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BOOK REVIEWS

A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*. Oxford: Oxford University Press, 2001. Xiv + 1161 pages. ISBN 0-19-826289-2. EUR 105.

Historically, the concept of human rights is a development of the earlier notion of natural rights. It has become received knowledge among historians of political ideas that this notion of natural rights – or simply, as the English language political philosophers say, "rights" – evolved in the context of the European struggle to legitimate its overseas expansion and the setting-up of colonial empires. This goes for the Spanish late-scholastics, such as Vitoria, and seems equally valid for the Dutchman Hugo Grotius. This historical link between the older concept of natural rights and human rights explains the claim of the universality of human rights (though the French Revolution linked human rights to citizenship in a manner which seems to reduce the universal meaning of human rights).

The Universal Declaration of Human Rights – which has clear roots in notions of natural and universal rights – and its direct descendants, the UN Covenants and the European Convention on Human Rights, were formulated "for export", particularly the Communist countries and some of the independent countries in what is now called the Third World, and not so much for application to the countries engaged in drafting these instruments themselves. It is an interesting irony that they were immediately turned against the Western countries, and in particular their colonial policies, by the anti-colonial movement with the active support of the Communist countries. The conclusion which suggests itself is that the notion of early modern natural rights of mankind originated in the context of the build-up of empire (just as the notion of a *ius* and even *iura* as a common law of mankind originated during the Roman empire), but the 20th century human rights developed in the context of the breakdown and ending of the colonial empires.

The story of the genesis of the Universal Declaration and the European Convention as far as the British were concerned, is told in A.W. Brian Simpson's voluminous work of narrative history.

As a work of "narrative history", it claims not to develop a general theory of legal or political evolution. "This book is indeed written in the spirit which inspires the journalist who features as the letter 'J' in Edward Gorey's illustrated alphabet. He, after contemplating the scene of some disagreeable yet attractively newsworthy disaster, consoles himself with a gin and water, and thus refreshed, *wonders how it came about*. So it is, for me, with the European Convention", the author submits in the preface. He doubts the truth of Oliver Wendell Holmes' claim that "we have too little theory in the law rather than too much", but claims that the establishment of a narrative account of the European Convention is a necessary precondition to any useful theoretical enquiry. Though theoretical enquiries are by definition "useful" already in themselves, it is quite true that there can be no theory without knowledge of the facts upon which it reflects: the introduction of this book review formulated a paradox which could only be formulated after reading this admirable book.

A voluminous book it is indeed. This reviewer admits to having spent two summer holidays reading it – holidays, because the normal chores of the life of an academic lawyer no longer permit reading books of this size. Perhaps the occasional lure of other activities

detracted from finishing it, but the pace of the book is also slow. However, it covers a great deal, in historical perspective too. Completing this book was helped because the author, usually just in time to avoid becoming tedious in the sometimes minute detail, manages to throw in an aside, a good joke or anecdote, or a very personal observation. These made reading the book a pleasure.

To give an impression of the pace of the book: after some 90 pages on such seemingly disparate issues as the 17th century roots of British concepts of liberty, and the means and methods of repressing colonial insurrections and disobedience, chapter 3 begins on "The Protection of Individual Rights before 1939"; after 461 pages the Universal Declaration is adopted; at page 542 the story of the initial, abortive attempts to draft a UN Covenant on human rights, comes to an end, which virtually coincides with the moment that the ECHR was signed; the story of how the ECHR came about is told from pages 543 to 753, followed by a chapter on the negotiation of the First Protocol, in which some important loose ends, about which huge disagreement had arisen in negotiating the Convention itself, had to be ironed out; from page 808 onwards follow three chapters on the consequences of ratification of the Convention for Britain as a colonial power, in which the first two Cyprus cases, brought by Greece against the UK, are dealt with; a concluding chapter, entitled "Coming In, Rather Reluctantly, From the Cold", tells the story of the resistance to the right of individual petitions and accepting the power of the Court and how the final dismantling of the empire made it possible to accept it all and thus eventually made the incorporation of the main substantive provisions of the ECHR in the Human Rights Act at all possible.

The book makes it amply clear that the making of the Universal Declaration and that of the ECHR are closely linked. In a sense the book's title suggests a certain scope for the contents, but this turns out to be much wider. Predominant in the history of the making of these documents is the permanent tensions and struggling between the Foreign Office and the Colonial Office. Most striking is the fact that although the British played a major role in the making of both instruments, in practice this was dealt with mainly by fairly low-ranking officials in the Foreign Office, certainly in the early stages of drawing up human rights instruments, particularly the Universal Declaration: and the policies set out during these early stages proved decisive for many of the policies to be followed regarding the ECHR's drafting. The role of the Home Office seems to have been negligible at least in the earlier stages, but as the author does not tire of pointing out, the real role of the Home Office cannot be described, because all evidence in its archives of human rights issues with which it must have been involved has been destroyed. The very late – mainly unhelpful – role of the Lord Chancellor in the bringing about of the ECHR is further witness of the fact that it was the civil servants at the Foreign Office who designed not only the policy in the negotiations but also the actual scheme of large parts of the ECHR. The Cabinet was only very rarely involved, as were ministers, as long as matters could be sorted out between the relevant officials within the ministries themselves.

Very many things on many different topics can be learned from this book. For instance, the story of the exile of the Kabaka of Buganda (877–884), which informed this reader of aspects of colonial policies in present day Uganda in the 1950s of which he was not aware. This story is told for its relevance under Article 5 of the ECHR and the policy of derogations – a matter to emerge to its full extent when the British wished to expel (and did expel) bishop Makarios from that one British colony in Europe which was governed in a most colonialist manner, but to which the ECHR was extended: Cyprus. The policy was that the human rights instruments had to be drafted in such a manner that they lived up to the high standards of legal draftmanship which prevailed in British legislative instruments. At the same time it was necessary that a resultant human rights instrument could also be extended to the colonies, as in fact they mostly were. (This, incidentally, meant that the ECHR was operative in very many countries in all parts of the world, where its operation soon lapsed again after those countries' independence.)

We also learn much about all kinds of persons involved in the process of negotiations and even more of those in preparing negotiations and instructions. One thing which happens in the course of the book is the fairly thorough demolition of René Cassin's acquired reputation as father of the Universal Declaration, a reputation which earned him the Nobel Peace Prize of 1968. That year's presentation speech calls him one of the two Declaration's architects – the other being Eleanor Roosevelt, who chaired, but Cassin being the one who drew up, "held a key position. He formulated, defined, and clarified. He was crystal clear in his formulations"(see www.nobel.se/peace/laureates/1968/press.html). Cassin's not being the father of the Declaration is spelled out in the many places in this book where he is mentioned (pp. 365, 420–422, 448, 459, 512, 516, 522, 531, 615, 652, 657, 691, 1084). Nor is the picture sketched of Fernand Dehousse always very flattering. On the contrary, the important role played by Charles Malik (who was not under instructions from his government, like Cassin and Dehousse at least in the beginning of the negotiations of the Declaration) is confirmed.

Also in the sphere of legal doctrine things are to be learnt, particularly from the chapters on the Cyprus cases. Among many other things, they trace the origin of the doctrine of the margin of appreciation in the Strasbourg case law (pp. 1000–1003) in the first Cyprus case. In this case, although the doctrine did not have its name yet, it was used in the interpretation of the very strict language of Article 15 ECHR. One of the major conclusions is that, in hindsight, the European Commission on Human Rights's judgment on the derogation from Article 15 was more illiberal than the Colonial Office had been at the time. The author makes the case that here, just as on the issue of curfews on Cyprus, the majority of the Commission – unlike the Greek dissenter Evstathiades – was probably on the wrong track in their approach and assessment of the facts of the situation.

This big book lends itself better to reading than to summarizing. It is an exemplary study which calls for equivalent studies of the role of other countries and their policies in the drawing up of the documents dealt with by Brian Simpson. It makes one long for similar studies of the drawing up of other European documents. This kind of study may reveal the huge divergence between the original intent and contingent motives of those drawing up these documents and their eventual legal lives of their own.

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J.H. Jans (Ed.), *The European Convention and the Future of European Environmental Law*. Groningen: Europa Law Publishing, 2003. x + 136 pages. ISBN 90-76871-13-2. EUR 125.

This edited collection stems from a conference of the Avosetta Group held in Amsterdam in October 2002. As the book's preface and annex state, the Group "is a small, informal group of lawyers whose main purpose is to further the development of environmental law in the European Union and its Member States" and is named after the Latin name of the rare bird which was the subject of the famous ECJ *Leybucht Dykes* case. The book's format partly reflects its purpose in feeding into the ongoing debate on the future of Europe and the draft constitution. It consists of a number of relatively short chapters, each containing a number of recommendations, followed at the end by an annex, which draws these recommendations together in the form of a resolution.

In the first chapter, on environmental principles in Community law, Winter implicitly raises an interesting question. How does one determine what an environmental principle is? Most lawyers adopt a positivist approach, whereby principles are those which are explicitly labelled as such in legal documents. In an EC context, principles would therefore be limited to those listed in Article 174 EC – *viz*. the polluter pays principle, the precautionary prin-

ciple and so on. However, Winter adopts a more constructive interpretation – principles are those which empower the Community and Member States to act in relation to the environment (which Winter refers to as "enabling" functions) and those which impose duties on them ("directive" functions). This leads to an interesting discussion not only of the 'traditional' environmental principles such as the precautionary principle, but also, for example, 'environmental protection' itself as an enabling justification for Member State measures in breach of Article 28 EC.

The following chapter by Ermacora on the right to a clean environment is less assured, not least because it fails to engage with much of the existing academic literature on environmental rights. If we adapt Liz Fisher's use of the term "precaution-spotting" in relation to the precautionary principle, we can say that Ermacora adopts a "rights"-spotting approach, which ranges across ECHR case law on environmentally related human rights, direct effect, proper implementation of directives, and procedural rights, such as access to justice and access to environmental information. The trawl is a worthy one. Unfortunately, there is little analysis of how these various rights differ in juridical and jurisprudential terms (which they surely do). Indeed, Ermacora seems to assume that these rights are all of a similar kind. His conclusion – that the right to a clean environment in the EU constitution needs to be formulated in a sufficiently unconditional and precise manner so that individuals can invoke it before national courts – is symptomatic of this confusion. Legislative rights may need to be sufficiently precise and unconditional to be justiciable by national courts under the doctrine of direct effect; however, (non-absolute) fundamental rights are meant to be somewhat more vague, precisely so that courts can engage in a balancing exercise.

Epiney's chapter on competence raises the question of EC competence to act in relation to procedural aspects of environmental law (such as access to justice), rather than just substantive fields, and the extent to which this competence is limited to procedural measures linked with Community law (drawing parallels with the applicability of EU law on fundamental rights to Member States). It is unfortunate that Epiney only mentions the (old) Directive 90/313 on access to environmental information in this regard and not the newer range of measures coming on stream to implement the Aarhus Convention. These may only have been draft measures at the time of writing, but their importance surely merited some discussion. That aside, Epiney argues that the EC does enjoy competence on procedural matters because these clearly contribute to the objectives of Article 174 EC. This then leads onto an interesting discussion about this goal-related delimitation of EC competence as against a more limited, list-like enumeration of areas which can be the object of Community legislation (with Epiney, rightly, favouring the former).

Jans' chapter on EU environmental policy and civil society is essentially a discussion of Aarhus-type issues involving access to justice, public participation in environmental decision-making, and access to information. Like Epiney's chapter, it suffers a little from not discussing recent legislative activity in this area. In addition, although the chapter comes out with a number of clear and welcome recommendations for reform, it would arguably have benefited from a more critical discussion of the role of civil society: Jans accepts at face value the Commission's argument that environmental NGOs provide valuable support for a more democratic system of governance; however, the representativeness of such groups has been called into question and, in fostering participation, care needs to be taken to ensure that more marginalized voices are also heard.

The chapter by Montini on external competence and protection of the environment is valuable, not least because the issue of the external environmental competence of the EC (to enter into international environmental agreements) is often not given the attention it deserves by environmental lawyers. In a lucidly written chapter, Montini draws parallels with the issue of internal competence and, in particular, the right of Member States to adopt more stringent measures (here international agreements) than those adopted by the Community. The final section considers external competence in a slightly different sense – unilateral

trade-related environmental measures taken by the EU (as opposed to international environmental agreements) and their compatibility with WTO law.

In chapter six, Krämer considers the future role of the ECJ in European environmental law. He begins by painting rather a depressing picture for EC law in general as a result of enlargement and the inconsistency likely to be engendered by a larger and more diverse EC judiciary. The bulk of the chapter is then taken up in considering the failings of the current centralized enforcement system under Articles 226–228 EC (where, as Krämer notes, the procedure culminating in an Art. 228 penalty payment takes an average of 9 years) and the prospects for a more decentralized system. By decentralization, Krämer has in mind, not the current system of actions in national courts, but rather decentralized EC complaint centres in Member States and also decentralized federal courts located in Member States. While apparently in favour of the former, Krämer does not believe that there is much to be gained from the latter.

In the final substantive chapter, Bándi considers the consequences of enlargement for EU environmental law. In a wide-ranging chapter, he begins by highlighting the difficulties which many of the candidate countries have experienced in implementing the existing Community environmental *acquis*, including the use of advanced technological instruments such as BAT, and voluntary arrangements where institutional support for such arrangements is limited. However, Bándi convincingly argues that the traffic should not all be one way and that the EU could usefully borrow some good practice from the candidate countries. Perhaps the most significant example relates to the weak environmental right contained in the EU Charter of Fundamental Rights. When compared with the existing constitutional rights in a number of candidate countries – which generally include an explicit right to a healthy environment – the EU provision is found wanting.

Overall, the book provides a brief, but stimulating account of some of the key challenges facing EU environmental law. One only hopes that some of its valuable recommendations are taken up by those putting the finishing touches to the new European constitution.

Chris Hilson
Reading

G. Koenig (Ed.), *L'euro, vecteur d'identité européenne*. Observatoire des politiques économiques en Europe. Strasbourg: Presses Universitaires de Strasbourg, 2002. 333 pages. ISBN 2-86820-201-2. EUR 22.

This book includes a series (9) of contributions by a group of researchers, mostly economists, of the Universities of Strasbourg I and III under the direction of Prof. Koenig. The purpose of the book is to study how the creation of a single currency can contribute to the development of a European identity. The first part analyses the way the euro can induce among the citizens the consciousness of their pertaining to the same community and the second part of the book looks at the single currency as a catalyst of integration acting on the consolidation of European identity.

The reader will realize that there is very little "legal" substance in this brilliant book, except for institutional considerations, but for this "lacuna", it is an interdisciplinary work as far as economics, sociology and anthropological history are concerned. And indeed, the book starts with a very interesting, important (p. 17–85) and erudite contribution on the development of coins in ancient Greece. The author (Ancori) demonstrates that it is the "cultual and political" hypotheses that explain the start of coinage and not the requirements of trade and accountancy. Koenig, in his chapter on "The acceptance of the euro and the feeling of European identity", recalls that the attachment to European integration and the

adoption of the euro do not necessarily go hand in hand among the citizens. On the other hand, those who are in favour of the euro do not necessarily consider themselves as European citizens and many declare themselves not very well-informed about both the euro and European integration. The recognition of intrinsic qualities to a currency does not mean that this currency will automatically been accepted. The experience of the substitution of the dollar to the pound as a universal reference did not prevent the pound initially keeping an important role due to its greater diffusion than that of the dollar. Let us pick up also this sentence of that contribution: "The function of unit of account can play a very important role in the development of a European identity as the euro becomes a common language and a social link" (p. 105). And also: "the euro can contribute, as a reserve of value, to the development of a sense of identity if it warrants a stable purchasing power and if its external value is strong " (p. 106). But the leitmotiv of the different studies is that if the development of the euro strengthens the sense of identity, the evolution will only be complete if it leads to a political union of which the euro will be the symbol (p. 109). Another chapter bears on the "euro fort" and European identity (Dai). This contribution was prepared before the spectacular rise of the euro. The author makes an interesting typology of "strong currencies". He analyses the differences of attitude of sometimes the same actors on the respective merits of a strong and a weak euro, the speeches on the "potential of appreciation" of the euro and the contrasting views on the causes and the impact of a weak euro, as it then was.

The next chapter looks at the effect of the internationalization of the euro on European identity (Seel). The author takes the view that Europe speaking with one voice would act as a legitimacy agent for the institutions. Devoluy contributes a chapter on the ECB as a vector of identity. The author analyses the objectives, features, independence and accountability of the ECB that has become such a vector, but he would like to see a greater interest of the ECB for the real economy and employment and pleads for a widening of the mission of the ECB, which should not be limited to price stability (p. 216). Precisely, the next chapter, again by Koenig, bears on the organization of macroeconomic policies, as vectors of multiple identities. He is of the view that it is difficult for the ECB to provoke strong support for a policy whose main objective does not constitute the priority of the citizens, and whose results risk deteriorating the employment situation, which is, for them, an essential preoccupation (p. 223). Under these conditions, no wonder that the ECB has not contributed to significantly strengthen the sense of identity. Reading that, one realizes the gap that exists between those (the central bankers and liberal economists) who support the (classical) view that price stability is the best contribution that a central bank can bring to growth and employment, and a number of economists, citizens and politicians who share the views of Prof. Koenig. It is difficult to conciliate the two opinions. Nevertheless, I would like to say that price stability is a medium term objective and that there is an obligation for the ECB, if this objective is not compromised, to give more importance to the obligation to support the general economic policies in the Union. It is what the ECB normally does, notwithstanding some declarations that in the past seemed to deny that. On the other hand, without forgetting the "rules", the coordination of economic policies should have at its disposition more proactive instruments and be more compulsory than it is. Unfortunately, this will not be achieved by the present reform.

The next element in the approach of Prof. Koenig is of course the stupid or not so stupid Pact, that is considered as too restrictive in its objective of a balanced budget or in surplus at medium term, and when it imposes on Member States a pro-cyclical policy when they are subject to negative demand shocks. On page 233, the author seems to consider that the ECB should not have supported the Commission's criticism of Ireland in 2001, because a monetary institution should not intrude in fiscal responsibilities that are in the hands of the governments (p. 233). It is true that under Article 4(b) of the ESCB Statute, the ECB may, in the fields of its competence, address opinions to institutions, organs and national authori-

ties. Should we interpret this provision as excluding the possibility for the ECB to express an opinion on the level of inflation or fiscal matters in a Member State? Surprising, isn't it? The concrete suggestions made by the author for the reform owe a lot to the thinking of P. Jaquet and J. Pisani-Ferry. Chapter 7, by Duchastaing, precisely includes the analysis of the proposals made by a number of economists in order to strengthen the coordination of budget policies ("Fiscal solidarity as a vector of European Identity"). The contribution is about the role of a federal budget, an inter-regional insurance system and risk-sharing through market mechanisms. The author concludes that the absence of a federal budget and the existence of national budgetary policies limited by the Stability and Growth Pact, risk provoking a rejection of the euro in case of a severe recession (p. 261). Chapter 8 bears on the European identity through centralization of salary negotiations (Diana and Sidiropoulos). This contribution, like the last one, on "European Cohesion, as a consequence or a condition for the success of the euro" (Méon), are full of mathematic formulas. On salaries, the authors underline the need of a reorganization of labour markets if one wants to achieve a centralization in the German manner of collective bargaining, a powerful instrument in order to develop a European identity. The last contribution is on the motivation of the choice of a monetary union and its redistributive effects.

It was not possible to sum up fairly the rich content of this book, which gives a lot of food for thought. Neither could we possibly take a position on each and every standpoints made by the authors. We hope that we have not given a caricature of the developments that are based on a huge literature. Those who are not familiar with econometrics can just not read some pages of a few chapters and go directly to the conclusions. They are always suggestive.

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R. Schulze, M. Ebers and H.C. Grigoleit, *Informationspflichten und Vertragsschluss im Acquis communautaire.* Tübingen: J.C.B. Mohr (Paul Siebeck), 2003. 314 pages. ISBN 3-16-148126-7. EUR 64.

This book is one of the results of the *Acquis-group* (www.acquis-group.org), coordinated by Hans Schulte-Nölke (Bielefeld). This research group focuses on the *acquis communautaire* in order to develop principles of existing European contract law. Although the pointillist character of Community law has been repeatedly stressed, the members of the group still consider it possible to find common features capable of generalization and crystallization into principles. In the words of Schulze in the introductory chapter, "[t]he analysis of existing Community law aims to establish overarching principles and evaluations which underlie primary and secondary legal acts as well as court decisions of the *acquis communautaire* in order to use them as a framework for the judicial and legislative development of Community law". This approach evidences that research in the field of European contract law is shifting from the opportunity and feasibility of harmonization to the contents of such harmonization. The Communication from the Commission to the Council and the European Parliament of 12 February 2003 (A More Coherent European Contract Law –An Action Plan) also fosters the substantive research on European contract law.

The book is divided into four sections. The first one is devoted to general aspects of consumer protection and contains two chapters (one by Kraus, the other by Rochfeld and Houtcieff). The object of the second section is the formation of contract, with contributions by Schulte-Nölke, Pfeiffer, Ferreri and Bydlinski. The longest section is the third one, five chapters written by Mota Pinto, Ebers, Van Erp, Grigoleit and Storme. The fourth and last section focuses on remedies; the authors are Wilhelmsson, Schwintowski and Magnus. Thus,

the contributors cover the majority of the present States of the European Community (Germany, France, Italy, Austria, Finland, Belgium, the Netherlands and Portugal). It has to be stressed, however, that none of the authors belongs to the common law world.

Even though the editors have preferred a title only in German, five of the chapters (36%) are written in English. Each chapter finishes with a summary in the other language, English or German. The French contributors have written their essay in their mother tongue; the summary then is both in German and English. The introduction is also provided in both languages.

The first essay of the section on "General Aspects of Consumer Protection" deals with case law on consumer protection in the framework of a European Contract Law. Krause summarizes the directives enacted by the community legislator and the case law applying such directives. Special attention is devoted to the language regime for the information to be given to the consumers: information must be provided in an understandable language. Another main issue of the essay is the resort to fundamental freedoms, a technique used by the ECJ in order to limit the Member States' discretion. The conclusion, however, is that the ECJ has not been able to draw a coherent system in the field of consumer law because of the disparate pieces of legislation in force. Rochfeld and Houtcieff point out the divergences between French law and Community law in the field of contract law. The concept of non-conformity introduced in Directive 1999/44 is not equivalent to the classic concept of *vice caché,* and the French legislature seems to be unwilling to amend the *Code civil.* By the way, the same has happened in Spain, since the transposition of the Directive has been effected by means of a statute (Act 23/2003, of 10 July), which has left unmodified the regulation on *saneamiento* (latent defects) enshrined in the *Código civil*

The second section begins with quite a programmatic essay by Schulte-Nölke, whose conclusion is more *de lege ferenda* and in terms of the results of the research team than an analysis of positive law. By contrast, Pfeiffer deals with core questions of the conclusion of contracts. This author stresses another of the weaknesses of Community law, i.e. the European legislature leaves to the national legislature essential aspects of the conclusion of contracts, such as the option for the moment of the conclusion (the mailbox rule, the knowledge of the acceptation, the possibility of the knowledge, etc.). Ferreri deals with the interpretation in the most comparative essay of the book. The Italian professor sketches a series of principles emerging from European legislation and case law on the basis of certainly more extensive materials. The *contra proferentem rule,* the contract to be interpreted as a whole, *favor negotii,* purposive interpretation, exceptions are to be strictly interpreted, are some of the deduced principles of interpretation. Complementary general principles policing the effects of contract, especially the almost omnipresent principle of good faith, are not left aside. Concerning form requirements and the legal consequences linked to such formalities, Bydlinski has to conclude that those requirements are certainly heterogeneous. In any case, there is a huge contrast when one compares the amount of formalities required in Community law and the tendency to the diminution in the significance of contractual formalities both in common law and in continental systems. The paradigm could be Article 2:101 of the Principles of European Contract Law ((1) A contract is concluded if: (a) the parties intend to be legally bound, and (b) they reach a sufficient agreement without any further requirement. (2) A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses). Bydlinski and Whittaker ("The reformulation of Contractual Formality", in Birks and Pratto, *Themes in Comparative Law in Honour of Bernard Rudden* (Oxford, 2002), p. 199) have laid the foundations of further research in the key field of form requirements.

Pursuant to the subject matter of the third section, information requirements, Mota Pinto highlights the fact that in spite of the imposition of information duties on the parties, especially in relation to distant contracts, the European legislature does not regulate the viola-

tion of such duties. In his opinion, the general requirements of information to consumers in Community law are four: essentiality, understandability, accessibility and opportunity. Ebers focuses on the information requirements in the financial services sector, where transparency plays a leading role, whilst Van Erp suggests glancing at property law in order to perceive the purposes that publicity may serve and transport them to contract law. Vices of consent are not regulated in Community law. Therefore, Grigoleit has to resort to the Principles of European Contract Law and to the Unidroit Principles (compare with Morales Moreno, "Los vicios de la voluntad", in Espiau and Vaquer (Eds.), *Bases de un derecho contractual europeo/Bases of a European Contract Law,* Valencia: Tirant lo Blanch, 2003, p. 147). The fact that also Storme deals with the regulation of the PECL proves the increasing importance of the Principles in the research on contract law. The Belgian author tries to set out a system of remedies for breach of information duties on the basis of the PECL, since the *acquis* does not furnish coherent materials.

Thus the contents of the fourth section are anticipated. The contributors, Wilhelmsson, Schwintowski and Magnus, all stress that although Community law imposes a variety of duties of information, the remedies for breach of such duties lack any systematization. Nevertheless, Wilhelmssson still tries to formulate a conclusion: "a party who has not fulfilled his pre-contractual duty of disclosure may face a successful claim that as a consequence of his failure, the contract should not be considered binding". It is doubtful, however, if that constitutes a remedy or simply the logical consequence of the lack of a true and sufficient consent to enter the contract. Schwintokski, on his hand, suggests looking for the sanctions inherent in the aim of the contract, because such sanctions become binding for the Member States as they have no discretion under Art. 249(3) EC.

Certainly, the portrait resulting from the book is rather disappointing, since it shows many inconsistencies and *lacunae* in Community law. The *acquis communautaire* necessarily presupposes the existence of national laws and is far from complete even in the areas covered by directives. But there is no reason to be pessimistic. Hopefully the work of the *acquis* group and other research teams will pave the way for a "more coherent European contract law", provided that the European legislature takes into account the conclusions drafted in this and in future books.

Antoni Vaquer
Lleida

O. Lando, E. Clive, A. Prüm and R. Zimmerman (Eds.), *Principles of European Contract Law- Parts I-III*, The Hague: Kluwer Law International, 2000–2003. 561 and 285 pages. ISBN 90-411-1961-2. EUR 110.

This is a work which has been a long time in the making, being based on an idea which started to come to fruition following a symposium held at the Copenhagen Business School in 1974. A search was instigated to find a common European contract law. Over the years different solutions have been presented ranging from a common uniform code of contract law to a much looser form of mutual recognition of national systems. A major contribution to the debate is provided by the results of the work undertaken by the Commission on European Contract Law which is reproduced in these two volumes.

Much of the initial drive for the establishment of this project came from the European Commission's Internal Market Directorate General. Members of the Commission on European Contract Law were distinguished lawyers from across the European academic community. By 1995 the first part of their research was published, covering performance, non-performance and remedies. This was updated and expanded with the publication of Parts I and II in 2000 which also contains chapters dealing with formation of contracts,

authority of agents to bind their principal, validity of contracts, interpretation, and contents and effects. Part III was published in 2003 and deals with plurality of parties, assignment of claims, substitution of debtor, set-off, prescription, illegality, conditions and interest.

In the last few years, the European Commission has properly entered the debate. In July 2001 it issued a communication on European contract law which considered whether certain continuing restrictions on the full functioning of the common market could be explained by reference to the disparity in national contract laws. Four options were proposed: leaving it to the market to determine applicable contract rules; promoting the development of non-binding common contract law principles; reviewing and improving existing EC legislation in the area of contractual obligations in order to make the law more coherent; adopting a new instrument at EC level. A frosty response was given from some in the common law systems, in particular the Bar Council and the Law Society. This was followed up with a further communication in February 2003 which was regarded by the English Bar Council as being more realistic with a lesser emphasis on harmonization.

The Principles of European Contract Law will form a very important part of this ongoing debate, and for that reason alone these two volumes deserve a wide exposure. It is a hope of the drafters of the Principles that they will provide a legal foundation for measures to be taken at EU level across a range of specific subject matters. It is envisaged that they may be effected either by express adoption of the parties, or by default in the absence of any stipulation as to the applicable law of an international contract or, possibly, through harmonizing legislation establishing a common code of contract law. The Principles are designed primarily for use in the Member States of the EU, having regard to the economic and social conditions prevailing there. Inspiration has been sought from the laws of all the Member States, although inevitably some systems of contract law may be more influential than others. The result is not intended to be a melange for the sake of it, but has tried to take the best from the disparate national systems and produce a coherent structure for regulating contractual relationships, particularly those with cross-border effects. This is not a book for continuous reading. Rather it is to be consulted on specific issues, one at a time. The format is in three parts. First, the text of an article is given. Secondly, a short comment is provided on the meaning and effect of that article. Thirdly, notes are provided analysing the origin of the article and showing how, or whether, that article reflects or differs from the national law in each Member State. Some useful reference is also made to United States contract law.

An attempt is made to show that there is not such a difference in practice between some of the fundamental principles of law which might be regarded by some as either sacrosanct or anathema. Thus, for example, Article 1:201 of the Principles states barely that each party must act in accordance with good faith and fair dealing. A lengthy comment cross-references the other instances in the principles which refer to the duty of good faith and gives various examples of its application in practice. In the notes it is recognized that, even though all Member States apply the principle of good faith, there is a considerable difference between the legal systems' approaches as to how extensive the principle should be. There then follows a very interesting analysis of the application of the principle in the legal systems of Germany, England and Ireland, together with shorter references to Austria, Belgium, France, Luxembourg, Greece, Italy, the Netherlands, Portugal, Spain and the Nordic countries. The conclusion is drawn that whilst English law does not include a principle of good faith as such, in fact the same result is achieved by other rules. For example, English law limits of the right of a party to terminate a contract as a result of a slight breach where the real motivation appears to be to escape a bad bargain.

In other cases, the Commission on Contract Law is obliged to choose between opposite rules which apply in different States. For example, the place of performance of the obligation to pay a debt is the place of the debtor under German, Spanish, French, Belgian and Luxembourg law, but the place of the creditor under Austrian, English, Greek, Italian, Dutch

and Nordic laws. Article 7:101 of the Principles requires payment, unless otherwise specified, to be at the place of business of the creditor at the time of conclusion of the contract. Non-payment obligations are to be performed at the place of business of the debtor.

The debate on the development of a common European contract law will continue, probably for several years to come. In particular, progress is sought by the European Commission and the European Parliament either on general principles or on their application to specific sectors, especially consumers, insurance and international commercial contracts. Whatever the ultimate outcome, much will be owed to the members of the Commission on European Contract Law for their diligence in producing these excellent Principles.

Conor Quigley
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S. Grundmann and J. Stuyck (Eds.), *An Academic Green Paper on European Contract Law*. The Hague: Kluwer Law International, 2002. 432 pages. ISBN: 90-411-1853-5. EUR 125.

This collection of essays, arising from a conference in Leuven organized by the Society of European Contract Law (SECOLA), marks an academic response to the *Communication on European Contract Law* from the EC Commission of 11 July 2001 (COM(2001)398 final). The Communication presented four non-exclusive options, including the drafting of a European Contract Law code which has received support from the European Parliament (since 1989) and the European Council (since 1999). Inevitably, given the forum, the essays concentrate on how best to introduce a European Code, rather than the more negative Option I that no EC action should be taken in this field. Equally, Option II – promoting the development of common contract law principles leading to the convergence of national laws – is considered a *fait accompli* in the light of the previous academic work in this field (notably the *Principles of European Contract Law* edited by two contributors to this book, Lando and Beale), and subsequent projects involving other contributors (Gandolfi, Von Bar, Bussani and Mattei). The essays therefore focus on Options III and IV: improving the quality of legislation already in place (Chapters 3–7) and the adoption of a uniform European contract law (Chapters 8–26). The authors divide into two main camps, favouring either an optional European code which, to various degrees, supplements existing national laws – "a European system of contract laws" – (discussed primarily in Chapters 20–26) or the more radical option of an exclusive European Code (Chapters 8–19).

The essays raise a number of significant questions which must inevitably follow from acceptance of some form of European Contract Law. What kind of Code is needed: comprehensive or limited; general or specific; compulsory or optional? Who should design its content: lawyers, academics, politicians, or some combination of all three? What is the rationale behind such a Code: harmonization or a more abstract goal of qualitative rule-making? What philosophy should any Code reflect: liberal or regulatory? How should it be implemented: Regulation, Directive, or Recommendation? What legal bases exist for any such proposal in current EC law? For example, is Article 95 EC still a viable option in view of the recent case law of the ECJ (notably the *Tobacco* judgment, Case C-376/98)? To what extent, if at all, should the wishes of the contracting parties be taken into consideration? Is there any merit in diversity? How should any proposals deal with limited enthusiasm from certain countries (the UK being an obvious example in view of its ongoing failure to ratify the Vienna Convention on the International Sale of Goods and its reluctance to join the Euro)?

The wide variety of views expressed on these topics serve to illustrate the complexities involved with any reform of this kind. The somewhat muted response of the Commission representative, Dirk Staudenmayer, additionally highlights the important role academics

may play in the fundamental debate as to what kind of Code, if any, should be adopted in relation to European contract law.

The range and number of essays are impressive. The conference brought together more than 100 professors from all Member States and more than 200 participants, including those influential in drafting the current proposals for a European Code. Contributors include Lando, von Bar, Gandolfi, Basedow, Beale, Bianca, Dorbing, Wilhelmsson and Collins. The text is also stimulated by a variety of approaches, bringing in valuable studies from the perspective of empirical analysis (Schwartze, Ch. 3), socio-legal analysis (Beale, Ch. 4), consumer law (Howells, Ch. 5) and law and economics (notably Van den Bergh, Ch. 17). Indeed, the need for empirical research is emphasized by the doubts expressed by Van den Bergh and Collins (Ch. 18) as to whether harmonization would, as the Commission query, lead to the removal of direct and indirect obstacles to cross-border trade. More difficult to accept is the editors' assertion that although the academic circle from which the speakers are drawn represents no more than 10–20% of private lawyers in this field, their ideas should not be questioned since they derive from "those circles which really studied the questions, i.e. among experts" (p. 8). Whilst no-one would doubt the great learning and expertise of those involved, it remains both a practical and academic question whether the Europeanization of private law is acceptable within Member States and, with all due deference to the excellent scholarship in this text, it is unlikely to quieten those voices which continue to question the utility of this enterprise. One must also note that the Commission's consultation process invited views from governments, business, consumer organizations, and legal practitioners in addition to academic lawyers in formulating an action plan for the future.

As is the nature of a collection of disparate essays, few firm conclusions stand out. It is also an inevitable, although regrettable, fact that in a collection of 26 essays some chapters are brief, although to a certain extent this is attenuated by the work of the editors in drawing arguments together and integrating arguments raised in general debate during the conference in a very helpful introduction. The strength of this collection is rather to provide a forum for discussion and stimulate an active debate as to the merits of the different ideas expressed than to advocate a single united approach. Despite the strong views expressed in favour of an exclusive European Code, the editors acknowledge that the majority of the participants seemed to favour strong optional elements (as indeed did the European Parliament). Equally, they note a common consensus that European substantive and comparative law education should be strengthened. Van Gerven (pp. 427–8) quotes Professor Coing's statement that "What is necessary … is a curriculum where the basic courses present the national law … against the background of the principles and institutions which the European nations have in common." It may be noted that whilst in the UK, EC law is now part of the core curriculum for the LLB, comparative law continues to rest at the margins of the degree, despite its obvious merits in encouraging a qualitative understanding of European legal systems and legal methodology in general. It is to be hoped that law schools will take heed of such clear advocacy for greater recognition of the value of comparative law.

For any lawyer working in the field of contract both within and outside the European Union, this will be an important text to read, setting out the main arguments of the major proponents for reform. It offers much to consider as the pace for change moves forward. It is a pity, however, that no translation is provided for Gandolfi's excellent chapter (and certain quotations in the text) which might limit accessibility of the text for English-language readers. The book also casts valuable light on the Action Plan produced by the Commission in February 2003 (COM(2003)68 final, *A more coherent European Contract Law*). In opting for further consultation on a mix of regulatory and non-regulatory measures and the possibility of an *optional* instrument in the area of European Contract Law, the majority view identified by the editors would appear to be influential. One may also note the Commission's emphasis on freedom of contract (para 93) and high quality and consistency

in any strategy in the area of contract law (paras. 69–80). Whilst the authors would no doubt be disappointed that the majority of those consulted were against Option IV, they would no doubt take heart from the fact that an important number of contributors suggested that such proposals should not be disregarded for the future, particularly in the light of developments in comparative research (Option II) and improvements of existing EC law in the contract law field (Option III).

Experts in this field will find few surprises in this text, as the authors express well-honed arguments relating to the nature of a common European Law of Contract. The book nevertheless provides a clear overview of the views of the leading academics in this field and facilitates a deeper understanding and appreciation of the law to those familiar with this area or seeking a sourcebook of the many arguments involved. It remains to be seen what shape, following the current ongoing consultation process, any form of European Contract Law will finally take.

Paula Giliker
London

P. Häberle, *Europäische Verfassungslehre*. Nomos: Baden-Baden, 2002. 616 pages. ISBN 3-7890-7711-9. EUR 89.

Peter Häberle is one of the most eminent German constitutionalists and most certainly the academic personality who has discovered, animated, and worked out the discipline of comparative constitutional law in Germany. His oeuvre disproves the (rather German) misconception that constitutional law is "too political" to lend itself to comparisons. More than 15 years ago, when hardly anybody spoke of a European constitution, Häberle coined in a seminal essay the notion of "*gemeineuropäisches Verfassungsrecht*", that is a "Common European Constitutional Law", consisting of shared legal institutions and understandings, growing from a seedbed of a European culture.

The book under review does not present a coherent system of European constitutional law. It is written more in the style of a long, sometimes entwined essay. The author himself frequently qualifies his statements as mere notes, outlines, sketches, fragmentary stock-taking, or cues for further research.

Many of Häberle's previous, original creations appear over and over again as *topoi* in his recent book. The *Leitmotiv* is "culture" and the idea of a *Kulturverfassungsrecht*. By this, Häberle calls for an understanding of the Constitution as a part of our (European) culture. He also considers "Europe as a cultural process" (p. 503). Consequently, education becomes a crucial factor of integration (p. 508), and religion as an element of culture must be specifically dealt with by the constitution of Europe (p. 522). The globalization of culture would be catastrophic (p. 557). Ultimately, and this seems to be the *summa* of the whole book, any theory of European constitutional law must take the form of cultural studies (p. 596).

Other recurring themes, which the extremely proliferate author has elaborated in numerous previous works are the *Textstufenanalyse* (cross-cutting analysis of legal texts), the importance of legal comparison as a means of interpretation (*Rechtsvergleichung als fünfte Auslegungsmethode*, see e.g. p. 251), the *gemischtes Verfassungsverständnis* ("mixed understanding" of the constitution as a (more passive) constraint on government and as a (more active) promoter of values and as a stimulus of specific policies); the *europäisches Gemeinwohl/öffentliches Interesse* (European common good), the *europäische Öffentlichkeit* (the European public sphere), and finally the dangers of a purely law & economics analysis, or the tyranny of the market.

Häberle quotes extensively from foreign constitutions, also non-European, highlighting

in particular the need to take into account Eastern European achievements (p. 481) as well. Sometimes one has the impression that too much emphasis is laid on the naked constitutional text, without taking into account how the wonderfully phrased provisions really function, what the constitutional reality looks like. Given the cosmopolitan use of legal sources, the author's focus on German academic works on the Constitution of Europe is slightly surprising. It is well known that the German debate is somewhat lopsided, and its fervour can easily be put into perspective by comparison with the literature from other European countries.

It is impossible to summarize a book of this type in a short review. The present reviewer merely wants to mention some particularly interesting hypotheses and assessments offered by the author. Häberle endorses a double-legitimacy model of the Union, based not on the States, but on the peoples of Europe and on the citizens (p. 156–157; whereas Art. I-1 of the Draft Constitution of 12 June 2003 relies on "citizens and States"). European integration should be pursued in a piecemeal approach, not by *grand dessin* (p. 217, 240, 245 relying on Karl Popper). The concept of Constitution is not linked to the State (p. 186). Relevant portions of European law are already a Constitutional Treaty or a European *contrat social* (p. 190, 241). No revolutionary foundational act of constitution-making (which would in any case be continued in the process of interpretation of the constitution, p. 231) is needed (p. 156). The *pouvoir constituant* is not monolithic, but a pluralist one consisting of multiple actors (p. 235). Europe is an emerging constitutional community *sui generis* (p. 198, 231). Two traditional elements of the (Member) States – viz. their peoples and their territories – have been already substantially transformed and europeanized (p. 227–228). The concept of the State must be reconceptualized with a view to culture (p. 248 and *passim*). As far as the relationship between European and Member State constitutional law is concerned, Häberle rejects, and this seems important, any notion of hierarchies (p. 207). The present reviewer agrees. A purely procedural arrangement (acceptance of the ECJ as an ultimate umpire) suffices to settle practical problems. The Member States' constitutions have become parts of the whole (*Teilverfassungen*, p. 220, 231).

Häberle, who has himself taught in Switzerland, is also the most profound connaisseur of Swiss constitutional law in Germany. He is therefore in a position to explain features of the Swiss constitution, which might be worth considering at a European level; and, after all, he treats Switzerland as a part of Europe. To consider democratic governance as a consequence of human dignity (p. 294, 579), seems, for instance, a rather Swiss idea.

With regard to European democracy, the author rightly points out that, before deploring a democratic deficit of the EU, we first have to decide on the relevant yardstick. Any assessment depends on the model of democracy embraced and on comparative findings on actual democratic governance in the European States (p. 306).

As far as fundamental rights are concerned, Häberle opts for a comprehensive view of human rights which overcomes the division in negative, political and positive, social and economic rights (p. 332). This is in line with international developments. He sees Europeanwide deficiencies in the fields of minority protection and fundamental duties (*Grundpflichten*, p. 342).

On the whole, the *Leitmotiv* style of Häberle's "Studies on European Constitutional Law" offers good reading, although at some places the book would have benefited from strict editing in order to eliminate repetitions. The volume is a treasure trove which will certainly stimulate further research on the Constitution of Europe.

Anne Peters
Basel

V. Deckmyn, *Increasing Transparency in the European Union?* European Institute of Public Administration, 2002. 287 pages. ISBN 90-6779-1687. EUR 36.

The book reviewed here is a comprehensive and informative account of the developments relating to the right of access to information since the issue was first introduced into the EU (then EC) at Maastricht in 1991. Most contributions to the volume are very substantial whereas a few, but only a few, are brief personal statements, presumably originally speeches give at the conference of which the volume is the result. The latter do not add anything of value to the majority of the more worthwhile contributions to the book. On the other hand, they do not comprise more than some 20 pages out of the 247 which make up the volume in total, excluding the annexes.

Among the authors there are both university researchers and public officials, mostly from different branches of the EU but also one from the Belgian Ministry of the Interior. Not only are the contributions of good quality generally, it is an additional advantage of the book that it includes both the view from inside the EU and the view (well-informed) from the outside. The two groups of authors respectively also manage to be neither overly flat or fearful (the public officials) nor excessively theoretical or critical (the university researchers). For the sake of the plurality of voices it would have been better not to let one and the same researcher contribute two of the articles to the volume, which, however, implies no criticism of the content of the contributions as such.

Among the subjects treated in the volume are an introductory overview of the legal developments relating to openness and transparency ”from Maastricht to Laeken” (unfortunately the terms ”openness” and ”transparency” are nowhere defined for the purposes of the book in its entirety nor used in the same way by the different authors), the European Ombudsman’s efforts to increase openness, the new regulation of 2001 on access to documents, access to information on EU external relations and justice and home affairs and, last but not least, an annotated summary of all the judgments on access to documents issued by the ECJ and CFI from 1995 to 2001. All this is very useful. In addition the articles also contain a lot of references to earlier works in the field so that the reader gets a full picture of what has been written on the issue of EU openness and transparency since discussions began.

The overall tone of the book is realistically optimistic. Much has indeed been accomplished in the field of access to information in the EU although much still remains to be done. The impression conveyed by the authors is that further improvements are not unlikely. The Head of the Legal Department of the Office of the EU Ombudsman concludes his contribution to the book by pointing out the importance of administrative culture. ”Above all”, he writes, ”it needs to be emphasized that for openness to become the rule and not the exception requires a culture of service-mindedness in the administration”. (p. 145) Thus not only the existence of the openness legislation, but the way it is applied is of crucial importance for the realization of openness. The question is how a such a new culture is instituted among the EU officials.

The purely legal argument in the volume is enriched and enlivened by being linked to some wider, future-oriented issues of principle like democracy, legitimacy and forms of governance in the EU.

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S. Griller and B. Weidel, *External economic relations and foreign policy in the European Union*. Wien-NewYork: Springer-Verlag, 2002. 500 pages. ISBN 3-211-83726-4. EUR 79.

This collection of essays constitutes the outcome of a research project carried out by the Research Institute of European Affairs at the Vienna University for Economics and Business Administration. Under the direction of Prof. Stefan Griller, this centre has recently undertaken a number of interesting initiatives which have given rise to various collections of essays produced by the same publishers, amongst which Breuss, Griller and Vranes (Eds), *The Banana Dispute. An Economic and Legal Analysis* (2003) and Griller (Ed.), *International Economic Governance and Non-Economic Concerns* (2003).

The starting point for this collection is the self-evident interaction between external economic and foreign policies. In their introductory essay, the editors set the scene by pointing out that "the complexity of international relations calls for a holistic and integrated approach taking into account existing reciprocities between different policy fields" (p. 9). Whilst this is an accurate statement, its legal repercussions within the context of the European Union and its tripartite structure are far more difficult to ascertain. The editors choose to do so in a twofold manner: on the one hand, they examine the political dimensions of the competences set out within the Community legal framework and, on the other hand, they identify specific areas of activity and analyse the way in which they touch upon economic and political objectives.

The book is divided in two parts. The first is focused on the division of competence between the EU, the Communities and the Member States. Whilst shorter, this part contains the most interesting contributions, amongst which an analysis of the pillar structure and its impact on the external policies of the European Union (Weidel) and the typology and effects of EC competence under the first pillar (Griller and Gamharter). The latter is one of the outstanding essays of this volume: it puts forward a detailed legal analysis of the Court's case law on external competence, whilst taking into account the convoluted provision of the new Article 133 EC post-Nice. In addition, there are overviews of the exclusive competence of the EC with emphasis on the Common Commercial Policy (Lukashek and Weidel) and the general aspects of the representation of the EU and Member States in international organizations (Dutzler).

The second part of the book is by far the longest and consists of analyses of case studies in areas of activity where the external economic and foreign policies of the Union interact. A number of them are of a rather descriptive nature: following a short outline of general arguments in favour of the establishment of international competition rules (Immenga), there is an overview of three major transatlantic disputes, namely the Bananas, Hormones and Foreign Sales Corporations cases (Vranes), the extraterritorial sanction regimes imposed by United States in 1996 on Cuba, Iran and Libya (von Lutterotti), the human rights clauses in association agreements (Hilpold), the regulation of exports of dual-use goods (Weidel) and the representation of the EC in international organizations within the sphere of the Economic and Monetary Union (Dutzler). In addition, there are issues which catch the reader's attention such as the detailed analysis of the new Nice provision of Article 181 EC in a chapter on cooperation with developing and other third countries (Martenczuk) and the examination of the EU response to the extraterritorial US legislation (von Lutterotti). The latter is one of the most interesting essays in this volume as it provides a detailed legal analysis of Regulation 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country. The interest in this topic is justified not only because that instrument has been rarely analysed in academic literature but also because of its legal context: this EC law instrument was adopted along with a Joint Action whose legal basis was in the second and third pillars governing the areas of Common Foreign and Security Policy and, then, Justice and Home Affairs. In other words, in shaping its reaction to the

extraterritorial measures adopted by United States, the Union sought to rely upon the three legal frameworks governing its external relations simultaneously.

The above overview clearly illustrates that the subject-matter of this collection is comprehensive. What appears to permeate a number of contributions is a degree of suspicion towards the legal diversity that underlies the regulation of the EU external economic relations. In other words, the sets of rules dealing with external economic relations and foreign policy are viewed as in a state of permanent normative conflict which, not infrequently, appears to entail a choice between either the EC legal framework or the CFSP. This rather pessimistic assessment is not always substantiated by a detailed legal analysis or an exhaustive account of the implementing record. A case in point is the essay on economic sanctions against third countries (Lukaschek) where a degree of confusion is sometimes apparent: for instance, the author argues for the fundamental supremacy of Community law over EU law (p. 342) whilst acknowledging that the Union is not prevented from relying upon the second pillar in order to deal with measures whose regulation falls within the competence of the first pillar (at p. 346). At another juncture, the Court's case law is viewed as inconsistent in recognizing the power of the Member States to carry out their foreign policy (Case C-124/95 *Centro-Com)* whilst it had already declared that the foreign policy implications of dual-use goods were not capable of rendering its regulation beyond the EC legal framework (Case C-70/94 *Werner* and Case C-83/94 *Leifer*). However, this argument appears to ignore the line of reasoning underlying the Court's judgments and the subtle construction of Community competence this entails. In both cases, the right of the Member States to define their foreign policy objectives was acknowledged; the issue was the implementation of that policy within the EC legal framework. In *Centro-Com*, the Member States had chosen to rely on the EC legal machinery and impose economic sanctions; in *Werner* and *Leifer*, the Member States could invoke the exceptional clauses laid down in the Export Regulation and exercise the wide discretion expressly conferred upon them by the Court. In other words, far from inconsistent, these judgments put forward a more subtle understanding of national sovereignty and its relationship with Community competence. That this is lacking in the essay on sanctions is also illustrated by the treatment of the post-Maastricht regime as exemplified in Article 301 EC: whilst the author doubts its efficiency, no evidence is produced to substantiate her conclusions.

This approach strikes as rather pessimistic. As the Treaty itself calls for "a single institutional framework", why is the interaction between the two legal frameworks ruled out as legally threatening? Are the principles set out in the TEU ensuring the integrity of the *acquis communautaire* and the jurisdiction of the Court inherently insufficient? There appears to be no evidence in this book that when EC and CFSP interact directly the result is bound to be legally flawed. Quite the contrary, the experience of the regulation of exports of dual-use goods and the amendment of the inter-pillar regime following the Court's case law illustrates that the management of legally distinct, yet interrelated, set of rules is far from impossible. Whilst the new Constitution of the Union will abolish the pillar structure, the fundamental questions about the interaction between national sovereignty and EU competence will not disappear. Instead, our legal antennae will have to be adjusted to more subtle understandings of how to manage diversity within a unitary structure. After all, this would be hardly a novelty within the framework of EU law, a message which would have been brought home had this volume included a contribution on the substantive content of the Common Commercial Policy. Indeed, neither the construction of Article 133 EC on common principles nor the acknowledgment of exclusivity by the Court have led to a truly uniform policy: instead, a degree of diversity in terms of the application of autonomous measures adopted thereunder is still maintained.

Whilst drawing upon a number of interesting themes, this collection of essays seems to have more questions than answers. In principle, there is nothing wrong with that. It is the

breadth of its subject matter and the reputation of the Institute under the aegis of which this volume is produced which had created higher expectations. One looks forward to reading the printed outcome of the other activities of the Research Institute of European Affairs.

Panos Koutrakos
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M. Bell, *Anti-Discrimination Law and the European Union*, Oxford Studies in European Law. Oxford: Oxford University Press, 2002. 269 pages. ISBN 0199244502. GBP 40.

The Introduction to this book states that it aims at providing a better understanding of the forces that influence the direction and development of European social policy by analysing the situation within anti-discrimination law. It proposes that European social policy is located between two models of social policy: the market integration model and the social citizenship model. It examines to what extent these models can help explain the development of EU anti-discrimination law by analysing in detail the development in respect of racial and sexual orientation discrimination. The book is based on a doctoral thesis defended at the EUI Florence, under the supervision of Prof. Sciarra.

Its aim makes clear from the outset that the discussion of the fairly recent European legal developments in these areas – i.e. the adoption of the Racial Equality Directive and the Framework Directive – is not an end in itself and that it is not limited to a mere description of the personal and material scope thereof. They are considered not only in the broader perspective of EU anti-discrimination law, in particular of discrimination on grounds of nationality and gender, but also in the perspective of European social policy and the direction this can be said to be taking in the EU. As such, Bell's book concerns a more fundamental study of the foundations of EU anti-discrimination law and social policy, encompassing a discussion of the historical development of law and policy in the areas at issue and a national legal comparative analysis, also linking the subject to the evolution of the notion of citizenship. In itself, I deem this approach an interesting and original one, reflecting a high academic standard. This is borne out by the actual contents of the book, which gives proof of an in-depth analysis of the subject and which is quite convincing in its arguments. Which is not to say that there may be no points of – rather minor – criticism.

The analysis starts in the first chapter with the presentation of the theoretical framework. The market integration model is said to prescribe a limited social policy for the EU, as it is predicated on the assumption that the primary goal of the Union is to achieve economic integration. This model is deemed evident as the original appropriate role for social policy. The social citizenship model is said to concern a model of social policy as an independent policy objective for the EU, centred around a role for the Union as the guarantor of fundamental human and social rights. The author notes that, whilst the Member States and the ECJ have been increasingly prepared to incorporate the 'language of rights' within social policy, including the Charter of Fundamental Rights, there has been considerably less progress in the actual establishment of enforceable basic rights for EU citizens and rights largely remain dependent on free movement. Bell is right in observing that the Court's case law shows more concrete evidence of progress, but his remark that an important limitation thereof can be traced back to the absence of any statement of rights in the founding Treaties is slightly surprising. This is in particular so in view of Article 12 EC on the prohibition of nationality discrimination and Article 141 EC on gender (pay) equality, which Bell discusses in the next chapter and where he puts these at the top of the "hierarchy of equality" precisely because provision is made for them in the EC Treaty. In summary, anti-discrimination law is said to find a location in both models of social policy, whether as a tool against the gaining of unfair competitive advantages through cheap labour or as a breach of the fundamental right to non-discrimination.

Given the "overlap" that may exist between race and nationality, discrimination and the question that has arisen in the case law of whether sexual orientation discrimination falls within the scope of gender equality law, it is only logical that the author proceeds in the second chapter first to a discussion of nationality and gender discrimination. This chapter thus provides a useful insight into how anti-discrimination law has hitherto been dealt with in the framework of EC law and whether one can speak in this respect of emerging rights of social citizenship. It is maintained that in both cases the original impetus for European intervention lies within the market integration model, but that increasingly anti-discrimination law in these fields has become more characteristic of the social citizenship model. As regards nationality discrimination, Bell points in particular to the absence of any prohibition on discrimination against third-country nationals. As regards EU nationals, Bell notes that the law is expanding in the direction of fundamental social rights, first, through case law that gives proof of a more generalized right to equal treatment for EU citizens lawfully present in other Member States and, second, through the extension of the same logic to other types of discrimination; if discrimination on grounds of nationality is a barrier to free movement, then discrimination on grounds of race, religion or disability may also constitute an obstacle to free movement.

In his discussion of EU gender equality law, Bell puts the emphasis on the factors that have enabled its relatively successful evolution rather than discusses its actual substance. Although this is understandable from the point of view of the scope of the book, some aspects would have deserved some (more) thought in my view. One wonders in particular why the issue of positive action is not addressed in this chapter, as this is of relevance for the establishment of the nature and scope of the gender equality principle and thus, in my view, also for determining whether the EU is heading towards a social citizenship model in this area. In fact, when reading chapter 6, Bell seems to acknowledge this as well, as there he takes the recognition in national law of positive action as a collective mechanism to combat discrimination as a criterion for distinguishing between equality law regimes and anti-discrimination regimes. Bell concludes the chapter by suggesting that one may speak of a "hierarchy of equality", where different groups enjoy a different standard of legal protection, as the actual EU provisions have only dealt with gender and nationality discrimination. He claims that the recent legislative developments have radically altered this equality hierarchy and that it is this equality hierarchy that constitutes the principal subject of the book – which seems somewhat late to state at this stage of the book. Yet, it marks an interesting angle which may not only be revealing indeed as to why certain grounds of discrimination have attracted greater protection from EU law than others, but also as to remaining differences between the actual levels of protection and the justifiability thereof.

Against that background, chapters 3 and 4 provide a highly informative and comprehensive description and analysis of the different stages in the evolution of EU law and policy on racism and sexual orientation discrimination. In chapter 3 in particular it is considered how, given the market integration model of social policy, anti-racism policy has been able to progress. Somewhat disappointing is the fact that, although Bell deems it surprising that in adopting the Racial Equality Directive the Member States did not choose simply to mirror the Equal Treatment Directive (Directive 76/207), but instead provided a new model for EU anti-discrimination law, he does not try to give an explanation for this; or is one to understand that this results from the EP's favourable negotiating position at the time? The author concludes that the difficulties experienced in developing EU policy on racism pre-Amsterdam can be clearly linked to the market integration model and to the invisibility of one of the main groups affected by racism – third-country nationals – in the internal market. He connects the transformation of anti-racism policy to the gradual emergence of a market rationale for EU intervention, in particular the growing appreciation that all types of discrimination can create barriers to free movement. Bell also highlights, however, the inher-

ent contradiction in founding anti-racism initiatives on a need to guarantee the right to free movement for EU citizens – a right which enshrines indirect racial discrimination as a result of the exclusion of third-country nationals. The reluctance of the Member States to engage with issues relating to third-country nationals is regarded as a continuing tendency towards forms of citizenship centred on rights acquired by virtue of nationality. In view of this, Bell rightly underlines the need to adopt the Commission's proposal to create a "long-term resident" status for most third-country nationals with five years' lawful residence, as being a vital complement to the Racial Equality Directive and for moving towards a model of social citizenship based on inclusion and solidarity. A short while ago, the Council finally reached agreement on this proposal. Very importantly, Bell thus puts the problems in the forefront touching upon both nationality discrimination and racial discrimination and the need of further action to solve these. The Directive is deemed to represent a social citizenship model in that its scope also extends into traditional areas of national social policy such as health, education and housing, and its protection is not dependent on the prior exercise of the right to free movement.

In chapter 4 the author concludes that the weak case for Union intervention in sexual orientation discrimination can also be easily traced to the market foundations of European social policy. The internal market rationale for combating sexual orientation discrimination is deemed greatest in respect of same-sex partnerships rights, as the divergence between national legislations on this topic is giving rise to new barriers to free movement. According to Bell, the dominant impression emerging is that the Union seeks to avoid moral controversies and that, therefore, great caution has been exercised in respecting national diversity on the recognition or non-recognition of same-sex partnerships. Yet, Article 13 and the Framework Directive are considered to demonstrate the potential for progress as part of a wider equality agenda. Sexual orientation has been nested within wider discourses on developing Union citizenship and removing barriers to participation in the employment market. Bell also notes that although the Framework Directive provides a platform for action, it remains a more lonely intervention than the panoply of actions to combat racism, which encompasses notably the mainstreaming approach.

When discussing the policy against AIDS as one of the reasons for the EU to engage itself with sexual orientation issues, the author deems it reasonable to assume that various resolutions and action programmes gradually strengthened the arguments in favour of combating sexual orientation discrimination. Given also the fact that at several other places in the book Bell points to the significance of soft law for the development of anti-discrimination law, it is a pity that he does not refer in this context to at least one example provided by the Court's case law that illustrates the possible legal effect of such instruments (staff case T-10/93 *A. v. Commission* [1994] ECR II-179, in which the applicant relied on the Conclusions of the Council and the Ministers for Health of the Member States, meeting within the Council, on 18 December 1988 concerning AIDS).

The next two chapters seek to explain the initial implementation of Article 13 EC through the adoption of the two Directives and to establish the role for the EU in anti-discrimination law. Chapter 5 does so by further exploring the legal scope of Article 13. Bell's view is that even though the impression exists that Article 13 might be seen as concrete evidence of the social citizenship model, it is not truly free of market dependency because its remit remains subject to the limits of the powers conferred by the Treaty upon the Community, which are strongest and most clear in those areas directly connected to the functioning of the internal market. In this regard, he examines the meaning of the rather confusing use of the concepts of "competence", "powers" and "scope of application of the Treaty" in Community law. Nonetheless, he concludes that Article 13 clearly marks a turning point in EU anti-discrimination law, which takes a step in the direction of creating a meaningful sense of European citizenship going beyond equal treatment in the marketplace. Instead of focusing only on

the areas in which the EU has competence to intervene and to establish what this competence actually implies, the author is of the opinion that a more instructive analysis of the role for the EU in anti-discrimination law may spring from a focus on understanding better the appropriate areas for EU intervention. This is the focus he takes in chapter 6, by providing an overview of existing national legislation and the traditions, philosophies and policies these laws represent. I think this is a very fruitful – bottom-up – approach, which can even be considered an indispensable complement to the top-down approach from the EU perspective, with a view to gaining a full understanding of the evolution that has taken place and of the prospect for future developments. The Member States' existing legal provisions on discrimination in employment are categorized into three distinctive levels of legal protection: anti-discrimination laws, equality laws and absence of any specific legal provision. A further distinction has been made between "comprehensive" and "mixed-level" regimes, the comprehensive ones covering both racial and sexual orientation discrimination and the mixed-level ones having no specific legislative protection against sexual orientation discrimination. While recognizing the limits of such a classification, as Bell also does, it allows us to gain a clear insight not only into the main features of the applicable laws of the different Member States but also into their main differences. Anti-discrimination law regimes are summarized largely as a set of negative obligations, focusing on actions that employers must refrain from, as opposed to the imposition of positive duties on employers to act in favour of equal opportunities. There is a focus on providing a legal remedy for individuals. Equality law regimes recognize the limits of an anti-discrimination strategy dependent on individual litigants and are characterized, first, by having institutional support mechanisms for individual litigants and, second, by having adopted collective mechanisms to combat discrimination, in particular positive action.

Bell concludes that the Article 13 Directives represent a careful negotiation of the diverse national legal traditions and that, as such, they do not reflect any single model of anti-discrimination law. They leave a significant range of discretion for Member States to locate the minimum rights required within their own national context. Yet, he maintains that the Directives have negotiated an upward trend in national law that will produce quite significant changes in the legal regime in most of the Member States. By introducing a Europeanization of anti-discrimination law and policy, they are also considered to open a dialogue between the Member States on the correct law and policy mix, which ultimately may be more crucial to policy development than the boundaries of legal competence.

In the last chapter, Bell draws some conclusions as to the transformation of EU anti-discrimination law, by looking first at how the new legal initiatives may re-position European social policy. His overall conclusion is that the Union is carving out a key role in protecting citizens against all types of discrimination and that Article 13 and the Directives reconfigure European social policy towards a greater emphasis on the social citizenship approach, without abandoning altogether the market-making focus of earlier periods. With a view to explaining this shift, he refers *inter alia* to the emergence of a new approach to social policy centred on the European Employment Strategy and its focus on labour market participation. Most interesting and topical is the question that Bell poses as to whether the open method of co-ordination, which has fairly recently occurred as a new methodology for implementing European employment policy, constitutes a third way for the development of social policy, next to the market integration and social citizenship models. This question certainly deserves closer examination in the future. Bell also considers whether the Directives are isolated measures or are part of a new European policy framework on anti-discrimination. In this regard, he focuses on the issue of mainstreaming equality norms into all aspects of EU law and policy. As far as sexual orientation is concerned, he concludes that there is little evidence that the EU is willing to tackle this issue.

Finally, the author points to the equality hierarchy within EU law as the key issue which Article 13 and future legislation must confront. The inherent contradiction of a system of

anti-discrimination law which itself discriminates in the degree of legal protection afforded was one of the underlying weaknesses of EU anti-discrimination law prior to Article 13. Quite ironically, in my view, the reality of the directives adopted was indeed a reinforcement of the equality hierarchy, as the prohibition of racial and sexual orientation discrimination has attracted stronger enforcement mechanisms as well as a wider material scope. Very importantly, the necessary amendment of the Equal Treatment Directive that Bell mentions with a view to incorporating many of the elements present in the Article 13 Directives has meanwhile materialized through the adoption of Directive 2002/73. Other issues that should be tackled are the extension of the principle of equal treatment between men and women to areas outside employment, and the adoption of a directive on disability discrimination. Bell points to the use of soft law with a view to maintaining policy momentum, when binding legislation remains a distant possibility. Overall, he thinks that soft law might become more effective if it were used with less frequency, though with a greater intensity of obligation. In saying this, however, he disregards the negative side effects this use may have for the legitimacy of EU law and policy and in particular democratic decision-making, which may not enhance EU citizenship.

Concluding, I think that the book certainly achieves its aim. It is a thorough piece of work, which, because of its wider approach, not considering the developments in respect of racial and sexual orientation discrimination in a legal vacuum, is a very welcome contribution to the existing literature. Apart from that, the book is written in a very accessible style and format. It is therefore recommended reading not only for academics, but also for everyone interested in the subject of anti-discrimination law and the development of EU social policy.

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Ch.C. Steinle, *Europäische Beschäftigungspolitik*, Tübinger Schriften zum internationalen und europäischen Recht, volume 56. Berlin: Duncker & Humblot, 2001. 456 pages. ISBN 3428105656. EUR 85.

Expectations were pitched high in the preliminary stages of changing the EC treaty in Amsterdam, when the new title on employment was discussed. Some were hopeful, that a competence of the EU concerning an employment policy could be a way out of the increasing unemployment in Europe. Others had reservations, because they feared an incalculable loss of national freedom of action. They stated that an efficient employment policy should be orientated on the principle of subsidiarity, whereby national or regional activities would be advanced. However the title on employment became reality, namely in the Articles 125 to 130 EC, but the power of national legislation remained unaffected (Art. 129(2) EC). Instead largely it is operated with the political and programmatic soft law. The Community is obliged contribute to a high level of employment and to establish an Employment Committee. The Member States have to coordinate their actions in the field of employment. There exists a reporting system, incorporated with exchanges of information, comparative analysis and pilot projects.

Because of the high politicized discussion concerning the title on employment and the vague formulation of the EC Treaty rules, jurisprudential enquiries were rare. This deficit is settled by the extensive and fundamental work of Steinle. His analysis starts with the economic coherence of an employment policy and a historic consideration (ch. 1 and 2). After a careful legal examination of the competences, there follows a systematic classification of employment policy (ch. 3 and 4). Finally Steinle gives attention to the procedure of coordination (Art. 128 EC, ch. 5) and the incentive measures in the field of employment (Art. 129 EC, ch. 6).

The results of Steinle will not be rehearsed in detail. Steinle starts his enquiry with reservations. He calls into question the economic sense of a uniform employment policy in Europe (p. 179 et seq., 218). Within the legal analysis, he demonstrates that employment policy can not to be defined by the form of the respective national action. Only a targeted interpretation makes sense, for which – independent from the manner or the measures – the purposes of an employment policy are important (p. 68 et seq.). The imperative consequence is a factual intersection of the rules concerning the employment policy with other rules of the EC Treaty (p. 76 et seq., p. 236 et seq.). Therefore it is possible to ascertain that the Community has to execute the employment policies by practising their politics. That is not only valid within the manifold support programmes and the corresponding EC bodies, whose numerousness Steinle criticizes understandably (p. 130). Even in the field of EU legislation, activities to achieve the employment policies are unfolded (cf. p. 255 et seq., 402 et seq.). Steinle's enquiries concerning the procedure of coordination according to Article 128 EC (p. 328 et seq.) and concerning the incentive measures in the field of employment (p. 384 et seq.) are impressive. He gives a precise analysis of the comprehensive body of legislation and points out the coverage of the activities taken by the Community.

Altogether it is a worthy aim of Steinle to deal with the shapeless rules of Articles 125 to 130 EC in a close and competent manner. He develops a reasonable and effective application of these rules, and thus presents a practical and valuable book.

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