for signature on 1 February 1995 and came into force on 1 February 1998. As a "framework" the Convention is not directly applicable in internal law. Contracting states must implement its principles, either through bilateral or multilateral agreements with other states or through legislation or appropriate national policies.[6] These principles include: prohibition of assimilation or discrimination; freedom to use and be educated in one's own language; freedom to preserve one's culture and uninhibited access to international and transfrontier co-operation; freedom to participate in economic, cultural, community and public life, etc. A peculiar feature of the Convention is the striking absence of a definition of a national minority, none having received the approval of all member states.

Despite shortcomings the framework Convention is a unique international instrument in a particularly sensitive aspect of domestic and international life and the monitoring of its implementation through the Committee of Ministers could add to its effectiveness.[7]

The third step was incorporated in the Action Plan of the Summit: the decision to set up a European Commission against Racism and Intolerance (ECRI). The Commission, which began its work in March 1994, has as objective to stimulate action to combat racism, xenophobia, anti-semitism and intolerance at local, national and European level as well as to formulate policy recommendations for member states and to study ways of strengthening wherever appropriate, relevant international legal instruments.[8] Among the various methods and practices employed by ECRI to promote its objectives, the most influential has been the country-reports it produces concerning racism and intolerance in each member state. At the end of 1999 ECRI finished the first round of country-by-country reports and prior to the conclusion of a second report on each member state it decided to organize country visits for ECRI rapporteurs. Thus on-the-field experience has strengthened the findings of ECRI, exerted a considerable amount of political pressure on the responsible national authorities and will most likely enhance the efficiency of the whole process.[9]

Unrelated to the first Summit but nevertheless responding to an unfortunately ever pressing need, the supervisory mechanism of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment represents another example of "on-the-field" monitoring by an institution of the Council of Europe. That institution is the European Committee for the Prevention of Torture (CPT), created by the above Convention, which came into force on February 1, 1989.[10]

CPT is the only international body within the territory of the Council of Europe that is entitled to visit any place where persons are deprived of their liberty by a public authority. In

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[6] F. Capoterti "The first European Legislation on the Protection of National minorities" in D. Pinto *Challenges of a Greater Europe* (Strasbourg: Council of Europe Publishing, 1996), pp. 147-151 at 147.
[7] Ibid p. 150.
[8] F. Orton, "Racism and Intolerance: Ensuring the Implementations of Existing Texts" in *Challenges of a Greater Europe*, ibid, pp. 155-158 at 155.
[9] See e.g. European Commission against Racism and Intolerance *Second Report on Turkey Adopted on 15 December 2000* (Strasbourg, 3 July 2001) where Turkish authorities feeling uncomfortable with the findings of the Report expressly asked to reproduce as an Appendix their own observations.
[10] R. Morgran, "A European Committee for the Prevention of Torture" in *Challenges of a Greater Europe*, supra n. 6, pp. 85-92, at 85.

addition to its regular visits, CPT can also carry out visits either upon the urgent request of a member state or in response to pressing matters brought to its attention through other channels. The reports drafted, following these visits and after a dialogue with the authorities of the state visited, are in principle confidential but, fortunately, there is a general trend to make them public. It is worth noting that CPT has not limited itself to conventional activities but has also exchanged letters with the International Tribunal for the Former Yugoslavia in order to exercise its monitoring functions with regard to the conditions of imprisonment and treatment of certain persons convicted by that Tribunal![11]

There is no doubt that the legal instrument that has made the greatest contribution to a common European legal culture and has paved the road to European integration is the European Convention for the Protection of Human Rights and Fundamental Freedoms better known as the European Convention of Human Rights (ECHR). The Convention was signed in Rome in November 1950, during the 6th Session of the Committee of Ministers. Unlike a similar UN Convention it is a binding legal instrument equipped with a supranational supervisory mechanism accessible not only to states but also to individuals, whose rights have been transgressed by the actions of one of the state contracting parties.

Originally it consisted of a Commission of Human Rights, which, failing a friendly settlement, expressed an opinion and, then for states having accepted its jurisdiction, referred the matter to the Court of Human Rights for a binding final decision. After the amendment of the original text by Protocol 11, there is now only a Single European Court of Human Rights dealing both with state and individual petitions that meet the criteria of admissibility e.g. exhaustion of available and effective local judicial remedies and violation of one of the rights protected by ECHR or one of its Protocols. Protection is accorded to the right to life; freedom from torture and *inhuman* treatment; freedom of thought, religion and expression; due judicial process and fair trial; right to own property; etc. Today over 800 million people enjoy the protection of the Convention and the privilege to bring cases to the Strasbourg Court. However, the supervision of the implementation of judgments by a political, intergovernmental, body like the Committee of Ministers has caused long delays and even implicit refusals to comply on the part of some states.

3. Upgrading Democracy and Human Rights Standards in Europe.

The collapse of the Soviet Union and its system of interstate alliances and economic co-operation institutions set in motion a process of radical transformation of political regimes in Central, Eastern and Southeastern Europe. For many of the states involved a basic model of a "western type democracy" could be traced in the national memories of the pre-communist era. But, for obvious reasons, constitutions of a distant past could be of little use in the early 1990s.

[11] "Statement of Mr. Pierre-Henri Imbert, Director General of Human Rights at the Council of Europe" *57th Session of the U.N. Commission of Human Rights Geneva, 19.3-27.4.2001* (29 March 2001) p. 3.

There were several areas where constitutional reform paid particular attention.[12] The *first* concerned the general implementation of the "democratic principle" as regards the sources of state authority the representative system of government coupled with certain institutions of direct democracy like referenda and, finally, the structure and functioning of the multi-party system. The *second* area is the principle of the "rule of law" both as regards the foundation and organization of the state and the exercise of state power as well asthe limitations prescribed by substantive and procedural legal rules that protect the average citizen from the excesses of state power. The superiority of the Constitution vis-à-vis ordinary legislation; the legality of administrative acts; the right to judicial protection as well as the independence of the judiciary; all originate from the fundamental principle of the "rule of law".

A *third* area of substantial constitutional reform in Eastern Europe after the end of bipolarity is that of fundamental rights and freedoms. Marxist-Leninist theory treated individual rights as an essential part of the suprastructure that perpetuated the dominant position of the bourgeoisie. For ideological, as well as practical reasons therefore, respect for human rights became a priority issue both for the construction of the post-socialist society as well as the advancement of a state's membership to European organizations. Emphasis was placed on rights virtually non-existent under the socialist regime such as the right to private property; the freedom of movement inside and outside the country; the right to form or be a member of a trade union, etc. National minorities became also the concern of constitutional reform. However, in many cases new rules upgrading the protection of national minorities proved unable to contain with long suppressed self-determination demands that led during the 1990s, to the breakdown of multinational former socialist states. Nonetheless, in some cases, state fragmentation multiplied rather than reduced the member of national minorities, making pertinent legal reform, a priority concern of state and interstate efforts.

A *fourth* area demonstrates the desire of "new democracies" to remove ideological impediments of their socialist past to the evolution of the societies, especially those that obstruct their European integration objectives. In this category are placed general declarations of a state's respect for international law, often accompanied by specific provisions concerning the incorporation of rules of international law, especially treaty-law into the domestic legal order and the place they occupy in the hierarchy of domestic legal norms. Finally, constitutional reform, in order to facilitate, in more practical ways, the integration of new democracies to European institutions and serve their aspirations to become eventually members of the European Union, contained, in several cases, provisions for the transfer of state powers to the organs of supranational international organizations.

A *fifth* element is the importance that the new constitutions in Central, Eastern and Southeastern Europe attach to the detailed regulation of the parliamentary system. Relevant provisions include, first of all, a careful separation of legislative, executive and judiciary powers, a feature absent under socialist regimes. The latter were dominated by the concept of unified state power as well as the deliberate confusion of the authority of the one and only political-socialist/communist party and that of the state. Here are also found detailed rules on the structure, functioning, competences and dissolution of parliaments and the legal status of their members; the election and competences of the President of the Republic as well as the election and competences of the Government.

[12] These issues, discussed in summary form in this paper, are the subject of comprehensive analysis in the study of Theodore Tzonos *The Constitutions of Central and Southeastern Europe* (Athens: A. Sakkoulas, 2000) – in Greek.

Finally, a *sixth* field of constitutional reform concerns the detailed regulation of local and regional administration. One reason for the emphasis on this issue was the desire to underline the demarcation line between the new constitutions and those of the socialist era where rules on local administration were strikingly absent. A second and even pressing reason was the need to comply with the requirements for membership to the Council of Europe where the credentials of those who would represent a member-state to one of its principal organs, the Congress of Local and Regional Authorities, would be carefully scrutinized.

Constitutional reform and institution building served, therefore, two complementary objectives: adjustment to the exigencies of political pluralism and free economy and integration into European organization that would consolidate the new regimes in Eastern Europe and end their isolation from the rest of the continent. In effect, the pursuit of the second objective placed its imprint on the course of constitutional reform and national institution-building. There is no single model of an ideal type of democracy or human rights protection and each state in the exercise of the prerogatives of national sovereignty makes its own choices. Nevertheless the political and economic incentives of European integration give additional weight to pertinent non-compulsory opinions and recommendations of European organizations and lead to voluntary compliance with the generally perceived fundamental principles of European legal civilization.

For reasons explained in the second part of this paper, the "new democracies" sought at first admission to the Council of Europe which negotiated with each applicant a package of domestic reforms to be implemented as a condition for membership.[13] This list of commitments was subject to the "monitoring" of the Parliamentary Assembly.[14]

In addition to individual surveillance, the Council of Europe through interstate conventions, signed under its auspices, has set minimum standards of conduct for its 46 members. It also created institutional mechanisms to supervise compliance in a number of important areas. The discussion in the second part of this paper has indicated that these areas include, first of all, human rights and fundamental freedoms. Indeed, the ECHR provides for the submission of individual as well as interstate complaints to the Strasbourg Court in case of alleged violations of the Convention or its Protocols. Also the Second Summit of the Council of Europe (October 1997) established the office of the Commissioner of Human Rights who supplements the work of the Court by preparing a comprehensive review of the overall human rights situation in the member states.

The latter also undertake general obligations concerning inter alia national minorities; prohibition of Racism and Intolerance; as well as prevention of Torture and Inhuman Treatment. They have also agreed to allow the supervision of state practices by bodies of independent auditors which, although less elaborate than those of the ECHR, can nevertheless cause considerable embarrassment to the delinquent state.

Member-states of the Council of Europe are also members of the Organization for Security and Co-operation in Europe (OSCE) which, save for the Court, has responsibilities parallel to those of the Strasbourg organization, OSCE, based in Vienna, has a much broader

[13] See supra p. 4.
[14] Ibid.

membership than the Council of Europe and includes, among others, the USA, Canada and many of the former Soviet Republics of Central Asia. The Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE has competences relevant to areas of constitutional reform in Eastern Europe and provides practical support in the consolidation of democratic institutions and respect for human rights as well as in strengthening civil society and the rule of law…

It is appropriate, at this point, to draw attention to the Commission for Democracy through Law, otherwise known, as the Venice Commission. This institution plays a leading role in the adoption of constitutions that conform to the standards of a common European legal heritage. The Commission, originally established in 1990, as a partial agreement, became, in February 2002, an enlarged agreement and, consequently, it is open to the membership to non-European states. Today it comprises all 46 member-states of the Council of Europe and one non-member: Kyrgyzstan. Argentina, Canada, the Holy See, Israel, Japan, Kazakhstan, the Republic of Korea, Mexico, the United States and Uruguay are observers. Belarus has the status of associate member and South Africa has a status similar to that of observers. The physical persons that are appointed members of the Commission are independent experts who act in their individual capacity.

Although the Venice Commission is an institution of the Council of Europe and issues opinions at the request of the Council's organs or member states, in practice it works closely with other European organizations, especially the OSCE/ODIHR which participates in its plenary sessions. In that sense it provides a practical solution to the well-known problem of overlapping competences between the Council of Europe and the OSCE.

The Venice Commission assists states in the drafting, revision, interpretation and implementation of Constitutions and other important legislative texts. The latter include electoral laws, laws on constitutional courts, laws on political parties, national minorities, etc. It also promotes co-operation with constitutional courts and prepares transnational studies, reports and organizes seminars.

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In conclusion, almost all European democracies, old and new, have upgraded their common legal standards under the combined influence of competent European institutions, especially the Council of Europe. The process of continuous interaction has been particularly valuable to countries that, after the end of bipolarity, sought to incorporate into their political regimes the values of the Western European legal heritage i.e. democracy, human rights and the rule of law. The European Union (EU) has grown over the years to represent now the ultimate level of European integration.

After EU's recent enlargement; eight of its twenty-five member states are Former Eastern bloc countries, which benefited, primarily from Council of Europe membership, to upgrade the principles guiding their political regimes to the standards of their Western European neighbours. Certainly one should not underestimate the overwhelming appeal that the prospect of EU membership exerts upon candidate countries and the concrete incentives it provides for speedy implementation of domestic reforms. Actually, the political conditions attached to EU membership give those reforms a very specific direction and content and more important a precise timetable. It was the prospect of EU membership and the need to comply

with a specific catalogue of political conditions that led Turkey – one of the oldest members of the Council of Europe and a founding member of the OSCE – to introduce a long-overdue package of legal/constitutional reforms to bring its political system close to common European standards.

But EU membership is not the end of the reform process. The new European Constitution and its Charter of Fundamental Rights present the EU with new challenges. After enlargement; the EU has become a less homogeneous community of nations, with new and challenging tasks. To make political union a reality the 25 member-states of the EU should continue adjusting their legal norms to the needs of an increasingly multinational and multicultural European society and, at the same time, prevent; through an effective "Neighbourhood" policy; the gap between the EU and the rest of Europe to undermine political stability and set obstacles to the continuous upgrading of European integration standards.