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The Value of Justice in the European Constitution

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DEPARTMENT OF LAW**

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ABSTRACT

The use of one and the same word, i.e. *Justice* in the English or French language to render the two concepts of *Gerechtigkeit* when the issue is about equitability or fairness in social relations, and of *Justiz* when the issue is about the administration of justice often leads lawyers to overlook the second aspect. The Constitution for Europe addresses both issues. The issue of *Gerechtigkeit* has a prominent role in the values of the European Union, especially through the new emphasis on social rights embedded amongst others in the Charter of Fundamental Rights. The issue of the administration of Justice, though being emphasised by the notion of “access to justice” in the Charter, receives less attention, and the EU judicial system is still in need of improvements, beyond the reforms of the Nice Treaty.

KEYWORDS

POLITICAL SCIENCE THEMES

constitution building – constitutional change – European identity – legitimacy

LEGAL ISSUES

EU Charter of Fundamental Rights – European citizenship – European law – fundamental/human rights – judicial review

TREATY REFORM

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The Value of Justice in the European Constitution

Jacques Ziller

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Introduction: *Vous avez dit Justice?*

Identifying the value of *justice* in the European Constitution is not a simple exercise, as the signification of the word *justice* is at least twofold. It appears eighteen times in the Constitution for Europe, and in a paramount way in Article I-2 ‘The Union’s values’:

‘The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, *justice*, solidarity and equality between women and men prevail’ (*emphasis added*).¹

Eighteen times? It is indeed so in the versions in Latin-based languages, including English². But the word *Gerechtigkeit*, which is being used for the German version of Article I-2, only appears three times. Once in the Preamble:

‘Believing that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, *justice* and solidarity throughout the world,...’

Then in Article I-2 (as quoted above), and ultimately in Article I-3: ‘The Union’s objectives’ at (3), second indent:

‘It shall combat social exclusion and discrimination, and shall promote social *justice* and protection, equality between women and men, solidarity between generations and protection of children’s rights.’

¹ Provisional consolidated version of the draft Treaty establishing a Constitution for Europe, doc. CIG 86/04, 25 June 2004, available on the Internet pages of the Council: http://ue.eu.int/cms3_applications/Applications/igc/doc_register.asp?lang=EN&cmsid=576.

² The French author Henriette Walter makes the point that French is the more Germanic of Romanic languages, and English the most Latin of Germanic Languages: Walter, H. (1994), *L'Aventure des langues en Occident*, Robert Laffont, Paris, p. 225 and p. 419.

This discrepancy between different language versions illustrates, more clearly than any lengthy discussion, how many misunderstandings may arise in discussing the value of *justice*. The German language which is duly known as a language for philosophers, but which is also a language for lawyers, due to its capacity for subtle differentiation between neighbouring words, uses the Germanic word *Gerechtigkeit* when the issue is about equitability or fairness in social relations, and especially about allocating or distributing goods or advantages, without focusing on the institutions and mechanisms that allow this equitable or fair distribution or allocation. Hence the use of the expression *soziale Gerechtigkeit* for *social justice* in the Constitution for Europe. German uses the Latin word *Justiz* when it comes to the administration of justice, i.e. the organisation and functioning of the judiciary, and of dispute resolution: *Justizielle Rechte* (i.e. Judicial Rights) for Title VI of the Charter (*Justice*), *justizielle Zusammenarbeit* in Articles III-269 and III-270³ for ‘judicial cooperation’, and *Justizbediensteten* for ‘judicial staff’ in the Article III-269.

More significantly, the Constitution for Europe uses the word *Recht* which means law in a generic sense (*droit* in French, as opposed to *Gesetz*, which means statute, *loi*) where the English uses *justice*, in articles I-3, I-14⁴, III-25⁵ and very significantly in Articles III-269 and III-270, when it comes to the ‘area of freedom, security and *justice*’: *Raum der Freiheit, der Sicherheit und des Rechts* and ‘access to *justice*’: *Zugang zum Recht*. The German concept of *Rechtsstaat* is usually being translated for convenience by ‘rule of law’; as a matter of fact the rule of law includes justice in the Diceyan tradition, but an expression like the ‘rule of law and justice’, while redundant to some extent, would probably be more precise.

The word *justice* in ‘Court of Justice’ is being rendered in German by *Gericht*, thus pointing out at the fact that both aspects of justice (*Gerechtig-keit*) and law (‘Ge-recht-igkeit’) are difficult to separate. Indeed the technical organisation of justice may well produce injustice, as the development of equity in order to remedy the injustice of the common law has demonstrated in England.

This discussion of linguistic versions would only amount to a rather pedantic exercise if it weren’t for the fact that the Constitution for Europe, and especially its Article I-2 on values, is supposed to be written for the European people: German speaking European people will probably not have the same perception of the *value of justice* as embedded in article I-2 as those who read the text in a Romanic language or in English. The lawyers’ temptation, on the basis of Romanic and English versions of the Constitution, might well be to concentrate on the second aspect of justice – the administration of justice e.g. *Justiz* –, hence commenting upon the Rule of Law, different concepts of the judiciary and the importance of access to justice as European values. The first aspect of justice – *Gerechtigkeit* – might seem too vague to be embraced in legal terms, or too much into the sphere of legal theory. Its presence both in the new Constitution for Europe as well as in a number of EU member states’ constitutional orders needs nevertheless some attention.

³ Final numbering: Art. III-170 and III-171 in the provisional version of the Treaty.

⁴ Art. I-1 provisional version.

⁵ Art. III-158 provisional version.

The European Value of *Gerechtigkeit*

Comparing the European Constitution as it stands (i.e. in the EC and EU treaties as well as in the relevant ECJ case-law) and in the future (i.e. in the Constitution for Europe) on one side, and in national constitutions on the other side⁶, makes it clear that the value of justice as equitability or fairness in interpersonal relations has both an internal and an external aspect: externally it is mainly linked to the idea of peace, whereas internally it is more often equated with social justice.

Justice as Gerechtigkeit in Member States' Constitutional Law

A quick look at the Constitutions of Member States might induce to the wrong conclusion that there are huge difference in EU member states' perception of justice in the first sense, as a number of formulations with very different meanings are to be found in those texts. Such a method is insufficient as it does not go to the heart of the matter of constitutional law, and even worse, as it excludes the United Kingdom from any solid comparison. Looking at the written constitutions is however a very legitimate exercise when it comes to try and assess comparatively the formulations embedded in the Constitution for Europe: there is no doubt that all the members of the European Convention 2002-2003⁷, as well as the members of the intergovernmental conference (IGC) 2003-2004, who contributed to the final wording of the text, had the formulations of their own national Constitution in mind. To a certain extent, they did the same intellectual exercise as the ECJ when it uncovers 'constitutional principles common to the member states'.

Justice, Peaceful International Relations and European Integration A number of European constitutions explicitly refer to the value of justice, in a way which indicates where the members of the Convention who drafted article 2 of the Constitution for Europe might have found their inspiration.

Article 2 of the German Basic Law of 23 May 1949, mentions human rights as the 'basis of any human community, of peace and justice in the world.⁸ Article 11 of the Italian Constitution of 27 December 1947 states that Italy accepts 'limitations of sovereignty necessary to an order that ensures peace and *justice* between nations'.⁹ Interestingly, neither the first French draft Constitution of 1946¹⁰ nor the final Constitution of 27 October 1946, use the vocabulary of justice in this context, although they follow the trend of European post World-War II Constitutions in placing the value of peaceful international relations at the forefront. The Constitutions of the three other founding members of the EC – Belgium, Luxembourg and the Netherlands – remained unchanged after the war. Looking only at the constitutional texts is again misleading: the simple fact that these six countries started the

⁶ See Millns, S. (2003), 'Unravelling the ties that bind: National Constitutions in the Light of the Values, Principles and Objectives of the Constitution for Europe', in Ziller, J. (2003 a), *L'europeanisation des droits constitutionnels à la lumière de la Constitution pour l'Europe – The Europeanisation of Constitutional Law in the Light of the Constitution for Europe*, L'Harmattan, Paris, pp. 97-120.

⁷ Ziller, J. (2003b), *La nuova Costituzione europea*, Il Mulino, Bologna, pp. 87-139, and (2004), *La nouvelle Constitution européenne*, La Découverte, Paris, pp. 46-82.

⁸ Translation by the author.

⁹ *Idem*.

¹⁰ The draft was adopted on 19 April by Parliament, but rejected by 52,82% of the voters in the referendum of 5 May 1946.

move towards EC/EU integration after the Schuman Declaration of 9 May 1950 shows that the search for a peaceful and just system of international relations was their primary objective. In this context, the provisions of the German and Italian post-war constitutions should be read with historical events in mind: not only had these two countries been the main initiators of unjust wars in the thirties and forties, together with Japan, but they both had come out of World War I with deep resentments and dissatisfaction, that were amongst the roots of dictatorship : Germany, who had lost the war, felt that the Versailles settlement was unjust, and Italy felt that although having won the war, it had not obtained due recognition of its World Power status, especially as far as an equitable share of the world's colonial empires – and thus wealth – was concerned.

Some more recent European constitutions also acknowledge this link between peace and justice in the sphere of international relations. Article 2 (2) of the Greek Constitution of 9 June 1975 follows the model of the German Basic Law in linking 'consolidation of peace and *justice* and fostering of friendly relations among Peoples and States' with the value of human dignity (Article 2 (1)).¹¹ One might easily think that the authors of the Greek constitution indeed wanted to follow the German Basic Law, which has been very influential in the countries which returned to democracy in the second part of the seventies; however the Spanish Constitution of 27 December 1978, which has also been very clearly influenced by contemporary German constitutional law has not followed the model. These similarities and differences are telling little in legal terms, but they show how different the perception of the word justice in its broadest sense may appear.

The Constitution of Portugal of 2 April 1976 is probably the most interesting as regard the link between justice, peaceful international relations, and European integration: since the revision of 25 November 1992, Article 7 (5) is stating that 'Portugal participates in reinforcing European identity and in the intensification of European States' action in the favour of peace, economic progress and *justice* in the relations between people'.¹² This formulation is being directly echoed by Article 2 of the Constitution for Europe.

Justice as A Component of The Social Contract The constitutional tradition of a number of European states, like revolutionary France, or Ireland, is in line with the tradition of the United States of America, which sees popular sovereignty as the source of the constitutional pact, mainly considered as a social contract. This contrasts with another European tradition, derived from a monarchic past, which tends to consider the Constitution as being primarily a self-limitation of the State. As a matter of fact, both traditions melt in most European constitutional texts, even though traditional legal thinking, at the beginning of the XXIst century, tends to disregard the contractual part of constitutions in a majority of European countries.

The Constitution of Ireland of 1 July 1937 clearly states its nature of a social contract, by insisting on the importance of justice in the social order, in its Preamble:

'We, the people of Éire, [...] seeking to promote the common good, with due observance of Prudence, *Justice* and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

¹¹ Translation by the Ministry of Foreign Affairs: <http://www.hri.org/MFA/syntagma/>. The revision of the Constitution in 2001 did not change the wording of Article 2.

¹² Translation by the author.

Do hereby adopt, enact, and give to ourselves.'

The Constitution of Poland makes also such a clear link both in its Preamble and Article 2:

'Both those who believe in God as the source of truth, justice, good and beauty,
As well as those not sharing such faith but respecting those universal values as arising from other sources,

[...]

Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities

Article 2:

The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.'¹³

In the same way as all European Constitutions rely on the recognition of the value of peace and justice in international relations, though not mentioning it always in an explicit way, most European Constitutions incorporate a notion of what Italian, Spanish and to a certain extent German legal theory has developed under the concept of *Stato di diritto sociale*, *Estado de Derecho Social* or *Sozialer Rechtsstaat*¹⁴: the concept should certainly not be translated by *Social Rule of Law*, as such a wording totally misses its *welfare state* dimension . It would also be misleading to subsume it into the notion of welfare state, especially in a time where the latter comes under attack from the side of those who leave aside the market dimension which has always been included in the concept; this market dimension is well rendered by the German post World War II idea of *soziale Marktwirtschaft*, which has been taken up in Article 3 (3) of the Constitution for Europe which mentions 'a highly competitive *social market economy*' (emphasis added).

The value of social justice has been quite clearly embedded in European constitutional law in the aftermath of World War II. Here again, the German and Italian constitutions are the most explicit about social rights, even though they do not use the word justice for the purpose. It would be quite wrong to oppose them to other Western-European countries on the basis of the constitutional formulations: the absence of specific social clauses in other texts is only due to a time-specific lack of opportunities: the three Benelux countries did not change their Constitutions at that time. The case of France perfectly illustrates the point: the first draft constitution of 1946 included an extensive bill of political and social rights; the draft was rejected, mainly because of the lack of a Second Chamber in its institutional setting, which prompted the Christian Democrats to join General De Gaulle's opposition to the draft; the second draft, which was eventually adopted by referendum, only includes a preamble and not a fully fledged charter of rights: but this was only due to the fact that the three major parties – Communists, Socialists and Christian Democrats – were not able to agree on an appropriate formulation on the issue of freedom of education v. right to education; the text of the Preamble nevertheless states the same kind of rights as the first draft did in its rights articles. One could also argue that if Britain had adopted a written constitution in the late forties, the Beveridgean model of social protection would have been incorporated into it.

¹³ Official translation : <http://www.sejm.gov.pl/english/konstytucja/kon1.htm>.

¹⁴ Carpano, E. (2003), *Etat de droit et droits européens – L'évolution du modèle de l'Etat de droit dans le cadre de l'europeanisation des systèmes juridiques*, PhD Thesis, European University Institute, Florence.

An in depth comparative analysis, adding legislation and even more case-law, would probably show that not only the concept, but also the words *social justice* form a common value for member States of the European Union. There are certainly strong differences of perceptions of the down to earth content of this value between former communist countries and Western Europe, but they are probably based on a misunderstanding in the countries of Central and Eastern Europe of what Western societies understand under the welfare state, beyond superficial political divisions. The affirmation of *social justice* as a common value in the Constitution for Europe might contribute to bridging this difference in the future.

Gerechtigkeit *in the European Constitution*

The value of justice in the broader sense does not appear explicitly in the founding treaties, neither in the version of justice, peaceful international relations and European integration, nor in the form of justice as a component of the social contract. In order to appreciate the degree of innovation of the new Constitution for Europe, one should however look beyond explicit formulations.

Gerechtigkeit *in the founding treaties* The value of justice in international relations, as being at the heart of European integration, is not explicitly stated, neither in the Treaty of Paris of 1951, nor in the Treaties of Rome of 1957. It could however be argued that it is immanent in the economic constitution of the European Coal and Steel Community and the European Economic Community. The European Communities' founding treaties have been successful in formulating in legal terms the principles and rules that rule market economies, whose characteristics are the free interplay of offer and demand, the free circulation of products and services and of factors of production (labour and capital) as well as clearly set up rules of competition. This was not based only, or even mainly, upon a belief in the intrinsic virtues of markets: neo-liberalism will take twenty more years to flourish. The fathers of European integration thought that a well functioning market economy was probably the best way of ensuring prosperity, but above all they were convinced by historical experience that cartels – and thus the lack of open competition – had played a major role in reinforcing European dictatorships and especially in German rearment. This is especially clear in the ECSC treaty. It can thus be argued that the main objective of the Treaties of Rome and Paris – although unwritten – is ‘the intensification of European States’ action in the favour of peace, economic progress and *justice* in the relations between people’, to put it in the terms of the more recent revised Portuguese Constitution.

The demonstration becomes easier for social justice, although its embedding has been progressive. The EEC Treaty of 1957 contained very few indications in this sense. Attention should nevertheless be given to the mention in its Preamble of ‘economic and social progress’, ‘the constant improvements of the living and working’ and the reduction of ‘the differences existing between the various regions and the backwardness of the less-favoured regions’; the idea of justice also underlies the mention in its Article 119 (Article 141 after the treaty of Amsterdam) that ‘the principle of equal pay for male and female workers for equal work or work of equal value is applied’.

The Maastricht Treaty has been far more explicit in terms of fostering the value of social justice (even though avoiding again the use of those specific words), through its recognition of economic and social cohesion on one side, of fundamental social rights on the

other. This is very apparent in the new formulation of Article 117 (later 136) of the TEC, which refers to ‘fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers’, and states that the EC and its member states ‘shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.’ Even though the social dimension of European integration remains far less important than its economic dimension, social justice is becoming one of the values of European integration, applying explicitly to all member states in 1997, once Britain renounced the opt-out clause that the Major government had obtained five years earlier in this field, together with exemption from the European Monetary Union.

Gerechtigkeit in the Constitution for Europe Clearly Article I-2 of the Constitution for Europe has to be read in the context of the general consolidation of existing EU law, but also in the light of the innovations introduced by the European Convention and the IGC that followed. Both are clearly reinforcing the equitability and fairness dimension of the value of *justice*.

The text of Article 2 of the Convention’s draft points predominantly at the first sense of *justice*, as it appears within one sentence, together with ‘*pluralism, tolerance, justice, solidarity and non-discrimination*’. The change of wording adopted by the IGC even reinforces this, as the final text will be read in two sequences ‘*pluralism, non-discrimination, tolerance*’ which appear on one side as different aspects of the same value, and then ‘*justice, solidarity and equality between men and women*’. The IGC gave no reasons for the modification of the place of non-discrimination, which was not an indispensable consequence of the introduction of gender equality into Article I-2. There is however a logic in the final formulation, as generally speaking the Constitution for Europe can be read as enhancing the dimension of social justice in the EU.

A cynical view would be to say that the Convention as well as the IGC have merely been paying lip service to the value of social justice, as there is no increase of EU competences in the social field and as unanimity voting in the Council has been kept in Article III-210¹⁵ in the fields to which it applied in article 137 TEC¹⁶, and while keeping accepting the UK claim that the simplified revision procedure – which allows to replace unanimity by qualified majority without the heavy amendment system implying an IGC – may not be applied to the field of social security and social protection of workers. A less pessimistic and more realistic interpretation has to draw on the proceedings of the European Convention itself: both in Working Group XI on ‘Social Europe’, which was lead by Giorgios Katiforis and in the plenary session which discussed the report of the working group, a strong divide materialised between those who supported the development of further European involvement in the social field, those who considered the welfare state as too heavy a burden

¹⁵ Art. III-104 provisional version.

¹⁶ For legislation in the fields of “social security and social protection of workers” III-210 (1-c), “protection of workers where their employment contract is terminated” (1-d), “representation and collective defence of the interests of workers and employers, including co-determination” (1-f), “conditions of employment for third-country nationals legally residing in Community territory” (1-g).

for European competitiveness and a well functioning internal market, and those who feared that an EU competence in the field might endanger their highly developed welfare state.

In this perspective the compromise solution which emerges out of the European Convention and of the IGC may be considered as a small step forward into the direction of social justice at the EU level. Although no significant new competence has been given in the social field to the Union, none of the existing competences has been withdrawn, contrary to what some adversaries of the welfare state had hoped. On the other side, the Constitution for Europe contains at least three innovations which might impact on the further development of European social policy: the constitutionalisation of fundamental social rights, as embedded in the Charter of fundamental rights which becomes part II of the Constitution; the addition of territorial cohesion to the existing social and economic cohesion, which is supposed to reinforce the objectives of cohesion that are not directly linked to an economic perspective; and foremost the new horizontal social clause which has been proposed under Italian presidency of the IGC, under Article III-117.¹⁷

'In defining and implementing the policies and actions referred to in this Part, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.'

This new social clause becomes thereby one of the seven major requirements that have to be respected in all EU initiatives.¹⁸ The first clause of Part II, Article III-115 formulates a horizontal clause of a different type, i.e. the principle of consistency between different EU policies and activities 'taking all its objectives into account', and may be read as encouraging not only the EU legislator and executive, but also the ECJ in balancing the economic objectives of integration with those of social justice.

Even if one adheres to this more optimistic reading of the changes introduced by the Constitution for Europe, social justice remains minor in the action of the EU, due to the simple fact that the Union has only very limited competences in the major fields of social justice, i.e. redistributive policies: the EU competences in the field of taxation and even more its limited budget do not enable it to have an important impact on the distribution of wealth, which could be comparable to that of member states, especially when it comes to the bigger and wealthier member states. *Gerechtigkeit* remains a value, not a major common policy objective.

The Common Value of *Justice-Justiz*

Article I-2 of the Constitution for Europe clearly puts the emphasis upon the first sense of *justice* i.e. *Gerechtigkeit*; this is however not a reason to disregard its second aspect, that of administration of justice, especially as this aspect will probably come immediately to the mind of all those who will read this article in other versions than in the Germanic languages. Even in the latter case, it is clear that Article I-2 is a whole: whereas it refers to

¹⁷ Art. III-2-a provisional version.

¹⁸ The other are the promotion of gender equality (Article III-116), combating discrimination (118), the promotion of sustainable development through environmental protection requirements (119), taking into account consumer protection requirements (120), respecting the welfare requirements of animals (121), and enabling services of general interest to fulfil their missions (122).

justice in its second sentence, Article I-2 also refers to the *rule of law* (*Rechtsstaat, Etat de droit*). In continuation with the treaties of Amsterdam and Nice, the work of the European Convention further promotes the ‘area of freedom, security and justice’ as a central aspect of European integration. There are both a big number of similarities and some important differences between EU member states as regards their systems of administration of justice and even their concept of the judiciary. There is enough common ground however, especially through the double influence of the European Convention of Human Rights (ECHR) – including the jurisprudence of the Strasbourg Court – and of the EC treaty system, and this allows to speak of a shared value of justice.

Justice as a Branch of Government

The European approach to the judiciary in the system of separation of powers is evolving. In a way which is completely opposed to the US tradition, two separate European traditions have long contributed to seeing it as a relatively minor branch of government. At the end of the XXth Century, most Constitutions of EU Member States seemingly consider the judiciary in the same way as the legislative and executive branches of government, but this has not always been the case and is not yet the case everywhere, at least at the level of symbols and concepts.

Converging National Traditions: Monarchical Past and the Sovereignty of Parliament The authoritarian tradition derived from a monarchical past has contributed to a perception of the courts as being the servants of the sovereign: while accession to democracy has meant everywhere that the independence of the courts became a major part of the principle of the rule of law, the idea remains that this independence is mainly linked to the necessary party-political neutrality of judges. A number of European Constitutions therefore do not clearly present the courts as forming together a third branch of government, but as a series of different institutions. Even more, this is probably one of the – often unconscious – reasons for the European preference for the Kelsenian model of a separate court specialised in constitutional review, as opposed to the US system allowing for constitutional review by any court. The choice of Germany and Italy after World-War II for this model, has been followed by a majority of European countries in the last quarter of the XXth Century, either as a consequence of their return to pluralist democracy (Portugal and Spain in the late seventies, former communist countries in the nineties) or in the framework of constitutional modernisation. The only three countries which allow for direct constitutional review by the ordinary Courts are Ireland – clearly influenced in 1937 by the US experience –, Greece, and Denmark, where the courts have almost always had a very restrained and deferring attitude towards acts of Parliament. In the Netherlands, the issue of allowing for judicial review of acts of Parliament was duly debated in the seventies during the preparation of the comprehensive constitutional revision that took place in 1983. However in the end it was rejected, both because it was considered that in practice the courts were able to protect fundamental rights in applying the ECHR – which had direct effect in this country from the beginning – and because the Dutch tradition relies on parliamentary sovereignty.

This second European tradition – the tradition of parliamentary sovereignty – is opposed to the authoritarian tradition which it has replaced after revolutions. It has had an even more important impact on the concept of the judiciary. In both its English and French versions it is deeply linked to the European tradition of parliamentary regimes, which in theory gives predominance to the legislative branch of government, though on different

theoretical bases. In France, the tradition stemming from the Revolution was that Parliament adopts the ‘law, expression of general will’. It has produced a very heavy legicentrism, only marginally contradicted by the development of a judge-made administrative law. The *Conseil constitutionnel* really became a Constitutional Court only after Giscard d’Estaing had promoted a constitutional amendment, allowing for 60 members of Parliament to defer a statute to check its conformity with the Constitution, hence departing from the legicentristic tradition. The French constitution traditionally does not recognise a ‘judicial power’ (*pouvoir judiciaire*), but only a ‘judicial authority’ (*judicial authority*), and the courts, though genuinely independent, are divided amongst at least four different sets: ‘judicial courts’, which are headed by the *Cour de cassation* and are mainly competent in civil, and criminal matters, ‘administrative courts’ which are headed by the *Conseil d’Etat*, one constitutional court (the *Conseil constitutionnel*) and two ‘political’ courts (*Haute Cour* and *Cour de Justice de la République*) which are competent for offences committed by members of the executive. In most other European countries, more modern written Constitutions include all courts in the judiciary, but for the Constitution of the Netherlands: article 112 mentions courts which are not part of the judiciary. In the United Kingdom, again with due respect to the necessary independence of courts, the minor position of the latter has been symbolically evidenced until 2003 by the judicial role of a section of the upper House (the Appellate Committee of the House of Lords) and of a specific body of the executive (the Judicial Committee of the Privy Council) and more importantly in practice, by the multiplication of specialised tribunals after World War II.

Comparing these European traditions with the US tradition points to the very limited relevance of the so called common-law/civil law divide. Truly, the organisation of the legal profession is very different on the Continent, where the careers of judges on one side and advocates on the other are separated and where judges formally have the status of civil servants, and in the British Isles, where judges are chosen amongst advocates, according to common law system. The latter however are neither more nor less independent than the former and this divide has no meaning as far as the value of justice is concerned.

The IGC eventually chose not to include a reference to this divide in Article III-270, contrary to the draft that had been submitted to the Brussels summit of December 2003. The latter included in the then Article III-170 (2) the mention that minimum rules for the mutual recognition of judgments and judicial decisions should ‘take into account the *differences between the legal traditions and systems of the Member States and in particular between the common-law systems and the others*’ (emphasis added). This sentence, based on prejudices and fears, was reflecting one of the most common clichés as to legal systems in Europe. Such a formulation in the European constitution would not only have pointed to a lack of expertise of its drafters – this is only interesting for true specialists in comparative law – it would have artificially enhanced a specific opposition between the British Isles and the Continent – as if the Continent were united –, which would have been against the recognition of cultural differences by the Constitution. The final text of the Constitution happily enough does not include this kind of mention anymore. It only provides in its paragraph (3) for a possibility for any member which considers that a draft European framework law ‘would infringe the fundamental principles of its system of criminal justice’ to refer the issue to the European Council.

The Absence of a New Judiciary in the Constitution for Europe The Constitution for Europe seems far closer to those of France, the Netherlands and the United Kingdom than to

the Belgian Constitution, for instance, which clearly puts the Judicial Power (*pouvoir judiciaire*) on the same footing as the Legislative and Executive Powers in its title III, or the Spanish Constitution, in its Title VI ‘*El poder judicial*’. The aforementioned European traditions have converged with the idea of the European Court of Justice, that its most necessary reforms had already been achieved with the Treaty of Nice. A very noticeable feature of the European Constitution is the lack of real progress towards a European Judiciary. A number of recent European Constitutions, to start with the German Basic Law, are far more advanced in mentioning both the Constitutional courts and all other courts in a section on the Judiciary. This also clearly appears when comparing the Convention’s draft to what could have been done with only a little bit more boldness¹⁹: there is no mention in the Constitution for Europe of the national courts as having a role in the European system of courts, something which is specially obvious with the English version of article I-29²⁰ (1) second sentence, according to which ‘Member States shall provide *rights of appeal* sufficient to ensure effective legal protection in the fields covered by Union law’. Other language versions refer to ‘*voies de recours*’ or ‘*Rechtsbehelfe*’, which means ‘remedies’, using the same word as Article II-107 about the ‘Right to an effective remedy and fair trial’.

The same combination of British and French traditions shows up in the fact that, while gaining more competence with the abolition of the pillar-structure of the Maastricht Treaty, the ECJ has still only a very limited role in reviewing the Union’s action in external policy. The French theory of ‘*actes de gouvernement*’ had been developed by the *Conseil d’Etat* as supreme administrative court in order guarantee judicial exemption to the executive in ‘high policy’ matters; while shrinking more and more, it still includes foreign relations.²¹ The British courts for long were even far more timid than the *Conseil d’Etat* in refusing to apply judicial review to the exercise of the royal prerogative, which includes foreign relations and the organisation of the civil service. Only in 1985 did the House of Lords reverse the case law and admit judicial review, in its famous *GCHQ* case.²²

The British tradition has clearly played a very important role in the Convention’s choices, and it is at the root of one of the most interesting paradoxes of the Constitution for Europe, as far as the absence of a strong judiciary is concerned. The technique of interpretation by reference to the ‘*travaux préparatoires*’ has been written into the Convention’s text upon the very heavy insistence of British delegates, coming from a country where advocates were not allowed to quote parliamentary debates for the interpretation of statutes in court cases until 1999. It is common knowledge that the British government did everything it could to force the Convention to include into the Preamble of the Charter of fundamental Rights (Part II of the Constitution) a reference to ‘the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention’. This has been even worsened by the IGC: while the Convention’s text only mentioned in its Preamble that the Charter should be interpreted ‘in the light’ of those explanations, the British

¹⁹ For a minimalist, approach that nonetheless goes much further than the European Convention did, see Lotarski, J. and Ziller, J. (2003) ‘Institutions et organes judiciaires’, in De Witte, B. (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, European University Institute, Florence, pp. 67-84. We proposed to introduce in the first Article on the ECJ a clause that would read : ‘In the framework of their respective competences, the member States’ judicial authorities are associated to the Court of Justice’s mission’.

²⁰ Art. I-28-a provisional version.

²¹ For a simple and clear account of this theory, see Bell, J., Boyron, S. and Whittaker, S. (1998), *Principles of French Law*, Oxford University Press, Oxford, p. 179-180.

²² *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] AC 374.

government insisted upon a stronger formula. The final version of the Preamble of Part II says that ‘In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations ...’, and article II-72 (7) reinforces this statement by saying that: ‘The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States’.

The Treaty establishing a Constitution for Europe will be accompanied by a Declaration n°12 ‘concerning the explanations relating to the Charter of Fundamental Rights’²³, which reproduces them in full extent.

Reading the explanations might very well lead to the conclusion that all this is much ado about nothing, especially as the notion of ‘giving due regard’ is not really limiting the interpretative powers of courts. Happily enough, the British government did not even try to ask for a mechanism like the ‘référendum législatif’ by which the French Revolutionary Assemblies required the courts to ask them for a preliminary ruling on questions of interpretation of the laws they had adopted – a system which was soon abandoned as not practicable. Furthermore, the ‘explanations’ usually only indicate the source of the rights which the Charter is trying to codify, and their meaning, but does not formulate strict boundaries to interpretation or further development of these rights.

On the other hand it is undeniable that the Constitution for Europe contains a clear signal to courts: they are invited to exercise judicial restraint. The invitation is specially clear to British courts: it signals that the ‘travaux préparatoires’ of the Charter have to be taken into account, and this occurs in the context of the British Human Rights Act of 1998 which although developing judicial review also tries to restrain these courts in their interpretation of the European Convention of Human Rights. There is also a clear invitation to the ECJ, as it has traditionally refused to take the ‘travaux préparatoires’ of the European treaties into account for interpretation, preferring a practical interpretation based on the ‘effet utile’ theory, and a teleological interpretation based on the ECT Preamble’s mention of an ‘ever close union’.

In the light of the European traditions of judicial interpretation (including those of the House of Lords in the last decades) it is however quite probable that the British government only won a Pyrrhus’ victory: setting aside the Austrian theories based on literal interpretation of statutes, which have less and less influence, European supreme courts, and even more European Constitutional courts, have a longstanding tradition of creative interpretation. In its 1947 decision *d'Aillères*²⁴, the Conseil d’Etat went so far as saying that a statute of September 1945 which explicitly excluded any right of appeal against decisions of a ‘jury d’honneur’ had to be read as allowing nevertheless for the ‘recours pour excès de pouvoir’, the traditional French remedy against *ultra vires*, one example amongst many of the paramount value of access to Justice in the European tradition.

²³ Published on the Council Internet site, *supra n.1*, CIG 86/04 ADD2, p. 15.

²⁴ CE, 7 February 1947, *d'Aillères*, Recueil Lebon, p. 50.

Access To Justice and the European Constitution

A number of changes have occurred both in Member states and at the EC level since Mauro Capelletti published the famous EUI research on ‘Access to Justice’.²⁵ Substantive comparable data are however missing in order to assess how this shared European value impacts on plaintiffs real possibilities.

The above-mentioned explanations to Article II-107 ‘Right to an effective remedy and to a fair trial’ contain in a nutshell the most important elements to be noted about this issue.

‘The first paragraph is based on Article 13 of the ECHR [...] However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. [...] [it] applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law. [...] In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. [...] in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union. [...] it should be noted that in accordance with the case law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy’.

The explanations rightly show the link between the two major aspects of the of justice: access to justice in the sense of *Recht* depends upon justice in the sense of *Gerechtigkeit*. The attentive reader of the Constitution for Europe will see prospects for a much more developed role of the European Union in this respect.

It lies in a simple addition to Article III-270, the legal basis for judicial cooperation in civil matters: framework laws may be adopted in order to insure ‘(e) effective access to justice’. The competence as such is restricted to measures ‘necessary for the proper functioning of the internal market’ in situations ‘having cross-border implications’. There is no basis for an across the board harmonisation of civil procedure, but it is quite clear that no member state’s legal system would be able to survive long with a two tier set of rules, providing effective access to justice in the application of EU law and not in the application of strict domestic law.

One should however not be overoptimistic in this respect: effective access to an efficient justice relies on sufficient resources and the EU does not have the budgetary means nor competences to be more helpful in ensuring equity in the access to justice than it is in ensuring social justice.

²⁵ See amongst many other titles : Cappelletti, M. ed. (1978) *Access to Justice*, Sijthoff and Noordhoff, Alphen aan den Rijn.

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