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Editorial

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Comme, certainement, tous nos lecteurs, les membres du Comité de rédaction de FORUM ont été choqués par les attaques de New York et de Washington du 11 septembre 2001. Au-delà du respect que l'on doit aux victimes, qui est vraisemblablement mieux rendu par le silence, il nous est apparu important de nous interroger sur la signification profonde de ces événements, à la fois dans ce qu'ils nous révèlent de leurs causes mais aussi pour ce qui a trait aux conséquences pour nos cadres de pensée, nos comportements et notre approche de la règle de droit.

Toutefois, nous pensons que cette réflexion ne peut se faire dans l'urgence. C'est pourquoi nos lecteurs ne trouveront pas dans ce numéro de FORUM des développements dédiés à ces événements, la rédaction ayant décidé d'en maintenir le contenu tel qu'il avait été prévu avant le 11 septembre. C'est dans les prochaines livraisons de FORUM que nous vous proposerons les analyses sur les questions que le Comité de rédaction se pose d'ores et déjà et qui seront complétées au fur et à mesure de l'avancée de notre réflexion.

Les questions auxquelles nous souhaitons que FORUM apporte sa contribution peuvent être résumées ainsi :

- Quel lien existe-t-il entre les attaques du 11 septembre et les disparités économiques et sociales énormes qui subsistent dans le monde, sachant que, selon les statistiques disponibles, une personne sur deux vit avec 2$ par jour alors que les pays développés ont tous diminué leurs programmes d'aide aux pays pauvres?

- Quelles remises en cause pour les modèles sociaux qui ont été développés dans le monde occidental ces événements nous amènent-ils à envisager ?

- Prenons-nous suffisamment en considération les différences de cultures, de valeurs, lorsque nous échangeons avec les autres peuples ?

- Plus près de nous, juristes, quelle signification les attaques ont-elles sur notre rôle, sur la place de la norme juridique, sur la création normative juridique ?

- Plus important encore, quel message doit-on retenir pour l'efficacité et la mise en oeuvre des normes juridiques, sachant que les normes juridiques existaient avant le 11 septembre qui auraient peut-être (certainement ?) pu prévenir les attentats? Rappelons-nous que, au moins depuis 1999, il existait des résolutions des Nations Unies sur le blanchiment de l'argent sale, la

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lutte contre le régime des Talibans ainsi qu'un foisonnement d'autres normes très utiles.

- Ces attentats vont-ils entraîner une remise en cause de l'harmonisation, voire de l'unification internationale des règles de droit ? Cela va-t-il au contraire inciter à plus de coopération dans ce domaine ? Les Etats seront-ils capables (au sens d'une volonté politique) de surmonter leurs intérêts égoïstes pour une meilleure justice mondiale ?

- De quelle manière pouvons-nous contribuer aux défis auxquels nous sommes confrontés, défis qui existaient avant le 11 septembre mais prennent un tour nouveau, une importance nouvelle, depuis cette date ?

Nous souhaitons que chacun d'entre vous prenne le temps d'écrire à FORUM pour nous faire part de vos réflexions en nous adressant soit une télécopie au + 31 70 338 87 73, soit un message électronique à intlaw.forum@worldonline.nl.

Exceptionnellement, cet éditorial est traduit en anglais pour permettre à ceux de nos lecteurs qui ne maîtrisent pas suffisamment la langue française de mieux contribuer à cette discussion ouverte que FORUM souhaite instituer.

Contrairement à la coutume bien établie dans les numéros précédents de FORUM, nos lecteurs ne trouveront pas ci-après de rubrique « actualité ». La raison en est simple : tous les thèmes auxquels nous avons pu penser nous ont paru particulièrement anodins dans les circonstances actuelles.

Nous vous proposons une discussion sur certains points essentiels des réformes aujourd'hui discutées au sein de l'Union européenne dans le tournant historique auquel cette intégration régionale doit faire face. Ce tournant est parfaitement illustré dans l'introduction que nous donne Jean Quatremer qui parle de « l'échec du Traité de Nice », vraisemblablement le mieux illustré par le « non » que l'Irlande a opposé à ce Traité, même si certains veulent en minimiser l'impact en rappelant que les circonstances du référendum irlandais et sa faible participation n'en font pas un résultat significatif. Il n'empêche que l'on ne sait toujours pas aujourd'hui quelles seront les conséquences exactes de ce refus, puisque, normalement, le Traité de Nice, comme tous les Traités européens, doit être ratifié par tous les Etats membres pour pouvoir entrer en vigueur. Les sujets que nous avons sélectionnés ne représentent qu'une petite partie des thèmes que nous aurions pu aborder mais les auteurs qui nous ont fait l'honneur de contribuer participent de manière exemplaire aux grands débats qui nous préoccupent tous.

Comme à l'accoutumée, nous espérons que vous apprécierez les rubriques « profil », « travaux en cours » et « le tour des conférences » qui mettent en lumière des personnalités ou des thèmes de tout premier plan pour le développement du droit international. Que tous soient remerciés de leurs contributions.

Notre troisième année de publication s'achève, le Comité de rédaction donne rendez-vous à ses lecteurs pour une quatrième année qui, nous l'espérons, saura vous satisfaire. Bien entendu, nous attendons avec beaucoup d'espoir et d'intérêt votre participation.

Editorial

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As will certainly be true of all our readers, the members of the Editorial Board of FORUM were shocked by the attacks on New York and Washington on 11 September 2001. Aside from the respect which is due to the victims, which can perhaps best be conveyed by silence, it seemed important to us to reflect upon what is the deeper meaning of these events, both for what they tell us about their causes and also for their consequences for our ways of thinking, our behaviour and our approach to the rule of law.

However, we take the view that this reflection is not something to be done in a state of urgency. That is why our readers will not find in this issue of FORUM any comments dedicated to these events, the editors having decided to keep to the contents which had been planned before 11 September. In forthcoming issues of FORUM we will be offering you analysis of the questions the Editorial Board is already addressing and which we will supplement as and when our thinking matures.

The issues on which we think FORUM should offer a contribution could be summed up as follows:

- What is the link between the attacks on 11 September and the enormous social and economic disparities which persist throughout the world, bearing in mind that, on the basis of available statistics, one person in two lives on $2 per day when the developed countries have all reduced their aid programmes to the poor ones?
- In what way do these events lead us to call into question the social models that have evolved in the Western world?
- Do we take sufficient account of differences in culture, in values, in our exchanges with other peoples?
- Closer to us as lawyers, what significance do the attacks have for our role, on the place of legal norms, and on the creation of legal norms?
- More important still, what message does this send about the effectiveness and implementation of legal norms, knowing that legal norms existed before 11 September which could probably (certainly?) have prevented the attacks? We should remember that, at least since 1999, there have been United Nations resolutions on money laundering, and on the struggle against the Taleban regime, as well as a wealth of other useful norms.
- Will these attacks bring about a rethinking of the harmonisation or even

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international unification of rules of law? Will it have the opposite effect of provoking more cooperation in this field? Will States be capable (in the sense of political will) of overcoming their selfish interests in favour of better global justice?

- In what way can we contribute to the challenges which confront us, challenges which existed before 11 September but which have taken on a new aspect, a new importance, since that date?

We would like each of you to take the time to write to FORUM to let us know your thinking, either by sending us a fax to +31.70.338.8773, or an electronic mail to intlaw.forum@worldonline.nl.

Exceptionally, this editorial appears also in English in order to allow those of our readers with an incomplete mastery of French to have the chance to contribute to the open discussion which FORUM wishes to open up.

By contrast with the well-established practice in previous issues of FORUM, our readers will not find an "In the News" section. The reason for this is simple: all the themes we might have thought of seemed particularly anodyne in the current circumstances.

We offer you a discussion on some of the essential aspects of the reforms currently under debate in the European Union at the historic turning point we have now reached in regional integration. This watershed is perfectly illustrated in Jean Quatremer's introduction, in which he speaks of "the failure of the Nice Treaty", probably best illustrated by the 'no' vote of Ireland against the Treaty, even though there are those who seek to minimise its impact by recalling that the circumstances of the Irish referendum and its low turnout mean that it is not a meaningful result. That said, we still do not know today what precisely will be the consequences of that rejection, because, normally, the Nice Treaty, like all European Treaties, must be ratified by all Member States in order to come into force. The topics we have chosen represent only a small sample of the themes we could have addressed, but the authors who have done us the honour of contributing are taking an exemplary role in the great debates with which we are all preoccupied.

As always, we hope you will enjoy the 'Profile', 'Work in Progress' and 'Conference Scene' sections, which shine the spotlight on personalities or themes in the foreground of the development of international law. We thank everyone who has contributed.

Our third year of publication is coming to a close, and the Editorial Board is preparing for a fourth year which we hope will prove rewarding for our readers. Naturally, we look forward with interest to your participation.

Recurring Themes / Thèmes récurrents

Introduction

JEAN QUATREMER*

L'Union européenne souffre d'une "maladie de langueur". "La plupart des progrès sont le fruit de décisions déjà anciennes. Depuis plusieurs années, l'Union est en panne d'élan et en quête d'identité parce qu'elle n'a plus de projet politique commun en dehors du grand élargissement". On doit ce sévère constat, rendu public le 15 octobre 2001 dans un appel intitulé "Réveillons l'Europe !", à treize anciens dirigeants européens qui ont beaucoup contribué en leur temps à la construction communautaire : on peut citer notamment Jacques Delors, Helmut Kohl, Helmut Schmidt, Felipe Gonzalez, Jean-Luc Dehaene, Etienne Davignon. Il est difficile de ne pas le partager, surtout si l'on a en mémoire le double échec qu'ont été les traités d'Amsterdam, en juin 1997, et de Nice, en décembre 2000. Dans les deux cas, les chefs d'Etat et de gouvernement ont été incapables d'aboutir à une réforme des institutions communautaires qui permettra d'accueillir plus d'une dizaine de nouveaux membres, faute d'avoir fait prévaloir l'intérêt général européen sur leurs intérêts particuliers nationaux. A chaque fois, les grands pays, avec arrogance, ont tenté d'imposer leur "leadership" pendant que les petits défendaient, bec et ongles, leurs avantages acquis. Cet aveuglement laisse pantois l'observateur qui a encore en mémoire le Sommet de Maastricht de décembre 1991 au cours duquel l'Allemagne à peine unifiée a accepté de sacrifier le deutsche mark sur l'autel de l'Europe.

Il n'est pas facile de pointer les responsables de ce qui apparaît comme un épuisement. Il est clair que la course à la qualification pour la monnaie unique et les sacrifices imposés aux populations jouent un rôle non négligeable. L'Europe reprend, en quelque sorte, son souffle. Une partie de l'explication réside aussi dans le changement générationnel : des hommes et des femmes nés après la Seconde guerre mondiale sont arrivés au pouvoir dans les années 1996-2000 dans la plupart des pays de l'Union. Moins pénétrés de l'urgente nécessité de l'Europe, habitués à vivre dans un espace apaisé et surtout tellement évident, ils n'ont pas consacré une énergie suffisante à la question européenne. Ces hommes et ces femmes ont aussi

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mis beaucoup de temps à développer une complicité entre eux – et encore n'est-on pas toujours certain qu'elle existe –, élément essentiel du cocktail bien particulier qu'est la construction européenne. Enfin, la situation politique interne à certains pays a compliqué la recherche d'un second souffle : la "cohabitation" entre un Président de la République conservateur et un Premier ministre socialiste a ainsi paralysé la politique européenne française depuis 1997. L'ensemble de ces éléments mis bout à bout, on comprend mieux pourquoi le couple franco-allemand, pierre angulaire de l'Union, a cessé de fonctionner dans les années qui ont suivi l'élection de Jacques Chirac puis de Gerhard Schröder. Or, faute d'accord entre Paris et Berlin, il n'y a pas d'avancée spectaculaire possible : cela fait plus de quarante ans que l'on sait qu'il n'existe pas d'alliance de rechange.

Cette panne de projet global ne veut pas dire qu'il ne se passe plus rien dans l'Union. Depuis décembre 1998, la défense européenne est sur les rails et une force de réaction rapide verra le jour en 2003. En octobre 1999, les Quinze ont décidé d'achever d'ici à 2004 un espace judiciaire européen. L'intégration économique se poursuit à marche forcée. Les pièces et les billets en euro remplaceront les monnaies nationales en janvier 2002. Le problème est qu'il pourrait s'agir là des derniers feux avant l'effritement puis peut-être l'effondrement faute d'un projet commun reflétant l'envie de vivre ensemble.

Car l'élargissement de l'Union à l'Est, d'ici à 2004, c'est-à-dire demain, impose une véritable réflexion sur l'avenir de l'Europe. Tout simplement parce qu'avec les règles de fonctionnement actuel, l'Union va droit à la paralysie : s'imaginer que l'on pourra décider à 27 voire à plus comme on le faisait à six, c'est prendre des vessies pour des lanternes. Or, le projet impose une architecture institutionnelle et réciproquement. L'un ne va pas sans l'autre.

Cyniquement, on pourrait dire que l'absence de réforme du mécano institutionnel est un projet en soi : la fin de l'Union et le retour aux bons vieux Etats-Nations qui ont pourtant montré tout le mal qu'ils pouvaient faire entre la seconde moitié du XIXème siècle et 1945. En réalité, personne n'a envie d'un tel retour vers le passé. Bien au contraire, car même les moins visionnaires des dirigeants européens actuels savent parfaitement quel en serait le coût. Mais rare sont ceux qui ont le courage d'assumer et de revendiquer les sacrifices de souveraineté qu'implique la poursuite du projet européen. Car, il ne faut pas tourner autour du pot comme on le fait depuis dix ans : l'avenir de l'Europe, c'est la fédération au sens américain du terme. En clair, les "Etats-Unis d'Europe" et non la fumeuse "Europe des Etats unis".

Le premier a l'avoir compris et proclamé est le ministre des affaires étrangères allemand, Joschka Fischer, dans son discours devant l'université Humboldt de Berlin le 12 mai 2000. D'autres, depuis, lui ont emboîté le pas : le Président de la

République Jacques Chirac, le Chancelier Gerhard Schröder, le Premier ministre belge Guy Verhofstadt et, en dernier lieu, Lionel Jospin. Bien sûr, les nuances sont parfois importantes, certains rêvant certes d'une Europe forte mais dotée d'institutions faibles, ce qui est bien sûr antinomique. Seul le chef du gouvernement britannique, Tony Blair, en octobre 2000, a clairement rejeté la perspective fédérale, tout comme les pays nordiques.

Cette prise de conscience progressive d'une partie des dirigeants européens face aux dangers d'un élargissement non maîtrisé n'a pas empêché le Conseil européen de Nice d'aboutir à un échec. La Conférence intergouvernementale (CIG) lancée en février 2000 est en fait arrivée trop tôt, les calendriers juridiques et intellectuels se télescopant. En même temps, cet échec a été salutaire : tétanisés par le déchaînement des égoïsmes nationaux bien peu en rapport avec les proclamations de foi européenne, les Quinze ont accepté la clause de rendez-vous proposée par l'Allemagne : en 2004, une nouvelle CIG, précédée d'une large concertation, sera convoquée afin de préparer "l'avenir de l'Union". En particulier, quatre thèmes devront être abordés : la "délimitation" des compétences entre l'Union et les Etats membres, le statut de la Charte des droits fondamentaux, la simplification des traités et le rôle des Parlements nationaux.

C'est à Laeken, en décembre 2001, que l'architecture définitive de cette nouvelle CIG sera arrêtée. Mais déjà, lors du sommet de Göteborg, les 15 et 16 juin 2001, les Quinze ont décidé que le but de la CIG de 2004 sera plus large que prévu : il s'agira d'adapter les institutions de l'Union "aux nouvelles réalités et aux attentes des citoyens". Lors du Conseil européen de Gand, le 20 octobre 2001, ils sont parvenus à un accord sur la convocation, au premier semestre 2002, d'une "Convention", calquée sur le modèle de celle qui a préparé la Charte des droits fondamentaux, proclamée lors du Sommet de Nice : composée de parlementaires nationaux et européens ainsi que de représentants des gouvernements des Etats membres et de la Commission, elle devra préparer des "options" parmi lesquelles la CIG choisira. L'un des sujets encore en discussion est celui du délai de viduité qui séparera la clôture des travaux de la Convention de l'ouverture de la CIG. Plus le délai sera long, plus les gouvernements retrouveront de la marge de maneuvre, bien évidemment.

En adoptant cette méthode, qui a fait ses preuves lors de l'élaboration de la Charte des droits fondamentaux, les gouvernements ont reconnu tout à la fois leur épuisement et celui de "l'intergouvernemental" pur. Ils ont compris que les ultimes sacrifices en matière de souveraineté nationale ne pourront être consentis que précédés d'un large consensus de la "société civile et politique", consensus qui passe par la mise en place d'une véritable "constituante".

Les attentats du 11 septembre aux Etats-Unis ont aussi causé électrochoc dont

il ne faut pas sous-estimer l'importance. Comme l'a dit Jacques Chirac, dans un discours prononcé à Montpellier, le 4 octobre 2001, "ce qui a changé au cours de ces dernières semaines, ce ne sont pas les objectifs à atteindre par l'Union européenne. Ces objectifs sont connus depuis longtemps. C'est l'urgence qu'il y a désormais à les atteindre". On ne saurait mieux dire. Ceux qui auraient encore hésité face à la tentation du "sondern weg" ont brutalement pris conscience que, seul, on est dramatiquement exposé. Le monde du XXIème siècle impose plus que jamais des regroupements régionaux afin de peser sur les affaires du monde. De ce point de vue, l'accélération de la mise en place de l'espace judiciaire européen décidée au lendemain des attentats montre que la leçon a été comprise : les ministres de la justice sont priés de faire taire leur réticence et leurs susceptibilités souverainistes afin d'adopter d'ici la fin 2001 le mandat d'arrêt européen et l'harmonisation de l'incrimination et de la répression du terrorisme. Mieux : même les Etats les plus farouchement attachés au secret bancaire ont accepté des mesures qui le mettent à mal pour lutter contre l'argent du terrorisme. La période incertaine qui s'ouvre s'annonce comme l'une des plus passionnantes de l'histoire récente de l'Union. D'ici 2004, les Quinze devront choisir clairement entre la dilution de l'Europe et la constitution d'un ensemble géo-politique véritable pendant de la puissance américaine, fut-ce au prix de la dissolution du vieil Etat-Nation.

The Simplification of the Treaties and the Post-nice Constitutional Agenda of the European Union

HERVÉ BRIBOSIA*

A few months before the last Intergovernmental Conference concluded the Nice Treaty, the Robert Schuman Centre for Advanced Studies (hereafter RSCAS) of the European University Institute submitted two reports to the European Commission at its request:[1] the first one on the "reorganisation of the treaties",[2] and the second one on the reform of the treaties' amendment procedures.[3] Obviously, times were not ripe yet to tackle those issues during the IGC, but the "simplification of the treaties" is now one of the four items mentioned in the Nice Declaration on the future of the Union.

The present contribution will address that topic, together with two other items set out in the Nice declaration which are not unrelated, i.e. the legal status of the Charter of fundamental rights and the "more precise delimitation of powers". In addition, a few observations will be attempted on the fourth item, i.e. the role of national parliaments in the institutional architecture, as well as the concept of an *avant-garde* for the EU since this issue pervades the current political rhetoric.

Declaration No. 23 annexed to the Nice Treaty on the future of the Union and the "simplification" of the treaties

One of the four items mentioned in the Declaration on the future of the Union addresses "a simplification of the treaties with a view to making them clearer and better understood without changing their meaning". Such intention could sound

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[1] Both reports are accessible on the web site of the European Commission (http://europa.eu.int/comm/ archives/igc2000/offdoc/discussiondocs/index_en.htm) and of the RSCAS (http://www.iue.it/RSC/ Treaties.html).

[2] "A Basic Treaty for the European Union. A Study of the Reorganization of the Treaties", European University Institute, Robert Schuman Centre for Advanced Studies, Italy, May 2000 (also in French and German).

[3] "Reforming the treaties' amendment procedures", Second report on reorganization of the European Union Treaties, submitted to the European Commission on 31 July 2000 (also in French).

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ironic given the complexity of some of the new provisions in the Nice Treaty itself (notably the reform of qualified majority voting, and article 133 TEC on foreign trade) … But this is not the issue: it is not likely that the results of hard and long negotiated compromises would be reopened just for the sake of simplicity.

So, what is meant by "simplification"?

The concept of "simplification" may seem curious to those bearing in mind that a "simplification" of the treaties has already been achieved by the Amsterdam Treaty, mainly by repealing the outdated provisions. It should also be recalled that the Amsterdam Treaty displays in its Final Act a "consolidated" (i.e. updated) version of the TEC and the TEU, but without merging them. These consolidated texts have become *de facto* the reference to all practitioners, notwithstanding their lack of legal value. Later, the General Secretariat of the Council released a draft unified treaty along the lines of what the national experts had already worked out during the 1996-97 IGC, but just "for illustrative purposes".[4]

So, the least ambitious meaning of the "simplification" envisaged in the Nice Declaration could amount to making *tabula rasa* of all the initial and successive revision treaties, while conferring legal authority upon either the consolidated (updated) version of the TEC and TEU, or an unified treaty merging them. This would already improve the legal certainty of primary law, and also reduce enormously the workload of translation of outdated legal material each time a new Member State joins the Union.

However, one can assume that most of the heads of State had in mind a "reorganisation" of the treaties, in the sense of restructuring and dividing them into two parts: a basic treaty and then the bulk of primary law. This is what the Florence team attempted to do in its first report to the Commission.

Context of the RSCAS' reports to the Commission

The idea of splitting up the treaties had already been put forward in a previous report of the RSCAS in 1998 for the European Parliament (the so called "Amato report").[5] The Group of Wise Men chaired by Dehaene found the idea attractive and therefore recommended to the Commission to give the RSCAS a mandate to

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[4] In accordance with Declaration No. 42 annexed to the Amsterdam Treaty. It is interesting to compare this draft with a first report by the RSCAS in 1996: *A Unified And Simplified Model Of The European Communities Treaties And The Treaty On European Union In Just On Treaty* , Legal affairs series, W-9 Directorate general for research, L-2929 Luxembourg, also accessible on the RSCAS website (see above).

[5] *Quelle charte constitutionnelle pour l'Union européenne? Stratégies et options pour renforcer le caractère constitutionnel des traités*, Parlement européen, Direction générale des études, Série POLI 105 FR, 1999 (in French only).

finalise its work, but also to combine it with an another proposal of the Amato report, namely to differentiate the Treaty amendment procedure.

At first, the Commission was, from a political perspective, very keen on justifying the reorganisation of the treaties by linking it to having recourse to two different treaty amendment procedures: the fundamental provisions would be revised according to the current procedure (IGC's), whereas the more technical or implementing provisions would be amended according to a more flexible procedure.

But later, both the Florence team and the Commission concluded that drawing such a systematic link between the two operations was somewhat too simplistic and artificial, whereas the consolidation of the treaties in two parts had its own merits, disregarding the amendment procedures. Moreover, the Commission feared in the end, because of the high political sensitivity of the latter, that the Member States would reject the report, including the more acceptable part on reorganisation "*à droit constant*". This is why the RSCAS accepted the idea of splitting the report, and of submitting a second one later which would deal only with the reform of the treaty amendment procedures.

Both reports however make it clear that the issues are not completely disconnected either. It would therefore not be surprising that some still have in mind re-coupling the simplification of the treaties and the "simplification" of the treaties' amendment procedures.

The RSCAS first report on the "reorganisation of the treaties"

The purpose of this contribution is not to give a detailed presentation of the RSCAS reports (which are all accessible on the web, see footnote above), but rather a general overview.

The underlying idea in the first report on the "reorganisation of the treaties" is that the Union by and large already enjoys a constitution, at least from a substantive point of view. The idea is not new, the Court of justice itself referred several times to the "constitutional charter" of the Union. But one has to bring that "constitution" to the fore. So a selection has been made of the constitution-like provisions scattered throughout the treaties (mainly the TEC and the TEU), in order to restructure them into a basic treaty. The *Basic Treaty of the European Union*, and two so-called "special protocols" regarding most of the second and third pillar provisions would thus completely replace the TEU, while respecting at best the law as it stands (*à droit constant*). The remaining provisions of the TEC could also be consolidated in a third Special Protocol, as suggested by the communication of the Commission,[6] but the Group of Florence preferred to keep the shell of the Treaty of Rome.

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[6] *A Basic Treaty for the European Union*, COM (2000) 434 final of 12 July 2000.

On the whole, the communication of the Commission endorses the approach of the report, in particular, the idea of a basic treaty replacing fully the TEU. But it takes no stand as to whether it prefers the long version (including a list of policies) or the short one (although at first it seemed to prefer the long one). Nor does it express preference as to the choice and the content of its provisions. Moreover, it favours the inclusion of more institutional provisions (like the decision-making procedures). The Commission is also likely to consolidate all primary law (including accession treaties), and be it only to a small extent, to depart from the law as it stands in order to simplify the text of the *Basic Treaty*.

In other words, the Commission seems to be willing to go further than the Florence team (which was constrained by its "*à droit constant*" mandate).

Follow up: from a Basic Treaty to a European Constitution?

Put in the new context of the post-Nice constitutional agenda, it would be interesting to reflect further on how the Florence Report could be useful and used in the future, as well as how the reorganisation of the treaties relates to the other items mentioned *inter alia* in the Nice Declaration. In other words, could a basic treaty *à droit constant* be an embryo for a European Constitution?

In its Resolution on the constitutionalisation of the treaties, the European Parliament considers that the Florence project "*goes a good way towards meeting this need of clarity and shows that recasting of the treaties is perfectly feasible from a technical point of view; this constitutes a first step in a 'constitutionalisation' process starting with a revision of the Treaties without departing from the law as it stands, regardless of the positions taken on the necessary reforms*".[7] More precisely, the European Parliament suggests that in a first stage, the European Council gives a mandate to the Council to adopt "such a reorganised treaty" (also referred to as "framework treaty") on a proposal from the Commission, following consultation with the Court of Justice, and after receiving the assent of the European Parliament, as well as the approval of the national parliaments (§ 10). It is then only in a second stage that a "Convention" would draft a proper Constitution by 2004.

The European Parliament approach has to be placed back in the pre-Nice context, where the perspective of working on a European constitution was still chimerical. So a basic treaty *à droit constant* would have seemed better than nothing. After the launching of a "constitutional" process in the Nice Declaration, such an approach appears to have become redundant as it is obvious that the Constitution would very soon replace or amend the basic/reorganised treaties. The Parliament itself

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[7] European Parliament resolution on the constitutionalisation of the Treaties, A5-0289/2000, 25 October 2000, point 5.

seems to have changed its views by now. It is better to combine both stages. This is what the Nice Declaration does by associating the "simplification" of the treaties with other topics, like the legal status of the Charter of fundamental rights, a more precise delimitation of "powers",[8] and the role of national parliaments, without excluding other issues (*inter alia*).

To say the truth, even if the enactment of a constitutional document was to fail in the coming years, it is questionable whether a basic treaty *à droit constant* (like the one drafted in the Florence Report) should be submitted to national ratification, and thus, serve as a substitute to a Constitution.[9] Indeed, the reorganisation of the treaties, and thereby drafting a constitution-like document, would be useful only if a certain number of substantive changes were adopted beforehand. And this for two reasons. One is that the *Basic Treaty* would look less cumbersome than if left as *à droit constant*. The Florence Report did its best to disguise the "messiness" of the Union architecture, but it is not fully convincing. The second reason is that the enactment of a solemn constitution-like document would be more politically relevant if it were accompanied by qualitative improvements.

Thus, it seems meaningless to unify the treaties if it does not go hand in hand with the unification of the Union and the Communities, and therefore with a clear recognition of the legal personality of the Union.[10] By the same token, the pillar structure should be expressed in a much less complex way, e.g. by posing the principle of a unitary system while making exceptions where it is felt they are really needed. By relaxing the pillar structure, the quality of the legal text would also be improved a great deal.[11]

Furthermore, it would make sense to rationalise the typology of norms, as well as the decision-making procedures. The Florence Report left them out of the *Basic Treaty* for they were too technical, and impossible to sum up. Eventually, if the post-Nice process is due to head towards political integration, the "constitutional treaty" should embody a proper, well thought out, political system. This raises then the question of the Union Executive, and the role of the national parliaments (see below).

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[8] Note that a previous wording referred to "competencies" , SN 533/00, p. 83 ("compétences" in French).

[9] Conferring legal validity on the consolidated version of the TEC and TEU would then be the only thing worth doing.

[10] See the, once again, voluntarily ambiguous formulation of article 24 of the TEU, as modified by the Nice Treaty.

[11] The Communication of the Commission goes in the same direction, pp. 5 and 6.

In short, a real "constitution" requires the clarification of basic questions relating to the architecture and the objectives (political or not) of the Union. This is precisely why it is unlikely to happen, as the integration process is precisely based on ambiguous compromises (the principle of subsidiarity being one of the most famous ones).

Nonetheless, a basic treaty drafted *à droit constant,* like the one drafted by the RSCAS of Florence remains very useful for the constitutional process in two respects. First, it shows how a European Constitution (or a constitutional treaty) mainly based on the current treaties could look (structure, entitled clauses, etc.), and how attractive it is likely to be. Second, at the same time, it brings to the fore the incoherence or complexities which deserve to be corrected, as much as it constitutes a "platform" prone to qualitative changes.

By way of conclusion, the *Basic Treaty* drafted in the Florence Report should not serve as a substitute for a European Constitution, but rather as a basis upon which to draft a Constitution (or a constitutional treaty), which should include some qualitative improvements.

Link between a Basic Treaty, the Charter of fundamental rights, and the delimitation of powers

Amongst the issues to be dealt with as a whole, together with the reorganisation of the treaties, the questions of the legal status of the Charter, and of the delimitation of powers between the Union and its Members States, are closely related.

As far as the Charter is concerned, conferring legal validity upon it by incorporating it into the Treaties is already not as obvious as it might seem. The legal complications related to its articulation with the present treaties and the European Convention of Human Rights are numerous.[12] Integrating the Charter into the previously *reorganised* treaties does not make things easier. On the contrary. It is interesting to remember in that respect that the Charter was drafted at the same time as the Florence Report, and that both mandates required in principle the consolidation of the legal situation as it stands (*droit constant*). Of course, the drafters of the Charter had more room for manoeuvre as they could take into account international instruments as well as "the constitutional traditions common to the Member States".[13] Yet, they also had to include rights based on the TEC and the TEU, notably the European citizenship and the principle of non-discrimination.

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[12] See, on that matter, the Editorial of Judge M. Wathelet in the latest edition of the *Cahier de droit européen*, 2001, p. 585.

[13] Article 6, § 2 of the TEU.

The problem is that in those cases the Charter had recourse to the technique of "*duplication*" ("*dédoublement*"), i.e. it paraphrases the current treaties without amending them. Thus, the title on citizenship in the TEC would remain untouched, and would be partly duplicated in the Charter. [14] This is exactly what the Florence group decided not to do with the *Basic Treaty*, which *replaces* the TEU and some of the provisions coming from the TEC. Therefore, the incorporation of the Charter into the Treaties, possibly in such a basic treaty (preamble or first chapter), could be highly problematic. Either part of the Charter would have to be redrafted (for proper "replacement" and articulation with the treaties), which would be politically extremely sensitive, or "duplication" would have to be taken up for the whole basic treaty … (which is less useful, even counter productive, and would create addtional legal confusion).

As for the "more precise delimitation of powers", the first question is of course whether it should be improved while respecting the law as it stands (*à droit constant*), possibly by including the case law of the ECJ ('restatement'),[15] or whether substantive changes are envisaged. According to well-informed officials, it should be *à droit constant,* although some Member States will probably try to re-nationalize some European policies. The point is that if it is *à droit constant*, without judicial restatement, it becomes a part of the exercise of "reorganisation of the treaties". In that respect, the long version of the Florence draft *Basic Treaty* displays what might look like a *kompetenzkatalog*, although the list tends to specify the Union objectives. There are no operative legal bases. Such a list might well improve the readability of what the Union is actually meant to achieve, but it gives a wrong image of the relative weight and importance of each policy. In any case, the powers would not be better circumscribed.

Those rather technical questions could well have an impact on the process itself that the European Council of Laeken will have to launch in a declaration by the end of 2001. Thus, the legal services of the Commission, the European Parliament, and of the Council could prepare the issues which are supposed to be dealt with "*à droit constant"*, and then submit them for approval by the Convention preparing the ground for the 2004 IGC, the main task of which would be to address the substantive reforms. In the end, both exercises would have to meet, as the substantive

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[14] See article 52, § 2 of the Charter: "Rights recognised by this Charter which are based on the Community Treaties or TEU shall be exercised under the conditions and within the limits defined by those treaties"

[15] See the attempt at restating the ECJ's case law in the Treaty establishing the European Community by the *Center for European Legal Studies of Cambridge*, introduced by A. Dashwood and A. Ward, *European Law Review*, 1997, p. 395.

changes would have to be incorporated in the basic and/or reorganised treaties.

This leads us to the treaties' amendment procedure, and the ideas outlined in the second report of the RSCAS to the Commission (*supra*).

Before that, more can be said on the issue of a "more precise delimitation of powers between the European Union and its Member States", and some remarks will be made on another institutional item mentioned in the Nice Declaration, i.e. the role of national parliaments.

Delimitation of powers: substantive and/or procedural?

The Nice Declaration points out that a more precise delimitation of powers should be not only established, but also "monitored". This means that the envisaged improvements should be not only substantive, but also procedural.

Some would even argue that a vertical substantive delineation of powers is very difficult to achieve in an ever interdependent world, and therefore that the competencies are destined to be shared and to overlap each other in many different ways. Whenever the Member States attempt to put substantive constraints on the powers of the Union at the treaty level (subsidiarity, the Maastricht Treaty new "complementary" competencies), they tend subsequently to disregard this kind of formalistic considerations anyway.[16] It is mainly the political will that counts. Furthermore, the Member States remain the main actors in the decision-making process, and thus, retain the main responsibility for the legislative output of the Union. Similarly, very detailed provisions often stem from the Member States themselves, because of lack of mutual trust.[17]

So the question would rather be: who is (the pretext of) a legal (and thus "justiciable") vertical division of powers supposed to protect? Obviously, the members states placed in the minority in the Council, and also the national parliaments which are supposed to ratify the transfer of competencies to the Union. So, there is a need for procedural adaptations taking more specifically those two elements into account, including allowing for opting out and increasing the role of national parliaments. I shall move on to these two issues next, although in more general terms.

Does this mean, however, that nothing can be done to clarify the vertical division of powers? It seems difficult indeed, and perhaps even counterproductive, to delineate more precisely the substantive scope of action of the Union, and the concept of a "list of powers" is too simplistic. Nevertheless, efforts could be made

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[16] Another good example is the extent to which the Member States and the European institutions "denatured" the directive, or where they have recourse to "atypical" instruments.

[17] On these arguments, see authors like G. De Burca, R. Dehousse and G. Majone.

to rationalise the articulation of competencies and norms between the two levels of powers, e.g. by spelling out what "exclusive", "concurrent", "implementing", "shared", "complementary", "parallel", or "implied" powers (or competencies) mean exactly, or by defining more strictly the legal effects of the typology of norms (and sticking to them, unlike the fate of the directive …).

The role of national parliaments in the European architecture: towards a "high Chamber"?

The resurgence of the debate on a possible role to be played by the national parliaments is revelatory of the problems that the European Parliament itself is facing to assert its authority, to work efficiently, and to legitimise the integration process. Therefore, the first thing to do would be to tackle that very problem (a true transnational political party structure, uniform electoral system partly based on transnational lists, etc …). Setting up a new assembly composed of members of national parliaments would, on the contrary, undermine even more the authority of the European Parliament (which used to be composed the same way until 1979 …), be it only to carry out a political review on EU business (as T. Blair suggested in his speech to the Polish Stock Exchange, 6 October 2000). And it would certainly overly complicate the institutional system.

By contrast, the recent ideas displayed by J. Fischer and G. Schröder to transform the Council into a « *Bundesrat* » of the Union, i.e. as the second chamber of a bicameral system together with the European Parliament, stick much closer to the current situation: it would amount to generalising the co-decision procedure for legislative acts. The German *Bundesrat* is indeed a perfect example of a "high" chamber composed of ministers (in this case, belonging to *lander* executives).

However, what is revolutionary in the German ideas, and probably barely realistic, would be to transform the Commission into a fully-fledged government for the Union. This is true, not only for both intergovernmental pillars matters, but also for Community affairs. The general trend in the past years has been characterised by an upsurge of influence of the European Council (and the Council of Ministers), which is some kind of a "political" executive of the Union, whereas the Commission is closer to be a "regulator" or "administrative" executive. Even where the Commission implement some legislation within the Community pillars, one shall not forget the importance of the "comitology" monitoring the work of the Commission which the Member States do not seem quite ready to get rid of.

Redesigning the institutional architecture – for it is difficult to envisage an ambitious role for the national parliaments without upsetting the present institutional system – is unlikely to be carried out from *tabula rasa* (unless a new organisation is set up for an *avant garde*, see *below*). One has to take into account

the main institutional characteristic of the Union, i.e. to be "governed" by a double executive.

Following this premise, the Council could be divided into two different bodies, one acting as the legislature (together with the EP), one as the executive (together with the Commission). It would not be difficult to figure out what "legislative acts" are, as the concept now exists in the framework of openness (access to documents), and thereby, the "executive" acts (the rest). The Council acting as a branch of the legislature could be named "Senate" or "High Chamber", whereas the Council (acting as an executive) would be merged into, and be headed by, the European Council.

Thus, we could imagine that the Council and the High Chamber would be composed differently, and also would function differently. For example, members of national parliaments would be allowed to sit in the "High Chamber" to represent their State, in the same line as what is already possible for local governments representatives (article 203 TEC). At the least, they should be able to accompany the ministerial delegations sitting at the "High Chamber", as the Commissioner Barnier has suggested several times. A specific role could be attributed to this "High Chamber", comprising members of national parliaments, to "monitor" the legislative process, in particular to check *a priori* that the competencies of the Member States are not being infringed upon. This would seem a better solution than creating a new "subsidiarity committee".

Splitting the Council along such functional lines could bring about other advantages, like differentiating the majority voting system and other procedural aspects. Such differentiation would allow both new bodies to pursue their own logic, legislative (including more transparency) and executive respectively.[18]

Eventually, the main institutional challenge would therefore be to rationalise the Executive of the Union, to reshuffle the relations between the Commission and the Council, and eventually to allow for a progressive shift of power in favour of the Commission. Their respective political liability would be distinct and specified. Only then does it make sense to envisage the election of a president for the Union (within the Council and/or the Commission?).

A specific role for national parliaments could also be envisaged within the framework of the treaty amendment procedure, not only in the preparation of the next IGC in 2004, but also in the future (see below).

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[18] Actually, the majority voting system could also differ according to the community or intergovernmental nature of the matter.

RSCAS second report on "reforming the treaties' amendment procedure"

The second Florence Report to the Commission on reforming the treaties' amendment procedures has been much less publicised, as it was allegedly much more controversial.

The starting point was the following. The last intergovernmental conferences have proved to be inadequate, indeed inefficient means of revising the treaties; they have suffered from a lack of legitimacy given the substance of the issues dealt with, which are ever more political, and increasingly concern citizens' daily life. The perspective of enlarging the Union to 27 Member States or more requires a modification of the amendment procedures in order to avoid complete paralysis. The bulk of the report can be summarised in three proposals.

Firstly, IGCs should be reformed so as to increase the influence of the Commission, of the European Parliament, and of the national parliaments at an early stage, be it only, in the latter case, to facilitate the national ratification of the revised treaties. The "Convention" formula which drafted the Charter of Human Rights will certainly create a precedent for future treaty revision which can not be ignored, although some of the procedures should be clarified in advance. The Florence Report suggests that a Convention-like procedure could be set up as a second alternative track for particularly important constitutional issues. In any case, the functioning of the European Council, in particular in the final stages of the IGCs, should be regulated in order to avoid weak compromises on the spot obtained thanks to the tiredness of the negotiators. This could be done without formally amending the treaty revision procedure.

The second main proposal aims at extending the number of treaty provisions which can be amended according to an "autonomous" procedure, i.e. a "supranational" or "*communautaire*" procedure, without the need for approval by national parliaments or referendum. In certain cases, it would indeed be disproportionate to subject the modification of the Union treaties to 27 or more national ratification procedures. National parliaments would instead be consulted at an earlier stage. In which cases exactly such an "autonomous" procedure would apply remains to be seen, but likely where the amendments would not directly affect Member States' powers or influence, like the organisation and internal functioning of the institutions, or provisions of a technical or implementing nature.

The third proposal is the most radical. It assumes that beyond a certain number of Member States, unanimity voting equals deadlock, both in the constitutional and legislative decision-making levels. So, wherever qualified majority voting can not be agreed upon, unanimity voting should be replaced, as a second best, by some kind of a super qualified majority voting system. Such a formula would actually amount, in the enlarged Union, to unanimity minus two or three Member States.

Those placed in a minority would be protected by increasing the powers of the Commission and the European Parliament, which are supposed to represent the common interest. They would also be given the possibility to opt out from the policies or the directly applicable substantive obligations they can not or do not want to bear. The reports suggests that such constitutional differentiation could be envisaged only if it relates to the scope of competencies or the instruments of action. But it would be impracticable for anything regarding the organisational structure of the Union.

The Nice Declaration on the future of the Union gives some interesting indications with regard to the procedure to be followed in the run up to and during the next IGC in 2004, and the Laeken Summit is expected to provide for important details. However, one should not neglect to tackle the issue in more general terms, for later IGC's in a Union that is about to double the number of its members, while considering the idea of differentiating the treaty amendment procedures. As seen above, the issue may also rise again in the framework of the reorganisation of the treaties.

An *avant-garde* within the enlarged Union?

The idea of setting up an "*avant-garde*" within the enlarged Union is also part of the recent political rhetoric. Initiated in 1994 by W. Schaüble and K. Lamers ("hard core") and then E. Balladur ("*cercles d'intégration*"), the debate has been re-launched by J. Delors, and taken up recently by many others under various appellations: "*européens de l'euro*" (V. Giscard d'Estaing et H. Schmidt), "groupe pionnier" (J. Chirac), "center of gravity" (J. Fisher), "un cuore" (G. Amato), etc.

No doubt that the imminence of enlarging the Union to the central and east European countries is the main reason for contemplating a two-tier Europe. It is however also interesting to note that the concept is very often associated with plans for a European Constitution. In that case, it is not ruled out that the Constitution establishes, quasi from scratch, a new unified institutional and political system (one single Executive?), which is due to cover all the activities, and to be relatively stable.

Although it does not appear in the Nice Declaration, the issue is implicit, and linked to several other topics.

Firstly, if a debate on the "*finalités*" is to take place, it would not be surprising that insurmountable divisions amongst Member States lead to the creation of a "political" Community within the Union, or alternatively to several (concentric or Olympic) circles of integration (Single Market and flanking policies, EMU, Area of Freedom, Security and Justice, CFSP and European Defence). Secondly, actual differentiated integration is a true alternative to the too abstract principle of

subsidiarity which proved to be useless if applied without distinction amongst the Member States' ability and needs, and indeed unused in practice. It is equally an alternative to a more precise delimitation of powers: if there can be no agreement on the "competencies" that the Union should implement, let the Member States interested in engaging themselves in a collective action do it (within or outside the Union framework), without the others. Thirdly, allowing for exemptions or opt-outs is a way to circumscribe the unanimity problem in an enlarged Union, both at the legislative and constitutional level, as we already mentioned.

Unfortunately, the new mechanism of "closer co-operation" may prove to be of little use in that respect, even after the Nice Treaty adjustments. It has to function within the framework of the competencies of the Union (no new competence), thus at the legislative level only. Moreover it has been conceived to be used in last resort, on a case-by-case basis, possibly as a substitute to qualified majority voting at the Council.[19] An alternative would be to "predefine" organic closer co-operation groups within the treaty itself, or to actually create an *avant-garde* organisation by means of a new treaty.

Such a situation could have occurred if the Danish second referendum on the Maastricht Treaty had been negative, and could occur again if the second Irish referendum on the Nice treaty is not positive … Already in 1984, the Spinelli initiative provided that the new treaty on the European Union would have entered into force as soon as a large majority of Member States had ratified it. The legal questions would certainly have been numerous and difficult, as the new entity would have had to relate with the former one, or bilaterally with the Member States not participating in the *avant-garde*. Of course, the political implications of enacting a two-tier system of this nature would have been even more dramatic. And this is no less true today. Nevertheless it may be about time for each present and future Member State (and their citizens) to make clear exactly what they expect from the European Union.

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[19] See H. Bribosia, "Les coopérations renforcées au lendemain du traité de Nice: chair ou poisson?, *RDUE*, 2001-1, p. 111, in particular at 157 ff.

Federalisme et Souverainete

JEAN-MICHEL DE FORGES*

Le XX° siècle a été le siècle de l'expansion du modèle fédéral d'organisation étatique. Mais, dans le même temps, le fédéralisme est un pavillon qui couvre toutes sortes de marchandises : l'ex-Yougoslavie et les Etats-Unis d'Amérique ont bien peu de choses en commun. Cette variété même des versions possibles explique et justifie que puisse être légitimement envisagé que l'avenir de l'Union européenne passe par le modèle fédéral.

L'idée n'est certes pas nouvelle. Et, pour ce motif, les partisans du fédéralisme européen se fondent non seulement sur des considérations techniques (comment gouverner efficacement une grande Europe ?) mais aussi – et peut-être surtout – sur une certaine philosophie de la construction européenne : le « sens de l'histoire » tire l'Europe, inéluctablement, vers une organisation de type fédéral [1]. Dans cette perspective, le problème n'est pas celui de la nécessité (ou au moins des avantages) d'une fédération européenne, mais seulement celui du choix du moment le plus opportun pour franchir une nouvelle « étape » de cette évolution. Toute réserve sur le fond passe non seulement pour de la tiédeur à l'égard de l'idéal européen, mais même pour une sorte de trahison puisqu'il est entendu que tout refus de franchir une nouvelle « étape » vers ce fédéralisme ne peut que se traduire par une régression, voire une dilution, de la construction européenne.

L'objection de la souverainete ?

Dans ce débat éminemment politique, l'objection principale, en tout cas en France et dans quelques autres Etats de l'union, est l'incompatibilité du fédéralisme avec la souveraineté des Etats membres de l'Union.

Qu'entend-on par là ? En réalité, rien n'est plus ambigu que le concept de souveraineté des Etats, qui a au moins deux acceptions :

- celle du droit international, selon laquelle un Etat souverain est un Etat reconnu comme indépendant par le droit international, c'est-à-dire, en définitive, comme sujet de droit international ;
- celle du droit interne, qui signifie que, dans l'organisation d'une société politique, l'Etat a la puissance souveraine, c'est-à-dire non pas une puissance absolue (ce qui correspondrait à la notion d'Etat totalitaire) mais une

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[1] La question des membres de cette fédération (nations actuelles ou autres entités politico-territoriales) demeurant ouverte.

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> puissance supérieure à celle de toutes les autres personnes juridiques (physiques ou morales, de droit privé ou de droit public) présentes sur son territoire.

Dans les réserves émises sur l'avenir fédéral de l'Union européenne, les deux acceptions de la souveraineté sont mêlées , ce qui se comprend dans la mesure où, en définitive, elles sont indissociables.

En effet, par principe (et sous réserve de quelque jurisprudence récente de la Cour Internationale de Justice), dans un Etat fédéral, la fédération est seul sujet de droit international, les Etats membres étant purement et simplement ignorés. Très concrètement, dès lors que l'Europe serait un Etat fédéral, aucun de ses membres (Italie, France ou Espagne, par exemple) ne pourrait plus conclure aucun traité international, la conclusion des traités relevant par hypothèse de l'union. Plus concrètement encore, les Etats membres de l'Union ne pourraient plus participer individuellement à une organisation internationale ; ainsi, par exemple, l'Organisation Mondiale du Commerce demeurerait compétente pour trancher un litige entre l'Union européenne et les Etats-Unis d'Amérique mais ne le serait plus pour trancher un litige entre la France et l'Espagne. De même encore, l'Union européenne pourrait avoir une ambassade au Canada, mais non l'Italie ou la Grèce. Il n'est donc pas douteux que l'introduction d'un système fédéral européen pourrait avoir une portée considérable sur les relations internationales de sorte que certains Etats membres, traditionnellement très actifs sur le plan diplomatique (France, Grande-Bretagne, Allemagne, notamment) disparaîtraient de la scène internationale.

On voit bien, du même coup, la portée du système fédéral sur le plan interne, c'est-à-dire sur celui des relations entre les Etats membres de l'union : seul Etat reconnu sur le plan international, la puissance de l'Union ne saurait être limitée par celle de ses membres.

C'est en principe ce qui distingue la fédération des autres formes d'« Etats composés », confédérations, unions réelles ou unions personnelles : dans ces types d'organisation, chaque membre de l'Union demeure un Etat souverain, acteur des relations internationales en même temps qu'acteur de l'Union ; celle-ci est donc subordonnée à ses membres, qui peuvent non seulement limiter ses compétences mais aussi la quitter à tout moment [2].

Ces présentations classiques sont cependant bien théoriques dès lors que toute société moderne admet la suprématie du droit. Ainsi, déclarer que la puissance d'un Etat fédéral ne saurait être limitée par celle de ses membres suppose que l'on

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[2] Sachant que le droit de sécession, consacré par certaines constitutions fédérales, n'a guère de portée pratique, sauf, le plus souvent, crise majeure qui fait éclater la fédération.

fasse abstraction de la force du droit constitutionnel : dès qu'il existe une règle constitutionnelle qui limite les compétences de la fédération et une juridiction constitutionnelle qui assure le respect de cette limitation des compétences fédérales, la perte de souveraineté conserve toute sa portée sur le plan international (la fédération étant bien seul sujet de droit international), mais peut être beaucoup plus faible sur le plan interne (les Etats membres conservant des compétences étendues que la fédération ne peut en aucun cas lui ôter).

Aussi bien les inquiétudes anti-fédérales vont elles au-delà et peuvent s'alimenter de l'histoire du fédéralisme moderne. En effet, la tendance constante des Etats fédéraux, au XX° siècle, a été de transformer progressivement les Etats membres de la fédération en simples instruments techniques de l'action de la fédération. Au point que la distinction entre Etats décentralisés et Etats fédéraux est parfois à peine perceptible dans les faits. Peu importent les causes de cette forme de centralisation au profit de la fédération (elles sont d'ailleurs en général excellentes : solidarité économique, politique sociale, protection de l'environnement, solidarité face à un péril extérieur …), sa traduction juridique est toujours à peu près la même : d'une part il n'y a pas vraiment d'Etat fédéral sans norme juridique (écrite, coutumière ou jurisprudentielle) selon laquelle le droit fédéral prime le droit des Etats membres ; d'autre part la Cour constitutionnelle finit toujours par développer quelque théorie des « pouvoirs implicites » qui renforce les pouvoirs de l'Etat fédéral au détriment de celui des Etats fédérés. Ces deux aspects se sont retrouvés aussi bien en Allemagne qu'aux Etats-Unis (et dans une certaine mesure en Suisse).

C'est d'ailleurs tout le paradoxe (apparent) du principe de subsidiarité, aussi fortement affirmé qu'il puisse être, comme en Suisse [3] : il ne peut, en réalité, être séparé du principe de solidarité [4] de sorte qu'il faut beaucoup de vertu et d'autodiscipline pour admettre que certaines politiques publiques sont mieux conduites au niveau local (fédéré ou décentralisé) qu'au niveau central.

Ainsi, dans un Etat fédéral, la logique institutionnelle conduit nécessairement à ce que les Etats membres perdent jusqu'à la notion de puissance souveraine : à l'instar des collectivités décentralisées d'un Etat unitaire, ils ne sont plus que des relais de mise en œuvre des politiques publiques décidées et réglementées au niveau central.

Certes cela n'exclut pas une certaine autonomie, et l'on pourrait objecter à cette présentation de l'évolution des Etats fédéraux d'une part que des pays traditionnelle-

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[3] Paradoxe que l'on retrouve, on le sait, dans les traités européens.

[4] Ce qui apparaît clairement dans l'encyclique quadragesimo de Pie XI (1931) qui présente la conception moderne, humaniste et antitotalitaire du principe de subsidiarité.

ment décentralisés ont tenu à se rapprocher du modèle fédéral (notamment le Royaume-Uni) et d'autre part que s'est développé un « fédéralisme coopératif » [5] fondé sur des relations contractuelles, aussi bien entre membres de la fédération qu'entre celle-ci et ses membres ; il y aurait ainsi un certain renouveau de l'autonomie locale, au point que les Etats fédérés contractent même désormais avec des sujets de droit international (Etats souverains ou organisations internationales) voire avec des collectivités publiques relevant d'autres Etats souverains. A quoi l'on répondra que ces phénomènes se rencontrent aussi dans les Etats unitaires (p. ex. les contrats de plan Etat-région en France, ou la coopération administrative internationale décentralisée) et qu'il s'agit plus de management public que de souveraineté politique : les collectivités subordonnées agissent dans une large mesure comme des « executive agencies » du pouvoir central, lequel leur a délibérément conféré une autonomie de gestion, pour des raisons de souplesse et d'efficacité technique, à condition qu'elle soit mise au service d'une politique publique dont il décide seul la nature, l'importance et le contenu général.

En définitive, ce n'est donc pas seulement la notion de souveraineté qui justifie les réserves émises à l'encontre d'une Union européenne constituée en Etat fédéral classique ; après tout l'Union serait alors un Etat souverain. C'est aussi l'évolution des Etats fédéraux modernes, qui tend à vider l'autonomie locale de son contenu politique et culturel traditionnel au profit d'un contenu purement technique.

A partir de ces quelques repères, on peut s'interroger sur la nature de l'Union européenne et sur son avenir institutionnel.

La singularite de l'unionisme europeen

Du point de vue de la souveraineté internationale, l'originalité de la construction européenne est sans aucun doute la coexistence d'une personnalité juridique internationale communautaire qui coexiste avec celle des Etats membres de l'Union ; mais cette originalité ne peut être retenue que dans la mesure où l'on admet que l'Union n'est pas une organisation internationale ordinaire.

Or cette singularité ne peut se déduire que des abandons de souveraineté consentis par les Etats membres au profit de l'Union, que la Cour de justice a depuis longtemps constatés, consacrés et largement interprétés. A bien des égards, cette jurisprudence a déjà donné à l'Union certains des caractères d'une fédération : ces abandons de souveraineté sont si définitifs que l'on ne voit pas comment, en dépit de toutes les proclamations subsidiaristes, ils pourraient être repris. A certains égards aussi les Etats membres, et leurs autorités décentralisées (au sens larges, incluant les länder allemands) fonctionnent comme des « executive agencies » des politiques commu-

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[5] V.M. Grewe, Le fédéralisme coopératif en R.F.A., éd. Economica, 1979.

nautaires. Faut-il ajouter que le droit communautaire prime le droit des Etats membres et que la Cour de justice des communautés dispose déjà de certaines des compétences d'une cour constitutionnelle ?

Ainsi, non seulement l'Union a déjà, sur le plan juridique, certains des caractères d'une fédération, mais son évolution a déjà suivi le même modèle centralisateur que la plupart des Etats fédéraux.

Peut-être sommes-nous à un moment décisif, comparable à celui qu'ont connu les Etats-Unis dans les années 1830, à la veille de la guerre de sécession. Certaines cours suprêmes européennes émettent des revendications qui ne sont pas sans rappeler celles des Etats sudistes, fondées sur les analyses juridiques du Vice-président américain (démissionnaire) Calhoun : selon eux, chaque Etat membre de ce qui était encore l'Union était détenteur de la souveraineté, de sorte qu'il disposait, comme la Cour suprême fédérale, du pouvoir d'interpréter la constitution fédérale sur son territoire ; le seul moyen juridique dont disposait la fédération pour surmonter cet obstacle était de recourir à la procédure d'amendement de la constitution fédérale, donc de constitutionnaliser la loi fédérale.

De la même manière, en Europe, certains prétendent que les autorités nationales, en tant que détentrices de la souveraineté, ont le pouvoir, à l'égal de la Cour de justice, d'interpréter les traités et de s'appuyer sur leur propre système juridique pour délimiter la compétence communautaire.

On sait ce qu'il en est advenu aux Etats-Unis : depuis la guerre de sécession, les Etats membres ne peuvent ni ignorer les lois fédérales et la jurisprudence de la Cour suprême, ni faire sécession : ils ont donc bien perdu toute trace de souveraineté.

Dans l'Union européenne, le problème des relations entre les autorités de l'Union et celle des Etats membres est d'autant plus complexe qu'il s'agit d'Etats qui ont une vieille culture de souveraineté politique et un droit constitutionnel propre très élaboré (ce qui n'était évidemment pas le cas dans les Etats-Unis du début du XIX° siècle). Il faut donc trouver des solutions qui évitent à l'Union une crise comparable à ce qui conduisit à la guerre de sécession américaine. Il serait paradoxal qu'un projet conçu dès l'origine pour assurer la paix sur le vieux continent en arrive à ce stade ; mais il serait prudent d'agir comme si un tel risque n'était pas invraisemblable.

Ces solutions doivent s'appuyer sur la réalité historique de la construction européenne : ce n'est pas par hasard si l'Union européenne s'est construite sur la base d'une union douanière et d'une solidarité économique, considérées dès après la première guerre mondiale comme indispensables à la préservation de la paix.

Autrement dit, ce n'est pas par hasard si les éléments constitutifs (« constituants » ?) de l'Union sont d'abord une « constitution économique », et même une « constitution sociale » communes plutôt qu'une constitution politique.

On a su, jusqu'à présent, de façon pragmatique, bâtir un ordre juridique original

qui n'est tout à fait ni du droit international ni du droit constitutionnel ; pas plus qu'hier il ne semble nécessaire de se référer à des modèles constitutionnels classiques. Il y a d'ailleurs bien longtemps que l'on sait que les peuples de la vieille Europe sont si attachés à leur identité nationale et culturelle (bien que ce concept soit passablement flou) que l'institutionnalisation de l'Europe doit s'écarter de ces modèles classiques [6] ; rien n'impose donc une constitution fédérale que les opinions publiques de certains Etats rejetteraient ; rien n'impose la disparition des deux éléments clés de la souveraineté que sont l'identité internationale des Etats membres[7] et l'existence d'un ordre constitutionnel interne souverain.

En revanche, ni la suprématie du droit communautaire, dans son ordre propre, ni la création d'un exécutif communautaire efficace ne doivent être sacrifiés.

Aussi bien peut-on penser que l'originalité de la construction européenne, la nécessaire conciliation entre certains mécanismes de nature fédérale et la préservation d'éléments de souveraineté au profit des Etats membres passe par un mécanisme unanimement accepté de cantonnement des compétences communautaires, fondé sur le principe de subsidiarité. Pour les raisons déjà exposées ci-dessus, rien n'est plus difficile à réussir.

Parmi les solutions possibles, pourrait s'avérer décisive l'invention d'un tribunal d'un type nouveau consacré exclusivement aux rapports entre l'ordre constitutionnel communautaire et les ordres constitutionnels fédéraux ; encore faudrait-il que sa nature (arbitrale ?), sa composition (représentants des cours constitutionnelles nationales ?) et sa sagesse en fassent un interprète incontesté des Traités (ou d'une éventuelle constitution européenne) et du principe de subsidiarité.

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[6] V. par exemple les premiers projets élaborés de construction européenne publiés en France, et notamment le concours organisé en 1930 par la « Revue des Vivants », introduit par Henry de Jouvenel dans le n° de mai 1930, p. 611.

[7] Sans exclure pour autant des abandons de certaines compétences internationales au profit de l'Union.

Human Rights, Constitutionalism and Integration: Iconography and Fetishism

J.H.H. WEILER*

I. Introduction: Mirror, Mirror on the Wall – Who is the Fairest of Them All?

The advent of the Charter of Fundamental Rights of the European Union is one of the factors which is feeding the renewed debate about a Constitution for Europe. For many, the Charter is the first, important element in a would-be European constitution. It is appropriate that fundamental rights (German preference) or human rights (French preference) should be at the center of such constitutional discussion. But it is also appropriate that one does not allow the normative complexity of the trinity of human rights, constitutionalism and integration to be obscured by our enthusiasms for all three. This essay is meant, thus, to highlight some of the darker aspects of the ongoing debate.

There is an undeniably celebratory tone to our human rights discourse. We brandish human rights, with considerable justification, as one of the important achievements of our civilization. We hail our commitment to human rights and their embodiment in our legal systems among the signal and mature proofs of Europe's response to, and overcoming of, its inglorious recent past in World War II. We consider human rights, alongside democracy, as a foundational value of our political order, something it is even worth fighting for. The recent "adoption" of the EU Charter (however ambiguous its formal status in the EU legal order) is a final apotheosis of this discourse. Human rights have undoubtedly achieved an iconographical position in European culture. And though we distance ourselves, with disdain, from the more vulgar expressions of American end-of-history triumphalism which gushed forth with the fall of the Soviet empire, that very disdain cannot but conceal Europe's sense of its cultural superiority and hence its own brand of self-satisfaction and triumphalism. We raise the mirror of human rights, as evidenced by both national and transnational instruments before our collective face, and smile with satisfaction: Yes, WE are the fairest of them all. But, as we know, the Mirror, if only we look carefully, does not hide our warts, blemishes and, at times, downright ugliness. At least it returns a more nuanced picture to the self-admiring gaze.

The following are three central features in the debate on human rights, constitutionalism and integration.

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1. First, human rights are part of a broader discourse of, and commitment to, constitutions and constitutionalism, often to the thick, hard version of constitutions and constitutionalism found in, say, the German and Italian legal orders, which embody the notion of Constitution as a higher law. Such developments are noticeable even in countries such as Denmark, Belgium, France and others which had a softer version of constitutionalism and a long tradition of skepticism towards American style judicial empowerment. For its part, the EU already has a very robust version of constitutionalism and the EU Charter is, as noted, perceived by many as the first element in a would-be European Union formalization of that brand of constitutionalism.

Concomitantly, human rights also signify the ever increasing acceptance of (and resignation to) the central role of courts and judges in public discourse. Courts are most audacious in asserting their power when they garb themselves in the mantle of guardians of the human rights guaranteed by constitutional documents. They are, too, most successful in mobilizing support for and legitimising their power in the context of human rights. Europe adds an interesting nuance to this phenomenon too. First, one should not forget this minor element of self-serving self-interest, as the European Court of Justice rushes to embrace the Charter into its Jurisprudence, a Charter which pointedly was not made part of the European legal order by those whose political and democratic legitimacy is much greater than that of the European Court. Second, whilst there has always been and there is currently perhaps an increasingly specific critique of the so called "activism" of the European Court of Justice, couched, from time to time, in the language which objects to a *Gouvernement des Juges*, a more careful look at such criticism usually discovers that it issues from a nationalist sentiment worried more about the loss of national sovereignty to Europe than of popular or parliamentary power to judges. If the European Court were "activist" in the opposite direction, namely slashing European Union power (and make no mistake, this too would be a form of judicial activism) you would find the same critics celebrating the European Court of Justice. In other words, most of the criticism is not of judicial empowerment as such, but of the content which it embraces. Significantly, when national courts, in acts of *national judicial empowerment,* claiming to protect *nationally defined human rights,* strike out at the European Court of Justice (and there have been quite a few such expressions in recent years) they are celebrated as protecting national values and identity and sovereignty. Few seem to protest that it is the judiciary, often in ways constitutionally shielded from parliamentary challenge, which is deciding fundamental issues which define the relationship of a Member State to the Union.

2. Second, beyond constitutionalism and its concomitant commitment to, or

acceptance of, courts and judges as such, there is in the discourse of human rights a great faith in the *judicial protection* of human rights. We may call this the Habeas Corpus syndrome The point I wish to make is simple enough: Increasingly, the measurement of the efficacy of these documents, of their very reality as meaningful legal instruments is in their invocability by individuals and their enforcement, at the instance of individuals, against public authority by courts. It is the *Writ* of Habeas Corpus which solidified its position in legal history. In today's world, documents and declarations which do not have such a quality are oft derided as "hortatory", aspirational, embryonic, all awaiting realization of their potential by arriving at the promised lands of individual invocability and judicial enforceability.

3. Finally, human rights have become an important part of the discourse about European Integration and European identity. This debate takes place at two levels. The first is the bland affirmation of human rights as being part of a common patrimony et cetera et cetera, good stuff for politicians to drone on about, something akin to Beethoven's Fifth or the Blue Flag with the Golden Stars. But there is a more serious dimension to this prattle. As the polity grows, as the ability of national mechanisms and instruments to provide democratic legitimacy to European norms is increasingly understood as partial and often formal rather than real, the necessity of democratizing decision making at the European level becomes ever more pressing. Such democratization requires, in its turn, the emergence of a polity with social commitments, allegiances and ties which is a *conditio sine qua non* for the discipline of majoritarian decision making. No demos, no democracy. Europe rightly shies away from an ethnic, religious or any other thick form of organic self-understanding and political identity. The only normatively acceptable construct is to conceive the polity as a Community of Values, much in the original spirit (though not practice) of Post-Revolution France and the United States. When one grasps for a content for such a community of values, the commitment to human rights becomes the most ready currency. Here are values around which, surely, Europeans can coalesce (and celebrate).

There is much truth and much value in our commitment to constitutional orders which celebrate democracy, human rights and the rule of law; in the seriousness with which we take this commitment as evidenced by our willingness to make human rights into veritable legal instruments, often of superior normative value, opposable by individuals against public authorities and adjudicated and enforced by our courts; and in our placing human rights, alongside markets and economic prosperity as defining the values of our emerging European polity. But there are, too, shades, nuances, warts and downright ugly aspects to this picture which are also worth reflecting upon.

II. Constitutional Patriotism: The Last Refuge of the Scoundrel?

Why is it that we give such importance to the constitutional integrity of our legal orders? Why is it, that despite the fact that the European Union has a functional legal order there are strong voices which would like to root it in a formal constitutional document? Why is it that we talk of crisis when national and European constitutionalisms conflict, not least in the area of human rights?

There is, of course, no one answer to this question. But any answer would, I believe, have to include at least an element of the following.

We consider the integrity of our *national* constitutional orders not simply as a matter important to the good functioning of government and an orderly distribution of political power but of moral commitment and identity. Our national constitutions are perceived by us as doing more than simply structuring the respective powers of government and the relationships between public authority and individuals or between the state and other agents. Our constitutions are said to encapsulate fundamental values of the polity and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a state, as a Community, as a Union. When we are proud and attached to our constitutions we are so for these very reasons. They are about restricting power, not enlarging it; they protect fundamental rights of the individual; and they define a collective identity which does not make us feel queasy the way some forms of ethnic identity might. Thus, in the endless and tiresome debates about the European Union constitutional order, national courts have become in the last decade far more aggressive in their constitutional self-understanding. The case law is well known. National courts are no longer at the vanguard of the 'new European legal order', bringing the rule of law to transnational relations, and empowering, through EC law, individuals *vis-à-vis* Member State authority. Instead they stand at the gate and defend national constitutions against illicit encroachment from Brussels and Luxembourg. They have received a sympathetic hearing, since they are perceived as protecting fundamental human rights as well as protecting national identity. To protect national sovereignty is *passé*; to protect national identity by insisting on constitutional specificity is *à la mode*.

On this reading, modern liberal constitutions are, indeed, about limiting the power of government *vis-à-vis* the individual; they do, too, articulate fundamental human rights in the best neo-Kantian tradition; and they reflect a notion of collective identity as a community of values which is far less threatening than more organic definitions of collective identity. They are a reflection of our better part.

But, as with the moon, or much which is good in life, there is also a dark side.

It is, first, worth listening carefully to the rhetoric of the constitutional discourse. Even when voiced by the greatest humanists, the military overtones are present.

We have been invited to develop a *patriotism* around our modern, liberal, constitutions. The constitutional patriot is invited to *defend* the constitution. In some states we have agencies designed to protect the constitution whose very name is similar to our border defenses. In other countries, we are invited to *swear allegiance* to the constitution. In a constitutional democracy we have a doctrine of a *fighting* democracy, whereby democratic hospitality is not extended to those who would destroy constitutional democracy itself. To be a good constitutional liberal, it would seem from this idiom, is to be a constitutional nationalist and, it turns out, the constitutional stakes are not only about values and limitations of power but also about its opposite: the power which lurks underneath such values.

Very few constitutionalists and practically no modern constitutional court will make an *overt* appeal to natural law. Thus the formal normative authority of the constitutions around which our patriotism must form and which we must defend is, from a legal point of view, mostly positivist. This means that it is as deep or shallow as the last constitutional amendment: in some countries, like Switzerland or Germany, not a particularly onerous political process. Consequently, vesting so much in the constitutional integrity of the Member State is an astonishing feat of self-celebration and self-aggrandizement, of bestowing on ourselves, in our capacity for constituent power, a breathtaking normative authority. Just think of the near-sacred nature we give today to the constitutions adopted by societies, great segments of which were morally corrupted, of the World War II generation in, say, Germany, Italy and elsewhere.

A similar doubt should dampen somewhat any enthusiasm towards the new constitutional posture of national courts which hold themselves out as defending the core constitutional values of their polity, indeed its very identity. The limitation of power imposed on the political branches of government is, as has been widely noticed, accompanied by a huge dose of judicial self-empowerment and no small measure of sanctimonious moralizing. Human rights often provoke the most strident rhetoric by courts. Yet constitutional texts in our different polities, especially when it comes to human rights, are remarkably similar. Defending the constitutional identity of the state and its core values turns out in many cases to be a defense of some hermeneutic foible adopted by five judges voting against four. The banana saga, which has taxed the European Court of Justice, the German Constitutional Court, the Appellate Body of the World Trade Organization, and endless lawyers and academics is the perfect symbol of this farce.

Finally, there is also in an exquisite irony in a constitutional ethos which, while appropriately suspicious of older notions of organic and ethnic identity, at the very same time implicitly celebrates a supposed unique moral identity, wisdom, and, yes, superiority, of the authors of the constitution, the people, the constitutional

demos, when it wears the hat of constituent power and, naturally, of those who interpret it.

It was Samuel Johnson who suggested that patriotism was the last refuge of a scoundrel. Dr Johnson was, of course, only partly right. Patriotism can also be noble. But it is an aphorism worth remembering when we celebrate constitutional patriotism, mostly embodied in human rights national or transnational.

III. The Charter and the Judicial Protection of Fundamental Human Rights

The European Charter is with us and we should make the best of it. But it is still worth asking whether Europe really needed it: Will it actually enhance the protection of fundamental human rights in the Union? European citizens and residents do not, after all suffer from a deficit of judicial protection of Human Rights. Their human rights in most Member States are protected by their constitution and by their constitutional court or other courts. As an additional safety net they are protected by the European Convention on Human Rights and the Strasbourg organs. In the Community, they receive judicial protection from the ECJ using as it source the same Convention and the Constitutional Traditions common to the Member States.

So why a new Charter at all?

Most important in the eyes of the Charter promoters was the issue of perception and identity. Ever since Maastricht, the political legitimacy of the European construct had been a live issue; the advent of EMU with its barely accountable European Central Bank added fuel to a perception of a Europe concerned more with markets than with people. It may be true that the European Court guarantees legal protection against human rights abuses, but who is aware of this?

A Charter, its supporters said, would render visible and prominent that which until now was known only to dusty lawyers. Additionally, the Charter, as an important symbol, would counterbalance the Euro and become part of the iconography of European integration, contributing both to the identity and identification with Europe.

Has this been borne out? Time will tell, but for now the Charter is a classical European story, akin to the concept of European Citizenship heralded with great triumph at Maastricht: An exercise characterized by highfaluting rhetoric by all and sundry and a simultaneous conspicuous failure to take decisive steps to integrate it into the legal order of the Union. We have become so habituated to this kind of Euro Double-speak, that we fail to notice.

Lawyers will point out with great excitement that the Court is already making reference to the Charter and that it may become "incorporated" in the legal order by judicial activity. I am not at all sure whether this is a positive development, both

from pragmatic and normative perspectives. I wonder if a stony silence by the Court or a defiant refusal to take note of the Charter would not, pragmatically, provide greater impetus to eventual political action. I also wonder, as indicated above, whether it is proper for the Court to go very far with judicial incorporation of the Charter given the fact that it was, let us not mince words, constitutionally rejected as an integral part of the Union legal order? One cannot chant odes to democracy and constitutionalism and then flout them when it does not suit one's human rights agenda.

Clarity was a second justification often invoked to justify the exercise. The current system of looking to the common constitutional traditions and to the ECHR as a source for the rights protected in the Union is, it is argued, unsatisfactory and should be replaced by a formal document listing such rights. But would clarity actually be added? Examine the text. It is, appropriately drafted in the magisterial language characteristic of our constitutional traditions: Human Dignity is Inviolable etc. There are many things to be said for this tradition, but clarity is not one of them. When it comes to the contours of the rights included in the Charter, I do not believe that that it adds much clarity to what exactly is protected and what is not.

Note however, that by drafting a list and perhaps one day fully incorporating it into the legal order, we will have jettisoned, at least in part, one of the truly original features of the pre-Charter constitutional architecture in the field of human rights– the ability to use the legal system of each of the Member States as an organic and living laboratory of human rights protection which then, case by case, can be adapted and adopted for the needs of the Union by the European Court in dialogue with its national counterparts. The Charter may not thwart that process, but it runs the risk of inducing a more inward looking jurisprudence and chilling the constitutional dialogue.

Drafting a new Charter, it was said, would give the chance of introducing much needed innovation to our constitutional norms which were shaped by aging constitutions and international treaties. Issues such as bio-technology, genetic engineering, privacy in the age of the internet, sexual identity and, most importantly, political rights empowering the individual could be dealt with afresh placing the Charter at the avant-garde of European constitutionalism.

I leave it to the reader to judge whether the Charter has introduced such innovation. In some instances the language used by the Charter risks "deconstitutionalization" of certain rights. The formula quite frequently used of rights "… guaranteed in accordance with the national laws governing the exercise of these rights" may turn out to do considerable damage to constitutional protection of human rights. Whilst it is a formula one finds in constitutional orders of the Member States and

international treaties, and whilst it is possible to develop a jurisprudence which separates the existence of a right from its exercise, in the particular circumstances of the Community, it will be very difficult ever to challenge constitutionally a Community (let alone a Member State) measure which replicated the existing law in this or that Member State. This may turn out to be a very regressive development for the protection of human rights.

Another regressive scenario is one under which there will be great pressure on the Court to reject any progressive interpretations of various formulae found in the Charter if this turns out to have been rejected by the Convention which drafted the Charter. For Example, a proposal to introduce to the Charter "the right for everyone to have a nationality" was rejected during the drafting process. It will be difficult for the Court to articulate such a right. Likewise, Genetic Integrity was dropped from Article 3 on the Integrity of the Person. This too might have subsequent interpretative consequences. Many more examples can be found. In general it will be much harder for the Court to crystallize a Community right when such was considered and rejected by a political constituent assembly. In some areas the Charter actually cuts down on protection now offered in the legal order of the Community. Article 51(1) actually reduces the categories of Member State acts which would be subject to European scrutiny, and Article 53 at least raises problematic issues on the supremacy of Community law in this area.

But most troubling of all is the fact that the Charter exercise served as a subterfuge, an alibi, for not doing that which is truly necessary if the purpose was truly to enhance the protection of fundamental rights in the Union rather than talk about enhancing such protection.

The real problem of the Community is the absence of a *human rights policy* with everything this entails: A Commissioner, a Directorate General, a budget and a horizontal action plan for making those rights already granted by the Treaties and judicially protected by the various levels of European Courts effective. Much of the human rights story, and its abuse, takes place far from the august halls of courts. Most of those whose rights are violated have neither the knowledge or means to seek judicial vindication. The Union does not need more rights on its lists, or more lists of rights. What is mostly needed are programs and agencies to make rights real, not simply negative interdictions which courts can enforce.

The best way to drive the point home is to think of Competition Policy. Imagine our Community with an Article 81 and 82 interdicting Restrictive Practices and Abuse of Dominant Position, but not having a Commissioner and a Competition Directorate to monitor, investigate, regulate and prosecute violations. The interdiction against competition violations would be seriously compromised. But that is exactly the situation with human rights. For the most part the appropriate norms

are in place. If violations were to reach the Court, the judicial reaction would be equally appropriate. But would there be any chance effectively to combat Anti-Trust violations without a Competition Directorate? Do we have any chance in the human rights field, without a similar institutional set up?

One reason we do not have a policy is because the Court, in its wisdom, erroneously in my view, announced in Opinion 2/94 that protection of human rights is not one of the policy objectives of the Community and thus cannot be a subject for a proactive policy.

Far more important than any Charter for the effective vindication of human rights would have been a simple Treaty amendment which would have made active protection of human rights within the sphere of application of Community law one of the policies of the Community alongside other policies and objectives in Article 3 and a commitment to take all measures to give teeth to such a policy expeditiously.[1] Not only was such a step not taken, but Article 51(2) made absolute that such a development would be even more difficult to take in the future.

IV. Human Rights and Integration

As mentioned above, the classical vision regards a commitment to fundamental human rights as a unifying "universal" ideal, one of the core values around which the peoples of Europe may coalesce in a shared patrimony. When the European Court held itself out as the guarantor of fundamental human rights in the field of Community law, was it not merely giving judicial expression (and teeth!) to a common heritage rather than contending with cultural diversity? The answer to this question is "Yes, but …"

Beyond a certain core, reflected in Europe by the European Convention on Human Rights, the specific definition of fundamental human rights often differs from polity to polity. Even in a relatively homogeneous cultural zone such as Western Europe, these differences might reflect fundamental societal choices and form an important part in the different identities of polities and societies. They are often that part of social identity about which people care a great deal. Often people might consider that these values as an expression of their specific identity should be respected against any unifying encroachment. Given that the rights are considered fundamental, so would be the differences among them. When the Court has to choose this or that variant of a right "for Europe" it is making, implicitly, a choice

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[1] For a fully fledged discussion of the need and content of such a policy, see Philip Alston and J. H. H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", Harvard Jean Monnet Working Paper 1/99 http://www.jeanmonnetprogram.org/papers/99/990101.html

about the cultural identity of Europe. The stakes, thus, are high. They are even higher if we consider that many would consider that the *autonomy* of different societies (certainly Nation-States) to make these identity choices is as important as the choice actually made and that this autonomy should be protected by boundaries as fundamental as the rights themselves. In essence, the exercise of European judicial protection of human rights inevitably manifests the inbuilt dilemma of a multi-nation and multi-cultural polity – that of reconciling the vindication of universal fundamental rights with the vindication of national autonomy guarded by fundamental boundaries.

It is worth exploring in greater detail the manifestation and contours of this problem in the context of European integration since this problem challenges the classical view which regards human rights as a net integration value.

Modern liberal States, taking their cue principally from a Franco-American rather than British democratic tradition, increasingly acknowledge a "Higher Law" – typically a Constitution, and in more recent time, international treaties – which bind even the legislature of the state. In an increasing number of modern democracies the higher law is backed up by courts and a system of judicial review which give it, so to speak, teeth. Within this constitutional ethos judicial protection of fundamental human rights has a central place. Subjecting the democratically elected legislature to a Court and the norms of a "Higher Law" of fundamental human rights, despite the counter-majoritarian image, is regarded increasingly as a complimentary foundation of democratic governance.

Whence this strong appeal of human rights? I think it has to do with two roots. The first of these two roots regards fundamental rights (and liberties) as an expression of a vision of humanity which vests the deepest values in the individual which, hence, may not be compromised by anyone.

The other root for the great appeal of rights and part of the justification, even if counter-majoritarian, looks to them as an instrument for the promotion of the per-se value of putting constraints on power. Modern democracy emerges, after all, also as a rejection of absolutism – and absolutism is not the prerogative of kings and emperors.

Similar sentiments inform the great appeal of fundamental boundaries in non-unitary systems such as federal states and the European Union. I use the term Fundamental Boundaries as a metaphor for the principle of enumerated powers or limited competences which are designed to guarantee that in certain areas communities (rather than individuals) should be free to make their own social choices without interference from above. If you wish, if fundamental rights are about the autonomy and self-determination of the individual, fundamental boundaries are about the autonomy and self-determination of communities.

At first blush it would seem that these two basic principles need not clash at all. There could be, it would seem, a neat, tidy way to situate fundamental rights and fundamental boundaries within the constitutional architecture of Europe.

For example, one set of norms and institutions, national-constitutional and/or transnational, would take care of human rights: Ensuring that no public authority at any level of governance would violate the basic autonomy and liberty of the individual. Another set of norms, national-constitutional and/or transnational, would take care of boundaries: ensuring that transnational governance would not encroach on fundamental societal choices of, principally, States.

The adoption of the European Convention of Human Rights by the Member States of the Council of Europe is a reflection of this tidy arrangement: The High Contracting Powers of the Convention retain their full prerogatives as sovereign states. State boundaries constitute thus *par-excellence* fundamental boundaries which guarantee full autonomy of their respective national societies. The one self-limiting exception concerns the core fundamental human rights given expression in the ECHR which may not be transgressed in any of these societies. Thus, the universalism of human rights and the particularism of fundamental boundaries may lie down together like the Wolf and Lamb.

You will note, however, that I used the term "core fundamental rights" in drawing this idyll. The neat arrangement which the ECHR may be said to represent can only work in relation to a core which gives expression to those "rights", or to those "levels of protection", which are said to be universal, transcending any legitimate cultural or political difference among different societies in, at least, the universe of Europe. The ECHR is premised on this understanding.

Critically and crucially the ECHR does not exhaust the spectrum of human rights. By its own self-understanding, whereas the ECHR provides the "minimum standard" of protection "below" which no State may fall, the High Contracting Parties are free, perhaps even encouraged, to offer "higher" standards of protection to individuals. Indeed, part of the uniqueness of States, part of what differentiates them from each other may be the very way they give protection beyond the core universal standard.

Thus, the commitment to, and the acceptance of, the ECHR as a universal, culturally transcendent core of human rights is, surely, an expression of a very important aspect of the political culture of a State which brings it together with other States and societies. When this is backed up by submission to transnational machinery of enforcement the commitment is all the more expressive.

But, I would argue, the differences in the protection of human rights in these societies within the large band which exists beyond the universal core, is no less an important aspect of the political culture and identity of societies. Human rights

constitute, thus, both a source of, and index for, cross-national differentiation and not only cross-national assimilation.

There is no dramatic conclusion to this final consideration. It is simply meant as a sobering reminder when we reflect on the import of the various instruments of human rights. In the process of integration, human rights becomes the perfect vehicle both for our celebration and hopes as well as for our hesitations and fears.

La Charte des droits fondamentaux de l'Union européenne

EMMANUEL DECAUX*

Conformément au mandat donné par le Conseil européen de Cologne (4 juin 1999) – complété par les décisions du Conseil de Tampere mettant en place une "enceinte" (*body*), baptisée par la suite "convention", pour préparer ce document – la Charte des droits fondamentaux a été "proclamée" lors du Conseil européen de Nice (7 décembre 2000)[1]. Ce texte constitue sans doute une des rares avancées du Sommet, même si son adoption solennelle a été éclipsée par les interminables marchandages du traité de Nice. Geste symbolique fort, la Charte est un pari sur l'avenir politique de l'Europe, tout en restant dans le flou quant à sa nature juridique, en raison notamment des réticences britanniques. Pour autant, les Quinze ont mis en marche une forme de juridicisation rampante qui semble aujourd'hui inéluctable. La Charte est désormais au cœur des débats en cours sur la future "Constitution européenne" qu'Allemands et Français souhaitent de leurs vœux. L'idée de faire élaborer cette Constitution par une nouvelle "convention" est de plus en plus souvent évoquée, à la mesure de l'échec de la dernière conférence intergouvernementale. Mais, il ne s'agit certainement pas d'une panacée.

Si la méthode de la "convention" d'une soixantaine de membres (et autant de suppléants) en réunissant représentants des exécutifs – les Quinze et la Commission – et parlementaires nationaux et européens, dans une grande transparence par rapport à la "société civile", est originale, on peut rappeler que la Convention européenne des droits de l'homme elle-même, élaborée sous l'impulsion du grand mouvement réuni au Congrès de La Haye de 1948 avait été le fruit d'une navette entre parlementaires et experts gouvernementaux. Bien plus, la tâche de la "convention" était relativement aisée, s'agissant de codifier des droits préexistants – avec le moins de variations possibles pour éviter les contradictions et les interprétations *a contrario* – alors qu'une "constituante" européenne aurait à trancher des choix beaucoup plus ouverts. Enfin l'essentiel de la négociation s'est fait entre les trois groupes et surtout au sein du bureau, bizarrement baptisé "*Praesidium*", dans une forme de "tout ou rien" qui contrastait avec les milliers d'amendements transmis par la société civile …

Sur le fond, en effet, la Charte n'apporte pas beaucoup de "valeur ajoutée" par rapport à la Convention européenne des droits de l'homme. Son plus grand mérite

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[1] JOCE du 18 décembre 2000, C 364/1 à 22. Voir aussi le site du Conseil de l'Union européenne: http://ue.eu.int/df/

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est d'ailleurs de coller au plus près aux acquis de la convention et de la jurisprudence de la Cour européenne des droits de l'homme, que ce soit par référence expresse du Préambule ou dans les "clauses horizontales" qui figurent parmi les dispositions finales. Des problèmes d'interprétation délicats de deux textes parallèles par deux juridictions supranationales ne manqueront pas néanmoins de se poser.

Le contenu de la Charte

C'est l'héritage du passé qui domine, même si certaines innovations ou ambiguités relativement inaperçues concernent plus le contexte, notamment le Préambule, que le texte proprement dit. Le titre même de la Charte limite son objet tout comme ses destinataires: "*Les dispositions de la présente Charte s'adressent aux institutions et organes de l'Union, dans le respect du principe de subsidiarité, ainsi qu'aux Etats membres uniquement lorsqu'ils mettent en oeuvre le droit de l'Union*" (art.51); mais son ambition est plus générale avec une confusion fréquente entre "Charte européenne des droits fondamentaux" et "Charte des droits fondamentaux de l'Union européenne". La structure en chapitres de la Charte a une vertu pédagogique évidente, mais elle renforce une approche catégorielle assez limitée et efface la dialectique qui est au coeur de la devise française: *liberté, égalité, fraternité*. Ici chaque droit est – parfois un peu arbitrairement – affecté à un chapitre "unidimensionel" – dignité, libertés, égalité, solidarité, citoyenneté, justice … Ce faisant, les droits économiques et sociaux ont été dispersés, ce qui les a rendus sans doute plus invisibles pour les négociateurs britanniques.

Enfin, et c'est sans doute le plus grave, les éléments juridiques les plus importants, notamment les références et interprétations conventionnelles, sont relégués dans des "explications" qui ne sont pas publiées en même temps que la Charte, au nom de la "lisibilité" du texte qui apparaît ainsi en trompe-l'oeil. Au moment où les Quinze invoquent la transparence, le "mode d'emploi" de la Charte est relégué dans les annexes des travaux préparatoires, comme s'il y avait une Charte lisible pour les citoyens et une Charte introuvable pour les spécialistes.

Le texte de la Charte, quant à lui, reprend l'essentiel de la Convention européenne, avec des progrès de rédaction (par rapport au champ de l'art.6 CEDH, par exemple), mais aussi des reculs en matière de sûreté (au regard de l'art.5 CEDH) où les garanties de la jurisprudence européenne ne sont pas reprises avec précision. La rédaction de certains articles peut même sembler en régression par rapport aux principes internationaux, qu'il s'agisse du droit de propriété (art.17) ou du droit d'asile (art.18). Dans le domaine social où la Charte entend innover, une série de droits importants de nature catégorielle sont pris en compte, mais le plus souvent avec une rédaction prudente qui vise à écarter toute obligation de faire. De même de nombreux renvois au droit communautaire et aux lois nationales, réduisent

d'autant l'apport de la Charte.

Contrairement à certaines ambiguïtés du mandat de Cologne, les *"droits réservés aux citoyens européens*" sont très réduits. En effet, si la Charte codifie des "droits fondamentaux", inhérents à la nature humaine, ceux-ci ne sauraient être exclusifs, mais doivent viser tous les individus, "citoyens européens" ou ressortissants étrangers. La Charte sauvegarde cette universalité de principe des droits de l'homme en visant "toute personne", ou de manière plus lourde "*tout citoyen ou toute citoyenne de l'Union ou toute personne physique ou morale résidant ou ayant son siège statutaire dans un Etat membre …*" (art. 42 *et seq.*).

Là où la Charte innove utilement, c'est lorsqu'elle prend en compte les défis modernes, en matière de bio-éthique (art.3), de protection des données (art.8), ou plus timidement d'environnement, selon une formule assez typique hélas de la langue de bois européenne *: "Un niveau élevé de protection de l'environnement et l'amélioration de sa qualité doivent être intégrés dans les politiques de l'Union et assurés conformément au principe du développement durable*" (art.37).

La portée de la Charte

La Charte est surtout un pari sur l'avenir. A partir d'un mandat ambigu, les rédacteurs de la Charte, à l'initiative du président Romain Herzog, ont rédigé un texte "*comme si*" il devait acquérir une valeur juridique, tout en différant cette décision pour des raisons essentiellement tactiques liées à l'opposition britannique. Pour autant, à court terme, l'adoption de la Charte par la "convention", puis sa proclamation solennelle au nom des trois institutions sont autant d'étapes d'une consécration progressive de la Charte.

En pratique, la Charte a pris la forme classique d'une "*déclaration commune*" signée le 7 décembre, à l'ouverture du Sommet. La Charte a été publiée au JOCE avec pour sous-titre "*proclamation solennelle*" – dans les douze langues officielles – et la précision suivante : *"Le Parlement européen, le Conseil et la Commission proclament solennellement en tant que Charte des droits fondamentaux de l'Union européenne le texte repris ci-après*" avec mention "*fait à Nice, le sept décembre deux mille*" (JOCE, 18 décembre 2000, 2000/C 364/01).

Le Parlement et la Commission ont pris aussitôt des positions de principe très fermes, anticipant sur la pleine consécration juridique de la Charte, en s'engageant à se référer à la Charte dans leur travail quotidien. Les avocats généraux de la C.J.C.E., comme M.Tizzano dès le 8 février 2001, ont commencé à se référer à la Charte pour étayer leurs raisonnements, en attendant une consécration jurisprudentielle en bonne et due forme.

A moyen terme, se pose la question de l'intégration de la Charte dans les traités, voire de sa consécration comme le Préambule d'une future "Constitution

européenne". La Déclaration relative à l'avenir de l'Union, annexée au Traité de Nice, renvoie formellement la question du statut juridique de la Charte à la future conférence intergouvernementale de 2004. D'ici là, des "forums publics" lancés dans chacun des Quinze Etats membres doivent clarifier des enjeux soigneusement balisés, en vue du Conseil européen de Laeken de décembre 2001 qui devra décider des étapes futures, dans une sorte de fuite en avant.

Parallèlement, ne manquera pas de se poser la question de l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme, formellement relancée à la demande de la Finlande. A tout le moins, un élargissement de la fonction consultative de la Cour européenne des droits de l'homme pourrait être un moyen utile pour veiller à l'harmonie entre les jurisprudences relatives aux droits fondamentaux.

Pour l'essentiel les travaux récents menés à Quinze, pour utiles qu'ils soient afin de donner une âme à une Union européenne en quête d'elle-même, ne sauraient faire oublier que l'Europe des droits de l'homme existe depuis 50 ans, avec un acquis jurisprudentiel considérable qui va bien au-delà de la lettre de la Convention de 1950 et de ses protocoles. S'il est facile de "copier" les clauses de la Convention européenne des droits de l'homme, il est plus important d'en préserver les acquis et surtout la dynamique propre. Au moment où les Quinze préparent un élargissement, il serait désastreux d'introduire un nouveau clivage, avec une Europe des droits de l'homme à deux vitesses.

Enfin, les "droits de l'homme" n'appartiennent pas en propre à l'Europe. Le préambule de la Charte semble l'oublier, au nom de la "subsidiarité", alors même que la Convention européenne était placée dans le droit fil de la Déclaration universelle de 1948. L'affirmation légitime d'une "identité européenne" ou de valeurs communes ne doit pas se faire au prix d'un message universel, ce qui constituerait tout à la fois un abandon et un redoutable précédent. L'Europe doit aussi regarder le grand large, sans se payer de mots, et pleinement intégrer la diplomatie des droits de l'homme dans le suivi de ses accords d'association comme dans toutes les composantes de la PESC.

PESC et coopération renforcée

FRANÇOISE DE LA SERRE*

Depuis le milieu des années 90, divers concepts – géométrie variable, différenciation, coopération renforcée – ont été avancés pour relever un défi majeur : organiser la différence au sein d'une Union de plus en plus hétérogène, en préservant la dynamique de l'intégration.

Avec le Titre VII sur « La Coopération plus étroite », le Traité d'Amsterdam avait apparemment mené à bien cet exercice difficile. Etait en effet reconnue comme légitime la détermination de quelques Etats membres à aller plus vite vers davantage d'intégration. Mais la politique étrangère et de sécurité commune (PESC), identifiée pourtant à l'origine comme l'espace de prédilection de la coopération renforcée, en était exclue. La formalisation d'un régime d'abstention constructive était la seule forme de flexibilité tolérée dans le 2e pilier … l'invocation par un Etat membre de « raisons de politique nationale » pouvant cependant empêcher de procéder à un vote.

Le Traité de Nice n'a pas sensiblement modifié, pour ce qui concerne la PESC, le dispositif d'Amsterdam. La coopération renforcée n'est en effet instituée que pour la mise en œuvre des positions et actions communes … là où existaient déjà majorité qualifiée et abstention constructive. Elle est interdite pour les questions ayant des implications militaires et dans le domaine de la défense, ce qui exclut en particulier la coopération en matière de production d'armements.

Fallait-il en rester là au moment où l'action extérieure de l'Union européenne est affectée par deux évolutions majeures?: D'une part, l'accélération de l'élargissement décidé, en décembre 1999, à Helsinki, qui va provoquer, avec la multiplication des acteurs, une hétérogénéité croissante des perceptions, des intérêts et des politiques. D'autre part, la progressive mise en œuvre de la politique européenne de sécurité et de défense (PESD)… avec le risque que l'exigence actuelle d'unanimité empêche l'Union de recourir aux capacités militaires dont elle est en train de se doter.

Cette absence de coopération renforcée dans le 2e pilier, au moment où la flexibilité progresse dans les autres politiques de l'Union, suscite certaines interrogations : l'introduction, dans la PESC, d'une dose significative de flexibilité est-elle souhaitable ? Est-elle possible et sous quelle forme ? Porterait-elle préjudice à la légitimité de la politique étrangère de l'Union ?

Deux arguments plaident en faveur de l'introduction de la coopération

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renforcée dans la PESC. En premier lieu, un tel dispositif permettrait de naviguer entre deux écueils : la paralysie due à l'unanimité et la tentation, récurrente pour certains Etats membres, de créer, hors Union, des groupes de contact et autres « directoires » informels. En second lieu, la nécessité de prendre en compte la nouvelle donne que constitue la PESD fournit des arguments aux partisans de la coopération renforcée. Ceux-ci considèrent qu'au moment où l'Union acquiert une capacité autonome de décider et conduire des opérations militaires, il serait paradoxal qu'un blocage intervienne en amont, au niveau de la décision politique. En outre la coopération existant entre certains Etats membres en matière de production d'armements (par exemple dans le cadre de l'OCCAR) pourrait également être « rapatriée » dans l'Union sous forme de coopération renforcée. A l'inverse, celle-ci est présentée par ses détracteurs comme risquant de nuire à l'ambition d'une politique de défense commune à laquelle les Quinze ont adhéré à Helsinki. Le noyau dur informel que représente l'entente entre les grands Etats membres, la capacité d'entraînement qu'il exerce sur les autres partenaires sont jugés préférables à un mécanisme codifié de flexibilité. Ce volontarisme, assorti de l'abstention constructive, est présenté comme suffisant pour mener à bien les missions Petersberg. Mais est-on sûr qu'il en sera de même quand il faudra passer de la fixation des capacités à la définition, par exemple, d'un concept stratégique ?

Si l'on considère souhaitable d'introduire une plus grande flexibilité dans le 2e pilier, quelles pourraient en être les modalités ? Il paraît exclu de transposer, par une sorte de décalque, les dispositions existant dans le 1er et le 3e pilier. Le caractère volatile et imprévisible des crises internationales rend a priori impossible une coopération renforcée pré-déterminée (type UEM ou Schengen) qui supposerait acquise la convergence durable des perceptions, des intérêts, des volontés d'un groupe fixe d'Etats membres. Seule la coopération en matière de production d'armements pourrait entrer dans un tel schéma. Mais on peut imaginer qu'une sorte de clause d'habilitation permette à un groupe d'Etats membres d'entreprendre une action au nom de l'Union, transformant ainsi l'initiative de quelques-uns (type ALBA) en opération de l'Union. D'autres pistes pourraient également être ouvertes par ce qu'on peut appeler une « géographisation » de la PESC, certains Etats membres d'une même région se voyant donner par l'Union une responsabilité particulière dans la gestion des relations avec leurs voisins proches.

Mais une PESC plus flexible peut-elle être considérée comme légitime par les citoyens de l'Union au moment où ceux-ci s'interrogent sur la nature et l'avenir de la construction européenne ?

Jusqu'à présent, il semble que, en matière de PESC, les attentes des citoyens (révélées, notamment par les sondages), n'ont pas été satisfaites : l'incapacité de l'Union européenne à gérer les crises de l'après-guerre froide et notamment – à ses

frontières – les conflits dans l'ex-Yougoslavie, n'ont pas créé la légitimité qui aurait découlé d'un minimum d'efficacité.

Si donc on s'interroge, à propos de la PESC, sur la relation existant entre flexibilité, efficacité et légitimité, deux approches sont envisageables. Dans un cas la flexibilité renforce l'efficacité qui, à son tour, accroît la crédibilité et la légitimité de la PESC, laquelle, par un effet d'engrenage vertueux, en sort renforcée. Dans l'autre, il y a réduction de la cohésion et de la solidarité entre Etats membres et incidences négatives sur l'action extérieure de l'Union parce que certains pays participeront peu, ou pas du tout, aux opérations conduites dans le cadre de la coopération renforcée.

Quoiqu'il en soit, le débat sur l'opportunité d'introduire une clause de coopération renforcée dans la PESC est désormais lié au débat lancé sur la finalité des coopérations renforcées. S'agira-t-il seulement de disposer d'un instrument d'amélioration de la politique étrangère de l'Union ou de contribuer à la constitution d'un « centre de gravité » d'un « groupe pionnier » ou d'une « avant-garde » qui se formerait par la participation des mêmes Etats membres aux mêmes coopérations renforcées, lesquelles incluraient évidemment la PESC ? Dans un cas comme dans l'autre, le 2e pilier de l'Union européenne devrait cesser d'être l'exception en matière de coopération renforcée.

Profile / Profil

Patricia Sellers

Patricia Sellers était visiblement encore bouleversée par la tragédie du 11 septembre lorsque je l'ai rencontrée récemment dans son bureau de La Haye. Au-delà de la crainte pour l'avenir elle se demande aussi si le droit international n'est pas à la traîne en matière de terrorisme.

Patricia Sellers est actuellement chef adjointe du département de droit international du Tribunal pénal international pour l'ex-Yougoslavie. Elle occupe une place à part dans le who's who du droit international humanitaire: en l'espace de moins de dix ans, elle est devenue au sein des Tribunaux pénaux pour l'ex-Yougoslavie et pour le Rwanda l'expert sans laquelle aucune réflexion ni décision en matière de viols et autres agressions sexuelles ne peut avoir lieu. Même si, par modestie, elle réfute le qualificatif de pionnière, force est de constater qu'elle est à l'origine des actes d'accusation portés à l'encontre des responsables politiques et militaires tant au Rwanda qu'en ex-Yougoslavie pour viols constitutifs d'actes de génocide et de crimes contre l'humanité. En effet, dès son arrivée au TPY en 1994, elle se rend compte que la question des viols en droit international humanitaire a été négligée, sans doute, explique Patricia, du fait que les femmes n'ont pas été consultées lors de l'élaboration des conventions. Elle convainc Richard Goldstone, le Procureur général d'alors, de l'importance de poursuivre les viols, et il lui apporte un soutien sans faille. Sa stratégie est complexe: il s'agit pour elle de gagner la confiance à l'extérieur des associations de survivants victimes d'agressions sexuelles, et à l'intérieur de sensibiliser ses collègues sur la nécessité juridique et morale d'enquêter sur toute forme d'agression sexuelle y compris celle exercée sur les hommes. Si elle bénéficie rapidement de l'appui des ONG, son combat à l'intérieur du Parquet s'avère beaucoup plus difficile.

Au prix de beaucoup de patience, elle parvient cependant à faire avancer la cause qui lui est chère : sa plus grande satisfaction est de constater qu'aujourd'hui la poursuite des crimes sexuels fait partie intégrante de la politique judiciaire des tribunaux et qu'une jurisprudence en la matière est dorénavant solidement établie. Patricia Sellers a notamment soutenu avec succès dans le procès Akayesu que le viol constitue une atteinte grave à l'intégrité physique et mentale du groupe au sens de la Convention sur le génocide et est un crime contre l'humanité. Ce n'est évidemment pas le seul cas dans lequel le Tribunal a reconnu la qualification de crime contre l'humanité pour les agressions subies par les femmes, jurisprudence désormais bien connue.

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Son action ne se limite pas aux TPI puisqu'elle a été aussi en décembre 2000 Procureur général du Tribunal international de Tokyo pour la répression des crimes d'esclavage sexuel commis par les militaires japonais au cours de la deuxième guerre mondiale. Elle dit avoir été particulièrement marquée par la force des témoignages à la fois des ''comfort women" survivantes et des auteurs des crimes. Elle ajoute d'ailleurs que les témoins survivants sont ses seuls véritables héros car en dépit des souffrances subies, ils restent avant tout humains.

L'engagement actuel de Patricia trouve son origine dans son éducation. Née de parents descendants d'esclaves, dans les années 50 dans l'Amérique de la ségrégation, elle se souvient que les discussions à la maison portaient sur l'émancipation et le progrès social. Bien qu'elle ait principalement grandi dans l'Etat de Pennsylvanie, elle fait très jeune l'expérience du racisme quotidien ; par exemple chez le photographe qui avait sali ses photos d'injures racistes.

Sa mère, professeur de collège, lui transmet des valeurs morales qui ne la quitteront jamais, telles que le goût insatiable d'apprendre, le refus de la fatalité ou la protection des faibles. L'Eglise luthérienne et plus tard les Quakers l'imprégneront d'une culture de la non violence. A l'âge de 11 ans, Patricia décide qu'elle sera avocate des droits civiques en regardant son programme favori à la télévision : « Judd for the defense ». Dans la réalité, ce sont Thurgood Marshall, juge de la Cour Suprême des Etats-Unis, et Paul Robeson, avocat devenu acteur et chanteur, qui l'inspirent. Elle admire également le juge sud africain Richard Goldstone et la Présidente afro-américaine du TPY, Gabrielle McDonald, dont le passé de militants des droits de l'homme dans leur pays respectif a permis d'apporter au Tribunal pour l'ex-Yougoslavie une dimension exceptionnelle.

Sa passion pour les langues étrangères et les relations internationales naîtra lors des deux années d'école primaire passées en Allemagne où son père était militaire dans une base américaine. De retour à Philadelphie, elle accumule les premiers prix de l'école jusqu'à l'université. Au collège, elle est active dans une revue consacrée à l'analyse des classes sociales. Elle part ensuite étudier pendant un an les civilisations d'Amérique latine à l'université de Mexico. Première femme admise à l'université de Rutgers College, elle obtient un B.A en sciences politiques en 1976. Elle poursuivra ensuite ses études brillamment en droit à « Penn ». A la sortie de l'université, fidèle à sa promesse, elle choisit de défendre les plus démunis dans l'enceinte judiciaire mais aussi sur le terrain. Elle effectue notamment plusieurs missions humanitaires pour le compte des Quakers en Amérique centrale et aux Caraïbes.

La Fondation Ford l'envoie ensuite pour trois ans au Brésil comme responsable d'un programme d'assistance sociale et juridique aux femmes des favelas. Cette expérience en plein mouvement afro-brésilien sera déterminante dans sa lutte pour la cause des femmes.

Le Brésil lui permet aussi de mieux comprendre son identité à travers la mosaïque des cultures africaines.

Après l'Amérique du sud, elle s'installe à Bruxelles pour y rejoindre son mari. L'Europe la fascine et elle démissionnera vite d'un grand cabinet d'expert comptable où elle s'ennuie pour travailler à la Commission de l'Union européenne dans la direction des relations extérieures. Et là encore, elle passe d'un continent à un autre pour s'occuper de la Thaïlande et de la Birmanie jusqu'à son recrutement au TPY en 1994.

La prochaine destination de Patricia Sellers? Elle se voit bien dans quelques années enseigner le droit international humanitaire et se consacrer à sa plus grande fierté: sa famille. En attendant, cette juriste élégante et raffinée continue avec détermination de faire tomber les tabous sexuels en droit international.

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Work in Progress / Travaux en cours

Research programme: The symbiosis between public international law and national law – studies in the enforcement of public international law in the national legal order, University of Amsterdam, The Netherlands

MARY E. FOOTER*

On 1 September 2000 the Amsterdam Center for International Law (ACIL) of the University of Amsterdam launched a new research project *The Symbiosis between Public International Law and National Law – Studies in the enforcement of public international law in the national legal order*. The project, funded by the Netherlands Organisation for Scientific Research and the University of Amsterdam, explores various dimensions of the evolving entanglement between public international law and national law.

The project contains both a general theoretical part and a number of specialised parts. The general part seeks to provide a renewed theoretical reflection on public international law and its relationship to national law that goes beyond the traditional monism-dualism dichotomy. The specialised parts explore various discrete issues pertaining to the relationship between international law and national law, including the direct effect of international law, the invocability of international law by private parties, the allocation of authority between international and national courts and interactions between international and national law in the law on state responsibility.

The project is being conducted under the responsibility of Professor André Nollkaemper, who is also Director of the ACIL. Currently, one post-doctoral and three Ph.D. projects are being carried out by ACIL researchers and the team will be expanded in the near future. As one of its activities, the project organises regular seminars and conferences on the relationship between international law and national law, both on theoretical and topical issues.

On 8 June 2001, a one-day seminar on 'The application of customary international law by national courts' was organised as part of the research project. The topic is of interest both for conceptual reasons – what differences remain, despite the many interactions, between the nature of (customary) international law and

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national law – and for technical reasons – through what procedures and mechanisms is customary international law applied at the national level. The seminar brought together attorneys, judges and academics from different countries.

Dr. Simonetta Stirling-Zanda, University of Edinburgh, drew upon her doctoral research into the practice of courts in European countries in applying customary international law.[1] Among the various issues raised was the tendency by several states to use constitutional provisions in order to test the applicability of customary international law in the matter of immunity from jurisdiction (France Germany and Italy), the way in which different courts in some countries, for example France (Cour de Cassation and Conseil d'État), interpret customary international law and the role of judicial agencies in advising national courts on customary international law (the Direction de Droit International in Switzerland and the Commissionnaire de Gouvernment before the Conseil d'État in France).

Michael Anderson, British Institute of International and Comparative Law, London, traced similar developments in Commonwealth courts, noting that the doctrine of parliamentary sovereignty remains embedded in the practice of such courts. One feature of practice in Commonwealth courts is that all too often there exists an underlying anxiety about the separation of powers which is translated into the issue of whether customary international law has been incorporated into national law. This has certain ramifications for the case law of these courts: renvoi to national instruments, particularly in the field of human rights, in order to construe national law, using those instruments both to endow constitutional status as well as to interpret international law and the tendency for common law judges to seek to have customary international law 'proven' as facts by party-led experts.

These two general introductions were followed by the interventions of a judge and a practising attorney, each of whom dealt with the treatment of customary international law before national courts. *Judge J.H.M. Willems*, Vice-President, Hof Amsterdam (Amsterdam Court of Appeal) described the process of finding the content of customary international law in relation to crimes against humanity and torture in the *Bouterse* case,[2] as well as the Court's use of expert evidence, in the form of an opinion by Professor C.J.R. Dugard of 7 July 2000, relating to jurisdiction

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[1] Stirling-Zanda, Simonetta *L'application judiciaire du droit international coutumier: (étude comparée de la pratique européene)* (Zürich: Schultless, 2000).

[2] *Re: Bouterse*, Hof Amsterdam (Raadkamer) 20 November 2000, NJ 2001, 51 (*decembermoorden*), involving the arrest, torture and killing of fifteen persons on 8/9 December 1982, upon the orders of the Surinam military authority under command of Lt. Col. D.D. Bouterse; an English translation of the decision will appear in vol. XXI *Netherlands Yearbook of International Law* (2000).

and the effect of the lapse of time of the alleged acts under customary international law.

David Lloyd-Jones QC, Barrister, Brick Court Chambers, London, who argued the two *amicus curiae* briefs before the House of Lords, in the *Pinochet Case* (nos. 1 and 3),[3] described the various substantive and procedural problems that arise for an attorney in trying to 'prove' the existence of customary international law before a national court. In the *Pinochet* case this involved proving the existence and content of customary international law in relation to the crime of torture.

Two final papers reflected upon the proper role of national courts in the application of customary international law. *Professor Alan Boyle*, University of Edinburgh, did this with reference to the opinion of the Scottish Appeal Court, High Court of Justiciary in *Lord Advocate's Reference No. 1 of 2000*[4] where the Law Lords were asked to consider whether evidence could be heard as to the content of customary international law pertaining to the United Kingdom's possession of Trident missiles, an issue which had been raised before one of the lower courts of Scotland, the Court of Sessions in Greenock. Professor Boyle was of the view that statutory law currently occupies the field where previously customary international law applied. The Court in this instance was faced with problems of statutory authorisation rather than the task of applying a rule of customary international law, which it had already found to be a rule of Scots law.

Professor Jan Wouters, Katholieke Universiteit Leuven, provided some final reflections on the proper application of customary international law in national and European Community legal orders. He was of the opinion that the reluctance on the part of national courts to apply customary international law may stem from a preference for written over unwritten rules, from a reliance on the codification of customary international law norms, constitutional factors, inter-statal aspects of customary international law, rules of national procedural law such as admissibility, sufficient interest, competence, grounds for cassation, etc. and the general state of knowledge of national courts as to the content of customary international law and its hierarchy in national law.

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[3] *R* v *Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)*, 25 November 1998 [1998] 4 All ER 897, HL (*Pinochet No. 1*) and *R* v *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)* 24 March 1999 [1999] 2 All ER 97, HL (*Pinochet No. 3)*.

[4] *Lord Advocate's Reference No. 1 of 2000*, 30 March 2001, Appeal Court, High Court of Justiciary (*Trident missiles opinion)*; not yet published, see www.scotcourts.gov.uk/justiciary/justiciary/htm.

The ACIL intends to publish the proceedings of the seminar in due course. Further details about the research programme and future seminars and conferences that are being organised under the auspices of the project can found on the ACIL web-site; for a listing of ongoing events see http://www.jur.uva.nl/acil/events.htm.

The UNCITRAL Working Group on Arbitration: A Progress Report

JOSHUA A BRIEN*

Introduction

Since its establishment in 1966,[1] the United Nations Commission on International Trade Law ('UNCITRAL'), has paid special attention to the classic candidates for unification in international trade law in developing international conventions, model laws and legal guides. This has certainly been the experience in the field of international commercial arbitration, in which UNCITRAL has been exceptionally prolific.

In 1976, it adopted the UNCITRAL Arbitration Rules, which have become widely known and applied by arbitration institutions worldwide. The UNCITRAL Conciliation Rules then followed in 1980, and in 1985, the Commission completed its most ambitious project when it adopted the Model Law on International Commercial Arbitration ('Model Law').[2] The Model Law is a comprehensive work that provides an internationally agreed legal framework for the conduct of international commercial arbitration, and is designed to complement and build upon the UNCITRAL Arbitration Rules and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

The goal of the Model Law is to facilitate international commercial arbitration and to ensure its proper functioning and recognition. Accordingly, the value of the Model Law depends upon the extent to which it assists in overcoming problems that may be encountered in practice. Bearing this in mind, UNCITRAL has continued to monitor developments in commercial arbitration practice and the application of the Model Law in anticipation that further work would be required to respond to emerging issues and any recurring problems.

In 1999, UNCITRAL decided to undertake a review and discuss proposals for the improvement of the Model Law and the rules and principles that complement the Model Law, in response to reports that difficulties continued to be encountered in practice but were not addressed by existing legislative or non-legislative texts on

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[1] General Assembly Resolution. 2205 (XXI), December 17, 1966.

[2] As adopted by the United Nations Commission on International Trade Law on 21 June 1985, U.N. Doc. A/40/17, Annex I.

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arbitration. The Commission assigned the project to the Working Group on Arbitration and instructed it to concentrate upon the following issues: the requirement of written form for arbitration agreements; the enforcement of interim measures of protection; and, international conciliation.[3]

The Working Group met for the first time in March 2000[4] and continued its work in Vienna in November 2000[5]. The following section provides a brief summary of the matters discussed by the Working Group at it most recent meeting in New York from 21 May to 1 June 2001.[6] A further meeting is scheduled to take place in Vienna from 19 to 30 November 2001.

Matters under consideration by the Working Group

The written form requirement

Article 7 of the Model Law requires that an agreement to arbitrate be in writing to be valid.[7] Article 7 is modelled upon Article II (2) of the New York Convention,[8]

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[3] *See* Report of the United Nations Commission on International Trade Law on the work of its thirty-second session 17 May-4 June 1999, UNGA Supp. No. 17 A/54/17.

[4] The deliberations and decisions of the Working Group are contained in the Report of the Working Group on Arbitration on the work of its thirty-second session (Vienna, 20-31 March 2000), U.N. Doc. A/CN.9/480. The reports of the Working Group may be accessed from the UNCITRAL web address at http://www.uncitral.org/en-index.htm.

[5] *See* Report of the Working Group on Arbitration on the work of its thirty-third session (Vienna, 20 November-1 December 2000), U.N. Doc. A/CN.9/485.

[6] *See* Report of the Working Group on Arbitration on the work of its thirty-fourth session (New York, 21 May-1 June 2001), U.N. Doc. A/CN.9/487.

[7] Article 7 of the Model Law provides:

> '(1) "Arbitration Agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

[8] Article II(2) of the New York Convention provides:

> '2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'

with some modifications that were intended to clarify elements of uncertainty in the interpretation of the writing requirement under the New York Convention and to elaborate what constitutes 'writing' for the purposes of the Model Law.[9]

There has been growing concern in recent years at the lack of uniformity in the interpretation by national courts and legislatures of Article 7 of the Model Law and Article II(2) of the New York Convention. In particular, there is concern that the adoption of a narrow interpretation of the written form requirement may conflict with current arbitration practices.

To address these concerns, the Working Group is considering amendments to Article 7 of the Model Law to promote a broad and liberal understanding of the writing requirement and to accommodate recent changes in arbitration practices.

As to the substance of the draft provision, the Working Group is proceeding on the understanding that for a valid arbitration agreement to be concluded, it must be established that an agreement to arbitrate had been reached and that some written evidence of the terms and conditions of the agreement exists.

The Working Group is seeking also to develop draft text that recognises various contract practices by which oral arbitration agreements are concluded by reference to written terms of an agreement to arbitrate, and that would recognise new contract practices such as electronic commerce. In this respect, the Working Group has been conscious of the need to develop text that is general so as to accommodate rapid changes in communications technology, taking as its inspiration aspects of the UNCITRAL Model Law on Electronic Commerce.[10]

The Working Group is also taking steps to promote greater uniformity in the interpretation of Article II(2) of the New York Convention. A number of options have been considered by the Working Group in this regard, including amending Article II(2) or developing a protocol to the New York Convention. However, the Working Group ultimately decided that it would develop a declaratory instrument to recommend a uniform and liberal interpretation of Article II(2). This approach was adopted in recognition of the fact that it is not necessary to amend Article II(2) to ensure that the written-form requirement is applied in a liberal fashion.

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[9] *See* Howard M. Holtzman & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary,* p. 258, Kluwer Law and Taxation Publishers (1989); Igor I Kavass & Arno Litvak, *UNCITRAL Model Law on International Commercial Arbitration: A Documentary History*, William S. Hein Company (1985).

[10] The reason for this is that the UNCITRAL Model Law on Electronic Commerce expressed the most recent view of the Commission on how to best respond to issues of electronic commerce. See *supra* note 5.

This is evidenced by the fact that whilst some courts and legislatures have interpreted Article II(2) narrowly, many others adopt a liberal interpretation of the writing requirement.

Enforcement of Interim Measures of Protection

Article 17 of the Model Law deals with the issue of interim measures of protection and provides that, unless otherwise specified by the parties, the arbitral tribunal has the power to order interim measures in respect of the subject matter of the dispute.[11] Like many other aspects of the Model Law, this provision was modelled upon the UNCITRAL Arbitration Rules.

During the process of drafting article 17, a decision was made not to address in the Model Law the matter of court assistance in the enforcement of an interim measures of protection.[12] Consequently, the enforcement of interim measures remains governed by domestic law. This is in marked contrast to the rules on the enforcement of final arbitral awards contained in articles 35 and 36 of the Model Law, which are based upon the provisions of the New York Convention and provide for the enforcement of arbitral awards.[13]

It is now widely recognised that interim measures of protection are increasingly relied upon in practice and that the lack of uniform rules concerning their enforcement is impacting upon the attractiveness and effectiveness of arbitration as a method of settling commercial disputes.

The approach of the Working Group to this issue has been to develop draft text amending Article 17 of the Model Law to update the definition of 'interim measures of protection' and to include rules on the making of *ex parte* interim measures (i.e., measures ordered without notice to the party against whom the measure is directed). It has also developed a draft article concerned exclusively with the enforcement of interim measures of protection.[14]

There are a number of unresolved issues relating to these draft provisions. One

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[11] Article 17 of the Model Law provides as follows:

'Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to proved adequate security in connection with such measure.'

[12] *See supra* note 7, Howard M. Holtzman & Joseph E. Neuhaus, at p. 53.

[13] Article 35 of the Model Law provides the basic procedure for obtaining recognition and enforcement of an arbitral award. It is complemented by Article 36, which sets out the grounds to refuse recognition or enforcement.

[14] *See supra* note 6, at p. 22.

particular issue concerns whether it is appropriate for the Model Law to include a provision allowing for the making and enforcement of *ex parte* interim measures of protection, and whether and to what extent a court should be given discretion to refuse enforcement of interim measures.

Uniform Rules on International Conciliation

As noted above, the UNCITRAL Conciliation Rules were adopted in 1980. These rules have become widely used and have served as a model for many institutions that specialise in the alternative methods of dispute resolution.

In the years that have followed the adoption of the UNCITRAL Conciliation Rules, there has been a rapid increase in use of conciliation as a method of resolving international commercial disputes. The growth in conciliation has prompted UNCITRAL to seek to develop uniform provisions that would complement the UNCITRAL Conciliation Rules.

The draft provisions that have been developed to date would address a range of important issues relating to conciliation, including *inter alia*: guiding principles of conciliation; disclosure of information by the conciliator to the parties; the role of a conciliator in arbitration or court proceedings; admissibility of certain evidence in subsequent judicial or arbitral proceedings; the effect of conciliation on the running of a prescription or limitation period; and, the enforcement of settlement agreements.[15]

In relation to the enforcement of settlement agreements, the Working Group has yet to decide whether it is appropriate to develop a harmonised statutory provision on how a settlement agreement might be enforced, or to leave the matter of enforcement to domestic law.

The Working Group is presently proceeding to develop a Model Law on International Commercial Conciliation. At this stage, it is expected that the Working Group will complete its task early in 2002, and that the results of its work on arbitration and conciliation will be considered at the 35th Annual Session of the Commission in June 2002.

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[15] See *supra* footnote 6, at p. 25.

Conference Scene / Le tour des conférences

Direct Effect: Rethinking a Classic of EU Legal Doctrine

JOLANDE PRINSSEN*

Is the concept of Direct Effect of EU Law on its last breath and ready to be abandoned by scholars and by the courts? Has it become a mere source of confusion, hampering the full deployment of EU Law in the national legal order? Or should it be rescued from being overstretched and diluted, to be revamped as a keystone doctrine of EU Law?

That was the central debating point for the June international conference on Direct Effect[1], hosted by the University of Amsterdam. The instigator of this debate was Sacha Prechal of Tilburg University, who last year made a plea to do away with Direct Effect and to replace it by the absolute supremacy of EU Law. To make EU Law simply 'the law of the land', fully available to the domestic courts ('Does Direct Effect still Matter?' *CMLRev* 37: 1047-1069, 2000). Her radical plea raised several objections in support of Direct Effect and turned out to be an excellent occasion for rethinking the many facets of the doctrine, including its conceptual, constitutional, comparative and practical elements.

If there is a single theme to be drawn from the several papers it must be this: Direct Effect is a concept and a principle essential for the maintaining of a *subsidiary* relationship between European and domestic law.

It is a form of subsidiarity in several senses of that term. First, in that it is an *exceptional* regime (Eijsbouts, Amsterdam). This requires every extension to be argued between the EU Court and the Governments. Only on these terms may it, as it does, continue to give rise to new forms and principles to give effect to EU Law.

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[1] Conference proceedings will be published under the title "Direct Effect of European Law" as volume nr. 3 in 'The Hogendorp Papers' in the beginning of 2002, by :

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Besselink (Utrecht) followed up on this argument by arguing that the concept is essential in maintaining a balance between legislative authority at the EU and the national levels, for the sake of the legitimacy of the EU. Gerkrath (Avignon) illustrated this, drawing on the approaches taken by French and German constitutions and their courts. Angela Ward (Essex) and Jan Jans (Amsterdam) argued for modesty on the part of the EU Court in pressing for judicial harmonisation under the procedural parts of the doctrine of Direct Effect. Domestic judicial variety should be respected, with only minimal judicial harmonisation being needed. Even then, however, it remains for the Court of Justice to draw the line, as was observed in the debate. Betlem (Exeter) argued for the limits of Direct Effect to be found in general principles of law. He demonstrated how the EU doctrine has overflowed into British legal mechanisms, notably the Human Rights Act. Nollkaemper (Amsterdam) and Wouters (Louvain) found direct effect and its equivalents to be most effective in shaping the relationship between Public International Law and domestic law and EU Law respectively.

Finally, with Judge David Edward of the ECJ drawing attention to the piecemeal character of the doctrine's development, it appeared safe to conclude that the attack on the doctrine has been warded off and the doctrine has emerged reinvigorated, a primary doctrine of EU law. This is not to say that it is settled in the sense of a set of practical tests. Rather it is a central principle leading to coherence in the broadening field of interaction between EU Law and domestic law.