The Constitutional Architecture of the European Union: The Principle of Constituional Tolerance

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The Constitutional Architecture of the European Union: The Principle of Constitutional Tolerance*

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As an IGC approaches one immediately turns to Institutional Reform which then overwhelms other items and becomes the central issue in the to and fro among the Institutions themselves. This is inevitable – but certain dangers have to be noted. Though all Institutions profess that their own pet agendas are exclusively in the interest of the Union and above all the citizens of the Union, in fact as one gets into the thick of it they all adopt keen corporatist attitudes, concerned mainly with protecting their own interest and power.

Additionally, on display emerge their blind spots or Achilles Heels: For example, the Commission's historical conundrum has always been, on the one hand its self-understanding as a Political Institution coupled, on the other hand, with a lack of the kind of political legitimation which political institutions in the Member State and, indeed, in our society require. The historic response of the Commission has been to seek legitimation through results, rather than through process, legitimation by outputs rather than inputs – a belief that if it can deliver the substantive economic and social goods, who can complain? Two Millennia ago one called that Bread and Circus. The Commission has the typical impatience of the Philosopher-King toward ideas which would increase voice, if the trade off is reduction of efficiency. It is interesting to note that in the recently released Prodi proposals there is some acknowledgement that process might, after all, be important.

Parliament's Achilles' heel has been its hegemonic attitude towards democratic legitimation. Parliament has not been charitable towards proposals designed to enhance democracy in which it did not play a central role. The trajectory of increase in the powers of the European Parliament in the last 15 years has not been matched by an increase in its own popular legitimacy nor in any appreciable or measurable empowerment of European citizens and their ability either to shape policy or take Euro-politicians to task – i.e. the two principal paradigms of democracy: Representation and Accountability. Let's drop the jargon: Because of the particularity of European Governance, individuals cannot exercise these two most elementary and primitive forms of democratic process: The cannot go to the urns and by their vote throw the scoundrels out of government. They cannot go to the urns with the knowledge that if a sufficient number of fellow citizens vote as they do, there will be an appreciable impact on key European socio-economic regulatory and redistributive policies.

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* This is the text of a lecture by Professor Weiler, given at *SPIRIT*, May 18, 2000.

Enlargement will not only mean a growing burden on the decisional processes of the Union – it will mean, too, the continuous decline in the specific gravity of each individual. It will also render more visible that one cannot easily presume the existence of a European society as a basis for a trans-European political discourse.

From a policy perspective one must go beyond the Institutional Matrix: The Institutions must be ready to discuss proposals which have as their objective the empowerment of individuals in the political process (instead of just throwing rights at individuals – power is what citizenship is really about) and the enhancement of a true European political discourse – not the old Maastricht type discourse of yes or no to Europe, but a discourse of the policy options which are on the Union agenda – a political discourse which should take place both within Member States and across Europe. Such a political discourse does not take place today. What policies? I have explored these elsewhere.[1]

I turn now to my principal theme: The European Constitutional Agenda.

Does Europe need a Constitution?

In substance Europe's legal order is in many senses constitutional – especially in that it demands a constitutional discipline and loyalty in the legal requirements it makes vis-à-vis MS branches of government: Vis-à-vis Legislatures it insists on Supremacy, vis-à-vis courts it insists on Direct Effect and vis-à-vis Governments it abolishes Reciprocity, Counter Measures, the principal artifacts of State Responsibility, namely the classical pacific instruments of government in international relations. Europe already enjoys judicial protection of human rights, the ECJ gives decisions and rulings of a constitutional nature when necessary, and even subsidiarity and the issue of competences, a key element in all federal systems, is considered in Europe to be justiciable – though how effective this would be is another matter. In some senses it has a common law constitution. Unwritten but addressing all the issues which more formal constitutions address.

The question then has to be refined: Does Europe need a formalization of its Constitutional Order?

Recently there has been a revival of the drive for a formal constitution; the rationale for this drive may be located in the following five reasons.

1. Europe may have a constitutional legal order but the problem is that it does not have traditional Constitutional Legitimation – its constitutional order has not been approved in a

[1] Certain Rectangular Problems of European Integration, with Alexander Ballmann, Ulrich Haltern, Herwig Hofmann, Franz Mayer, Sieglinde Schreiner-Linford (www.iue.it/AEL/EP/index.html)

manner which gives it the kind of legitimacy that is commensurate with the discipline it demands and especially the kind of autonomy it needs to transcend Statal authority. What is needed, it is argued, is a process which will define the European peoples as a *Pouvoir Constituent* and then a formal Constitutional adoption process.

2. A second dimension to the question "Does Europe Need a Constitution" is the argument that asserts the non functionability of the Treaties as a Constitution. The Treaties are far too long and detailed and undifferentiated. Trivial stuff, but the mere fact that it is part of the Treaty is given constitutional status and the important, truly constitutional norms are submerged and do not get the prominence they deserve. One result is to make the process of constitutional amendment bog down with detail instead of focus on truly structural stuff.

3. A third dimension to the question "Does Europe Need a Constitution" is the question of the Court: Does Europe need a Constitutional Court in the way it exists in many of the European Countries. This has become especially acute in the light of the well known "rebellion" of national high courts in the last decade.

4. A fourth argument for a constitution concerns the introduction of a formal bill or catalogue of rights instead of the common law, unwritten system now prevailing. The Charter exercise, now underway, is considered as an important element of such a constitution, though formally the eventual status of the Charter is yet to be decided.

5. The final dimension concerns the issue of limiting the competences of the Union. Only a constitution it is argued can effectively anchor the jurisdiction of the Union in a binding way.

Does Europe *really* need a Constitution?

Allow me now to express some skepticism about each of these five elements. My overall view is that the European constitutional architecture is in urgent need of repair in various aspects, but that a formal process of adopting a constitution is not only pragmatically not feasible but might even be conceptually undesirable.

I will take each of the five points in turn.

Constitutional Legitimation

At some level the final product, a European Constitution adopted through some process articulating a European Constituent Power composed of the European Peoples, will resolve many of the problems now facing European constitutionalism, especially its authority vis-à-vis Member State constitutionalisms. If the objective is to open up the debate to a truly democratic, non court and non elite led constitutional discourse, than the need can be fully justified. But if

the object is to increase the stability of the European order (and that is how it is typically presented) than the process might be counterproductive and yield the opposite: A decrease in stability. There are many aspects of European constitutionalism which, in common law fashion, have become conventional and accepted by the players involved but which, I suspect, if thrown again into the public arena will re-ignite old fires and stoke old debates. Marriage counseling and frank debate between spouses often leads to divorce. The British *detto* Let Sleeping Dogs Lie may well be wise counsel in this situation.

But beyond this pragmatic speculation on the effect of a constitutional process on the stability of the European constitutional order I have a more principled and conceptual doubt.

A formal constitution would rob Europe of its most important constitutional innovation: *The Principle of Constitutional Tolerance.*

What, then, is the non technocratic significance of European constitutionalism which makes such a high demand on national legal orders and of European society as a whole, namely to accept European law, in its entirety, as the "supreme law of the land?"

Europe was built on the ashes of World War II, which witnessed the most horrific alienation of those thought of as aliens, an alienation which became annihilation. In some respects the European construct was about the prevention of another such carnage: But that's the easy part and it is unlikely ever to happen again in Western Europe though events in the Balkans remind us that those demons are still within the continent.

More difficult is dealing at a deeper level with the source of these attitudes. In the realm of the social, in the public square, the relationship to the alien is at the core of such decency. It is difficult to imagine something normatively more important to the human condition and to our multicultural societies.

There are, it seems to me, two basic human strategies of dealing with the alien and these two strategies have played a decisive role in Western civilisation. One strategy is to remove the boundaries. It is the spirit of "come, be one of us". It is noble since it involves, of course, elimination of prejudice, of the notion that there are boundaries that cannot be eradicated. But the "be one of us", however well intentioned, is often an invitation to the alien to be one of us, by being us. Vis-à-vis the alien, it risks robbing him of his identity. Vis-à-vis one's self, it may be a subtle manifestation of intolerance. If I cannot tolerate the alien, one way of resolving the dilemma is to make him like me, no longer an alien. This is, of course, infinitely better than the physical annihilation. But it is still a form of dangerous internal and external intolerance.

The alternative strategy is to acknowledge the validity of certain forms of bounded identity but simultaneously to reach across boundaries. We acknowledge and respect difference (and what is special and unique about ourselves as individuals and groups) and yet we reach across

differences in recognition of our essential humanity. I never tire of referring to Hermann Cohen (1842-1918), the great neo-Kantian philosopher of religion, in an exquisite modern interpretation of the Mosaic law on this subject which captures its deep meaning in a way which retains its vitality even in today's Ever Closer Union. It can be summarised as follows: The law of shielding the alien from all wrong is of vital significance. The alien was to be protected, not because he was a member of one's family, clan, religious community or people; but because he was a human being. In the alien, therefore, man discovered the idea of humanity. What is significant in this are the two elements I have mentioned: on the one hand, the identity of the alien, as such, is maintained. One is not invited to go out and, for example, "save him" by inviting him to be one of you. One is not invited to recast the boundary. On the other hand, despite the boundaries which are maintained, and constitute the I and the Alien, one is commanded to reach over the boundary and love him, in his alienship, as oneself. The alien is accorded human dignity. The soul of the I is tended to not by eliminating the temptation to oppress but by maintaining it and overcoming it.

Europe represents this alternative, civilizing strategy of dealing with the "other". This is, more than peace and prosperity, Europe's true soul. The constitutional expression of this strategy is the principle of Constitutional Tolerance and it is encapsulated in that most basic articulation of its meta-political objective in the Preamble to the EC Treaty:

> Determined to lay the foundations of an ever closer union among the peoples of Europe.

No matter how close the Union, it is to remain among distinct peoples. An ever closer union could be achieved by an amalgam of distinct peoples into one nation – which is both the ideal and/or the *de facto* experience of most federal and non federal states. The rejection by Europe of that One Nation ideal or destiny is usually understood as intended to preserve the rich diversity – cultural and other – of the distinct European peoples as well as to respect their political self-determination. But the European choice has an even deeper spiritual meaning.

An ever closer union is altogether more easy if differences among the components are eliminated, if they come to resemble each other, if they aspire to become one. The more identical the "other's" identity is to my own, the easier it is for me to identify with him and accept him. It demands less of me to accept another if he is very much like me. It is altogether more difficult to attain an Ever Closer Union if the components of that Union preserve their distinct identities, if they retain their "otherness" vis-à-vis each other, if they do not become One Flesh, politically speaking.

Herein resides the Principle of Constitutional Tolerance. Inevitably I define my distinct identity by a boundary which differentiates me from those who are unlike me. My continued existence as a distinct identity depends, ontologically, on that boundary and, psychologically and sociologically, on preserving that sentiment of otherness The call to bond with those very others in an ever closer union demands an internalization (individual and societal) of a very

high degree of toleration. The Leviticus imperative to love thy neighbour as oneself is so difficult and hence civilizing because that neighbour is not like myself. Living the Kantian Categorical Imperative is most meaningful when it is extended to those who are unlike me.

It is in legal terms that the principle of Constitutional Tolerance finds its deepest and most remarkable expression. The European *Courts* of Justice – in Luxembourg and the various Member States – have enjoined us to accept European law as the supreme law of the land. This, despite the fact that at face value this law defies the normal premise of democracy. Normally in democracy, we demand democratic discipline, i.e. accepting the authority of the majority over the minority only within a polity which understands itself as being constituted of one people, however defined. A majority demanding obedience from a minority which does not regard itself as belonging to the same people is usually regarded as subjugation. And yet, in the Community, through the doctrines of direct effect and supremacy, we subject the European peoples to the discipline of democracy even though the European polity is composed of distinct peoples. It is a remarkable instance of Constitutional Tolerance to accept to be bound by a decision not by "my people" but by a majority among peoples which are precisely not mine – a people, if you wish, of "others". I compromise my self-determination in this fashion as an expression of this kind of internal (towards myself) and external (towards others) Constitutional Tolerance.

However – there is a big "however" at this point. This, the Union's most fundamental principle, that of Constitutional Tolerance, becomes a travesty if the norms I follow, if the democratic discipline I obey is not adopted by others, my fellow European citizens, with whom I do not share the bonds of peoplehood but instead the bonds of a Community of Values and a new civic and political culture of transnational tolerance, but by a technocratic bureaucracy over which I have little control – presided over in the unreachable supranational Olympus of the European Council (and even European Parliament) and within the infranational netherworld of Comitology. A non-democratic Europe extinguishes the principle of Constitutional Tolerance just as a Statal or an One Nation Europe would.

And that exactly is the weakness of the European Court and some of its national counterparts. Their scant regard for, and weak sensibility to, the democratic processes by which the norms of which they demand supreme loyalty are enacted. It was evident in the Court's historic decisions such as *Van Gend en Loos* where the Court said

> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. *Furthermore, it must be*

noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee. (Recital 10, emphasis added)

There is something deeply unsettling to present the European Parliament and the ECOSOC of 1963 as a chamber that can be said to express a meaningful democratic notion of citizen cooperation in governance and justify rendering laws coming out of the Community process an obligatory nature binding upon States and individuals

Independently of the legislation of Member States (Recital 12)

This original sin of the Court (and its acceptance by national jurisdictions) may have been justified at the time when the international legal nature of the Community was strong and ratification of the Treaty in national parliaments could have been considered as an effective means for democratic legitimacy. But in today's incredibly complex and wide ranging Community when national ratification after each IGC is an impossible Take-it-or-Leave-it pact reminiscent of the worst plebiscites in authoritarian regimes and nothing more than a formal act rather than a civic exercise of democracy, the continued indifference of the Court to the weak democratic basis of many of the norms which it upholds – notably in those coming out of the Comitology process is more than unsettling: it is an act of Constitutional abdication.

The late Judge Mancini was right: The Court assumes that respectable democracy which is not there.[2] What a jurisprudence respectful of democracy should look like is not a theme that can be developed here. But I can indicate a starting point. Just as the Court of Justice served notice in the fields of Anti-Dumping and Anti-Trust that unless procedural fairness would not be respected by the Commission and Council, Anti-Dumping and Anti-Trust Regulations and Decisions would be struck down, so it can indicate in its Comitology jurisprudence that unless Democratic "fairness" and accountability (not just form, but also substance) are not respected, the outcome of these processes would be equally in danger. It would be instructive and entertaining to see the Commission and Council finally scurrying around to put that particular house in order.

The Non Functionability of the Treaties.

I entirely agree with this critique of the current constitutional architecture. But the remedy does not require the adoption of a European Constitution. It is perfectly possible from a legal point of view and feasible from a political point of view to engage in a redactive process, undertaken already by a team led by Yves Meny of the Robert Schumann Centre at the European

[2] See Mancini v Weiler: Europe—The Case for Statehood ... And the Case Against: An Exchange. Harvard Jean Monnet Working Paper No. 6/98 (also Vol. 4 European Law Journal (1998)

University Institute in Florence, which would reduce the Treaties to their essential constitutional nature and transform the non-constitutional provisions into normal measures of Community law. This would be a very valuable exercise, but it does not require a new Constitution.

The Judicial Architecture

The European judicial branch is composed of two limbs. We should, rightly, speak of the European ***Courts*** of Justice – not the ECJ and the Tribunal of First Instance, but those two courts coupled with Member State courts.

The judicial malaise of Europe can be summarized in the following Proposition:

We ask too much of the European Court and the Tribunal and we ask too little of National Courts.

It has become apparent to all, even the Court itself, that the current architecture of European courts will become functionally intolerable and symbolically retrograde in a Community of, say, twenty-six. But the problem is not simply one of a well functioning system which may be strained by a new heavy burden – the premise of most Court reform including the admirable new Due Report. The problem is also inherent – i.e. an architecture that served well the Community in its foundation and consolidation phases but which would merit rethinking and reform even if the Community were not to enlarge.

I want to begin by raising three issues which are considered by some as taboo in the debate on the future Judicial Architecture: The Tasks of the Court, the Qualifications of the Judges and the nature of the Judicial Conversation between the European Court and National Courts.

My theses here are simple:

a. The Court cannot effectively discharge its duty with its present tasks and present composition. This is not just a question of work load – a problem which is widely acknowledged. It is also a question of competences and credibility.

b. The style of judicial decisions is outmoded, does not reflect the dialogical nature of European Constitutionalism, and is not a basis for building European constitutional relations between the European Court and its national constitutional counterparts.

Any discussion of the Judicial Architecture must start with the preliminary reference procedure, one of the most remarkable and successful dimensions of the European legal order and European constitutionalism.

Its success means, however, that:

Barring the very few cases of "inappropriate" references, the ECJ is obliged to deal with a growing number of references – the equivalence of almost *all* cases pending before national courts going to the national constitutional court before they can be disposed of at first instance.

It also means that the ECJ has to answer questions on all aspects of European Law: One day a most specialized issue of agricultural law, the next day a complex issue of product liability and, increasingly, other aspects of private law and on day three, address, most critically, profound issues of constitutional law which engage the highest courts and the deepest legal values of the Member States.

Couple these two features together and the trajectory becomes one of implosion.

One issue is that of workload. The issue is not simply the delays which the heavy load on both Court and Tribunal creates – justice delayed is justice denied. It is, and this is usually only whispered, an issue of quality of justice. With the prompting of a former Member of the Court we tried in my Harvard Seminar to construct the schedule of a judge on the ECJ. Approximate as our calculations must have been, we concluded that between meetings and deliberations and actual hearings the workload is such that judges have very little time to think deeply about many of the cases – especially those for which they are not the Reporting Judge - which they eventually have to decide. This has various consequences, one of which concerns the role of Legal Secretaries. In the United States the question of the appropriate role and influence of judicial clerks has been discussed intensely. I believe that similar questions may be legitimately raised about the role and influence of Legal Secretaries at the ECJ. This is not meant in any way to impugn the integrity of the process but simply to bring arithmetic to bear on the problem. The year has so many days, the day has so many hours, the Court has so many judges, the judges have so many cases (indeed many) – time to think, to reflect, to deliberate is the most scarce resource of the Institution. Justice delayed is justice denied, but so is hurried justice, scantily deliberated justice, justice in which Legal Secretaries write and judges merely approve. The fault is not that of the Court. We ask too much of it.

The success of the Preliminary Reference also makes us forget the fact that in this procedure, the ECJ is both court of first and last instance – in principle a very unsatisfactory situation in itself constituting a violation of a fundamental principle of justice. This fact alone would call at least for the most careful and deliberative process in each and every case – since there is no appeal – but this is exactly what we do not allow the Court to do because of the heavy burden we place on it.

But the matter does not end simply with workload and time burden. Strangely, even paradoxically, the ECJ concept follows more the Anglo-American model of a plenary court supposedly competent in all areas of law rather than the Continental model of specialized courts – as we find in different ways in Germany, Italy, France, Greece and other countries.

There is the general issue of specialization and the most delicate one is the functioning of the ECJ when it sits as the Constitutional Court of the Union.[3] One of the peculiarities of the European system is that its most decisive constitutional issues depend, as a matter of legal realism, on a relationship of trust, confidence and credibility between the European Court and its national counterparts. The European Court can pronounce on the supremacy of Community law, or on the Frankovitch principle of Member State liability all it wants, so to speak. These doctrines become effective only when accepted and practiced by national courts under the guidance of the highest courts in each Member State.

It is no secret that the 90s have seen a certain erosion in the relationship. The German "Maastricht Decision" in which the German Constitutional Court declared, in defiance of established case law of the ECJ, that national authorities may disregard European law measures if they fall outside the competences of the Community as understood by German State organs, is notorious. Less well known area a number of decisions by other high courts in various Member States that display similar defiance. The Italian Constitutional Court declared that it did not regard itself in most cases that come before it as a Court or Tribunal in the sense of Article 177 (now 234) and, thus, outside the duty to make preliminary references. Troubling decisions have come out of Denmark, Belgium and Greece. And the Banana Saga before the German Court continues to cast a shadow.

It does not surprise me that there is a certain credibility issue. The members of the ECJ are jurists of the highest quality. But only few of them are constitutionalists. When European law and the European Court demand subordination even of the most important constitutional principles of a Member State (such as the protection of fundamental human rights) to European law, it is critical that such decision emanate from a tribunal which is capable, *and seen to be capable* of comprehending the constitutional sensibilities of the Member State at issue and communicating that comprehension to its national counterparts. Without this we can only expect more "Maastricht Decisions". The same can be said, of course, also regarding decisions of the Court on complex economic matters such as intellectual property, competition and the like. I focus on the constitutional dimension because it is politically the most sensitive and it touches often on legal values which go to the very identity of the Member States. The position of the European Court is different from that of the Supreme Court of the United States and even of the House of Lords. Its relationship with, and dependence on, national courts is far more delicate and sensitive.

In thinking about the future of European law, consideration must be given whether finally the European Court system should become European (rather than Anglo-American) and see the establishment of specialized jurisdictions, among them a European Constitutional Court composed of judges whose qualifications and expertise would be mostly in this field.

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[3] In some respects, every time it is called upon to interpret the Treaty it could be said to be sitting as the Constitutional Court since the Treaty is the Union's constitution. I mean, instead, when it sits on matters that would be considered of a constitutional nature in the legal cultures of most Member States.

Here, then, are some preliminary reflections on what a New Architecture may look like.

The New Architecture has two limbs too – the process at the level of the ECJ and Tribunal and the process at the level of National Courts.

At the heart of the European Judicial Architecture will be what is now the Tribunal of First Instance but which will become a very different animal. Let us call it for convenience the European Tribunal.

The European Tribunal will be composed of several functional chambers or divisions: A general chamber and several specialized chambers. Without being exhaustive one can imagine specialized chambers in matters of Customs Law including Antidumping and other Safeguard Measures; Competition; Social Security; Agriculture. Matters not falling within the jurisdiction on a specialized chamber would fall within the general chamber.

The number of judges would be decided on a purely functional basis. It may thus be that the Customs law chamber would have 12 members because of the number of cases it has to deal with and the Agriculture Chamber only 6. The general chamber too could have more judges than the number of Member States so as to ensure a reasonable burden on each panel and a reasonable time scales in rendering decisions. The General Chamber would have a plenary forum (judge from each MS) for important cases and could also sit *en banc* for very important or complex cases.

The principle of nationality would apply only to the general chamber. Specialized chambers would be composed of judges selected on the basis of their expertise from a Community wide pool. As the Community enlarges, the principle of parity will eventually have to yield. For reasons of coherence, any specialized panel of judges hearing a case in a chamber would always include one judge from the general chamber too.

The European Tribunal would have plenary jurisdiction under the existing jurisdiction of the ECJ – i.e. it would entertain both direct actions and preliminary rulings under the existing rules and procedures established by the Treaty. But its elevated number of judges would mean that the current delays associated with turning to the European Court would be eliminated. Further, I would suggest one expansion of its jurisdiction: The granting of a right to individuals to petition the Court to hear a case against a national public authority when a preliminary reference should have been made and was not made in violation of the Treaty – currently a lacunae in the judicial protection system of the Treaty.

This architecture would ensure both a balance between the specialized and generalized judge, it would substantially expedite the administration of justice and, because of the combination of specialization and reduction in docket burden, would also improve the deliberative quality of

the decisions rendered. And yet, the advantages of the classic European system of preliminary references and direct actions will be maintained – the best of both worlds, so to speak.

The European Court of Justice would become, under this vision, the High Court of Europe. It would have primarily Appeal Jurisdiction from decisions of the European Tribunal much on the same principles that govern the relationship between the two Courts today. In cases involving the legality of acts of the Institutions and of failure of Member States to fulfill their obligations under the Treaty, the Institutions and Member States would have an automatic right of appeal. Individuals would have leave to appeal if the Tribunal itself certified that the matter was of such interest that it should be heard by the European High Court or if they petitioned the High Court and it itself decided to hear such an appeal.

The European High Court would, however, have one new Jurisdiction – the appeal from Preliminary Rulings. These I propose would be taken by a reference made by the highest courts in the national jurisdictions – either in dealing with a case that came to them on appeal from a lower national court where a reference had already been made in the matter at issue, or, if the first reference was made by the high national court itself, it could re-refer the matter to the European High Court if it were unsatisfied with the decision of the European Tribunal.

I would also suggest that when a reference were made from the highest courts of the Member States to the European High Court, to underscore the importance of the matter and the national interest in the case and to ensure the fullest possible consideration of all national sensibilities, the deciding Panel should always include one judge of the national Court making the reference, though not from the actual group of judges deciding the case – in other words a national ad-hoc judge from the highest court of the Member State in those cases where the highest court makes a reference or appeal to the European High Court.

The composition of the European High Court should reflect its more "august" responsibilities. Member States should reflect much harder on the candidates they send – it would be worth reflecting whether European High Court judges should not come normally from the highest sitting Courts.

My final issue derives from the same special relationship and dependence between the ECJ and its national counterparts. Whereas in relation to the architecture I think the model should be less Anglo-American and more Continental, as regards the style of judgments, I think the Court should abandon the cryptic, Cartesian style which still characterizes many of its decisions and move to the more discursive, analytic and conversational style associated more with the common law world – though practiced by others as well, notably the German Constitutional Court. As noted above, especially in its Constitutional jurisprudence, it is crucial that the Court display in its judgments that national sensibilities were fully considered and taken into account. And it must amply explain and reason its decisions if they are to be not only authoritarian but

also authoritative.[4] The Cartesian style with its pretense of logical legal reasoning and inevitability of results[5] is not conducive to a good conversation with national courts. In the same vein I would argue for the introduction of separate and dissenting opinions. One of the virtues of separate and dissenting opinions is that they force the majority opinion to be reasoned in an altogether more profound and communicative fashion. The dissent often produces the paradoxical effect of legitimating the majority because it becomes evident that alternative views were considered even if ultimately rejected. As a precondition for these changes in the style of ECJ decisions the Member States in the next IGC would have finally to eliminate a continuous affront to the integrity of the European legal system, namely the renewability provisions for sitting judges on the Court. The European Parliament has proposed, twice, in its input to two successive IGCs, that judges on the ECJ be appointed to one non renewable term of office, thus removing any appearance of dependence on a Member State. (Whilst we are at it, the same should be true also for Commissioners who are meant to be independent....) The refusal of the Member States to accede to that request is simply unacceptable. Once this elementary anomaly is corrected, the conditions for dissents and separate opinions would be open.

The new Architecture should also address issues at the national level. The main recommendation here is to encourage a more proactive style of relationship between the national courts and their European counterparts.

National courts must be encouraged to move away from the model that to be a good European Court is to make Preliminary References to the European Court of Justice and to say Amen to the pronouncements of the Court.

To be a good European Court is to engage the European Court of Justice in a continuous conversation that it is not only the parties and the Commission which inform the sensibility of the European Courts but also the judicial branch of national judiciary. Right now we have to two models: Lower Courts (with some notable exceptions like the formidable Finanzgericht of Hamburg) simply frame questions for the European Court and follow the Rulings. By contrast, some of the most august Higher Courts regard themselves as the custodians of national constitutional values, the gatekeepers whose task is to make sure that core values of the national polity are not compromised by European norms. They do not regard themselves as part of a European constitutional conversation whose object would be to both shape European constitutional values and re-shape national ones.

The technology of a new style of conversation should encourage Member State courts at all levels not simply to ask the question but to propose what they think ought to be the correct Ruling and, most importantly, inform the European Court in the Reference itself of the

[4] See J.Vining, The Authoritative and the Authoritarian (Chicago : University of Chicago Press, 1986)
[5] Cf. Lasser, Judicial (Self-)Portraits: Judicial Discourse in the French Legal System, 104 Yale L.J. 1325 (1995).

constitutional and other concerns that the national legal order has when referring the question to the European Court of Justice.

Human Rights

The citizens and residents of Europe "suffer" from a surfeit of judicial protection of human rights. In most Member States a robust judiciary will provide the first and, in most cases, effective judicial barrier against public abuse of human and other fundamental rights. Then, in the field of application of Community law, the European Court of Justice has for decades extended its protection to all Community measures and even to certain categories of Member State measures. Finally, all Member States are also Members of the ECHR and under the tutelage of Strasbourg. And even though the Community is, lamentably, not a Member of the ECHR (despite a Commission initiative going back to 1978), the substantive provisions of the Convention are among the sources the European Court will use when exercising its human rights jurisdiction – though without the eventual scrutiny by the Strasbourg organs.

The enthusiasm with which the drafting of a Union Charter of human rights has been met is thus something of a surprise. Some good can, of course, come from a successful conclusion of the current exercise. There are some areas, such as privacy in the information age and issues of bio-technology, where ex-ante clarification would be helpful, not least to the Courts themselves. But for the most part the utility of the Charter will not be in closing a deficit of judicial protection but a deficit of perception. Making visible that which already exists here can be of important significance to the legitimacy of the Union as a whole. Even on this score one would have to wait and see the substantial content of the Charter, and its eventual status within the legal order of the Union. If a Charter is adopted by then left at some hortatory status, from a legitimacy point of view the exercise might actually backfire.

However, if the overall purpose is to enhance the protection of fundamental human rights within the Community, the Charter exercise might turn out to be a devil in disguise – for the simple reason that it is detracting attention from the much more pressing needs in this field.

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 granted already 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 knowledge nor means to seek judicial vindication. Many times what is 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 for a minute of Competition Policy. Imagine the Community which contains an Article 85 and 86 (currently 81 and 82) interdicting

Restrictive Practices and Abuse of Dominant Position, but not having DG4 to investigate, regulate and prosecute. 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 we have any chance against Anti-Trust violations without a DG4? 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, announced in Opinion 2/94 that protection of human rights is not one of the policy objectives of the Community and thus cannot be subject for a proactive policy. Far more important than a Charter for the effective vindication of human rights rather than for the public relations of human rights would be a simple Treaty amendment which made the active protection of human rights one of the policies of the Community alongside other policies and objectives in Article and a commitment to take all measures to give teeth to such a policy expeditiously.

Competences

The final issue relates to the competences of the Union and Community. In one of its most celebrated cases in the early 60s the European Court of Justice described the Community as a "...new legal order for the benefit of which the States have limited their sovereign rights, albeit in limited fields". There is a widespread anxiety that these fields are limited no more. Indeed, not long ago a prominent European scholar and judge has written that there "...simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community".[6]

The Problem of Competences is, in part, one of perception. The perception has set in that the boundaries which were meant to circumscribe the areas in which the Community could operate have been irretrievably breached. Few perceptions have been more detrimental to the legitimacy of the Community in the eyes of its citizens. And not only its citizens. Governments and even Courts, for example the German Constitutional Court, have rebelled against the Community constitutional order because, in part, of a profound dissatisfaction on this very issue. One cannot afford to sweep this issue under the carpet. The crisis is already there. The main problem, then, is not one of moving the boundary lines but of restoring faith in the inviolability of the boundaries between Community and Member State competences.

Comparative analysis of federal systems demonstrates that any attempt to formulate constitutional boundaries which will be impervious to centralized transgression is doomed. The problem rests in the fact that historically, centralized Courts charged with policing constitutional boundaries have either identified with an expansionist ideology or have abdicated such control to the political process. By contrast in those few instances when the central

[6] Lenaerts, Constitutionalism and the many faces of Federalism 38 A. J.Com. L 205 (1990) at 220. The Court, too, has modified its rhetoric: In its more recent Opinion 1/91 it refers to the Member States as having limited their sovereign rights "... in ever wider fields." Opinion 1/91, [1991]ECR 6079, Recital 21.

adjudicatory body did not itself become an agent of transgressing boundaries, the boundaries were maintained.

Any proposal which envisages the creation of a new Institution is doomed in the eyes of some. And yet I propose the creation of a Constitutional Council for the Community, modeled in some ways on its French namesake. The Constitutional Council would have jurisdiction only over issues of competences (including subsidiarity) and would, like its French cousin, decide cases submitted to it after a law was adopted but before coming into force. It could be seized by any Commission, Council, any Member State or by the European Parliament acting on a Majority of its Members. I think that serious consideration should be given to allowing Member State Parliaments to bring cases before the Constitutional Council.

The composition of the Council is the key to its legitimacy. Its President would be the President of the European Court of Justice and its Members would be sitting members of the constitutional courts or their equivalents in the Member States. Within the European Constitutional Council no single Member State would have a veto power. All its decisions would be by majority.

The composition of the European Constitutional Council would, I believe, help restore confidence in the ability to have effective policing of the boundaries as well as underscore that the question of competences is fundamentally also one of national constitutional norms but still subject to a binding and uniform solution by a Union Institution

I know that this proposal might be taken as an assault on the integrity of the European Court of Justice. That attitude would, in my view, be mistaken. The question of competences has become so politicized that the European Court of Justice should welcome having this hot potato removed from its plate by an *ex-ante* decision of that other body with a jurisdiction limited to that preliminary issue. Yes, there is potential for conflict of jurisprudence and all the rest – but nothing that competent drafting cannot deal with.

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