International Law and Global Political Science

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Chapter 1

Introduction

Factors Governing of International Laws

European Union (EU) member states have occasionally failed to comply with EU directives and laws, thus falling short of their treaty obligations. The issue of states' inability or reluctance to implement European Union law due to attributes that are structural or macroeconomic rather than unique to one country. The question of implementation of EU laws is crucial to this loosely quasi-federal organization, because implementation, left to the member-states, is the foundation of cooperation in Europe. The European Court of Justice (ECJ) has transformed the Treaties of Rome into far more than a treaty: it has made the treaties into a constitution, asserting that the treaties establish binding principles over member states. The EU relies upon the individual nations to implement and enforce EU law within their territories. The failure to do so is a challenge to the authority of the EU. Indeed, the submission of member states to the law of the EU is “more than a comparison of laws, more than a condition for the smooth functioning of the Common Market, it is the actual foundation of the European Community”. Implementation is defined as failure to implement treaty obligations within the EU context of the first pillar, or

"supranational" policy-making. As such this issue is critical for the EU, though it says very little about second and third pillar policy. The number of cases of implementation infractions involving each member state varies greatly, and understanding the reason behind the variation is a necessary precondition to addressing the issue. The variation has often been attributed to particularistic aspects of individual states (Fernandez-Martin 1996, Furlong and Cox 1995). However, comparable cross-national reasons also exist, as this paper will demonstrate. Two large bodies of literature lend themselves as bases for statistical comparisons in non-implementation research: liberal intergovernmentalism (LI) and multilevel governance theory (MLG).

Liberal Intergovernmentalism and Multilevel Governance

The present debate in EU literature centers around how one can best describe the emerging body. We depart from this debate. One the one hand, LI is a primarily state-centered theory; while MLG theorists describe the meaningful participation of a variety of actors in interrelated policy arenas. Work on implementation must be centered in and contribute to our understanding of the wider phenomenon of the EU, lest it fail to speak to true understanding of the body. The concept of non-compliance. Non-compliance or non-implementation is defined as a situation in which a member state has failed to translate an EU directive into

law, whether it is a partial failure or a total failure. During the period 1972 to 1993, about 460 cases of non-compliance were brought before the ECJ by the Commission. However, these instances are not equally distributed over the (then) twelve states. Instead, some countries have fewer than 25 over the entire twenty year period, while Italy, at the extreme, has twenty in one year.

Research in implementation has flourished – when limited to an individual issue-area or an individual state. Current literature focuses upon problems encountered by individual countries when implementing a range of policies, often focusing on each issue area separately, rather than on overall implementation problems. Little work has been done that uses structural variables to explain variation in EU implementation rates.

The problems associated with case studies in answering implementation questions. Rasmussen (1988) presents a fascinating and detailed case-study of Denmark's experiences in implementing EU directives. He points out that, though the directives are legally equally important, some created much larger work-loads than the others. Some were implemented by statute, none created public debate or opinion. This said, Rasmussen embarks upon a description of the Danish legislature. Rasmussen does not test hypotheses, rather, thick (and important) description of the Danish case is his aim. Rasmussen asserts that Denmark is accommodating itself to its EU membership by formalizing its procedures for implementing laws, much like the interdependence argument that will be presented

and testing in this paper. However, Denmark has a relatively impressive compliance record and Rasmussen accords much of the success to the public way that Denmark complies. It widely publicizes its compliance (perhaps as a way to raise its status among its EU partners, a very strategic action indeed). Denmark's experience with compliance cannot be extrapolated to the wider EU, however. Without knowing why other states have experienced success or failure in implementing EU law, we would hesitate in generalizing this particularistic experience of Denmark with publicity.

Given the paucity of cross-national literature, it has been necessary to apply general EU theories to the study of implementation. The great debate in EU literature is between the liberal intergovernmentalists and those who contend that multilevel governance better describes the European Union.

Liberal Intergovernmentalism

A reaction to neofunctionalist approach to European integration, intergovernmentalism was a counter-argument presented by Stanley Hoffman. This theory of European integration relies heavily on realist ideas about the state and its roles, as well as their government in international relations. Hoffman criticised neofunctionalism as he believed that integration had to be viewed in a global context, and that regional integration was a smaller part of global system. He believed a major failure in the neofunctionalist approach was the prediction of unavoidable

further integration based on an internal dynamic which supposed that international background situation would stay the same. This assumption was seen as especially inaccurate with the changes to the economic climate in the start of the 1970's. He also argued that even though 'national interests' could be a reason to integrate with some parts of government, this process will never include higher politics such as national security. Lastly it was this desire to preserve the national interest that led to governments taking part in the integration, and so it was the national governments that controlled the degree and speed of integration, rejecting the neofunctionalist idea that states were overwhelmed by demands from interest groups.

Key Thinkers

Stanley Hoffman first presented his theory of intergovernmentalism in The State of War: Essays on the Theory and Practice of International Politics, critiquing the neofunctionalist ideas and presenting his own. This was later built upon by Andrew Moravcsik with his theory of Liberal Intergovernmentalism, which involved a more fundamental critique of neofunctionalism and involved those that neofunctionalists acknowledged themselves.

Theory

To Hoffmann, it is clear that there are actors other then national governments who are influential in the process of integration. In national politics, interest groups could affect government

decisions, but he pointed out that they were not the only bodies to do so, as the party in office or officials from within the government would also assert pressure. He acknowledged however, that national governments were the key people who made the decisions, and that they could be seen to be especially powerful for two reasons. Firstly, as they had gained the legal sovereignty of their country, and linked to this, that had legitimacy in the form of being the only elected officials in the integration process. This opinion explains how it was the pursuit of national interest that led to supranational bodies gaining power.

This theory leaves nations with a much greater independence, and so integration happened on a level that was intergovernmental, only preceding to the degree the governments wished. He did however take note of the importance of the location of the state in the world structure, in much the same way realists do, and recognised this as another limitation on these governments.

Moravcsik built on the ideas of Hoffmann, and agreed with many of the key principles, such as the assumption that nations could be seen as rational and departing from realists approach to the state. He believed that the position governments entered into within international negotiations could be understood based on two factors. One was the economic interests within nation's interior, and the second was to understand how conflicting interests were resolved within the council of ministers. This was separated into two sections; agreement on a policy response and

agreement on the institutional arrangements. Moravcsik's example involved monetary union, and he explained how without knowing the aims of the European Central Bank, it would not be feasible to understand negotiations regarding its constitution. This structure wasused on 5 case studies; the Treaty of Rome (1955 – 58), the Common Agricultural Policy (1958 – 83), the European Monetary System (1969 – 83), the Single European Act (1984 – 88) and the Treaty on European Union (1988 – 91). Movaravcsik arrived at the conclusion that national interests were concurrent to economic interests, ignoring any political bias and that any choices in favour of Europe came from the national governments, not supranational governments. He also realised that the negotiations would imitate the power of the states taking part, and that states allowing supranational bodies to make decisions were attempting to ensure that all members would abide by these decisions. This rejected the confidence in the effectiveness of these organisations and also federalist ideology.

Impact

According to Movaravcsik and Schimmelfennig; "Liberal Intergovernmentalism has acquired the status of a 'baseline theory' in the study of regional integration: an essential first cut explanation against which other theories and often compared". The main reason that these two writers believe this is due to Intergovernmentalisms success at explaining state behaviours, and the theory's ability to work with and build on other theories on both integration and behaviour. However they go on to explain that due to its grounding in general social science theory, it has

helped ensure the modernisation of integration theory. They also claim that Liberal Intergovernmentalism is a "'grand theory' that seeks to explain the broad evolution of a regional integration. LI [Liberal Intergovernmentalism] is a theoretical synthesis or framework, not a narrow theory of a single political activity". This enables it to be very versatile, and simple to use, and the "apparent accuracy of the substantive assumptions and empirical predictions" show it to be successful.

Critique

Like all theory's, Liberal Intergovernmentalism has critics whose main assertion is that politics and economics cannot be divorced, and that economic interest do not, in fact guide integration opposing Movavcsik's theory. An example of this can be seen in the 1950 Shuman Declaration which explained that the European Coal and Steel Community would make war between European nationals impossible, hardly an agreement made only for free trade and other economic reasons. Movarvcsiks choice of case studies in his initial explanation of his theory has also been criticised, as only intergovernmental negotiations are considered which ignores the smaller decisions that make up the bulk of the EU's role. These could provide a very different result, as supranational bodies could retain more importance, and items being discussed would not be as easy to assign national preference to.

Basic Model of Liberal Intergovernmentalism

Liberal intergovernmentalism is the state-centric progeny of the intergovernmentalist literature. The basic model outlined here is a synthesis of the theories of many authors, most notably Andrew Moravscik. Liberal intergovernmentalism posits the state as the primary rational actor in a strategically bounded game – the game being, of course, European Union politics. These states are the central, supreme decision-makers both within their borders and in relationships between themselves and other states. Understanding the EU in this draws upon traditional theories of international relations.

State executives come to the international bargaining table with specific goals. These executives use the international arena to achieve particular goals that require the cooperation of other state executives. They chose to conduct these negotiations within the rubric of international institutions created to serve the purpose of those state executives. Liberal intergovernmentalists do not assert that every detail of policy is subject to direct state control, but they do contend that states are the primary actors and thus that it the general pattern of policy is consistent with state control of international organizations, including the European Union. These institutions are not autonomous, acting with agency. They have relatively little power apart from the will of the state executives involved in the bargaining game. “Rather, they have limited powers to achieve state-oriented collective goods”. Liberal intergovernmentalists contend that the member-state government acts as a gatekeeper between the international

political arena and the domestic one. While domestic politics certainly influences the international agenda, domestic actors must channel international demands through the national government. "Domestic actors" include voters in addition to unions, interest groups, domestic industry, and subnational governments, among others. These actors must lobby their governments in the national capitals in order to have the best chance of achieving their international goals at Brussels.

The reverse is also true: member-states act as a gatekeeper between domestic politics and actors and the European Union. Member-states bring back new regulations and various "goodies" to their populations. Government actors interpret the policies created in the international arena, implement them, and mediate their effects upon the member-state's politics and actors.

Theoretical arguments that emerge between the proponents of Intergovernmentalists and Supranationalists

In an attempt to convince the people on the reasons for proposing and possibly choosing a particular theoretical framework for European Union Integration, different theorists began to engage in political debate over EU policy making in terms of autonomy and authority. Those who support intergovernmentalism consider key actors to be nation states and their governments while supranationalist supporters argue that it is supranational organizations and their institutions who represent it.
It is worthwhile to define the basis for the different schools of

thought and the issues which form the foundation of the proponents' arguments. Their main cases for arguments and differences occur in the following areas: who they consider to be the key actors of integration; question of possession of power; their perceptions of EU; what character of decision making they prefer; types of politics they focus on; how they view the relationship between politics and economics; how they approach the question of sovereignty and national security. Arguments by the Intergovernmentalists Proponents of intergovernmentalism had cited the limitations of supranationalism exemplified by the Luxemburg compromise in 1965, when then French Ministers boycotted Council meetings in a process later known as the "empty chair" policy, and the failure of the paradigm to take account of the role of strong and influential National leaders and the resilience of the Nation State (Wallace et al, 1983., Wallace & Wallace, 2005). They also cited the fact that Ernst Haas, the 'father of neofunctionalism' recanted and discarded his own theory in 1975 as evidence of impracticability of the framework. The arguments goes further to reiterate its point especially following the events in the late 1990's when the economic recession and depression culminate din the development of a new non-tariff barriers to trade across the member states of the EU resulting in the empowering the concept of the intergovernmentalistic approach through the formation of the European Council in 1974. In furtherance to the realization of need to establish the intergovernmental aspect of community method of governance in the European community, the Committee of Permanent Representative was established whose function was to prepare

legislations for adoption by the Council of Ministers. As the arguments lingers on, the intergovernmentalist suggest that although widely accepted at that time, Federalism was characterised by sceptism as there were differential acceptance of the objectives of a federal Europe by member states of the European Union. The intergovernmentalist believe that the neofunctionalism is flawed because it assumes that integration in low politics such as economic will lead to integration in areas of high politics such as sovereignty, which it states would not be possible since the issues of high politics are integral to the national interest hence integration would only be possible when national interests coincide, though unlikely.
Also in reviewing the assertion made by Hoffmann, proponents of intergovernmentalism proposed that states were uniquely powerful for two reason: because they possessed legal sovereignty; and they had political legitimacy as the only democratically elected stakeholders in the integration process, hence unlike what Hoffmann thought, governments had much more autonomy than in the view of neofunctionalist.
They also argued that the neofunctionalistic approach of supranationalism which was short lived would not be acceptable in the current political climate since it failed to predict accurately the outcome of regional integration in Europe. In support of this argument Wallace & Wallace (2005) in citing the 1966 work of Stanley Hoffman, the leading proponent of intergovernmentalism stated that "the nation state was not obstinate, not obsolete". Different scholars like Milward (2000) had argued that it was the EU national governments who have played a great role in the historical antecedents of the EU which

have reinforced and enhanced its integration.
It is also seen that the modalities of operation and policies surrounding the European Union have been positively reinforcing and re-asserting the theories of intergovernmentalism especially in terms of neither compromising nor diminishing the values of National Sovereignty of member states.
Intergovernmentalism argues that European integration is driven by the interest and actions of the European Nation States. In this interpretation, the main aim of governments is to protect their geopolitical interests such as national security, defence and national sovereignty. Arguments by the supranationalism proponents The Supranationalists argue that following the failure of the Nation state by the end of the World War II, the concept of Nation state had become obsolete and redundant hence the need to promote an alternate form of framework. In its argument, the supranationalistic proponents inform that other alternatives of Nation State are Federalism and neofunctionalism.
In its debate, the proponents argue that federalism played parts in the pre-World War and post-World War era with the formation of the union of European Federalists in 1946, and are today the founding members of the EU. According to the work of Tsebelis et al (2001) which focused on the changing treaty base of the EU, they had stated that from the foundation of the Rome Treaty which was later ratified in 1958, through the Single European Act of 1987, the Maastricht Treaty of 1993 (which was ratified in 1992 and implemented in 1993) to the Amsterdam Treaty of 1999 it was the supranational concepts that established the three institutions of the Commission of the European Communities, The European Court of Justice, and the European Parliament.

And that it was only the Council of Ministers that originated from the ideology of intergovernmentalism. In illustrating its argument the supranationalistic theorists emphasises that what distinguishes the European Union from all other international organisations in Europe is the institutional structure of EU provided for by the original Paris and Rome treaties of 1951 and 1957 respectively amended, which gave them extensive law making powers in agreed policy areas-a new international legal order, hence in support of supranationalistic paradigm. The proponents of the neofunctionalism, approach of the supranationalistic paradigm argue on the ground of the functional needs which governments in the EU face in the modern era creates a sense of common purpose, which would invariably lead to a network of international organisation to facilitate international cooperation.O'Neill (1996) in quoting the work by Ernst Haas defined European integration as: "the process whereby political actors in several distinct nation setting are persuaded to shift their loyalties and expectations towards a new centre, whose institutions process or demand jurisdiction over the pre-existing nation states". The work of Rosamond (2005) reassessed the statements made by Haas and concluded that Haas never abandoned neofunctionalism but changed it and accepted more the view of 'complex interdependence'. The supranationalistic framework theorists argue that the intergovernmentalism does not accurately reflect political reality as the institutions of the European Union are clearly invested with extensive law making powers and intense cooperation and integration. It further stresses the point that this paradigm did not fully account for such common purpose and action as were to

be seen among the member states. And that the political will in favour of common policies went beyond what one would expect of a conventional intergovernmental organisation. The complexities and fluidity of the EU, and the argument outcomes between the traditional supranationalistic and the more recent intergovernmentalistic theorists led to the shift in the proposition of the theoretical framework of European integration. The more recent argument is that of the syncretic theoretical framework.

Multilevel Governance

Multilevel governance provides an alternative description to the one liberal intergovernmentalism proposes. MLG provides a very different way of looking at the interactions and the politics of Europe. MLG theorists assert that the state no longer holds a monopoly upon EU policy making. Rather, decision-making competencies and influence are shared across multiple actors at many levels. Supranational actors (EU Commissioners, bureaucrats, Parliamentarians, and Judges) have power and influence independent of the will and control of state executives. Making policy in conjunction with others necessarily leads to, if not a reduction in sovereignty, then certainly a loss of control over the policy making process. But as important as the influence of supranational actors (and other member states) is the emerging role of subnational actors.

Subnational actors include unions and interest groups who have set up lobbying offices in Brussels, but they also include the

regional and local governments within national states. Some policies of the EU have reinforced and augmented the power of these other levels of government. While MLG does not reject that state executives remain a power actor – indeed, perhaps the most important actor – in European politics, MLG proponents contend that other actors matter. State executives no longer monopolize the aggregation of interests in the context of the European Union.

Theorizing Implementation

The two theories outlines above in creating two theories of implementation. The theories themselves say relatively little in relation to implementation. However, the paper will examine each theory in turn, using the assumptions each makes as a guide in choosing independent variables – and in hypothesizing the impact each should have – that will be analyzed in subsequent sections of the paper. We begin with liberal intergovernmentalism, with a heavy dose of rational choice theory, and then turn to multilevel governance. The central assumption of liberal intergovernmentalism is that state executives use the EU to achieve goals that they cannot otherwise achieve. In understanding this theory as essentially a state-centric international relations rational actor theory, we can begin to apply it to compliance. It casts the state as a unitary actor, suggesting a wide set of assumptions that require elaboration.

Liberal intergovernmentalism is based in rational choice theory. The first assumption of rational choice is that governing elites represent the state. Second, these elites are actors that pursue

goals. Third, actors have a perceived self-interest that is consistent and relatively stable. Fourth, actors behave consciously to actualize those goals. LI assumes that rational actors act strategically to achieve their goals. When applying this theory to states, it is critical to point out that in a chaotic international system, actors only have a certain set of goals that are possible. This is a constrained rational actor model. The European Union structures the chaotic international system and further reduces the options available to the member-states. Therefore, it is not necessary to assume that all member-states have a full range of options. Fifth, liberal intergovernmentalism assumes that actors within the state are irrelevant to the policy process at the EU level except insofar as they influence or attempt to influence the national government's actions at the bargaining table.

Rational choice and liberal intergovernmentalism taken together suggests that structural, state-level variables should explain why some member-states experience a great deal of non-compliance and others do not. As a group, these assumptions lead to the idea that the use of variables based upon state power and state economics would explain why some states comply and others cannot. The variables under consideration for this framework of understanding are related to economic power within both the national setting and the European one. First, one implication of liberal intergovernmentalism is that states whose power in the EU was great should have little trouble complying with the regulations that are made at that level. States whose power is great are able to craft the regulations that enable them to achieve

goals that they would have liked to achieve nationally. My argument here about power is two-fold: first, that states who have been EU members longer wield greater informal power than relative newcomers; and second, that states whose economy is relatively important to the common market will wield greater power. Greater power leads to greater compliance, because legislation passed by the European Union has been crafted by those state executives with the greatest power.

In effect, this simple argument brings to the fore three variables. First, length of membership should have a positive effect upon non-compliance. While LI does not address membership length, membership length ought to have an impact upon informal power of a member state. States whose membership is shorter will have more non-compliance because the policy to be enacted is not their preferred policy. Newcomer states are learning the rules of the game and cannot win against states that are power players. In addition, states whose economic power is great will be able to influence EU policy through their importance both to the EU bodies and to their partner states. Economic power is a central player in the rational actor model.

The second variable gets at the idea of economic power. States that contribute a large percentage of the total EU economic activity are more powerful vis-à-vis their partners. Due to the fundamentally intergovernmental nature of policy bargaining in the EU, a powerful state can accomplish more of its own agenda and therefore crafts less objectionable and indeed, advantageous policies. Third, states whose economies make up a smaller part of

inter-EU trade will find it harder to pass policies that they prefer and thus will experience more non-compliance.

The second group of factors suggested by rational choice theory are structural constraints. The rational goal of states is often thought to be the maintenance of their power in the international system, yet they must act within their domestic contexts. In the case of the member-states of the EU, an economic association, it can be asserted that economic health and growth within the EU is the central goal of the member-states in this arena. Therefore, states will act within their own capacity to protect and expand their economic influence, their overall economic health, and power. Economic health bears upon state action. States whose economies are robust will be able to implement policies that are passed at the EU level whether or not they supported those policies. This argument is not so much an LI implication as it is pure economic logic. In times of poor economic health (operationalized as an index of high unemployment and inflation), state capacity to act is limited by the rational imperative to do whatever is necessary to survive (both economically and politically: elites want to remain in office), even to the extent of refusing to comply with EU directives that may help ameliorate problems but could further harm the state economy. Some directives are not conducive to lowering these two indicators: some may be viewed as an irrational expenses in times when the money is needed elsewhere. States with poor economic health should have more non-compliance. Finally, related to the first in this group of structural constraint factors, is wealth. States with high GDPs can better afford to implement policy, whether they

are policies supported by the national government or whether it is a policy issue in which the government was defeated. Poorer states will have greater difficulty implementing policy. Liberal intergovernmentalist assumptions and arguments lend themselves well to creating a theory of non-compliance. Member-states should commit more non-compliance when their membership in the EU is short and when their economic power is low. More non-compliance is expected when states' economic misery is high and when wealth is relatively low.

Multilevel governance assumptions are, in a sense, more difficult to pin down. MLG asserts that many actors are important and that complex patterns can result from negotiation and cooperation between various actors at all three levels – supranational, national, and subnational. However, multilevel governance theorists do not contend that states and state power are irrelevant. Therefore, many of the predictions related to power hold within the MLG framework as well. Long-time members will have fewer cases of non-compliance before the Court of Justice because they have more power. Within MLG, power is measured both vis-à-vis other member states and vis-à-vis the Commission. As it is the Commission that must draw action against a member state, the Commission may find it difficult as well as impolitic to draw action against a member states with a great deal of power. Member states should commit more non-compliance when their membership in the EU is short and when their economic power is low. Critically, however, the power aspect should be less important to the overall model than other components of an implementation model, because far more

factors are at work in shaping policy in multi-level governance accounts of decision-making. Since MLG theorists do not challenge the claim that national states are central to the European Union, I assert that very similar predictions can be made regarding economic misery and wealth. Higher rates of non-compliance are expected when states' economic misery is high and when wealth is relatively low.

However, one implication of the MLG theory that is quite different is an argument related to state structure. Viewing the state as a single entity is not enough if one wishes to understand the nature of the European Union. The implication of basing a theory of implementation in and MLG framework is that subnational regions and actors must be considered. In addition, state structure is an important factor because it can be a formidable constraint. Structural constraints are in fact related to state capacity to act: state capacity is determined by the constraints on the state. Mark Levy et al. express the theoretical concept of political structure restraints thus:

Hierarchical states in which great authority is vested in the central government will find it easier to translate the provisions of international regimes into national law than decentralized systems in which the central government has limited control over regional and local government.

In a decentralized, federal system, the central government may have difficulty in compelling local governments to implement international law simply because they do not have the power to

do so. State structure functions as a structural constraint on the strategic actor. U.S. public policy literature points to the effects of federalism on implementation. Lowry (1992) states "[t]he danger of a federal system is that subnational policymakers will... [skew] policies to the extent that outcomes no longer match national outcomes. This is entirely rational: policymakers want to implement laws in the most beneficial way (and least painful way) possible. In the EU, this skewing by subnational actors can have the effect of placing the national government in a position of international non-implementation. A state that has a unitary system should have more impact upon local governments in choosing to implement law, and no question of ultimate responsibility can exist – the central government has both power and responsibility within its borders. Therefore, having a unitary, hierarchical state structure will cause a state to commit fewer incidences of non-compliance. States with a more autonomous local and regional governmental structure will commit more non-compliance.

However, while federal states should experience more non-compliance, this is complicated by the integration of regions into the European Union policymaking structure. Federal states with a higher number of integrated regions will experience less non-compliance then those whose regions are not integrated into the EU structure. Since federal systems present an implementation problem because regions misinterpret supranational policy, regions that are integrated into the supranational policy structure will be less likely to misinterpret or to refuse to implement this international policy. Two reasons exist for this.

First, regions integrated into the EU structure will be able to have their voices heard in the policy-making process. Member-states whose regions are present in Brussels will find that less policy is made which is abhorrent to regional actors and less policy is made that is difficult to adapt to local political and economic realities. Second, regions present at the table, so to speak, will interpret supranational policy in ways that approximate the way that Commission officials interpret policy. Therefore, nations whose regional and local actors are integrated into the EU structure will experience less non-compliance. National states whose regional actors are not will experience more non-compliance.

In addition, the problem of regional autonomy arises when regions are not taken into account in the federal system in addition to being highly autonomous. In other words, regional autonomy presents a problem to implementation when these regions are not engaged in the national governmental structure. Engagement here is simply the idea that regions are represented as regions in the state structure, and that through this representation, regional policy preferences are taken into account. Engaged regions will be less likely to fail to implement EU policies (and, for that matter, national policies). Along with this argument is an idea that regions can be engaged at both a national and a supranational level. Member states with regions that are integrated at the EU level will commit non-compliance. This is a very difficult variable to measure, and to some extent hinges on the power of regions in the federal context (and hence, reproduces the regional autonomy variable). However, it is

possible to create an independent proxy that gets at the power of member-state regions at the EU level, as is discussed in the operationalization section of this paper. Regions that are powerful and present in the EU context will commit less non-compliance because they are informed and because they have a stake in the proceedings. States with regions that are integrated at the EU level within them will commit less non-compliance than states with non-integrated regions (among those states with high regional autonomy). In effect, I predict an interaction between regionalization and regional engagement in the model.

Also complicating the argument that federalism presents implementation problems with an idea that the internal conditions of the central government (be it federal or unitary) are integral to implementation as well. A case study by Marcus Haverland suggests that veto points shape both the speed and the quality of implementation of EU law, regardless of whether those policy provide a "good fit" between the national and the supranational law. More veto points leads to lower quality and slower speed of implementation. Coalitional politics and partners, and structural check and balances in can inhibit legislatures from implementing supranational law. This paper uses George Tsebelis's concept and scale of veto points to test the Haverland argument. As the number of institutional and coalitional veto players goes up, then the amount of non-compliance a member state will commit goes up as well. The final national variable in this argument about implementation relates to the national bureaucracies. In general, bureaucracies are charged with implementing policy. If a nation has a bureaucracy that is not

efficient, policy will not be implemented properly. It is actually a simple argument. States with inefficient bureaucracies will experience more non-compliance than will states with efficient ones, regardless of government standpoints on the issue. This may explain why Britain, anti-EU for so much of its tenure as a member, experiences very low non-compliance rates, while other, seemingly pro-EU states have problems implementing EU law to the Court's satisfaction.

Operationalization

The Dependent Variable: Cases of Non-implementation

The dependent variable, the number of times a state does not implement EU law, can be measured at many stages of the process set out in Article 169 of the Consolidated Treaty on European Union, or TEU. Article 169 states:

If the Commission considers that a member state has failed to fulfill an obligation under this treaty, it shall deliver a reasoned opinion on the matter, after giving the state concerned the opportunity to submit its observations. If the state concerned does not comply with the opinion in the within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

In practice, the Commission will open a dossier when a possible case comes to its attention. Then it sends a formal letter to the

state concerned, informing it of the alleged infringement. The state responds, and then Commission, if the reply does not satisfy, will issue a reasoned opinion informing the state what it must do. This part of the procedure is referred to as the "administrative" phase. In the issue area of public procurement infringements between 1984 and 1990, 99 dossiers were opened, and in 67 cases a reasoned opinion was created by the Commission. Thirty-two cases were settled in the formal letter stage, 33 were settled after the reasoned opinion was reached, and 18 were sent to the ECJ. Sixteen cases were not settled but had not been referred to the ECJ. Only a small percentage of cases reached the ECJ, and it stands to reason that this is not an isolated issue area. Most cases never reached the Court of Justice.

The cases of non-implementation, therefore, can be measured at several different stages with very different results. In simply opening a dossier, the Commission is only investigating whether or not an infraction of treaty obligations has occurred. Therefore, counting the number of dossiers opened for each country is not an accurate measure. A member-state may be unaware of an infraction, and cases that are resolved at the formal letter stage may not reflect a state's ability to implement, but rather simple ignorance. They may represent the cases that the state allowed to slip through the system, and the fact that they are resolved at this point shows that an ability and willingness to implement is there. At the next stage, the reasoned opinion stage, the state may simply be testing the Commission's resolve to force implementation of some directive in a way that reflects a different

interpretation of EU laws. When cases are resolved in the administrative phase, they may reflect ignorance or varying interpretation of a directive. Measuring the number of cases involving non-implementation in the judicial phase of Article 169-- once the case has been referred to the ECJ by the Commission-- will not get at states' reasons for non-implementation, but it will cull out cases that are simply overlooked by the member-state and cases in which the member-state is attempting to "test" the Commission. No records exist that declare the states' reasons for non-implementation. Whether the state is protesting the decision because it believes that the EU directive is deleterious or whether the state simply cannot implement the law, the case will be included in the study. The hypotheses of this study address ability and willingness to implement laws, whether or not the directive is acceptable to the member-state. Measuring in the administrative phase may not be an accurate reflection of true non-compliance.

Compliance can also addressed by examining the process of the Court and the compliance with its decisions. Many authors address the idea of compliance with international courts. In particular, whether the ECJ has pushed the envelope of integration by forcing states to comply with EU law is an important topic. The present study, however, is aimed at why states do not comply with laws, not whether they comply with ECJ decisions and the implication of those (related) theories. Measuring in the judicial phase more accurately converts the concept of non-compliance into an empirical measurement for the purposes of this study. Therefore, cases in which the ECJ has

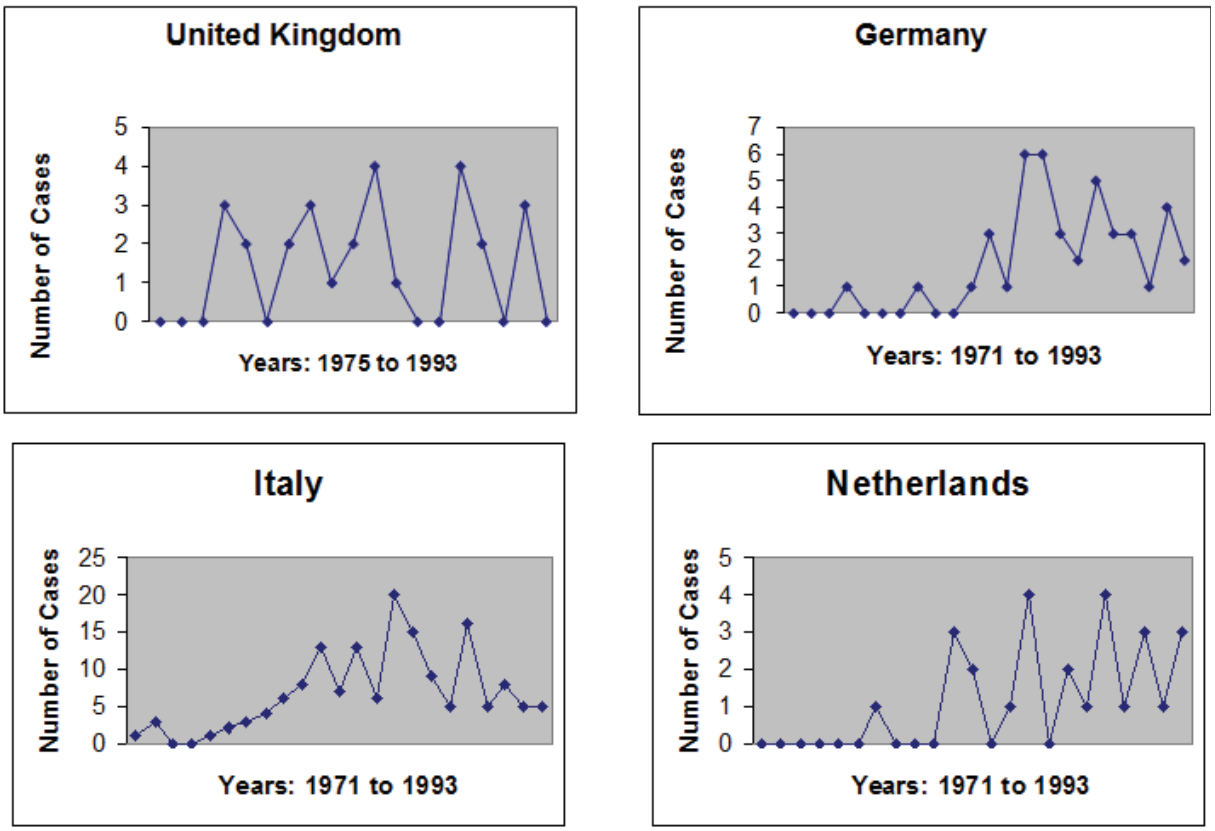
found that a failure to fulfill treaty obligations has occurred were counted from the years 1971 to 1992.

The European Court Reports and the Bulletin of Proceedings of the Court of Justice were used in order to count the number of cases for each country. Simply stated, three general rules were followed. The unit of measure was the individual court case, regardless of how many infractions are involved, because it could be a matter of researcher opinion as to how many different infractions are involved in a single court case. To be counted, each case resulted in a decision in which the state was found to be partially or fully in a situation of non-implementation. While leaving in a partial judgment against the state is faulty, leaving them out could be just as faulty. Determining some measure of how much went against a state an how much of a judgment was in favor is again a matter of discretion, and could be difficult to reproduce. Finally, only those cases in which the Commission brings suit against a state for failure to fulfill an obligation were considered. In the EU it is possible for a state, a company, or an individual to bring suit against any one of the same for breaking laws, and, in the case that the defendant is a state, failure to fulfill obligations can be a reasonable cause for a suit. Generally, however, citizens and other states must go through the Commission when filing a complaint, and the Commission takes over from that point.

Cases were counted by country and by year of filing of the case, rather than by year of the decision. All of the then-twelve members of the EU were counted, only for their years of

membership. Due to the ECJ backlog, it may take between one and two years for a case to reach the Court. It is preferable in terms of the event count analysis to know when the cases were filed rather than decided.

This study is delving into conditions previous to the filing of the case. Therefore the date of the decision is not important, but rather the year of filing. In some of the models, the dependent variable, cases, was lagged as an independent variable to test the robustness of the models. Visual representation of the data may be found on Figure below.



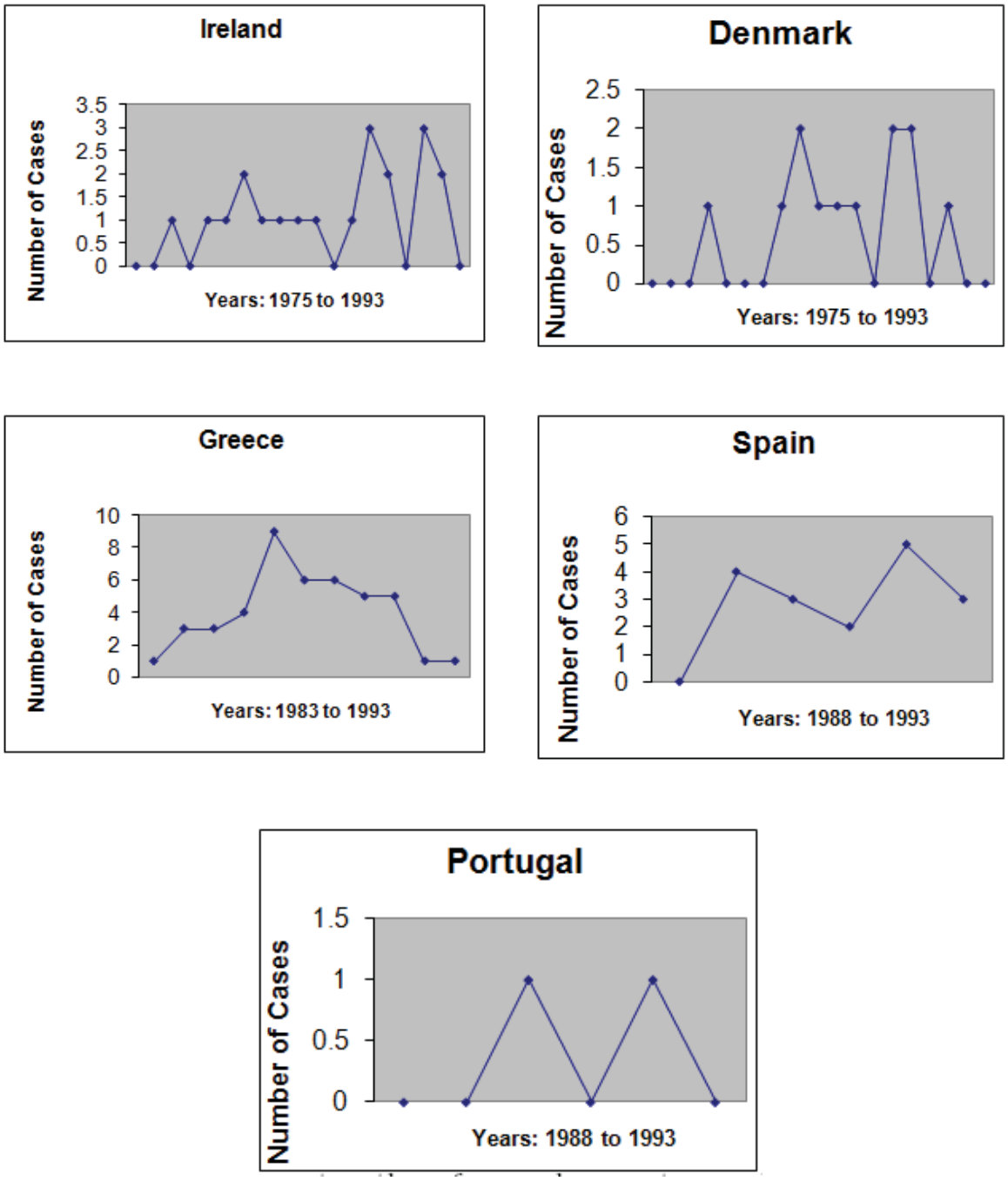


Fig. Visual representation of the dependent variable by country. Note that the ranges are not visibly comparable.

Operationalization of Independent Variables

Commitment/ Length of Membership. Length of membership for each year is a count of how many years a state has, at that point, been a member of the EU.Economic Importance of a State to the GNP of the EU. This is the state's GNP as a percentage of the total EU GNP for each state and for each year. The total EU GNP is composed of adding all the state GNPs together for that year, so that the total percentage for all years is 100. Dependence of the EU upon Economic Participation of the Member-state. This variable is operationalized as a percentage of the raw dollar total of exports to EU partners for each country for each year. The year totals were tallied and a percentage was taken. For each year, the total of all percentages equals 100. The figures for raw exports were taken from the IMF's Direction of Trade Statistics Yearbook, editions 1994, 1988, 1982, and 1971-1977.

Economic Health. The economic health variable is a misery index composed of inflation and unemployment percentages added together for each country and for each year. The raw numbers were pulled from Somers (1998), and they were subsequently added together to form the standard misery index.

Regional Autonomy Index. The regional autonomy index is an updated version of the regional autonomy index found in Marks, Nielson, Ray, and Salk 1996. The index presents a summary score of 0-8 for each member state for each year. The index is comprised of a score of 0-4 on Constitutional Federalism, of 0-1 on Special Territorial Autonomy, of 0-2 on the Role of Regions in

the Central Government, and 0-1 on Regional Governance. The index has been recently updated by Gary Marks and Liesbet Hooghe.

Regional Engagement at the National Level and the European Level. This variable is an index of whether or not regions are present as regions in the constitutional structure of the member states and whether or not a member state has allowed a regional authority to represent it at the Council of Ministers under Article 146 of the TEU. The first indexed value is, very simply, whether regions send representatives meant to present the interests of the region to a body of the national government. This is most easily seen in the Europe in Germany's Bundesrat. The second index factor was used because regions that are powerful and important enough to be represented at the Council are certainly engaged at the EU level and will most likely remain engaged whether or not that service on the Council is up. The data is based upon easily obtainable facts of government from a myriad of introductory textbooks. Each of these aspects, if present, scores a one. If not present, a two is scored. Therefore, the range of scores falls between 2 and 4, with higher scores indication less engagement.

This was done so that the multiplicative effect of the regional engagement index means that regions that are not engaged will score higher on an interaction variable. So done, it makes the expected relationship between the regional engagement variable and the interaction variable positive: the higher scores are expected to be associated with more non-compliance. However, this variable does not mean anything except as a factor in

creating the interaction term. While states with disengaged regions score highly, so to do states without regions at all. Disengaged regions should be associated with more non-compliance, but unified states are associated with less non-compliance. Therefore, the index must be multiplied with the regional index. When multiplied, the product of the high score on this index and a zero on regionalization is still zero, but a highly regional state with disengaged regions may score seven on the first and four on the second, for a total of 21. This makes the index logical. Therefore the index is presented and included in the model only to ascertain the effect of the interaction term and cannot be interpreted alone.

Bureaucratic Efficiency. Bureaucratic efficiency is an extraordinarily difficult concept to operationalize. For this paper, an index of factors has been constructed upon which a nation might score between 0 and 11. The lowest actual score was 4, and the highest, 8. The index tracks the professionalism of the bureaucracy, using the statutory construction of the civil service for each country. This variable assumes that the more professional a civil service is, the more efficient it will be.

Analysis and Results

The nature of the data is that it is cross-national time-series data. Each country is entered as a single case for each year. In addition, countries were only included for that period of time that they were a member. Therefore, not every country is included in the data for the entire time period. This data structure, in short,

is an unbalanced pooled-time series. Luxembourg has been dropped out of the study because of the difficulty encountered in acquiring data for that state, and Greece has dropped out because the data on veto players is unavailable. The data were analyzed in several models using Poisson regression. The nature of the dependent variable is that it is a randomly distributed, time-series cross-section event count. This type of data is often analyzed using linear regression. However, the use of linear regression for count data can result in "inefficient, inconsistent, and biased estimates". Standard regression techniques, therefore, are not applicable. Poisson regression has the ability to take into consideration the non-standard distribution of the dependent variable and determine whether or not each independent variable has a significant impact. Poisson regression assumes that the count events (in this case, the number of court cases in each year) are independent. Logically, it might appear that the number of court cases that each country encounters in one year would have some bearing on the number that it has in the next year. If that were the case, then it appears that the Poisson regression technique cannot be used.

However, it can be argued that court cases are independent events. A large number of actors are involved in implementing cases and in deciding whether or not a case goes to court. While implementation might not be independent, court cases that measure non-compliance are not necessary dependent. Non-compliance comes from many sources. The independence of compliance events is addressed in the data analysis through the technique of lagging the dependent variable and including it as a

predictor. In addition, the year has been included in the models. Including the year allows systematic examination of the rise and fall of the total number of cases. Since cases of non-implementation are filed by the Commission, it is logical to assume that activist Commissions might file more cases than non-activist Commissions.

Chapter 2

Global Political Science

Changing Meaning of Political Science

Political Science is that part of social science which deals with the foundations of the state and the principles of the government. J W Garner, “Politics begins and ends with the state.” Similarly, R G Gettel wrote that Politics is the “study of the state in the past, present and future”. Harold J Laski stated in the same vein that the study of Politics concerns itself with the life of men and women in relation to organized state. Thus as a social science, Political Science deals with those aspects of individuals in society which relate to their activities and organizations devoted to seeking of power, resolution of conflicts and all these, within an overall framework of the rule and law as laid down by the state. The term Politics is derived from the Greek word polis which means city-state. That is why many commentators, as you saw, rightly define Politics in terms of the state or government. However, this definition does not exhaust the meaning of Politics. Politics also deals with power. Harold D. Lasswell and Abraham Kaplan define Political Science as “the study of shaping and sharing of power”. In a word, Politics deals with both state and power. However, the power that Political Science deals with is, more often than not, the legitimate power. Since science is the

systematic study of any phenomenon through observation and experiment, it follows that Political Science studies the state and power in all their aspects. You will learn more about the state and power later in this lesson. Political Science deals with both empirical facts and normative issues. Facts are in the domain of "what is" and value preferences are in the domain of "what should be." For example, if somebody says India is a parliamentary democracy, he or she is making a statement of empirical fact. This is what India today actually is. But if she or he were to make a statement like the one that India should switch over to presidential form of democracy, the statement would be a normative one. Political Science is not satisfied with describing the state of affairs, it wants to change or improve upon them. Empirical statements are true or false by virtue of what observation shows to be the case. Evaluative statements are ethical/moral imperatives, which are often said not to be true or false in any sense at all. Formal statements are true or false by virtue of the meanings of their constituent terms alone. Political Philosophy deals with formal statements. Political Science deals with empirical statements and also evaluates the existing political institutions, practices and focuses on how to improve them.

Growth of the Discipline of Political Science

Systematic study of Politics started with the Greeks in the fourth century BC. Philosophers like Plato and Aristotle used it in the most comprehensive sense. Aristotle called Politics a "master science". For him, it comprised of not only the institutions of

state or government but also family, property and other social institutions. Politics, for the Greeks, was an allencompassing activity. The ancient Greek view about Political Science was mainly ethical. In contrast, the ancient Romans considered the legal aspect of Politics more important for their governance. During the Middle Ages, Political Science became a branch of religious order of the Church. Political authority was, then, subordinated to the authority of the Church. As the state grew in size and became more complex, Political Science acquired a realistic and secular approach. After the Industrial Revolution, the role of the State, which was limited to maintenance of law and order and providing defence against external aggression, underwent considerable changes with the emergence of the new economic system called capitalism. In the twentieth century, after the Second World War, the 'behavioural approach' offered a new dimension of Political Science. The behavioural movement in American Political Science in the 1950s and the 1960s placed a lot of emphasis on the 'science' part of Politics. It wanted to model Politics after the methods followed by natural sciences like Physics, Botany, etc. The behaviouralists built theory inductively from empirical propositions. Those who follow inductive method would come to the conclusion after study, observation and experiment. For example, when some behaviouralists saw African-Americans of the southern United States of America voted for the Democratic Party of the United States, they came to the conclusion that the African-Americans do vote for the Democrats. This behavioural approach shifted the focus of its study from political institutions and structures to their functions. It placed stress on political activity and the behaviour of men and women

who control these institutions. It replaced the study of ideas by the study of facts, evidence and behaviour. It considered political activity manifested in behaviour as the true subject of Political Science. A political activity may be in the form of an individual contesting an election. It may be the activity of a group seeking the adoption of a particular policy in its favour by the government. As different people pursue different interests, such activities tend to generate disagreement, competition and conflict. But the distinctive quality of Politics is that it includes physical coercion or force by the government. It may and usually does involve the persuasive influence and effort of the government to resolve conflicts through its balanced policy decisions. Politics is also viewed as a process whereby individuals, groups or communities seek to achieve their specific but conflicting goals. Politics, as the process, seeks to allocate resources authoritatively. Politics, as the study of structures, institutions, processes and activities, recognizes the possibility of the use of power. The Marxist approach, which is derived from the writings of the nineteenth century German philosopher Karl Marx, views Politics as a study of irreconcilable conflicts between the two classes 'haves' and the 'have-nots'; in other words, the exploiters and the exploited. The emancipation of the have-nots will come only through a revolution which would put an end to the institution of private property, thus changing the class society to the classless society. But Politics, as against the Marxist view, has another view also, the liberal view, according to which Politics is considered as an as effort for conciliation and accommodation to bring about rule of order and Justice.

Incidentally, the Marxist view of politics comes as a reaction to the liberal view of politics.

Distinction between Political Science and Politics

The terms 'Political Science' and 'Politics' are often used interchangeably. However, the distinction between the two needs to be understood. Some scholars define Politics to be "the science and art of government." But this is only a part of the total explanation of the subject of Political Science. Now-a-days the term Politics is used to mean the problems of the citizens interacting with the instrument of political power in one form or the other. Sometimes, Politics was and still is used as the technique of compromise or the method to capture power and retain it. According to many political scientists, the study of Political Science comprises theory of the state, concept of sovereign power, forms and functions of government, making and execution of laws, elections, political parities, rights and duties of citizens, policy functions and study of welfare activities of the State and government. There is another aspect of Politics that needs to be emphasised. Politics, many a time, implies practical politics. Practising politics is different from studying it. Practical politics includes actual formation of government, the working of government, administration, laws and legislation. It also includes international politics including matters such as peace and war, international trade and economic order, protection of rights, etc.

All these also comprise the subject matter of the study of Politics. While the knowledge of Political Science as a discipline is acquired through study, the skill of practical politics is acquired through politicking or manipulations and craftiness or by exploiting caste and regional loyalties and religious sentiments. Practical politics is often described as the 'dirty game' and a 'corrupting' process in the common people's mind. But we find that there are hardly any human groupings or societies, which are free from 'politics' and hardly any individual who does not know the implications of the "game of politics". Practical Politics also has many positive aspects. In this era of welfare state many positive programmes such as removal of untouchability, land reforms, release of bonded labourers, prohibition of trafficking in human beings and begar, introduction of minimum wages, employment generation programmes, empowerment of the other backward classes are all examples of positive aspects of practical politics. 'Politics' refers to the process of actual happenings in society and in institutions, which Political Science refers to its understand in a systematic manner.

Scope Of Political Science

Here we shall learn about the scope of Political Science in terms of role of the State, functions of government and its relationship with citizens.

Role of the State

The term 'State' in its modern sense was first used by Machiavelli, the Italian statesman. The study of the State has since remained the focal point for the political scientists. The State consists of four elements. These are:

- the people;
- the territory on which they live;
- the government to rule and regulate the lives of the people and
- sovereignty, which implies unrestricted authority to take decisions and manage its own affairs.

The role and nature of the State have been interpreted differently. Modern western liberal thinking, about which you will study more in the fourth lesson, arose with the commerial Revolution in Western Europe in the sixteenth century and became prominent with the Industrial Revolution in the eighteenth century. These Revolutions brought into focus a new economic system called capitalism. The social group consisting of traders, merchants and businessmen and later the industrialists was the major beneficiary of this system. The liberals emphasized that the consent of the people is the true basis of the state. Early liberal thinkers also considered the state as a 'necessary evil'- an evil but necessary for the purpose of protecting the individual from the external and internal enemies. According to this view, that government is the best which governs the least. In other words, the state should be a 'police state' and hence a limited

one. It should also be limited in a different sense: as John Locke, the famous English liberal philosopher of the seventeenth century, said it is there to protect the individual's natural right to life, liberty and property. By contrast, the Marxist view, about which you will study more in the fourth lesson, does not consider the State as an impartial institution. It asserts that, throughout the centuries, the state has been a tool in the hands of the "haves" for exploiting and dominating the "have-nots." In the future classless society like the communist society, the state would "wither away,". In Gandhian view, the State would justify its existence, by acting as a "trustee" of the people. It should help the poorest and the weakest one. It should restore to him or her, a control over his or her own life and destiny. The Welfare State, which slowly emerged during the 1930s, tries to promote the well being of its citizens, especially the poor, the needy, the unemployed and the aged. It is now generally agreed that the Welfare State exists to promote common good. So the functions of the state have increased manifold. Power refers to the ability of one person affecting the attitudes or action of another. I have power over you if I can make you do what you would not have done otherwise. But power is not always exercised openly. It can be exercised in unseen way, as in controlling the agenda. However, power can be best exercised when I can convince you about what is good/bad for you. To that extent, my power over you would be complete. And this dominance would always go unchallenged. By power of the government, we think of the different aspects of government. We think of ministers who have departments under them for the exercise of power over the area of their domains. There is the bureaucracy and the enormous

structure of governmental administration, which has power over us. It can control our lives in various ways by making, administering and implementing laws. Here, one thing is to be noted. Power does not lie only in the highly publicized areas of social life, like government, administration, elections, etc. It also exists in small institutions like family etc. Many feminists are of the opinion that inside the private world of family man exercises power or dominance over woman. Hence, it is very aptly said, "even the personal is political." Another thing to be noticed is that there is a distinction between legitimate and illegitimate power. There can be power, which is considered right or proper, while another may be improper. A dacoit's power over me is very real, because if I do not comply with his wishes, I might lose my life or limb. But it is not proper power as is generally understood. Contrary to it the power that the government's representatives, policemen or judges exercise over me is proper power. The dacoit's power is illegitimate power while the government's is legitimate. And the power of constitutional authorities over me is called authority. Authority contains the two ideas of power and legitimacy. Authority is that form of power which is legitimate. It is power plus ligitimacy.

Citizens and Government

The government is the most important instrument of the State through which the latter realizes its objectives. Through its three organs i.e; the Legislature, the Executive and the Judiciary, it makes laws and rules, implements them, maintains peace and order in the Individual and the State country and resolves

clashes of interests. It also tries to ensure territorial integrity or unity of the country. Modern democratic governments perform many other functions for the development and welfare of citizens and the society, as a whole. This is especially so in a developing country like ours. The relationship between citizens and the government is reciprocal. The citizens are members of the State. The state recognizes certain rights of the citizens and in turn expects certain duties from them. So far as the rights of the citizens are concerned, they can be divided into three: civil, political and social. CIVIL RIGHTS are those rights which are necessary for the freedom/ liberty of the individual. They include the right to life and personal liberty, right to freedom of speech, expression and thought, right to own property, right to enter into contract, right to equality before law and equal protection by law. Equality before law means absence of special privileges; equal protection of laws implies equals should be treated equally. POLITICAL RIGHTS include the right to vote and the right to contest election. SOCIAL RIGHTS include the right to some degrees of economic welfare and security and the right to live the life of a civilized being according to standards prevailing in the society. It is the primary duty of the citizens to pay taxes to the government. They should cooperate with the government and abide by the laws and rules; should help in preventing diseases by immunization and by keeping neighborhood clean. They should have small families to help the government check the population growth. They should preserve public property, help in catching and punishing anti-social and anti-national elements. Further, the citizens of different castes, religions, languages and regions should solve their problems by understanding and

agreement and not by violent means. In this way, a lot of resources, energy and time of the government can be saved for constructive purposes.

Liberty

The term liberty is derived form the Latin word liber meaning free. Thus liberty means freedom. Freedom is of paramount importance for the development of an individual's personality. Historically speaking, the term liberty was initially defined as absence of all restraints on an individual. This is known as the negative concept of liberty. Early liberalism championed negative liberty. John Stuart Mill, the nineteenth century English political philosopher, described, "Restraint as an evil". Mill was especially worried about the restraints coming from the state and society. However, since individuals live together in a society, complete absence of restraints would be neither possible nor desirable. Further, differentiating between the self-regarding and other-regarding action is not always possible. It has been very aptly said that your liberty to swing your arm ends there where my nose begins. For liberty to be enjoyed by everyone, it should have reasonable restraints. This is the concept of positive liberty. This concept further means freedom to be a master of one's own self. Harold J Laski supported this concept. Freedoms are opportunities which history has shown to be essential to the development of personality. The freedom of many requires restraint of law on the freedom of some. Later liberals supported the positive liberty.

Safeguards of Liberty

Declaration of rights of the individuals in the Constitution is considered as an important safeguard of liberty. This way the government can be prevented from encroaching upon the freedoms of the people. Impartial judiciary is rightly called the watchdog of liberty. Without it the liberty of the individuals would be meaningless. Decentralization of powers is another important safeguard of liberty. History is witness to the fact that concentration of power has very often led to despotism. Separation of powers, i.e. the executive, the legislature and the judiciary being separate, is a great ally of liberty. Montesquieu said, “Power should be a check on power.” Rule of law or equality in the eyes of the law is also an important safeguard of liberty. This is the bulwark against discrimination based on caste, class, colour, creed, etc. A large measure of social justice or diffusion of social and economic privileges is a prerequisite for liberty. If privileges become the prerogative of the select few, then effective liberty would be denied to a vast majority. A well-knit party system is also indispensable for the preservation of liberty. All these institutional safeguards are inadequate to preserve liberty if the citizens themselves do not possess the proud spirit to preserve it. People should always be on their toes to ensure that their liberty is not encroached upon. Eternal vigilance, it has been rightly said, is the price of liberty.

Justice and its Relevance for Citizens and State

The term Justice is derived from the Latin word jus, which means a bond. Thus the word Justice means joining or fitting. “Justice”, says E Barker, “is the reconciler and the synthesis of political values.” The best general definition of Justice is to “render to everyone his/her due.” Individual and the State

Aspects of Justice

When we turn to the broader question of Justice, it has other constitutions, we find a number of views. Herein comes the concept of distributive Justice – what is the proper way of distribution of income or social position in a given society. There are two major conceptions of distributive/social Justice, one involves the notion of merit and the other involves need and equality.

Merit

The first conception argues that each person’s social position and wealth must be decided on the basis of merit. When people talk of careers open to talents and equality of opportunity, they have merit in view. However, the question arises as to how to measure merit or talent? The liberals say that the price that someone can command in a free market is the reasonable indicator of his/her

value to others. The socialist critics are of the opinion that market receipts are often affected by chance and social background which have nothing to do with merit.

Need and Equality

The second conception views that goods, positions, etc. should be allocated on the basis of a person's needs. But how to define needs? Everybody agrees on food, shelter and clothing. Beyond this, there is no agreement. Communism believes that each person should define his needs and sufficient resources can be created under communism to meet all the needs of all individuals. However, others are of the opinion that needs can be satisfied by two agencies – welfare state and the market. Some needs can be satisfied through the welfare state and others being allocated through the market.

Equality of Opportunity

Equality does not mean identity of rewards or identity of treatment, i.e. same reward or treatment for everybody, regardless of efforts and circumstances. For example, there would be no equality if all the students were awarded sixty marks regardless of the quality of answer. Ideally, those who write better should get higher marks. And this is compatible with equality. Likewise, in a society some people have more income and some have less. However, this state of affairs does not violate equality provided two conditions are met:

- Absence of privileges strengthens equality; the existence of privileges would, conversely, promote inequality. This means that no one be given facilities/opportunities more than those given to others. Privileges create a situation of inequality, and in the process, harms equality.
- Equality of opportunity means everybody should have the same chance to access public position and office. An example of the working of the equality of opportunity in India is the Civil Services examination conducted by the Union Public Services Commission. Any Indian graduate from any university of India can take the examination.

Allied to the concept of equality of opportunity is equality of conditions. Everybody should get a chance to be at the initial starting line; then the race of life could begin. Some would come first, some, second and others would fail. But this would not be a violation of equality. Many people are convinced that equality of conditions can only be achieved when the historically disadvantaged groups are compensated through reservation of jobs or affirmative action. Equality is closely connected to equity, i.e., even-handed treatment. Equity demands like cases to be treated alike. Relevantly similar cases are to be treated in similar ways.

Overall Results (Communitarian Justice)

There is the other kind of theory of Justice that does not take either merit or need into account. It takes into account the overall results. John Rawls' theory belongs to this category. In his book A Theory of Justice he argues that inequalities in the allocation of goods are permissible if and only if those inequalities work to the benefit of the least well-off members of society. In other words, a society having income inequality is just if and only if that inequality benefitted the least advantaged members of that society. For example, a professor's higher salary can be just if and only if it, directly or indirectly, benefits, so to say, the bricklayer. On the other hand, scholars like Nozick argue in favour of traditional meaning of Justice: as respect for law and entitlements. Entitlements mean established/ conventional rights. According to this theory, individuals have natural rights, especially the right to property. These entitlements accrue to the individuals because they are human beings. Nozick says nobody, not even the state, can override these entitlements. Putting simply, Nozick is arguing against excessive taxation imposed by the state. He thinks that taxation interferes with rights of the individual to dispose of the income as she or he thinks fit. Taxation is an instance of curtailment of liberty of the individual. Justice is a dynamic concept. It has been undergoing changes from the ancient times till today. So no final word can be said about Justice. Justice is concept which keeps evolving.

Justice and its Relationship with Liberty and Equality

The nineteenth century scholars like Lord Acton and Alexis de Tocqueville considered liberty and equality as incompatible. They thought that too much of stress on equality would lead to the dilution of liberty. Many later scholars also agreed with them. Progressive taxation by the welfare state was considered violative of the liberty of the propertied people. However, it remained a fact that proceeds of tax went towards financing the programmes to ameliorate the plight of the poor, the unemployed, the needy, the handicapped and the aged. A largely egalitarian society was made possible by these programmes. In times of conflict like this, prevailing notion of Justice decides what should be the right mix of liberty and equality. Thus freedom and equality are two aspects of Justice. The ultimate objective of both freedom and equality is Justice.

History of Political Science

Political science as a separate field is a relatively late arrival in terms of social sciences. However, the term "political science" was not always distinguished from political philosophy, and the modern discipline has a clear set of antecedents including also moral philosophy, political economy, political theology, history, and other fields concerned with normative determinations of what ought to be and with deducing the characteristics and functions of the ideal state.

The antecedents of Western politics can be traced back to the Socratic political philosophers, Plato (427–347 BC), Xenophon (c. 430–354 BC), and Aristotle ("The Father of Political Science") (384–322 BC). These authors, in such works as The Republic and Laws by Plato, and The Politics and Nicomachean Ethics by Aristotle, analyzed political systems philosophically, going beyond earlier Greek poetic and historical reflections which can be found in the works of epic poets like Homer and Hesiod, historians like Herodotus and Thucydides, and dramatists such as Sophocles, Aristophanes, and Euripides.

The rise and fall of the Roman Empire

During the height of the Roman Empire, famous historians such as Polybius, Livy and Plutarch documented the rise of the Roman Republic, and the organization and histories of other nations, while statesmen like Julius Caesar, Cicero and others provided us with examples of the politics of the republic and Rome's empire and wars. The study of politics during this age was oriented toward understanding history, understanding methods of governing, and describing the operation of governments. Nearly a thousand years elapsed, from the foundation of the city of Rome in 753 BC to the fall of the Roman Empire or the beginning of the Middle Ages. In the interim, there is a manifest translation of Hellenic culture into the Roman sphere. The Greek gods become Romans and Greek philosophy in one way or another turns into Roman law e.g. Stoicism. The Stoic was committed to preserving proper hierarchical roles and duties in the state so that the state as a whole would remain stable. Among the best

known Roman Stoics were philosopher Seneca and the emperor Marcus Aurelius. Seneca, a wealthy Roman patrician, is often criticized by some modern commentators for failing to adequately live by his own precepts. The Meditations of Marcus Aurelius, on the other hand, can be best thought of as the philosophical reflections of an emperor divided between his philosophical aspirations and the duty he felt to defend the Roman Empire from its external enemies through his various military campaigns. Polybius, Roman institutions were the backbone of the empire but Roman law is the medulla.

The Middle Ages

With the fall of the Western Roman Empire, there arose a more diffuse arena for political studies. The rise of monotheism and, particularly for the Western tradition, Christianity, brought to light a new space for politics and political action. Works such as Augustine of Hippo's The City of God synthesized current philosophies and political traditions with those of Christianity, redefining the borders between what was religious and what was political. During the Middle Ages, the study of politics was widespread in the churches and courts. Most of the political questions surrounding the relationship between church and state were clarified and contested in this period. The Arabs lost sight of Aristotle's political science but continued to study Plato's Republic which became the basic text of Judeo-Islamic political philosophy as in the works of Alfarabi and Averroes; this did not happen in the Christian world, where Aristotle's Politics was

translated in the 13th century and became the basic text as in the works of Saint Thomas Aquinas.

Indian Sub-Continent

In ancient India, the antecedents of politics can be traced back to the Rig-Veda, Samhitas, Brahmanas, the Mahabharata and Buddhist Pali Canon. Chanakya (c. 350–275 BC) was a political thinker in Takshashila. Chanakya wrote the Arthashastra, a treatise on political thought, economics and social order. It discusses monetary and fiscal policies, welfare, international relations among other topics. The Manusmriti, dated to about two centuries after the time of Chanakya is another important Indian political treatise.

East Asia

Ancient China was home to several competing schools of political thought, most of which arose in the Spring and Autumn Period. These included Mohism (a utilitarian philosophy), Taoism, Legalism (a school of thought based on the supremacy of the state), and Confucianism. Eventually, a modified form of Confucianism (heavily infused with elements of Legalism) became the dominant political philosophy in China during the Imperial Period. This form of Confucianism also deeply influenced and were expounded upon by scholars in Korea and Japan.

West Asia

In Persia, works such as the Rubaiyat of Omar Khayyam and Epic of Kings by Ferdowsi provided evidence of political analysis, while the Middle Eastern Aristotelians such as Avicenna and later Maimonides and Averroes, continued Aristotle's tradition of analysis and empiricism, writing commentaries on Aristotle's works. Averroe did not have at hand a text of Aristotle's Politics, so he wrote a commentary on Plato's Republic instead.

The Renaissance

During the Italian Renaissance, Niccolò Machiavelli established the emphasis of modern political science on direct empirical observation of political institutions and actors. Machiavelli was also a realist, arguing that even evil means should be considered if they help to create and preserve a glorious regime. Machiavelli therefore also argues against the use of idealistic models in politics, and has been described as the father of the "politics model" of political science. Later, the expansion of the scientific paradigm during the Enlightenment further pushed the study of politics beyond normative determinations.

The Enlightenment

Like Machiavelli, Thomas Hobbes, well known for his theory of the social contract, believed that a strong central power, such as a monarchy, was necessary to rule the innate selfishness of the individual but neither of them believed in the divine right of

kings. John Locke, on the other hand, who gave us Two Treatises of Government and who did not believe in the divine right of kings either, sided with Aquinas and stood against both Machiavelli and Hobbes by accepting Aristotle's dictum that man seeks to be happy in a state of social harmony as a social animal. Unlike Aquinas' preponderant view on the salvation of the soul from original sin, Locke believed man comes into this world with a mind that is basically a tabula rasa. Locke, an absolute ruler as proposed by Hobbes is unnecessary, for natural law is based on reason and equality, seeking peace and survival for man.

Religion would no longer play a dominant role in politics. There would be separation of church and state. Principles similar to those that dominated the material sciences could be applied to society as a whole, originating the social sciences. Politics could be studied in a laboratory as it were, the social milieu. In 1787, Alexander Hamilton wrote: The science of politics like most other sciences has received great improvement.". Both the marquis d'Argenson and the abbé de Saint-Pierre described politics as a science; d'Argenson was a philosopher and de Saint-Pierre an allied reformer of the enlightenment.

Other important figures in American politics who participated in the Enlightenment were Benjamin Franklin and Thomas Jefferson.

Modern political science

Because political science is essentially a study of human behavior, in all aspects of politics, observations in controlled environments are often challenging to reproduce or duplicate, though experimental methods are increasingly common. Citing this difficulty, former American Political Science Association President Lawrence Lowell once said "We are limited by the impossibility of experiment. Politics is an observational, not an experimental science." Because of this, political scientists have historically observed political elites, institutions, and individual or group behavior in order to identify patterns, draw generalizations, and build theories of politics.

Like all social sciences, political science faces the difficulty of observing human actors that can only be partially observed and who have the capacity for making conscious choices unlike other subjects such as non-human organisms in biology or inanimate objects as in physics. Despite the complexities, contemporary political science has progressed by adopting a variety of methods and theoretical approaches to understanding politics and methodological pluralism is a defining feature of contemporary political science.

The advent of political science as a university discipline was marked by the creation of university departments and chairs with the title of political science arising in the late 19th century. In fact, the designation "political scientist" is typically reserved for those with a doctorate in the field. Integrating political studies of

the past into a unified discipline is ongoing, and the history of political science has provided a rich field for the growth of both normative and positive political science, with each part of the discipline sharing some historical predecessors. The American Political Science Association was founded in 1903 and the American Political Science Review was founded in 1906 in an effort to distinguish the study of politics from economics and other social phenomena.

Behavioral Revolution and New Institutionalism

In the 1950s and the 1960s, a behavioral revolution stressing the systematic and rigorously scientific study of individual and group behavior swept the discipline. A focus on studying political behavior, rather than institutions or interpretation of legal texts, characterized early behavioral political science, including work by Robert Dahl, Philip Converse, and in the collaboration between sociologist Paul Lazarsfeld and public opinion scholar Bernard Berelson.

The late 1960s and early 1970s witnessed a takeoff in the use of deductive, game theoretic formal modeling techniques aimed at generating a more analytical corpus of knowledge in the discipline. This period saw a surge of research that borrowed theory and methods from economics to study political institutions, such as the United States Congress, as well as political behavior, such as voting. William H. Riker and his colleagues and students at the University of Rochester were the main proponents of this shift. Criticisms of the use of this

rational choice theorizing has been widespread, even among political scientists who adopt quantitative methods.

This trend toward formalization has continued and accelerated, even as the behavioralist revolution has subsided. At the same time, because of the interdependence of all social life, political science also moved towards a closer working relationship with other disciplines, especially sociology, economics, history, anthropology, psychology, public administration, law, and statistics without losing its own identity.

Increasingly, political scientists have used the scientific method to create an intellectual discipline involving quantitative research methods, as well as the generation of formal economics-style models of politics to derive testable hypotheses followed by empirical verification. Over the past generations, the discipline placed an increasing emphasis on relevance and the use of new approaches to increase scientific knowledge in the field and provide explanations for empirical outcomes.

Kenneth R. Mladenka, a political scientist at Texas A&M University, was among the academics that proceeded to bring acceptance of the newer urban studies component of the discipline. In the 1970s and 1980s, he found that urban scholars were not as prominent on the editorial boards of the major political science journals, and that traditional scholars, called empiricists, regard most urban research, dependent on case studies, paradigms, qualitative analysis, and theoretical perspectives, as less reliable than the traditional emphasis of the

discipline. The urban scholars such as Mladenka stress "local settings where global, national, and voting behavior outcomes happen at street level and where day-to-day lives are affected."

Recent Developments

In 2000, the Perestroika Movement in political science was introduced as a reaction against what supporters of the movement called the mathematicization of political science. Those who identified with the movement argued for a plurality of methodologies and approaches in political science and for more relevance of the discipline to those outside of it.

Chapter 3

State‘s Laws and Political Science

Elements of the State

The term ‘State’ is central to the study of Political Science. But it is wrongly used as synonym for nation, society, government etc. The term ‘state’ is also used as State management, State aid and so on. Also as the States of Indian union or the fifty States that make the United States of America. But in Political Science, we use this term differently; it has a more specific meaning. Some of the definitions of the concept of State are as follows:

- “The State is the politically organized people of a definite territory”— Bluntschli
- State is “a community of persons, more or less numerous, permanently occupying a definite portion of territory, independent, or nearly so, of external control, and possessing an organized government to which the great body of inhabitants render habitual obedience.”— Garner
- State is “a territorial society divided into governments and subjects, whether individuals or associations of individuals, whose relationships are determined by the exercise of this supreme coercive power.”— Laski

- State "is a people organized for law within a definite territory".— Woodrow Wilson
- "The State is a concept of political science, and a moral reality which exists where a number of people, living on a definite territory, are unified under a government which in internal matters is the organ of expressing their sovereignty, and in external matters is independent of other governments."— Gilchrist

Human beings are social animals and cannot live alone. When people live together, they fulfill their socials needs. But everybody is not good and kind. There are all sorts of men and women, who exhibit various emotions such as pride, jealousy, greed, selfishness and so on. Burke, "Society requires not only the passions of individuals should be subjected, but that even in the mass and body as in the individuals the inclination of men Individual and the State should be thwarted, their will controlled and their passions brought into subjection." The best is to control human perversity through means of political authority. Therefore people are bound by rules of common behaviour. If these are broken then they can be punished. Society fulfills people's need for companionship; the state solves the problem created by this companionship. The state exists for the sake of good life. It is an essential and natural institution and as Aristotle said, "The State comes into existence originating in the bare needs of life and continues its existence for the sake of good life."It is only within a state that an individual can rise to his or her ability. If there is no authority, no organisation and no rules, then society cannot be held together. The state has existed where

human beings have lived in an organized society. The structure of the state has evolved gradually over a long period of time, from a simple to a complex organisation that we have today. The essence of state is in its monopoly of coercive power. It has a right to demand obedience from the people. However, the Marxists believe that state is a class organisation, which has been created by the propertied class to oppress and exploit the poor. They refuse to believe that the state is a natural institution. To them the propertied class created the state and it has always belonged to them only. Thus, the state is just a means of exploitation. Therefore, they visualize a situation of classless society or communism in which there will not be any need of the state. State will, thus, wither away.

The state possesses four essential elements. These are:

Population

The State is a human institution. It is the people who make a State. Antarctica is not a State as is it is without any human population. The population must be able to sustain a state. But the question is; how much should be the population? Plato's and Aristotle's ideals were the Greek City – States of Athens and Sparta. Plato fixed the number of people in an ideal state at 5040. Aristotle laid down a general principle that the state should neither be large nor small; it should be large enough to be self sufficing and small enough to be well-governed. Rousseau put the number at 10,000.But it is difficult to fix the size of the people of a state. In modern times we have India and China

which have huge population and countries like San Marino with a very small population. Countries like former Soviet Union gave incentives to mother of large families. In India, over-population is a big problem while China has enforced a one-child norm. Dictators like Mussolini had openly encouraged large population of the state. So no limit-either theoretical or practical-can be put on population. But it must be enough to constitute governing and governed classes, sufficient to support a political organization. The population should be in proportion to the available land and resources. It should be remembered that the differences in the size of population, other things remaining the same, does not make any difference in the nature of State. The quality of the population is also important. A state requires healthy, intelligent and disciplined citizens. They should be possessed with qualities of vitality. The composition of population is also very important. A state with a homogenous people can be governed easily.

Territory

Just as every person belongs to a state, so does every square yard of earth. There is no state without a fixed territory. Living together on a common land binds people together. Love for the territory inculcates the spirit of patriotism. Some call their countries as fatherland and some call it motherland. But there is a definite attachment with one's territory. The territory has to be definite because it ensures exercise of political authority. Mobile tribal's had some sort of political authority but they did not constitute a State because they lacked a fixed land. The Jews were living in different countries and they became State only with

the creation of Israel, which had a definite territory. Without a fixed territory it would be difficult to conduct external relations. It is essential for the identification if one state attempts to conquer the territory of another. The territory may be small or large. But the state has to have a definite land. It may be as small as San Marino, which has an area of 62 Square kilometers, or it may be as large as India, USA, Russia or China. The size of a state influences the form of government. For example, smaller states can have a unitary form of government but for the large states like India and the USA, the federal system is relatively suitable. The quality of land is also very important. If the land is rich in minerals and natural resources, it will make the state economically powerful. It should be able to provide enough food for its people. The States of West Asia were insignificant but they acquired prominence after the discovery of oil. Large territory of a State gives it strategic and military advantage during the times of war. Mostly the territory of a state is contiguous and compact though there are exceptions also. Before the creation of Bangladesh, the two wings of Pakistan were miles apart. Hawaii and Alaska are far away from the main territory of USA. Land, water and airspace comprise the territory of the state. The sovereignty of a state is exercised over its land, its rivers, mountains and plains and airspace the land. These a up to a certain limit from the land border is also a part of the territory of a State.

Government

The purpose for which people live together cannot be realized unless they are properly organized and accept certain rules of conduct. The agency created to enforce rules of conduct and ensure obedience is called government. Government is also the focus of the common purpose of the people occupying the definite territory. It is through this medium that common policies are determined, common affairs regulated and common interests promoted. Without a government the people will lack cohesion and means of collective action. There would be groups, parties and warring associations and conditions of wars and chaos. So there is a need for common authority and order where people live. This is the pre-requisite of human life. The state cannot and does not exist without a government, no matter what form a government may assume. The government is a must, though it may take any form. It may have a monarchy like Bhutan or republic as in India. It may have a parliamentary form of government like India and Great Britain or a presidential form of government as in the United States of America.

Sovereignty

A people inhabiting a definite portion of territory and having a government do not constitute a state so long as they do not possess sovereignty. India before 15 August 1947 had all the other elements of the state but it lacked sovereignty and therefore it was not a State. Sovereignty is the supreme power by which the state commands and exerts political obedience from its

people. A state must be internally supreme and free from external control. Thus sovereignty has two aspects, internal and external. Internal sovereignty is the state's monopoly of authority inside its boundaries. This authority cannot be shared with any other state. The state is independent and its will is unaffected by the will of any other external authority. Therefore every state must have a population, a definite territory, a duly established government and sovereignty. The absence of any of these elements deprives it the status of statehood. So the term generally used for the 28 provinces of Indian Republic at times creates confusion and as is the case of '50 States' in the United States of America.

State Politics: Emerging Patters

Politics of India

Politics of India take place in a framework of a federal parliamentary multi-party representative democratic republic. India is the world's largest democracy. In India, the Prime Minister of India is identified as the head of government of the nation, while the President of India is said to be the formal head of state and holds substantial reserve powers, placing him or her in approximately the same position as the British monarch. Executive power is enforced by the government. It can be noted that federal legislative power is vested in both the government of India and the two characteristic chambers of the Parliament of India. Also, it can be said that the judiciary is independent of both the executive and the legislature. Looking at the

constitution, India is a nation that is characterized to be "sovereign socialist secular democratic republic." India is the largest state by population with a democratically-elected government. Like the United States, India has a federal form of government, however, the central government in India has greater power in relation to its states, and its central government is patterned after the British parliamentary system. Regarding the former, "the Centre", the national government, can and has dismissed state governments if no majority party or coalition is able to form a government or under specific Constitutional clauses, and can impose direct federal rule known as President's rule. Locally, the Panchayati Raj system has several administrative functions. For most of the years since independence, the federal government has been guided by the Indian National Congress, In India the two largest political parties have been the Indian National Congress and the Bharatiya Janata Party. Presently the two parties have dominated the Indian politics, however regional parities too exist. From 1950 to 1990, barring two brief periods, the INC enjoyed a parliamentary majority. The INC was out of power between 1977 and 1980, when the Janata Party won the election owing to public discontent with the corruption of the then Prime Minister Indira Gandhi. In 1989, a Janata Dal-led National Front coalition in alliance with the Left Front coalition won the elections but managed to stay in power for only two years. As the 1991 elections gave no political party a majority, the INC formed a minority government under Prime Minister P.V. Narasimha Rao and was able to complete its five-year term. The years 1996–1998 were a period of turmoil in the federal government with several

short-lived alliances holding sway. The BJP formed a government briefly in 1996, followed by the United Front coalition that excluded both the BJP and the INC. In 1998, the BJP formed the National Democratic Alliance with several other parties and became the first non-Congress government to complete a full five-year term. In the 2004 Indian elections, the INC won the largest number of Lok Sabha seats and formed a government with a coalition called the United Progressive Alliance, supported by various parties. In the 2009 Lok Sabha Elections, it won again with a surprising majority, the INC itself winning more than 200 seats. At the federal level, India is the most populous democracy in the world. While many neighboring countries witness frequent coups, Indian democracy has been suspended only once. Nevertheless, Indian politics is often described as chaotic. More than a fifth of parliament members face criminal charges.

Central and State Governments

The central government exercises its broad administrative powers in the name of the President, whose duties are largely ceremonial. The president and vice president are elected indirectly for 5-year terms by a special electoral college. The vice president assumes the office of president in case of the death or resignation of the incumbent president. The constitution designates the governance of India under two branches namely the executive branch and Real national executive power is centered in the Council of Ministers, led by the Prime Minister of India. The President appoints the Prime Minister, who is designated by legislators of the political party or coalition

commanding a parliamentary majority. The President then appoints subordinate ministers on the advice of the Prime Minister. In reality, the President has no discretion on the question of whom to appoint as Prime Minister except when no political party or coalition of parties gains a majority in the Lok Sabha. Once the Prime Minister has been appointed, the President has no discretion on any other matter whatsoever, including the appointment of ministers. But all Central Government decisions are nominally taken in his/her name.

Legislative branch

The constitution designates the Parliament of India as the legislative branch to oversee the operation of the government. India's bicameral parliament consists of the Rajya Sabha (Council of States) and the Lok Sabha. The Council of Ministers is held responsible to the Lok Sabha.

State Government

States in India have their own elected governments, whereas Union Territories are governed by an administrator appointed by the president. Some of the state legislatures are bicameral, patterned after the two houses of the national parliament. The states' chief ministers are responsible to the legislatures in the same way the prime minister is responsible to parliament. Each state also has a presidentially appointed governor who may assume certain broad powers when directed by the central government. The central government exerts greater control over

the union territories than over the States, although some territories have gained more power to administer their own affairs. Local state governments in India have less autonomy compared to their counterparts in the United States, Africa and Australia.

Judicial branch

India's independent judicial system began under the British, and its concepts and procedures resemble those of Anglo-Saxon countries. The constitution designates the Supreme Court, the High Courts and the lower courts as the authority to resolve disputes among the people as well as the disputes related to the people and the government. The constitution through its articles relating to the judicial system provides a way to question the laws of the government, if the common man finds the laws as unsuitable for any community in India..

Local governance

On April 24, 1993, the Constitutional (73rd Amendment) Act, 1992 came into force to provide constitutional status to the Panchayati Raj institutions. This Act was extended to Panchayats in the tribal areas of eight States, namely Andhra Pradesh, Bihar, Gujarat, Himachal Pradesh, Maharashtra, Madhya Pradesh, Orissa and Rajasthan from 24 December 1996. The Act aims to provide 3-tier system of Panchayati Raj for all States having population of over 2 million, to hold Panchayat elections regularly every 5 years, to provide reservation of seats for

Scheduled Castes, Scheduled Tribes and Women, to appoint State Finance Commission to make recommendations as regards the financial powers of the Panchayats and to constitute District Planning Committee to prepare draft development plan for the district.

Role of political parties

As like any other democracy, political parties represent different sections among the Indian society and regions, and their core values play a major role in the politics of India. Both the executive branch and the legislative branch of the government are run by the representatives of the political parties who have been elected through the elections. Through the electoral process, the people of India choose which majority in the lower house, a government can be formed by that party or the coalition. India has a multi-party system, where there are a number of national as well as regional parties. A regional party may gain a majority and rule a particular state. If a party represents more than 4 states then such parties are considered as national parties. In the 61 years since India's independence, India has been ruled by the Indian National Congress for 48 of those years. The party enjoyed a parliamentary majority barring two brief periods during the 1970s and late 1980s. This rule was interrupted between 1977 to 1980, when the Janata Party coalition won the election owing to public discontent with the controversial state of emergency declared by the then Prime Minister Indira Gandhi. The Janata Dal won elections in 1989, but its government managed to hold on to power for only two

years. Between 1996 and 1998, there was a period of political flux with the government being formed first by the right-wing nationalist Bharatiya Janata Party followed by a left-leaning United Front coalition. In 1998, the BJP formed the National Democratic Alliance with smaller regional parties, and became the first non-INC and coalition government to complete a full five-year term. The 2004 Indian elections saw the INC winning the largest number of seats to form a government leading the United Progressive Alliance, and supported by left-parties and those opposed to the BJP. On 22 May 2004, Manmohan Singh was appointed the Prime Minister of India following the victory of the INC & the left front in the 2004 Lok Sabha election. The UPA now rules India without the support of the left front. Previously, Atal Bihari Vajpayee had taken office in October 1999 after a general election in which a BJP-led coalition of 13 parties called the National Democratic Alliance emerged with a majority. Formation of coalition governments reflects the transition in Indian politics away from the national parties toward smaller, more narrowly-based regional parties. Some regional parties, especially in South India, are deeply aligned to the ideologies of the region unlike the national parties and thus the relationship between the central government and the state government in various states has not always been free of rancor. Disparity between the ideologies of the political parties ruling the centre and the state leads to severely skewed allocation of resources between the states.

Chapter 4

Political Issues

Social issues

The lack of homogeneity in the Indian population causes division between different sections of the people based on religion, region, language, caste and race. This has led to the rise of political parties with agendas catering to one or a mix of these groups. Some parties openly profess their focus on a particular group, for example, the Dravida Munnetra Kazhagam's focus on the dravid population, and the Shiv Sena's pro-Marathi agenda. Some other parties claim to be universal in nature, but tend to draw support from particular sections of the population, for example, the Rashtriya Janata Dal (translated as National People's Party) has a vote bank among the Yadav and Muslim population of Bihar and the All India Trinamool Congress does not have any significant support outside West Bengal. The Bharatiya Janata Party, the party with the second largest number of MPs in the 15th Lok Sabha, has an image of being pro-Hindu, and anti-Muslim and anti-Christian. Such support from particular sections of the population affects the agenda and policies of such parties, and refute their claims of being universal representatives. The Congress may be viewed as the most secular party with a national agenda, however it also practices vote bank politics to gain the support of minorities, especially Muslims, through appeasement and pseudo-secularist strategies. The

narrow focus and vote bank politics of most parties, even in the central government and central legislature, sidelines national issues such as economic welfare and national security. Moreover, internal security is also threatened as incidences of political parties instigating and leading violence between two opposing groups of people is a frequent occurrence.

Economic issues

Economic issues like poverty, unemployment, development are main issues that influence politics. Garibi hatao (eradicate poverty) has been a slogan of the Indian National Congress for long. The well known Bharatiya Janata Party is looked upon with grace as a political party that is indeed encouraging to free market economy, businesses and others. The Communist Party of India vehemently supports left-wing politics and has strongly opposed to socio-economic policies such as globalization, capitalism, foreign investments and privatization. The economic policies of most other parties do not go much further than providing populist subsidies and reservations. As a noteworthy case, the manifesto of the Samajwadi Party, the third largest party in the 15th Lok Sabha, for the 2009 general elections promised to reduce the use of computers upon being elected.

Law and order

Just to name a few, terrorism, Naxalism, Religious violence and caste-related violence are important issues that affect the political environment of the Indian nation. Stringent anti-terror

legislations like TADA, POTA and MCOCA have received much political attention, both in favour as well as criticism. Law and order issues such as action against organized crime are not issues that affect the outcomes of elections. On the other hand, there is a criminal-politician nexus. Many elected legislators have criminal cases against them. In July 2008 Washington Times reported that nearly a fourth of the 540 Indian Parliament members faced criminal charges, "including human trafficking, immigration rackets, embezzlement, rape and even murder".

Governors of states of India

The Governors and Lieutenant-Governors of the states and territories of India have similar powers and functions at the state level as that of the President of India at Union level. Governors exist in the states while Lieutenant-Governors exist in union territories and in the National Capital Territory of Delhi. The Governor acts as the nominal head whereas the real power lies in the hand of the Chief Ministers of the states and the Chief Minister's Council of Ministers. In India, a Lieutenant governor is in charge of a Union Territory. However the rank is present only in the union territories of Andaman and Nicobar Islands, Delhi and Pondicherry (the other territories have an administrator appointed, who is an IAS officer). Lieutenant-Governors hold the same rank as a Governor of a state in the list of precedence. The Governors and Lieutenant-Governors are appointed by the President for a term of 5 years.

Powers and functions

The Governor enjoys many different types of powers:

- Executive powers related to administration, appointments and removals,
- Legislative powers related to lawmaking and the state legislature, that is Vidhan Sabha or Vidhan Parishad,
- Discretionary powers to be carried out according to the discretion of the Governor.

Executive powers

The Constitution vests in the Governor all the executive powers of the State Government. The Governor appoints the Chief Minister who enjoys the support of the majority in the Vidhan Sabha. The Governor also appoints the other members of the Council of Ministers and distributes portfolios to them on the advice of the Chief Minister. The Council of Ministers remain in power during the 'pleasure' of the Governor, but in the real sense it means the pleasure of the Vidhan Sabha. As long as the majority in the Vidhan Sabha supports the government, the Council of Ministers cannot be dismissed. The Governor appoints the Chief Minister of a state. He also appoints the Advocate General and the chairman and members of the State Public Service Commission. The President consults the Governor in the appointment of judges of the High Courts and the Governor appoints the judges of the District Courts.

Legislative powers

The Governor summons the sessions of both houses of the state legislature and prorogues them. The Governor can even dissolve the Vidhan Sabha. These powers are formal and the Governor while using these powers must act according to the advice of the Council of Ministers headed by the Chief Minister. The Governor inaugurates the state legislature by addressing it after the assembly elections and also at the beginning of the first session every year. The Governor's address on these occasions generally outlines new policies of the state government. A bill that the state legislature has passed, can become a law only after the Governor gives assent. The Governor can return a bill to the state legislature, if it is not a money bill, for reconsideration. However, if the state legislature sends it back to the Governor for the second time, the Governor must assent to it. The Governor has the power to reserve certain bills for the President. When the state legislature is not in session and the Governor considers it necessary to have a law, then the Governor can promulgate ordinances. These ordinances are submitted to the state legislature at its next session. They remain valid for no more than six weeks from the date the state legislature is reconvened unless approved by it earlier.

Financial powers

Money bills can be introduced in the State Legislative Assembly only on the prior recommendation of the Governor. He also causes to be laid before the State Legislature the annual

financial statement which is the State Budget. Further no demand for grant shall be made except on his recommendation. He can also make advances out of the Contingency Fund of the State to meet any unforeseen expenditure. Moreover, he constitutes the State Finance Commission.

Discretionary powers

Normally, the Governor has to act on the aid and advice of the Council of ministers headed by the Chief Minister. However, there are situations when the Governor has to act as per his own judgement and take decisions on his own. These are called the discretionary powers of the Governor.

In the appointment of the Chief Minister of a state

When no party gets a majority in the Vidhan Sabha, the Governor can either ask the leader of the single largest party or the consensus leader of two or more parties (that is, a coalition party) to form the government. The Governor then appoints the leader of the largest party to Chief Minister.

In informing the President of the failure of constitutional machinery in a state

The Governor can send a report to the President informing him or her that the State's constitutional functioning has been compromised and recommending the President impose "President's rule" upon the state.

Removal

The term of Governor's office is normally 5 years but it can be terminated earlier by:

- Dismissal by the President on the advice of the Prime Minister of the country, at whose pleasure the Governor holds office.
- Resignation by the governor

Vidhan Sabha

The Vidhan Sabhas also known as Legislative Assemblies are the lower houses of state legislature in of the different states of India. Members of a Vidhan Sabha are direct representatives of the people of the particular state as they are directly elected by an electorate consisting of all adult citizens of that state. Its maximum size as outlined in the Constitution of India is not more than 500 members and not less than 60. However, the size of the Vidhan Sabha can be less than 60 members through an Act of Parliament, such is the case in the states of Goa, Sikkim and Mizoram. The Governor can appoint 1 member to represent the Anglo-Indian community if he or she finds that community to not be adequately represented in the House. Each Vidhan Sabha is formed for a five year term after which all seats are up for election. During a State of Emergency, its term may be extended past five years or it may be dissolved. It can also be dissolved if a motion of no confidence is passed within it against the majority party or coalition.

Qualifications required to become a member

To become a member of a Vidhan Sabha, a person must be a citizen of India, not less than 25 years of age. He should be mentally sound and should not be bankrupt. He should also state an affidavit that there are no criminal procedures against him. The members of a Vidhan Sabha elect a Speaker of Vidhan Sabha who is responsible for the conduct of business of the body, and also a Deputy Speaker to preside during the Speaker's absence. The Speaker acts as a neutral judge and manages all debates and discussions in the house. Usually he is a member of the stronger political party A Vidhan Sabha holds equal legislative power with the upper house of state legislature, the Vidhan Parishad ('Legislative Council'), except in the area of money bills in which case the Vidhan Sabha has the ultimate authority. If conflicting legislation is enacted by the two Houses, a joint sitting is held to resolve the differences. In such a session, the members of the Vidhan Sabha would generally prevail, since the Vidhan Sabha includes more than twice as many members as the Vidhan Parishad.

Special powers of the Vidhan Sabha

A motion of no confidence against the government in the state can only be introduced in the Vidhan Sabha. If it is passed by a majority vote, then the Chief Minister and his Council of Ministers must collectively resign. A money bill can only be introduced in Vidhan Sabha. After it is passed in the Vidhan Sabha, it is sent to the Vidhan Parishad, where it can be kept for

a maximum time of 14 days. Unless the Vidhan Parishad rejects it or 14 days lapse or the suggestions made by the Vidhan Parishad are not acceptable to the Vidhan Sabha, the bill is considered passed. The budget of state is also presented in the Vidhan Sabha by the Finance Minister of the state in the name of the Governor of that state. In matters related to ordinary bills, after it is passed by the originating house (that is either Vidhan Sabha or Vidhan Parishad) it is sent to the other house, where it can be kept for a maximum period of 6 months time. If the other house rejects the bill or 6 months pass or the suggestions made by the other house is not acceptable to the originating house, it results in a situation of deadlock. This is resolved by the Governor by calling a joint session of both houses which is presided over by the speaker of the Vidhan Sabha and decided by a simple majority. Since the Vidhan Sabha has greater numerical strength, it is in a position of advantage unless fractured by many different parties.

Vidhan Parishad

The Vidhan Parishad (Legislative Council) forms a part of the state legislatures of India. In six of India's 28 states (Uttar Pradesh, Bihar, Karnataka, Maharashtra, Jammu and Kashmir and Andhra Pradesh), the Legislative Council serves as the indirectly-elected upper house of a bicameral legislature. It is also a permanent house because it cannot be dissolved.

Every Member of Legislative Council serves for a six-year term, with terms staggered so that the terms of one-third of members

expire every two years. MLCs must be citizens of India not under 30 years of age, mentally sound and not bankrupt, and on the voter's list of the state from which he or she is contesting the election. The size of the Vidhan Parishad cannot be more than one-third the membership of the Vidhan Sabha, the Legislative Assembly of that state. But its size cannot be less than 40, except in Jammu and Kashmir where there are 36 by an act of Parliament. MLCs are chosen in the following manner:

- One-third is elected by members of local bodies such as corporations, municipalities, and zilla parishads.
- One-third is elected by members of Legislative Assembly from among the persons who are not members of the Assembly.
- One-twelfth is elected persons who are graduates of three years' standing residing in that state.
- One-twelfth is elected by persons engaged for at least three years in teaching in educational institutions within the state not lower than secondary schools, including colleges and universities.
- One-sixth is nominated by the governor from persons having knowledge or practical experience in fields such as literature, science, arts, the co-operative movement and social service.

In April 2007, the State of Andhra Pradesh re-established its Legislative Council. The State's main opposition party, the Telugu Desam Party, has stated that it would abolish the council again if it comes to power in the state. But Telugu Desam Party could not

come to the power for the past 7 years. After the victory of the Akali Dal-BJP in Punjab, newly elected Chief Minister Prakash Singh Badal stated that he would re-constitute the state's Vidhan Parishad.

Panchayati raj

The panchayat raj is a South Asian political system mainly in India, Pakistan, and Nepal. "Panchayat" literally means assembly of five wise and respected elders chosen and accepted by the village community. Traditionally, these assemblies settled disputes between individuals and villages. Modern Indian government has decentralized several administrative functions to the village level, empowering elected gram panchayats. Gram panchayats are not to be confused with the unelected khap panchayats (or caste panchayats) found in some parts of India.Panchayati Or Panchaayati Raj is a system of governance in which gram panchayats are the basic units of administration. It has 3 levels: village, block and district. The term ‘panchayat raj’ is relatively new, having originated during the British administration. 'Raj' literally means governance or government. Mahatma Gandhi advocated Panchayati Raj, a decentralized form of Government where each village is responsible for its own affairs, as the foundation of India's political system. His term for such a vision was "Gram Swaraj" (Village Self-governance). It was adopted by state governments during the 1950s and 60s as laws were passed to establish Panchayats in various states. It also found backing in the Indian Constitution, with the 73rd amendment in 1993 to accommodate the idea. The Amendment

Act of 1993 contains provision for devolution of powers and responsibilities to the panchayats to both for preparation of plans for economic development and social justice and for implementation in relation to twenty-nine subjects listed in the eleventh schedule of the constitution. The panchayats receive funds from three sources – (i) local body grants, as recommended by the Central Finance Commission, (ii) funds for implementation of centrally-sponsored schemes, and funds released by the state governments on the recommendations of the State Finance Commissions. In the history of Panchayati Raj in India, on 24 April 1993, the Constitutional (73rd Amendment) Act, 1992 came into force to provide constitutional status to the Panchayati Raj institutions. This Act was extended to Panchayats in the tribal areas of eight States, namely Andhra Pradesh, Bihar, Gujarat, Himachal Pradesh, Maharashtra, Madhya Pradesh, Orissa and Rajasthan from 24 December 1996. Now panchayati raj system exists in all the states except Nagaland, Meghalaya and Mizoram. Also all the UTs except Delhi. The Act aims to provide 3-tier system of Panchayati Raj for all States having population of over 2 million, to hold Panchayat elections regularly every 5 years, to provide reservation of seats for Scheduled Castes, Scheduled Tribes and Women, to appoint State Finance Commission to make recommendations as regards the financial powers of the Panchayats and to constitute District Planning Committee to prepare draft development plan for the district. The 3-tier system of Panchayati Raj consists of a) village level panchayat b) block level panchayat c) district level panchayat. Powers and responsibilities are delegated to Panchayats at the appropriate level:-

- Preparation of plan for economic development and social justice.
- Implementation of schemes for economic development and social justice in relation to 29 subjects given in Eleventh Schedule of the Constitution.
- To levy, collect and appropriate taxes, duties, tolls and fees.

Village level panchayat

It is called a Panchayat at the village level. It is a local body working for the good of the village. The number of members usually ranges from 7 to 31; occasionally, groups are larger, but they never have fewer than 7 members. The block-level institution is called the Panchayat Samiti. The district-level institution is called the Zilla Parishad.

Intermediate level panchayat

Panchayat samiti is a local government body at the tehsil or Taluka level in India. It works for the villages of the Tehsil or Taluka that together are called a Development Block. The Panchayat Samiti is the link between the Gram Panchayat and the district administration. There are a number of variations of this institution in various states. It is known as Mandal Praja Parishad in Andhra Pradesh, Taluka panchayat in Gujarat, Mandal Panchayat in Karnataka, etc. In general it's a kind of Panchayati raj at higher level.

Constitution

It is composed of ex-officio members (all sarpanchas of the panchayat samiti area, the MPs and MLAs of the area and the SDO of the subdivision), coopted members (representatives of SC/ST and women), associate members (a farmer of the area, a representative of the cooperative societies and one of the marketing services) and some elected members. The samiti is elected for 5 years and is headed by the chairman and the deputy chairman.

Departments

The common departments in the Samiti are as follows:

- General administration
- Finance
- Public works
- Agriculture
- Health
- Education
- Social welfare
- Information Technology and others.

There is an officer for every department. A government appointed block development officer is the executive officer to the samiti and the chief of its administration the department of

Functions

- Implement schemes for the development of agriculture.
- Establishment of primary health centres and primary schools.
- Supply of drinking water, drainage, construction/repair of roads.
- Development of cottage and small-scale industries and opening of cooperative societies.
- Establishment of youth organisations.

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Sources of income

The main source of income of the panchayat samiti are grants-in-aid and loans from the State Government. THE ZILLA PARISHAD ALSO GIVES IT SOME GRANTS ON THE BASIS OF LAND REVENUE COLLECTED.

Zilla parishad

Zilla Parishad is a local government body at the district level in India. It looks after the administration of the rural area of the district and its office is located at the district headquarters. The Hindi word Parishad means Council and Zilla Parishad translates to District Council

Constitution

Members of the Zilla Parishad are elected from the district on the basis of adult franchise for a term of five years. Zilla Parishad has minimum of 50 and maximum of 75 members. There are seats reserved for Scheduled Castes, Scheduled Tribes, backward classes and women. The Chairmen of all the Panchayat Samitis form the members of Zilla Parishad. The Parishad is headed by a President and a Vice-President.

Administrative structure

The Chief Executive Officer, who is an IAS officer, heads the administrative machinery of the Zilla Parishad. The CEO supervises the divisions of the Parishad and executes its development schemes.

Functions

- Provide essential services and facilities to the rural population and the planning and execution of the development programmes for the district.
- Supply improved seeds to farmers. Inform them of new techniques of training. Undertake construction of small-scale irrigation projects and percolation tanks. Maintain pastures and grazing lands.
- Set up and run schools in villages. Execute programmes for adult literacy. Run libraries.

- Start Primary Health Centers and hospitals in villages. Start mobile hospitals for hamlets, vaccination drives against epidemics and family welfare campaigns.
- Construct bridges and roads.
- Execute plans for the development of the scheduled castes and tribes. Run ashramshalas for adivasi children. Set up free hostels for scheduled caste students.
- Encourage entrepreneurs to start small-scale industries like cottage industries, handicraft, agriculture produce processing mills, dairy farms, etc. Implement rural employment schemes.
- They construct roads,schools,& public properties.And they take care of the public properties.
- They even supply work for the poor people.(tribes,scheduled caste,lower caste)

Sources of Income

- Taxes on water, pilgrimage, markets, etc.
- Fixed grant from the State Government in proportion with the land revenue and money for works and schemes assigned to the Parishad.

Federalism: Structure, Nature, Current Issues and Debates

In order to discuss federalism (at a theoretical level at least), it is necessary to define it. This immediately raises a number of the complexities that beset this subject and that mechanistic discussions of it tend to ignore or obscure. In fact, the problem is sufficiently complex that no mere definition will suffice. However clear one tries to be about such an emotionally charged political term, its varied usages will tend to seep through the verbal boundaries one has established. Any effort to provide real clarity must therefore distinguish the term federalism from related terms and attempt to map the conceptual topography of the entire underlying issue. That issue is the relationship between the center of a political regime and its constituent parts, however those parts are conceived—a relationship that implicates the foundational matter of political identity. The first section of this stage offers definitions of the two central concepts that motivate our theory, political identity and federalism. The second section distinguishes the concept from related but different concepts of consociation, decentralization, and democracy, both local and general.

Political Identity

Identity is one of modernity's most contested concepts, not only on its own terms, but because it implicates our theories of the

self. In fact, one definition of modernity is that it begins with Descartes' declaration that the isolated self is the starting point of knowledge. His notion of cogito is a declaration of the self's independence from both God and tradition, its ontological priority over any pre given structure, whether transcendent or empirical. This notion is central to Kantian philosophy, where the self not only possesses ontological priority but projects its inherent understandings on the perceived structure of the universe. It has been carried forward by both political liberalism and analytic philosophy and is probably the dominant view of educated people in the Western world. In Continental philosophy, the issue of the self's independence serves as the battleground between Husserl's phenomenology and Heidegger's existentialism, with Husserl a self-declared Cartesian and Heidegger granting priority to Dasein, or being. But there are actually large areas of agreement between the two—most relevantly, for present purposes, the idea that the self is socially constructed. For Husserl, the self is an irreducible internal consciousness that integrates experience, but all its content, all a person's ideas and ways of interpreting the world, are the product of social, or inter subjective, processes. For Heidegger, those social processes create the self and define its boundaries, with Dasein present only as a primordial substrate. Most modern social scientists premise their work on this notion of a socially constructed self. Identity can be understood as the self's interpretation of itself. This would be true for the Cartesian, Kantian, Husserlian, and Heideggerian self, although it would have different ontological significance in each case. Descartes and, more particularly, Locke and Kant urge that the self develop an identity as an

independent, morally responsible agent. In contrast, modern Continental philosophers, such as Husserl and Heidegger, following Hegel, argue that this is impossible in the ordinary course of life, where socially constructed conceptions of identity prevail, conceptions that can only be escaped if the self sheds its identity through either a transcendental epoché or a reconnection with the essence of Dasein. This is why the insights of Continental philosophy have seemed so useful—and so convincing— to English-speaking as well as Continental social scientists, although Continental philosophy itself has remained far less popular than analytic philosophy among English-speaking scholars. From a social science perspective, identity is best regarded as an empirically observable production of social systems that vary in their complexity and interrelationships. Thus social scientists, without necessarily becoming involved in philosophical debates about the ontology of the self, can explore the ways that people decide who they are, where they belong, and what their lives are all about. Once identity is treated in social science terms, it becomes clear that people's identities are powerfully affected and perhaps determined by their community or social group. Descartes, Locke, and Kant may urge us, from a philosophical perspective, to view ourselves as isolated individuals, but the social science based on phenomenological or existential concepts recognizes that identity is constructed by the groupings that claim individuals from birth, inculcate them, and serve as the dominant context of their adult lives. In fact, this social context generally determines whether people view themselves as individuals at all, rather than as members of a tribe or clan. Modern individualism can thus be regarded as a

specific cultural production, the distinctive way in which contemporary Western society constructs people's identities, so that our sense of ourselves as separate entities is merely a special case of the more general process of cultural construction. As Anthony Cohen points out, this approach can be taken too far, so that it denies the phenomenological reality of individual consciousness that is posited by most philosophers. But there can be no doubt that community or social group—a collective sense of self—is a crucial factor in the formation of the individual's identity. Political identity is that aspect of identity that connects the individual with politics, that is, with some group that exercises governance in a given area or competes for the ability to exercise governance. Sometimes, political authority is defined as the process of obtaining monopoly of authorized force, but in a settled modern society, it implicates the whole range of activities by which civil order is maintained within a given area and by which the collective goals of the people in that area can be achieved. Even when politics is thus broadly defined, no theoretical or empirical approach demands that every individual possess a political identity at all. In a situation such as that of the Roman Empire, for example, where political control was well-established, comprehensive, largely nonparticipatory, and completely tolerant of nonpolitical affiliations (e.g., religion), the social groups that defined people's identities often had no political involvement, and it is at least possible that political commitments were entirely absent from many people's constructed identities. That was certainly St. Augustine's recommendation, and one gets the impression that it was the actual experience of many early Christians. The notion of identity

as a socially constructed conceptual framework suggests that it is a variable one, that even if people possess an instinctive need to belong to a group or an instinctive sense of such belonging, such instincts can assume many different forms. In the modern world, however, people's political identity—their sense of themselves as being part of a group that exercises or demands to exercise a monopoly of authorized force, to maintain civil order, and to implement collective goals—seems enormously important and very often dominant. Indeed, it could be argued that the rise of the nation-state, another hallmark of modernity, caused (or perhaps was caused by) the increasing dominance of political identity over other modes of self-definition. Benedict Anderson's well-known characterization of nationalism as an "imagined community" captures both the subjective character of nationalism and its connection to the concept of identity. Certainly, modern nations have demanded and obtained levels of loyalty and commitment that render them a major force in people's process of identity formation and that displace prior social groupings based on caste, consanguinity, or religion. As late as the early nineteenth century, Eugen Weber argues, citizens of France still identified with their provinces or localities; by the end of that century, the military conscription and the advances in communications, transportation, urbanization, and industrialization had made them all think of themselves as French. Of course, such prior modes of self-definition as religion, language, collective mythology, and ethnicity continue to shape people's identities as well, but the tremendous impact of the nation-state has tended to draw these alternative constructs into the political orbit. The religious wars

of the sixteenth and seventeenth centuries made all religion political, and religious groups have responded by becoming political participants, as recent events in our own nation readily attest. Similarly, with nationalism's increasing impact, the collective myths or memories of various groups either have become identified with national identity or have been consciously constructed as a means of opposing that identity and establishing another in its place. The relationship of ethnicity to nationalism is particularly complex and particularly significant for purposes of this discussion. As David Miller, T. K. Oommen, and Anthony Smith have noted, the two are far from identical, since nationalism embodies a political claim that ethnicity, as an independent concept, does not. But these two instincts, these two ways of constructing identity, have been intimately intertwined as a matter of historical experience, and nationalism has tended to politicize ethnicity in a way that did not occur in prior eras. Smith observes that some nations are formed when a governing elite is "gradually able to incorporate middle strata and outlying regions into the dominant ethnic culture," while others are formed when an ethnic intelligentsia mobilizes "a formerly passive community into forming a nation around the new vernacular historical culture that it has rediscovered." Clearly, however, these two nation-building processes can conflict, as will occur when a governing elite attempts to incorporate a group that is being mobilized by its intelligentsia around a different identity; and both processes can conflict with ways of defining a nation that are carried out without regard to the populace's ethnic identification, such as conquest or colonial demarcation. Given the centrality of both political and ethnic identity in the modern

world, conflicts and discontinuities of this sort frequently produce incendiary results. There are, however, countervailing tendencies. In their accounts of the contemporary conceptual landscape, many writers speak of multiple identities, of shifts from one identity to another, or of self-actualizing identities that reject any hard-and-fast affiliation. Certainly, globalization, Internet communications, and increasing individualism could been seen as major social trends that are undermining the primacy of people's political and ethnic affiliations, with the rise of the European Community and the desire of people to enter that community by portraying themselves as "good Europeans" serving as both emblematic and pragmatically important instances of such trends. But the question can be treated as a largely empirical one, and there is no need to resolve it for purposes of this study. Political identity need not be universal, exclusive, or even primary in order to be an important determinant of people's attitudes. It need only be a means of self-interpretation that is readily and widely deployed in a variety of situations. That is sufficient for it to serve as an important consideration in virtually any political setting and as a determinative one in a good number of situations. Thus there is great explanatory value in focusing on people's political identity when examining issues of politics or governance. Even if it is one strand among many when considered at the individual level, it is likely to be dominant when individuals are aggregated (as they are in politics), because it is often the primary aspect of identity that connects the individual to larger groups. It could be compared to gravity, which is the weakest of the basic forces at the subatomic level but determines the structure of the universe because it

combines unidirectionally and acts at unlimited distances. To the extent that other aspects of an individual's identity (e.g., language, religion, or ethnicity) connect to larger groups, these aspects are likely to overlap with political identity in the modern world of nation-states; that is, modern people expect that their nonpolitical identities and their political identities will correspond. Moreover, as Amin Maloof suggests, "[p]eople often see themselves in terms of whichever one of their allegiances is most under attack."Political crises would thus generate a heightened sense of political identity, even among people who might otherwise define themselves in religious, personal, or cosmopolitan terms. In short, we can expect that the conditions of modernity have given political issues an essential role in defining people's sense of self.

Federalism

Federalism, as the term is used in political science and legal scholarship, refers to a means of governing a policy that grants partial autonomy to geographically defined subdivisions of the polity. Clearly, such a regime lies somewhere between a fully unitary state and an alliance of separate ones. A political entity that is governed by a single central government making all significant decisions cannot be described as federal without abandoning the ordinary meaning of the term. The same is true for a group of separate political entities that have entered into an alliance that precludes conflict among them but leaves all other decisions under the control of the separate entities. While the concept of federalism, as an ideal type, is clear enough, the

rationale behind its formulation requires further exploration. Divisions of authority within a government are obviously of interest, but what is the significance of geographical divisions, as opposed to functional ones? Why must the division involve a partial grant of autonomy to these geographical entities, as opposed to a functional grant of more extensive powers? A regime where some public officials exercise comprehensive authority over a range of governance areas (e.g., police, education, and social welfare) but are divided between those who are part of a central government and those who are part of regional governments is generally understood to implicate the issue of federalism. In contrast, a regime where some officials' authority extends over the entire polity but is divided into single functions (e.g., police, education, or social welfare) implicates such issues as separation of powers or delegation but is not regarded as involving any question of federalism, except for the question of whether the absence of federalism produces beneficial or deleterious effects. Why do we associate one division of authority with federalism and not the other? The distinction cannot be based on the extent of decision-making authority that is being exercised by a subordinate unit, because an expansively defined functional agency can exercise more authority than a narrowly defined geographic one. Nor can it be based on the amount of independence that the subordinate exercises. The functional authorities could be independent agencies largely free of central control (e.g., the Federal Reserve Board or the U.S. Supreme Court), but such arrangements are still not described in terms of federalism. It would appear that at least one key to our conception of federalism lies in the question of geography itself

and the significance of geographical divisions of authority, in contrast to other sorts of divisions. There are at least two ways in which geography appears to create a distinctive division of authority and thus explain the restriction of federalism to that situation. First, geographical divisions are mutually exclusive while functional divisions are not. The reason is simply that geography is an external factor whose features are dictated to us by nature, whereas functions are socially constructed in their entirety. To be sure, we choose, as a matter of social construction, what significance we attribute to geography, just as we choose what significance we attribute to function. But once we have chosen geography as an organizing principle, once we have said that we want to divide authority by geographic regions, we are compelled by the nature of physical space to define those regions as separate from each other. In contrast, functional divisions can overlap depending on the way they are defined. Thus, if we assign the maintenance of public order to one agency and the provision of social services to another, we still have the option of having the first agency monitor the second agency's distribution of social services, having the second agency monitor the first agency's treatment of individuals, or creating a third agency that takes a public order approach to providing social services or a social services approach to maintaining public order. But once we have decided that the western third of a country is one administrative region, we cannot include parts of it in another administrative region unless we abandon geography as the principle of organization. Second, geographically defined entities tend to reiterate the structure of the polity as a whole in a way that functional entities do not. New institutional theorists

refer to this phenomenon as institutional isomorphism. In the United States, for example, the central government, confusingly known as the federal government, is divided into an elected chief executive, an elected legislature, an appointed judiciary, and a large group of administrative agencies headed by appointed officials and assigned to such functions as agriculture, commerce, health, education, environmental protection, national defense, and foreign relations. The subsidiary governments, confusingly known as states, are also divided into an elected chief executive, an elected legislature, a judiciary, and a large group of administrative agencies headed by appointed officials and assigned to such functions as agriculture, commerce, health, education, and environmental protection. There are differences, of course: state judges are often elected, not appointed; and state governments generally do not deal with certain issues, such as national defense and foreign relations. Despite these differences, the state governments appear as smaller versions of the national governments. In other words, the structure of the national government in its entirety and the structure of its geographically defined subsidiaries reiterate each other, whereas the structure of the national government and its functionally defined subsidiaries do not. Why are these features of geographically divided authority so distinctive or important that they merit a separate designation and implicate all the claims and issues that are featured in the federalism controversy? Why are mutually exclusive regions that reiterate the structure of the central government so important and so controversial? The answer lies in the connection between these regions and the issue of political identity. Nations, described earlier as the focus of the modern

person's political identity, are territorial in nature. As Miller notes, national identity "connects a group of people to a particular geographic place,... a clear contrast with most other group identities that people affirm."Ethnic groups can serve as either a basis or a challenge to the formation of a nation, but only if they have a similar link to physical territory, so that they can aspire to national status. Thus the geographical organization of government, the physical pattern into which governmental authorities are arranged, powerfully implicates people's sense of self, in a way that cannot be duplicated by other issues of government organization, at least in the modern world. But the boundaries of the nation do not always correspond to people's sense of political identity. A vast range of causal factors, including history, culture, ethnicity, economics, and international relations, determines political boundaries. Moreover, different people with different political identities are often mixed together in a single political entity. Thus there will often be disjunctions between the structure of governance that corresponds to people's sense of self and the structure of governance that actually obtains in a given region. Given the territorial nature of the nation-state, the mutual exclusivity of territorial boundaries, and the centrality of political identity to people in the modern world, these disjunctions are likely to create serious conflict, as noted earlier in connection with ethnicity. Although observers vary in the extent to which they attribute political conflict to leaders' choices, economic forces, or popular attitudes, it seems apparent that disjunctions between political identity and geographic governance have been among the most important sources of such conflict in the modern world.

Federalism, as a concept, serves as a means of modulating, or varying, political identity. It thus expands the range of psycho-political resources available for the creation of a political regime. Without federalism, the citizen or subject confronts the dichotomous choices between identification with the central regime and alienation from it in the realm of thought and between loyalty to the regime and rebellion against it in the realm of action. Federalism creates a wider range of possibilities for thought and action; it provides the individual with opportunities to divide loyalty and rechannel action. Thus, if people's political identity is associated with some region that has been subsumed into a larger polity, federalism provides a means by which the disjunction between their political identity and their territorial mode of governance can be reduced. It grants some reality to the region with which they identify, some objective correlative for their politically defined sense of self. There are, of course, a variety of ways that loyalty can be divided or action rechanneled. The individual could become attached to a religion, a clan, a cultural movement, or a vocation. Confronted with a central regime that one dislikes, one can take refuge in any number of affinities and actions that provide an alternative identity. In an increasingly politicized environment, however, many of these alternatives are themselves politicized, and the nonpolitical refuges that are adequate for certain individuals may not be sufficient for large groups. Federalism has the value of being a political response. It provides alternative sources of identity and grounds for action in a purely political arena, so that the individual can feel motivated to remain involved in that arena. This is why federalism typically involves reiterated

governmental units that reproduce the structure of the central unit. In using federalism to modulate political identity, the individual is giving loyalty not to something that is different in kind from the central government (e.g., a religion or a clan) but, rather, to something that is similar in kind and differs largely in extent. None of this implies that a political redirection of one's commitments is better or worse than any other type of redirection. But it is a response distinctive enough to merit a separate designation, which, by established usage, is federalism. A defining feature of federalism is that it grants partial autonomy to geographical subdivisions, or subunits. As both political scientists and political economists have established, the subunits must exercise exclusive jurisdiction over some set of issues; that is, there must be some types of decisions that are reserved to the subsidiary governmental units and that the central government may not displace or countermand. This structure is often, although somewhat controversially, described by saying that the subsidiary units possess rights against the central government. Like an individual in a regime that recognizes human rights, such as the right to speak or to practice one's religion, the subunits may assert certain claims of rights against the central government, claims that preclude the central government from taking action. The result is to allow the subunit to reach any result regarding the decisions that have been allotted to it, whether or not this decision comports with the desires of the central government. The significance of this feature is related to the question of political identity and will constitute a principal theme of this book. If people identify exclusively with the nation as a whole, they have no consistent reason to desire or demand

that geographic subdivisions of the polity possess autonomy rights. Rather, their political desires will involve the nation as a whole, and they will want the entire nation to be governed according to their views. Only when their identity is divided between the nation and a geographic region or exclusively linked to such a region will they want the region to possess some level of autonomy, so that it can make choices that the center cannot countermand. In other words, regional autonomy will only be appealing to people if the region itself is meaningful to people, that is, if it relates to their sense of political identity. The emotive content of political identity leads to the equally emotive stance that a region's partial autonomy should be recognized as a matter of right. From this perspective, regional autonomy can be contrasted with functional autonomy, such as the autonomy of the central bank or the judicial system. Many people regard functional autonomy as extremely important, but they do so on the basis of their political attitudes, not their sense of identity. Their commitment to central bank autonomy will be based on the way they think the nation should be governed, the advantages of having trained economists control the money supply or the dangers of having elected politicians controlling it. But this will not address the problem of divided loyalty, it will not provide a means by which a disjunction between their political identity and their territorial mode of governance can be reduced. Thus governance issues regarding functional autonomy implicate a variety of issues, but issues regarding geographical autonomy are best understood by exploring people's sense of political identity. A subsidiary issue with some definitional impact involves the extent to which a particular nation is federalized. No effort will

be made in this study to categorize the enormous variety of political arrangements that make use of the federalist principle. Some nations are entirely divided into regions that possess autonomy rights, generally the same set of such rights. Thus there is no area over which the central government possesses exclusive jurisdiction, except perhaps the capital city or some sparsely populated territories. Other nations grant autonomy rights to particular areas, while the remainder of the nation is governed in a unitary manner. In the United Kingdom, for example, Wales, Scotland, and Northern Ireland have been granted various autonomy rights, while England, with the majority of the population, remains a unitary state, with the counties into which England is divided possessing no such rights. Because the present discussion addresses the theory of federalism as a governance mechanism, both types of regimes will here be considered federal, and the two types will be distinguished only when that distinction is relevant to the analysis.

Federalism distinguished

Obviously, federalism is not the only means of organizing a nation's government, nor is it the only means of dividing control among different components of a polity. Further clarity about the nature of federalism can be achieved by comparing it to some of these other means of dividing control and by explaining the operative reasons for making verbal distinctions among them. The means that will be considered here are consociation, decentralization, local democracy, and, in a slightly different

sense, democracy in general. Like federalism, these are principles for organizing a political regime and respond to the problem of divergent attitudes and circumstances among the citizens of the regime. Each principle shares at least one additional feature with federalism: consociation grants authority and autonomy to subsidiary groups within the polity, decentralization grants authority to geographically defined subunits, local democracy establishes political structures in geographically defined subunits, and democracy in general grants members of the polity definitive rights against the central government. Nonetheless, each of these principles is distinctly different from federalism. They are sometimes conflated with it to bolster contested claims of one sort or another, but this mode of argumentation breeds conceptual confusion. Different modes of governance should be described by different terms, and arguments in favor of each one should be based on its own distinctive features, not merged with other arguments through verbal obfuscation.

From Consociation

Consociation, a concept most fully developed by Arend Lijphart, is an effort to achieve stable democratic government in a polity with a heterogeneous and potentially fractious population by means of power sharing and group autonomy. Lijphart explains, “Power-sharing means the participation of the representatives of all significant groups in political decision-making, especially at the executive level; group autonomy means that these groups have authority to run their own internal affairs, especially in areas of education and culture.”While federalism in a democratic

regime can be regarded as a form of consociation, the concept of consociation itself is much broader, in terms of both the groups that it covers and the mechanisms that it employs. Most obviously, as Daniel Elazar observes, the groups whose participation is invited and whose loyalty is secured in a consociative regime need not be geographically distinct and frequently will not be. Religious, racial, or ethnic groups that are dispersed throughout the population are prime candidates for the consociative approaches that Lijphart discusses. Indeed, many of his examples—such as the conflicts between blacks and whites in South Africa, between Catholics and Protestants in the Netherlands, and between Muslims and Maronite Christians in Lebanon—involve intermixed populations and could not be viably addressed by federalist solutions. Moreover, the mechanisms that Lijphart regards as implementing a consociational approach to governance are often unrelated to federalism. His concept of power sharing consists of four elements. Proportional representation enables all significant segments of the population to elect at least some members of the legislature, government by "grand coalition" allows leaders from these segments to participate in executive decisions, the requirement of a "concurrent majority" grants all segments veto power over legislative or executive decisions, and judicial review protects these arrangements from being undermined by a powerful majority. The unifying theme among these mechanisms is that they allow minority groups to participate in the decision making by the central government. They are designed to ensure that minority voices will be heard in the national legislature and executive and that those bodies will not take action inimical to

minority interests. In some sense, they are the polar opposite of federalism, in that they protect minorities by granting them a role in the central government, not by granting them a separate government apart from the center, with semiautonomous authority. Lijphart's idea of group autonomy might seem more closely allied to federalism, but even here there is a clear distinction. The educational and cultural autonomy that he envisions is precisely the sort that can be granted to dispersed groups with no particular geographic base. For example, imagine a nation whose population is divided between two religions, such as Protestantism and Catholicism. In its educational policy, the government might adopt a unitary approach by compelling all children to attend public schools with either a secular curriculum or a curriculum based on either of the two religions. Alternatively, it might adopt a consociational approach by allowing parents to choose between schools run by each religious group and by providing public funding for these schools. This strategy, which authorizes each group to perform a specific function for its own members, is quite distinct from federalism, which allows a general government in a particular region of the nation to make a range of decisions for all citizens within that region. Federalism may fulfill some of the same functions as consociation and might even count as a consociational approach, but many consociative strategies do not count as federalism, because they do not possess federalism's defining characteristics; that is, they do not establish geographically defined subunits with definitive autonomy rights against the central government. Because the overlap between federalism and consociation is only partial, some of the advantages claimed for consociation apply to

federalism only adventitiously, if at all. To begin with, Lijphart argues that consociation provides protection for minority groups in democratic regimes controlled by a unified majority and provides stability in democratic regimes that are comprised of contesting minorities. These same advantages cannot be claimed for federalism unless the minority or contesting minorities happen— at a minimum—to be geographically based. If they are not—if the minorities are intermixed with the majority or with each other—federalism will not necessarily benefit minority groups or contribute to stability. Its effect will depend on a complex series of factors, such as whether the geographic subdivisions are themselves governed in a consociative manner, whether a dispersed minority in a majority-dominated regime represents a local majority in one of the subunits, whether the subunits contain minorities within them, and how the subunits are represented in the central government. Certainly, federalism offers dispersed minorities no consistent advantage of the sort claimed for consociation. Moreover, the arguments for consociation may not even apply to regimes where minorities are geographically based. At its core, consociation is based on an ethos of compromise and mutual accommodation. Because they must work together in the proportionally elected legislature and the coalition government, the majority and the minority or the competing minorities are likely to become more tolerant of one another, to minimize their differences, to seek creative non-zero-sum solutions, and to avoid symbolic confrontations. Federalism, in contrast, protects minorities by giving them a political base with some degree of autonomy from the central government. Very often, the minority can maximize this protection by emphasizing

its differences with the remainder of the nation and engaging in symbolic confrontations in order to increase the political identification of its members with their autonomous subunit. Using the principle of institutional isomorphism, the geographic minority may want to secure regional political control that mirrors and thereby counteracts the advantages that the majority possesses at the central level, rather than compromising with that majority in a coalition government.

From Decentralization

A crucial distinction must be made between federalism and decentralization. As stated earlier, federalism grants subunits of government a final say in certain areas of governance; that is, it grants these governments definitive rights against the center. Decentralization, in contrast, is a managerial strategy by which a centralized regime can achieve the results it desires in a more effective manner. The effectiveness of any decision-making unit depends on a variety of factors, including the information available to it, the quality of its personnel, its level of control over its subordinates, and its prestige among those who must follow its commands. These factors suggest sometimes that the most effective decisions will be made by the central government and sometimes that they will be made by a geographical subdivision. A central government can achieve uniformity and may be able to command greater resources and prestige. A subsidiary government may be able to gather information more effectively, to control street-level employees, and to respond to circumstances that are specific to its locality. The choice between

these two alternative strategies—that is, the particular allocation of responsibility within the overall structure—is determined by the effectiveness of each strategy in achieving the desired result. But in decentralization, in contrast to federalism, the central government identifies this result and thus defines the criteria for success or failure, and the central government decides how decision-making authority will be divided between itself and the geographical subunits. The distinction between federalism and decentralization can be clarified by an analogy to business firms, which arouse less intense emotions and are therefore easier to think about. Many large firms decide, as a business strategy, to decentralize a large proportion of their operations. A firm that sells clothing through retail outlets may decide to divide the country into regions and appoint a separate manager for each region. These managers might then be given control over such functions as purchasing, advertising, store design, hiring, bookkeeping, and inventory. The basis for this strategy might be a belief that sartorial tastes differ from one region of the country to another and that the regional managers will be more attuned to these variations than the central office executives, who are necessarily located in a single region of the country. It is clear that this means of organizing the firm is an alternative to dividing the firm into functionally defined units with nationwide authority—that is, one unit that does that purchasing for every outlet in the country, another that hires employees for every outlet, and so forth. It is equally clear that the purpose of both methods of organization is exactly the same—namely, to maximize profits—and that the choice between them is based on empirical assessments about which method would be most

efficient. Under no circumstances, however, would the geographically designed subunits be allowed to define their own purposes, such as altering the sartorial tastes of their region, raising money for local charities, or increasing the number of people who come into their stores to visit with each other. In other words, decentralization is a managerial strategy that is readily and frequently deployed within a unified structure. While federalism generally results in a fairly high level of decentralization, decentralization does not necessarily lead to federalism. This point is worth emphasizing because many of the arguments about the virtues of federalism advanced by both courts and commentators refer to decentralization, not to federalism. In fact, true federalism, where geographical subunits are allowed to establish their own goals and maintain their own values, would tend to undermine many of the advantages that are often claimed for federalism but in fact pertain to decentralization. This is not to say that federalism lacks virtue; rather, its virtues lie in an entirely different area than many American courts and commentators tend to assume. An extensive catalog of pseudo federalist arguments can be found in what is perhaps the U.S. Supreme Court's leading statement on the virtues of federalism, Gregory v. Ashcroft. Writing for the majority, Justice O'- Connor declared that federalism increases public participation, achieves economic efficiency by allowing for competition among jurisdictions and increases citizen utility by enabling them to choose among these competing jurisdictions, and encourages the development of new governmental techniques through experimentation. Scholarly works that champion federalism generally refer to these same supposed virtues. All

these advantages, however, flow from decentralization, and none have much to do with the federalist principle that geographically defined governmental subunits must be granted partial autonomy in particular areas of governance. To begin with the first argument—that federalism increases public participation—Justice O'Connor states that federalism "increases opportunity for citizen involvement in democratic processes."If one wants to implement a program of ensuring and increasing participation in the democratic process, increasing the number of decentralized decisions may well be a valid way to proceed, but this would be a national policy, not a result of federalism. The goal would be to encourage political participation in every region or locality. Federalism does not necessarily increase participation; it simply authorizes a set of specified political subunits to decide for themselves how much participation is desirable. Some might choose to encourage participation, but others might choose to suppress it. There are a variety of other, more direct methods that national policymakers could adopt for achieving the same goal, such as hiring community organizers, funding local organizations, and requiring approvals for government decisions from different sectors of the population. None of these have anything to do with federalism or even decentralization, but if participation is a real goal (rather than a post hoc rationalization for federalism), they should be given equal consideration. More generally, participation is a complex process that must be fostered by specific, carefully constructed mechanisms. It will not be secured by large-scale structural arrangements whose relevance to that process is based on vague and unproven assumptions. One might argue that political subunits that

possess autonomy rights in a federal regime are "closer to the people" than the central government and are thus more likely to foster local participation. In assessing this argument, however, it is important to note that federalism necessarily vests authority at a given level of political organization, usually the regional level of provinces, prefectures, or American states. Localities, which are truly closer to the people and are where the envisioned participation will occur, are typically subordinated to the larger, regional subunits. Moreover, a common—if not essential—feature of federalism is that there are significant constraints on the national government's ability to interfere with subunit policies for managing and controlling the local governments within their borders. As Richard Briffault points out, however, there is simply no reason why an intermediate political unit would be more favorable to local units than the nation's central authority. In fact, the autonomy granted to a political subunit might favor a narrow elite that can control that subunit, while the national government, which is more difficult for such elites to control, might seek to encourage broader-based participation, particularly if it incorporates consociative features. Actual alignments are likely to depend on the political positions of central and local authorities. In the United States, for example, the white-dominated governments of the premodern Southern states undoubtedly fostered the autonomy of white-dominated towns against federal intervention, while the federal government was the champion of participation by Afro-Americans, at least during the Reconstruction and civil rights eras. One might also argue that federalism fosters local participation by enabling citizens of political subdivisions to choose their own rulers. But this merely

combines decentralization and the independent norm of electoral politics, without involving federalism at all. In a truly federal regime, some states might opt for elections, while others might not. Moreover, to the extent that these subunits possess political autonomy in a federal regime, they will control the decision about whether or not their own subunits—cities, towns, villages, and rural districts—choose their leaders by election. If a nation, as a matter of policy, wants to use elections to increase political participation, its best strategy would be to require elections in all localities within its borders (as a matter of national policy), rather than allowing subunits to control this determination. The second pseudo argument articulated by Justice O'Connor is that federalism achieves economic efficiency by allowing subunits of the polity to compete for valuable resources. The idea is that quasi-autonomous jurisdictions will compete for productive assets, such as factories, and desirable people, such as corporate executives, by creating a favorable economic climate. Asset managers and individuals will then choose among jurisdictions, voting with their well-heeled feet in favor of the most efficient states and thus ensuring the efficiency of the nation as a whole. This argument is associated with the theory of fiscal federalism. Here, it is sufficient to note that it suffers from the same defect as the argument for public participation. Federalism allows a multiplicity of norms, not simply a multiplicity of rules. In a truly federal system, some subunits might not be interested in economic efficiency or social welfare at all; they might be primarily motivated by the desire to preserve an agrarian lifestyle, to protect the environment, or to encourage individual spirituality. These particular subunits might lose out in the

competition for factories and corporate executives, as the economic analysis predicts. But rather than perceiving their losses as a chastening lesson that induces them to change their laws, they might perceive them as a necessary cost or as a positive advantage. Clearly, this would not achieve the single goal that the proponents of efficiency desire. What they really want is a unitary system, devoted to efficiency, which delegates instrumental decisions to decentralized subunits but retains normative control to make sure that every subunit is committed to the general goal. In other words, they might decentralize decision-making authority to subsidiary units, but they would not grant that authority as a matter of right. Closely related to the argument that federalism fosters competition is Justice O'Connor's third argument—that federalism increases the citizens' utility by enabling them to choose among competing jurisdictions, each offering different packages of services and obligations. This is the second branch of fiscal federalism. It would appear to be an unquestionable benefit—surely it is better to give people the opportunity to choose the governmental conditions under which they live than to confront them with a monolithic system that may comport with their preferences but may just as easily conflict with them. But the argument, as stated, is also an attribute of decentralization, not federalism. The idea that people can choose among jurisdictions on the basis of the services that they provide suggests that they could live a reasonably comfortable life in any—or at least a significant number—of those jurisdictions, so that the choice among government service packages will be a real option, that is, one that people can actually exercise. This will be true under two

circumstances: first, if the national government imposes certain uniform standards on each jurisdiction to ensure that citizens can live as comfortably in one as in another; or second, if the national is so culturally homogenous that most of its citizens are comfortable in any of its regions. Both of these circumstances are characteristic of decentralized regimes, not federal ones. In the first case, federalism does not exist; in the second, it is unnecessary and thus likely to be vestigial. A truly federal regime is one whose subunits differ from one another on normative grounds, which are usually cultural and almost always linked to questions of political identity. In such a regime, citizens cannot realistically choose on the basis of government service packages, because their choices will be largely dictated by more compelling issues. To take the example of the United States, most Americans can comfortably live in any state because the people of every state regard themselves as Americans, are culturally similar, speak the same language, and display roughly the same mix of races and religions, although in different proportions. Choosing among states on the basis of government service packages is thus at least a possibility, although, as a practical matter, it is constrained by factors. But suppose that each state varied in language, religion, and culture the way the constituent republics of the Soviet Union did; how comfortable would people be about moving to another state to obtain more preferable government service packages? For that matter, would European, African, or Asian Americans move to Puerto Rico, Guam, or a Native American reservation to obtain different services? These regions are true examples of federalism because their inhabitants possess divergent political identities from the nation as a whole;

for that very reason, they are simply too different from the rest of the country for such factors as Justice O'Connor mentions to predominate. In other words, citizen choice—the choice among different subunits on the basis of political identity—is a genuine feature of federalism. But the choice among government service packages that Justice O'Connor mentions and that fiscal federalism has championed is much more likely to be found in decentralized regimes than in federal ones. To put the analysis of all three arguments more generally, true federalism cannot be regarded as a means of favoring any specific, first-order norm, because its essence is to permit a multiplicity of norms. It favors only the second-order norm that no first-order norm should dominate the polity. In practice, of course, a federal regime may achieve a specific, first-order norm, such as local participation, citizen choice, or economic efficiency. This will occur when that norm is so widely shared that every subunit will adopt it, even if left to its own normative devices. But in this case, federalism is essentially vestigial, and the uniform norm is being achieved despite the continued existence of federalism, not because of it. The disjunction between federalism and any first-order norm is further emphasized by a fourth and somewhat different argument for federalism: that federalism gives the states an opportunity to experiment with different policies. The reason this is desirable, presumably, is not because of an abiding national commitment to pure research but because the variations may ultimately provide information about a range of alternative governmental policies and enable the nation to choose the most desirable one. James Madison advanced this idea in Federalist No. 56,and Lord Bryce elaborated on it a century later in his classic commentary on

American government. Still later, the Progressive Movement picked it up to defend state regulatory policies that were being struck down by a conservative Supreme Court. It appeared in a 1918 dissent by Justice Holmes and found its most eloquent exponent in Justice Louis Brandeis, who, in a famous dissent in a 1932, observed, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."This argument has a certain ring to it, but on further examination, experimentation turns out to be a happy incident of managerial decentralization, not of federalism. In a unitary system, the central authority will generally have a single goal, but it may be uncertain about which of several policies will best achieve that goal. To resolve this uncertainty, it could invite or order its subunits to experiment with different strategies until the best way to achieve the goal emerges. Experimentation of this sort is an instrumentality, useful only when the subunits share a single goal. It is not particularly relevant to subunits whose goals are different from each other. But true federalism allows governmental subunits to choose divergent goals, not merely to experiment with different mechanisms for achieving a single one. Divergent goals will typically render instrumental experimentation irrelevant; for example, precisely what experiment would one design to tell the antebellum Southerners whether they should retain slavery or to tell contemporary Quebecois whether they should maintain their language and culture? The experimentation argument, like the arguments touting competition and citizen choice, seems applicable to

federalism only when there is no normative disagreement among subunits, so that federalism produces the same results as administrative decentralization. It is an effort to justify a normative regime by invoking the appeal of an instrumental one. The instinct to do so is understandable in this instrumental age, but it is not conducive to coherent analysis In fact, even decentralization creates problems for the kind of experimentation that is needed to select policies in a modern administrative state. To experiment with different approaches for achieving a single, agreed-on goal, one subunit must be assigned an option that initially seems less desirable, either because that option requires changes in existing practices or because it offers lower, although significant, chances of success. Allowed to choose their own strategies, as they are in a decentralized system, subunits would be unlikely to choose these unappealing options; they must be forced or encouraged to do so by the central authority. Economic theory underscores this conclusion. Experiments are likely to be public goods, because the information they generate will be available to the entire nation, regardless of each state's individual investment. As a result, as James Gardner and Susan Rose-Ackerman have pointed out, individual subunits will have no incentive to invest in experiments that involve any substantive or political risk; they will instead prefer to be free riders and wait for other subunits to generate them. This will, of course, produce relatively few experiments. The standard solution to this dilemma is either coercion or coordination through the central government. If the decentralized subunits are rational actors who desire to experiment—a heroic assumption, but certainly one that is required for the entire states-as-laboratories argument—they

might agree among themselves to share the costs of such experiments. More typically, they might agree to subject themselves to coercive discipline to overcome the problem of free riders, just as a patriotic citizenry that supports strong national defense might opt for a military draft and a system of taxation, rather than a voluntary army supported by individual contributions. In either case, the natural consequence of their agreement would be centralization. Finally, even if decentralized subunits establish a mechanism by which they can coerce themselves to experiment, they will need to collect massive amounts of data if proper choices are to be made; in technical areas particularly, the virtues of a specific policy are unlikely to be self-evident. Decentralized subunits, acting on their own, will have little incentive to generate this information. They may be motivated to articulate politically palatable justifications for their chosen policy, but they are unlikely to gather data directed to its replication or modification. If the information is gathered and assimilated, it is not likely to be useful unless the original policy choices are coordinated by a centralized authority. Even in the absence of normative, truly federalist variations, experiments initiated by one subunit are unlikely to be particularly useful to another because they will tend to vary along an unruly variety of dimensions. Of course, data and experience developed for one set of conditions can be applied to another, but such applications require information and analysis that no subunit is likely to undertake on behalf of others. Thus centralization is necessary not only to initiate the experimental process but also to implement the results of that process in any reasonably effective fashion. All of this is implicit in the imagery of scientific

experimentation, once that imagery is taken seriously. Experiments generally involve variations among subsets of a total population, but those variations are carefully and minutely prescribed by the researcher—a centralized authority if ever there was one. In medical research, for example, it would be unusual for the researcher to authorize the subjects to follow whatever course of treatment they desire, even if all the subjects agree on the general goal of finding a medical cure. The more common practice is for the researcher to prescribe the treatment for each group, which allows the use of therapies that would not otherwise be chosen and provides comparable data regarding their effects. Experimentation is neither a first-order norm (like local participation, citizen choice, or economic efficiency) nor a second-order norm (like federalism) that allows for a multiplicity of norms. Rather, it is a technique for implementing a first-order norm in a more effective manner. It is not even related to decentralization in any necessary way, since a highly centralized decision maker can command experimentation by varying the commands it issues to different subordinates. If we assume, however, that the experiments are being generated by the subunits, rather than the center, experimentation joins the other arguments in favoring decentralization of decision-making authority. This may feel like federalism, which also involves such a shift, but federalism allows for normative variation that would undermine, at least potentially, the norm that is being advanced and that would vitiate whatever experiment is being used to advance it. Eliding the distinction between federalism and decentralization breeds conceptual confusion, because the distinction makes a real difference in the world. In a

decentralized regime, the central authority can always override the decisions of the subdivisions if they fail to achieve the purpose that the centralized authority intended when it authorized the subdivisions to decide. In a federal regime, there are some decisions that the center cannot override, although, depending on specific circumstances, it may be able to influence the decision by threat or by inducement. In a decentralized regime, a constitutional court could never strike down an intrusion on a subdivision's authority by the supreme policymaker, typically the legislature. In a federal regime, the court is obligated to strike down some intrusions on subunit decision making, on the basis that these intrusions violate the autonomy rights that are a necessary component of a federal regime. Confusing these two different modes of governance, as the U.S. Supreme Court has done, insinuates irrelevant issues into the managerial concept of decentralization and leaves the concept of federalism without a generally recognized name. For example, some writers distinguish between dual federalism, which involves a clear division of governmental responsibilities, and cooperative federalism, where there is a division of labor between the central and subsidiary governments in the implementation of particular programs. Similarly, other writers draw a distinction between federalism that grants subsidiary units the authority to decide and federalism that only grants these units the authority to act. The problem is that cooperative implementation and grants of the authority to act are actually decentralization, rather than federalism. Both approaches display the most characteristic feature of decentralization, where basic policy decisions are made at the center and implemented in the

subdivisions; and both approaches lack the most characteristic feature of federalism, where the subdivisions possess an area of independent decision making in which they can establish their own policies. Attaching the term federalism to both approaches confuses two very different modes of governance and thus impedes the enterprise of choosing between them in a responsible and beneficial manner.

From Local Democracy

An aspect of government that is frequently conflated with federalism is local democracy. For linguistic convenience, the term local will here be used to refer to any governmental unit below the national level, whether designated as city, commune, county, prefecture, province, or state. The term democracy is not so easily contained, as it is subject to extensive debate about its meaning and implications. The term local democracy is a bit more manageable; for present purposes, it can be defined as the practice of selecting the executive or legislative authorities of governmental subunits by means of free and fair elections. While there may be other features of local government that some commentators would demand before describing it as democratic, few people would be willing to say that local government was organized on a democratic model if neither the executive or legislative bodies that comprise that government were elected. Local democracy is distinct from democracy in general. A fully democratic regime, comporting with the most extensive demands of democratic theorists, need not use elections to select the ruling officials of its geographic subunits. Having elected its

national leaders through a fully deliberative process (with high levels of participation, rationale debate, and political participation) and having resolved internal tensions through consociative means, a regime might choose to use regionally and locally appointed leaders to implement the policies that resulted from this electoral, deliberative, consociative process. Conversely, a dictatorial regime might allow the election of local authorities who were then commanded to implement policies developed by authoritarian means and allowed to determine policies of no particular concern to the center. To be sure, neither arrangement is particularly common. A democratic regime, embodying a vigorous process of public debate and popular election at the national level, is likely to draw on political resources for choosing local leaders, while authoritarian regimes will generally be reluctant to allow open debate and free choice at the local level. Beyond these conscious or pragmatic considerations, the principle of institutional isomorphism suggests that the structure of local government will mirror the national government's structure within a given polity and certainly within a given political culture. Nonetheless, local democracy is conceptually distinct from democracy in general and needs to be considered as a separate mechanism of governance. The difference between federalism and local democracy is that federalism reserves particular issues to sub national governmental units, regardless of the political process that exists within these units, whereas local democracy establishes a particular political process in the subnational units without granting these units any particular area of authority. A national regime may limit the responsibilities of the local,

democratically organized units to the implementation of centrally established policy or may grant a certain range of policy-making authority but subject it to review and revision by central authorities. In either case or in the virtually infinite variety of intermediate cases, the subunits would have no claim on the right to make a definitive decision on any subject. Since federal regimes are defined by such a right, those regimes that do not incorporate this right should not be regarded as federal, even if their subunits choose executive or legislative authorities by free and fair elections. Just as some of the arguments in favor of federalism in fact refer to decentralization, some of the arguments for federalism in fact refer to local democracy. In one case—public participation—these two sets of arguments overlap. While federalism, as discussed earlier, does not necessarily increase public participation, local democracy does, because elections, the defining feature of local democracy, are a form of participation. A closely related argument involves the virtue of making government officials accountable to the people whom they govern, by empowering the electorate to demand certain behaviors from public officials and dismissing these officials if they fail to comply. But the participation that is generated by elections and whatever accountability results from these elections is a feature of local democracy, not federalism. Local democracy requires elections, whereas federalism involves an assignment of definitive authority to government subunits, whether democratic or not. Political terminology is malleable, of course, and it might be argued that local democracy, which, after all, involves the empowerment of electorates in political subunits, should be included within the concept of federalism. To capture

the categories discussed earlier, one might distinguish between substantive federalism, where certain issues are definitively reserved to governmental subunits, and process federalism, where the subunits lack such a definitive assignment of authority but possess a guaranteed political structure that involves the election of their executive and legislative officials. Stipulative categorizations of this sort cannot be proven right or wrong, of course. The difficulty with this one, however, is that it fails to distinguish between democratic nations that are generally regarded as federal, such as Switzerland, Germany, Canada, Australia, and the United States, and democratic nations that are regarded as centralized, such as France, Sweden, Finland, Denmark, the Netherlands, and Japan. All the centralized nations feature local democracy; all are divided into political subunits, of one sort or another, that are controlled by elected executives or legislatures. To describe local democracy as federalism—even as a separate category of process federalism—simply reiterates the distinction between democratic and nondemocratic regimes and fails to distinguish those regimes in either group that reserve all authority to the national government from those regimes that grant political subunits definitive control of certain issues. In other words, without a substantive component, federalism ceases to be a distinguishable mode of governmental organization. One might argue that process federalism, as a separate and meaningful categorization, could be retrieved by restricting it to those nations that establish local democracy as a matter of right, that is, those that preclude the central government from canceling local elections or overturning their results. Such regimes, after all, grant definitive rights to governmental

subunits, even though these rights involve the political process and not a substantive area of authority. The difficulty is that this argument fails to distinguish among democratic regimes. Virtually all democracies, including those regarded as highly centralized states, grant constitutional protection to local democracy. The constitution of diminutive and highly centralized Luxemburg, for example, provides that the nation's even more diminutive communes "form autonomous authorities, on a territorial basis, possessing legal personality" and that "in each commune there is a communal council directly elected by the inhabitants."The reason these provisions appear in the constitutions of centralized states is that local democracy is conceived as a human right, like freedom of speech or religion, and not as a means of dividing central governmental authority. In these nations, the central government maintains plenary control, but people are granted the right to elect the local officials who will carry out central commands. The constitutional protection of local democracy, therefore, does not distinguish national from federal regimes but only distinguishes constitutional regimes from those regimes, such as the United Kingdom, that do not provide constitutional guarantees.

Chapter 5

Liberal Theories of International Law

Liberalism (international relations)

Liberal theories of international relations (IR) focus on the demands of individuals and social groups, and their relative power in society, as fundamental forces driving state policy and, ultimately, world order. For liberals, every state is embedded in an interdependent domestic and transnational society that decisively shapes the basic purposes or interests that underlie its policies. This "bottom-up" focus of liberal theories on state–society relations, interdependence, and preference formation has distinctive implications for understanding international law (IL). Accordingly, in recent years liberal theory has been among the most rapidly expanding areas of positive and normative analysis of international law. As the world grows more and more interdependent and countries struggle to maintain cooperation amidst diverse economic interests, domestic political institutions, and ideals of legitimate public order, international law will increasingly come to depend on the answers to questions that liberal theories pose.

Liberalism is one of the main schools of international relations theory. Its roots lie in the broader liberal thought originating in

the Enlightenment. The central issues that it seeks to address are the problems of achieving lasting peace and cooperation in international relations, and the various methods that could contribute to their achievement.

Broad areas of study within liberal international relations theory include:

- The democratic peace theory, and, more broadly, the effect of domestic political regime types and domestic politics on international relations;
- The commercial peace theory, arguing that free trade has pacifying effects on international relations. Current explorations of globalization and interdependence are a broader continuation of this line of inquiry;
- Institutional peace theory, which attempts to demonstrate how cooperation can be sustained in anarchy, how long-term interests can be pursued over short-term interests, and how actors may realize absolute gains instead of seeking relative gains;
- Related, the effect of international organizations on international politics, both in their role as forums for states to pursue their interests, and in their role as actors in their own right;
- The role of international law in moderating or constraining state behavior;
- The effects of liberal norms on international politics, especially relations between liberal states;

- The role of various types of unions in international politics (relations), such as highly institutionalized alliances (e.g. NATO),confederations, l eagues, federations, and evolving entities like the European Union; and,
- The role, or potential role, of cosmopolitanism in transcending the state and affecting international relations.

Liberal Theories of International Relations

The central liberal question about international law and politics is: who governs? Liberals assume that states are embedded in a transnational society comprised of individuals, social groups, and substate officials with varying assets, ideals and influence on state policy. The first stage in a liberal explanation of politics is to identify and explain the preferences of relevant social and substate actors as a function of a structure of underlying social identities and interests. Among these social and substate actors, a universal condition is globalization, understood as transnational interdependence, material or ideational, among social actors. It creates varying incentives for cross-border political regulation and interaction. State policy can facilitate, block, or channel globalization, thereby benefitting or harming the interests or ideals of particular social actors. The state is a representative institution that aggregates and channels those

interests according to their relative weight in society, ability to organize, and influence in political processes. In each state, political organization and institutions represent a different subset of social and substate actors, whose desired forms of social, cultural, and economic interdependence define the underlying concerns (preferences across "states of the world") that the state has at stake in international issues. Representative functions of international organizations may have the same effect.

The existence of social demands concerning globalization, translated into state preferences, is a necessary condition to motivate any purposeful foreign policy action. States may seek to shape and regulate interdependence. To the extent this creates externalities, positive or negative, for policy-makers in other states seeking to realize the preferences of their individuals and social groups, such preferences provides the underlying motivation for patterns of interstate conflict and cooperation. Colloquially, what states want shapes what they do.

Liberal theory highlights three specific sources of variation in state preferences and, therefore, state behavior. Each isolates a distinctive source of variation in the societal demands that drive state preferences regarding the regulation of globalization. To avoid simply ascribing policy changes to ad hoc or unexplained preference changes, liberal theory seeks to isolate the causal mechanisms and antecedent conditions under which each functions. In each case, as the relevant domestic and transnational social actors and contexts vary across space, time,

and issues, so does the distribution of state preferences and policies. Ideational liberal theories attribute state behavior to interdependence among social demands to realize particular forms of public goods provision. These demands are, in turn, based on conceptions of desirable cultural, political, and socioeconomic identity and order, which generally derive from both domestic and transnational socialization processes. Common examples in modern world politics include conceptions of national (or civic) identity and self-determination, fundamental political ideology (such as democratic capitalism, communism, or Islamic fundamentalism), basic views of how to regulate the economy (social welfare, public risk, environmental quality), and the balance of individual rights against collective duties. The starting point for an ideational liberal analysis of world politics is the question: How does variation in ideals of desirable public goods provision shape individual and group demands for political regulation of globalization?

Commercial liberal theories link state behavior to material interdependence among societal actors with particular assets or ideals. In international political economy, conventional "endogenous policy" theories of trade, finance, and environment posit actors with economic assets or objectives, the value of which depends on the actors' position in domestic and global markets (i.e., patterns of globalization). The starting point for a commercial liberal analysis of world politics is the question: How does variation in the assets and market position of economic actors shape their demands for political regulation of globalization?

Republican liberal theories stress the role of variation in political representation. Liberals view all states (and, indirectly, international organizations) as mechanisms of political representation that privilege the interests of some societal actors over others in making state policy. Instruments of representation include formal representation, constitutional structure, informal institutional dynamics, appointment to government, and the organizational capacity of social actors. By changing the "selectorate" – the individuals and groups who influence a policy – the policy changes as well. The starting point for a republican liberal analysis of world politics is the question: How does variation in the nature of domestic representation alter the selectorate, thus channeling specific social demands for the political regulation of globalization?

Although for analytical clarity we customarily distinguish the three categories of liberal theory, they are generally more powerful when deployed in tandem. Interdependence often has significant implications for both collective goods provision (ideational liberalism) and the realization of material interests (commercial liberalism). Moreover, whether underlying preferences are ideational or material, they are generally represented by some institutionalized political process that skews representation (republican liberalism). Even the simplest conventional theories of the political economy of international trade, for example, assume that all three strands are important: private economic interest is balanced against collective welfare concerns, whether in the form of a budget constraint or countervailing public policy goals, and these social pressures are

transmitted to the state through representative institutions that privilege some voices over others.

It is important to be clear what liberal theory is not. Theoretical paradigms in international relations are defined by distinctive causal mechanisms that link fundamental causes, such as economic, technological, cultural, social, political, and behavioral changes among states in world politics, to state behavior. Hence the term liberal is not used here to designate theories that stress the importance of international institutions; the importance of universal, altruistic, or utopian values, such as human rights or democracy; or the advancement of left-wing or free market political parties or policies. In particular, institutionalist regime theory, pioneered by Robert Keohane and others, often termed "neo-liberal," is distinctly different. Kenneth Abbott has written that:

EXT Institutionalism...analyzes the benefits that international rules, organizations, procedures, and other institutions provide for states in particular situations, viewing these benefits as incentives for institutionalized cooperation.... [R]elatively modest actions – such as producing unbiased information, reducing the transactions costs of interactions, pooling resources, monitoring state behavior, and helping to mediate disputes – can help states achieve their goals by overcoming structural barriers to cooperation.

This institutionalist focus on the reduction of informational transaction costs differs from the focus of liberalism, as defined

here, on variation in social preferences—even if the two can coexist, with the former being a means of achieving the latter.

The distinctiveness of liberal theories also does not stem from a unique focus on "domestic politics." True, liberal theories often accommodate and explain domestic distributional and political conflict better than most alternatives. Yet, it is unclear what a purely "domestic" theory of rational state behavior would be, liberal or otherwise. Liberal theories are international in at least three senses. First, in the liberal view, social and state preferences are driven by transnational material and ideational globalization, without which liberals believe foreign policy has no consistent purpose. Second, liberal theories stress the ways in which individuals and groups may influence policy, not just in domestic but in transnational politics. Social actors may engage (or be engaged by) international legal institutions via domestic institutions, or they may engage them directly. They may organize transnationally to pursue political ends. The liberal assumption that political institutions are conduits for political representation is primarily directed at nation-states simply because they are the preeminent political units in the world today; it may also apply to subnational, transnational, or supranational institutions. Third, liberal theories (like realist, institutionalist, systemic constructivist theories, and any other intentionalist account of state behavior) are strategic and thus "systemic" in the sense that Kenneth Waltz (1979) employs the term: they explain collective international outcomes on the basis of the interstate distribution of the characteristics or attributes of states, in this case their preferences. The preferences of a

single state alone tell us little about its probable strategic behavior with regard to interstate interaction, absent knowledge of the preferences of other relevant states, since liberals agree that state preferences and policies are interdependent and that the strategic games states play matter for policy – assumptions shared by all rationalist theories.

The critical quality of liberal theories is that they are "bottom-up" explanations of state behavior that focus on the effect of variations in state–society relations on state preferences in a context of globalization and transnational interdependence. In other words, liberalism emphasizes the distribution of one particular attribute (socially determined state preferences about the regulation of social interdependence), rather than attributes favored by other major theories (e.g., coercive power resources, information, or nonrational standards of appropriate strategic behavior). Indeed, other theories have traditionally defined themselves in contrast to the liberal emphasis on social preferences.

International relations theory

International relations theory is the study of international relations from a theoretical perspective; it attempts to provide aconceptual framework upon which international relations can be analyzed. Ole Holsti describes international relations theories act as a pair of coloured sunglasses, allowing the wearer to see only the salient events relevant to the theory. An adherent of

realism may completely disregard an event that a constructivist might pounce upon as crucial, and vice versa. The three most popular theories are realism, liberalism and constructivism.

International relations theories can be divided into "positivist/rationalist" theories which focus on a principally state-level analysis, and "post-positivist/reflectivist" ones which incorporate expanded meanings of security, ranging from class, to gender, to postcolonial security. Many often conflicting ways of thinking exist in IR theory, including constructivism, institutionalism, Marxism,neo-Gramscianism, and others. However, two positivist schools of thought are most prevalent: realism and liberalism; though increasingly, constructivism is becoming mainstream.

Liberalism

The precursor to liberal international relations theory was "idealism". Idealism (or utopianism) was a critical manner by those who saw themselves as 'realists', for instance E. H. Carr. In international relations, idealism (also called "Wilsonianism" because of its association with Woodrow Wilson who personified it) is a school of thought that holds that a state should make its internal political philosophy the goal of its foreign policy. For example, an idealist might believe that ending poverty at home should be coupled with tackling poverty abroad. Wilson's idealism was a precursor to liberal international relations theory, which would arise amongst the "institution-builders" after World

War II. Liberalism holds that state preferences, rather than state capabilities, are the primary determinant of state behavior. Unlike realism, where the state is seen as a unitary actor, liberalism allows for plurality in state actions. Thus, preferences will vary from state to state, depending on factors such as culture, economic system or government type. Liberalism also holds that interaction between states is not limited to the political/security ("high politics"), but also economic/cultural ("low politics") whether through commercial firms, organizations or individuals. Thus, instead of an anarchic international system, there are plenty of opportunities for cooperation and broader notions of power, such as cultural capital (for example, the influence of films leading to the popularity of the country's culture and creating a market for its exports worldwide). Another assumption is that absolute gains can be made through co-operation and interdependence—thus peace can be achieved.

The democratic peace theory argues that liberal democracies have never (or almost never) made war on one another and have fewer conflicts among themselves. This is seen as contradicting especially the realist theories and this empirical claim is now one of the great disputes in political science. Numerous explanations have been proposed for the democratic peace. It has also been argued, as in the book Never at War, that democracies conduct diplomacy in general very differently from nondemocracies. (Neo)realists disagree with Liberals over the theory, often citing structural reasons for the peace, as opposed to the state's government. Sebastian Rosato, a critic of democratic peace theory points to America's behavior towards left-leaning democracies in

Latin America during the Cold War to challenge democratic peace. One argument is that economic interdependence makes war between trading partners less likely. In contrast realists claim that economic interdependence increases rather than decreases the likelihood of conflict.

Neoliberalism

Neoliberalism, liberal institutionalism or neo-liberal institutionalism is an advancement of liberal thinking. It argues that international institutions can allow nations to successfully cooperate in the international system.

Post-Liberalism

Post-liberal theory argues that within the modern, globalized world, states in fact are driven to cooperate in order to ensure security and sovereign interests. The departure from classical liberal theory is most notably felt in the re-interpretation of the concepts of Sovereignty and Autonomy. Autonomy becomes a problematic concept in shifting away from a notion of freedom, self-determination, and agency to a heavily responsible and duty laden concept. Importantly, autonomy is linked to a capacity for good governance. Similarly, sovereignty also experiences a shift from a right to a duty. In the global economy, International organizations hold sovereign states to account, leading to a situation where sovereignty is co-produced among 'sovereign' states. The concept becomes a variable capacity of good governance and can no longer be accepted as an absolute right.

One possible way to interpret this theory, is the idea that in order to maintain global stability and security and solve the problem of the anarchic world system in International Relations, no overarching, global, sovereign authority is created. Instead, states collectively abandon some rights for full autonomy and sovereignty.

Constructivism

Constructivism or social constructivism has been described as a challenge to the dominance of neo-liberal and neo-realist international relations theories. Michael Barnett describes constructivist international relations theories as being concerned with how ideas define international structure, how this structure defines the interests and identities of states and how states and non-state actors reproduce this structure. The key tenet of constructivism is the belief that "International politics is shaped by persuasive ideas, collective values, culture, and social identities." Constructivism argues that international reality is socially constructed by cognitive structures which give meaning to the material world. The theory emerged out of debates concerning the scientific method of international relations theories and theories role in the production of international power. Emanuel Adlerstates that constructivism occupies a middle ground between rationalist and interpretative theories of international relations.

The failure of either realism or liberalism to predict the end of the Cold War boosted the credibility of constructivist theory.

Constructivist theory criticises the static assumptions of traditional international relations theory and emphasizes that international relations is a social construction. Constructivism is a theory critical of the ontological basis of rationalist theories of international relations. Whereas realism deals mainly with security and material power, and liberalism looks primarily at economic interdependence and domestic-level factors, constructivism most concerns itself with the role of ideas in shaping the international system (indeed it is possible there is some overlap between constructivism and realism or liberalism, but they remain separate schools of thought). By "ideas" constructivists refer to the goals, threats, fears, identities, and other elements of perceived reality that influence states and non-state actors within the international system. Constructivists believe that these ideational factors can often have far-reaching effects, and that they can trump materialistic power concerns. For example, constructivists note that an increase in the size of the US military is likely to be viewed with much greater concern in Cuba, a traditional antagonist of the US, than in Canada, a close US ally. Therefore, there must be perceptions at work in shaping international outcomes. As such, constructivists do not see anarchy as the invariable foundation of the international system, but rather argue, in the words of Alexander Wendt, that "anarchy is what states make of it". Constructivists also believe that social norms shape and change foreign policy over time rather than security which realists cite.

Substantive Scope and Depth of International Law

One way to employ liberal theory is as the first and indispensable step in any analysis of international law, focusing primarily on explaining the substantive content of international interaction. Explaining the substantive focus of law, a task at which few IR theories excel, is a particular comparative advantage of liberal theory. Realism and institutionalism seek to explain the outcome of strategic interaction or bargaining over substantive matters, but they take as given the basic preferences, and hence the substance, of any given interaction. Constructivists do seek to explain the substantive content of international cooperation, but do so not as the result of efforts to realize material interests and normative ideals transmitted through representative institutions, but rather as the result of conceptions of appropriate behavior in international affairs or regulatory policy divorced from the instrumental calculations of societal actors empowered by the state.

For liberals, the starting point for explaining why an instrumental government would contract into binding international legal norms, and comply with them thereafter, is that it possesses a substantive purpose for doing so. From a liberal perspective, this means that a domestic coalition of social interests that benefits directly and indirectly from particular regulation of social interdependence is more powerfully

represented in decision making than the countervailing coalition of losers from cooperation – compared to the best unilateral or coalitional alternatives. This is sometimes mislabeled a realist ("interest-based") claim, yet most such formulations follow more from patterns of convergent state preferences than from specific patterns of state power. Thus, liberals have no reason to disagree with Jack Goldsmith and Eric Posner's claim that much important state behavior consistent with customary international law arises from pure coincidence (independent calculations of interest or ideals), the use of IL as a coordination mechanism (in situations where symmetrical behavior increases payoffs), or the use of IL to facilitate cooperation where coordinated self-restraint from short-term temptation increases long-term issue-specific payoffs (as in repeated bilateral prisoners' dilemma, where payoffs to defection and discount rates are low). Contrary to Goldsmith and Posner, however, liberals argue that such cases do not exhaust the potential for analyzing or fostering legalized cooperation. The decisive point is that if social support for and opposition to such regulation varies predictably across time, issues, countries, and constituencies, then a liberal analysis of the societal and substate origins of such support for and against various forms of regulation is a logical foundation for any explanation of when, where, and how regulation takes place.

The pattern of preferences and bargaining outcomes helps define the underlying "payoffs" or "problem structure" of the "games" states play – and, therefore, help define the basic potential for cooperation and conflict. This generates a number of basic predictions, of which a few examples must suffice here. For

liberals, levels of transnational interdependence are correlated with the magnitude of interstate action, whether essentially cooperative or conflictual. Without demands from transnationally interdependent social and substate actors, a rational state would have no reason to engage in world politics at all; it would simply devote its resources to an autarkic and isolated existence. Moreover, voluntary (noncoercive) cooperation, including a sustainable international legal order that generates compliance and evolves dynamically, must be based on common or compatible social purposes. The notion that some shared social purposes may be essential to establish a viable world order, as John Ruggie observes (1982), does not follow from realist theory – even if some realists, such as Henry Kissinger, assumed it. The greater the potential joint gains and the lower the domestic and transnational distributional concerns, the greater the potential for cooperation. Within states, every coalition generally comprises (or opposes) individuals and groups with both "direct" and "indirect" interests in a particular policy: direct beneficiaries benefit from domestic policy implementation, whereas indirect beneficiaries benefit from reciprocal policy changes in other states. Preferences help explain not only the range of national policies in a legal issue, but also the outcome of interstate bargaining, since bargaining is often decisively shaped by asymmetrical interdependence – the relative intensity of state preferences for inside and outside options. States that desire an outcome more will pay more – either in the form of concessions or coercion – to achieve it. Trade illustrates these tendencies. Shifts in comparative advantage and intra-industry trade over the past half-century have generated striking cross-issue variations in

social and state preferences. Trade creates coalitions of direct and indirect interests: importers and consumers, for example, generally benefit from trade liberalization at home, whereas exporters generally benefit from trade liberalization abroad. Patterns of trade matter as well. In industrial trade, intra-industry trade and investment means liberalization is favored by powerful economic interests in developed countries, and cooperation has led to a massive reduction of trade barriers. A long period of exogenous change in trade, investment, and technology created a shift away from North–South trade and a post–World War II trade boom among advanced industrial democracies. Large multinational export and investment interests mobilized behind it, creating ever-greater support for reciprocal liberalization, thereby facilitating efforts to deepen and widen Generalized Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO) norms. In agriculture, by contrast, inter-industry trade patterns and lack of developed-country competitiveness has meant that powerful interests oppose liberalization, and agricultural trade has seen a corresponding increase in protection. Both policies have massive consequences for welfare and human life. In trade negotiations, as liberal theory predicts, asymmetrical interdependence is also a source of bargaining power, with governments dependent on particular markets being forced into concessions or costly responses to defend their interests.

More recently, as developed economies have focused more on environmental and other public interest regulation, liberalization has become more complex and conflict-ridden, forcing the

GATT/WTO and European Union (EU) systems to develop new policies and legal norms to address the legal complexities of "trade and" issues. In environmental policy, cross-issue variation in legal regulation (the far greater success of regulation of ozone depletion than an area such as climate change, for example) reflects, most fundamentally, variation in the convergence of underlying economic interests and public policy goals. The "fragmentation" of the international legal system due to multiple, overlapping legal commitments reflects, from a liberal perspectives, underlying functional connections among issues due to interdependence, rather than autonomous tactical or institutional linkage...

In global financial regulation, regulatory heterogeneity under conditions of globalization (especially, in this case, capital mobility) undermines the authority and control of national regulators and raises the risk of "races to the bottom" at the expense of individual investors and national or global financial systems. Major concerns of international legal action include banking regulation, which is threatened when banks, investors, and firms can engage in offshore arbitrage, seeking the lowest level of regulation; regulatory competition, where pressures for lower standards are created by professional, political, and interest group competition to attract capital; and exacerbation of systemic risk by cross-border transmission of domestic financial risks arising from bad loans or investments, uninformed decisions, or assumed risk without adequate capital or collateral. Coordination of international rules and cooperation among regulators can address some of these concerns, but in a world of

regulatory heterogeneity, it poses the problem of how to coordinate policy and overcome political opposition from those who are disadvantaged by any standard. High levels of heterogeneity in this issue area, and the broad impact of finance in domestic economies, suggest that legal norms will be difficult to develop and decentralized in enforcement.

Similar variation can be observed in human rights. The most important factors influencing the willingness of states to accept and enforce international human rights norms involve domestic state–society relations: the preexisting level and legacy of domestic democracy, civil conflict, and such. Even the most optimistic assessments of legalized human rights enforcement concede that international legal commitments generally explain a relatively small shift in aggregate adherence to human rights. By contrast, liberal theories account for much geographical, temporal, and substantive variation in the strength of international human rights norms. The fact that democracies and post-authoritarian states are both more likely to adhere to human rights regimes explains in part why Europe is so far advanced – and the constitutional norms and conservative legacy in the United States is an exception that proves the rule. Recent movement toward juridification of the European Convention on Human Rights system, with mandatory individual petition and compulsory jurisdiction, as well as the establishment of a court, occurred in part in response to exogenous shocks – the global spread of concern about human rights and the "second" and "third" waves of democratization in the 1980s and 1990s – and in part in order to impose them on new members. Political rights are

firmly grounded in binding international law, but socioeconomic and labor rights are far less so – a reflection not of the intrinsic philosophical implausibility of the latter, but of large international disparities in wealth and social pressures on governments to defend existing domestic social compromises. Even existing political rights are constrained in the face of economic interests, as when member states ignore indigenous rights in managing large developmental projects.

Liberal theories apply also to security areas, such as nuclear nonproliferation. Constructivists maintain that the behavior of emerging nuclear powers – such as India, Pakistan, Israel, North Korea, and Iran – is governed by principled normative concerns about fairness and hypocrisy: if existing nuclear states were more willing to accept controls, new nuclear states would be. Realists argue that the application and enforcement of the nonproliferation regime is simply a function of the cost-effective application of coercive sanctions by existing nuclear states; were they not threatened with military retaliation, states would necessarily be engaged in nuclear arms races. Both reasons may be important causes of state behavior under some circumstances. The liberal view, by contrast, hypothesizes that acceptance of non-proliferation obligations will reflect the underlying pattern of material and ideational interests of member states and their societies. Insofar as they are concerned about security matters, it reflects particular underlying ideational or material conflicts. Recent research findings on compliance with international nonproliferation norms confirm the importance of such factors. The great majority of signatories in compliance lack any evident

underlying desire to produce nuclear weapons. Those that fail to sign face particular exogenous preference conflicts with neighbors or great powers.

International Law Directly Regulates Social Actors

A second way in which variation in social preferences helps explain institutional choice and compliance is that international law and organizations may regulate or involve social ("non-state") actors directly. Many international legal rules and procedures are not primarily designed to shape state policy and compliance, as in the classic model of public international law or conventional WTO dispute resolution, but to assist states in regulating domestic and transnational social actors. When states cooperate to manage matters such as transnational contract arbitration, money laundering, private aircraft, multinational firms, emissions trading, or the behavior of international officials, for example, or when they assist refugees; establish institutions within failed states; or combat terrorism, criminality, or piracy; recognize nationalist movements; or grant rights of participation or representation to private actors in international deliberations, they directly influence domestic and transnational non-state actors such as corporations, nongovernmental organizations (NGOs), private individuals, political movements, international organizations, and criminal and terrorist organizations. The legal enforcement of many such regulatory regimes functions by

empowering individuals and groups to trigger international legal proceedings vis-à-vis states. As we shall see, the greater the range of private access to an international regime, all other things being equal, the more likely it is to be effective and dynamic. Often, such access is a function of the issue area itself. It is customary within nations for individuals to trigger litigation about rights, independent prosecutors to trigger criminal prosecutions, and interested parties to sue to assert economic rights and enforce contracts, and the international system is no different.

Many, perhaps most, international legal instruments are not "self-binding" for states at all, but are instead "other-binding". They do not force the signatory states to delegate direct sovereignty over government decisions, but are designed primarily to constrain non-state actors. Some regulate international organizations, establishing international procedures or regulating the actions of international officials. Many other international legal rules oversee the behavior of private actors. Much private international law governs corporate activity, individual transactions, investment, communications, and other transnational activities, mostly economic, by non-state actors. Which non-state actors are regulated and how they are regulated by international law is itself determined by the interests and political strength of those and other social groups.. Other rules govern different aspects of individuals and NGOs. It is conceivable that a government may find such rules onerous, just as it may find an entrenched domestic law onerous, but there is no particular reason to assume that this is more likely in

international than domestic life – or that there are "sovereignty costs" associated with international legal obligations of this kind. We cannot understand the attitude of states without the subtle understanding of state-society relations provided by liberal theory.

Evolution of International Law

A particular advantage of the liberal accounts of the substance, form, and enforcement of international law is that they can be extended to particularly detailed and plausible accounts of the long-term evolution of international legal norms. International law can evolve through liberal mechanisms of either exogenous or endogenous change.

Exogenous change takes place when autonomous changes in underlying ideational, commercial, and republican factors drive the elaboration, expansion, and deepening of international legal norms over time. Since exogenous trends in core liberal factors such as industrialization, competitiveness, democratization, globalization, and public ideologies often continue for decades and centuries, and vary widely geographically and functionally, such theories can support explanations for "big-picture" regularities in the scope and evolution of international law over the long term, among countries and across issues. This offers a particularly powerful means of explaining trends in substantive content. For example, nineteenth- and twentieth-century waves of democracy and industrialization have driven a steady shift away

from treaties governing military, territorial, and diplomatic practice to treaties governing economic affairs, which now dominate international law making and the activity of international tribunals, and in recent years toward human rights and human security, although the latter still remain only 15 percent of the total. Also consistent with factors such as democratization, industrialization, and education is the fact that the development of international law has been geographically focused in developed countries, notably Europe, and has emanated outward from there.

Endogenous evolution occurs when initial international legal commitments trigger feedback, in the form of a shift in domestic and transnational state–society relations that alters support for the legal norms. In liberal theory, such feedback can influence material interests (commercial liberalism), prevailing conceptions of the public good (ideational liberalism), or the composition of the "selectorate" (republican liberalism), thereby changing state preferences about the management of interdependence. Each of these three liberal feedback loops creates opportunities for "increasing returns" and internalization, but they do not assure that it will take place. It takes place, on the liberal account, only if the net preferences of groups mobilized by cooperation are positively inclined toward cooperation, and if those groups are powerful enough to have a net impact in domestic political systems. Isolating examples and conditions under which this takes place is an ongoing liberal research program. Exogenous and endogenous effects are often found together. There is, for example, broad agreement that exogenous shifts in technology,

underlying market position, and a desire to expand permanently the size, wealth, and efficiency of the tradable sector of the economy explains the general direction of postwar changes in trade policies. Bailey, Goldstein, and Weingast (1997) argue that postwar, multilateral trade liberalization generated domestic economic liberalization, thereby increasing the underlying social support for further rounds of trade liberalization in a continuing virtuous circle of deepening international obligations. A strategy like EU enlargement is expressly designed to use this sort of incentive not just to induce a shift in trade policy, but also to engineer broader economic and political reform, as well as more cooperative international policies in the future.

In the EU and elsewhere, vertical and horizontal judicial networking can encourage deeper forms of tacit cooperation, such as "judicial comity," in which judges mutually recognize that "courts in different nations are entitled to their fair share of disputes...as co-equals in the global task of judging". As a result, domestic courts no longer act as mere recipients of international law, but instead shape its evolution. Moreover, as we saw in the area of multilateral trade, legal cooperation may have broader effects on political and economic systems, both intended and unintended. Even French President Charles de Gaulle, in many ways an archetypical defender of traditional sovereignty, committed France to firm legal developments with the deliberate goal of fundamentally reforming and modernizing the French economy – adaptations that altered French attitudes over the long term and facilitated more cooperation. More recently, EU enlargement has been employed as a means to encourage broad

reforms in domestic politics, economics, and societies. Even the distant prospect of enlargement, as was the case in Turkey, encouraged movements toward Islamist democracy that are now irreversible.

What is the relative impact of exogenous and endogenous effects on international law? Here, research still progresses and, obviously, the answer depends on the specific case. Nonetheless, the available evidence suggests that, in general, exogenous factors seem to have a more significant effect than endogenous ones on substantive state policies. The broad constraints on compliance and elaboration tend to be set by patterns of interdependence among countries with underlying national preferences – even if endogenous effects can dominate on the margin and in particular cases. Consider two examples. One is European integration. "Neo-functionalists," such as Ernst Haas, long stressed the essential importance of endogenous processes ("spillovers") in explaining integration. Recently, Alec Stone Sweet and Wayne Sandholtz (1997) have sought to revive the argument for endogenous effects, presenting legal integration as the primary cause of economic integration. Yet, it is now widely accepted that Europe has responded primarily to exogenous economic and security shocks. Nearly all basic economic analyses, which leave little doubt that exogenous liberal processes (factors such as size, proximity, level of development, common borders, common language) explain the bulk (around 80 percent) of postwar economic integration in Europe, leaving about 20 percent for other factors, such as endogenous legal development. Similarly, in the area of human rights, the

consensus in the literature is that the effect of international human rights norms on state behavior is marginal. Even those scholars who claim the most for legal norms concede that their impact is uneven and secondary to underlying exogenous factors.

Yet, the focus on substantive outcomes may underestimate some endogenous effects. In the same case of the EEC, Weiler, Slaughter, Alter, and others have persuasively demonstrated that initial legal delegation and intervening feedback processes (sometimes unforeseen and even, in part, unwanted by national governments) can decisively influence the form of legal cooperation – even if they are not the primary cause of substantive cooperation. European Court of Justice jurisprudence embedded itself in domestic legal systems and helped establish "supremacy," "direct effect," and other doctrines. Explaining this process requires close attention to the liberal micro-incentives of litigants, domestic judges, and international courts under supranational tribunals – to which we now turn.

Liberal Analysis of Tribunals

Liberal theorists such as Helfer and Slaughter contend that international legal regimes more deeply internalized in society often generate more effective compliance and more dynamism over time than do conventional state-to-state legal arrangements. This argument is sometimes stated as a liberal ideal type and, perhaps as a result, the Helfer-Slaughter view of international tribunals has often been criticized for positing an unrealistically

linear relationship between "democracy" and the effectiveness and dynamism of international law. The resulting debates have received much scholarly attention, but the underlying critique seems misplaced. As we have seen, liberal theory in fact predicts considerable variation in the effectiveness and dynamism of international law, both among democracies and among autocracies, based on variation in domestic and transnational ideas, interests, and institutions – a finding that may coexist with the observation that democracies are, as a whole, more law-abiding. This liberal claim (properly understood) has been accepted by its critics, and their queries are best viewed as friendly amendments or extensions to liberal theory.

Neo-conservative critics, such as Eric Posner and John Yoo, allege that liberal theory overestimates the extent of vertical internalization. Yet, in fact, Posner and Yoo accept most of the liberal empirical argument. They concede that interest group pressures shape state interests in the promulgation and enforcement of international law. They acknowledge that vertical enforcement and evolutionary dynamics sometimes occur – notably in the significant areas of WTO enforcement and in promoting democratic peace. They also accept that the EU and the ECHR exhibit more dynamism than other legal systems, though they seek to exclude Europe from consideration as an exceptional "political union". Yet, excluding Europe paints an arbitrary and misleading picture of international law, not simply because it eliminates over a quarter of the global economy and a much greater proportion of global trade, investment, and law making, but also because EU scholars do not view the

institutions as an exceptional "federation," but rather, as do Helfer and Slaughter, as the most interdependent and uniformly democratic of continents.

Posner does insist, rightly, that dominant interest group coalitions lack "a commitment to international law" per se and thus may oppose the promulgation and enforcement of international norms if they are inconsistent with social interests. He and liberals agree that liberal analysis of international law requires underlying theories to explain variation in social and state preferences across issues, countries, and time. Mills and Stephens make a similar point, from an "English school" perspective, when they argue that, it is difficult to disagree with Slaughter's argument that vertical (through domestic courts) rather than horizontal (through international bodies) enforcement of rules of international law offers the greatest potential at present for an international rule of law. However, Slaughter must confront the reality of domestic politics when it comes to the actual use of domestic courts or highly integrated international courts. Nowhere is this more apparent than from an analysis of the failings of the United States and many other liberal states to accept or internalize international human rights standards by allowing their enforcement in domestic courts...[A]t least part of the explanation for the failure of vertical enforcement in this context must derive from the actions of individuals and groups as political actors within democratic states.

Perhaps early formulations of liberal theory were too dichotomous, but the theory, properly understood, is based on

precisely the need to theorize the state-society foundations of the variation in the response of liberal states to international law. The fact that compliance requires such an analysis seems an argument for, not against, the centrality of liberal theory.

Harold Koh similarly criticizes liberals for exaggerating the link between democracy and the dynamic success of international law. He presents himself as a "constructivist" and seeks to argue the contrary of the conservative case, namely that Helfer and Slaughter underestimate the extent to which internalization may occur in non-European and especially nondemocratic settings. Yet, Koh's most important conclusions, too, dovetail with those of liberal theory.

First, his claim that some vertical enforcement can take place in non-democracies is consistent with liberal theory. To present this fact as a critique creates disagreement where none exists. Helfer and Slaughter do maintain that democratic states are more likely to establish dynamic and successful vertical "supranational" adjudication systems, yet, as we have seen, they do not view this relationship as dichotomous: "Non-democracies may have democratic impulses, embodied in specific institutions; illiberal states may have strong liberal leanings". For example, international economic law can be developed with a nondemocratic China, while even the most advanced democracies, such as the United States in human rights, have incentives to resist compliance with international norms, which is why courts always need be jurisprudentially incremental and politically cautious.

Second, although Koh superficially rejects the importance of regime-type for domestic internalization, his view that internalization is promoted by stable, repeated interactions, the "legal" quality of norms, open transnational legal interaction, and a rich field of NGOs puts him on a slippery slope to recognizing its importance. As Joel Trachtman observes, Koh's simple claim that "repeated participation in the international legal process" leads to norm acceptance "is hardly theoretically satisfying" on its own because "repeated interaction with duplicity or hostility would not necessarily change anyone's ideas, or their incentives to comply" or "necessarily overcome strong incentives to defect". In fact, this mechanism is likely to function in the way constructivists imagine only under certain (liberal) preconditions, as Koh himself concedes: "the structural attributes of liberal systems undeniably make them more open to some kinds of internalization". Indeed, the qualities Koh stresses—stable interaction, legality, open interaction, and civil society—all depend on democratic institutions. Without transparency, accountability, issue-advocacy networks, and professional status, legal processes are unlikely to have a consistently positive effect. As Keohane observes, "[i]nstead of downplaying the point, it would seem wiser to elaborate it" – something Slaughter and other liberals have done in work on transnational networks and democratic institutions.

Third, while Koh's approving references to Thomas Franck, suggestive use of the term "internalization," and self-identification as a "constructivist" seem to suggest that he holds a non-rationalist or "non-liberal" theory of international law, he

does not in fact commit to the distinctive causal mechanisms of these theories, but rather to liberal ones. Unlike Franck, Goodman, or others, he does not portray states as governed by "logics of appropriateness" drawn from habit, cognitive framing, psychology, deontological morality, or standard operating procedures – and he avoids Frank's view that law-abiding states will necessarily be more law-abiding abroad simply because they transfer legalistic habits of mind. Instead, like Helfer and Slaughter, Koh believes that dynamic legal cooperation is possible with semi-democratic or nondemocratic states in selected areas primarily because states pragmatically seek to realize interests and ideals. Legal agreements are possible between China and the United States, for example, because a measure of largely self-interested institutional autonomy has been granted to economic law, even when fundamental disagreement remains in other areas. These are quintessentially liberal processes of instrumental pursuit of specific material interests and ideals channeled through representative institutions. Overall, Koh's specific use of theoretical language from IR theory seems misplaced—a case of paradigms hindering understanding.

Traditional International Law and Wars of National Liberation

What recognition, if any, could wars of national liberation gain under these categories of conflicts of international law? Wars of

national liberation take multifarious forms, from sporadic riots to sustained and concerted use of force against the established government. Therefore, the merits of each individual war of national liberation would have to be examined in order to deduce whether the threshold for insurgency or belligerency has been passed, and deduce whether the application of international law should be triggered. Of course, as discussed above, one of the problems with this is the lack of clear and definite criteria for the recognition of insurgency. Indeed, while belligerent status is more easily defined, some uncertainty still persists in this area also. The second major obstacle to the application of the status of belligerency to wars of national liberation is the reluctance of all States to admit that they have a serious conflict occurring within their borders. Firstly, this would show that the situation was out of control and that the central government could no longer deal with it. Secondly, an admission of this sort – that the groups of rebels actually were belligerents recognised by international law –would give legitimacy to their challenge to the established government. However, recognition of insurgency, or preferably, belligerency, was the only way in which those engaged in a war of national liberation were entitled to jus in bello under traditional international law. Recognition of belligerency would especially have been of great importance to such insurgents in order to offer some humanitarian protection to the 'freedom fighters' and to limit casualties of war. Moir points out that:

An examination of some major internal conflicts of the nineteenth and early twentieth centuries shows that, in those cases where the laws of war were accepted and applied by opposing forces,

some form of recognition of belligerency had invariably taken place. In contrast, where recognition of belligerency was not afforded by the government, the laws of war tended not to be applied, leading to barbaric conduct by both sides.

He goes on to state that '...recognition of belligerency tended to encourage the observance of the humanitarian rules of warfare, whereas an absence of recognition did the opposite.'

Some national liberation movements would have come very close to attaining, if not passing, the threshold required for belligerency by satisfying the necessary criteria as discussed by Schlindler and Higgins above. Yet the fact remains that a state of belligerency has never been recognised in a war of national liberation. Therefore, as Wilson comments, '...[d]iscussion of what rights and duties are applicable under traditional international law when belligerency of a national liberation movement is recognised is highly theoretical and devoid of practice in support of theory.'

Prior to 1949, 'rebels' / members of national liberation movements were mainly dealt with as criminals under municipal law. This was the common practice of States before international humanitarian law dealt with non-international conflicts in Common Article 3 to the 1949 Geneva Conventions. However, if the conflict / 'rebellion' was in any way protracted, governments often softened or moderated their position in order to afford some protection or benefits to those engaged in combat against the established government. The first attempt to codify this

approach is to be found in Francis Lieber's Instructions for the Government of Armies of the United States in the Field, which was formulated for use in the US civil war. This war has been called the first war of the 'modern era'. During the course of this non-international conflict, 'combatants' on both sides were generally treated as legitimate combatants and were also treated as prisoners-of-war if captured. The Boer War also saw captured Boers treated as prisoners-of-war by the British until the annexation of the Boer Republics.

This behaviour by established governments was, however, a matter of courtesy, not obligation and was not always afforded. An example of where an established government did not honour this commitment was the behaviour of the Greek government during the Greek Civil War of 1946 to 1949. As Wilson comments:

The record of State practice when confronting organized resistance movements or secessionist movements is not entirely Draconian. Governments may eventually treat captured persons in an internal armed conflict as prisoners of war, even if they do not recognize them as such. It was generally agreed that according to accepted principles of international law there was no obligation for them to do so, and no government granting analogous treatment to captured prisoners prior to the 1949 Geneva Conventions in an internal armed conflict where the rebels were not recognized as insurgents claimed to do so out of any legal duty. It was a matter of policy and expediency rather than legal obligation.

Chapter 6

The Implementation of International Rules in National Systems

Relationship between National and International Law

Three different theories as to interplay between international law and municipal law:

- Monistic View
- advocated by Moser and maintains the supremacy of municipal law: national law prevails over international legal rules, which were said to merely constitute “external State law”
- International law proper does not exist, for it is made of States’ external law
- This theory maintained the existence of only one legal order – the national legal order and thus reflected the nationalism views of the major Powers
- Dualistic Approach
- recognizes the authority of international customary rules and duly ratified treaties

- It is based on the notion that international law and national law constitute two different, separate systems, which differ as to their subjects, their sources, and as to their rules' content
- International law cannot directly regulate the conduct of individuals, international law has to be transformed into national laws for it to be binding on domestic authorities and individuals
- It advocates compliance with international norms by turning them into national rules, but provides the possibility for non-implementation of international norms at the domestic level, when that would conflict with a State's interests, even though such conduct may result in the State incurring international responsibility.
- This theory rests on moderate nationalism
- Monistic View Advocating the Supremacy of International Law – advanced by H. Kelsen and according to which:
- There is unity between the international and national legal order
- International law having primacy
- National norms shall conform to international law. If a national norm contradicts international law, such norm shall be viewed as illegal.
- The transformation of international rule into domestic systems is not necessary as far as international law is concerned, although it may be a requirement based on national constitutions.

- Courts are required to apply international as well as national rules, and if constitution requires the application of international norms only if they have been translated into the national legal order, the court shall do so, although the failure to apply an international law norm will trigger the State's international responsibility. State is also responsible if, in the case of a conflict between national and international law, the courts are required to give priority to national rules.
- Rests on internationalism and pacifism

The Relationship between Public International Law and National Law

Public International Law and national law (municipal law as known in the Common Law Countries) are two legal systems. National law governs the domestic (internal) relations between the official authorities of a State and between these authorities and individuals as well as the relations between individuals themselves. Public International Law governs primarily the relations between States.

With the rise and extension of Public International Law, a question begins to arise as to the relationship between the national law of the States and the Public International Law. This

question gives rise to many practical problems. What is the status of the rules of Public International Law before a national court? What is the status of the rules of national law before an international court? Which rule does prevail in a case of conflict between the two laws? How do rules of Public International Law take effect in the internal law of a State?

The answers to the above questions are presented in the following sections: section one deals with the theories dealing with the relations between International Law and national law; section two deals with the attitude of International Law to national law; and section three deals with the attitude of various national laws to International Law.

The Theories Dealing with the Relations Between International Law and National Law

There are two major theories on the relationship between Public International Law and national law. The first is the dualist theory. The second is the monist theory.

The dualist theory considers that International law and national law are two separate legal systems which exist independently of each other. Each of these two systems regulates different subject matters, function on different levels, and each is dominant in its sphere. Public International Law primarily regulates the conduct of sovereign States. National law regulates the conduct of persons within a sovereign State. On this view, neither legal system has the power to create or alter rules of the other. When

national law provides that International Law be applied in whole or in part within the jurisdiction, this is merely an exercise of the authority of national law in the adoption or transformation of the rules of International Law into its legal system. The national law has a supremacy over the International Law; in the case of a conflict between International Law and national law, a national court would apply national law.

The monist theory, which upholds the unity of all law, regards International Law and national law as forming part of the same legal system (order). It argues that both laws are based upon the same premise, that of regulating the conduct and the welfare of individuals. However, it asserts the supremacy of International Law over national law even within the national sphere; in the case of a conflict between the two laws, International Law is supreme.

It is notable that the position taken by each of these two theories is a reflection of its ideological background. The dualist theory adheres to positivism, while the monist theory follows natural law thinking and liberal ideas of a world society.

Facing these two basic theories, a third approach is introduced. This approach is somewhat a modification of the dualist theory. It attempts to establish a recognized theoretical view tied to reality. While it asserts that the two laws are of two distinct legal systems, it denies that a common field of operation exists as between International Law and national law by which one system is superior or inferior to the other. Each law is

supreme in its own sphere (field). Just as one cannot talk in terms of the supremacy of one national law over another, but only of two distinct legal systems each operating within its own field, so International Law and national law should be treated in the same way. Each law exists within a different juridical order.

Because the above opposing theories, in reality, do not adequately reflect actual State practice, the scholars in each side have forced to modify their original positions in many respects, bringing them closer to each other, without, however, producing a conclusive answer on the true relationship between International Law and national law. This fact has led some legal scholars to pay less attention to these theoretical views and to prefer a more empirical approach seeking practical solutions in a given case. The method of solving a problem does not probe deeply into theoretical considerations, but aims at being practical and in accord with the majority of States practice and international judicial decisions. On this view, it is more useful for us to leave the theoretical controversy aside and direct our attention to the attitude of International Law to national law and the attitude of the various national laws to International Law; these are what are discussed in the following two sections.

The Attitude of International Law to National Law

International Law, in the international sphere, has a supremacy over national law. However, this principle does not mean that national law is irrelevant or unnecessary. International Law does not ignore national law. National law has been used as evidence

of international custom or general principles of law, which are both sources of International Law. Moreover, International Law leaves certain questions to be decided by national law. Examples of these questions are those related to the spheres of competence claimed by States as regards State territory, territorial sea, jurisdiction, and nationality of individuals and legal persons, or those related to obligations to protect human rights and the treatment of civilians during belligerent occupation. Thus, the international court may have to examine national law related to these questions in order to decide whether particular acts are in breach of obligations under International Law, particularly, treaties or customary law.

A great number of treaties contain provisions referring directly to internal law or employing concepts which by implication are to be understood in the context of a particular national law. Many treaties refer to "nationals" of the contracting parties, and the presumption is that the term means persons having that status under the internal law of one of the parties.

The international courts, including the International Court of Justice and its predecessor, have regarded national law as a fact that the parties may provide by means of evidence and not to be taken by the court ex officio. Moreover in examining national law the courts have in principle regarded as binding the interpretation by national courts of their own laws.

The Attitude of National Laws to International Law

The attitude of national law to International Law is not that easy to summarize as the attitude of International Law to national law. This is because the laws of different States vary greatly in this respect. However, States are, of course, under a general obligation to act in conformity with the rules of International Law; otherwise, they will be responsible for the violations of such rules, whether committed by their legislative, executive or judicial authority. Further, States are obliged to bring national law into conformity with their obligations under International Law; for example, treaties may require a national legislation to be promulgated by the States parties. Nevertheless, International Law leaves to States the method of achieving this result. States are free to decide how to include their international obligations into their national law and to determine which legal status these have internally. In practice, on this issue there is no uniformity in the different national legal systems. However, the prevailing position appears to be dualist, regarding International Law and national law as different systems requiring the incorporation (adoption, transformation and reception are other concepts used) of the international rules on the national level.

Actually, the most important issues of the attitude of national legal systems to International Law concern the status of international customary law and international treaties. On these issues, the attitude of various national legal systems varies.

The survey of the attitudes adopted by various countries of the Common Law and Civil Law traditions leads to the following conclusions. The first of these is that most countries accept the operation of customary rules within their own jurisdictions, providing there is no conflict with existing laws, i.e., if there is a conflict, national law is supreme; some countries allow International Law to prevail over national law at all time. The second conclusion is that as regards treaties, in some countries, certain treaties operate internally by themselves (self-executing) while others require undergoing a process of internal legislation. Some countries allow treaties to supersede all national laws (ordinary laws and the constitution), whether made earlier or later than the treaty, while others allow treaties to supersede only ordinary laws and only that made earlier than the treaty. Others adopt opposite positions.

Modern Trends in the Relationship between International and National Law

The monistic view has no scientific value. The dualistic approach did reflect the legal reality of the 19th and first half of the 20th century, but did not explain certain instances where, for example, international law addressed itself directly to individuals (e.g. piracy laws). The Kelsian theory seemed, at the time it was advanced, rather utopian. It did, however, have a significant

ideological impact. It consolidated the notion that States must bow to their international obligations and put them before national demands.

Today, some of the notions of the dualistic approach remain valid, while the Kelsenian theory is gaining momentum in that:

- international law is not a legal system totally separate from national systems
- it has a huge daily direct impact on national systems
- many international rules address themselves directly to individuals, without the need of them having to be transformed into national rules
- subject to certain limitations, international legal order is gradually evolving to encompass not only States, but also individuals and other aggregates cutting across the boundaries of states
- it is tending to become less horizontal in character and more of a jus super partes (i.e. a law regulating conduct from above)
- limitations: there are some treaties and customary rules create some community obligations (those which are intended to safeguard fundamental values), but they are still rare, states do not invoke them, although they are erga omnes, unless their interests are affected, which also explains the fact that aggravated responsibility is not yet firmly embedded in the world community; enforcement is problematic

The Relationship Between Domestic and International Law

When examining the relationship between international law and municipal law, it is important to analyse the clash between dualism and monism. Both concepts entail the concurrent existence of international and domestic law. The question to be assessed is the nature of the co-habitation of these legal orders. Is there a legal order which supersedes the other? Or do they exist cooperatively and non-contentiously? Under the dualism doctrine, a clear distinction is created between international and municipal law, establishing them as separate legal orders which regulate different subjects. Thus, while international law involves the regulation of the relationship between sovereign states, domestic law confers rights to persons and entities within the sovereign state.

It is therefore important to point out that under the dualism doctrine, neither legal order has an absolute, undeniable power to create, alter or challenge the rules of the other system. In that regard, the use of international law in domestic courts can only be allowed through an instrument in municipal law which confers rights to that effect. According to the dualism principle, in a case of conflict between municipal and international law, the domestic courts would apply the former.

In contrast, monism asserts the supremacy of international law within the municipal sphere and describes the individual as a

subject of international law. The doctrine is established when international and municipal law form a part of the same system of norms which are based on general notions of fairness. The latter concept somewhat translates into an alternative theory which entails that international and municipal law are superseded by a general legal order which rests upon the rules of natural law.

In the eyes of the monists, the state merely represents an amassing of individuals who are subjects of international law. Although monism clearly possesses a logical and equitable basis (since it estops states with higher capabilities from imposing their own legal rules as the highest and most sophisticated authority) it is submitted that this doctrine directly contradicts established legal rules. For instance, with respect to the position of states, the law recognises that economic entities such as corporations possess a legal personality. In that regard, to claim that sovereign states do not have a legal capacity would not only deprive international law of its primary purpose (to regulate the relationship between states) but would also overtly undermine the doctrine of separation of powers, which is a fundamental part of contemporary democracy.

The state merely represents an amassing of individuals who are subjects of international law.

When discussing the methods of coordination between municipal and international law, academic views challenge the presumptions drawn by the followers of monism and dualism that

the two legal orders share a common field of operation. In Sir Fitzmaurice's view the two systems work in different spheres. This affords them an equal degree of supremacy and precludes them from entering into conflict. When a state does not act in accordance with international law it is not a question of conflict of laws but rather a conflict of obligations. As such, the consequences will relate to that state's position on the international political scene, but will not, prima facie, undermine the validity of its internal laws.

With regards to the relation between the states' obligations and municipal law, the legal position is unambiguous. A state cannot use provisions of its own law as a defence to a claim against it for alleged breaches of international law. This rule is exemplified in the Alabama Claimsarbitration where the United States was awarded damages against Great Britain for the latter's breach of its obligations as a neutral state during the American Civil War.

In the Free Zones case it was decided that 'France cannot rely on its own legislation to limit the scope of its international obligations'. Furthermore, in the Advisory Opinion in the Greco-Bulgarian Communities case it was stated that 'it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty'. If a state has signed to a treaty and its domestic laws violate any provisions of that treaty, the state must change said laws in order to fulfil its international obligations.

Due regard must be paid to the decisions of municipal courts as they provide jurisprudential guidance on the effect of the particular domestic law.

The relationship between international law and municipal law should be viewed as one of cooperation and symbiosis. As such, international law should recognise doctrines and concepts created by municipal law. The practical implications of this argument arise when considering the admissibility of municipal courts' decisions in the International Court of Justice (ICJ). In theBrazillian Loans case the Permanent Court of International Justice (the predecessor to the ICJ) decided that due regard must be paid to the decisions of municipal courts as they provide jurisprudential guidance on the effect of the particular domestic law in the municipal sphere. Although, in accordance with the Court's jurisdiction, international law is primarily applied, it will nevertheless be logical to assume that parties will rely on provisions of municipal law as part of their arguments. As such, they must present said laws in the form of evidence before the court.

As part of the continuous evolution of international law, the ICJ must recognise concepts created by municipal law which historically have had effect on international relations. Thus, where legal issues arise concerning a matter which is not covered by international law, reference will be made to the relevant rules in municipal law. In such cases the court cannot blatantly disregard municipal law as there are no relevant provisions of international law which can be applied.

In conclusion, by examining the relevant academic principles and case law, one can infer that the generally accepted view describes that international and municipal law are supreme in their own spheres. However, one can also argue that there has been a fusion of the operating fields of both concepts. In the spirit of modernisation, both the municipal and international courts have recognised the need to resort to the other's sphere of operation as aids to interpretation. Moreover, as you will read in the second part of this feature, the English courts have recognised the confinement of the fundamental doctrines of Parliamentary Supremacy and stare decisis. In that regard, although the segregation barrier between the municipal and international sphere remains existent, it is no longer infrangible.

International Rules on Implementing International Law in Domestic Legal Systems

Most international rules to become operative need the cooperation and the willingness by State officials and individuals to apply such rules within the domestic system. However, there is no international regulation as to how national systems are to give effect to international rules.

Under traditional international law:

- a State cannot invoke its national legislation to excuse the breach of its international obligations
- with respect to treaties, a State cannot invoke internal law to justify a breach of its treaty obligations. Art. 27 VC
- Exchange of Greek and Turkish Populations, PCIJ: There exists a general duty for States to bring national law into conformity with their international obligations. This holding would have the consequence of double breach whenever a state fails to fulfill its international obligations. First it would breach the specific rule which gives rise to the conflict; second, it will breach its general duty to make national rules conform to international law. However, State practice shows there is no such general duty, with the consequence that a breach merely triggers a claim for damages or a request for injunction by the aggrieved party.

Modern International Law shows evolution in two directions:

- some treaties, in addition to laying out other obligations, also impose an obligation on their signatories to enact implementing legislation so as to give effect to international norms at the municipal level (e.g. some of the rule of the 4 Geneva Conventions of 1949; a number of human rights treaties, the statutes of the ICTY, ICTR)
- Certain general rules that have acquired the status of jus cogens require States to adopt the necessary

implementing legislation. See Furundzija, ICTY: Due to its peremptory character, the rule prohibiting torture requires that States enact national legislation prohibiting and designed to prevent torture at the national level. In such cases, where a State fails to enact national legislation prohibiting torture and, further engages in torture, his conduct would result in a double breach (breach of its international obligation to enact national legislation and breach of its international obligation to not engage in torture). Limitation: some individualism still prevails in the international community and States will not bring a claim for violation of the general duty to pass national implementation laws if their interests have not been negatively affected, under the pretext that they do not want to meddle in another State's internal affairs.

- International law still lacks any regulations on the mechanisms of implementation and leaves each State complete freedom as to how it fulfills its obligations, which results in total lack of uniformity. This state of affairs is the result of national self-interest, and still strong attachment to the concept of sovereignty and reluctance to submit to international control

Trends Emerging Among the Legal Systems of States

Modalities of Implementation

Two basic trends: Automatic standing incorporation:

- a national constitution, or law, or judicial decision enjoin a state and its nationals to apply certain existing or future international rules
- effect of such national provisions is to incorporate international rules into the domestic legal order without the requirement for further action other than notice (usually, through publication in the OJ)
- this mechanism allows for automatic and instantaneous adjustment of national laws to international legal standards

Legislative ad hoc incorporation

- international law becomes applicable only through specific, ad hoc, legislation
- distinction between statutory ad hoc incorporation (when a law sets out in detail the various obligations, powers and rights deriving from the international rule) and automatic ad hoc incorporation of international law (a law provides that the international obligation at issue is an integral part of national law, the effect

being the same as an automatic standing incorporation with the difference that it is done on an ad hoc basis). The former is more appropriate for non self-executing international rules, while the latter (whether permanent or ad hoc) is best fit for self-executing international norms.

The Rank of International Rules within National Legal Orders

- some States put international rules incorporated into the national system at the same level as national legislation. When there is a conflict between the two, general principles regarding rules of same rank, apply. Under this regime, a simple law can repeal an international law as it applies to that State and thwart its application at the national level. The State will still incur international responsibility.
- Some States accord international rules a status higher than that of national legislation. When a State has a flexible constitution (i.e. one that can be amended by a simple act of parliament), the only way to give international rules primacy is to entrench them, so that they cannot be modified by a simple legislative majority. However, States with flexible constitutions have not adopted such a practice. States having a rigid constitution (sets special requirements for its amendment and provides for judicial oversight of national legislation to insure its constitutionality), if the constitution provides for the incorporation of

> international norms, these acquire constitutional or quasi-constitutional rank, and the legislature is precluded from passing a contrary law unless it can satisfy the stringent requirements for constitutional amendment.

States that tend to adopt the statist (nationalist) approach prefer legislative ad hoc incorporation and give international rules the same rank as national legislative actsStates that favor the internationalist approach opt for automatic standing or ad hoc incorporation and give international rules superiority over national legislative enactments.