Democracy and the Rule of Law: Institutionalizing Citizenship Rights in New Democracies

Final Report

Philip Oxhorn, McGill University

Introduction

An unprecedented number of countries throughout the world currently enjoy democratic rule. The majority of these countries, however, have had little experience with democracy and the future of their democratic regimes is often precarious at best. A principal focus of Canadian foreign policy has been to support these still fragile democratic processes throughout the world. The principal purpose behind this report is to help sharpen and develop that focus.

While a number of factors help account for the fragility of democratic regimes in many countries, one of the least studied but most important is the weakness of basic legal guarantees of civil rights and civic law enforcement. Law enforcement often remains an instrument for corruption and repression, rather than a progressive instrument for enforcing legal reform. Furthermore, a number of countries are only beginning to emerge from social crises that have raised the issue of deciding who actually constitutes the "citizenry."

In order to address these concerns and develop specific policy recommendations to guide Canadian foreign policy, an international conference was held at McGill University in March 1998. Titled *Democracy and the Rule of Law: Institutionalizing Citizenship Rights in New Democracies,* the conference brought together scholars and practitioners from a variety disciplines who actively work on these issues in Africa, Eastern Europe and the former Soviet Union, Latin America, and South Asia to discuss the problems of democratic consolidation from the perspective of citizenship, legal reform and law enforcement. Four panels were held over two days focusing on the following issues: deciding who is a citizen and what that means; designing civil rights and implementing enforceable laws; extending citizenship and security to the disadvantaged; and a plenary session which addressed the democratic challenges posed by violence and difference within societies (see Appendix 1). This was followed by a roundtable specifically addressing the foreign policy implications of the issues raised during the conference (see Appendix 2).

The report is divided into two sections. The first provides a detailed set of seven policy recommendations for consideration by the Department of Foreign Affairs and International Trade, as well as other interested bodies. The second provides a summary of the conference proceedings in the form of a rapporteur's report, written by Tamara Sorger of FOCAL.

Section I: Detailed Policy Recommendations

1) **Develop a Human Rights Framework for Evaluating Foreign Assistance Projects**: Canada should take the lead in formulating a human rights framework based on international consensus that Canada and the international community could use to evaluate foreign assistance projects. Drawing on the considerable expertise of different governmental agencies and non-governmental organizations (NGOs) in Canada, a draft framework should be developed by the Canadian Government which would serve as the basis for an international conference in which national

governments, international organizations and transnational NGOs such as Amnesty International participate. The recent successful efforts of the Canadian Government in spearheading the adoption of an international ban on landmines could serve as a model.

Such a framework should be based on an holistic or integral approach to understanding human rights. The framework should specify the direct relationship between human rights, civil rights and democracy. It also should detail the various dimensions of the issue area, including police and judicial reform, the capacity and receptivity of civil society vis-a-vis establishing respect for basic civil rights, and the capacity and receptivity of the state in recipient countries to provide the necessary institutional infrastructure for ensuring effective democratic rule of law and accountability.

The framework, in turn, would serve as a basic checklist for project approval for Canada and other aid givers. Distinctions should be made between post-conflict situations involving peacebuilding and other situations. The human rights framework would serve as the core set of organizing principals guiding the allocation of scare foreign aid resources in Canada and, ideally, like-minded governments and international institutions.

Throughout the conference, the importance of being sensitive to local priorities and cultures was stressed. For this reason, it is important that participation in its elaboration be as broad as is feasible in order to ensure a wide variety of perspectives. The framework should also be implemented through processes of ongoing networking and coalition-building with local and Canadian actors (see recommendations 4 and 5).

2) **Centralization of Civil Rights and Democratization Programs**: Canada's efforts in the area civil rights and democratization should be centralized in a single government office or department. While some participants felt that DFAIT would be the most appropriate place to house such an office, others felt that the decision should be left to the appropriate authorities.

Currently, a number of actors are involved in programs relating to human rights, legal and judicial reform and democratization in general. These include various offices of DFAIT, CIDA, the RCMP and the Justice Department. Such activities should be coordinated to avoid duplication and maximize the international contribution that Canada can make in this area. This office would also have the responsibility for directing technical assistance programs, drafting the initial human rights framework and convening the international conference, as well as coordinating educational programs (see recommendation 6).

3) **Creation of a Central Data Base**: Establish a central data base which would house information on the weakness of civil rights in new democracies, as well as the experience and expertise of Canadians working in related areas.

Such a data base would serve several purposes. One would be to develop a comprehensive sense of the dimensions of the problem in a way very similar to the activities of a variety of international

actors in systematically accumulating information about human rights abuses. Nothing of this nature exists in the area of civil rights and their enforcement, and would be an important complement to the ongoing working of the human rights community. In particular, data could be collected dealing with problems in law enforcement, judicial processes and violations of important civil rights. Much of this data already exists and a primary task would be to bring it together in a central location.

Data on the experiences and expertise of Canadians working in related areas is important for at least two reasons. First, it would provide a "catalogue" of Canadian resources in this area. Second, it would facilitate better policy-making by maintaining an accessible public record of policy successes as well as disappointments. Building upon recognized successes is obviously worthwhile. Recognizing less satisfactory outcomes not only will help avoid similar problems in the future, but it will enhance the credibility of Canadian policies helping to ensure that expectations remain realistic.

4) **Identify Local Partners and Build Coalitions to Back Reform**: To be effective, Canadian aid policies need to identify appropriate local partners and build coalitions that support greater guarantees for civil rights and democratization initiatives in recipient countries. There is a danger with any aid program that potential recipients will accept projects because of the promise of resources. But without any real commitment to achieving their goals, such projects will ultimately not succeed. This is particularly true in the case of civil rights and democratization projects, where undemocratic elements within the state may come to play a pivotal role given the weakness of democratic institutions. Such problems can be overcome only by working with actors within national institutions that truly believe in international human rights standards. One possible test for such a commitment on the part of governmental actors could be the requirement that potential aid recipients assess if the proposed project's practices are consistent with the human rights framework and publicly report the assessment locally. If they are willing to do this, then the necessary commitment would appear to exist.

In many instances, however, civil society actors might be the preferred recipients of project aid. All of the conference participants stressed the importance of involving civil society actors in all aspects of policy-making and execution. Canada should take a lead in identifying prospective partners and helping to facilitate the emergence of local civil rights/pro-democracy coalitions that then could work with and through domestic government institutions to advance agendas consistent with the human rights framework.. Civil society actors should be identified in terms of their expertise, capacity and areas of specialization. By coordinating these efforts with educational efforts (see recommendation 6), moreover, Canada can play an important role in helping to create local capacity and at both the levels of civil society and the state for implementing effective projects consistent with the human rights framework.

An excellent example of this kind of activity is the Center for the Study of Violence of the University of São Paulo in Brazil. It is involved in identifying and bringing together local actors committed to a human rights framework and conducting workshops related to issues of justice in order to raise

public consciousness of problems and alternative solutions. The Center also has extensive international connections, including ongoing relationships with various Canadian foreign policy actors.

5) **Establish On-going Dialogue Among Relevant Actors**: There is a desperate need to establish on-going dialogues between civil society actors, state actors and the Canadian foreign policy community in recipient countries. This is essential for several reasons. First, it will allow for the strengthening of coalitions committed to the human rights framework. Second, it will allow that framework to be implemented in ways which are sensitive to local customs and priorities. The framework should guide policy decisions, but its interpretation must be made flexible in line with the feedback continuously collected from recipient countries. Again, the example of the Center for the Study of Violence of the University of São Paulo provides model to follow in other countries. Such networks and dialogue will also help ensure transparency and accountability in Canadian supported projects, an essential element for maintaining support for such activity in Canada. Through dialogue and effective networking, democratic principals of participation and transparency will also be put into practice directly in concrete ways on a daily basis in the recipient countries themselves. There can be no more effective mechanism for the consolidation of democratic regimes in long term.

6) **Human Righs Education in Canada and Recipient Countries**: The basic thrust of this foreign policy initiative needs to be undergirded by appropriate educational policies. Such policies should be designed to promulgate the human rights framework under the coordination of a central office or department (see recommendation 2). It would have two distinct target groups: Canadians in the foreign policy community, particularly those who work in recipient countries, and as wide an audience as is feasible in recipient countries.

It is important that Canadians working on issues related to civil rights and democratization be knowledgeable about the human rights framework in all of its dimensions. However neat the distinctions may appear on paper, in the field the true multi-dimensional nature of these problems quickly becomes obvious. In particular, it is imperative that people sent out on foreign assistance projects be capable of doing everything that they are asked, and that their activities are consistent with the human rights framework. In-house workshops, seminars and short background papers can address this.

Within recipient countries, educational activities should be directed at providing civil society actors and government officials with an appropriate understanding of the human rights framework and its implications. Such efforts, realized through workshops and seminars, could contribute to the strengthening of coalitions in support of civil rights and democratization initiatives. They can also contribute to increasing the capacity of both the state and civil society to create an environment more hospitable to the effective exercise of civic and democratic rights.

Education projects, both in Canada and recipient countries, should be organized in close cooperation with the networks discussed in recommendation 5. This will help ensure appropriate policies in tune

with the priorities of local actors. It will also strengthen fundamental democratic norms of participation and transparency by example, contributing to democratic consolidation over the long term.

7) **A Team Approach**: Consistent with all the above, future initiatives should emphasize a team approach. The holistic nature of the human rights framework, as well as the democratic norms that underpin it, suggest that people with a range of expertise and variety of experiences should work together for effective project design and implementation.

Section II: Rapporteur's Report, prepared by Tamara Sorger (FOCAL)

Thursday March 19
Panel One: Human Security and Citizenship: Who is a Citizen and what does that Mean?

Philippe Schmitter -- Citizenship without Nationality (The EU)

Despite the fact the European democracies are widely accepted to be fully consolidated, the EU offers fertile ground for the study of citizenship due to its non-nation,/non-state status. Europe, Schmitter highlights, is the first political unit with universal citizenship. Furthermore, the EU is not democratic but it expects its citizens to be so.

Synoptically, Schmitter outlined the three meanings of citizenship:
1) Citizenship is a status or condition which grants certain rights to groups.
2) It refers to a practice of rights within an unequal system.
3) It produces a specific result -- the integration of citizens into the norms of a polity.

New form of citizenship presented by the EU-- transnational while retaining national ties. There is a widely held assumption that citizenship is a property exclusive to individuals, but Schmitter argues that this is no longer true. Today, citizenship is more relevant to organizations because those individuals who are not members of organizations enjoy formal citizenship rights, but they cannot execute them. In proposing the idea of ORGANIZATIONS AS CITIZENS, Schmitter is forcing us to reconsider whether citizenship is a property of individuals or of the groups to which those individuals belong (as members). He is also challenging us to consider how to make organizations into effective citizens.

Schmitter offered a number of "modest democratic" recommendations including:

*   to include (Europe-wide) referenda in elections on issues pertaining to the EU (ie: single currency).
*   to have parents vote for their children, and therefore, for future generations of Europeans.
*   to have electronic voting throughout Europe to facilitate and expedite the voting process, but also to facilitate referenda.

James Booth -- Ethics and Membership

Booth posed a number of questions concerning the theoretical implications of citizenship. These included: how does the universality of liberal norms help us think about citizenship in a context of distinctiveness?; what is the role of collective memory in shaping identity and restricting political (community/group) membership?; and how were the ideas of membership and exclusion (strangers to a group) originally constructed.

Booth focused on the politics of collective memories, and pointed out that the notion of "one past, one history" has dominated the nation state since the time of the Greeks. Nevertheless, the liberal response to collective memory is amnesia. Liberals instead look to the rule of law, and challenge the assumption that certain citizens should be privileged over others. Booth turned to Habermas to expound upon a "middle-path to liberal conceptions of citizenship. Such a path would focus on questions of immigration, particularly the dichotomy of discriminating on the basis of race and/or ethnicity. Booth also discussed the paradox of universal liberal principles and the notion of (exclusive) collective memory. He raised a number of profound theoretical questions, the most notable of which were the Habermaisan questions of whether or not history can be generalizable, and how value laden (in terms of moral and social responsibility) is amnesia?

Philip Oxhorn, Social Inequality, Civil Society and the Limits of Citizenship

Oxhorn discussed citizenship as a socially constructed phenomenon, ie: that citizenship consists of socially constructed actions. Oxhorn stressed that even within a political community, the construction of rights is differential. Oxhorn then discussed how the elite nature of recent transitions to democracy in Latin America, combined with processes of economic change which are a result of the adoption of a new, outward oriented economic development model, has stymied the process of citizenship construction. The result is that while the majority of Latin Americans now enjoy unprecedented political rights, their civil rights are often severely circumscribed as their social rights of citizenship diminish.

Commentary: Nancy Thede and Chris Manfredi

Thede supported Oxhorn's arguments, claiming the International Centre for Human Rights and Democratic Development defines citizenship along similar lines. She stressed that state action can and does undermine civil society. Thede concluded by saying that new movements, such as indigenous movements, are forcing us to reconsider and redefine democratization.

Manfredi's commentary focused on the themes which had been raised in the three presentations, namely, the expansion of citizenship to include new actors/issues such as gender, labour etc. The themes which struck Manfredi most were: the issue of exclusion or

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who is considered/not considered a citizen; and identifying means of removing barriers to citizenship. The discussion also highlighted that terms insider and outsider should not be applied only between communities, but within communities also. On Schmitter in particular, Manfredi suggested that becoming a citizen may, in fact, be increasingly less important on an individual level, yet it remains of the utmost importance as a legal category. Booth's presentation led him to a similar conclusion, said Manfredi. According to Booth, the legal erosion of the distinction between citizens and non-citizens may mean that being a citizen becomes less important than being part of a community.

Discussion:

Booth asked why political amnesia is important or necessary, why not require (instead) that new members of a group take on the burdens of the past?

Zammora: Citizenship via struggle is questionable. There is an assumption that struggles of this type are national struggles, but often they are social struggles. Furthermore, when considering struggles for citizenship or other ends, one must also consider links to international community etc.

Schmitter: Accountability is the key to democracy he commented and officially disputed the definition offered by Thede. The EU is a perfect example of why Thede's definition is wrong. For the EU, the external security situation has been resolved, there is no external security threat to the EU. We must therefore, begin to think about citizenship in a context of perpetual peace -- what does it mean to be a citizen when war is no longer a factor? The functional equivalent of war, he concluded, is international diffusion.

Panel Two , Once Peace is Restored: Designing Civil Rights and Implementing Enforceable Laws.

Terry Lynn Karl and Ruben Zammora: Democratization in Uncivil Societies

Karl stressed the need to de-criminalize security institutions as we reform them. In order to be able to do so effectively, she argued, we must be familiar with the exit situation of the previous regime/system. For example, the rule of law existed before the departure of apartheid in South Africa, but there was no commensurate institutionalized system of legality in El Salvador. The duration of the war, and how long uncivil societies have been permitted to grow is also key, according to Karl. Zammora re-iterated Karl's point and highlighted the important role which truth commissions can play in transitions. Such enterprises are necessary for maintaining impunity from the previous era, for providing a foundational basis for the development of respect for the rule of law, and to compensate for the weakness of the rule of law prior to the transition.

Karl went on to argue that certain things are necessary for a viable legal system. These include:

*   the political capacity to implement decisions.
*   truth commissions in transition phase to facilitate rule of law in future. For example, truth commissions can impart standards, particularly for the presentation of evidence.
*   faith in rule of law in civil society (again, this can be kick-started by a truth commission in transition phase).

Kathryn Hendley, Legitimizing Judicial Institutions: Russian Economic Courts in Transition.

There are two hierarchies of courts in Russia began Hendley: those dealing with citizen's cases and those whose jurisdiction is economic. Hendley's presentation focused on arbitrage courts. In order to build legitimacy in a court system, argued Hendley, there must first be capacity (for the court to function). By this, she explained, it means that the state must not merely create an institution, it must also endow the court with the authority of the state. Of course, this must be coupled by close observation of how one goes about creating trust and respect for the courts as being endowed with the authority of the state, while necessary, may not be sufficient to make the court credible. Hendley went on to discuss the intricacies of access to the courts, the complexity of the system (particularly on the question of enforceability), and the cost.

Justice Gerald Lapkin, A Globalized Approach to Public Accountability: How Citizens Can Watch the Watchman.

Lapkin stressed the need for universal norms and professionalism for law enforcement purposes. He also discussed the need for creating credible juridical systems, a problem which was addressed in Canada through the justice of the peace program. By exerting citizens into the power structure, one can also create credibility in the legal system, he argued. What Lapkin's presentation made pointedly clear is that to make the legal system more democratic, effective and credible, one needs to look well beyond juridical reform per-say. Lapkin delved into the justice of the peace program and how it has facilitated policing in Ontario.

Joseph Thome: Presentation focused on the unequal distribution of law (will need to see the paper).

Paulo de Mesquito Neto, Police Reform in Latin American Emerging Democracies: The Experience of Brazil.

Neto began his discussion by focusing on community policing. He pointed out that, in Brazil, there is no institutional separation between the police and the armed forces, ie: the police also lack civilian oversight and are often overseen by the military. In states which have recently been through/are in the process of transition, the authoritarian legacy must not be underestimated. The historical baggage of authoritarian regimes can greatly impede the efficacy of police reform. Such baggage may include: a high degree of tolerance for the use of violence, a high degree for clientelism.

Nevertheless, there is wide support for community policing in Brazil, he claimed. The current debate in that country is now focusing on the scope of police reform and the type/form of community policing. The police perspective is elitist in nature, where citizens are allowed to help the police by making suggestions but are excluded from the policy making process. From the civil society perspective, there is a need for broader police reform with a much larger civil society component in the policy making process.

Commentary: Peter Solomon and Yvon Dandurand

Peter Solomon focused his comments on the Russian situation and the legal transition from authoritarianism to modern order. He called for a study into the evolution of modern order in Western Europe, so as to better understand the point of departure of modern order. We need to learn from history he commented, and that we should look to historical success stories, particularly how and why they happened. In the Russian case, he said, major judicial reform has taken place, but it has done so in an environment which is inhospitable to improvement. There continue to be life-term appointments for judges in Russia for example. Solomon also raised the questions of: constitutional review, fairness (inquisitorial vs. adversarial system), the effectiveness of lawyers, pre-trial examinations and funding. In response to Hendley's point that Russians seem to prefer personal dispute resolution mechanisms to formalized procedures, Solomon called for more reflection of society in judicial reform.

Dandurand commented that international cooperation in this arena is still quite new, and mercurial. Although the international community now sees legal and police reform as a priority, tight (state-imposed) constraints on international cooperation remain in place. He warned that "good intentions" can lead to more problems where those offering assistance do not fully understand the context which they are studying. Dandurand also addressed the issue of technical assistance and the transnational nature of crime.

Hendley replied that it is crucial that we continue to observe reforms well after legislation has been passed. She asked if anyone is actually paying attention, because, although everyone looks at reforms and recognizes the need for reform at the institutional level, the social level (ie: the repercussions of those reforms) are often overlooked.

Zammora warned of equating legitimacy of the police with that of the judiciary. He argued

that these are two separate spheres with different levels of legitimacy.

Karl pointed to increased death squad activity within the police, and argued that this is a reflection of the lack of legitimacy in the judiciary, ie: it is commonly believed that criminals escape conviction or the court route is too slow and that justice needs to be taken into ones own hands. Reform, she warned, is not a linear process. She also stressed that democracy cannot exist without the rule of law. The rule of law is a critical source of accountability she concluded, elections have proven to be insufficient.

Thome answered that the complexity of the juridical system is such that there cannot be a litmus test! Too many institutions and actors are involved, if we just look at one, we run the risk of missing too much.

Lapkin called for the incorporation of community members into the bench (as is done in the justice of the peace program). The issue is not about creating a civilian bureaucracy, he argued, but about incorporating civilians into the process.

Friday March 20

Panel Four, Accessibility for the Most Vulnerable: Extending Citizenship and Security to the Disadvantaged.

James Holston, Citizenship in Uncivil Democracies

Holston's discussion focused around the quality of democracy in Third Wave Democracies. The rule of law, and other democratic institutions per-say do not address the question of democracy he argued. Holston argued that democracy needs to be evaluated in terms of the substance of citizenship (social and cultural), not just political analysis. Democracies, he suggested, can be even more pernicious than authoritarian regimes which is why it is vital to monitor the social repercussions of democracy. Democracy, he reminded the group, can be disjunctive.

Electoral democracy, suggested Holston, becomes "uncivil" where it is lacking the socio-cultural requirements for democratic citizenship. A democratic society is one where citizens widely exercise citizenship and membership, and there is widespread accountability. Disjunctive democracy refers to polities where citizenship can expand in one arena while simultaneously contracting in other arenas. A democratic rule of law is just one tenet of democracy he concluded. Democracy also requires: fair trials, access, universality and accountability.

Teresa Caldiera: Women's Movements, Individual Rights, and the Boundedness of the Body in Brazil

Women's movements offer a strategic perspective from which to look at the consolidation of democracy in Brazil, argued Caldiera. She claims that this is true because women's movements force us to transcend standard political science approaches. Women's movements have created new political and social spaces in Brazil, and the restrictions which are placed on women's movements sheds considerable light on the limits of democratization and political democracy.

Individual rights are inseparable from conceptions of the body in Caldiera's analysis. Civil rights have never been respected in Brazil, which in large part explains how socially interventionist norms and conceptions of reproduction have been able to evolve there. Synoptically, the (female) body is unbounded in Brazilian culture. The de-legitimization of individual rights is a counterpart of unboundedness of the body. By unboundedness Caldiera means that the body is permeable, open to intervention, malleable, and unprotected in terms of formal/liberal rights. Not surprisingly, therefore, unboundedness leads to lack of respect for human rights and increased support for the death penalty. It is very closely connected to the rule of law and access to the judicial system. The objective of Brazilian feminists, who are very well organized and influential, is not equality but entitlement (to individual and gender specific rights). Caldiera concluded by acknowledging the paradox of seeking boundedness, as boundedness is a patriarchal concept and is subsequently problematic. Given the alternatives for Brazilian women, argued Caldiera, it is the best option at this time.

Heinz Klug, Civilizing Nonnegotiable Conflicts: The Constitutional Court's contribution to the Institutionalization of Democracy in South Africa.

Klug's presentation raised a number of troubling questions about the democratic nature of constitutional courts, and the courts commitment to promoting pluralism in South Africa in particular. He discussed the role of human rights in transitions to democracy and the manipulation of international law to protect segregation in the South African context. he sighted an example of an Afrikaner group who were usually international law on the protection of minority culture to maintain an all-white school.

Nareen Subramanian: Which law Shall Rule? Secularism, Statecraft and Citizencraft in India.

Subramanian began by presenting the ominous specter that secularism, at least in the Indian context, can potentially be used as an excuse for authoritarianism. He raised the issues of securing good governance, and the necessary institutions for ensuring good governance. He concluded by arguing that the idea of pluralistic legal systems have existed in South Asia since the pre-colonial era, and concluded that there is no ready line between secularism and democracy.

Discussion: Kathryn Sheppard

Sheppard's question to Holston was: how do we move forward to enforce citizenship rights while maintaining the institutionalization process. Synoptically put, her question was: how do we make emerging democracies more civil? Sheppard's question to Caldiera was: how does one develop the notion of individual rights within a context of unboundedness? Simply put, how does one push the rights discourse forward, beyond a mere retreat to liberal rights? She asked Klug to elaborate further on the manipulation of international legal norms and Subramanian to take his discussion one step further to show how citizenship could be defined to encompass both individuals and groups.

Holston answered that the rule of law is necessary but insufficient for democracy. The positivist nature of the law, ie: he cited the way that the courts can transfer blame to the citizenry as evidence to support his argument. Holston went on to say that he is interested in looking at how the rule of law plays itself out in democracy. He challenges the assumption in democratic theory that political democracy will produce a democratic rule of law. We need to shift our focus away from the institutions, and to the quality of both democracy and the rule of law.

Klug gave a synoptic account of the evolution of the court system in South Africa, and the unique position of the constitutional court since the transition. Until South Africa has clearly defined legal norms, it will continue to refer to international law to guide its judicial decisions. The court creates a dialogue, but it uses international law to bound that dialogue while maintaining the flexibility to revert to tradition if necessary.

Discussion:

Karl asked Klug about the origins of the legal tradition of the constitutional court, and its potential durability in a one party (ANC) system. She also asked him to further explain the separation of powers. Karl also asked Holston to define what he means by "uncivil" in his discussion of uncivil democracies.

Klug echoed Karl's concern that the ANC has the potential to become a hegemonic party much like the PRI in Mexico. Holston answered that although he does not have an exact definition of uncivil, it reflects the conjunction between legal and police practices and social norms. Uncivil, for Holston, is a combination of democratic electoral systems with systematic flaws (ie: a legal system which is illegitimate due to impunity, widespread violations of civil rights). Uncivil democracies are democracies with discredited institutions. The increasing demands for private security and legal solutions illustrate such a disjuncture.

Plenary: *Violence, Difference and the Democratic Challenge*

Hugo Fruhling, Implementing Enforceable Laws: The Difficult Transition of the

Carabineros in Chile

Fruhling gave a historical synopsis of the evolution of the Carabineros in Chile. It became clear that the Carabineros were a result of the military regime and the security context in Chile at the time. He framed his discussion around three issues: the rise of crime and the fear of crime; the current changes which are underway in Chile highlighting fact that you cannot change the legal system without also changing the police; and that, since the civil war, the main perpetrators of violence have been the police.

The transition to democracy brought about a crisis for the Carabineros. The long-standing debates around training and leadership (ie: should it be civilian or not), have resurfaced. But the issues of increased crime and insufficient capacity have also come to the fore. Not only will the Chilean state need to put more money towards policing to curb the surge in criminality, but it will need to increase the salaries of the Carabineros if order is to be maintained (salaries are currently very low).

A number of options and issues are currently being discussed. These include: programs in "citizen security," where to investment capital, ie: equipment?, and how to make the Carabineros accountable? Serious clashes between the Carabineros and the state have resulted from these discussions. Despite the gravity of the problems the future for Chile, according to Fruhling, looks good -- the distorted model of policing has been exposed and it is unlikely that the police can continue to be autonomous and democratization coupled with economic growth has seen a decrease in human rights violations.

Neelan TiruchelvanmThe Crisis of Constitutionalism in New Democracies: The Securing of Minority Rights in Plural Societies.

Tiruchelvam focused on the contradictory outcomes of constitutionalism. In particular, he examined how the constitution has responded to challenges of ethnicity. After providing a historical overview of the evolution of constitutionalism and the tensions and oversights of the elites in this process, Tiruchelvam discussed the question of constitutionalism and the democratic ideal. He stressed the importance of value formation, and the challenges of building civic values with communitarian and democratic roots. Tiruchelvam stressed the need to transcend the notion of individual based rights, and to focus the discussion more on rights as they relate to tradition and to the cultural context of Asia.

He then switched the focus of his discussion to how constitutions have responded to the challenges of diversity in a number of different environments. Tiruchelvam also discussed the difficult questions of consociationalism and human rights and the complexity of the issue of minorities, especially minorities within minorities. Tiruchelvam concluded that the political compact is no longer viable and that civil society must be incorporated into constitution formation.

Commentary: Philippe Schmitter

Schmitter gave a comprehensive summary of the conference. He drew a "triangle of legitimacy" which tied all of the themes which had been discussed over the previous two days together. He asked a number of questions/issues which struck to the root of the discussions such as:

What is the relationship between federalist formulae and with other kinds of cleavages (ethnicity, linguistic cleavages)?
The fundamental importance of the timing of democratization and its many components ie: when should constitutionalism be introduced into the transition process? When do guarantees need to be given?
What is the relationship between human rights and identity formation?
The impact of examining the local/regional/national versus the international context.
Is the rule of law good/bad in and of itself?
What are the components of state building, regime consolidation and the rule of law?
Can you rule of law too much and too soon?
Does having presidentialism or parliamentarianism matter?
Is it sufficient to have a "maximal winning coalition" -- do we not then risk getting caught up in methodology and missing out on the content?
How do parties (which were entirely overlooked in the deliberations) aggregate ethnic demands? -- can ethnic identities be formulated in tolerant ways? How are parties constructed?, and how can politicians be professionalized?
Do we need to put qualifiers on our definitions of democracy and the rule of law?
How many undemocratic deals need to be made to get democracy?
He reminded the audience that democracy is built on a tension between accountability and representation. Democracy is a "moving target", of new sets of ideas.

Klug commented on the issue of sequencing/timing with an anecdote from the South African experience. South Africa, reached an agreement via the United Nations, which was developed by South Africans, endorsed by the international community and then given back to South Africa.

Karl commented on the intra-state changes of wars, which is best depicted by changes in the behaviour of the Security Council. She asked if wars between states can be seen the same way as wars within states? She also raised the issue of needing consensus (particularly with elites) in order to implement socio-political change/reform.

Appendix 1
Final Conference Program

Democracy and the Rule of Law:
Institutionalizing Citizenship Rights in New Democracies

McGill University, March 19-21, 1998

Wednesday, March 18 : 7:30 P.M.

I.   Opening Session Keynote Address

   David Malone, Director General of Global and Human Issues, Department of External
   Affairs and International Trade, Canada

   Lois Wilson, Board of Directors, International Centre for Human Rights and Democratic
   Development

Thursday, March 19 : 9:00 A.M. - 12:00 Noon

II.   Human Security and Citizenship : Who is a Citizen and What Does That Mean?

Chair: Antonia Maoini, McGill University

   W. James Booth, Vanderbilt University. **Ethics and Membership**

   Philip Oxhorn, McGill University. **Social Inequality, Civil Society and the Limits of**
   Citizenship

   Philippe Schmitter, Stanford University. **Citizenship Without Nationality Or Can There Be**
   Such A Thing As A European Citizenship?

Discussants :

   Nancy Thede, International Center for Human Rights and Democratic Development

   Christopher Manfredi, McGill University

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2:00 P.M.- 5: 30 P.M.

II.   Once Peace is Restored : Designing Civil Rights and Implementing Enforceable Laws

Chair: Jean Daudelin, Canadian Foundation for the Americas

> *Terry Lynn Karl, Stanford University, and Rubén Zamora, Member of Parliament, El Salvador.* **Democratization in Uncivil Societies**

> *Kathryn Hendley, University of Wisconsin, Madison.* **Legitimizing Judicial Institutions: Russian Economic Courts in Transition**

> *Justice Gerald Lapkin, Ontario Police Complaints Commissioner, Ontario Police Complaints Commission.* **A Globalized Approach to Public Accountability: How Citizens Can Watch the Watchmen**

> *Joseph Thome, University of Wisconsin, Madison.* **Judicial Reforms and the Transitions to Democracy in Latin America**

> *Paulo de Mesquita Neto, Center for the Study of Violence, University of São Paulo.* **Police Reform in Latin American Emerging Democracies: The Experience of Brazil**

Discussants :

> *Peter Solomon, University of Toronto*

> *Yvon Dandurand, Director of Policy Development and of the Human Rights Program, International Centre for Criminal Law Reform and Criminal Justice Policy*

Friday, March 20:   9:00 A.M. - 12:00 Noon

IV.   Accessibility for the Most Vulnerable : Extending Citizenship and Security to the Disadvantaged

Chair: Lee Maclean, McGill University

> *Teresa Caldiera, University of California, Irvine.* **Women's Movements, Individual Rights,**

and the Boundedness of the Body in Brazil

Heinz Klug, University of Wisconsin, Madison. **Civilizing Nonnegotiable Conflicts: The Constitutional Court's Contribution to the Institutionalization of Democracy in South Africa**

James Holston, University of California, San Diego. **Citizenship in Uncivil Democracies**

Narenendra Subramanian, McGill University. **Which Law Shall Rule? Secularism, Statecraft and Citizencraft in India**

Discussants :

Colleen Sheppard, Faculty of Law, McGill University.

2:00 P.M. - 5.30 P.M.

IV.   Plenary : Violence, Difference and the Democratic Challenge

Chair *: Carmen Sorger, Department of External Affairs and International Trade*

Hugo Fruhling, Centro de Estudios del Desarrollo, Santiago. **Implementing Enforceable Laws: The Difficult Transition of the Carabineros in Chile**

Neelan Tiruchelvam, Member of Parliament and the Law and Society Trust, Colombo. **The Crisis of Constitutionalism in New Democracies: The Securing of Minority Rights in Plural Societies**

Discussants :

Philippe Schmitter, Stanford University.

Saturday, March 21 :   9.00 A.M.

V.   Policy Roundtable

Appendix 2
Policy Roundtable Participants

Jeff Clark, Human Rights Research and Education Centre, University of Ottawa

Yvon Dandurand, International Centre for Criminal Law Reform

Jean Daudelin, FOCAL

Gerald Lapkin, Ontario Police Complaints Commissioner

Jean Lavoie, Parliamentary Centre

Paulo de Mesquita Neto, Center for the Study of Violence, University of São Paulo

Pushkar, McGill University

Philip Oxhorn, McGill University

Tamara Sorger, FOCAL

Nancy Thede, International Centre for Human Rights and Democratic Development

Neelan Tiruchelvam, Member of the Si Lankan Parliament and the Law and Society Trust, Colombo

Joseph Thome, University of Wisconsin at Madison