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BOOK REVIEWS

Review essay: Classical and baroque constitutionalisms in the face of change

T.C. Hartley, *Constitutional Problems of the European Union*. Oxford and Portland OR: Hart Publishing, 1999. 195 pages. GBP 22.50
J. Gerkrath, *L'Emergence d'un droit constitutionnel pour l'Europe*. Brussels: Éditions de l'Université de Bruxelles, 1997. 426 pages. 1950 BF.
N. MacCormick (Ed.), *Constructing Legal Systems. "European Union" in Legal Theory.* Dordrecht: Kluwer, 1997. 147 pages. NLG 120. $ 68. GBP 39
F. Snyder, "General Course on Constitutional Law of the European Union" in *Collected Courses of the Academy of European Law* VI, 1 (pp. 41–155). The Hague: Kluwer Law International, 1998. 356 pages. NLG 195, USD 105, GBP 66.
R. Bieber and P. Widmer (Eds.) *L'espace constitutionnel européen*. Zürich: Schulthess, 1995. 478 pages. Fr. 72,–.
"De betekenis van de grondwet voor de Europese rechtsorde vanuit het oogpunt van het Europese recht", Part 2 of J. Wouters and Rimanque, *De betekenis van de Grondwet voor de Europese Rechtsorde*. Deventer: Tjeenk Willink, 1998, pp. 47–119.

At the closing page (181) of his latest book *Constitutional Problems of the European Union*, T.C. Hartley has come to the end of his personal quest for certainty about Europe. It has been a long journey but the goal has been reached, doubts dispelled. In the first printing of Hartley's grand work, *Foundations* (1981), a copy of which I cherish, there loomed a dilemma. The Community is "unstable in its present form: either it will go forward to become a federation or it will regress and eventually break up" (p. 6). The author seemed to favour the first road, of federalism: France's *Conseil d'État* when banning direct effect (in *Cohn Bendit*) "struck a blow at the foundations of the Community." (p. 236) In later editions, the conviction wavered but the perspective stood.[1]

In the present little work there is an about-face. Or, rather, there is the completion of one which could be felt coming for a while. Its foreword finds the author doubting that the Union will become a federation, yet on the other hand "there are no signs that it is about to collapse or wither away", so instead of expecting regression and break-up it becomes "vital to understand what sort of entity it is." From there, he undertakes a thorough criticism of the Community's claims and methods. *Cohn Bendit* is now treated to a note of sympathy (even though the *Conseil d'État* itself has since given in – in *Nicolo*). The ECJ's *Van Duyn* (direct effect of directives) is blandly "contrary to the Treaty" (p. 29). In this vein, the author thrashes most of the sacred cows of Community Law and especially its herdsman the ECJ, which is often found to act in clear violation of the Treaty's spirit, if not its letter. Nor are the other institutions spared the whip. The Council, where "Member States sometimes enter into secret agreements", contributes to the vagueness of Community Law. The Commission fails to get Community Law enforced evenly between North and South. the Parliament "fails to provide

1. See also Hartley "Federalism, Courts and legal systems: The emerging constitution of the European Community", (1986) *AJIL*, 229.

a mechanism for popular opinion to influence Community policy" (p. 19). And, finally, he is ready to dispose with the idea of constitutional autonomy of the Community order and of the Treaties no longer dependent for their validity on international or domestic law. Here is how:

> "The problem with this theory is that, even if it is accepted by the European Court, there is no evidence that it is accepted by any of the governments of the Member States or by any of their courts. . . . At present, therefore, it suffers from a 'reality deficit': at the crucial moment, the rabbit stubbornly refuses to come out of the hat, no matter how frantically the magician waves his wand."

To one sometimes exasperated by the evangelism of Community Law text-books, this book comes as a delicious debunk. Apart from its crystal line of argument, which is itself a tribute to the constitutional tradition, it covers the field elegantly and wittily. Why then is it in the last instance disappointing? Let this be the question inspiring the present review essay.

The Decade of European constitutionalism

In the summer of 1993, the Strasbourg Graduate Institute of European Studies hosted a conference of mostly French constitutionalists, clashing over Europe. Those who were privileged to attend, vividly recall the great Louis Favoreu, nestor of the French public law profession, giving head to the incoming waves of Europeanists headed by Jean-Paul Jacqué. Almost single-handedly defending his own "certain idea of the constitution", Favoreu reminded one of the famous Spartan chief with the name of a now better known Brussels chocolate imperium, who held up the Persian hordes in the pass of Thermopylai long enough for the Greeks to realign their defence down south (480 BC, see Herodote *Histories*, book VII).[2] Shortly after, seeming to answer Favoreu's call, the German Constitutional Court stood up to deliver its now notorious "Maastricht judgment" and firmly assert supremacy for the German constitution over European law.

Events such as these have inaugurated the present decade as one in which the great claims and questions of integration have converged on European *constitutionalism*. Joseph Weiler, never at a loss for new expressions, has called constitutionalism "the DOS or Windows of the European Community". He further asserts: "Because constitutionalism captures more than anything else what is special about the process of European integration it becomes the focal point of both content and contempt of those involved in the process."[3]

In recent years there has indeed occurred a true flood of literature on the theme, breaking the dykes of the printed press to flow over to the internet.[4] The bad news is that this constitutionalism is not producing a common ground of argument and debate. Its scholarship instead has split up mainly into two self-contained and self-referring communities, which I shall name the "classical" and the "baroque". *Classical* constitutionalism addresses the subject and its questions in the perspective of simplicity, singularity, order. *Baroque* constitutionalism goes under the banner of pluralism, diversity, variety, culture. The question is how each of these answers the need to understand what is going on in terms of constitutional *change*.

2. Flauss, (Ed.) "Vers un droit constitutionnel européen. Quel droit constitutionnel européen?" 7 *RUDH* (1995, published 1996), 11–12. At one point in the heated debate Jacqué exclaimed emotionally and poetically: "What is the use of forms if they cannot allow reality to express itself?" I personally regret that this gem has not made it into the conference proceedings. The imagery of battle is taken from Steyger, *Europe and its Members. A Constitutional Approach*, 1995, chapt. 3, called "Drawing the battle lines".

3. Weiler, "The Reformation of European Constitutionalism". In Kreuzer, Scheuing and Sieber (Eds.), *Die Europäisierung der mitgliedstaatlichen Rechtsordnungen* (Baden-Baden, 1997), pp. 9–40, at 10.

4. See e.g. the site WWW.harvard.edu./Programs/Jean Monnet/papers

Classical constitutionalism: Order and authority

Classical constitutionalism is of French origin. In France, constitutional debate on Europe converges on definitions and rules. The French constitution, unlike its German counterpart, for example, puts no substantive obstacles in the way of Europe. All it takes between France and Europe is a change in the Constitution whenever the Constitutional Council feels that a Treaty change affects the exercise of national sovereignty. The constitutional question in France is simply about sovereignty and order on the one hand, rights and separation of powers on the other. Louis XIV may or may not have said "L'état c'est moi" but this motto fully satisfies the first quality required of the constitution: clarity and sovereignty.

Of course it is not just the French who are are classical constitutionalists. The same want of clarity inspired Deirdre Curtin's famous complaint in this *Review* (in 1993) of "A Europe of bits and pieces". And Hartley's above-mentioned attack on the heart of supranationalism is another unmistakable case. It sticks to the well-known tenets of law, order and authority. Classical constitutionalism posits no deep allegiance to one or the other system nor to one or the other political foundation. This is how it has so easily allowed the claim of sovereignty to be smuggled into European legal doctrine, from *Van Gend & Loos* and *Costa-ENEL* onward. Community legal orthodoxy, with the self-evidence of autonomy, direct effect and supremacy, is of course a paragon of classical constitutionalism.

How does this strand of thinking measure up to the test of change? No book beats a recent French PhD thesis from Strasbourg in providing an answer. It is, interestingly, by a German national, Jörg Gerkrath, though written in elegant French. The book is extremely well researched in a fully classical spirit (Vlad Constantinesco, supervisor) and densely covers the history and doctrinal debates on the Union's increasing constitutional claims, as pressed by the Court of Justice and by the guardians of the Brussels paradigm (Jacqué et al.). True to his German background (if I may be allowed to make this connection), the author does not adopt this paradigm full-heartedly. On the basis of a thorough historical study of the concept of Constitution, he holds reservations as to the idea that a European Constitution as such is nascent, retreating to the safer line that what emerges is, at any rate, European Constitutional *Law*. Its development, to be sure, is driven by a "constitutional spirit" (153), a "constitutional conscience" (223) and similar idealisms. If these do not break into a full constitution, then surely, through a "constitutional process" (142) they weave a "constitutional web" (réseau constitutionnel, pp. 133, 275).

This analytical and historical approach is well-geared to free the author (and the reader) from the idea that a constitution can only be the attribute of a State. Yet it also begs the question: where does Union Law fall short of the full thing? Gerkrath gives the answer: in two respects. First, there is no constitutive act of authority (*herrschaftskonstituierend*, p. 47, here the author trusts only his native German); second, no new authority of constitutional amendment has been created, the surest sign of authenticity (166 et seq.). This point is very well set up – and driven home.

To qualify as a Constitution, it is no help that the founding treaties increasingly add up to a labyrinth, understandable only to insiders (he gladly borrows their well-known disqualification by Curtin as "constitutional chaos", p. 142). Lack of clarity about the relationship between it and the Members' constitutions affects the Union's Constitution's authority (257). Until further notice, the relationship is in a state of constitutional ambiguity. If that. At p. 286 we even read that "the national constitutions do not go so far as to allow their essential principles to be drawn into question". This aporia does not prevent Gerkrath from detailing the aspects in which a constitutional momentum is being built up. The Treaties have become "constitutionalized" in a formal and in a substantive sense, especially by the Court of Justice. The formal approach went by way of the well-known doctrines of autonomy, direct effect, supremacy, conferred powers, the proclamation of the Treaty's "constitutional nature" and a hierarchy of rules (p.

216 et seq.). The substantive approach is principally by way of rights (223–224). All said and done he seems to be drawn, by the force of logic, to a position close to Hartley's.

The strength and the weakness of classical thinking is that it does not really allow for contradiction or ambiguity. Its weapons are logic and consistency: and the Court of Justice uses these with skill and rigour. But it is at a loss when up against a similar claim of logic and consistency (as from Favoreu and the like), or from a claim based on essentialism (as from the German Constitutional Court). Bound to the force and logic of system, it is unbeatable for setting up a new system ex nihilo, but does not suffer the ambiguities inherent in gradual evolution or transition. Classical thinking has had less difficulty with the succession of French constitutional revolutions than it has with the present twilight-situation involving Europe, which has led to a trench war in France over the definition of the words constitution and sovereignty.

Baroque constitutionalism: Pluralism and culture

The incapacity of classical thought to account for change (and its ambiguities) will explain how baroque European constitutionalism has come *en vogue* from the beginning of the 1990s. Baroque constitutionalism is concerned to reflect the wealth and depth of reality. It is not afraid of complexity, or even of contradiction, and has a predilection for culture (which is a paragon of all these qualities).

An outstanding protagonist is Neil MacCormick, who in his latest book writes, characteristically, of a "post-sovereign Europe". The problem of clarity and structure, so dominant in classical constitutional thinking, vaporizes under this tone of historical optimism, as do clarity and structure themselves:

> "Let us consider the possibility of institutions that by their discourse and deliberation come to be constitutive of a common good, or of the common perception of a shared good that is itself an intrinsic good and an instrumental condition of willing mobilization of group and individual effort in fulfilling a common legal order grounded in acts of legislation and in the pursuit of highest-level economic and security policies". ("Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth"', at p. 8 of the book under review.)

An even more radically pluralist definition of the same notion is found in another chapter of the same book, by Bellamy and Castiglione. They go for a "highly differentiated social system [which] is characterized by numerous subsystems each governed by its own rules and practices." Sovereignty, they hold,

> "does not lose its relevance in such a situation. If anything, the need for autoritative mecanisms capable of mediating between diverse values and interests increases rather than diminishes. However, sovereignty does need to be reconfigurated to reflect the competing attachments and norms emanating from the various spheres of people's lives, and the complexities of the relationships that exist between them. . . That suggests that sovereignty will also be plural, because more dispersed, with different persons or bodies having the power to decide in different circumstances, without there necessarily being any single, hierarchical system of decision-making." ("Building the Union: the Nature of Sovereignty in the Political Architecture of Europe", at p. 92 of the book under review.)

Francis Snyder (Florence, and many other places) with his long-drawn General Course of 1995 (published 1998) is also in this vanguard. Central to Snyder's concern is not, as with Gerkrath, the orderly relationship between the EU charters and those of the Member States, but that between the EU and the *people*: a constitution "in the subjective sense" (p. 55). From here, Snyder goes on to free himself from the constrictions of classical thought: "The task of the makers of EU constitutional law thus is how to organize relations of authority in a non-hierarchical and polycentric polity, taking authority to refer to the legitimate exercise of power." (ibid.) His "intellectual experiment" (74) which in a space of more than hundred dense pages will amount to "merely a preliminary attempt to set out the main lines of enquiry

regarding the EU constitution", (154) leads to a reappraisal of "constitutional culture" as a more potent agent of European constitutionalization than structure or principles:

> "My hypotheses are threefold. First, a constitutional culture which is specific to the EU is now emerging and being created at the individual, organizational and societal levels. Second, its main features are not at all fixed, nor are they by any means entirely coherent and free from contradiction. Third, there exist both an internal legal culture of the EU, founded on the elite emerging and operating within the legal and political systems of the Union, and an external or general legal culture visible at a broader and more general level which takes into account the different national legal and political systems."(138.)

It is remarkable that Snyder nowhere mentions the long standing champion of cultural constitutionalism, the prolific German writer, Peter Häberle. His *"Europäische Rechtskultur"* (1994) is compulsory reading for anyone interested in the core of the baroque culturo-constitutional paradigm.[5] Häberle sings the praise of things held in common, sprinkling the mystical German prefix "Gemein-" (in the communitarian sense of the word, of the ultimate social bond of people).[6] If instead of Germany you like (and trust) Europe, then Europe becomes "*Gemein*europa"; European constitutional law is "*Gemein*europäisches Verfassungsrecht". And it is the cultural unity of Europe which forms the rooting soil (*Wurzelboden*) for this One-European constitutional law (p. 53). What this culture amounts to is (again) not sharply defined, but one of its elements is (to bring us full circle) the idea of a culturul-constitutional State. And of course there is Weiler, who just published a collection of his essays in *The Constitution of Europe* (to be reviewed separately in this *Review*). Interestingly, Weiler proves a convert from classical constitutionalism (law and politics, first part of the book) to baroque (plurality, difference, culture, etc., second part).

Baroque constitutionalism with its appeal to depth, culture, can liberate thinking towards the future, but it can also do the opposite: to host fear of change. The *Maastricht Urteil*, grounding the German Constitution in a historical "*Staatsvolk*" took the way of fear and conservatism. If the critical quality of constitutionalism in the case of Europe is whether and how it accounts for fundamental change, baroque constitutionalism at the face of it has more to offer than the classical variety, which already breaks down on the logical contradictions of the situation. But is baroque constitutionalism really more potent? True, admitting the wealth of reality and the depths of human culture into constitutional thinking is liberating. But the question is whether ultimately it will help a *new* compelling and stable form for the relationship between the domestic and the Union levels of government. After all, one can accept a measure of creative ambiguity about such questions, yet for a final state of things, undetermined diversity is no option. There is even a conservative slant. From reading the "baroques", it appears that even those who do allow for the dynamic, evolving quality of the situation, will eventually want to land it back in a pre-existing culturally or even anthropologically (Snyder) defined environment. In the face of change it is not wholly convincing as, lacking in sense of discipline (down to the linguistic level, I am sorry to say) it does not seek a "landing site" for change, in the form of clarification of the basic options.

5. Häberle, *Europäische Rechtskultur. Versuch einer Annäherung in zwölf Schritten* (Baden-Baden, 1994). He published *Verfassungslehre als Kulturwissenschaft* in 1982 (and even *Der Sontag als Verfassungsprinzip*, 1988).

6. In the German discourse it is possible to express unquestioned appreciation of the "*Gemeinwesen*" which is the soul of the *Gemeinschaft*: community. *Gemein-* is a complex of one-ness, togetherness, originality, uniqueness, historicity. Even Weiler's vocabulary conveys this communitarian mystique through terms such as "belongingness", "groupness" (see Weiler, *The Constitution of Europe* (Cambridge: CUP, 1999) p. 247, 252 resp.).

Constitutionalism of change

Change is where logic meets variety. A fairly early book edited by Bieber and Widmer picks up this challenge. Its title elegantly figures in three languages, i.e. also: *Der europäische Verfassungsraum* and *The European constitutional area*. The title is presumably taken from an article by Tomuschat "Europe – a Common Constitutional Space".[7] Contributions by a solid cast of experts (including some of those mentioned above) are in the three tongues too, and are often original. Take Auer's "L'adoption et la révision des constitutions: de quelques vérités malmenées par les faits". The author first descends to the fundamentals of constitutionalism and then resurfaces to their mockery by reality. Revision is a case in point. It is dogma since Sieyès that a constitution is only a constitution if it has eaten up its constituants and provides for its own progeny, including revision. This dogma would preclude the Union from having anything constitutional, in view of the members' clinging to their prerogatives of amending.[8] The dogma is also the last line of defence in the German argument that there is no European people. If you haven't a people to feed to history, how can you expect to be given unity in return? Well, says Auer, if you look around you, the facts debunk Sieyès. In all the revolutions since 1989 in Eastern and Western Europe, one is bound to see that the original constituant remains alive and kicking as a participant in the constitutional process and change (p. 282, 283).

Conversely, the Union's ineradicable Member States need not stand in the way of constitutional evolution. Let us see what Pernice, Frankfurt, has to say on the subject. From a long study of rules concerned with entrenchment-provisions of national constitutions he draws the original suggestion "to view the Union Constitution not in isolation but als (shared) part of the members' constitutions. . . The Members and the Community thus form a *Verfassungsverbund*". ("Bestandssicherungen der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung" in Bieber and Widmer, at 262 (my translation)). This model admits both the Member States' *multiform* sovereignties and the latters' durable *uniform* qualification by a common undertaking outside of each individual member's control. More than that: it solves the questions of mutual interference between the constitutional levels elegantly and realistically by way of a paradox: "The supranational intrication (*Einbindung*) of the Constitutional State becomes the vehicle for the entrenchment of national rules and identity. As integral part of the national constitutions, the Treaty-constitution is at once obligation, entrenchment and token of identity of the Member State in the European constitutional federation (*Verfassungsverbund*)." (263)

The virtues of this model are as great as they are obvious. If the European Constitution is seen as a common, shared (and guaranteed) part of the national constitutions, while the latter keep the ultimate role of founding State-power, there is no theoretical problem in the growth of this overlapping common set of constraints and practices, inside the national constitutions. Then it is also logical that, for practical purposes, the ECJ should tend to the common rules, while the domestic constitutional courts watch over their own constitutions. Pernice has recently elaborated his views in this Review ("Multilevel constitutionalism and the Treaty of Amsterdam: European constitution-making revisited" (1999) 703–750).

Another elegant contribution to conceiving change was recently made by Jan Wouters (Leuven) in a paper put to the Belgian-Netherlands society of comparative law (and soon to appear in English, *LIEI* 2000/1.). As is well known, the ECJ has ordained the EC freed from its different constitutional moorings and legally autonomous. This is a benign fiction from the

7. In De Witte and Forder (Eds.), *The common law of Europe and the future of legal education* (Deventer, 1992), pp. 133–147. For an inspired lecture on the basis of the idea of a European public space: Curtin, *Postnational democracy* (The Hague, KLI, 1997).

8. See De Witte "Rules of change in international law: How special is the European Community" (1994) NYIL, p. 299.

classical repertoire, useful as a *pont aux ânes* for law students, but unsatisfactory otherwise. The German Constitutional Court has easily trumped the classical fiction by a baroque one, equally unsatisfactory (*Volk*, culture). Wouters' position is, interestingly, that the primacy of the European Treaties roots not in any inter-system logic but in the *acts* of acceptance by the Member States while ratifying the Treaties. Though this sounds much like the ECJ's mantra about autonomy, in fact it works out to the contrary. This is because it stresses the constant presence, albeit in the background, of national authority in the functioning of the system, while limiting decisive constitutional action to the stage of treaty revision. At the same time it avoids the parties' institutions brandishing the national constitution at every opportunity:

> "The Court in our opinion would gain from grounding primacy of the European treaties more explicitly in the Member States' free participation in these, following ratification in conformity with their constitutional provisions. It would thus build a bridge to the national constitutional courts and take at least part of the wind from the sails of constitutional review *a posteriori* of treaty provisions." (96)

This option does not still the calls for constitutional review of *secondary* legislation. These however are not a matter of sovereignty (authority) but of rights and democracy.

Wouters' view is that the Member States have not written themselves out of many of the system's ground rules, as the ECJ would have us believe. And that the Court, instead of considering itself above the Member States, should refer matters back to them in their compound (The European Council, at Treaty Revision). If these Member States together originally committed themselves far beyond what is expressly provided in the Treaties, it was on the authoritity of their constitutions. These are not groceries of competences; they are the platform of sovereign *action*.[9]

This may turn out to be the key to understanding the Union's constitutional capacity in a context of change. The change is not in the law, nor in the culture, but in the *facts*. Addressing as he does the question in its core: "where is the locus of constitutional authority?" Wouters' answer must be that it is twofold. First it is with the national polities independently, acting out of their constitutions. This is no problem. The problem lies with the second locus of authority. This consists of the Member States acting in concert, as a political community of sorts. "The Member States' free participation" (Wouters) is the key. If, fifty years back, this was merely a meeting of interests brokered by law and chance, it is now, with each treaty revision, becoming more of a compound, with the European Council as its political actor. This is neither legal logic nor cultural foundation, it is the break of constitutional practice for the Union's evolution.

Returning now to Hartley and Gerkrath, it is interesting to see how they both recoil from this idea of constitutional practice, especially the latter. In his opening chapters, Gerkrath is clearly enticed by the spirit and power of informalities of the British Constitution.[10] When forced however (at gunpoint, one has the impression) to pick the attributes of a constitution which will make the difference, he seeks refuge behind (classical) formalities such as supremacy, entrenchment, constitutional review. He doesn't realize that legal formalities may be signs of weakness. Elevating those formal attributes to arbiters of authority, Gerkrath leads himself to discount the most historical, British, experience and to idealize the German *Grundgesetz*.

9. There is a predicament attached to constitutionalism which becomes apparent in the European context. It is that of seeing the constitution primarily as a *limit* to power and ignoring that a constitution not only limits, but also empowers sovereign action.

10. Gerkrath is aware of the Union Constitution's likeness to the British. The latter also lacks clarity and singularity as well as the presence of a founding moment and authority. Yet it is the oldest and most solid one existent. There are obvious similarities, such as the fact that the Community Constitution lacks a constituent act, and is being made from day to day (23). Even the great Alfred Verdross, in his perceptive (albeit speculative) studies on a "public international constitution", turns to the British model, as Gerkrath himself notices (104).

He would have been well advised to side not with Tocqueville but with Montesquieu, who admired English constitutional wisdom (and even said that it was found in the German forests).[11] This would have allowed Gerkrath to deal with rules and fact alike, to account for the fact-formed nature of constitutional evolution. About institutional practice (the facts) he writes that it happens only "at an infra-constitutional plane" (229). We know differently, since the March 1999 clash between European Parliament and European Council (about the Commission).[12]

Now, finally, about Hartley's rabbit and hat. Hartley says there is no rabbit. The Community has no original authority. Sovereignty over Britannia rests fully with Parliament which "cannot validly limit its own future powers" (170). I wonder, if this were so, how Parliament's sovereignty allowed the actual emancipation of Australia, Canada, the dismantling of the Empire (not to speak of the present devolution to Wales and Scotland)? The rule that Parliament cannot limit its own future power is not meant to be in the way of reality, but to force constitutional change to be the business of politics instead of being at the mercy of the judiciary (as happens in Germany). In Jacqué's golden phrase: it is a form allowing reality to express itself. (*supra* note 2).

Hartley seems to run for shelter behind a legal fiction instead of staying put, to seek accommodation for what is coming. This is particularly regrettable as constitutionalism in the British tradition, with its ultimate sovereignty of *fact* (practice), has probably more to offer thinking about the Union than either the classical or the baroque counterparts.

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Olivier De Schutter, *Fonction de juger et droits fondamentaux. Transformation du contrôle juridictionnel dans les ordres juridiques américain et européennes*. Brussels: Bruylant, 1999. 1164 pages. Price BF 7600.

Today, fundamental rights have forced their way into many branches of law and are applied in many different ways. Still the expansion has its price, says De Schutter. Welfare State interventions to protect citizens against the many risks of life endanger the individual's right to self-determination and, as fundamental rights proliferate, conflicts amongst rights multiply. The judiciary adapted to this multiplication of conflicts by developing the technique of "balancing of interests", which makes it possible to solve conflicts, without providing for all hypothetical cases that could arise.

It is this transformation in the law of fundamental rights that makes the core subject of De Schutter's doctoral thesis. The author starts from the presumption that the importance that can be attributed to the technique of "balancing of interests" is completely dependent upon the procedural law under which an appeal is brought. Accordingly he focuses on three widely differing legal orders: the United States, the European Community and the legal order of the European Convention of Human Rights. The first part of the book discusses the concept of efficiency (*effectivité*) of fundamental rights in the three above mentioned legal orders. De

11. 'Si l'on veut lire l'admirable ouvrage de Tacite sur les moeurs des Germains, on verra que c'est d'eux que les Anglais ont tiré l'idée de leur gouvernement politique. *Ce beau système a été trouvé dans les bois*' (XI/VI, my emphasis).

12. For a full analysis underpinning the remark that this was in fact a clash between the EP and the European Council (= the assembly of political leaders), see my contribution in (1999) NJB, 627–635.

Schutter concludes that the opposition between efficiency and formalism always seems to be controlled through a certain form of "balancing of interests". The second part develops on the plurality of objectives of an action (*pluralité des objets du litige*). When bringing a lawsuit, a plaintiff does not only want his rights to be enforced. He may also aim at respect for the law in general and at the creation of a precedent. Here the author discusses in depth the meaning of the doctrine of *stare decisis* and the effects in time of judicial decisions. In the third part, De Schutter engages in a study of the progressive separation in fundamental rights case law of the need to show an interest in bringing an action from the right one wants to see enforced. He links this phenomenon with the concept of efficiency and plurality of objectives, and highlights that a plaintiff may not only have a material interest in having his right enforced, but may also want the other above-mentioned objectives to be realized. De Schutter therefore proposes to broaden the requirement of "an interest in bringing an action" and calls this new concept *autonomie*. The fourth and last part of the book is dedicated to the role of groups in the case law of the three legal systems under consideration. This role appears to be a double one. On the one hand, groups contribute, through class actions, to the objective of respect for the law in general. On the other hand, an increasing number of groups intervene in legal proceedings as *amici curiae*. In doing so they help the judge to find the solution that is legally most correct and thus add to the efficiency of fundamental rights.

It is clear from this publication that De Schutter took great pains to make his doctoral thesis a well-written, well-documented and intelligent piece. His widely ranging insights gained through many stays abroad, both as a student and researcher and as a teacher, turned his work into a remarkable mix of Anglo-American legal culture and legal thoughts of the European continent.

Petra Foubert
Leuven

F. Sudre (Ed.), *L'interprétation de la Convention européenne des droits de l'homme*. Brussels: Etablissements Emile Bruylant and Editions Nemesis, 1998. 352 pages. ISBN 2-8027-1162-8. BF 3000.

The Council of Europe may be seen as the rival of the European Union in the battle for being the driving force of tying together the European States. The Council of Europe's most important achievement is probably the European Convention on Human Rights (ECHR), with the European Court on Human Rights as its main supervising body. Although the Committee of Ministers also plays a role in supervising the compliance with the Convention, the focus should rightfully be placed on the Court. Like its counterpart the ECJ, the European Court of Human Rights has to deal with the problem of interpretation of the Convention. This raises questions as to e.g. the methods of interpretation used by the Court and the consistency of the interpretation. Also questions may be raised as to the authority of the interpretation by an international Court, which is by definition not democratically legitimized, especially when broad interpretations of the Convention obligations are given.

This book is the result of a colloquium held on 13 and 14 March 1998 by the Institute for European Human Rights Law of the Law Faculty of the University of Montpellier I. It contains articles by some eminent, mainly French, authors, who have focused on different aspects of the interpretation of the ECHR. The book is divided in three parts, covering the coherence, the specificity and the authority of interpretation, and includes a foreword by Pettiti and an introduction by Matscher, respectively the French and the Austrian judge at the Court.

The part on the coherence of interpretation has two contributions. The first article, by Rigaux, is on the so-called consensual and evolutive interpretation, that is used to make the

codified Treaty provisions applicable to ever-changing circumstances. For instance, the right to respect for family life has been extended by the Court to non-married couples, contrary to the original intent of the drafters of the Convention. Rigaux defends this method of interpretation against the criticism that it imposes on States obligations they have not committed themselves to when signing the Convention, thus invading the State's sovereignty. The character of the ECHR, Rigaux argues, is somewhat that of a constitution – the Court has not been instituted and given supervising power for no reason. The mere institution of the Convention organs is in itself a clear expression of the will of the signatory States to give the Convention, as it were, a life of its own. The Court itself also frequently holds that the Convention is a living instrument, and has to be interpreted in present-day conditions. Furthermore, it is problematic when States themselves may decide what exact obligations come out of a human rights Convention. The concept of sovereignty is awkward in the field of human rights. A parallel may be drawn with the ECJ, which also has to interpret a Treaty in continually changing circumstances, and which has developed the idea of the European Community as an autonomous legal order, also seeming to lead some kind of life of its own, independent from the national legal orders. The second contribution, by Lambert, gives a good oversight of the doctrines of the margin of appreciation and the review of proportionality, where he emphasizes the dangers of the doctrine of the margin of appreciation. The doctrine is used to counterbalance the loss of sovereignty by the signatory States, by giving the national authorities a margin of appreciation in certain areas. One problem is, however, that the application of the doctrine by the Court is inconsistent. A more fundamental objection against the doctrine is that it is an evasion by the Court of its own responsibility. It is the Court that has been endowed with the power to supervise compliance with the Convention, and it is its task to uphold the European human rights order, which implies that national particularisms have no role to play where the substance of human rights is in play.

The second part of the book focuses on what is labelled the specificity of the interpretation. Sudre deals with the autonomous notions of the ECHR, which are notions labelled as such by the Court. He shows the difficulties and the advantages of the technique of detaching judicial terms from the meaning they have in the diverse national legal systems, and giving them their own "European" meaning. In this way, signatory States cannot evade their duties under the Convention by using their own national terminology. Sudre tries to show that autonomous interpretation and the concept of the national margin of appreciation are not opposites on a level playing field: autonomization is a technique used in interpreting the Convention, whereas leaving a margin of appreciation to national authorities is the exertion of judicial self-restraint by the Court and is directed at the conditions under which a right can be exercised. It is submitted that, however true this may be, the distinction is rather academic: it does not make much difference whether the State's obligations are determined by limiting or extending the interpretation of a right or by limiting or extending its application. What count in the end are the obligations imposed by the Court on the signatory States for the protection of human rights. It must be admitted that Sudre skilfully shows that the use of autonomous notions is a useful complementary method in the formation of a common European legal order, though he finds a more thorough motivation by the Court on the contents of the specific contents of each autonomous notion desirable.

In his contribution, Spielmann writes about the so-called positive obligations and the horizontal effect of the Convention provisions. He gives an oversight of the Strasbourg case law on positive obligations, and pleads for more convergence where the horizontal effect or *Drittwirkung* of the Convention in the diverse national jurisdictions is concerned. As the Court itself never deals with complaints against individuals, it uses the doctrine of the positive obligations to impose on States the duty to protect individuals in horizontal relations. Tavernier's contribution is on the scope of the competence of the supervising bodies, and focuses on the questions concerning the competence of the Commission and the Court, where he emphasizes the competence of the bodies to determine their own competence (*Kompetenz-Kompetenz*). Time will tell how the Court's case law on its competence develops, regard being had to the

entry into force of the 11th Protocol, (which discards the Commission), and the enlargement of the Council of Europe due to developments in Eastern Europe.

The third part of the book deals with the authority of the interpretation. The contributions deal mainly with the relations between the interpretation of national judges and the interpretation by the European Court of Human Rights. Grewe takes a comparative perspective in describing the position of constitutional judges *vis-à-vis* the European interpretation. Margénaud focuses on the private law judge (*juge judiciaire*) and insists that a coherent Strasbourg case law is much more authoritative than a constraining case law. Pacteau's contribution is on the French administrative judge and the European interpretation. More exciting is Picod's contribution on the ECJ and the interpretation by the European Court on Human Rights of the ECHR. Picod draws a good comparison between methods of interpretation used by the two Courts, and shows that both use the methods of teleological and evolutive interpretation. However true Picod's assessment may be that both Courts have shown the will to avoid contradictory solutions, one cannot but get the impression that the ECJ is not too committed to giving a high level of protection to human rights in European Community law. The ECHR is treated as a general principle of law in European Community law, where the interpretation of the ECHR given by the European Court of Human Rights will be taken in consideration. The general impression remains that protection of fundamental rights still is an issue that is dealt with only "on the side" by the ECJ. It must not be forgotten that the ECJ's initial reluctance to apply human rights could only be overcome after opposition of the German and Italian constitutional judges. Picod is regrettably not too outspoken on this point.

Inevitably, the different contributions to the book do vary in depth and thoroughness. On the whole, the book is certainly a valuable contribution for the libraries of those who are interested in the subject of Treaty interpretation, and should be welcomed.

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Marie-Thérèse Bitsch, Wilfried Loth and Raymond Poidevin (Eds.), *Institutions européennes et identités européennes*. Brussels: Bruylant, 1998. 523 pages. BF 2850.

This book is a collection of two dozen papers presented at two conferences, in Essen in May 1996 and in Strasbourg in September 1997, devoted to examining the question of the relationship between various European institutions and the emergence of a European consciousness or common identity. To what extent have institutions created to foster cooperation and integration reinforced a shared sense of Europeanness? A second preoccupation concerns the idea of Europe held by key decision-makers. What does "Europeanness" signify to them? The fourteen papers of the first part of the book focus on various European organizations and their diverse aims, while the ten papers in the second part of the book concentrate on the role of individuals and the functioning of common institutions. This distinction sometimes seems somewhat artificial, but the collection as a whole is both strong and varied.

The book's first part commences with two papers which examine the League of Nations as the inspiration for the later development of pan-European institutions. Guillen considers cooperation in the fields of education and culture, concluding that the League of Nations opened up spaces for discussion and exchange between teachers, artists, academics and other intellectuals from various European States, thus contributing to the emergence of a common sense of European identity. Sylvain Schirmann explores the history of monetary cooperation at the start of the 1930s, when the relatively stable financial system achieved during the previous decade disintegrated into three blocs. When the British, together with Portugal and the Scandinavian countries, abandoned gold in 1931, other western European States (France,

Italy, the Netherlands, Switzerland and Belgium) remained faithful to the gold standard. In a third zone, central and south-eastern Europe, exchange controls became increasingly severe. The League of Nations attempted to maintain the international financial order but was ultimately unsuccessful.

Two papers by Skär examine, respectively, the political philosophy of the British Conservative Party between 1945 and 1955 and the activities of the "Strasbourg Tories" in the Council of Europe between 1949 and 1951. Conservative political philosophy is often underestimated as a cause of the party's Euroscepticism. Inspired by Burke's reaction to the French Revolution, British Conservatives have always remained opposed to the revolutionary ideal in politics. Instead, they believe that change must slowly evolve. From this perspective, newly-created European institutions lack the authority of custom and a successful history, and are foreign to British traditions (66). This attitude may also help explain why the Strasbourg Tories failed to use the Council of Europe as a bridge between the UK and the Six. In her second paper, Skär identifies three reasons why their efforts remained fruitless. First, there was a lack of leadership from Churchill. Second, the Tories were suspicious of any threat to national sovereignty. Finally, Jean Monnet favoured direct, bilateral relations between the UK and the ECSC's High Authority instead of having them pass through the Council of Europe, which included many non-ECSC members.

The next three papers consider the Council of Europe in more detail. Gruner explores the perception of Europe in the debates of the Consultative Assembly of the Council of Europe between 1949 and 1951. The members, selected by national parliaments rather than governments, were generally convinced that Europeans needed a common institution which could offer them "the prospect of becoming citizens of a continental community, which would guarantee them liberty and security" (91). Gonçalves Martins turns his attention to the cultural activities of the Council of Europe, showing how some core cultural goals have remained unchanged since its formation while other goals have been added over the years. He also briefly explains how these cultural activities have been affected by EU institutions. Bitsch concludes the triptych of papers on the Council of Europe with an examination of the debates about European identity which surrounded the eastward expansion in membership. She argues that, next to the broad stipulation that Member States must be democratic and the contested idea that the Council's members should belong to the European "cultural community", geography plays an important role. Yet even geography is a flexible criterion, since it is difficult to draw precise boundaries between what is European and what is not. The enlargement debates show that the concept of European identity is pluralist and can evolve.

Poidevin next considers the role of the ECSC in forging a European identity. He argues that a sense of Europeanness was born and developed in Luxembourg, since the various "Eurocrats" of the High Authority were able to define a supranational European interest. Kaiser reflects on the EFTA and the European identities of the "outer seven" (Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK) between 1958 and 1972. While EFTA's membership was too diverse to permit the formulation of a distinct identity, it did contribute to the emergence and consolidation of political conceptions of Europe (183).

Hereafter, three papers examine the role of "Europe" in international relations. Bossuat and Vaicbourdt study American views of European integration following the rejection of the European Defence Community by the French legislature in August 1954, while Perron considers the relationship between the EEC and the United States, focusing on the examination of the Treaty of Rome at the GATT in 1957. Finally, Ludlow looks at the development of a distinctive European way of conducting diplomacy, focusing on the way in which the Six handled the discussions surrounding the question of British membership between October 1961 and January 1963. He argues that this period shows evidence of four significant innovations compared to traditional diplomacy. The very existence of Community institutions reduced the bargaining room with the UK; the regular meetings between the Six encouraged more moderate positions; since the other five Member States were convinced of the necessity of reaching

compromises, they saw as legitimate the many problems raised by the French delegation; and finally the increase of Community agreements limited what Member States could offer third parties in bilateral negotiations. The first part of the book concludes with two studies of cooperation in matters of security. Ghebali examines how the pan-European idea was affected by the fall of the Berlin wall, which has led to a situation in which the "European security community" now stretches from Vancouver to Vladivostok. Romer in turn explicates the rush among newly-independent States in central and eastern Europe to join western alliances.

The second part of the book under review, devoted to exploring the role of individuals acting within common institutions, commences with three papers about the evolution of the European Parliament and Commission. Riondel examines the early years of the parliamentary Assembly, concluding that although many of the institutional reforms promoted by federalist politicians 40 years ago have been achieved, their desire to make the Parliament a major force for the emergence of a European identity has yet to be realized. Ludlow's paper adopts a similar tone with respect to the European Commission. Focusing on the *Service de Presse et de l'Information*, he argues that the Commission successfully kept opinion leaders informed, but failed to speak to ordinary European citizens. Ludlow concludes that the reduced dynamism that accompanied the scaling-down of the Commission's political ambitions in the late 1960s indicates how vital it had been to believe that the creation of a new European identity was near at hand. Finally, Bitsch questions whether the creation of a single Commission out of the three existing bodies was simply a technical reform or rather a political move designed to reinforce or accelerate the process of integration. Although those in favour of fusion raised three political arguments – it would lead to greater political unification, allow the Commission to improve its image, and make the European project more transparent – it finally occurred in 1967, at a time when the prospects of forging a common European identity appeared far from evident.

This attention to the Parliament and Commission in general is followed by four papers which focus on the actions and thoughts of specific individuals. Riondel's piece considers Maurice Faure's opinions, Neri Gualdesi examines Altiero Spinelli's actions, Loth writes about the conflict between Charles de Gaulle and Walter Hallstein in 1965, while Rometsch concludes with an examination of the impact of Jacques Delors on European integration. All four papers provide fascinating accounts of the impact of *personnages politiques* on the development of European identity. Along similar lines, Constantinesco's paper assesses the role of the European Council in the emergence of a European identity. He argues that regular meetings between the political leaders of the Member States act as catalyst for the expression of a common identity.

Gerkrath's contribution considers the part played by the ECJ in the emergence of a European identity. He argues that the Court's "constitutionalization" of the Treaty of Rome has provided the citizens of the Member States with a common set of laws out of which to construct a common identity. Through its jurisprudence, the ECJ insisted that "Europe" constitutes a new legal order which limits the sovereignty of the Member States, made individuals (rather than simply States) subjects of this new legal order, and argued for the direct application of Community law. Nevertheless, the Court's insistence that the Treaty of Rome is a constitution might mask the fact that it was signed by States rather than by citizens (473). The penultimate paper by Palayret explores the role of the European University Institute in Florence in the development of an "academic" European identity between 1948 and 1990. Since its establishment in 1976, the EUI has rapidly grown to become one of the largest PhD granting institutions in the social sciences and humanities in Europe. Finally, the conclusion by Bitsch restates the book's themes or central questions: how is European identity defined within common institutions? How do institutions seek to reinforce this identity? How do institutions succeed in managing European diversity? While the answers to these questions remain tentative, this book is a strong collection of fine pieces of scholarship.

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Evelyn Ellis, *EC Sex Equality Law*, second edition, Oxford Community law series, Oxford: Clarendon Press, 1998. xxvi + 365 pages. GBP 60.

The book under review is the second, thouroghly revised and updated edition of a textbook on EC sex equality law first published by Ellis in 1991. In five chapters, the book contains a detailed and critical examination of EC sex equality law. The first chapter is a very useful general introduction to EC law, dealing with issues such as the importance of EC Law in the Member States, forms of EC law, the nature of EC law and the constitutional scope of EC law. Chapter 2 addresses equal pay. Chapter 3 deals with equal treatment. Chapter 4 (somewhat shorter) is about sex equality in social security. The final chapter 5 critically deals with the policy underlying EC sex equality law and makes useful suggestions for legal and strategic changes.

The book is very comprehensive. It not only deals extensively with EC sex equality law as it stands, but also explains the historical background of the relevant provisions and their place in the wider context of international law (such as ILO law and the ECHR). The book also refers to the relevant EC soft law measures (which cover far more issues than the existing legislation) and mentions relevant bodies within the Community (such as the Advisory Committee on Equal Opportunities for Women and Men, the Parliament's Standing Committee on Women's Rights and the European Women's Lobby). Explaining and commenting on the case law on issues of sex equality handed down by the ECJ is quite a task given the amount of case law existing, even on specific aspects. An illustrative example is the interpretation of the notion "pay" in Art. 141 (ex 119) EC: in the book, this alone takes some 45 pages (including the difficult question whether pensions are pay). Further, this case law is constantly increasing which obviously makes it impossible for any textbook to be totally up to date. For instance, Ellis refers to the "*Emmott* principle" according to which "until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time". While indicating that there might be limits to this principle, Ellis in this second edition of her book does not yet refer to the 1997 *Fantask* decision (see p. 52/53 and 162). This decision is decisive in this context, but was probably handed down after the manuscript for the book had been finished. In *Fantask* the ECJ clarified that the solution adopted in *Emmott* was justified by the particular circumstances of that case only and that it is not valid as a general principle (Case C-188/95, *Fantask* [1997] ECR I-6783, paras. 50/51). In other words, it is now clear that there is no *Emmott* principle as referred to in the book. Another example is the *UEAPME* case on the validity of the directive on parental leave, decided in 1998. This case is especially interesting as it dealt for the first time with the validity of a Community measure adopted under one of the special legislative procedures provided for by the Social Agreement (now integrated into the EC Treaty): the directive implements a framework agreement concluded by some European Social Partners (meaning that the substance of the legislation is not made by Community institutions but rather by certain Social Partners). The *UEAPME* case involves important questions of standing in the framework of the annulment procedure (Case T-135/96, *UEAPME*, [1998] ECR II-2335). The CFI held that given the lack of involvement of the European Parliament in the legislative procedure at issue, the democratic element of such legislation consists in the involvement of the Social Partners. Therefore, Social Partners which have a *right* to participate in the procedure are indeed directly and individually concerned by the directive and therefore entitled to ask the Court for the annulment of the measure concerned. The Court denied, however, that this was the case regarding the plaintiff. UEAPME appealed; however, the appeal was later withdrawn.

In his foreword to the book under review, A.G. Jacobs (also the general editor of the Oxford Community Law series) states that within EC law, Sex Equality Law is a subject of intrinsic importance as it brings together questions of fundamental human rights, issues of great social importance, and policy matters of very considerable economic significance. He points out

that the principles developed in this specific field of law and the lessons to be learnt are often relevant across the whole field of Community Law (as illustrated by both *Emmott* and *UEAPME*). Mr Jacobs therefore concludes that the subject is one which is indispensable for all students of the workings of Community law. Having read Prof. Ellis' book, one would indeed wish for a large readership among students and academics, but also among practitioners, and employers and employees.

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M. Furse, *Competition Law of the UK & EC*. London: Blackstone Press Limited, 1999, 320 pages. GBP 18.95

The founding fathers of the EC Treaty must be enjoying the current harmonization craze and are looking down upon us with smiles on their faces. It seems, they will probably be thinking, that the best way to achieve harmonization at an EC level is not to impose it upon Member States. Whilst some harmonization proposals have crawled through the EC legislative process with much procrastination, all Member States have now, voluntarily, adopted laws modelled on Article 81 (ex 85) and Article 82 (ex 86) EC. Even the UK, albeit the last to do so, has joined the party with the adoption of the Competition Act 1998, which is due to come into force on 1 March 2000.

Given this natural alignment with EC law it was inevitable that the publishing industry would follow suit. Whereas previously two books would be needed to cover national and EC competition law, now one will suffice. Mark Furse is amongst one of the first authors to attempt such a publication (see also, e.g. Ottervanger, Steenbergen, van der Voorde, *Competition Law of the European Community, the Netherlands and Belgium*, Kluwer Law International, 1998). Like any good novel, a legal text should have a good beginning. Furse gets off to a good start with an introduction to competition law which takes the reader from 483 AD, through medieaval Europe, the Sherman Act, right up to the European Commission's recent vertical restraints proposals. This gives the reader the ability to place all that follows in its historical context. Designed as a textbook, the book's 17 chapters provide invaluable background to the law, administrative procedures and economics of both the new UK regime and the EC regime.

The text is clear and concise with law and economics interwoven seamlessly. Helpful and clear summaries of the main cases are given, although there are too many references to US competition law for my liking, there is enough EC case law around nowadays without the need to cross the Atlantic for our legal precedents. Many clear practical examples are given, putting the law and economics into an everyday context that will help the comprehension of many competition students. My only grievances are the lack of space given to the new UK Competition Act in favour of the old law which is just about to be repealed (in one chapter more space is given to the Competition Act 1980, most of which has only six months to live, than to the Competition Act 1998). These minor gripes aside, this is one of the clearer texts on the market. Any student reading the book will be rewarded with a sound understanding of the law and economics of UK and EC competition law.

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