European University Institute

Department of Law

PUBLIC POLICY IN THE EC; THE COMMUNITY *ORDRE PUBLIC.*

A PROPOSAL WITH INTEGRATIVE EFFECTS

by

Elena Rodríguez Pineau

Thesis submitted for the assessment with a view
to obtaining the Degree of Doctor of the EUI
Florence, January 1996

Examining Jury:

Professor A. Borrás, University of Barcelona
Professor J. González Campos, Spanish Constitutional Court (Madrid)
Professor C. Joerges, European University Institute (supervisor)
Professor P. Mengozzi, University of Bologna
Professor F. Rigaux, University of Louvain-la Neuve (co-supervisor)

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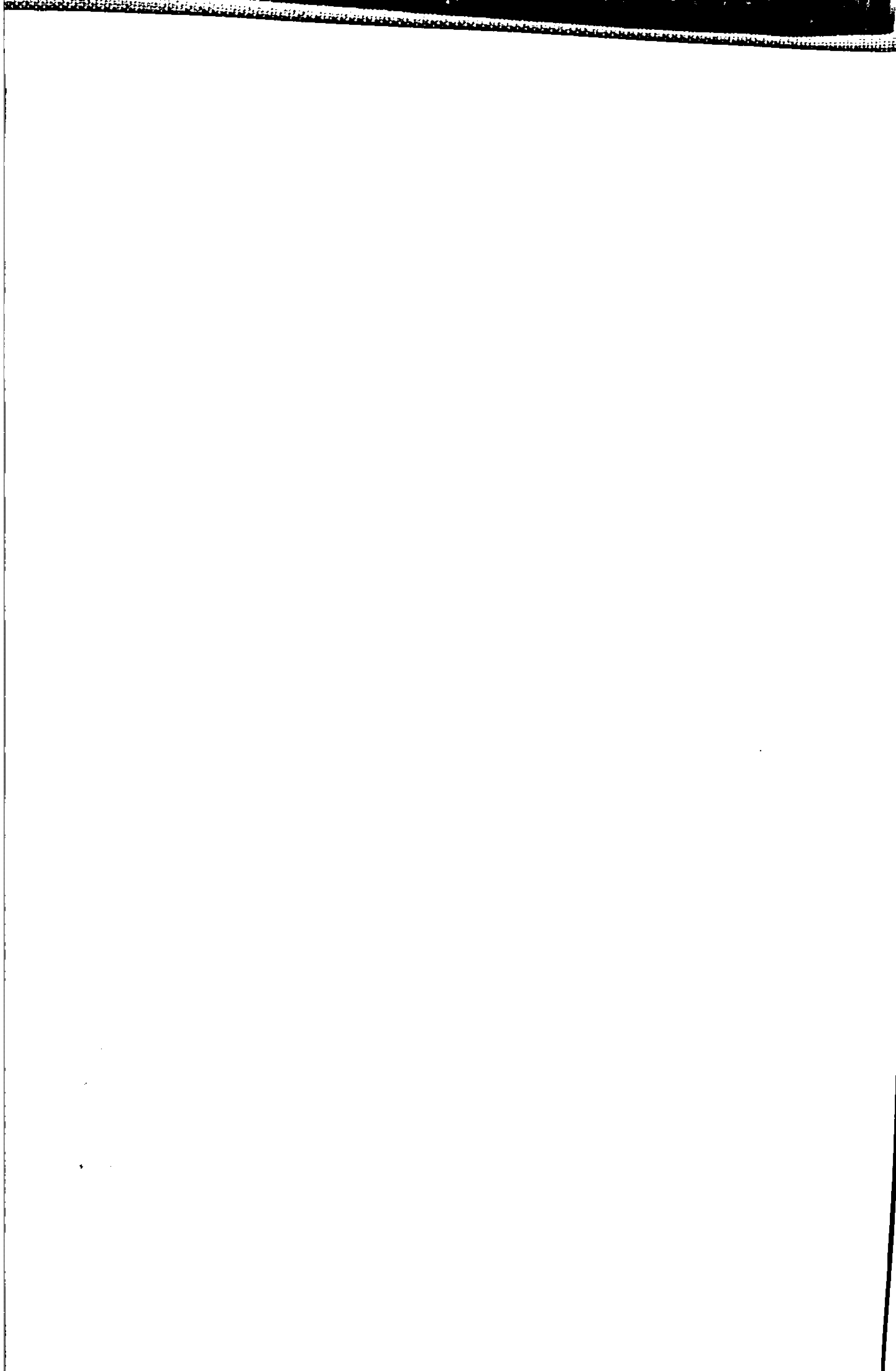


For the artist:

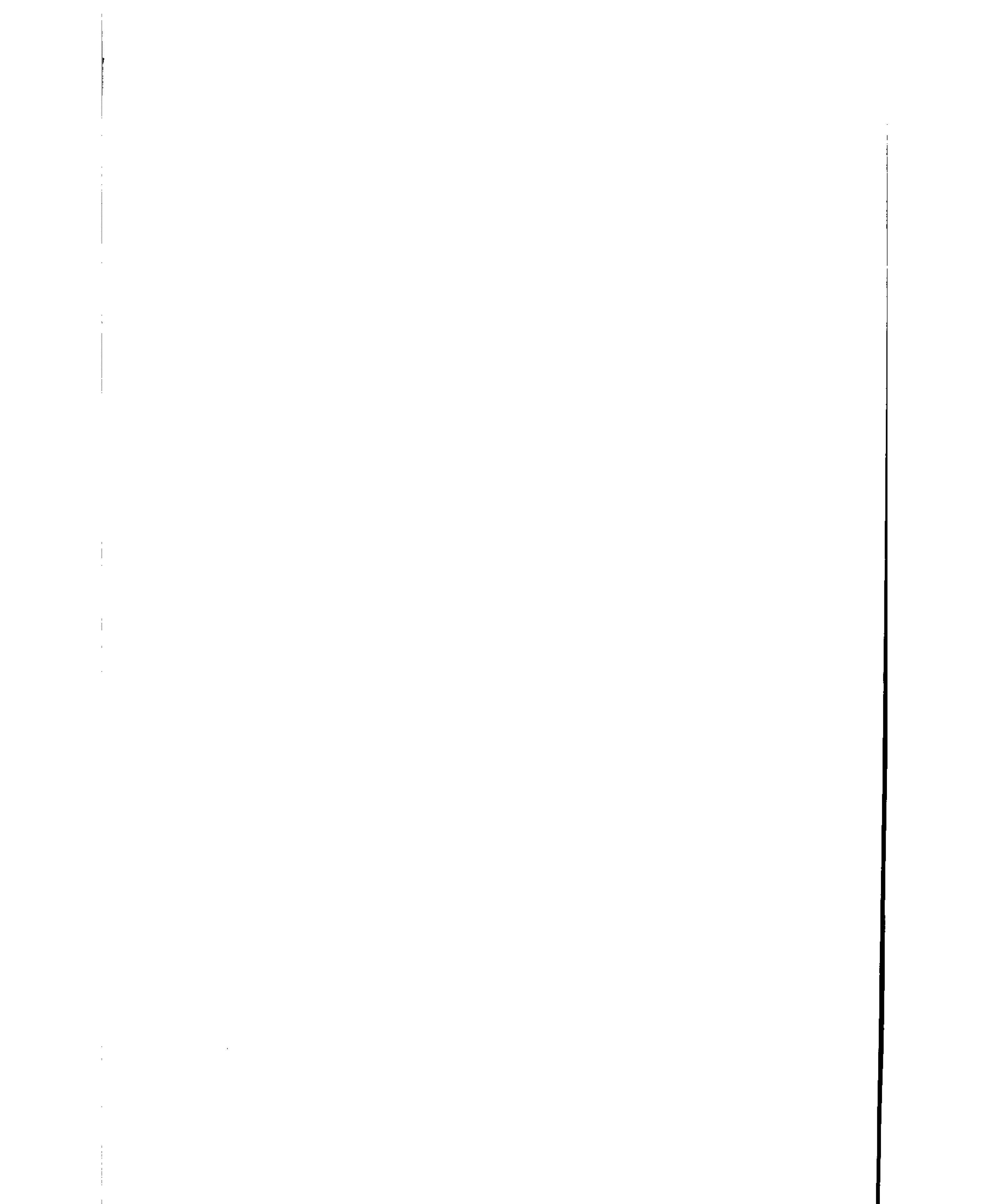
"L'ordre est le plaisir de la raison,
le desordre le délice de l'immagination"

Claudel

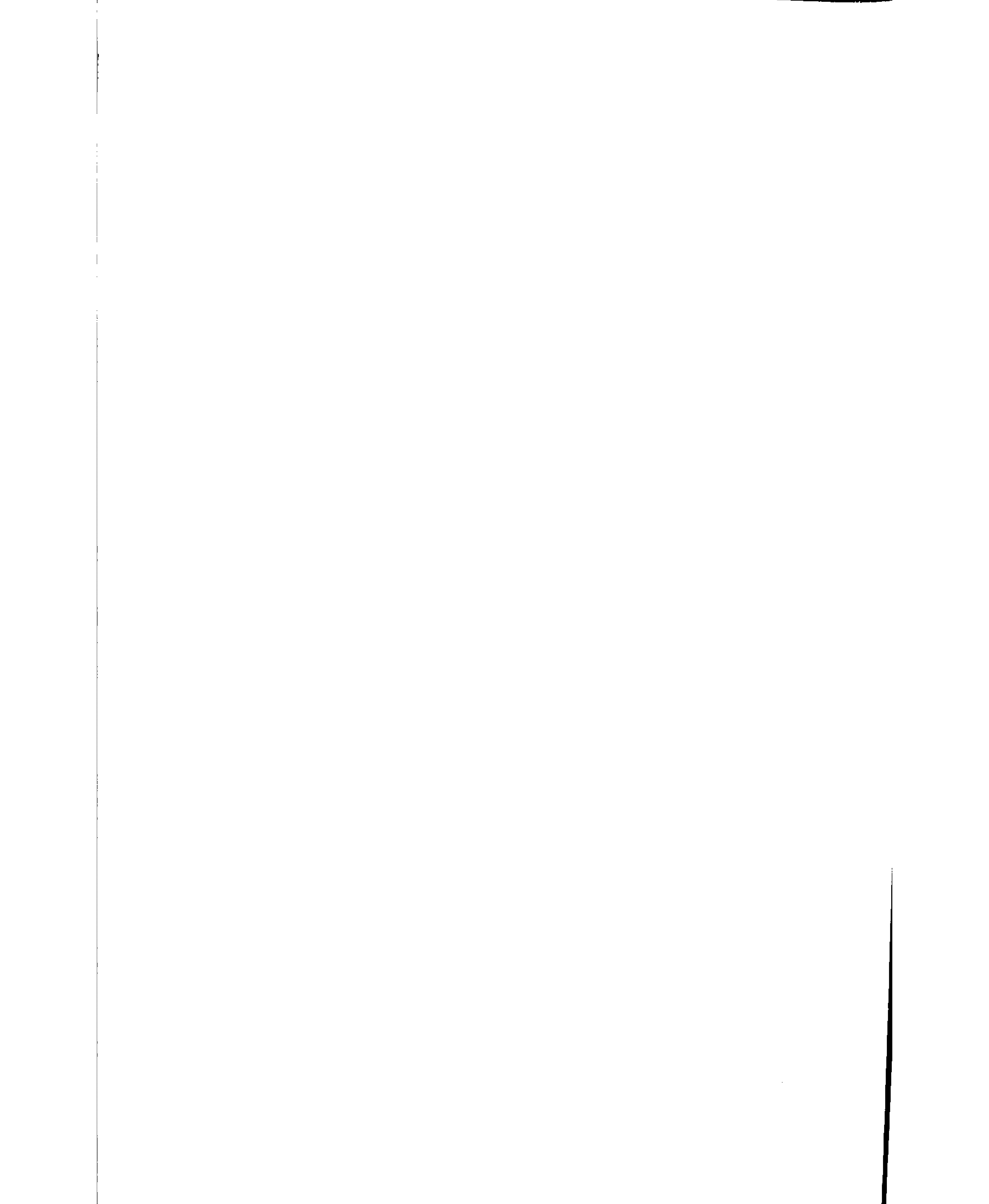
For the jurist:

"Die meisten versuchen,
immer von neuem den Sisyphusstein
des ordre public in die Höhe zu wälzen.
Einmal muss er jedoch wohl liegenbleiben,
kann nicht immer wider herunterrollen"

Kahn



To my family



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ABREVIATIONS

A.J.C.L. - American Journal of Comparative Law
B.J. - Belgique judiciaire
Bull. civ. - Bulletin civil
Cal.L.Rev. - California Law Review
C.D.E. - Cahiers de droit européen
Clunet - Journal de Droit international
C.M.L.R. - Common Market Law Reports
C.M.L.Rev. - Common Market Law Review
Col.L.Rev. - Columbia Law Review
E.B.L.R. - European Business Law Review
E.Cur.L. - European Current Law
E.J.I.L. - European Journal of International Law
E.L.Rev. - European Law Review
Foro it. - Foro italiano
Gaz. Pal. - Gazette du Palais
Harv.L.Rev. - Harvard Law Review
H.R.L.J. - Human Rights Law Journal
I.C.L.Q. - International and Comparative Law Quarterly
I.I.C. - International Review of Industrial Property and Copyright Law
I.L.M. - International Law Materials
I.L.R. - International Law Reports
IPRax - Praxis des Internationalen Privat- und Verfahrensrechts
J. Bus. L. - Journal of Business Law
J.C.P - Jurisclasseur périodique
J.D.I. - Journal de droit international
J.T. - Journal des tribunaux
J.Z. - Juristenzeitung
K.C.L.J. - Kings College Law Journal
Law & Pol'y Int'l Bus. - Law and Policy International Business
L.I.E.I. - Legal Issues of European Integration
Mercer L.Rev. - Mercer Law Review
Mich.J.Int'l L. - Michigan Journal of International Law
Mich.L.Rev. - Michigan Law Review
Modern L.Rev. - Modern Law Review

N.I.L.R. - Netherlands International Law Review
N.Q.H.R. - Netherlands Quarterly of Human Rights
Pas. - Pasicrisie Belge
RabelsZ. - Rabels Zeit
RBelDI - Revue belge de droit international
R.C.D.I.P. - Revue critique de droit international privé
R.G.D.I.P. - Revue générale de droit international public
Rec. des Cours - Recueil des Cours
Rec. Dal. - Recueil Dalloz-Sirey
Rev. cr. - Revue critique de droit international privé
Rev. crit. juris. belge - Revue critique de jurisprudence belge
Rev. dr. int. et dr. comp. - Revue de droit international et de droit comparé
Rev. Dr. ULB - Revue de droit de l'Université Libre de Bruxelles
Rev. Marché Com. - Revue du Marché Commun
Rev. trim. dr. h. - Revue trimestrielle des droits de l'homme
Riv. dir. europeo - Rivista diritto europeo
Riv. dir. ind. - Rivista diritto industriale
Riv. dir. internaz. - Rivista diritto internazionale
Riv. dir. proc. - Rivista diritto processuale
R.D.I.P.P. - Rivista di diritto internationale privato e processuale
R.I.D.C. - Revue international de droit comparé
R.I.E. - Revista Instituciones Europeas
R.T.D.E. - Revue trimestrielle de droit européen
R.U.D.H. - Revue universelle des droits de l'homme
*St*AZ - Zeitschrift für Standesamtwesen
Va. J. Intn'l L. - Virginia Journal International Law
Vand. J. Trans. Law - Vanderbilt Journal of Transnational Law
Virginia J.Intl.L. - Virginia Journal of International Law
Yale L.J. - Yale Law Journal
Y.E.L. - Yearbook of European Law

INTRODUCTION:
PUBLIC POLICY IN THE EC, THE COMMUNITY *ORDRE PUBLIC*

Community *ordre public*, is there such a notion? Seemingly this term provokes an answer from a private international law perspective with difficulty. It is precisely in this sense that the notion is addressed in this work. Admittedly sceptical comments may have arisen after having read the three preceding lines: is public policy not a fading notion? and if it is not, is the European Union the correct context to speak of such a notion? Again, if the context were correct, are there not already enough notions of public policy in a too restricted area to introduce another one? An answer to these questions will be attempted in this thesis.

Is public policy still alive in the dawn of the 21st century? Such a traditional notion could be suspected to grow old and like a distinguished lady, withdraw discretely before its 'wrinkles' become too evident. Still, public policy, despite its 'age' is indeed alive. It could not be otherwise since it is essential and inherent to the survival of legal orders. *Ordre public* is a concept which intuitively brings to mind a protective mechanism of legal systems, mainly in three senses: (a) within the legal order, (b) in international relationships, against possible threats of other legal orders and (c) in the framework of international instruments and organisations, as safeguard clause of the national system against the supranational order. International public policy responds in this case to the second meaning indicated. It is in this sense that a notion of Community *ordre public* is proposed, a notion with a separate identity from the (fifteen) national notions which are likely to be applied on the European Union territory.

Ordre public is a lively and versatile notion, with an amazing aptitude to adapt to circumstances. It becomes thus rather difficult to seize. The width of *ordre public*, the variability of the notion together with a nature difficult to pin down, make it almost impossible to tackle *ordre public* in a global manner. The thesis deals with this limitation and acknowledgedly sets aside spheres where the notion finds current application as regards both conflict of laws (for instance, in family law) and jurisdiction and recognition of foreign decisions (namely arbitration). Chapter I addresses public policy from a historic, functional

and substantive viewpoint. The different meanings that the notion enshrines are to be reviewed, as well as classical devices such as the relationship of public policy and mandatory rules.

Which are those fundamental values of the system protected by public policy and according to which it tries to fulfil material justice? Admittedly, human rights appear as an essential reference in this respect. The issue is addressed only within the restricted terms of a public policy delimitation, in the framework of an evolving conception of private international law that incorporates substantive concerns through human rights. These reflections constitute the object of chapter II, which displays in a parallel structure a general approach to human rights and their concrete protection in the European area. Not very much seems left out of the defensive mechanism - reflection of national sovereignty, that public policy used to be. In its place emerges an offensive instrument with integrative effects which overcomes national parameters and may even acquire a true international character.

In order to ascertain whether it is possible to reproduce in the Community sphere the notion of public policy as it stems from a traditional private international law viewpoint, the need is felt to understand the Community framework and the web of notions that interact in the European area. Setting aside domestic *ordre public*, the interest remains focused in the functioning of public policy in the sense of the EC Treaties on the one hand (that is, in the third sense referred to above), and in the application of traditional public policy in the Union in the framework of private international law structures on the other. It will appear that these two notions may not be absolutely dissociated. To these aspects are devoted respectively chapters III and IV.

Public policy in the sense of the Treaties appears -as well as international public policy, to be an exceptional clause of restricted recourse. Indeed, a well-known case law of the Court of Justice tends to draw the boundaries of such (national) notion in strict (Community) terms. The attention of scholars has been at large focused on this point. On the contrary, only recently has interest been drawn to the general good. This notion of jurisprudential source has progressively enlarged to the point of being enshrined in Community legislation. The analysis of these two features provides three milestones. Firstly, it suggests a path through which

human rights enter the EC system. Secondly, it demonstrates that aspects of internal and international state public policy find reflection in the Community context. Thirdly and lastly, it shows how the EC is forced to take a position in order to define its own perception of such notions.

Chapter IV brings back the notion of public policy in the sense of private international law as it applies in the sphere of two conventions: on applicable law on the one hand and recognition and/or enforcement of foreign decisions on the other. The chosen conventions, 1980 Rome and 1968 Brussels, have the interest of being in force between the Member States of the EC while they exhibit a close link to Community law and fulfil integrative purposes which are essential to the European Union. The integrative potential of private international law seems to have been acknowledged by the EC in the last decades. The private international law setup of Community secondary legislation needs to find accommodation with the rules of the conventions. In the resulting framework, State public policy is seen under a new light. In other words, the fact that it is operative in the Community implies a new reading of national public policy to which is devoted the last section of the chapter. These two chapters will provide essential elements for the definition of the notion which concerns this work, that is, European Union *ordre public*. Indeed, the latter may find more precise delimitation by contrast to the two notions analyzed in chapters III and IV, while paradoxically, it will reproduce defining features of the latter. Furthermore, the conventions may prove to be the correct context where it could be applied.

Once this framework has been set up, the question raised at the very beginning of these pages may find an answer: a Community public policy... is it possible? and if so, is it desirable? The evolution of the Community phenomenon invites a cautious answer. Indeed, Community law has surpassed a purely economic view to enshrine and foster other interests. Moreover, it introduces a 'supranational' perspective which overcomes the state approach. Is it so then, that Community *ordre public* replies to the schemes of a true international (or better, regional) public policy? Is it possible to speak again of a revived *communio iuris* in Europe? Certainly, it does not exist in the same terms as those in which it was defined in the 19th century. Nevertheless, it may be recognised in this notion of European *ordre public*. Its defining features, its use and the way it relates with the Member State notions will point in

that direction. The fifth chapter is devoted to the analysis of these matters.

Admittedly, the answers thus reached will be relative since Community *ordre public* does not lose any of the essential defining features of public policy: variability, contingency, adaptability. One could suggest it was too bold to try and grasp such an evasive notion. The reader please be indulgent of the many gaps and settle for an attempt to draw a picture, possibly a clearer one of this lady who, with a mocking smile, keeps on escaping the objective of the camera while never coming out of its reach.

CHAPTER I:
PUBLIC POLICY ACCORDING TO PRIVATE INTERNATIONAL LAW

INTRODUCTION

Putting forward the existence of a Community notion of public policy in the area of private international law entails two assumptions: that international public policy exists on the one hand and that it is operative in the European Community sphere on the other. This chapter is devoted to the first of the assumptions. Voices object to the existence and utility of such a notion that relies on an ancient conception of private international law and does not respond any more to the needs of contemporary private international law. This thesis contends, on the contrary, that such a notion exists and is necessary for present-day law. This is so because it constitutes a protective mechanism that any legal system cannot do without. Admittedly, the terms in which to address public policy have changed, but this change responds to the characteristics of the notion.

It could further be wondered whether a variable and slippery notion, which adapts to diverse legal, territorial and temporal criteria may be addressed in a coherent manner. Although each legal actor may adopt a particular conception of *ordre public*, an approach to the functional and substantive aspects of the notion is possible. These pages will thus undertake a historical approach of the notion and then shift to a negative delimitation, that is, to distinguish international *ordre public* from other similar notions. Once this context has been framed, further precisions of the notion will come from the analysis of the application of the notion.

The picture thus drawn fixes precisely the correct terms in which public policy is to be understood and may consequently be argued to exist in a Community framework. Seemingly economic concerns and the evolution of private international law in the context of international relationships are two main points in the delimitation of international public policy at the end of the XXth century. But, as suggested, the correct understanding of the notion requires firstly that we go back in time and try to seize the unruly horse on which public policy fancies to appear.

1. FUNCTIONAL AND SUBSTANTIVE DEFINITION OF PUBLIC POLICY

With a remarkable sense of humour the following paragraph illustrates the many names that *ordre public* has been given:

> "On satisfait les amoureux de la faune quand on voit dans l'ordre public un *cheval emballé* et on satisfait ceux de la flore quand on y voit une *plante carnivore*; pour ceux qui pratiquent des sports dangereux, l'ordre public est le *parachute d'urgence* qui assure le *saut dans le vide* tandis que les initiés en balistique y voient, eux, une *bombe à retardement*; les amateurs de musique populaire peuvent le considérer comme un *accordéon* tandis que les veilleurs de nuit le considèrent comme un *clé universelle* ou un *passe-partout*; les apprentis de thaumaturgie l'invoquent comme un *moyen miracle*..."[1]

All these appearances reflect the same slippery and variable notion. Due precisely to the unseizable character of the notion, firstly a historical vision will be proposed to then introduce a functional and substantive approach to it.

1.1. First approach to the notion

a. Historical and ideological factors

Although public policy[2] is a well known concept it remains surprisingly vague. Hence it seems useful to give a definition of the notion as it will be understood in this work. Put simply, it can be stated that public policy encompasses all those general principles and values (and also policies) that the system considers so essential as to protect them from any possible attack derived from the application of foreign law or the recognition of a foreign decision or judgment. As derived from these terms, public policy is an inherent element of any legal system.

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[1] Remiro Brotons,1984:245.

[2] The notion to be studied is *ordre public*, however, reference will be made indistinctly to public policy. The latter has without doubt a more restricted scope, which is closer to public order, but it will still be used while being aware of this reduction for linguistic convenience.

Public policy is an evolving concept that changes according to the circumstances, ideologies and influences of the period and territory to which it is applied. This implies a steady fulfilment of a protective function which is shaped in different terms across different times. The notion of public policy can be traced from ancient times down through legal history. Already in the XVIIIth century philosophers had dealt with the theories of State, power, sovereignty, etc. This is too large a subject to allow for a thorough analysis. A study of the most relevant trends from the XIXth century up until today will provide us with some elements by which to understand the current notion of public policy and to question whether what was valuable a hundred years ago is still applicable.

The starting point of these reflections is the idea of sovereignty (which finds its roots in philosophers such as Hobbes, Bodin and Rousseau). However, it is more precisely with the theory of the State monopoly of law that the idea of the State as the only source of a sovereign legal system develops. The logical outcome of this trend is that principles of international public policy must be exclusively searched for in domestic legal systems.[3] Through the XIXth century there also was a continuous reference to the so called *communio iuris* or international community of law. This is reflected in the allusion to the "common principles of civilized nations" which recurs in the application of international public policy.[4] This conception of international society as a community of law, mainly composed of Western Christian States, finds its roots in Savigny's theories. His system of private international law is based on the idea of a social and legal community that leads the States that belong to it to recognise and apply foreign laws to the legal relationships that, by their nature, are to be ruled by foreign law.

The recognition and application of foreign laws was thus linked to the existence of a substantive unity concerning fundamental principles of the legal institutions constituted by

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[3] For a brief review of this historical aspect of public policy, see Benvenuti,1977:14ff who refers to classic legal scholars such as Jellinek, Triepel or Anzilotti. See also Juenger,1993:79ff.

[4] What is to be considered "civilized" is a rather disputable matter. In the XIXth century there was a "natural" identification of Europe and civilization. This expression sounds quite old-fashioned today. However, the general background idea might not be completely discarded; namely the existence of common principles that must be taken into account. Today, with an updated view of these principles, it can be ascertained that "civilised" nations, which encompasses those that belong to UN, share some values.

private international systems. This idea implies going beyond exclusive sovereignty and comity as the only grounds by which to explain the application of foreign law. Applying the latter does not depend on good will or reciprocity but is the logical result of general rules of universal value that are applicable not only by single States but, and above all, by the supranational *iuris communio* of civilized nations. Moreover, independence and the sovereignty of States were not to be considered to contradict their "natural" adherence to a wider system. Each socio-legal system was autonomous and tended towards harmonisation in its essential defining characteristics with the *iuris communio*. This natural trend however permitted States to keep some specific and idiosyncratic features. Consequently, a State might deem a legal institution to be essential for its survival whereas another State belonging to the same *iuris communio* would not.[5] The last practical outcome of this system is the definition of two levels disposition of State principles, namely those of national source and those conforming the *iuris communio*.

This *iuris communio* as a shared community of fundamental principles concerning ethical, cultural, religious and political organisation was a recurring feature of the European tradition during the XIXth century. The European *iuris communio* was almost equivalent to an international community. Indeed, it reflected a cultural notion more than a geographical concept, since the USA and other American nations were also included therein. This international community found in public policy the expression of the principles it defended because it reflected common principles to all nations.

The first important crisis in this European-capitalist community took place with the advent of communism. Afterwards it was followed by the two world wars, which resulted in a strengthened USA and brought first, colonisation and then, de-colonisation. All these phenomena implied a new vision of the international community, not only because of the enlarged number of States on the one hand, but also because they were compelled to accept economic, political and cultural values that were not always homogeneous. The logical result was that judicial systems, when faced with public policy matters tended to accept principles of international law that conformed to the latter; namely those requiring the equality of States

[5] See the detailed references to the litterature and case-law in Benvenuti,1977:22 et seq.

(sovereignty, non-interference in international affairs, etc). Therefore, public policy became a means of defending national interests and also those of the international community.[6]

In this sense it has been said that there exist two types of public policy, an absolute and a relative one. The former defends those values which affect the international community, independently of their being linked to a concrete State. The latter are activated in relation to those principles that affect specific national interests. A further refinement of this differentiation implies that anything which is repugnant to the *communio iuris* is immediately repugnant to those States belonging to it. On the contrary, not all infringements of State values are necessarily repugnant to the *communio iuris*. To prove such repugnance, one must show a particular link with the State.

These previous considerations ask now for an adjustment to contemporary world. In other words, what is left from this conception in the 90s? Is it possible to update these features in current days? The world has become a sort of big village, where nothing is actually foreign. In this sense, it is not realistic to juxtapose the *communio iuris* to the rest of the world as two complete diverse and irreconciliable realities. Today the international community is larger and less polarised than that of the XIXth century. Pushing further the image of the village, the world may be envisaged as constituted by several 'quartiers' in which they develop their own values, aware of belonging to a wider community.

The idea of *communio iuris* is not to be abandonned completely. If it is not operative at an international level (since it has lost its reason to exist), it is very useful in order to understand the regional configuration of the world. In this sense the European Union (EU hereinafter) can be envisaged as the "legal heir" of this previous system. Of course differences can be noted. Further reference is made in chapter V where this feature will be framed in contemporary

[6] It must be pointed out, however, that there is a risk of mistaking rules of public international law and principles of public policy. In actual fact, *ordre public* enshrines national values since it is a national institution. However, the fact of belonging to the international community leads to the adoption of certain principles of public international law that govern peaceful coexistence between States. This does not imply that all the principles that govern international relations automatically belong to national public policy. On the contrary, they maintain their nature. If a State has recourse to them, it does so by applying international law principles that overrule the decision which runs counter to them, precisely because of their supremacy, but not on the basis of public policy (see Rigaux,1987:352). In conclusion and in order to avoid misunderstandings, we assert that although they sometimes present close links, the two notions are distinct.

criteria. The following pages will consider more deeply the progressive internationalisation of the world and the subsequent consequences that this fact entails as regards public policy. It suffices here to indicate that *communio iuris* is still a useful reference to understand public policy in a European sphere.

b. Sovereignty

Once this historical-theoretical framework has been analysed, it is necessary to make a brief reference to the notion of sovereignty, since traditionally the basis of public policy has been found in the concept of sovereignty. Sovereignty is a notion of an uncertain nature that shows different sides of State power which are related to socio-historical changes. The variety of these manifestations explains why in modern theory the notion of sovereignty is spoken of in functional terms.[7] By definition only States are sovereign, since they are the only entities that can define the exercise of power (and/or law) within the limits of a given territory. Therefore, sovereignty appears as a horizontal phenomenon since the manifestations of sovereignty concern relationships between States. Such is the traditional sense of sovereignty.[8]

However, the position of States in the international community constitutes a factor of crisis for the notion of sovereignty. States belong to international or supranational organisations and are bound by international treaties and conventions. In short, there is a conscious reduction of State sovereignty in favour of other entities. One of the main reflections of this cession of power lies in the loosing of the effective power to enact law. Indeed, it could be said that the mere existence of diverse sources of law as conforming a national legal order brings about the disappearance of sovereignty. A pessimistic evaluation of this fact would lead us to conclude that "there are no sovereign States now. No State is in a position such that all the power exercised internally in it, whether politically or legally, derives from purely internal

[7] See Nerep,1983:418. Later on reference will be made to the functional aspect of *ordre public*.

[8] It is also possible to understand sovereignty as a means of allocating power within a legal order. In other words, it answers to the question who has the ultimate power within the system. This meaning is less relevant from a private international law viewpoint.

sources".[9] In this sense it has been suggested that the role of sovereignty has been absorbed by law.[10]

Paradoxically, this limitation finds a counter-element in the reaffirmation of economic sovereignty by States. This can be seen particularly as regards economic rights granted in the international sphere (as the right to economic self-determination) and the regulation of monetary matters (that become a deciding factor as regards cesion of sovereignty). Furthermore, the membership of supranational entities seems to reinforce the sovereign feeling of States that take sovereignty as the means of defence against what is perceived as an excesive intrusion in State affairs. Sovereignty exhibits thus a new character which operates in a vertical sense. Sovereignty appears then as a multi-faced feature that disappears under a specific manifestation just to reappear, reinforced, in another one. The 'crisis' pointed out in previous paragraphs has also reflections in the private international law sphere. The following comments will concentrate on some aspects of the notion in relation to private international law, since a more thorough analyse excedes the purpose of this chapter.

The role of sovereignty is particularly important as regards private international law. At the birth of this branch of law, at the statutary period, private international law was conceived as a system designed to solve conflicts of sovereignty. The application of public policy was thus identified with the application of territorial rules. Nowadays, private international law is called upon to govern private relations, submitting them to the law of the State most closely connected with them.[11] If this law appears to be a foreign rule, sovereignty does not withdraw since the conflict rule that led to such a choice is a reflection of national sovereignty (understood as the power to enact legislation).

Private international law has evolved through time. However, it exhibits mani-fold aspects of national sovereignty. Throughout the diverse kinds of rules and connecting factors, the presence of sovereignty can be traced. For instance, unilateral conflict rules are the logical

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[9] MacCormick,1993:16.

[10] See Bobbio, Matteucci & Pasquino (1992:1084) for a definition of sovereignty.

[11] See for instance Batiffol & Lagarde,1993:410 (No.242).

outcome of sovereignty understood in these terms.[12] The same kind of argument leads to mandatory rules. Mandatory rules are conceived as reflecting national choices of such importance as to endeavour and prevail over the normal functioning of the conflict rule. They are a means of safeguarding the coherence and efficacy of the legal system. They have been said to constitute "un élément perturbateur de la coordination des systèmes juridiques" that reflect "une sécrétion inéluctable de l'intensification de l'idée de souveraineté liée à l'envahissement par l'État des rapports privés".[13] Another clear reflection of sovereignty in private international law appears in relation to the diverse connecting factors enshrined in conflict rules. The notion of nationality can illustrate this pervasion. It reflects in a paradigmatic manner, the power of States to decide upon the status of nationals and the rules applicable to them. It also appears from a jurisdiction viewpoint, as exorbitant jurisdiction based on nationality illustrates.

Sovereignty is also present as regards public policy. Sovereignty implies the power to take decisions, moreover decisions on the exception -according to Carl Schmitt's theories.[14] In this sense, public policy appears as a reflection of sovereignty and as a means of safeguarding the latter.[15] This is so both from a substantive and a functional viewpoint, as will be dealt with in the next points. Public policy exhibits thus a national character which provides a complete protection of the legal system.[16]

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[12] Lagarde,1986:64. In simple words, unilateral conflict rules pursue the application of forum law.

[13] Y. Loussouarn & P. Bourel,1993:193, Nos. 132 et 133. Moreover, sometimes the existence of this kind of rule appears as a step back towards a conception of private international law as solving conflicts of sovereignties: indeed, potential conflicts between mandatory rules, which claim concurrently application to an issue, are understood as conflicts of sovereignty (Rigaux,1988:127).

[14] "In contrast to traditional presentations, I have shown in my study of dictatorship that even in the XVIIth century authors of national law understood the question of sovereignty to mean the question of the decision of the exception [...] The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: it confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanisms that has become torpid by repetition" (Schmitt,1988:9 & 15).

[15] Lattanzi,1974:294, footnote No.47.

[16] Barile (1986:9) insists on the fact that *"nostra Corte costituzionale, nell'affermare la inderogabile tutela dell'ordine pubblico, la giustifica con un argomento - quello de la protezione della sovranità statale - che non lascia in alcun modo dubitare della portata onnicomprensiva di tale tutela"*.

Before concluding these reflections a last consideration raises itself, namely the appearance of some principles that have accomodated gradually in the framework of private international law. These principles interact with the notion of sovereignty and try to adapt to the exigencies of contemporary society. Therefore, they are important to understand correctly public policy. Reference is made to the principle of proximity on the one hand and the notions of *comitas gentium* or reciprocity on the other hand. Proximity is a new criterion which is already operative in several areas of private international law. It engages with sovereignty in a complex system of coordination and subordination[17]. On the contrary, *comitas gentium* and reciprocity are well-known principles in the sphere of public international law. What appears as new is their application in the private international law sphere. Indeed reciprocity and *comitas gentium* can explain the actual perception of the mandatory rules of other States. Sovereignty explains why a State would impose its mandatory rules, but in itself it does not explain why a State would apply the mandatory rules of another State.[18] If a State pursues a certain aim it seems logical that it recognises that other States might pursue the same objective. Thus, it has been argued that comity would play when a State compels its judiciary to apply foreign mandatory rules -under the respect of certain conditions- which reflect State interests. On the contrary, the acknowledgment of foreign rules that protect particular interests (of private parties) would not be possible on grounds of comity.[19]

One could wonder on what grounds would these rules be admitted then in the forum. The problem apparently relies on the level where *comitas* plays. It is argued that such a notion can only operate at a State level but not at the court's level. This leads then to admitting comity only when the State can impose on the judge the obligation of applying foreign mandatory rules. Such a distinction is not shared since while it is true that mostly all the times the courts will be supported in the application of foreign mandatory rules by legislation in that sense (be it internal or international), courts sometimes so procede without such a basis. It is not possible to draw the conclusion that the court does not act on behalf of the State in that case.

[17] Fallon (1993:209-210) analyses with detail the articulation of the two notions.

[18] As results of provisions like Article 7 of the Rome Convention 1980 on the Law applicable to contractual obligations (OJ L266/1 of the 9.10.80) signed by the Member States of the European Community on the 19.6.80.

[19] Mayer,1981:326.

What appears as reasonable is the recognition that beside sovereignty there is an admittance of a kind of solidarity between States that has been identified as positive reciprocity.[20]

This brief review of sovereignty has pointed out the contested character of the notion. Sometimes it is said to have disappeared, other times it coexists with other notions. The most relevant feature is, nevertheless, its endurance. Sovereignty may be reduced (either in a legal or in a political level) but it reappears under new manifestations. If horizontal sovereignty loses relevance, vertical sovereignty rises with unexpected vigour; if sovereignty has to cede in favour of law, economy appears as a new expression of sovereign powers. The same trend is identified in the private international law sphere. Together with an increasing questioning of the role of public policy, the emergence of mandatory rules is noted. Throughout the different chapters we shall refer back to this phenomenon. Suffice here to confirm the link existing between public policy and sovereignty.

1.2. Functions fulfilled by *ordre public*

The notion of public policy escapes any attempt at thorough definition and classification; its content is variable and likely to change according to diverse influences. It has been said that "*le problème de la définition de l'ordre public est un faux problème et que seule importe pour le moment la recherche de sa fonction... l'incertitude et la souplesse sont au centre de la notion d'ordre public, et le juriste peut seulement en reculer les limites sans jamais les effacer; le problème est seulement de savoir jusqu'où ces limites peuvent être actuellement repoussées*".[21] Public policy belongs then to a set of notions, namely "functional" concepts, that legal systems cannot abandon because otherwise they would lose a fundamental support. They present the advantage of being elastic notions that, as happens with regard to public

[20] Positive reciprocity means that a State applies foreign rules in order to see its own rules applied. See Virgós Soriano,1986:819; González Campos et al,1991:271. Such a statement, according to some scholars -namely H. Coing (1981)- would only be acceptable where there exists a convention that permits States to admit the rules of another State in the forum. Outside conventions, there would be no place for foreign rules of a third State.

[21] Lagarde,1959:177.

policy, cannot be limited to statute.[22] The reference to functional notions implies a dynamic view of the concept that evolves according to the needs of the system. Bearing in mind this dynamic character of *ordre public*, the next pages will try to indicate what functions it fulfils. Traditionally three functions of public policy are enumerated:[23]

1. The elimination of foreign law that is contrary to "natural" law.
2. The defence of principles that, although not considered to be universal, are felt to be at the foundation of a civilised community.
3. The safeguarding of legislative policies.

This classification is opposed by two main criticisms: on the one hand, the reference to 'natural law', on the other, the assumption of the existence of 'non-civilised' communities. Probably the terminology used is no longer valid (since it was conceived in the last century and maintained as a form of respect for tradition). However, the grounds which justify this three-fold classification are still valid. The following paragraphs are devoted to an explanation of the uses and problems of these functions.

The reference to 'natural law' may indeed be understood as including those values of universal acceptance, which shape the conception of law from its deepest root.[24] In other words, today 'natural law' could be equated to fundamental rights. If the reference to natural principles may be disputed from a purely positivist point of view, the increasing importance of fundamental rights cannot be ignored. They are omni-present in national legislation, they reshape traditional notions and introduce the need to balance different interests. This tendency takes place also in the international sphere with such a force that protection of fundamental

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[22] For wonderful description of these notions see Vedel as quoted by Lagarde,1959:175 ff.

[23] This enumeration follows the French approach to the notion. See Mayer,1991a:137ff; Battifol & Lagarde,1993 No.358/9.

[24] A clear reflection of this function is to be found in the *Latour* case which refers to *"principes de justice universelle considérés dans l'opinion française comme doués de valeur international absolue"* (Cass. civ. of 25.5.48, *D.* 1948,2,357). Precisely the reference to principles of universal justice instead of universal principles of justice has been pointed out as entailing a true idea of universality -despite the fact that the contrasting element is a national criterion- (Chapelle,1979:369). Similarly, the Italian court of cassation has stated that "the respect of international public policy is based first and foremost in the need to safeguard a legal and moral minimum which is common to the feeling of several nations" (Cass. *Alarcia Castells v. Hengstenberge e Procuratore*, RDIPP 1983,364).

rights excedes national frontiers to become an international matter. Such a movement grows bigger all over the world and entails the consequent growth of mechanisms of defence. The latter aim at the protection of fundamental rights (either at a domestic level, as for instance the recourse to higher or constitutional courts, or at an international level, namely the recourse to international courts as the European Court of Human Rights or the American Court of Human Rights). At the same time fundamental rights become the parameter which activate the mechanism of defence and measure the degree of offence reached. Fundamental rights (together with some other principles such as *non bis in idem, nulla poena sine legge...*) reflect the essential values of the legal order which the latter is not ready to renounce. The elimination of foreign law which is contrary to 'natural law' should be understood in the light of these remarks. Therefore, public policy appears as the means of defence of the most essential values of the system.

Secondly, reference has been made to those principles that are at the basis of a civilised community but do not belong to the category of protected values as encompassed in the first group. Such a statement does not mean that this second function aims at the defence of second-class values. On the contrary, they reflect organisational principles and choices of the system where they are enshrined but they might change according to evolutions in the group's beliefs and interests. They constitute sometimes the most characteristic feature of a group, even in manifest opposition to the surrounding States. The fact that they are prone to changement does not entail a reduction of the protection granted by the legal order. Clear examples are the conception of marriage or the system of property. A well-known example is the Spanish law which forbade divorce and, therefore, recognition of judgments granted abroad, as contrary to public policy until the 80s, when the new constitution brought a revision of the conception of public policy as concerns marriage and divorce. In relation to property, the same evolution can be assessed as regards the communist States before the fall of the Berlin wall and after it.

Third and finally, reference is made to the policies that a legal system fosters. They affect many different areas but they concern mainly economic and political choices. A clear example of this use of public policy is to be found in Germany where a body of case-law had developed based on the former Art.30 EGBGB, that provided for setting aside foreign law

where it was contrary either to the morals or to the aims pusued by a German law.[25] At the same time, the importance of these policies gives rise to a specific kind of legislation, namely mandatory rules that aim precisely at the protection of these policies. It is argued that mandatory rules fulfil the same defence function than public policy. Despite the essentially national character of these policies, it is underlined that they are likely to be influenced by membership of institutional or international orders, as well as the ratification of international agreements or treaties.[26]

These three functions aim at different purposes within a national legal framework. However the distinction here drawn is not so clear-cut as it would seem. Economic and political choices are often behind the organisational schemes. But the relationship is likely to be read in the opposite sense: a specific socio-economic organisation fosters a determined kind of policies. Furthermore, the defence of morals or a certain conception of fundamental rights seemingly conceals a political approach. A clear example is to be found in the former communist countries, which fostered this particularly 'political' conception of public policy.[27] On the other hand, policy choices and organisational principles cannot be explained without an 'ethical' background which underlies the system.

These functions take place at a national level, but they should reach further: human rights are no longer merely a State affair; on the contrary, they are universal principles. Belonging to international/supranational organisations entails a review of State policies which abandons a strict national approach and takes into consideration other interests. In other words, a State

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[25] References to this case-law may be found in Dubuisson (1994:619) who points out a risk that this provision entails, namely, the transposition of the requirements of internal public policy into international standards. In point 2.1 of the chapter some considerations are devoted to this risk.

[26] See for instance the decision by the German Bundesgerichtshof of 22.6 82 *Allg. Vers. G.H. v. E.K*, BGHZ 59,82. Moreover, the influence exercised by the international treaty can go further than ratification. It is possible that although not being in force, a treaty can be taken into account by the national judge when appreciating the existence of public policy exceptions. See, in this sense case *Anstalt del Sol* (Belgian Cour de Cassation, 13.1.78, Pas., 1978, I, 543) in relation to the Convention on the mutual recognition of companies of 29.2.68 (not yet in force). In relation to the same convention see Corte di Appello di Milano (3.10.86) in case *Industrie Creusot Loire* (Foro italiano, 1987, 3238 No.760).

[27] See for instance the Czech proviso: *"il y a lieu de déclarer inapplicable la loi dont l'application se heurterait aux principes du régime social et politique de la République socialiste tchécoslovaque et de sa législation"* (quoted by Vassilikakis,1987:328).

must also pay heed to (or even defend) alien interests since this is the way of ensuring collaboration among States in the international sphere. Is this a kind of implicit comity? To what extent can comity and public policy be applied at the same time? As was previously pointed out, the current tendency is to speak of a positive reciprocity between States. Usually, where a State refers to another State's legislation it does so because there is an agreement. However, it can also be argued that where two States pursue the same aims it appears as nonsensical to reject taking into consideration the other State's piece of legislation or decision because of the absence of a written text binding the two States. The existence of a national provision endowing the State organs with competence to do so or even positive reciprocity between States may suffice to take into consideration foreign rules on sensitive matters in the forum with the belief that the foreign jurisdiction will also apply the forum's law. If the term 'comity' appears as old-fashioned, its substitution by positive reciprocity, or cooperation or coordination may be suggested.[28]

The fulfilment of these functions is inherent to the notion of public policy. However, there is no need for an explicit clause in a legal text so that these functions may be considered to be operative. The protective purpose of *ordre public* implies that even with implied terms its existence is accepted. This statement can be supported by the fact that it has been applied in cases even when it could not be traced in legal texts.[29] As has been said by an authoritative author in a classic judgment on private international law

> "in the sphere of private international law the exception of ordre public, or public policy, as a reason for the exclusion of foreign law in a particular case is generally - or rather universally - recognised. It is recognised in various forms, with various degrees of emphasis [...] On the whole, the result is the same in most countries - so much that recognition of the part of ordre public must be regarded as a general principle in the field of private international law [...]"[30]

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[28] However, recently it is also possible to find references to comity. See for instance the English judgment *Lemenda Ltd. v. African Middle East Co.* [1988] 1 Q.B. 448 at p.461.

[29] In cases concerning international treaties especially, this is a necessity that cannot be overlooked. Modern history has produced examples of manifest injustices to which foreign countries might find it utterly impossible to allow and with regard to which the right to denounce the treaty might not provide a sufficiently rapid remedy. Thus the only solution seems to be to have recourse to *ordre public*.

[30] Sir Hersch Lauterpacht in his dissenting opinion in the case *Boll*, (p. 92) International Court of Justice on the 28.11.1958.

If this is so, the question is what is the content of this general principle?

1.3. Content

A further step to obtain a global first view of the notion of *ordre public* leads to an inquiry into the content of the concept. In order to approach the content of *ordre public* the whole system must be studied, taking into account not only its particular legal features but also its philosophy, the policies it pursues, its economic, moral, social and political characteristics. The content of public policy is not to be found listed in legislation. On the one hand, because of the variability of this constantly changing notion, legal systems do not usually provide a fixed set of principles that can be said to be those of public policy. On the other hand, the concept is too general, and its scope can cover many different areas that are only relevant as a function of the specific case at hand and at that time.[31] However, this absence of a delimited content is filled by a kind of intuition according to which the principles to be protected refer mainly to moral, economic and political values. These are a reflection of the previously enumerated functions, since moral values concern the defence of the essential content of "natural" law and economic and political values can reflect both those principles which are at the basis of a legal system and/or the legislative policies it pursues.

Pursuing the inquiry about the content of public policy further, it can be stated that this complex web of principles is structured in different layers that are not necessarily strictly ordered hierarchically and which sometimes even interact. Three levels can be identified:

a) ethical-moral values
b) national identity signs/characteristics
c) economic-legal standards

These three layers exist, they structure and characterise any legal system. Although they are

[31] That is what scholars identify as "actualité de l'ordre public". In other words, public policy is seen in the light of the values that are in force or prevail in a precise moment. For a more thorough study of the matter, see De Angulo Rodríguez (1972,369).

not subordinated to each other, the first two listed are less likely to be sacrificed than the third. Therefore, a kind of primacy over the third group can be asserted. Firstly, because usually these ethical-moral principles are connected in some way to the identity signs of a community.[32] Therefore, it is more difficult to consent to any kind of bargaining concerning them. Secondly, they delimit the differences between systems. Economic and legal standards are prone to be negotiated according to the position the State occupies in the international community. States can belong to supranational communities and this fact implies an assumption of common policies and therefore values that will inmediately shape the system. Pursuing this argument further, it could be concluded that in actual fact, ethics makes the difference between the different notions of public policy. Indeed, the most traditional approaches tend to consider ethics the relevant feature which determines the public policy character of a rule.[33]

The previous statement should not lead to a partial vision of the notion. In fact, morals and other State interests have to be considered as a whole. Moreover, there must be a balance between them. Morals and state interests are not to be confused although there is a tendency to mistake them when defining public policy as the means of defending the "political, economic, religious, social and ethical organization". While morals protect these values, which are in principle universal, the public policy that protects economic state interests considers these morally irrelevant.[34] However, the fact that they are different in nature should not lead one to disregard the fact that they are not completely alien, since as was pointed out in relation to the functions that public policy fulfils, there is a global and inter-dependent protection of values and policies. Regulation of gambling represents a clear example in this sense: it entails moral choices which are combined with monetary policies.

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[32] Traditionally there has been a tendency in the Western world to identify 'natural moral' to the Christian morality. An extreme reductionism has led to considering the ethical aspect of public policy reduced to *bonnes moeurs* - with a clear sexual connotation, especially from a domestic point of view (Ghestin,1993:106). Ethical-moral considerations concern also gambling; human rights are not alien to them either. Ethical-moral values should be understood then in a large sense, comprehensive of a whole net of values not necessarily linked to Christian ethics nor to sexual connotations. This reductionism should be resisted both by scholars and judges.

[33] Benvenuti,1977:4 (footnote No.5).

[34] See Verheul,1979:112.

These values and principles, although of national definition, must take into consideration the fact of the State as part of an international community. Indeed, a purely national reading of public policy appears as insufficient. A global reading, on the contrary, provides the proper framework for a correct understanding of public policy. In this sense the very nature of international treaties favours the delimitation of principles of public policy. Since they reflect the consensus of the States in the international community (at a regional or at a truly international sphere) they are likely to provide elements of delimitation or inspiration. No misunderstanding should arise from this assertion: not all conventions elaborated inat an international or regional framework will provide elements to identify values of public policy. It goes without saying that some treaties are directly concerned with matters that refer to private international law while others are clearly excluded.[35] Therefore, conventions related to political, civil, social and economic rights, those that prohibit slavery and discrimination or those concerned with nationality, stateless persons, refugees and marriage may introduce elements of public policy when these matters are at stake. The Hague Conventions will thus be essential references. On the contrary, other texts (as for instance the UN Declaration on the Right to Independence of States of 14.12.60) will not be *a priori* concerned with public policy matters. Such a view has been confirmed by national case-law.[36]

Indubitably, the coexistence of different principles in the system may give rise to contradictions among them. From a static point of view this possibility seems nonsensical. However, legal systems are shaped according to different influences and this entails a careful reading of the whole structure in order to reach a coherent interpretation. The problems of potential contradictions between the principles of public policy will be dealt with later on. Suffice it now to indicate that, despite the fact that the times of the *communio iuris* are over, some of the features that were defined then are still valid in the contemporary system. In the

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[35] Goldman (1969:458) suggests that the dispositions of a treaty which are likely to provide elements of public policy must exhibit a manifest 'aptitude' as principles of public policy. This is proved by the actual granting of a subjective right with a precise content which claims application in a case of private international law. Some examples are Article 16(1) and (2) of the Universal Declaration on Human Rights (that refer to the right to marry with the free consent of the parties), Article 17(1) and Article 27(2) of the same Declaration (that refer to the right of property and intellectual property respectively).

[36] See for instance Tribunale di Roma (16.1.84) ordin. *De la Fuente v. Casini* (RDIPP, 1985:138): *"l'ordine pubblico internazionale è la risultante di principi comuni a molte nazioni di civiltà affine, intesi alla tutela di alcuni diritti fondamentali dell'uomo, spesso solennemente sanciti in dichiarazioni o convenzioni internazionali"*.

context of the former a State would activate its *ordre public* when a principle of the international community was threatened. However, not all the principles protected at a national level were automatically within the scope of the *communio iuris*. Nevertheless, they coexisted and were a sign of the respect for the idisyoncrasy of States.[37] This same scheme is still valid today. Ultimately, these reflections reduce the problem to a question of cooperation between States as members of a larger community. The fact of belonging to a supranational institution implies the assumption of certain values without renouncing, however, national ones unless they are completely incompatible. The relationship relies on a presumption of compatibility between *forum* values and international law. Public policy values of an internal origin mingle with values from international sources, thus impeding any kind of conflict between principles of public policy despite the diverse origins of these principles.[38]

If nevertheless, conflicts appear, the main criterion that should guide the solution of the conflict is the relativity of *ordre public* values. This relative character should be understood in the sense that international values are not necessarily superior to national values of public policy. Probably an ethical national value that clashes with an international economic standard (which has been incorporated to the national standard by way of belonging to the international community) will prevail over the second. Hierarchy has no role to play in this context. The dynamic and functional character of public policy provides further elements in order to solve these conflicts. If this were otherwise, social progress and development would be hindered. Summing up, public policy appears as a functional notion with an eminently national character that cannot, however, ignore an international reference to be complete. It aims at the protection of essential values of the system disposed in a three-layer design (namely ethical values, national identity signs and legal-economic standards). Despite the fact that its purpose is the maintenance of the essence, it has to be interpreted in a dynamic manner.

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[37] Policies concerning marriage and divorce provide a clear example. For instance, Italy defended the indissolubility of marriage as an essential principle of its legal system. Nevertheless, divorce between non-Italians was usually admitted and recognised because international conventions and other legislation of States belonging to the *communio iuris* admitted it. From a theoretical point of view many explanations have been given: that there are relative and absolute terms of public policy, that in actual fact this was a case of personal/internal public policy, etc. For a more detailed analysis of these theories, see Benvenuti,1977, Lattanzi,1974. The same reflections may be reproduced in relation to the Spanish case-law on these matters.

[38] Parisi,1991:43 and 45.

2. FURTHER DELIMITATION OF THE NOTION: DISTINCTIONS

2.1. Internal and international public policy: a true international *ordre public*?

The distinction between internal and international *ordre public* is rather a classic feature in any study of public policy.[39] However, the precise terms in which it is tackled are somewhat misleading. Indeed both internal and international public policy, as has been previously stated, are domestic notions which apply exclusively at the national level. In this sense it is admitted that the terminology of 'international' public policy as usually referred to, is not correct. A more precise approach would hence require speaking of public policy in an international sense or public policy in the sense of private international law. In contrast to these notions one frequently reads about a truly international public policy. This feature would show a true international nature because of its source and way of application. In this sense, it could be opposed to the two former as not linked to States. These three issues will be the object of attention at this point. In the first part, the two national notions will be dealt with, namely internal and international public policy.[40] The second part will be devoted to truly international public policy.

a. Domestic and international public policy

Both notions, domestic and international public policy, are internal elaborations of the national legal system that has conceived them as a defensive mechanism. While I hold that a distinction between the two notions is possible, heed must be paid to the fact that teleologically, internal and international *ordre public* show a close relationship since *"ordre public constitue le pouvoir judiciaire gardien d'une forme supérieure de légalité qu'on ne saurait pas inscrire dans les textes, elle confie aux juges la mission d'exprimer, à propos de situations particulières que le législateur est impuissant à prévoir, la conscience juridique de*

[39] Most of the bibliography concerned with public policy, devotes some considerations to this distinction: Mayer,1991:137ff, Rigaux,1987:341ff, Vassilakakis,1987:321, Alexandre,1970:250; Sperduti,1950:305ss, etc.

[40] While being aware of the reduction of language, reference will still be made to 'international public policy'.

la société".[41] Based on this teleological approach it has been sustained that indeed, the notion of public policy is simply a unitarian concept that assumes different functions.[42] In the same line of argumentation it has been claimed that the national or international character of the notion is irrelevant since an internal disposition of *ordre public* has both characteristics.[43] This thesis argues, on the contrary, that internal and international *ordre public* should be distinguished because otherwise there is a risk of ocnfusing the two, hindering the correct fulfilment of their respective roles.

From an internal point of view public policy is a legal instrument which reflects the necessity felt by the State legislator to ensure that the public interest prevails over private will. Its manifestations are various depending on the branch of law where it is applied. Hence, it can be found in imperative terms, such as criminal law, administrative law, social law, family law, etc. This versatility of public policy from an internal point of view reflects a *"véritable gradation de l'intensité du caractère impératif des différentes institutions qui touchent au droit privé"*.[44] Thus, public policy may refer to two legal areas: first, from a private point of view, those laws or principles which are not at the disposition of private parties when contracting and that may impose themselves contrary to the express will of the parties; second, from a public law point of view, those principles of public order with an administrative (or police) shade (for example the prohibition of a demonstration because of reasons of public order).

In an attempt to further delimit the content of internal public policy, several distinctions have been suggested. For instance, that between *ordre public né de la jurisprudence* and *ordre public législatif.* The latter corresponds to the imperative rules that regulate private

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[41] Rigaux,1987:351.

[42] Issad,1970:133. The two functions that the *ordre public* exception would fulfil would be the substitution of foreign law by the forum law and the neutralisation or prohibition of the effects of an act independently of whether it comes from the same State where it has been issued or it has a foreign origin -which covers both purely internal public policy and the recognition of judgments.

[43] García Rodríguez (1993:929) refers to Niboyet,1930:407-410. According to him there would only be a State internal public policy that, as opposed to the public policy of other States, then becomes international.

[44] Vander Elst,1956:77.

agreements without any possible intervention from the parties. The former intervenes when the parties, in the exercise of the freedom that is left to them, violate essential principles of the system.[45] The distinction between *ordre public virtuel* and *ordre public textuel* can also be referred to.[46] The former imposes to the parties a prohibition to dispose of certain legal aspects of the relation. The latter mirrors the former aspect into legislative enactment.

International public policy (in the sense of private international law) is at stake when the judge is confronted with a situation which exhibits an international element. From this point of view, *ordre public* refers to a exception clause that encompasses both the application of foreign law that derives from the intervention of conflict rules and the recognition and enforcement of foreign decisions or judgments. In contrast to internal public policy, its function in a traditional sense is not a positive one, of imposing a particular will, but on the contrary, it is a negative one: refusing entry into the forum of a potentially dangerous foreign piece of legislation or decision.

No doubt can exist about the national nature of international *ordre public* which may adopt both the shape of principles and rules. Rules of *ordre public* are public policy principles that have acquired a textual shape. Precisely this character brings about another one, namely the link to the forum. Values of public policy, on the contrary, keep a more abstract shade. They tend to be common to all States, unlike public policy rules that tend to reflect national choices. This means that, despite the interdependence between rules and principles, they are not identical. It should be firstly underlined that this fact is not sufficient to justify that a rule is of public policy since the rule is merely one particular development of the principle and other developments could be envisaged. Secondly, these rules are sufficient in themselves, without any reference to any principle, and where this happens it might in fact be rather a loose link. The main difference between rules and principles of public policy is in their application. The principles delimit the framework of tolerance for foreign law without indicating what should be substitued for the foreign law in case of its rejection. On the

[45] Lagarde,1959:132.

[46] Dubuisson,1994:371.

contrary, rules of public policy also fulfil this second function.[47]

International public policy has a more restricted scope than domestic public policy. The former in many cases reflects internal values of particular intensity. In general, whatever belongs to the category of international public policy is also a matter of internal public policy.[48] On the contrary, not all the issues that are labelled as pertaining to domestic public policy are applied by judges as international *ordre public*.

b. True international public policy

In opposition to the internal point of view referred to in the previous point, the existence of a genuine international public policy has been hinted at. It is usually agreed that the first orientations in this direction were provided by Rolin. On the basis of the case law of international courts (such as the International Court of Justice) he suggested the existence of a universal and objective notion of public policy.[49] The ICJ applies international treaties, custom and general principles of law (according to Article 38(1) of its statute). From its decisions can be specified which are the international rules of *ius cogens*. International texts also provide essential guidance in order to decide whether a rule is of *ius cogens* nature. UN Conventions on genocide, slavery, racial discrimination, etc would reflect such international consensus and would thus provide, a guiding element which avoids the imposition of the criteria of a particular State.[50] These *ius cogens* rules should be thus incorporated into

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[47] Bucher,1993:37-38. This distinction between principles and rules of public policy can also be found in Sperduti (1976:473) who establishes the same distinction to conclude that public policy is indeed encompassed in principles whereas rules of public policy are shaped as *"lois d'application immédiate"* (to them we shall refer in a following point).

[48] See Watté,1989:73 and the bibliographic and jurisprudential references she presents. See also Ghestin,1993:89 and Juris-classeur droit international, fasc.534-2, page3 n.7.

[49] Rolin (1960:448) argues that international courts, when they solve public international issues have recourse to international public policy in the very sense of the term, that is *"un ensemble de principes et de règles auxquelles tous les pouvoirs de tous les États sont tenus de se conformer"*.

[50] Rigaux,1987:350.

national public policy[51] but at the same time they configure a web of truly international values which defend universal principles not connected to any specific territory. In this sense they shape a true international public policy. This notion would find particular application as regards human rights.[52]

This proposal relaunches the ancient idea of *communio iuris*, whereby the State had not only an internal public policy but also defended those principles that defined the *communio*, independently of their actual link to the State. That is, two notions of public policy would coexist, relative public policy on the one hand -which is a national public policy in the sense that it requires a connection to the State, and absolute public policy on the other hand -which is truly international because it does not depend on State criteria, on the contrary it is common and superior to all nations.

This doctrine encounters several handicaps that lead to severe criticisms. If a principle cannot be identified as a *ius cogens* rule or it is not enshrined in an international treaty, is it excluded from this category of true international public policy? To what extent are there universal principles? Indeed, a certain similarity of civilisation develops common principles. However, it can be argued that this similarity is not universal, on the contrary, it has a regional scope. Consequently, the 'international' treaties that reflect those principles are but regional.[53] A second inconvenience that a true international public policy entails is its lack of connection with the territory of a State, that contrasts with the traditional manner of application of public policy by national courts.

Precisely this absence of links to any territory explains the success of the notion in

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[51] Yasseen,1965:459.

[52] Lerebours-Pigeonniere (1950:262) asserts that, because of the influence of the UN Charter and the Universal Declaration on Human Rights, *"l'exception d'ordre public pourra perdre son caractère national et revêtir un caractère universel"*. Goldman (1969:463-464) argues, on the same line of argumentation that the *ordre public* based on the international protection of human rights is a truly international public policy, *"un ordre public de la collectivité internationale"*.

[53] Vander Elst (1985:659) argues in this line and contests the 'universality' of these principles. The same debate will reappear in relation to human rights.

arbitration practices.[54] 'Transnational' public policy finds thus its application in arbitration case-law where no connection to a precise forum is required and therefore there is no necessity to apply a national notion of public policy.[55] Arbitration practices are mainly restricted to trade matters. This delimited area helps to attain a clearer vision of public policy. Indeed, application of the notion by arbitration courts reveals that *ordre public transnational* is concerned with a kind of contractual morality that delineates the limits of the autonomy of contracting parties in international trade.[56]

One may wonder whether this transnational public policy might find application in national courts. Three trends drawn from the analysis of case law so confirm. Firstly, the fact that traditional international public policy contributes to the formation of specific (substantive) rules adapted to international situations, thus taking into account the needs of international trade. As a clear example stands the case *Messageries maritimes*.[57] This case has been said to promote a public policy "which does not underlie the particularism of French domestic life and, quite to the contrary, is based on the desire that private transfrontier relations be governed by an international legal order (...) the exception of public policy leads here to the creation within French domestic law of a kind of *ius gentium* parallel to the domestic common law".[58] It would seem that international public policy reflects a national interest

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[54] See Lalive,1987:257-317 and Pommier,1992:27-34.

[55] Nevertheless, arbitration courts still refer to national notions of public policy, leaving to transnational public policy a sort of role of confirming the solutions reached at a national level. However, *"ramener l'ordre public vraiment international à une fonction de confirmation des solutions des ordres publics étatiques occulte un mouvement progressif et audacieux des arbitres en vue d'appliquer purement et simplement l'ordre public véritablement international"* (Pommier,1992:34).

[56] The role that this notion fulfils is deemed to be of extreme importance: *"on voit encore (...) la necessité d'un ordre public étatique au sens du droit international privé, pour pouvoir imposer aux ordres public étatiques une moralité contractuelle internationale"* (Pommier,1992:35).

[57] Decided by the French Cour de cassation on 21.6.50 (D. 1951,749), the case concerned a loan in Canadian gold dolars by the French company, which attempted to repay its bond holders in paper dollars, in order to comply with a Canadian statute enacted after the date of the loan; that statute had devalued the dollar and forbidden gold clauses without distinguishing between internal and international payments. The Cour de cassation disregarded the Canadian statute and declared that the parties were entitled to agree, even against the mandatory rules of the law governing their contract, a gold value clause valid under a French law of 25.6.28, which complied with the French concept of international public policy.

[58] Lerebours Pigeonnière,1951:6,14.

which sometimes takes into account and satisfies the interests of international trade.

A second trend may be pointed out, namely the intervention of public policy as imposing the application of rules which are common to several systems - instead of imposing the application of the forum rules. These common rules usually reflect, in an international trade framework, a 'contractual morality' similar to that referred to in relation to arbitration. This contractual morality appears in several areas. For instance in the field of contracts, where 'mandatory' general principles appear to benefit from a very wide international consensus - despite the fact that they are usually incorporated into mandatory rules of domestic law. The 'moralisation' of the practices of trade at an international level can also be found in cases of bribery. The general interest in the normal functioning of international trade justifies the existence of a transnational public policy which punishes corruption and bribery contracts.[59] Thus, public policy appears as the major means to "safeguard a legal and moral minimum which is common to the feeling of several nations".[60] The idea of an international public policy which is common (although also part of State law) to various nations grows stronger in an international context

> "The security of international commercial and financial relations requires the recognition of a public policy which is, if not universal, at least common to the various legal systems which protect the interests of the shareholders of joint stock companies; that, in such circumstances, one cannot consider as against *international public policy* practices which offer the plaintiffs the minimum of safeguards which are recognised to the shareholders of banks established in England"[61]

Thirdly and lastly, it has been noted above that the forum's public policy may also intervene in order to protect the foreign public policy of one or several States and lastly, of the international community. Such rules concern the most diverse policies, from the protection

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[59] Lalive,1987:276.

[60] Case *Alarcia Castells v. Hengstenberge e Procuratore generale*, R.D.I.P.P., 1983:364.

[61] Third decision on the case *Comité de défense des actionnaires de la Banque ottomane et autres v. Banque ottomane*, of the 3.10.84, R.1985,526 (emphasis added).

of cultural goods[62] or foreign export prohibitions[63] to the fight against smuggling[64]. They have in common that they reflect matters which are manifestly "transnational" and so justify the application of a true international public policy.[65]

Foreign mandatory rules will retain our attention later on. Suffice it here to indicate that mandatory rules of third States together with basic requirements of solidarity or comity in international economic relations, lead courts to accept the task of protecting a common international public policy. It appears then, that the real question at stake is not to ascertain the source of international public policy, but to determine its precise content. Thus, Lalive's opinion finds its complete sense: "*international* public policy remains always national by its source for the judges, but it may well, however, on occasions, be inspired by supranational legislative purposes and therefore it may have *by its object*, a truly international purpose".[66]

It has been argued that, for the time being, the existence of an *ordre public réellement universel* is a utopia if the following factors are born in mind: a lack of cohesion of international society, the variety of political, moral and social values and the inequality of economic-political-social development.[67] Such diversity may lead one to conclude that only

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[62] See case *All. Vers. G. H. v. E. K.*, of the German Supreme Court (22.6.82) BGHZ (59,82) and case *Repubblica dell'Ecuador -Casa della cultura ecuadoriana v. Danusso*, Trib. Torino (25.3.82) R.D.I.P.P. (1982,625).

[63] See the famous cases *Borax*, decided by the German Federal Court, BGH, 27 XII 1960, BGHZ 34,169 and BGH, 24 V 1962.

[64] "If French judges are not called upon to sanction in French courts the violations commited abroad against the public policy of a given State, nevertheless, they must consider as illegal and therefore devoid of validity smuggling operations which, as they violate foreign laws, do infringe as in the present case international public policy", quoted in Lalive,1987:283.

[65] *"Une face positive nouvelle de la clause d'ordre public devrait ainsi se dégager, dans la mesure où la solidarité internationale le cédera au principe traditionnel de souveraineté, dans des questions manifestement "transnationales" telles que les interdictions d'importation ou d'exportation, les règles cartelaires, les règles de sécurité sociale, le droit de l'environnement, les prescriptions monétaires, pour ne citer que quelques exemples"* (Dutoit,1985:471).

[66] Lalive,1987:278 (emphasis added). In the same sense, see Pommier,1992:29.

[67] Pommier,1992:30.

a regional public policy is possible, where common organisational schemes exist.[68] As a preliminary conclusion however, I sustain that a kind of embryonic international public policy exists but still has to be developed. It becomes the 'visible expression' of a true international society in formation, to which the courts contribute by applying such a notion.[69] The increasing concern of courts in international relations - mainly but not exclusively concerning trade,[70] together with a growing commitment as regards human rights, point to the underpinning of the enlargement of the true international public policy.

2.2. Positive and negative (effect of) public policy

Once again a controversial distinction must be tackled. The heading chosen for this part already shows that the issue faced is far from well-defined. Although most of the scholars refer to it, it is not clear whether they refer to intrinsic characteristics of public policy, to diverse aspects of the notion or simply to its effects. In many cases reference is made merely to contest its utility either because it is seen as useless or misleading. In this sense, it has been found that such a distinction is not necessary since the most important issue to resolve is the identification of the rule that must substitute the rejected one by means of public policy, and this is so regardless of whether it is a manifestation of positive public policy.[71]

Other scholars, on the contrary, go so far as to reject the distinction. Several positions could be noted here. Their main common denominator is a reproach of the distinction as misleading since it does not reflect the *état de la question*. For instance, F. Mosconi wonders about the correctness of the distinction because it might not be a single phenomenon but rather one

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[68] Goldman,1969:464. Chapelle (1979:496) reaches the same conclusion. He speaks of the diverse degrees that true international public policy may adopt without this affecting its nature. He refers to a universal option that he discards as ideal, to a regional notion and to a common notion of a couple of States. Since the last option is hardly appointable as truly international, only the second possibility remains.

[69] Chapelle,1979:489.

[70] Watté(1989:94) proposes filiation matters as an example which shows that a transnational *ordre public* would go further than economic transactions or trade.

[71] Sosniak,1984:178ff.

expression that refers to different -though related- phenomena. The first of these phenomena concerns the rejection by the forum legal system, in order not to endanger certain basic principles related to moral and social concepts which provide its foundation. In this sense, it has a negative character. The second comprises the rules that claim their application in certain cases, in such a way that the judge does not have to look for the conflict rule applicable to the case; therefore he does not evaluate the consequences of applying the foreign law indicated by the conflict rule.[72] From another point of view, Vander Elst contests the distinction between the positive and the negative effect (or functioning) of international public policy. In his view *"ce n'est pas l'ordre public international qui est positif ou negatif: c'est la règle de droit interne, et elle seule, qui créant un droit ou imposant une obligation auxquels il ne peut être dérogé, comporte une disposition d'ordre public "positive" (...) ou, ne contenant qu'une interdiction d'ordre public, est "négative" (...) Il n'y a qu'un ordre public international, toujours identique dans sa nature et ses effets. Il y a des diverses dispositions de droit interne, différentes par leur contenu et leurs effets"*.[73]

The two last positions are criticisable. Vander Elst criticises the distinction introducing a highly disruptive element: internal public policy, which is an incorrect term of comparison. As was pointed out, internal and international public policy have separate spheres of application. Although they are related they cannot be wholly identified. If the similarities are clear to a certain extent as regards applicable law, it is much more difficult to explain a positive and a negative effect of public policy in relation to recognition of foreign judgments based on internal public policy. Mosconi on his side falls into a common error, namely the identification of public policy with a reaction of rejection of the forum, while mandatory rules assume a positive character of imposition. By refusing the distinction he appears to join those scholars who identify positive public policy with mandatory rules.[74] Suffice it here to point out the error of this identification, to which we shall come back in the next point.

Indeed, the distinction between positive and negative public policy is only partially correct.

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[72] Mosconi,1989:124.

[73] Vander Elst,1956:98 and Vander Elst,1985:663.

[74] This position is defended by Fernández Rozas,1991:482, Forde,1980:260 and Chapelle,1979.

The relevant distinction concerns the positive and negative effect of public policy. These effects are clearly established in relation to rules of public policy.[75] The negative effect of the rules would imply *"l'éviction de toute solution différente prévue dans une loi étrangère designée par la règle de conflit. Cette conséquence implique nécessairement une sanction qui vise non seulement le résultat de l'application de la loi étrangère, mais également celle-ci, voire la règle de conflit ayant designé cette loi"*. Together with this negative effect, there is a positive effect since this rule *"contient la solution à retenir, dans le cas particulier, pour l'intérêt de la sauvegarde de l'ordre public du for"*. These two effects exist and take place in this order once the rule is operative.[76]

2.3. Mandatory rules

Mandatory rules have been progressively incorporated to private international law systems - not without some disagreement[77] - since Ph. Francescakis defined them for the first time in the way they are known nowadays. According to a traditional definition, mandatory rules (*lois d'application immédiate* in its French version) are rules *"dont l'observation est nécessaire pour la sauvegarde de l'organisation politique et sociale du pays"*.[78] The quality of a mandatory rule is given by *"le caractère indispensable de la règle pour la sauvegarde de la cohérence sociale ou économique de l'ordre juridique interne"*.[79] This presupposes

[75] Recalling the distinction about rules and principles of public policy as in point 2.1, public policy principles do not fulfil the two functions but just one of definition of the forum's frame of tolerance as regards foreign law. They do not indicate the solution that must substitute the latter where it is rejected (Bucher,1993:38).

[76] Bucher,1993:39.

[77] Mann (1978:35), contesting the arguments put forward by Drobnig (1975:83) argues that neither comity nor avoidance of conflicts can explain the existence of these rules. He further adds that these rules introduce uncertainty in international trade, they lead to injustice and they open the door to the most abusive tactics by defaulters.

Also the Italian professor Pau (1969:481,486,499) repeals these rules on the ground they lacked a positive founding in the Italian legal system. He contests the utility of these rules since the only admitted limit to the application of foreign law lies in the exception of public policy. After the ratification of the Rome convention 1980 he admits that the basis for these rules in the Italian system exists; however he adverts the risk of eluding positive law in favour of imagination of the interpreter (Pau,1982:871).

[78] Franceskakis,1966:12 and Franceskakis,1967:691.

[79] Karaquillo,1977:152 and 199 Nos.481 and 633.

their application whatever the external element happens to be. Such a definition of mandatory rules highlights their functional character. This implies that they may change according to space and time, according to what is felt by a concrete society to be *"nécessaire pour la sauvegarde de l'organisation politique et sociale du pays"*. Mandatory rules are thus profoundly delimited by their substantive element. At the same time they exhibit a particular way of application which contrasts with the traditional savignian system of conflict rules. A substantive approach and a functional approach are consequently, the next aspects to tackle.

Some attempts have been made to isolate the rules that would fit into this definition. The variety of rules that can be encompassed under the label of mandatory rules makes it difficult to identify clear individuating parameters.[80] However, a kind of agreement exists between scholars to differentiate two categories of mandatory rules. On the one hand those that protect in certain circumstances the weaker party in a contractual relationship, namely workers and consumers. They aim at reestablishing a balance of the obligations of both parties and then focus on the internal regulation of the contract. On the other hand, those rules ennacted to ensure the protection of the general community interest. These rules play an 'institutional' role and intervene because of the eventual external effects on sensitive matters for the State. For instance they aim at the organisation of the socio-economic system and they organise external transactions, competition and anti-dumping measures, etc.[81]

The importance of the aims pursued by mandatory rules is such that they cannot be withdrawn to the benefit of the law indicated by the conflict rule. Mandatory rules appear as *a priori* exceptions to the application of a foreign rule, regardless of the content of the latter, since in the concrete issue the forum does not tolerate the application of that foreign rule.[82] Summing up, these rules would not function as a corrective mechanism but rather in an

[80] See for instance, the following classification suggested by Vischer (1974:1-70), that reflects clearly diverse substantive areas: rules that protect the economic and political interests of a country, those which safeguard the economic system of a State (namely the regulation of competence), rules that protect weak parties in contractual relationships (i.e. workers or consumers), rules that regulate professional conduct and activities (such as lawyers) and the rules that regulate the system of property.

[81] González Campos et al.,1991:265; Virgós Soriano,1986:813; Lando,1981:196; Hartley,1979:238.

[82] Francescakis,1966:13.

affirmative way, to override the otherwise applicable law.[83] In this sense, mandatory rules can be clearly distinguished from public policy. Mandatory rules and public policy retain differentiated identities, especially as regards their mode of operation. Whereas public policy is the correcting factor that enters the field once the conflict rule has displayed its effects, mandatory rules are applied regardless of the conflict rule.[84]

Indeed, mandatory rules can be seen as an independent system of regulating problems of private international law, separate and different from the conflict law system. In contrast with a more - but not exclusively - formal conception of conflict rules, mandatory rules appear as mainly substantive rules that take precedence over the former precisely because of their substantive character. Mandatory rules can thus be defined as substantive rules which incorporate an extension rule (*norme d'extension*) that delimits the scope of application.[85]

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[83] Watté,1989:78; Hay,1991:381.

[84] A rather innovative vision for this traditional reading of private international rules has been suggested by Bucher (1993:58). He envisages *ordre public* not as an extension of the conflict rule which is activated as an exception to the normal system of choice of law but rather as its constituent element. His theory defends the idea that the substantive content that is at the basis of public policy can be taken into account while creating conflict rules. The latter might be shaped as unilateral or bilateral conflict rules, which both concern the forum's interests. This is so because conflict rules constitute mainly the *bilateralisation* of unilateral rules and also because *"les règles bilatérales de conflit participent également à l'expression normative des dispositions internationalement impératives de la loi du for, dans la mesure où elles sont calquées sur les exigences de l'ordre public"*. Bucher opts for an evolutive vision of private international law that was already suggested as regards mandatory rules: *"s'il est vrai que la règle de police est appréhendée dans un premier temps dans un mode unilatéraliste parce qu'elle repose sur la constatation d'un défaut de convergence des intérêts étatiques, rien n'exclut qu'elle puisse donner naissance, dans un second temps, à une règle de conflit bilatérale lorsqu'une convergence est constatée ou même recherchée dans la politique poursuivie par différents Etats."* (Dubuisson,1994:401, he refers to Lagarde,1986:51; Francescakis,1966:16; Imhoff-Schreier,1981:106 and Guedj,1991:676).

If conflict rules already enshrine the fundamental interests of the forum, recourse to excepting clauses is not any more necessary: *"la clause d'ordre public n'a ainsi pour objectif d'écarter des règles de conflit fondées, dès leur conception, sur des objectifs mal définis, du fait de leur inadéquation avec le droit matériel du for. Elle doit jouer, en effet, son véritable rôle d'exception, corrigeant des règles de conflit insuffisamment adaptées aux exigences d'efficacité résultant du droit du for"* (Bucher,1993:74). A further development of his theory leads him to suggest the intervention of public policy as an intermediate step towards new bilateral rules since *"lorsque, par le biais de l'ordre public, une nouvelle orientation de la définition du domaine impératif appartenant au droit matériel du for se manifeste, il peut paraître opportun, voir necessaire, de réexaminer plus généralement le domaine d'application de la loi du for et, ce faisant, de reconsidérer tant l'objectif que le contenu de la règle bilatérale de conflit"* (Bucher,1993:77).

This is not only a theoretical construction. Recent legislations have enshrined rules that tend to mitigate the effects of the application of the foreign law by means other than public policy. This brings up the regulation of sensitive matters (not only as mandatory rules but) as imperfect bilateral conflit rules. The actual effect of these rules is an anticipation of the public policy clause (Mosconi,1994:12). Two examples are Article 17 of the German law on divorce and the Swedish law of 30.5.85 on the law applicable to paternity matters.

[85] For a thorough study, see Marques dos Santos,1991:1064.

As was pointed out by Francescakis, *"le conflit de lois ne représente pas le type unique de réglementation des rapports internationaux, puisqu'aussi bien il fonctionne concurrement avec deux autres types de règles, celles visant l'extension de la propre loi interne du for et celles visant directment une réglementation matérielle des rapports internationaux"*.[86] This complex system of applicable rules responds to the diverse functions they fulfil. They adapt to a more complex net of international relationships which entails an enlargement of private international law and a more adapted set of solutions in order to reach fairer answers to concrete cases.

It is not the task of this chapter to undertake a more thorough study of these rules. Here these remarks suffice. On the contrary, the relationship between mandatory rules and public policy requires attention. Despite the previous distinction of roles - explained according to the different systems in which public policy and mandatory rules are inserted -, it is acknowledged that a relationship between these two notions exists.[87] In many ocasions, however, it has not been understood in a correct mode. The wrong identification will be the first aspect addressed to then analyse the correct terms in which public policy and mandatory rules are linked.

One of the recurring identifications sees mandatory rules as a kind of transposition of domestic public policy to an international context. A direct transposition is to be avoided since the roles that internal and international public policy fulfil should not be mixed. A recent attempt to explain this relation has been undertaken by Dubuisson. He distinguishes two levels of internal public policy, namely *ordre public virtuel* and *ordre public textuel*, and then transposes these categories to an international level into the *exception d'ordre public* and *lois de police* respectively.[88] The kinship between international public policy and mandatory rules is explained then because of the fact that each one of these techniques reflects a side

[86] Francescakis,1958:125.

[87] See for instance Graulich (1963:634-635 No.4) *"règle d'application immédiate comme ordre public (...) jouent un rôle assez similaire, ne fût ce que dans la mesure où elles situent toutes les deux les niveaux de tolérance du droit du for vis-à-vis des systèmes étrangers"*; Mayer(1981:292) refers to *"une approche fonctionnelle, qui semble mieux convenir à leur nature [of mandatory rules], et dont l'ordre public offre déjà un exemple bien connu"*.

[88] Dubuisson,1994:424. *Ordre public virtuel* corresponds to negative public policy, that is, the prohibition on the parties deciding on some aspects of the legal relationship. *Ordre public textuel* would correspond to the legislative enshrinement of this negative public policy.

of internal public policy.

Another frequent reference is the identification of positive public policy with mandatory rules.[89] This assimilation is favoured by the transposition of internal categories to international regulation. Lagarde demonstrated that only the negative conception of internal public policy could be close to public policy in the sense of private international law.[90] To find a reflection of positive public policy in the private international law sphere seems to be a logical consequence. In other words, the positive public policy, understood as *lois impératives*, would be 'naturally' extended to international mandatory rules (*lois d'application immédiate/lois de police*). Such identification endows public policy with a material role in the solution of private international law problems that leads to *"supprimer toute influence de la loi étrangère dans le règlement de ces problèmes, en imposant d'office la loi du for".*[91] The very notion of positive public policy was already criticised, and the conclusion was that one should speak of positive and negative effect of public policy.[92] Public policy, as well as mandatory rules - as will be presented right now, develop both aspects, a positive and a negative one. It seems then incorrect to reduce one of the notions to one aspect of them.

In order to delimit the correct terms in which public policy and mandatory rules are related it is necessary to come back to the distinction established between principles and rules of public policy. Mandatory rules reflect essential rules that safeguard the political and social organisation of a country. In this sense, they are closely linked to the functions that were attributed to public policy, mainly the defence of the principles which are felt to be at the basis of the community and the safeguard of legislative policies. This explains why mandatory rules, like public policy, are variable in space and time. Mandatory rules reflect thus, the State

[89] See for instance Dutoit(1985:455).

[90] Lagarde,1959:131 (No.114).

[91] Lagarde,1959:129 (No.112).

[92] See point 2.1 of this chapter. It is interesting to note, however, that in the arbitration sphere all these terms may be read with slightly different meaning: *"Devant le juge étatique, la fonction positive d'application des lois de police et la fonction négative d'exception puisent au même et seul ordre public entendu au sens du droit international privé. Or, devant l'arbitre, le contenu de l'ordre public diffère selon la fonction qu'il exerce: ordre public au sens du droit international privé (et donc étatique) pour la fonction positive d'application des lois de police; ordre public véritablement international pour la fonction négative d'exception d'ordre public"* (Pommier,1992:28-9).

interests, those which could be referred to as 'relative public policy'.

In this sense, mandatory rules appear as one of the two systems of individualisation of public policy rules. In other words, the latter can be either the outcome of the normal application of conflict laws or the result of having recourse to unilateral rules. In the former case, first the negative effect (rejection of the foreign rule) is felt; then, the positive effect (imposition of - generally, forum law) takes place. On the contrary, as regards mandatory rules, there is first a positive effect of imposition that is followed by the negative effect of whatever other rule (either forum or foreign law). Mandatory rules appear then as an 'inverted' functioning of public policy.[93] Summing up, both bilateral and unilateral rules provide the legal order with defensive rules which are defined as public policy rules.

So far, the functioning of State defensive mechanisms of the legal order is explained. The question raises why should foreign public policy find application in the forum. Foreign mandatory rules (foreign public policy rules) may claim application to a concrete case in the forum. If these rules show a particular *Sonderanknüpfung* (link with the situation at stake) they are likely to be applied in the forum regardless of the conflict rule. Mandatory rules of a third State are likely to be applied where international conventions so provide.[94] These texts are a written reflection of a positive reciprocity among States. A certain similarity of these rules with the forum rules is understood. The ratification of international treaties appears to ensure in this sense this 'minimum' coincidence of interests.[95] The question arises whether

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[93] Bucher,1993:39.

[94] Article 7 of the Rome Convention 1980 on applicable law to contractual obligations provides an example of these rules. It should be noted however, that such an article does not entail an immediate application of foreign mandatory rules. The latter must exhibit a will to be applied that is ascertained by the judge, together with its object, nature and link to the situation at stake. Finally, the consequences of the application (or non-application) of the rule are taken into consideration. It is disputed whether this Article gives primacy to the will of the law to be applied or to the actual link of the rule with the forum. We agree with those who believe that the imperative nature of the rule first lets the judge control ***a posteriori*** the link with the forum (Marques dos Santos,1991:1024). The existence of a ***rattachement spécial*** or a ***intérêt prépondérant*** to be applied are essential elements in order to correctly understand these rules (see Bucher,1993:90ff).

[95] Other examples of this kind of provision can be found in Article VIII(2)(b) of the Bretton Woods agreement (of 22.7.44) drawing up the Statute of the IMF; Article 3 of the Unesco Convention 1970 on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property; Washington Convention on International Trade in Endangered Species of Fauna and Flora; Article 16 of The Hague convention (of 14.3.78) on applicable law to contracts of agency; Article 16(2) of The Hague convention (of1.7.85) on applicable law to trust

third State's mandatory rules (that is, which do not belong to the forum law or to *lex contractus*) may be applied (or be given effect -in the words of Art.7 Rome convention-) outside the framework of an international convention. Despite the position that sticks to a very formal criterion (that is, deeply linked to the idea of sovereignty), it would seem ridiculous that States pursuing the same policies reject consideration of third State's rules because no convention binding them exists.[96] Traditionally some explanations of the application of foreign mandatory rules have been proposed, namely the three following: the consideration that the forum *ordre public* so required, the admission that the rule pertained in fact to the *lex contractus* and the understanding that the forum provides an *ad hoc* rule for the application of those rules.[97]

Again, the correct understanding of this problem is to be found under the vision of mandatory rules as public policy rules in the way they have been presented here. It has been pointed out that in order to apply the public policy of a third State (in the shape of mandatory legislation) a forum interest is required: *"du point de vue de l'État du for, le respect des règles d'ordre public d'un État étranger (différent de l'État de la lex causae) est subordonné à l'existence d'un intérêt propre et préponderant du for. Un tel intérêt ne peut se manifester, en d'autres termes, qu'en présence d'une certaine convergence des intérêts, de l'État tiers, d'une part, et de l'État du for ayant désigné une loi différente en tant que lex causae, d'autre part".*[98] In other words, *"l'ordre public étranger d'un État tiers ne peut s'imposer à l'État du for si celui-ci ne connait pas des règles d'ordre public ayant une finalité comparable".*[99]

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and recognition.

[96] Drobnig (1979:83) refers to comity between States in order to justify the taking into consideration of other State's mandatory rules. However, as was said in former paragraphs, today reciprocity tends to substitute comity; it would seem then that States apply other States' rules in order to see the own ones applied.

[97] For all, González Campos,1991:272; see also Bucher,1993:83 and Mann,1978:34.

[98] Bucher,1993:91 & 95.

[99] Bucher,1993:99. These seem to be the same conclusions that Guardans i Cambó reaches. He considers that the forum public policy may have the possibility to impose the consideration of a foreign rule (probably mandatory) to avoid that the court enforces a contract contrary to that mandatory rule. The court will take into consideration this rule where a certain coincidence between forum and foreign State principles exists. (Guardans,1992:292,367ff).

It should be remembered that the acceptance of a foreign mandatory rule does not mean that the forum law has a similar rule (otherwise probably forum law would claim application) but that the foreign rule fits into the general aims pursued by the State legislation (for instance, protection of weak parties). Even where identical rules existed in the forum it can be admitted that the foreign rule is applied because it shows greater links to the issue at stake than forum mandatory rule. The relevant issue is the capacity of the third State to actually impose its rule.[100] However, the *rattachement spécial* which permits invoking the applicability of the foreign mandatory rule does not ensure the compatibility with forum's public policy. That would explain why forum public policy may be invoked as against foreign mandatory rules. In this sense it would seem that public policy rules can recede in front of public policy principles.

[100] Bucher,1993:82.

3. APPLICATION OF THE NOTION

The first approach to international public policy undertaken in previous pages becomes more concrete from a functional and a substantive point of view. International public policy was defined as encompassing all those general principles and values that the system considers so essential as to protect them from any possible attack resulting from the application of a foreign law or the recognition of a foreign judgment. Consequently, the two areas where public policy is operative from the viewpoint of private international law are the choice of applicable law and the recognition and/or enforcement of foreign decisions. The study of these will follow.

This protective necessity is felt both at a purely internal level and at an international level, that is, in the framework of international treaties signed by States in those matters.[101] Public policy is, both in relation to choice of law and recognition of judgments an exceptional means of defence. Therefore, its application must be restricted within reasonable limits.[102] A lucid approach to public policy must, however, be as dynamic as public policy is. Its classical conception as a defensive means must be completed by the new characteristics that the notion is acquiring, namely an offensive role. Public policy increasingly reflects a substantive content

[101] See for instance all The Hague conventions (except the one relative to illegal transfer -abduction- of minors). The following Articles (which refer to public policy) will illustrate: Art.2.5 of the Convention 15.4.58 on recognition and enforcement of decisions involving obligations to support minor children; Art.5.1 of the Convention 2.10.73 on the law applicable to maintenance obligations. It can also be found in Art. 10.1.a) of the European Convention 20.5.80 of Luxembourg on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children and in the Rome Convention 1980 on law applicable to contractual matters.

[102] Precisely at the level of international treaties this effort of restrictive interpretation has been undertaken with particular care mainly relying on a 'manifest' opposition of the foreign judicial decision (or rule) to the *ordre public* of the State where it must be effective. Thus only relevant oppositions to *ordre public* should be taken into account. This kind of statement appears frequently in the Conventions of The Hague Conference. This option has been criticized because, in the last analysis, it is up to the concerned State to decide whether there is an opposition to State principles and, if so, it is not relevant if it is manifest or not (Franchi, 1984:235). Thus, it has been suggested to use other terms as, for instance, 'strongly' (Carter,1993:2). Despite the criticisms it has provoked, it seems to be more convenient than other proposals, namely *a priori* precision of the content of the notion - elaborated after a casuistic analysis of the domestic jurisprudence (Vitta,1972:390 and Franchi,1984:235) - and the application of the clause only to exceptional situations (as suggested by Jenard in his Report on the Brussels convention -OJC 59 of 5.3.79 at p.44) which is closely related to the criterion of 'manifest' opposition. Indeed, the use of the adjective 'manifest' should act as a sort of advice for judges to be moderate in the use of the exception. In this light it has been understood by national case law, for instance see Italian Cass. (18.10.91) *Procuratore v. Ficarra e Scuderi* (RDIPP 1993,94). However, one could say that formula of 'a manifest opposition' has become a standard clause with no additional strength.

and consequently adopts new forms. Thus, it will manifest itself again as a versatile notion. This does not imply that it is a means of maintaining the *status quo* in a legal system. On the contrary, *"l'ordre public remplit une fonction très progressive quand, grâce à lui les fruits de systèmes juridiques qui resistent à l'évolution se voient mis en quarantaine et, de ce point de vue là, on peut dire qu'il est un instrument non plus du, mais contre, les particularités et l'intransigeance nationales"*.[103]

3.1. *Ordre public* from a functional point of view

a. Choice of law rules and public policy

From a functional point of view it is traditionally accepted that in relation to conflict rules public policy is either a constituent element of the conflict rule, a natural extension of it[104] or a *"procédé technique, lié à cet autre procédé qu'est la règle de conflit"*[105] reacting where the conflict rule has said its last word.

Public policy in a traditional sense works as a last resort to establish which is the applicable law. By way of summary,[106] it can be stated that the national judge, when confronted with a situation with a (sufficiently relevant) international element, will refer to his system of conflict rules, according to which he will determine what is the law applicable to the issue. This law has to be applied unless the judge considers that the result of this application might be contrary to the public policy of the forum. In order to establish whether the foreign law is to be disregarded, the judge has to analyse it, taking into consideration the particular circumstances of the issue at stake (*relativité de l'ordre public*) and its connection with the

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[103] Remiro Brotons,1984:247. (The grammar mistake is in the text).

[104] Lagarde (1959:232) calls it *"les antennes de la loi de conflit"*.

[105] Lagarde, id.p.184.

[106] For a more detailed study of the procedure that the judge must follow see Batiffol & Lagarde,1993:569ff.

forum (*Inlandsbeziehung*[107]). The following step that the judge must undertake is to delimit (*Konkretisierung*, according to the terminology used by Jayme[108]) the forum *ordre public* having regard to both the forum law and international and/or transnational legal orders. Where the judge concludes that effectively there is a contradiction between the foreign law and the forum public policy, another rule must substitute for the rejected one;[109] otherwise a denial of justice arises. Two schools of private international law can be identified:

a) in the majority of the cases the rejected law will be substituted by the *lex fori*, since it is the law that the judge knows best. This system has been criticised because ultimately it

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[107] In its actual conception, *Inlandsbeziehung* is seen as the totality of circumstances that are considered in relation to the situation at stake and that impose the application of the forum law despite the fact that a foreign law had been selected by the conflict rule. *Inlandsbeziehung* activates public policy because of the tight links the issue shows with the forum (Lagarde,1993:270, No.9 - it is interesting to note that he identifies this notion with territorial link, which entails a certain reductionism). The more fundamental an *ordre public* principe is and the more decisive the consequences of its application are, the less a link with the forum is required. *Inlandsbeziehung* may also retreat when confronted with values of such importance that the link to the forum has no relevance, namely general principles of law and human rights. On the contrary, the *Inlandsbeziehung* doctrine appears as particularly important in relation to mandatory rules. Since the latter reflect exclusive State values and policies, it is normal that the link with the State is particularly felt. Such link explains not only the imposition of the rule in the forum but also the claim of application of that rule outside the forum's jurisdiction. In the latter case, the State must have the actual possibility to enforce the rule outside the forum.

In a simplified way it could be stated that public policy rules require a link with the forum while public policy principles may (even will) disregard any kind of relationship to the forum since the values therein included are commonly accepted by States. The requirement of a link with the forum in the modern conception reflects the distinction between absolute and relative public policy.

A better understanding of *Inlandsbeziehung* entails a reference to the principle of proximity. This implies discarding a rule because of its lack of actual connection to the situation at hand. From a functional point of view it would seem that the principle of proximity fulfils a similar role to that of *Inlandsbeziehung*. They are nevertheless, different realities. *Inlandsbeziehung* is a link with the forum which is not the closest link with the forum. The closest link is to be found, on the contrary, in the principle of proximity. The effects of applying these notions points out another difference between them. While *Inlandsbeziehung* will generally lead to apply forum law, the principle of proximity may bring about whatever law, provided it shows the closest connection. Indeed, the distinction is not always clear. Thus, the judgment of the French Cour de cassation (of 1.4.81, Clunet 1981,812) - which ruled that Spanish law was *"contraire à la conception française actuelle de l'ordre public international qui impose la faculté pour un français domicilé en France de demander le divorce"*, finds several readings as reflecting public policy combined with *Inlandsbeziehung* (Gaudemet-Tallon,1991:108ff), mandatory rules (Mayer,1991:364 No.583) or the principle of proximity (Lagarde,1986:111).

An attempt to overcome the uncertainty that these notions entail may be seen in the so-called *clauses spéciales*, which combine criteria of public policy and closest connection in legislative dispositions (f.i. Article 15 Swiss law on private international law of 18.12.87). For a further and thorough study of the notion see Kokkini-Iatridu,1994, Lagarde,1993 and Marques dos Santos,1991.

[108] Jayme(1989) "Methoden der Konkretisierung des Ordre Public im IPR".

[109] For a broad study of the diverse options followed by different legal systems, see Sosniak,1984. See also Vassilakakis,1987:319ff, who reviews the *état de la question* in former Comunist countries and a more recent approach in Mosconi,1994:6ff.

imposes national law and therefore annuls the effect intended by private international rules of conflict (that is, the application of the most connected or reasonable rules). Moreover, it entails the risk of being a means of imposing national-forum law in a concealed manner.

b) in other cases (namely in the German system and the brand new reform of the Italian system of private international law[110]) there is a tendency to look for another rule from the system to which the rejected rule belongs. This presupposes either a conflict rule of successive connecting factors or the existence of other norms in the same system that might be applicable to the same issue. In the latter case, the judge thus accomplishes a kind of accomodation of the foreign law to the forum. This solution is also criticised since it attacks the normal functioning of the conflict rule and may lead to the application of a law which is not in force.

The proposed solutions are by no means absolute. It may be thus more convenient to take into consideration the nature of the foreign rule and the effects it aims to produce in the forum.[111]

Nevertheless it must be taken into account that conflict rules no longer respond to an exclusively technical structure. To be more precise, the evolution of conflict rules can be ascertained in two directions. On the one hand there is a tendency to have more flexible rules. This implies the incorporation of either alternative or successive connecting factors in order to favour the validity of the resulting relationship.[112] This fact consequently leaves a reduced margin of activity to public policy, since the more rigid a conflict rule is, the more place public policy is given. On the other hand, the traditional concept of the conflict rule, as delineated by Savigny has further developped and now incorporates a public policy content

[110] This text (Legge No. 218 of 31.5.95, G.U.R.I. of 3.6.95, Supplemento ordinario p.5) first refers to all the possible connecting points that bring about all the potential laws that the conflict rule can indicate. Only then, if there is no solution to the case, may the judge refer to Italian law.

[111] Dubuisson(1994:423) puts forward two hypotheses concerning contracts. Either the foreign law at stake is a permissive rule that violates a prohibition of the forum, or it is a prohibition which runs counter to a permissive rule of the forum. In the former case, the eviction of the foreign law implies the invalidation of the contract, therefore, it also implies substitution by the *lex fori*. In the latter case, it is likely that the foreign prohibitive rule is substituted by another foreign permissive rule which derives from the common rules.

[112] A typical example of this trend is to be found in The Hague Convention 1961 on testamentary dispositions where the *favor testamenti* designs a list of connecting factors by means of which almost every law will validate the testament. Five contacts are listed: place of execution, the testator's nationality, domicile, habitual residence and situs of inmovables, all of them upholding the wills that meet the form requirements of any of them.

(*orientation materielle de la règle de conflit*). The "neutrality" of conflict rules has become a historical memory. Therefore, this bias of the conflict rule has also to be considered when public policy is applied.[113]

That is why it has been asked whether it is legitimate to once again introduce substantive requirements by means of the public policy that have already been taken into account by the conflict rule. *"Justifié à titre d'expédient lorsque l'ordre public international était le seul moyen d'éviter les conséquences chocantes de la règle de conflit, le recours à ce mécanisme perd sa légitimité au regard des techniques nouvelles développées par le droit international privé qui intègrent des préocupations de droit matériel interne dans la formulation de la règle de conflit... La présence d'une règle de conflit à caractère substantiel ne suffit évidamment pas à exclure l'intervention de l'ordre public, mais elle devrait néanmoins susciter plus de réserves dans l'usage qui en est fait. Si cette règle est bien construite, il paraît logique et cohérent d'en respecter les conséquences, sans tenter de réintroduire par le moyen de l'ordre public international une exigence de protection que la règle de conflit en question n'a pas cru utile de satisfaire"*.[114] If it is taken into account that conflict rules already enshrine the fundamental interests of the forum, recourse to excepting clauses is not necessary; therefore, public policy must apply strictly as an exception, with the sole purpose of correcting conflict rules which are insufficiently adapted to efficency requirements stemming from forum law.[115] Conceived in this way, public policy is no longer an element of perturbance to the coherence of the conflict rules system, but a mechanism to adapt them to their purpose, i.e. the interest of States in having their law applied.

Consequently, as regards conflict rules, public policy is firstly a constituent element. Secondly it reflects the core of values defended by the State. Bucher's words will illustrate this view with more clarity: *"Les principes d'ordre public ne mettent pas en cause, en cas*

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[113] From a completely diverse point of view, American scholars reach the same conclusion. In a system where interest analysis is one of the main criteria of guidance as concerns conflict law, it is stated that "teleology can be reduced to statutory form and that positive law contradicts the proposition that our discipline is value-free. Conflict statutes that promote substantive values can serve several important purposes" (Juenger,1993:185).

[114] Dubuisson,1994:625-6.

[115] Bucher,1993:74.

d'intervention de l'ordre public, l'objectif de la règle de conflit, consistant à designer, dans le cas particulier, le droit d'un État étranger avec lequel la cause présente le lien le plus étroit... l'intervention d'un tel principe n'est pas d'avantage motivée par une volonté d'application prépondérante de la loi du for, celle-ci n'étant précisement pas, en tant que telle, de nature d'ordre public, mais seulement dans son noyau dur. En ce qui concerne les principes d'ordre public, une clause de réserve ou d'éviction détient aussi une fonction spécifique qu'elle est seule à pouvoir remplir.

Les règles d'ordre public, en revanche, peuvent être absorbées par des règles de conflit, dans la mesure où leur contenu est déterminé et leur domaine d'application, nécessaire à la réalisation de leur objectif, connu. L'appel à une clause réservant l'ordre public ou les dispositions impératives n'est alors plus nécessaire. Une telle clause de réserve remplit ainsi une fonction supplétive, consistant à donner effet aux règles d'ordre public dont l'intérêt à se voir appliquer n'est pas pris en compte par les règles de conflit ou seulement de manière insuffisante. Cela peut s'expliquer très souvent par le caractère générale de la plupart des règles de conflit, fondées sur des catégories de rattachement au contenu large...".[116]

b. Recognition and/or enforcement of foreign decisions and public policy

Legal systems protect themselves not only from foreign legislation that might thwart their essential principles, but also from the effects that foreign judgments may produce in their territory once they have been recognised or enforced by the national judge. Thus, it is usually accepted that conformity with public policy is a condition to confering recognition and/or enforcement. This contradiction can result either because of the law applied by the foreign judge while deciding the case or because of foreign procedural law, which might be deemed not to satisfy the minimum procedural rights that the forum demands.[117] Consequently, if

[116] Bucher,1993:74-5.

[117] Rigaux (1987:359) illustrates this twofold possibility with the example of repudiation of the wife by the husband as a means of dissolving mariage. He claims that whereas in Italy and Switzerland repudiation is deemed to be contrary to the *ordre public* of the *lex fori*, French, English and Belgian case law do not reject this institution as being necessarily contrary to the public policy of the forum. Instead, they assess whether the circumstances that led to the repudiation of the woman have not violated fundamental rights. He quotes the following cases: Swiss Trib. fed. of 8.2.62 (*Clunet*, 1965,919); Italian Cass. 5.12.69 (R.D.I.P.P. 1970,868); French Cass. civ. 22.1.51 (Revue 1951,170); Seine, 17.4.62 (Clunet 1963,150); *Qureshi v. Qureshi* (1972), 2 WLR, 519; Trib. civ. Bruxelles, 13.3.71,

a judgment or decision is deemed to be contrary to public policy the required recognition or enforcement is not given. This is so both from the international treaty (either bilateral or multilateral) and the domestic point of view.[118]

The particularity of public policy in this area is seen precisely at this stage, since its function stops at the rejection of the foreign decision. In this sphere it is not possible to speak of the positive or negative function of public policy. As regards conflict rules, there is a concurrent interest of private parties and State legal systems to see the legal relationship governed by the most convenient rule. Public policy enters into action when private interests run counter to State interests. It is precisely the interests of the latter which impose a regulation in default of the one that has been disregarded. As regards the recognition and/or enforcement of foreign decisions, other interests are at stake. Whereas private parties seek recognition, the State where recognition is sought has at its main interest the safeguarding of its internal legal system. Hence, it protects it by rejecting judgments whose effects might thwart it. Consequently, if the decision is rejected, the State has no longer any interests at stake, while the private party who asks for recognition still has not seen his own interest satisfied. These remarks point out that on some ocasions the application of public policy might lead to a denial of justice or generate many procedural problems such as *lis pendens* or the existence of concurrent judgments, since the parties may endeavour to protect themselves in advance from a potential refusal of recognition on grounds of public policy by initiating a parallel procedure in another court.

It must be noted, nevertheless that in this procedure of recognition and/or enforcement, two parties are involved. Whether the previous comments are valid for the party who claims recognition of the decision, it is no less true that the party against whom recognition is sought has some interests at stake. This includes the right to an effective judicial protection, both at the moment when the judgment is given and at the moment of the recognition. In this sense,

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(*J.T.* 1975,171); Trib. Bruxelles, 17.12.74, (*J.T.* 1975,279).

[118] Reference is made exclusively to public policy as regards jurisdiction. However, it cannot be forgotten that the role of public policy is particularly developed as regards arbitration. The paradigmatic provision concerning this point is Article V(2) of the New York convention of 10.6.58. Despite the fact that jurisdiction and arbitration are two differentiated areas, most of the references in relation to recognition and/or enforcement of decisions are interchangeable and suit both of them.

the granting of a set of procedural guarantees usually is a determining element of public policy in the State addressed. Thus, from the viewpoint of the recognition and/or enforcement of foreign decisions, the notion of public policy is given a larger substantive content since it refers not only to the effect of the applied rule but also, and moreover, to procedural guarantees. The latter encompass many aspects such as the right to defence, legal means of notification and means of proof. In a regime of recognition and enforcement of foreign decisions progressively more technical, both the substantive and the procedural aspect are essential. If the former has been said to be likely to take precedence over the latter,[119] this must be understood in the sense that the substantive dimension encompasses the aspects which refer to fundamental rights and are related to process. In the following points these considerations will be pursued.

3.2. *Ordre public* from a substantive point of view

The previous points devoted to the delimitation of public policy illustrated how difficult it is to grasp the notion. One may suspect the final outcome to be closer to intuition than to assertion. In this point public policy will be approached as regards those fields where it is invoked. Case law will be the main element in this search. Certainly this analysis will not be exhaustive, since the evolving nature of public policy does not permit one to understand it in a definitive manner. However, the main guidelines to understand the substance of the notion will come out from this case law. The point has been divided in three sections. Civil public policy refers to the traditional fields where public policy has been applied, closely (but not exclusively) linked to civil matters. The second point refers to procedural public policy and the last one is devoted to economic public policy.

a. Civil public policy

From a substantive point of view, public policy is traditionally linked to family law, particularly marriage and divorce - and the consequent right to alimony/maintenance that

[119] Remiro Brotons,1984:245.

arises from it, filiation, adoption and custody of minors, and so family law appears in international treaties. Indeed, it is contended that international conventions on these matters play an essential inspiring role to weighing the importance of public policy.[120] It is impossible to consider all the cases relating to these matters where public policy may apply. However, it is possible to identify a strong drift excluding discrimination. Thus, discriminatory treatment is rejected in adoption procedures,[121] in matters of custody[122] as well as in the fields of marriage and divorce.[123]

Seemingly, these areas have traditionally been the main operational ground for public policy as a reflection of the protective concerns towards un-protected or weak parties.[124] As Sir Hersch Lauterpacht established in his separate opinion in case *Boll*, "apart from criminal law, it is difficult to conceive of a more appropriate and more natural object of *ordre public*, as general understood, than the protection by the State of infants, especially when they are helpless, ill, an actual or potential danger to themselves or to society, a legitimate object of its compassion and assistance, and an occasion for public resentment whenever the State fails to measure up to its responsabilities in this respect".[125] Moreover, public policy becomes here a clear reflection of State idiosyncracy. The way in which recognition of illegitimate

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[120] In relation to the custody of minors, see App. Milano (5.10.82) *Pres. Caroselli; P.L.T., L.F.Z.* (R.D.I.P.P. 1982,852) which settles that in order to evaluate a violation of public policy, that *"occorre anche rifarsi allo spirito e alle condizione poste dalla convenzione europea di Strasburgo del 24.4.67 sull'adozione dei minori"* despite the fact the foreign State was not a contracting party thereto. In relation to marriage and divorce, see Italian Cass. (18.10.91) *Procuratore v. Ficarra e Scuderi* (R.D.I.P.P. 1993,94); Italian Cass. No. 9627 (21.9.90) *Procuratore v. DiChio e Nagel* (RDIPP 1992,74); App. Firenze (12.10.90) *Ezri v. Barberot* (R.D.I.P.P. 1992,83).

[121] Trib. minorenni Milano (15.2.69) *Joanna Peter (in re)* (R.D.I.P.P. 1969,826) rejects the application of the Indian law that allows only for the adoption of Hindu minors because it clashes with the Italian constitutional provision which forbids any kind of discrimination based on race or religion.

[122] Trib. minorenni Bologna (22.1.77) *Sonbul Taher Ismal* (Dir. fam. pers., 1977, I, 645) establishes the contrariety to Italian public policy of the law that automatically granted the custody of the minor child to the father, without any choice about the convenience of leaving the child with one or the other parent.

[123] This is so both as regards discrimination based on sex grounds and as regards religious discrimination. For the former see Paris, 28.6.73, (*Clunet*, 1974,124); As regards the latter, see Trib. Torino, 24.2.92 (R.D.I.P.P. 1992,985).

[124] See for instance case *Procuratore v. Pergolotti & Branchesi*, Corte di cassazione, 7.9.91.

[125] Judgment of the ICJ (28.11.58) in relation to the application of The Hague Convention of 1902, p.90 opinion of Sir Hersch Lauterpacht.

children is admitted or the acceptance of diverse means of proof in order to sustain filiation are matters very dissimilarly regulated. Thus, freedom to establish filiation[126] as well as the revocability of the recognition of a 'natural' son[127] may be protected by public policy. Such diversity does not entail, however, a refusal of foreign values. It appears thus, that a means of proof which is not admitted in the forum does not necessarily go against public policy if it grants serious guaranties respecting the biological truth.[128]

Two more comments are needed in relation to civil public policy. On the one hand, the growing recourse to the *effet attenué* doctrine in order to provide answers based on fair grounds is noted.[129] Such search of fairness appears clearly in the fields of alimony,[130] repudiation[131] and polygamy.[132] On the other hand, reference must be made to the

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[126] Trib. gr. inst. Paris 23.4.79, (R.C.D.I.P. 1980,83).

[127] Paris, 5.12.91, (D. 1992, com. 170).

[128] Cass. civ. 9.10.84, (R.C.D.I.P. 1989,643). In the same line of argumentation, the strict character of the means of proof admitted in the Italian legal order as regards 'natural' fatherhood, implies that a foreign judgment based on presumptions of probability or verosimilitude is found contrary to public policy - even if only affects alimony obligations - (App. Brescia [18.12.74] *Cobler v. Gibertoni*, Giur. it. 1976 I, 2, 28). The Belgian Cass. 25.10.79, (*Pas.*, 1980, I, 262) holds as consistent with public policy means of proof other than those admitted by Belgian law.

[129] This doctrine - as firstly formulated in the *Rivière* case - entails that the impossibility of acquiring a right in a State does not preclude that the 'vested' right is given some effect in the former State when it has been regularly acquired. This theory, that has provoked critical readings (namely Lagarde, 1959:32, No.30ff), has evolved according to the contemporary evolution of social and legal factors. Thus, it is admitted that *"le contrôle de l'ordre public, même atténué, ne peut se faire aujourd'hui sans relier l'effet demandé à la situation dont il découle"* (Lagarde,1993:227, No.17). The doctrine of *effet atténué* may seem unfair in different ways. On the one side, it maintains unjust situations which are at the basis of the issue, as for instance discrimination between men and women in civil aspects. On the other side, the application of a mild public policy conceals deeper grounds of fairness, since not to recognise the effects of a repudiation on grounds of discrimination may deprive the weaker party of the allowances she would be endowed with if the shocking institution would be admitted.

Certainly most of these cases could be read in terms of *Inlandsbeziehung* and permit results not possible if the matter were purely domestic. This seems to be the position adopted by the Irish courts as regards recognition of divorce decrees. Indeed, the constitutional prohibition of divorce (Article 41) is saved when the Irish persons obtaining divorce abroad had at the time of the divorce, their domicile outside Ireland. (For a study of case-law evolution see Binchy,1988:271-289). If this mechanism permits avoidance of an awkward confrontation with other European States, problems concerning the effects of divorce in Ireland still remain to be solved and would invite recourse to the *effet attenué de l'ordre public*. (Seemingly, things will have to change after the result of the referendum on divorce which took place on 24.11.95).

[130] In relation to alimony, see Cour d'appel Bruxelles, 8.11.84, (*J.T.*, 1985,319), Italian Cass. (17.4.91) *Perry v. Hogan* (R.D.I.P.P. 1993,369) and French Cass. civ., I, 23.11.76, (R.C.D.I.P. 1977,504).

[131] In this sense the unilateral repudiation granted to the husband by Iranian law appears contrary to Italian public policy (App. Milano, 17.12.91, *Mansouri v. Shirnia* [R.D.I.P.P. 1993,109]). French public policy rejects the repudiation of a Tunisian woman on the basis only of the husband's disposition (Cass. civ. I, 25.2.86, R.C.D.I.P.

evolution of the scope of public policy as new features enter the stage. Phenomena such as bioethics are already reaching courts while raising considerations of public policy. Some cases concerning "mères porteuses" have already been settled by French courts under considerations of public policy.[133] Moreover, new clashes may appear, even in the framework of close civilisations.[134] Seemingly, the admission of homosexual marriages in Denmark (or the uncertainty arising from the judgment given by the Hawaii Supreme Court on this matter[135]) and the different status that *de facto* couples enjoy in Western countries will provide new sources of conflict, despite the similarity of civilisations. The *effet atténué* of public policy may find application.

This is a brief review of some of the civil aspects where public policy is still operative. Other matters could indeed have been included, namely testamentary regulation,[136]

1987,103). It is interesting to note that between France and Morocco repudiation no longer constitutes an offence to public policy because of the signing of a treaty between the two countries. In general it is possible to admit the repudiation where it is ascertained that each party has been endowed with the means of defending his/her interests at the court (Cass. civ. I, 18.12.79, JDI 1981, 597) and where it ensures to the woman pecuniary guarantees (Cass. civ. I, 3.11.83, *Rohbi*, JDI 1984, 329).

[132] Trib. gr. inst. Versailles, 31.3.65, (JDI 1966, 97).

[133] See for instance the judgment given by the Court of Paris, 1re ch. 15 June 1990: D.1990,540 (and comments F. Boulanger, or JDI 1990,982, Gaudemet Tallon) where the court refused to apply the exception of public policy against the American law (that admits the feature of mères porteuses under certain conditions). The court settled that the matter was one of recognition of the effects of a right regularly adquired abroad (that is, it applied *l'effet attenué*): " *Considérant que... l'enfant soit née d'une mère de substitution, ayant accepté de l'abandoner et de la remettre au père biologique, cette situation ne serait pas de nature à faire obstacle à l'adoption plenière, dès lors que l'enfant a été abandonnée par la mère naturelle conformement à la loi applicable et que l'ordre public international, intervenant par son effet attenué, ne s'oppose pas aux effets en France d'une telle situation de fait et de droit. Considérant qu'en définitive, la maternité pour autrui, pratiquée dans des conditions exclusives de tout mercantilisme, ne heurte pas la conception française de l'ordre public international...*". However, one year later, the Court of Cassation (ass. plén. 31 may 1991: D.1991,417, concl. Y. Chartier) assessed that this kind of conventions established in France run counter *"tant au principe d'ordre public de l'indisponibilité du corps humain qu'à celui de l'indisponibilité de l'état des personnes"*.

[134] See for instance case-law concerning divorce based on mutual consent allowed according to Italian and American law -, which was hold contrary to French public policy before the 11.7.75 law: Cass. civ. 26.1.38 (DC 1942, 120); Trib. gr. inst- Seine 17.10.61, (JDI 1962, 710).

[135] *Baehr v. Lewin*, of 5.5.93, 74 Haw 530,583, 852 P2d.44,68 [1993].

[136] Trib. Genova, (18.7.89) *Petit e Brown v. Ministero delle Finanze e Ministero per i beni culturali*, (R.D.I.P.P. 1990,674).

reparation of damages derived from international accidents[137] and many aspects of contractual relationships among private parties. To these we shall come back under the heading of economic public policy.

b. Procedural public policy

Both at an internal and an international level, the defence of procedural rights appears as an essential choice of legal orders. It is usually accepted that such a defence is reflected in a procedural public policy that exhibits its own characteristics.[138] From an internal point of view, many aspects of procedural law are deemed to be of public policy. This procedural public policy is aimed directly at the judge's powers and presents both a positive aspect (the modification of the powers of the judge) and a negative one (the limitation of party autonomy, since many of these procedural rights are not renounceable). The judge is endowed with specific powers and at the same time he is compelled to respect certain limits.[139] It is also noted that the criteria which delimit the repartition of jurisdiction is a matter of public policy.

From an international viewpoint many of the matters qualified in domestic law as being of public policy come under the scope of international public policy. We sustain that procedural public policy in this sense encompasses what has been identified as rights to defence and the rules concerning proof. The former mainly refer to a due assignation. Consequently a judgment given in default of appearance will not immediately be contrary to the public policy of the forum if the defendant was duly notified and if he/she is the only one to blame for this absence.[140] Other manifestations of the right to defence concern the respect of the

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[137] Trib. Milano (14.10.91) *Amadi Calini v. Iberia* (R.D.I.P.P. 1991,1043) and the recent German judgment refusing punitive damages granted in the US, BGH of 4.6.92 (I.L.M., 1993:1327).

[138] Ganshof van der Meersch (1968b:659); Juris-classeur, fasc 534-2 p.10 n°44. For the opposite view, see Carter (1993:1) who establishes a distinction between public policy and the denial of justice, including the defence of procedural guarantees exclusively under the scope of the latter.

[139] To a certain extent the following simplification could be reached: procedural public policy corresponds to an *ex officio* valutation of the judge. For further analysis see Vincent,1961.

[140] See for instance the following case-law of the Spanish Supreme Court: Autos of 18.8.33, 23.3.35, 23.3.65, 25.6.69, 11.2.81, 17.6.83, 10.2.84, 25.2.85 etc. In the same sense see in French case-law case *Lundwall*, of 4.2.58 Cour d'appel de Paris (rev. 1958.389) or case *Hochapfel* of 8.5.63 (Clunet, 1964.115). See also Spanish Constitutional

adversarial principle, the regular representation of the defendant[141] and the due notification of the judgment in order to permit the recourse for revision or appeal.[142] There is somewhat of a controversy concerning this point. However, it is claimed that as part of the fundamental rights a State fosters, they are likely to be considered as public policy matters.[143] For a long time the absence of motivation of the judgment entailed the consequent refusal of its recognition on grounds of public policy. However it is now admitted that, where from the judgment or joined documentation it can be assessed what the justifying grounds of the decision are, then, the judgment will be recognised in the forum.[144] This point brings these reflections to the delicate matter of the "substantive" control of procedural public policy.

As regards the means of proof, there is a constant evolution and reconsideration of the use of the mechanisms of proof that might thwart the forum's public policy. For instance, usually an oath will not be admitted by itself but will be accepted if confirmed by other means of proof. The same considerations can be reproduced as regards confessions, which might be contrary to public policy unless corroborated by other means of proof. Blood proof has also been subject to changes and after a period of general rejection it is now admitted.[145] As progress is developping new techniques, new problems arise. Such problems are particularly acute in the field of paternity.[146] It is not clear whether all aspects are to be considered to be aspects of public policy. In this sense, human rights will become an essential element of

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Court, Sentencias T.C. (sala 2ª) 45/1986 and 265/1988.

[141] Paris, 12.7.77 (Gaz. pal. 1978, 1, somm, 221) or Paris, of 9.10.87 (JDI 1988, 125).

[142] Tribunal de première instance de Rennes, 18.6.73 (R.C.D.I.P. 1976, 533) and Tribunal de grande instance de Nanterre, of 2.7.74 (Gaz. pal. 1975,I,57).

[143] In this sense, see Article 328(4) German ZPO (Code of civil procedure) which provides that recognition and enforcement of a foreign judgment is excluded "should such recognition be incompatible with fundamental rights".

[144] See for instance in French case-law the following judgments: Cass. civ. I, of 17.10.72 (RCDIP 1973, 556) and Paris, of 18.1.80 (R.C.D.I.P. 1981, 113).

[145] For a recollection of case-law concerning these matters see Alexandre,1970:251.

[146] After a conflictual period, biological truth as regards paternity is progressively preferred under the condition that the father so designed *"ait pu assurer efficacement sa défense"* - Frech Cass. civ. 1ère, 9.4.84 (R.C.D.I.P. 1985,643); Cass. civ. 1ère, 6.3.84 (R.C.D.I.P. 1985,108).

evaluation of the compatibility with public policy, for instance as privacy is concerned.[147]

Procedural public policy puts at stake a delicate balance between the defence of the forum values and the respect of the system in the granting forum. Indeed, when the judge of the State where recognition is sought procedes to analyse the proofs and procedure as pursued by the granting court, he cannot avoid undertaking a certain "substantive" evaluation. The subtlety of the judge will determine whether he respects a control (and not a revision) of the foreign judgment. The opposite risk that this careful control entails (and that should also be avoided) is the granting of a purely formal justice that is as pernicious as the revision of the substance.[148]

c. Economic public policy

The constant changes that the world undergoes are reflected in law and consequently in public policy. This implies an enlargement in the conception of the latter. One of the most relevant factors that will shape the notion is, without doubt, the increasing importance of economic activity. Directly linked to it, political shades must be taken into account. A State not only imposes legislative measures but also (and mainly) political-economic ones. Indeed, as will be referred to inmediately, national case-law provides examples of this extension of the notion to economic matters. In this sense, it becomes common to refer to a so-called

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[147] Thus, a Dutch law that regulates the tapping or recording of telephone conversations in accordance to the dispositions of the ECHR has not be deemed to be contrary to Belgian public policy (Belgian Cass. 24.5.83 (Rev. dr. pénal et crim., 1984,583). Always in the penal sphere it is usually admitted that proofs obtained by coercion or violence cannot be accepted in the forum.

[148] Arguably a guiding line which seems reasonable is the one given by the Spanish Constitutional Court. The notion of "constitutional public policy" has been enshrined by the Constitutional Court (Sent. 54/1989 T.C. Sala 2ª). This public policy establishes a limit to recognition and enforcement of foreign judgments, mainly respecting the requirements of a efective judicial protection (Art.24 of the Spanish Constitution) as interpreted by the same Court. The preceding judgment imposes the respect of fundamental rights as a minimum standard in order to admit the foreign decision. The judge must control this respect thus bearing in mind the formal interdiction of revision of the substance of the case. The guarantees ensured by the right to defense entail an analysis of the facts that justify the decision and the verification that a convenient proof of them has been undertaken. *"Comprobar si en la resolución extranjera se cumple con esa exigencia de que se ha realizado una prueba razonable de los hechos no tiene por qué implicar una revisión del fondo del asunto, y no desborda, en consecuencia, la función homologadora que corresponde al juez del exequatur"* (Fdto jurídico 3º). Summing up, the Spanish Constitutional Court imposes a control (but not revision) of the substance in order to avoid solely formal justice. Any fundamental right encompassed in the Constitution may be invoked as the basis of the exception of public policy.

economic public policy. One could inquire how it is defined and when it is operative.

Ordre public économique presents itself as a reflection of economic law. Economic law is a flexible term that encompasses various areas, from the regulation of monetary policy and company law to the specific regulation of economic aspects of contracts. Economic law has progressively grown and, despite its essentially national character - which entails a strong link between the territory where it is applied and the State that enacts it - it is directing its stride towards international economic law. These features will naturally be reflected in public policy. In order to adapt to the evolving notion of economic law, the notion of economic public policy is prone to be particularly flexible. International economic public policy appears thus as a complex feature. The following paragraphs endeavour to unravel this complexity. The notion as understood at an internal level will be the starting point to then tackle it at an international level.

Ordre public économique at an internal level exhibits clear features in French systems. In this sense, it refers to the role that States assume as regards the exchange of goods and services in order to ensure the protection of the "bien économique".[149] The State fosters certain policies and economic choices which reflect in this economic public policy that, understood at an internal level, appears as limiting parties' autonomy in certain economic relationships. Indeed, economic public policy materialises an *"idéal technique qui fonde le droit économique"*.[150] The development of this notion has prompted other distinctions such as the one between *ordre public de direction* and *ordre public de protection*.[151] These expressions reflect internal rules that are midway between internal public policy rules and complete party autonomy. When the distinction between internal and international public policy was undertaken it was ascertained that internal public policy would be in many

[149] See for instance Savatier,1965. Ghestin (1993:95) points out that economic public policy appears then as a legislative notion more than a jurisprudential one which exhibits the features of *"révolutionaire et dynamique... en particulier dans le domaine économique qui constitue aujourd'hui une part essentielle de l'ordre public..."*.

[150] Savatier,1965:37.

[151] Chapelle,1979:269; see also Ghestin,1993:103ff, Nos.130 and 136. *Ordre public de direction* fulfils a positive function, since it indicates in an authoritative manner to the collectivity a certain economic direction by means of specific legislation. *Ordre public de protection*, on the contrary, fulfils a negative function. Instead of promoting a general economic policy, it ensures the balance in contractual relationships when there exists a weak party.

ocasions reflected in international public policy. Suffice it here to indicate that the protecting aims that this internal economic public policy fosters will also find a reflection in the international sphere.[152]

International economic public policy exhibits then a specific character that, nevertheless, is not completely alien to internal requirements. The development of this feature is closely linked to the growth of international trade and the enlargement of international relationships. States have to face both the defence of State economy choices and the membership of an international community that entails certain common interests to be protected. Such diversity has favoured the appearance of new features in order to cope with these interests, namely mandatory rules. These rules have developed in an astonishing way in relation to the most diverse areas. At the same time the clear-cut distinction between public and private law has vanished and the extraterritorial application of law is accepted as a necessary tool to ensure the growth and development of national laws and international trade.[153] These phenomena explain why it has been said that in this field [of economic legislation], public policy is a provisional and "fuzzy explanation of intuitive and *ad hoc* solutions to new problems, a secret laboratory where new rules crystallize".[154]

Which are those areas where international economic public policy is called on to apply? As

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[152] Misunderstandings should be avoided, however. Otherwise unnecessary confusion is introduced, as for instance happens when Chapelle (1979:291 vol.I and 477-8 vol.II) transposes the criteria of domestic economic public policy to international public policy. He indicates that international *ordre public de protection* fulfils an role of rejection, while international *ordre public de direction* exhibits a connective character that plays a positive function. Such a distinction forgets that positive and negative effect occur with any application of public policy. Moreover, the negative function that *ordre public de protection* plays at the domestic level does not respond exactly to the international sphere. Indeed, the protection of weak parties here entails the imposition of specific positive rules of State intervention.

[153] The phenomenon of extraterritorial application of law is not exclusive of economic law. Indeed, it could also be argued that some features of civil law (namely family law of Muslim countries) endeavour to reach such extraterritoriality. However, it would seem that the extraterritorial application of the latter is more difficult to justify than the extraterritoriality of economic law. As Rigaux (1988,132ff) indicates, economic relations, in opposition to family relations, tend to have a global character and thus are likely to affect in a more direct way the interests of the legal systems. He further argues for the intrinsic international character of economic relations that does not necessarily exist in family matters.

[154] Verheul,1979:118. The importance of economics is not to be neglected since it affects almost all spheres of the legal system. Not only is there economic regulation at stake, but also more essential values such as human rights (see Verheul,1979:121).

has been pointed out, there are many fields where *ordre public* has been put at stake, either in the shape of public policy principles or in the shape of public policy rules (mainly of mandatory rules). For instance, in relation to company law,[155] bankruptcy and winding up of societies,[156] intellectual property,[157], immovable property, etc. These devices may be grouped under three headings. The first one refers to the sustenance of international regulation practices. Under this heading the fulfilment of two kinds of aims is envisaged, namely the regulation of international trade on the one hand and the protection of an international 'morality' in trade on the other hand. The second field to tackle concerns the legislation put forward in defence of the interests of the State. Third and last, comes the the protection of private parties.

These rules incorporate on many ocasions a public law component. However, the public law nature of a rule does not exclude that problems of conflict of laws arise. As the IDI has established in its Resolution on the application of foreign public law, *"le caractère public attribué à une disposition du droit étranger désigné par la règle de conflit de lois ne fait pas obstacle à l'application de cette disposition, sous la reserve fondamentale de l'ordre public"*.[158] The same Resolution expressly excludes any kind of distinction, as regards application, between foreign public law rules which aim at the protection of private interests and those rules which aim at the protection of State interests.[159] Public policy ensures thus, its primacy as the last safeguard of the legal order. It should be noted, as will be confirmed by the case-law here analysed, that the same public policy will be one of the criteria to precisely attain the opposite effect, that is, the application of foreign mandatory rules in the forum. Certainly, this element will be taken into account when the rule is evaluated by the

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[155] Paris, 3.10.84, (R.C.D.I.P., 1985,526); Belgian Cass., 27.9.27 (*Pas.*, 1927, I, 296); App. Milano (3.10.86) *Industrie Creusot Loire*, (Foro it., 1987, 3238 No.760).

[156] See for instance the two judgments given by the Trib. Com. de Bruxelles (of 18.6.65, (J.B.C., 1968, p.161) and of 20.6.75, (J.B.C., 1979,628) that sanctioned the violation of Belgian public policy by the German law that does not respect the principle of equality of creditors.

[157] Trib. Milano (29.10.64) *Srl Ariston Edizioni Musicali v. Srl Edizioni Southern Music*, (Riv. dir. ind. 1965,II,279); French Cass. civ. (1ère) No.172 of 28.5.91 (IIC, vol.23, 1992,702).

[158] See Article I.1 of the Resolution, Ann. Inst. int.56 [Wiesbaden session on 11.8.75] 550 (emphasis added).

[159] Article III, (ibid. 552).

judge, in the same manner as it will happen in relation to other elements such as the 'autolimitation' of the rules, or their unilateral or extraterritorial character. Each one of these features will be studied in the following paragraphs.

i. Regulation of international trade

The rules that aim at the regulation of international trade encompass several fields of diverse nature. While some aim at the object of this trade (e.g. cultural goods, drugs or weapons), other concentrate on the means (namely monetary and exchange regulation). The latter require attention in the first place. It is peacefully admitted that, in the forum, monetary rules claim immediate application.[160] Usually, judges will feel that a rule/principle of public policy has been violated when it pertains to the forum. On the contrary, a State will not accept foreign rules in fiscal/monetary matters as pertaining to public policy.[161] Consequently, it is exceptional that a violation of the foreign rule in these matters appears as inmoral according to forum law. However, it is not impossible that this possibility occurs since monetary rules in general (exchange rate rules in particular) usually appear as mandatory rules and hence can come under the scope of international provisions - such as Article 7 of the Rome Convention - which leave for the judge an open door for the application of these foreign rules; this is so in spite of the fact that they are clearly public law rules.

Monetary matters require a reference to Article VIII(2)(b) of the Agreement constituting the IMF. According to it, mandatory rules of Contracting parties should be accepted by other States unless they offend the forum's principles. In this sense, the clause provides the framework to apply foreign monetary mandatory rules in the forum. It is interesting to note that the Bretton Woods Agreement can be understood as providing, on the contrary, an

[160] Upheld this view the following judgments : *Boissevain v. Weil* (1950) A.C. 372.343 in England; judgment of 8.4.58 of the Spanish Tribunal Supremo; judgment of 9.5.83 of Cour de French Cassation, *Les jardins de Grimmand v. Société d'études juridiques et fiscales*; judgment of 2.6.84 of the Italian Corte di Cassazione; judgment of 6.4.76 of the Austrian OGH.

[161] Trib. Milano (25.1.82) *Privatkredit Bank v. Bassi* (RDIPP 1983, 126); App. Bologna (19.4.83) *Melanca Motori spa v. Savoie sa* (Giur. it. 1983, I, 2, 625); App. Milano (5.6.90) *Mobilia Italia v. Clairval* (RDIPP 1992,1001).

example of (express) exclusion of the public policy clause in the framework of the IMF.[162] Indeed, this Article can be tackled as exhibiting a twofold nature; on the one hand it has a negative aspect by means of which States are constrained to respect the prohibition; on the other hand, it shows a positive effect by means of which judges are required to give effect to another State's monetary policy that goes beyond conventional cooperation.[163] These considerations suggest that the formal wording of the Article is the less relevant thing if cooperation among States is ensured.[164]

Cooperation at the international level is also manifest in relation to the legality of the object of trade. Thus, illegal deeds that take place at the international sphere also prompt the intervention of public policy, either because the forum feels its own *ordre public* threatened or because an international *ordre public* is endangered. Typical examples that provoke such a reaction are smuggling,[165] traffic of influences,[166] traffic of drugs or weapons[167] and protection of cultural goods. The protection of the latter induces States to enact specific protective rules, admitedly of mandatory nature. What is striking from the case law is the acceptability that these rules find in other fora. Such a statement is confirmed by German and Italian decisions concerning the illegal export of artifacts that are frequently cited as reflecting a true international public policy (or a public policy of the international community).[168]

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[162] Juris-classeur droit international, fasc.534-1 p.11 n°44.

[163] Rigaux,1989:326.

[164] The breadth and complexity of the matter exclude a wider reference to it. For a more thorough study see Guardans,1992:178ff.

[165] See for instance the following French case (R. 1956, 580) that states: "If French judges are not called on to punish in French courts the violations committed abroad against the public policy of a given State, nevertheless, they must consider as illegal and therefore devoid of validity smuggling operations which, as they violate foreign laws, do infringe as in the present case, international public policy".

[166] See Q.B. *Lemenda Trading Co Ltd v. African Middle East Petroleum Co Ltd* (C.L.J. 1988,169). See also Gent (16.1.86) *SA De Hoop International v. SA De Meyer Zelzate* (J.T. 1989, 108).

[167] See for instance the following cases: Seine, (2.7.32) *Flörsheim v. Delgado Chalbaud* (Journal 1933, 73) on credit to finance a coup d'Etat in Venezuela; Paris, (9.2.66) *Favier v. Société Andersen* (Rev cr. 1966,264) and Brussels, (2.5.88) *Lavi v. Asco & al.* (J.T. 1989,131) on contracts for the sale of weapons.

[168] (See point 2.1.(b) of this chapter). The German Federal Court (German Bundesgerichtshof, (22.6.82) *Allg. Vers. G.H. v. E.K.*, BGHZ 59, 82) considered as void an insurance contract relating to goods illegally exported from Nigeria as against *bones mores*. It is interesting to note that the Court did not apply the Nigerian mandatory rule as

The first block of State rules which concern international trade include certain political measures that could hardly be defined as public policy rules, precisely because of their political character. Boycott or embargo are typical examples of these rules that conceal political criteria behind economic regulation. These rules put at stake problems other than conflict rules. Indeed, they may have incidence not only in the relations between States,[169] but also within State boundaries.[170] It is interesting to note that judges, when confronted with such rules, tend to reason as if they were tackling foreign mandatory rules. In principle a clear distinction can be set between the application of public policy and the consideration of political rules.[171] The case-law on these matters reveals that political-economic rules usually are taken into consideration in the forum when the latter recognises the same interests as the State whose law is at stake.[172]

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such (that was not applicable under the relevant conflict rule) but *lex fori*. Such a heterodox procedure proves that a kind of international morality specific to international trade (which includes the respect of foreign laws that protect the cultural heritage of a State) is acknowledged. This assertion would be moreover confirmed by the fact that the court took into consideration the Unesco convention of 1970 relating to measures aimed at prohibiting the illicit import, export and transfer of ownership of cultural goods, although it was not in force in the State of the forum. The same reference can be found in a Italian case, concerning Ecuadorian cultural goods. The Italian court (Trib. Torino, (25.3.82) *Repubblica dell'Ecuador -Casa della cultura ecuadoriana v. Danusso*, RDIPP 1982,625) assessed that Italian public policy was inspired in the values recognised by the convention.

[169] The Hague (17.9.82) *Cie. Européenne des pétroles S.A. v. Sensor Nederland*, R.C.D.I.P. 1983,474.

[170] *Banco Nacional de Cuba v. Sabbatino* (376 U.S. 398,84) reflects clearly the conflict between the judiciary and other powers in the U.S. These conflicts may even reflect the conflicts of economic policy as they arise from sectorial interests within a State (see Rigaux,1988 for further analysis).

[171] Indeed, any confusion should be avoided since *"il y a une différence caractéristique entre l'effet de la non-application des lois politiques et l'effet de la non-application d'une loi causée par l'incompatibilité de cette loi avec l'ordre public du pays du tribunal: dans cette dernière hypothèse, le tribunal applique la loi de son ordre juridique réglant le rapport auquel la loi étrangère ne peut pas être apliquée en raison de l'ordre public; en cas de refus d'appliquer une loi politique étrangère, le tribunal n'applique rien du tout..."* (Gihl,1953:221). Despite the fact that this application of the forum law might be subject to correction, the basic idea underlying the quotation is still valid.

[172] See for instance the *Borax* cases decided by the German Federal Court in the 60's in relation to an American embargo (BGH, 27.12.60, BHGZ 34,169 and BGH, 24.5.62, NJW 1962,1436). These decisions take into consideration the foreign rule but at the same time they also insist on the damage to the German economy as well as on the general interest of the whole Western 'free' world. Precisely this lack of interest-connection of the foreign rule with the forum in which it claims application has entailed the refusal of American embargo measures on two other ocasions, namely the French case *Fruehauf v. Massardi* (JPC 1965, 14274 bis) and the Dutch case *C.E.P.S.A. v. Sensor Netherlans BV* (The Hague Rb, 17.9.82).

ii. Legislation protecting State interests

The second group of partiçular public policy rules consists of the legislation passed to protect State interests. These rules, because of their protective character, usually appear as mandatory in States. However, it is not exceptional that they find 'extraterritorial application' in those situations where, although generated abroad , they may produce effects in the forum. Such a tendency is particularly noted as regards competition rules, nationalisation, expropriation and tax law.

If competition rules, as an expression of essential choices of the forum, are progressively accepted as reflecting economic public policy,[173] admission of the extraterritorial character of competition rules appears as particularly complex. American courts have settled on the 'effects doctrine' in these matters. According to it, if a foreign decision is likely to produce anti-competitive effects in the forum, the latter may impose its competition regulation -taking into consideration certain parameters settled by case-law.[174] Furthermore it could be wondered whether courts may not only apply their own competition law, but take into consideration another State's regulation that is concerned. In the case *British Nylon Spinners v. ICI Ltd*[175] the English court rejected that possibility (insisting on the fact that all connections centred on English law and jurisdiction). It would seem, on the contrary, that obligations which have at their basis practices restricting competition of another State, will compel the judge to have consideration of that violated rule in order to decide about the obligation at stake.[176] This taking into consideration entails, however, a certain link between the foreign rule, the case at stake and the attainment of fairness, in order not to favour the

[173] See for instance the Spanish court for a defence of free competetition that ascertains the protective role of economic public policy against unfair practices as regards competition: TDC pleno R. 20.2.91, La Ley, 1992-1,837 (83-TDC).

[174] See the evolution of the American doctrine in case *Alcoa*, C.A. 2nd Circuit 1945, 148 F. 2d 416; *USA v ICI Ltd* N.Y. S.D. 30.7.52 and *USA v. Watchmakers of Switzerland*, N.Y.S.D. 1962 as corrected by *Timberlane Lumber Co. v. Bank of America* (27.2.76) C.A. 9th Circuit 549F. 2d 597.

[175] C.A., (1955) 1 *Ch.* 37.

[176] This was, in actual fact, the further step in the ICI case, when the Chancery division had to rule on the cesion of patents between the two companies as result of the anti-competitive measure.

faulty party.[177]

From an internal point of view nationalisation and expropriation do not raise considerations of public policy. The problem araises in relation to the recognition of these effects by foreign courts.[178] The territorial character of nationalisation (and expropriation) does not stand any more as an absolute argument to refuse recognition (or effectiveness) to decisions of the kind in another State.[179] Two considerations may lead the forum to reject the foreign decision of nationalisation. Firstly, the objectives that the decision pursues. The fact that it exhibits a strong public character and fosters State interests is not sufficient to deny recognition where those interests are legitimate according to the forum criteria of evaluation.[180] The second consideration of the courts concerns the non confiscatory and non discriminatory character of the measure.[181] This entails the granting of an indemnity the lack of which condemns the nationalisating measure.[182] As regards the non-discriminatory character it would seem that not every discrimination violates public policy. However, discriminations based on the nationality of the expropriated will decidedly not be accepted.[183] The effects of an expropriation may be taken into consideration by foreign courts as deciding cases which are not directly concerned with the issue.[184]

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[177] In this sense, see Trib. app. Bruxelles (9.12.68) *Bara v. Advance Transformer Philips*, (*Pas.*, 1969,II,44).

[178] The following considerations refer to nationalisation of goods. Nationalisation of credits exhibit some distinct features that shall not be studied here. For further analysis see Iuris classeur 534-3 p.14 and Guardans,1992:247.

[179] See Juris-classeur, droit international, fasc.534-3, No.69.

[180] Trib. Roma (13.9.54) *Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R.*, (Rev. crit. 1958,532) provides a clear confirmation of the statement. In the same line, see Swiss Federal Court (2.2.54) *Ammon v. Koninglijke Nederlandsche Petroleum Maatschappij*, (I.L.R., 1954,26) and Belgian Cour de cassation (2.6.60) *Agebel v. Koh-I-Noor & Hardmuth*, (*Pas.*, 1960,I,1144).

[181] Com. Bruxelles, 25.9.87, (R.G.604/82).

[182] French Cass. civ. I, 14.3.84 (JCP 84). The study of the evolution in the understanding of the notion of indemnity is far more than ambitious in this context. For further references see Juris-classeur, droit international, fasc.534-3 No. 73ff.

[183] Paris, 25.6.58 (*Clunet*, 1959,1098); Bruxelles, 4.5.39., (B.J., 1939,450).

[184] See namely case *Rumasa S.A. v. Multinvest -Williams & Humbert Ltd. v. Williams & Humbert Trade marks (Jersey) Ltd.* (1986) All E.R. 133.

Tax law is another manifestation of regulation in the interest of the State which may have, nevertheless, an influence in the resolution of cases between individuals. Courts seemingly accept that the principle of territoriality does not necessarily play a role in these matters and foreign rules may be given effect in the forum. Thus, a contract governed by English law but concluded by a fraud in Japanese revenue law, is deemed to be contrary to English public policy.[185] However, it would not be admissible to rely on the infringement of a foreign mandatory rule in order not to comply with another obligation that does not derive its validity from the previous infringement.[186]

iii. Legislation protecting private interests

This review concludes then with the legislation that is aimed at the protection of private interests. The paradigmatic rules are those concerned with maritime transport[187] and the protection of the weakest party in contractual relationships, namely workers and consumers.[188] As regards protection of workers, both public policy principles and public policy rules (mainly mandatory rules) play an essential role. It would seem that courts reject three categories of dipositions on grounds of public policy. Firstly, discriminatory dispositions are excluded. A second exclusion concerns the dispositions that restrict in an excessive manner the freedom of workers in matters of non-competition and professional secrecy. The third category is constituted by dispositions which limit the right of workers to ask for civil

[185] Q.B. *Mitsubishi Corporation v. Aristidis I. Alafouzos*, [1988] 1 *Lloyd's L.R.* 191.

[186] This was the case that was solved by the English courts, *Euro-Diam Ltd. v. Bathurst*, (Q.B. [1987] 2 *All E.R.* 113). Fiscal German law had been infringed and the insurance company pretended to rely on that infringement in order not to pay the indemnity which derived from the robbery of the diamonds that had been insured and illegally introduced into Germany. The court assessed the insufficient link of the insurance contract to the illegal deed and therefore, the irrelevance of the latter to the fulfilment of the obligation.

[187] Maritime transport has generated a large case law and it is commonly admitted that the *Alnati* case (Hoge Raad, of 13.5.66) is the precedent that opens the door to the admission of foreign mandatory rules. Despite its interest, this matter shall not be dealt with since it would enlarge in an excesive manner the object of this research. Suffice here these brief remarks.

[188] Tenants, who are traditionally protected under national law, could also be included within this section. It is noted, however, that this is a category that in a private international law context may be encompassed under the heading of consumer protection.

liability actions in the case of professional injuries.[189] Together with these cases, States have developed a consistent web of mandatory legislation which covers most of the aspects of the laboural relationship. In this sense, the following should be related: dispositions concerning the 'délai minimum de préavis' and indemnities to be derived from it,[190] dispositions on security and hygiene, those protecting specific categories of workers (i.e., the more vulnerable ones: children, women and disabled). It is even possible to find case law where no distinction is made and all legislation concerning labour law is deemed to constitute international public policy as far as it grants minimun inderogable rights in favour of the worker.[191]

Consumer protection is developing in many sectors and accordingly, gives rise to case-law in diverse sectors such as banking, insurance, renting. Case law in consumer contracts is not too frequent since the latter do not involve such large sums of money as to encourage litigation (and moreover litigation that reaches higher courts). However, some examples can be traced in French case-law as regards insurance contracts. A certain confusion between mandatory rules and public policy is noted. In short, those decisions allow the victim to directly sue the insurer of the tortfeasor as result of mandatory legislation. However, such *actio* is given to the victim in the interest of public policy.[192] A similar reasoning can be found also in cases concerning renting.[193]

The cases so far analysed show how difficult it is to define 'a priori' the contents of the rules that a judge may deem to be essential in economic matters. A convergence of interests emerges nevertheless, with clear features. States tend indeed to pursue the same policies and the conflicts appear at the stage of application. The rationality of the choices is the same; the

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[189] See references in Morgensten,1986:47.

[190] Belgian Cour de cass. 25.6.75, (Pas., 1975, I, 1038).

[191] Trib. Roma *Scozzaro v. United Press Association*, (Dir. Lavoro, 1950, II, p.117) so states; see also Italian Cass. (6.9.80) *Ditta Gruenig Marmorindustrie v. Kroh*, (RDIPP, 1981,923) and Cass. sez. lavoro (9.11.81, No. 5926) *Marinaro v. Banco di Napoli*, (Foro padano 1981, I, 192).

[192] Trib. app. Paris (16.3.60) *Great American Indemnity Co. v. Dubois* (Rev. cr. 1961,350); Cass. civ. (11.5.62) *Ets. Carrière-Durisol v. Cie d'assurances "La Protectrice" et al.* (Bull. civ. 1962-IV, 393).

[193] Cass. soc. (16.1.53) *Sabatier v. Salort et Dubois* (Rev. Cr. 1953,581).

means are divergent. Thus, specific economic regulation changes from one State to the other. The application of forum mandatory rules appears as a manifestation of the essential policies and values that the forum fosters. Their application supposes the existence of a deep link to the forum that can be spoken of in terms of *Inlandsbeziehung*.

Economic matters have proved to be the 'laboratory where new rules crystallise', especially as concerns application of foreign States' regulation. Foreign mandatory rules (understood as those rules which do not belong to the forum law or to the *lex causae*) are being introduced progressively in the forum. Courts are not very precise when justifying the application of these rules. Sometimes they appear to respond to a concern of comity while on other occasions the forum's public policy seems to be at the basis of their application. However, a distinction must be advanced: while the application of mandatory rules that aim at the protection of private parties (the third group referred to) is 'automatic' (where the conditions of application of such rules are fulfilled), foreign rules that aim at the regulation of international trade on the one hand, and the defence of State interests on the other hand, require the violation of the rule in order to activate the protection granted by the forum.

From the displayed case-law it can be deduced that the fulfilment of best criteria of justice is most of the times at the basis of the application of these rules. This ascertainment leads to a last remark, i.e., the role that human rights play in such pursuit of justice. Public policy must be read under the light shed by human rights. The latter become an essential element to understand public policy and moreover, they become on themselves criteria of public policy. Suffice here with this comment that will be developed in chapter II.

4. CONCLUDING REMARKS

The first chapter has undertaken the task of defining and delimiting the notion of public policy. The moment has come to make an overall evaluation of the conclusions reached. The starting point of these reflections was the notion of sovereignty. Public policy appears indeed as a particular relevant manifestation of sovereignty in all its aspects, either in the internal sphere - since it settles legislative limits to private parties' will and delimits what is to be understood as 'common interest', or at an international level, with a correspondent affirmation of national identity (and power) as against other sovereign States. This is so both as regards the imposition of its legislation and the recognition of foreign decisions in its territory. This starting point was confirmed by the ascertainment of new manifestations of sovereignty, more adapted to new circumstances, and the role that human rights play in the configuration of State's identity. However, the absoluteness of sovereignty appears tempered by the acknowledgment of the State belonging to an international community. In this sense, sovereignty cedes in favour of a kind of international solidarity (cooperation) in matters of 'transnational' interest - environmental policy, protection of cultural goods, etc - and where universal values as human rights so require.

States undergo a process of reduction of sovereign powers in favour of supranational entities. Sovereignty remains, nevertheless, the main reference point as against those entities. This membership of supranational organisations entails the main consequence of opening up the State to other criteria, values and policies which are common to several (even to all) States. Such a sharing explains the distinction put forward between absolute and relative public policy. Relative public policy reflects the more idiosyncratic elements of each State. The defence is only activated where there is a particular connection with the forum that requires such a reaction. On the contrary, as regards absolute public policy, no particular link is required. Absolute public policy defends principles and values that are common to many States. They are of such importance that they are defended by themselves, without any particular link to a concrete State that promotes them, in the acknowledgment that they form their own system but and are not exclusive to any State.

This distinction brings about the reference to the ancient *communio iuris*. The progressive

internationalisation of relationships and the belonging of States to supranational entities and international organisations should not lead one to misunderstanding: both relative and absolute public policy are national notions that may be distinguished by the bigger or lesser intensity of the *Inlandsbeziehung* and the universality of the values at stake. In opposition, a true international public policy may be found in the feature of transnational public policy. Its truly international character at its origin derives from it being applied by arbitration courts (that are not bound to any territory) and from its object, since it would regulate international commercial transactions. The progressive recognition and strengthening of human rights opens a door to a larger notion of true international public policy that is not only a common agreement on some aspects but reflects universal values that cannot be overlooked by any State which belongs to the international community. Seemingly, at a regional level the concretion of such a notion will find quicker success.

Public policy evolves as private international law so requires. In this process of evolution must be understood certain recent features, namely mandatory rules. If the latter appeared to safeguard *"l'organisation politique et sociale du pays"*, nowadays they have become an essential mechanism to grant material justice. These rules appear as a manifestation of public policy rules which are to be distinguished from public policy principles. While rules show particular suitability to protect concretely national concerns and then, appear as the logical manifestation of relative public policy, principles exhibit a more general reach which reflects common concerns that, no doubt, bring about more easily absolute public policy. However, no strict identification between rules and relative public policy on the one hand and principles and absolute public policy on the other, should be imposed.

The main problem that mandatory rules raise is their relation to public policy. If it is admitted that they are public policy rules it is also certain that they do not operate in the same way. Indeed, mandatory rules do not fit into the savignian system of conflict rules but they constitute a system by themselves. These two parallel systems provide the legal order with a defensive mechanism that is activated when essential principles, values and policies are threatened. What distinguishes both systems is not the substance of the protection afforded, since it has proved to be similar, but the way of application. While traditional public policy rules firstly put forward a negative effect and then, the positive one, mandatory rules stress

firstly the latter aspect and only in a second term leave place to the negative effect.

The previous considerations provide the necessary references to understand the potential (and real) conflicts that may arise between public policy and mandatory rules, both at a purely internal level (i.e. within a legal order) and the conflicts between different systems (either conflicts of mandatory rules or conflicts between foreign mandatory rules and State public policy). Conflicts within a legal order may hardly take place. A legal system endeavours to appear as a unity, compact and with no gaps. In principle no contradiction is possible between its elements since a presumption of compatibility rules the system. It is nevertheless noted that not all the features interacting within the system have the same value (strength) and that some may in fact not be in accordance with others. Either hierarchical criteria or substantive contents provide elements of solution to the conflits at stake. As regards public policy it was ascertained that mandatory rules are deemed to be precisions of public policy principles. This implies that the latter must prevail; moreover if the rule is likely to change, since it is one of the possible developments of the principle, it is logical that the latter takes preference. In this context it is to be remembered that public policy principles will stem in many ócasions from international treaties and conventions to which the State is bound and should respect.[194]

In a framework of private international law, where the principles and rules of different States may concur, the solutions reached in the previous hypothesis are also helpful. If two mandatory rules (belonging to the forum and to a third State) claim application in a case, several are the criteria that may decide upon the application of one or the other. Despite the theoretical equality of State rules, a clear predisposition to favour forum law exists.[195] In this sense, the connection to the forum will favour the application of forum mandatory rules in detriment of foreign mandatory rules. If the latter exhibit, on the contrary a closer link to the situation, it will be ascertained whether they claim application or not. The balance may

[194] Despite the presumption of compatibility, it is no less true that public policy is a variable notion and so, subject to change. This entails that, in residual cases, an essential principle stemming from an international convention may withdraw in favour of a national principle - see opinion of Judge Moreno Quintana in case *Boll* at p.104 -. However, it has been argued that the (public policy) principle invoked by the State would not be completely internal but since "its content must be determined in the same way as that of any other general principle of law in the sense of Article 38 of the Statute, namely by reference to the practice and experience of the municipal law of civilized nations in that field" (opinion of sir Hersch Lauterpacht in case *Boll* at p.92).

[195] Rigaux,1989:135.

be broken also in favour of the rule which claims to be a development of an international convention. Where there is an absence of convergent interests (for instance when the same provision exists in the forum but has not got the character of public policy), it appears as rather difficult that the forum should endow the foreign law with the character of public policy in the forum. Moreover, if the foreign rule advances objectives which are decidedly opposite to the forum public policy, the foreign rule will not be applied. This usually happens when those rules come within the spatial scope of application of a forum public policy principle or rule.[196] The question arises whether the forum, once it has accepted the foreign mandatory rule, may reject it on the grounds of it being contrary to public policy. There is a favourable opinion among scholars which reflects again the same conflict presented at a purely internal level. Where public policy principles are threatened, foreign public policy rules have to withdraw.

Public policy appears then as a functional notion which exhibits different manifestations. The point has come to ask about the effects of the application of public policy once it has been activated. A distinction must be put forward between public policy principles and public policy rules. The former fulfil their function by indicating the forum's frame of tolerance; therefore, once it has repealed the foreign rule or decision its function is over. Such a functioning suits the protection of human rights and other absolute values.[197] It may, however, lead to unfair results (in some cases to a denial of justice) that tend to be solved by the acknowledgment of the *effet atténué de l'ordre public*. In this sense the safeguarding of essential values is balance with the fulfilment of effective material justice.

As regards public policy rules, again a distinction should be drawn between public policy rules and mandatory rules. It has been argued that the main feature to distinguish these rules

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[196] Bucher(1993:98) gives as an example the case Soljenitsyne, where the contract of edition, which was ruled by German law, could not be affected by the Soviet prohibition to dispose of the rights of intellectual property that clashed with the German protection in German territory (Decision of 16.4.75, BGHZ, 64, p.183, Rev. Crit. 66 (1977) p.72).

[197] It must be admitted that human rights protection has not yet attained such a universal acceptance and it still depends on States. In this sense, public policy appears as a means of protecting human rights and by means of it, of attaining material justice. Precisely the fulfilment of material justice becomes an essential aim of private international law. Such an aim responds to the necessity to adapt to the requirements of modern times, where simply a localisation of the situation in order to identify the rule to apply does not suffice any more.

is noticeable in relation to the effects of the rule. While public policy rules firstly display a negative effect and then a positive one, mandatory rules follow the opposite procedure. The main concern here is in the evaluation of the positive effect.

In relation to public policy rules two main streams are usually accepted: either the substitution of the foreign rule by the forum's rule, or the substitution of the former by another rule which pertains to the same legal order as the rejected one. As was pointed out, these proposed solutions are by no means absolute. Seemingly it is more convenient to take into consideration the nature of the foreign rule and the effects it aims to produce in the forum. If the foreign rule is a permissive rule that violates a prohibition of the forum, the eviction of the former implies an invalidation of the act. Therefore, it would also imply the substitution by the *lex fori* which is applicable in relation to that issue. On the contrary, where the foreign rule is a prohibition that runs counter to a permissive rule of the forum, the former rule will likely be substituted by another foreign permissive rule which derives from the common rules.

Mandatory rules put at stake other considerations. Firstly, a distinction appears depending on the kind of rule, either forum or foreign mandatory rule. If a forum mandatory rule is applicable, the effects of its application to the act will be established by forum law, that may vary according to the interest protected and the technique used in each case. The whole legal order is concerned. In this sense, the judge will take into consideration other principles inspiring the system.[198] If the rule which shows a closer link to the forum is, on the contrary, a foreign mandatory rule, the considerations are somewhat different. The forum can face two cases: either the exclusive invocation of the foreign rule or its concurrence with the forum law. The main problems appear because of the terms in which these rules are called on to apply. Indeed they may be 'taken in consideration'[199] or be 'given effect'.[200] These

[198] An example that may illustrate these considerations can be found in Spanish case-law. In Spain the presumption of nullity (as embodied in Article 63 of the Civil code) may be balanced with the principle of conservation of the contract. This means that, unless the contract has been concluded with the intention of violating the forum's law, the system will avoid the complete nullity of the act/contract. A manifestation of this technique can be found in the distinction between the substance and the formalities of conclusion of the act/contract (Sentencia Trib. Supremo [1ª] of 6.4.63 *Remitex v. Industrias Mendoza* in relation to rules on exchange control; in the same line, but this time as regards foreign investment in Spain, see Sentencia Trib. Supremo[1ª] of 15.10.83).

[199] In the wording of Article 19 of the Swiss LDIP.

terms try to set a difference with the strict 'application' of the rule. In this sense it can be understood that the rule must be respected in its essential consequences, but is not to be applied with all its effects. Foreign mandatory rules which impose an obligation to do or not to do something may be operative in the forum but this does not mean that their violation entails the sanctions foreseen by the foreign law. In other words, only the indispensable effects for the fulfilment of the objective of the rule will be considered. It would seem then that the application of foreign mandatory rules will have to be taken into consideration and be integrated within the *état de fait de la lex causae.*[201]

These considerations project not only the dynamic character of public policy, but also its conception as a means of fulfilling material justice in the context of private international law.[202] The fact that public policy is not a single phenomenon, but shows different sides, proves the actual interest of the system in adapting to the necessitites of the contemporary world. Thus, mandatory rules appear as a means of protecting weak parties in specific relationships (namely consumers, workers, tenants); this specificity will favour the progressive incorporation of this kind of rules in 'detriment' of public policy principles. Public policy may not be given a definite shape, as has been seen while the content and application of the notion have been tackled. However, this functional notion can be defined as reflecting the most essential basis of the legal system in which it is enshrined, precisely those elements that make each system individual and distinct from the others. At the same time, it may be envisaged as a general principle of law (in the sense of Article 38 of the Statute of the ICJ[203]) which conveys potential integrative effects -if the fulfilment of material justice is considered. These two factors are the guidelines for reading the following chapters.

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[200] Which is the wording used by Article 7 of the Rome convention.

[201] Bucher,1993:103.

[202] Thus, Sir Hersch Lauterpacht, in case *Boll* states that "the purposes of private international law is to make possible the application, within the territory of the State, of the law of foreign States. This is an objective dictated by considerations of justice, convenience, the necessities of international intercourse between individuals and indeed, as has ocasionally been said, by an enlightened conception of public policy itself" (p.94).

[203] See Bucher,1993:76; Mosconi,1989:43-59.

CHAPTER II:
ENFORCEMENT OF FUNDAMENTAL RIGHTS

INTRODUCTION

The approach made in chapter I to public policy has led to the acknowledgement that public policy exhibits a substantive concern and shifts from abstract principles of justice to more concrete requirements that can be put in terms of material justice. It is contended that human rights constitute an essential reference point in order to individualise public policy as a means of fulfilling material justice. This is so because they add a certain content to the notion. Thus, the three levels of public policy (ethical-moral values, national identity signs and legal-economic standards) entail, in a more or less direct manner, a choice concerning human rights. Admittedly, it is at the ethical-moral level that human rights are more likely to be identified. Although the three layers are not hierarchically ordered, a certain preeminence was accorded to ethical-moral values. This confirms that the approach to human rights accounts mostly for the difference between notions of public policy.

Human rights fulfil an essential role as far as public policy is concerned also from a functional viewpoint. The ancient conception of the defensive notion is substituted by a cooperative approach between the States of the international community. In other words, human rights constitute the key -if not to a true international public policy, at least to a regional public policy which overcomes State particularities.

The first purpose of this chapter is thus, to ascertain to what extent fundamental rights are at the basis of public policy and the consequences that can be drawn from this fact. Therefore the first inquiries will concentrate on the localisation of fundamental rights; this will be followed by the ascertainment of whether there is an actual community of shared values. The latter points will provide the measure of the impact of fundamental rights in public policy. The second part of the chapter will display then a general approach to human rights and its concrete implementation in the shape of public policy in the European area.

1. FUNDAMENTAL RIGHTS AS CONSTITUTING ELEMENTS OF PUBLIC POLICY

1.1 Where are fundamental rights to be found?

Modern times have seen atrocities perpetrated by men; but at the same time a growing concern about human dignity and the respect of the world man inhabits have developed and have consequently driven societies to the adoption of various treaties and international conventions. This concern also (and moreover) takes place at a national level, where constitutions enshrine full catalogues of human rights that are progressively more complete and adapted to the requirements of present times. International treaties and national constitutions are the points that will be dealt with next.

a. International treaties

After the Second World War international organisations with the most diverse purposes, either at a regional level or at a global level, have been concerned with the elaboration of international treaties (and/or other diverse international instruments such as decisions, protocols, declarations, etc) in order to favour international cooperation and the peaceful coexistence of nations.[1] Some of these treaties directly deal with fundamental rights issues, while others apparently do not show a direct link with them. The former do not need particular introduction: general instruments on fundamental rights that can be referred to are the United Nations Universal Declaration of 10.12.1948 and the two Pacts of 6.12.1966 (on economic, social and cultural rights on the one hand, and on civil and political rights on the other hand), the European Convention on Human Rights of 14.11.1950 (ECHR) and its Protocols[2], the American Declaration of Bogotá of 2.5.1948 and Convention on Human

[1] Without any pretension of being exhaustive, the following organizations could be listed: the United Nations, the UNESCO, the ILO, the OAU, the OAS, the Council of Europe, NATO, EEC (now EU), COMECON, etc.

[2] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1952; Protocol No 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights the competence to give advisory opinions of 1963; Protocol No 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention of 1963; Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those included in the Convention and Protocol No 1 of 1963; Protocol No 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22, and 40 of

Rights of San José de Costa Rica of 7.4.1970. Together with these conventions, other international instruments achieve a further development of these general instruments and show, on many occasions, an overlapping material scope. Indeed, general treaties on human rights may have the fault of having too vague definitions of the rights, just limiting themselves to aseptic enumerations. Necessary precision is provided then by particular conventions.

Other international treaties are not directly concerned with human rights but they may provide essential elements in understanding these rights. This may be the case of the International Labour Organisation or The Hague conventions on private law. The coverage of human rights is thus guaranteed by a complex net of international instruments. In this sense, all these treaties are a valuable assistance in order to define with more accuracy the meaning of human rights since they have to deal with concrete manifestations of the right and its understanding in particular situations.

Unfortunately, the existence of such web of conventions does not ensure either a general respect of human rights, nor a uniform understanding of them. Violations of human rights are permanently denounced, but States may retreat to positions of exercise of sovereingty regarding internal affairs which escape the intervention of the international community. This was China's position in the Second World Conference on Human Rights held in Vienna in June 1993. If the international community globally tends to reject this kind of argumentation - therefore implying international concern on human rights, the question as to the universality of human rights remains much of a confused issue. Even the classic universal text, the Universal Declaration - in the sense it is the outcome of the international organisation which encompasses the biggest number of States- is not outside the controversies. Formal and substantive points of opposition have been raised as to the universality of the Declaration. A thorough study of these points goes beyond the reach of this thesis, which has to limit itself

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the Convention of 1966; Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty of 1983; Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1984; Protocol No 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1985; Protocol No 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1990; Protocol No 10 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1992; Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby of 1994.

to some remarks on the matter.

Most of the formal criticism of the Universal Declaration relies on the non-binding legal character of the text. It would reflect an agreement in a concrete moment of recent history, but it does not engage UN Member States further than with 'moral' obligations. More important than the legal binding force of the Universal Declaration seems to be the acknowledgement that some rights are binding and are applied as such by States and international institutions.[3] We shall not enter in the debate, but just join the opinion that "the jurist should not bother too much about the issue of normative foundation of universality of human rights, as also the International Court of Justice (ICJ) does not seem to be bothered by it".[4] Probably a certain consensus could be reached on considering the Declaration as the expression of general principles of law as understood and interpreted by the International Court of Justice according to Article 38 of its Statute.[5]

The debate on the substantive universality of human rights is mainly promoted by Muslim countries and States from the Third World. The latter contend that the Universal Declaration is tainted with the limitation of identifying universal rights by Western criteria. However, such a contention sounds quite awkward in the mouth of those countries that have found in the human rights movement a useful weapon against colonial and racial policies.[6] In the same line of substantive criticism, a sector of Islamic countries claims that human rights are at variance with Islamic norms and the El Cairo Declaration on human rights in Islam. Although the latter Declaration exhibits a certain appearance of similarity with other texts, some doubts

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[3] Van Dijk (1995:110) identifies this acknowledgment as the universal normative applicability of human rights.

[4] Van Dijk,1995:109.

[5] Cassin (1951:294) had already sustained that *"la notion des droits de l'homme est certainement comprise, dès avant la Charte des Nations Unies, parmi les principes généraux du droit reconnus par les Nations civilisées que la Cour permanente de La Haye appliquait [...] conformement à l'article 38 de son Statut. On peut dire que la Charte a même fait du respect de ces droits en général, une règle positive de droit international conventionel"* (emphasis added). Carrillo Salcedo(1993:177) underlines how this view is uphold by paragraph 34 of the judgment of the Court of 5.2.70 (case *Barcelona Traction*) and in a more explicit manner by paragraph 91 of the judgment of 24.5.80 (case *Iran Hostages*).

[6] See Pathak's intervention in "Universality of Human Rights in a Pluralistic World" at p.9.

arise, however, as to the actual meaning of the rights there encompassed.[7] The diversity of regimes and of legislation in effect in Muslim countries may lead to conclude that El Cairo Declaration does not represent a true meeting of the minds on the part of Muslim governments about how Islam applies to rights. Moreover, it has been argued that, paradoxically, El Cairo Declaration provides for the opposite effect it pursues: the attempts to minimize and equivocate the appearance of deviation from the international norms are in effect forms of tribute to the normative force that the international declaration on human rights has acquired in Muslim *milieus*.[8]

If this position favours the universality of the Universal Declaration, the doubt arises nevertheless, whether it would be more accurate to refer to regional uniformity of human rights. Regional protection of human rights introduces positive features, since it adapts the understanding of the right to the particular conditions of a geographic area providing, in addition, the protection and interpretation of courts in those specific areas (as the European Court of Human Rights or the American Court of Human Rights). It should be remembered however, that a comprehension of regional systems is the first step in order to attain universal acknowledgment of human rights.[9] The latter will probably be admitted only when there is an independent world-wide authority (similar to European or American organs) that can give autonomous meaning to the norm through authoritative interpretation. As long as this is not so, different interpretations for different cultures may be legitimate.[10]

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[7] The maintenance of a clear religious intransigent point of view and a decided inferiority of women are two outstanding characteristics of the IOC Declaration. For a thorough study of the declaration and the discrimination it entails, see A. Mayer,1994:349 ff.

[8] Mayer,1994:326.

[9] Cassin (1961:121) hints of the danger of closing the understanding and protection of human rights within concrete delimited geographic areas. He indicates moreover that *"les plus grands périls découlant de la méconnaissance des droits de l'homme ne se présentent pas seulement dans les rapports entre États voisins, mais surtout de continent à continent... en définitive, la protection régionale des droits de l'homme doit être elle-même envisagée de la même façon que la déclaration, c'est-à-dire comme un moyen d'arriver à protection universelle"*. In the same line of argumentation the words of Kakouris (1993:422) reflect the concern that sensitiveness as regards human rights becomes restricted to solely a regional area because *"si nous commençons à nous desintéresser de ce qui se passe en dehors de notre région, de la violation d'un droit qui n'est pas pour nous un droit humain, mais qui en est pour les hommes qui vivent ailleurs, nous rompons la communauté humaine"*.

[10] Van Dijk,1995:117.

To what extent is it possible then, to speak of universality of human rights? Universality of human rights has been proposed in two senses: moral universality on the one hand and international normative universality on the other. The former is based on the inherent nature of human beings. Thus, human rights are held universally by human beings. International normative universality is based on the almost world-wide acceptance of and adherence to international human right norms.[11] This viewpoint has found practical acknowledgement in the Vienna Declaration when it states that "human rights and fundamental freedoms are at the birth right of all human beings".[12] This is the reason why it "welcomes the progress made in the codification of human rights instruments, which is a dynamic and evolving process, and urges the universal ratification of human right treaties".[13]

Such understanding of universality permits us to explain what has been identified as the necessary tension between relativity and universality. Moral universality allows for human rights to be relative in a fundamental way because human nature is itself in some measure culturally relative. The cultural variability of human nature not only permits but requires significant allowance for cross-cultural variations in human rights. Cultural diversity is unavoidable as the product of past and present economic, social and environmental differences. A sufficient degree of cultural consensus may be achieved through internal cultural discourse and cross-cultural dialogue. From a normative viewpoint, rights that vary in form and interpretation still may be universal in an important sense if the substantive list of rights can be said to have considerable international normative universality. There may also be a weaker universality even in the midst of considerable substantive diversity.[14]

If universality is seen as an ideal, a kind of reformulation of justice, there is a reason to believe that the ideal will be acceptable in all societies since "what is culturally variable is not the concept that the human being needs protection from the excesses of the State and just

[11] Donnelly,1989:1.

[12] Vienna Declaration (1993) point 1, part I. General Assembly, A/CONF.157/23 of 12.7.93.

[13] Point 26, part I.

[14] Donnelly,1989:111ff. He contends that such diversity responds not only to cultural factors but also to economic and financial factors.

conditions be created for the fulfilment of his needs; what is culturally variable is the specification as to how the ideal can be achieved in different cultures".[15] Therefore, the essence of human rights appears as universal whereas their shape may reflect diversity.[16] The main confusion has risen because universality has been identified with uniformity and immobility. Agreement may be found upon the fact that universality does not imply that all States must respect in absolutely the same way, regardless of circumstances, all the rights identified as human rights; conversely, it is not because States are divided by differences of all kinds that the universality of human rights is meaningless.[17]

Indeed, most of the times diversity appears as the result of a different way of understanding and solving conflicts between human rights. The choice in the conflict cannot be universal, but such choice does not prevent the universality of the conflicting rights. In this absence of consensus, probably the solution will be found in accordance with the different patterns of values of each State. It has been argued that these differences seem justifiable and are only subject to marginal international review unless they affect to the core rights that may not be bargained with and therefore activate Article 30 of the Universal Declaration.[18]

It would seem thus, that certain rights considered fundamental should be regarded as a hard core or as a minimum standard respected by all cultures. It has been advanced that this minimum standard is to be found (with wide accepted consensus) in the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights on the one hand, and the Covenant on Economic and Social Rights on the other hand.[19] Other individualisations of what these rights are have been proposed. Here is reproduced the one given by M. Vance in

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[15] See Pathak's intervention in "Universality of Human Rights in a Pluralistic World" at p.10.

[16] In the same line of argumentation, Van der Ven,1984:254.

[17] See Imbert in "Universality of Human Rights in a Pluralistic World" at p.143. In the same line of reasoning, Van der Ven,1984:261.

[18] Van Dijk,1995:119.

[19] Donnelly,1989:27.

1977.[20] In his view the first fundamental core of human rights is made up of the right to life and security (which encompasses the right not to be tortured or be killed illegally). Then follow the rights relating to the fundamental needs of the person: right to work, to a decent housing, to nourishment, to protection of health. Thirdly come some civil and political rights like freedom of expression and of association.[21] This clasification follows a hierarchical scheme that may suit to all countries since it does not reflect perforce a Western conception.

One could wonder with Bedjaoui[22] whether the observance of other human rights is optional. He contests this since these other rights receive their expression in accordance with the character of each nation, without departing noticeably or permanently from the universal ideal standard nor deviating from it in such a way that the society in question forfeits its respectability.[23] Thus, despite the admitted differences in understanding the boundaries of human rights, their true international character is maintained. The Vienna Declaration may consequently affirm that "all human rights are universal, indivisible and interdependent".[24]

b. National constitutions

Constitutions, as the highest expression of the will of a State, appear progressively as the frame where pluralism may find definition. They incorporate values of justice as they overcome a strict formal vision of the law in favour of a material approach to law.[25] In this sense, they are particularly important in understanding the rank, content and protection human

[20] Quoted by Cassese in "Universality of Human Rights in a Pluralistic World" at p.57.

[21] Other classifications are proposed by Bedjaoui (in the same Colloquium, at p.45 he includes the respect for life, the obligation to aid and protect the weak and the duty towards future generations) and Kakouris (1993:421) who suggests the right to life, physical integrity, freedom of movement and protection against torture. They are seemingly more restricted than the first one but essentially they coincide.

[22] "Universality of Human Rights in a Pluralistic World" at p.45.

[23] In the same line of argumentation, see Kakouris,1993:421.

[24] Vienna Declaration (1993) point 5, part I.

[25] For a wonderful explanation of this new approach to constitutionalism see Zagrebelsky,1992.

rights are given. Constitutions (understood in a large sense, not exclusively in written shape, as to encompass the UK) are at the basis of the whole legal order. The vision of human rights enshrined therein will shade the understanding of features, institutions and defence means as public policy. Specific courts endowed with the exclusive competence to interpret the constitution dictate the directives of its understanding.[26]

Even in a restricted Western area, the different constitutions exhibit diverse levels of adjustment to the evolution of human rights. Thus, the most recent ones enshrine more thorough and detailed catalogues of rights, more adapted to the exigencies of contemporary life. At the same time they make reference to international texts as providing further criteria of interpretation in the matter - see the Dutch, Spanish, Portuguese and Italian constitutions.[27] Such a clause represents an important step in ovecoming the rooted tendency to look simply at the domestic level, ignoring further developments and the fact that States belong to an international community where common principles and values are shared and to which States are committed.[28] Unfortunately, reference to international treaties on human rights seems to be made most of the times *ad maiorem abundantiam*, in order to confirm what has already been ascertained according to national criteria. If this is so, it would seem that the granting of contitutional protection ascertains the national origin of human rights if the source of the right is the criterion according to which define the nature of the rights. However, it is recalled that on many ocasions, Constitutions simply enshrine the rights previously identified by international texts. In this sense, the incorporation of human rights to legal national texts does not entail a 'nationalisation' of the former, that keep a *supranational character* (above States).

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[26] The interpretation of constitutions rests in some cases in the exclusive competence of constitutional courts, namely in Austria, Germany, Spain and Italy, while in other States another organ has assumed that competence, namely the Conseil Constitutionel in France or the Supreme Court of the USA.

[27] More precisely these references can be found in Articles 93 and 94 of the Dutch Constitution, Article 10(2) of the Spanish constitution at a general level which is to be completed with the reference made in Article 39(4) in relation to conventions on the protection of children; references for the Portuguese and Italian constitutions are Articles 16(2) and 10 respectively.

[28] In this line of argumentation, see the following judgement of the Italian Corte di Cassazione (sez. un. of 8.1.81 No 189), *Makvicka v. Wallach* (RDIPP, 1981, 787): *"l'ordine pubblico internazionale e' invece costituito dai principi comuni a molte nazioni di civilta' afine, intesi alla tutela di alcuni diritti fondamentali dell'uomo spesso solennemente sanciti in dichiariazioni o convenzioni internazionali".*

This assertion should not conceal however, another important fact, which is the constant exchange of influence between international treaties and national legal orders. The incorporation of human rights in national legal systems entails to 'reshape' the national understanding of human rights as it has happened in the European area. However, national legal orders play an essential role in the development of international treaties. This is so for different reasons: because the latter necessarily refer to national terms and institutions instead of elaborating new ones, or because the rights enshrined in the treaties are applied by national courts and authorities in the context of national controversies. Consequently, national legal orders represent the means of updating international treaties to the requirements that socio-economic and cultural changes of modern life imply.[29] There is, without doubt an inter-relation between different sources that has been defined as a dialectic development of human rights.[30] Such development is noted, above all, at a 'regional' level, as stems from the case law of specific organs that interpret conventions with a restricted territorial scope (as the ECHR or the American Convention on human rights).[31]

These comments will close here with a classification of human rights as will be referred to in the chapter. Many criteria could be followed in order to classify human rights: content, subject of the rights, source, protection granted, etc. Taking into account their chronological appearance, human rights can be classified in simple terms as civil and political rights, social, economic and cultural rights and rights of the third generation.

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[29] Frowein (1986:301), when he comments on Article 3 of the ECHR, points at the following opinion that is adhered to: "either one accepts that general standards for concepts such as 'degrading punishment' may indeed evolve [...] or Article 3 is to be understood as referring only to a past standard prevailing in 1949 or 1950, which will now very difficult to establish in a given case. Such an approach would preclude, of course, the achievement of greater unity among the members of the Council of Europe through further development of concepts of fundamental rights by the organs of the Convention".

[30] This is the terminology used by Frowein (1986:302). As an example he proposes the *Tyrer* case, (of 25.4.78 Series A: vol.26, p.15ff) where the Strasbourg court admitted that it could not help "but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field".

[31] A good review of this interaction at the European sphere can be found in Eissen (1990). He analyses both the influence of the ECHR (as results from the case-law of the Court) in national law and the acceptance by the European organs of a certain national jurisprudence, as derives from specific constitutional courts. He points out how the procedure may attain a perfect closure in relation to the principle of non-discrimination: the Court gets inspiration from the national practices and then turns to inspire the national courts (p.152). Such interaction brings about "un échange constant dans un esprit desintéressé" (p.155).

a) Civil and political rights; they were the first to be recognised (firstly in the English Bill of Rights of 1688, the American Declaration of Independence and the consequent State's constitutions, in the 1789 French Declaration of Rights and then in later texts) and have developped as to trace the following: right to life, recognition of freedom of men, equality (without discrimination on grounds of sex, race, religion, ideology, etc), right to be endowed with a name and a nationality, inviolability of dwelling and mail, freedoms of expression, association and assembly, right to privacy, respect of one's honour and image, right to a fair hearing and due process, and the right to property. Political rights included in this group are the right to petition, the right to vote and to take part in the government of one's own country.

b) Social, economic and cultural rights; under this point the following rights can be referred to: right to found a family and to be granted protection to the family group, the equality between children (born either inside or outside marriage), to have a decent house, to have work (without discrimination of payment and equality between men and women) and social security insurance, the right to education.

c) Collective rights and rights of the third generation; they are the latest incorporated and try to respond to the evolutions of contemporary society: health protection, environmental protection, consumer protection, protection of the historical and archaeological patrimony, protection of cultural identity, protection against abuse of data information, rights of minorities, of youth, etc.

This is not an exclusive list. It is admitted that new features will develop and will introduce the taking into consideration of other rights as fundamental. At the same time those rights that have belonged to the 'common property' of States for decades -or even for centuries, are subject to new readings since human rights are alive and their understanding is affected by the necessities they respond to. In this sense, environmental protection appears as an evolution of the right to live a human life; the protection against abuse of data information is a new manifestation of the protection against violations of privacy, etc. All these aspects will reappear in the following point when the notion of public policy from a human rights' viewpoint is dwelt with.

1.2. Can we speak of fundamental rights as the basis of public policy?

The adaptability of public policy to the specific (temporal and geographical) circumstances in which it is called to apply seems to combine easily with human rights as reflecting precisely the essential defining elements of each legal system. This intuition was already pointed out in chapter I where reference to human rights was made to address the content and functions fulfilled by public policy. Time is ripe for tackling again these aspects in the light shed by the previous considerations.

The three levels in which public policy expresses itself bring about all the types of human rights delimited in the previous paragraphs.[32] Certainly ethical-moral values seem to bring about a more immediate reference to human rights than legal-economic standards. The latter, nevertheless, have prompted the recognition of more recent features in the framework of the protection of human rights in the fields of environment, social concerns, etc. It is argued that whatever choice in the legal order responds to and will shape the State approach to human rights. It follows that human rights are indissolubly present in each one of the three levels.

The proposed approach to human rights in public policy intends to set aside any kind of identification with an ethical choice, except for human rights. Indeed, *ethical-moral values* of a legal system may not be exclusively identified to a concrete religion or natural morality. As pointed out above, this is a reductionism that deserves critical evaluation, particularly when it confines morality to sexual behaviour. In actual fact, ethical values are closer to human rights than to sexuality. This is particularly so in the field of procedural public policy: in this sense, public policy refusing proofs obtained by illicit means appears as an ethical choice of the system which reflects both the right to dignity and the right to privacy; in more general terms the right to defence and to a fair hearing underlies a procedural notion of public policy.[33]

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[32] Ganshoff van der Meersch (1968b:661) suggests that human rights pervade the political and moral orders, and only to a lesser extent the economic order. Almost thirty years have passed since these words were written. Nowadays the complex web of elements that compose economic relations cannot be understood without a reference to human rights, especially socio-economic rights as will be seen later on.

[33] Although it is not an uncontested assumption that public policy should be a means of protecting the right to defence, in chapter IV will be advanced the existence of arguments to so defend.

A reference to cultural identity signs introduces the *idiosyncratic values* of the State and certainly, no reference can be made to idiosyncratic values without immediately bringing up cultural rights.[34] Protection of cultural goods and historic patrimony appeared in chapter I as one of the generally admitted clauses to invoke public policy. Strangely enough, public policy materialises in this context as a reflection of true international public policy. However, cultural identity signs usually tend to stress the relative aspect of human rights. Indeed, they reflect choices which differ from one system to the other and not necessarily in distant legal and cultural conceptions as the approach to marriage and property illustrate. A polygamous or monogamous conception of marriage or the private or social organisation of property are essential choices which shape the legal order. They entail a choice on human rights (of the spouses and owners) with an immediate reflection in public policy. Thus, traditionally in Western countries - with a monogamous conception of mariage and based on a system of private property, public policy has been activated when the State addressed has estimated that there is discrimination between spouses as results of repudiation and in cases of expropriation where the compensation granted is deemed to be insufficient.

The latter example pinpoints how the close relationship existing between cultural signs and *legal-economic standards* is also present when human rights are at stake. The peculiarity of these legal-economic standards manifests itself in a tendency to adopt the shape of mandatory rules. Fundamental rights will therefore appear under the shape of both principles and rules of public policy. Probably public policy rules are more likely to incorporate new aspects of human rights. If fundamental rights evolve according to the necessities of time and space,[35] so does public policy and mandatory rules respond precisely to this need of adaptation. Indeed, mandatory rules arise as a suitable means of incorporating fundamental rights of social and economic shade. These rights find better protection in the shape of mandatory rules since they adapt better to the particularities that each State reflects, endowing these rights with a very precise definition and protection. A clear example is to be found in relation to the

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[34] This is again a controversial term, since it is not universally admitted that such a right exists. Here it will be used in a broad sense, which encompasses those issues that define the way of living of a Community but not necessarily reflecting choices of the minority.

[35] As was pointed out in the first part of this chapter, this evolution does not entail the relativity of human rights, but the better adaptation to temporal and territorial coordinates. See the Strasbourg Court, *Tyrer* case (of 25.4.75) Series A, vol.26 at p.31.

rights that workers and consumers are granted.[36]

Human rights are not only a means of identifying the content of public policy. They are also an essential instrument to approach better public policy from a functional viewpoint. The protective function that this notion fulfils may only be correctly understood in a human rights context which pays heed both to the internal and international sphere. A correct fulfilment of the protective function that public policy must carry out requires one to accomplish such a function in accordance with international principles and values as derive from international texts to which States adhere (namely, international texts on human rights). Such a commitment in the international sphere results in further obligations for the State. Indeed, private international law issues will be approached not only as exclusively internal matters but will necessarily mind international protection of human rights. If the State does not do so, it will likely breach its international obligations.[37] The protection and enforcement of international human rights goes through the correct application of public policy: a violation of these texts may not be accepted in another State which is entitled to refuse such infringement without it becoming itself an accomplice in breaching the same obligation by applying a rule or recognising a judgment which violates the international rule.

From a national point of view there is not much discussion to admit that human rights constitute public policy.[38] It is consequently argued that the violation of a fundamental right is a matter of public policy. This is the reason which underlies a provision such as Article 6

[36] In this sense, mandatory rules appear as a means of fulfilling material justice (Pocar,1984:360).

[37] As a practical illustration, see case *Soering* (7.7.89) Series A, vol.251, where the European Court of Human Rights held that the extradition to a country in which the infringement of Article 3 of the ECHR would be likely, (though the US are not a contracting party to that convention) would constitute itself an infringement of the ECHR for the extraditing State. A similar case was solved in the same line by the Hoge Raad (30.3.90, Riv. dir. internaz., 1991,1007).

[38] Germany supplies a good confirmation of this statement. The question was raised as regards the role that fundamental principles enshrined in the German Constitution (GG) should be given. Two possibilities were foreseen, namely to consider them of direct application and/or to include them among the principles the respect of which is ensured by the notion of public policy. The latter opinion seems to have prevailed after the last reform of the German system of private international law. Mayer (1991a:663) upholds this choice because of the impossibility to apply directly fundamental rights in a case of private international law. Indeed, he argues, their formulation is too vague and, since they constitute only a minimum, the judge will be forced to determine the content of the applicable law; then he will proceed to the eviction of that rule because of its contrariety to fundamental rights. He concludes that in actual fact, it is the mechanism of public policy that has been activated.

of the EGBGB, by means of which no foreign rule will be applied by a German court where its application is contrary to human rights.[39] A violation of a fundamental right goes beyond the personal sphere of the individual since it has an effect in the community and has repercusions in the legal system.[40] If this is so at a national level, moreover in the international sphere where the offence may harm the whole international community. A favourable opinion has thus grown among scholars to consider fundamental rights as essential constituents of public policy since *"i diritti fondamentali informano e conformano l'ordine pubblico, danno ad esso un contenuto concreto"*.[41] This opinion runs parallel to a progressive acceptance of this view by courts.[42]

1.3. *Ordre public* and fundamental rights

It has been argued that introducing human rights helps to undertake another vision of private international law, namely a social conception[43] which favours material justice in the concrete case together with the satisfaction of the interest of the parties. Effective protection of the rights of the parties becomes then the main ground of the decision about the application or

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[39] Introduction to the German civil code. It reads as follows: *"Eine Rechtsnormen eines anderen Staates ist nicht anzuwenden, wenn ihre Anwendung zu einem Ergebnis führt, das mit wesentlichen Gründsätzen des deutschen Rechts offensichtlich unvereinbar ist. Sie ist insbesondere nicht anzuwenden, wenn die Anwendung mit den Grundrechten unvereinbar ist"*. It should be noted that the German BVG does not deduce therefrom an automatic activation of the protective clause since *"une juste application des droits fondamentaux admet qu'il faille tenir compte du particularisme de la matière [...] Un droit fondamental peut supposer de façon essentielle, au sein du domaine d'application de la Constitution, un certain lien avec l'ordre social, de sorte qu'une application illimitée de ces droits dans toutes les situations intéressant l'étranger manquerait son but"*, Decision 4.5.71 RCDIP,1974,57, p.67.

[40] Peces-Barba,1986:196.

[41] Gamillscheg,1987:96. In the same line of argumentation see Goldman,1969; Ganshoff van der Meersch,1968b; Lalive,1987.

[42] See for instance the following quotation: *"l'ordine pubblico internazionale e' invece costituito dai principi comuni a molte nazioni di civilta' affine, intesi alla tutela di alcuni diritti fondamentali dell'uomo, spesso solemnemente sanciti in dichiarazioni o convenzioni internazionali"* (Cass. sez. un. (8.1.81 No.189) *Makvicka v. Wallach*, RDIPP 1981,787; or in the same sense, Trib di Roma, 16.1.84 *De la Fuente v. Casini*, RDIPP 1985,138); Cour d'appel de Paris, 14.6.94 *Osmar B. v. Procureur général pres de la cour d'appel de Paris*, RCDIP 1995,308.

[43] Stöcker,1981:326. Such a conception mirrors a wider phenomenon which is taking place at a general level. Zagrebelsky(1992:123) contends then, that the identifying character of contemporary constitutionalism is the identification of material principles of justice that inform the whole legal order.

exclusion of foreign law, about the recognition or refusal of foreign decisions. Courts will search not only for formal justice, but above all for material justice. It gleans from these remarks that public policy must consequently function as a means of fulfilling material justice.

This idea of material justice in public policy finds a clear reflection as regards the so-called *effet atténué de l'ordre public.* The fulfilment of material justice explains the acceptance of situations that *a priori* may contrast with basic principles that inspire the system. In other words, to admit the effects of a repudiation or a polygamous marriage in a State entails the maintenance of an unjust situation that decidedly runs counter to human rights of wide acceptance (and therefore, against public policy), namely equality between men and women, equality of rights during and after the disolution of marriage and non discrimination. The taking into consideration of human rights as constituting elements of public policy entails a criticism of the variable character of the latter. However, this application *atténué* of public policy conceals deeper grounds of fairness: not recognising a repudiation on grounds of discriminatory treatment to one of the parties may deprive the weaker party of the allowances that she would be endowed with if the shocking institution be admitted. If this fulfilment of material justice cannot but be praised, courts should also be aware of the risk that a combination of *effet atténué* and fairness, favours *fraudem legis*. The good sense of judges has an essential role to play.

Such good sense must also appear in the use made of public policy while taking into consideration the human rights component here included. Since public policy is an exception that should remain of restricted use, the more concrete the delimitation of a right is, the more restricted recourse to the exception appears. Only concrete violations of human rights should activate the exception. Otherwise, the risk exists of invoking whatever vague definition of a right in order to impose forum law. A balance between public policy and human rights must be found so that neither a too zealous protection of human rights entails an excesive use of the exception of public policy, nor a too zealous application of public policy leads to unjustified restrictions of the application of human rights (as pointed out above in relation to the *effet atténué* of public policy). Indeed, despite the enlargement of the notion of public policy brought about by human rights, the latter helps to temper the discretionary character

of the former (that derives from its national origin). In this sense, human rights become a factor of progress for private international law.[44]

Public policy mirrors the approach that States make to human rights. The necessity to adapt fundamental rights to precise conditions brings about the notion of relative public policy which mainly reflects in mandatory rules. Concrete circumstances imply that stress is put in one aspect of the right instead of another one. Historical background, economic situation, ideological trends, etc, will accentuate certain sides of rights which may be less emphasized (or even ignored) under different parameters. No doubt, States reflect their own approach to human rights as they apply public policy. It is insisted that this factor does not entail a relativisation of human rights. On the contrary, States may also apply other State's public policy in the shape of mandatory rules. This application implies acknowledging a certain convergence of criteria of public policy despite cultural relativism also as human rights are concerned. Public policy based on human rights must be read under cultural identity parameters understood in large terms. In other words, *ordre public* is a means of protecting the idiosyncrasy of the State but also of accepting positions other than the State's. This is so because of the acknowledgment that human rights are also - and mainly, a concern of the international community, which activate absolute public policy. Indeed, no specific territorial connection will be required in order to activate their protection. In this context is explained why it has been defended that criteria as the *Inlandsbeziehung* withdraw when fundamental rights are at stake.[45]

Human rights contribute in this sense to the *communio iuris* at the same time that they adopt specific shape in national systems. Cultural identity appears thus as necessarily encompassed in the *communio iuris*. The *communio* is based then upon the concesion that together with the State peculiarities other States' particularities exist. The *communio* does not entail a uniformity of its elements but it secures the respect of the latter. Respect for diversity inevitably leads to consensus. Such a proposition raises the following question: is it so then, that common shared web of universal human rights exists on the basis of which the existence

[44] Goldman,1969:466.

[45] Bucher,1993:53.

of an *ordre public réellement international* may be advanced?

In a context where the universal character of human rights appears so conflictual a matter, the question as to the community of sharing of human rights may not find an easy answer. The precise profile of fundamental rights and the protection they are endowed with differ sensibly in different geographic areas, even in areas which are prone to have similar schemes.[46] This common core on which a true international public policy would rely should be drawn according to international parameters since the comparative approach to national constitutions does not provide uncontested elements of agreement.

As results from previous comments, the verification of a community agreement in the shape of international treaties on human rights does not exclude the discussion as to the degree of actual sharing. Indeed, international treaties seemingly coordinate human rights at the lower level, leaving aside many rights that, because of a more recent appearance, have not yet been enshrined in international instruments.[47] Few treaties are concerned with such matters as the environment, and only gradually is the protection of historical and/or archaeological patrimony undertaken in international treaties. These criticisms revealing failures of the 'international' criterion, other reasons can be brought forward in the opposite sense. Thus, a specialisation of international concerns is aknowledged and results in the elaboration of new international texts in those matters until now neglected.[48] Secondly, if human rights existed and were

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[46] While it is acknowledged that the right to marry exists as enshrined in international conventions and national constitutions, features as polygamy or the more recent admission of homosexual marriages have not an overall acceptance in Europe, the USA or Africa. See for instance the debate that has arisen in the US as a result of the judgement given by the Hawaii Supreme Court (of 5.5.93, *Baehr v. Lewin*, 74 Haw 530,583, 852 P2d.44,68 [1993]) contending that Hawaii's marriage statute discriminates on the basis of sex by barring people of the same sex from marrying. Indeed, the appurtenance to a common area does not either ensure an equal understanding of human rights. Clear contrasts are to be found as regards right to life in two European States as Ireland and The Netherlands. Whereas the former defends life even before birth (condemning then, abortion), the latter has recently passed the only law on euthanasia in the European area.

[47] In this line of criticism, see Melchior,1979:55.

[48] As regards environmental protection, see for instance Convention on prevention of Marine Pollution by Dumping of Wastes and other Matter (of 29.12.72, 11 I.L.M. 1294 [1972]), International Convention on Oil Pollution, Preparedness, response and Cooperation (of 30.11.90, 30 I.L.M. 735[1991]), Convention on the conservation of Antartic marine living Resources (of 20.5.80, 19 I.L.M. 837[1980]), the Convention on Biological Diversity (of 5.6.92, UNEP Doc. Na 92-7807) or the Basel convention on the Control of transboundary movements of Hazardous Wastes and their Disposal (of 22.3.89, 28 I.L.M. 656[1989]).

recognised to delineate public policy before the elaboration of international texts,[49] it is also true that their recognition in international treaties ensures a larger consensus as principles of public policy. This is moreover confirmed by the case law of international courts (either at a regional or at an international level). The ICJ has repeatedly maintained that the respect of certain 'essential' human rights is deemed to be an *erga omnes* obligation.[50] It is argued that this obligation (that involves all States, whether they have ratified or not -or they have introduced reservations to- a treaty) regards what can be deemed to be the common core of international human rights.[51]

The acceptance of such common core brings about the existence of a true international public policy. The reference to criteria as human rights outside national framework to define public policy involves the consideration of the latter being indeed a specific international public policy.[52] It has been argued that this transnational public policy would then lack the character of a variable notion that changes according to the place and time it is applied. A common core of *ordre public réellement international* equally applied by States would be delineated. This possibility has lead to suggest a strict vision of public policy by which judges could not modify the conception of public policy based on human rights according to the evolution of philosophic, economic or social criteria in his/her country, unless a breach of the commitment with the international community was intended. A similar position is only partially admissible since *ordre public* is by definition a flexible instrument of protection and must not lead to stagnation of law.[53] Such a conception of public policy is in accordance with the impossibility to fix a definite and unchanging conception of human rights. This is

[49] Goldman (1969:451) points out as an example the previous existence in France and the United Kingdom of the right to marry without discrimination before the UN Declaration of Human Rights of 1948 saw the light of day.

[50] This is so in the terms of the Universal Declaration as corroborated in footnote 5.

[51] ICJ Reports, 1970 p.3; 1971 pp.6 and 57; 1980 p.42.

[52] See Goldman,1969:465; Lalive,1987:280; Chapelle,1969:464; Rolin,1960:441-462; Stöcker,1981:16-22.

[53] Cohen (1989:479), assuming an evolving vision of public policy constituted of human rights, indicates that the acceptance of a certain conception of human rights impedes the possibility to return to a former public policy.

so even in delimited geographic areas.[54] However, different *nuances* do not prevent the right being still at the basis of the exception of public policy. Human rights bring back with renewed actuality the distinction between relative and absolute public policy.

This twofold vision of public policy as both absolute and relative, entails that in principle no conflict between national public policy and international texts can exist. The relationship cannot be explained in terms of supremacy, but of international solidarity.[55] It also explains why conflicts between State public policies can take place since on many occasions they conceal conflicts in the understanding of human rights. This has been repeatedly proved with the clash between Islamic and Western criteria, but it is also present in the same cultural areas where scientific discoveries are shaking the social and legal understanding of human rights. Where States are able to admit that they are fostering relative criteria of human rights and accept that other States -in a context of pluralism, may do the same, then an agreement is reached. Where the common core is respected, regional and even national divergencies are admitted.

Summing up, as a conclusion for the first part of the chapter, a rather wide spread admittance of human rights shared by States of the international community is acknowledged. These rights constitute a *communio iuris* which is most probably at the basis of a true international notion of public policy. Together with this absolute public policy - which

[54] For instance, in a European area, the Strasbourg Court has admitted such an impossibility. A margin of appreciation is consequently left to national authorities which does not deter, however, any value to the 'internationality' of human rights and public policy based on them. Indeed, "the authorities' margin of appreciation is not unlimited, it goes hand in hand with convention supervision" (par. 50 case *Otto Preminger Institut v. Austria*, Series A, vol.295) which is assumed by the Court (par. 68 case *Open Door Counsel*, Series A, vol.246-A).

[55] Mayer (1991a:664) suggests that there is no possible conflict between the ECHR and national public policy. Indistinctly of the shape that public policy adopts (as a general principle of law or in the form of a written rule), the higher rank of the convention ensures its supremacy. It is argued, on the contrary, that it is not always so, since conventions as the ECHR include exceptions to the normal application of the right and admit restrictions to the right if justified by grounds of public policy -among others. Moreover, this is not only a question of supremacy. Firstly, because the convention expressly foresees in Article 60 that if a domestic rule is in conflict with a rule of the Convention, where the former is more favorable to a right, it must be given effect despite the latter. This is a highly hypothetical case, but it relativises the absolute character of supremacy as regards the convention. Secondly, most of the rights enshrined in the convention admit derogations to their exercise where they respond to certain requirements essential in a democratic society - namely the principle of proportionality. Its respect appears thus, as an interpretive rule that tempers the powers of States to derogate from fundamental rights. Therefore, where the domestic public policy fulfils these conditions, the supremacy criterion should also withdraw.

appears as a code of principles for the international community, a myriad of relative public policies defines national and regional understanding of that common core based on human rights, delimited with the aid of texts (constitutions and treaties) and case law. Admittedly, to acknowledge human rights at the basis of public policy does not solve all the problems that arise since human rights are in themselves source of conflict: a balance between two conflicting rights has to be solved in favour of one or the other. The world of human rights is not a pacified universe. However, they are extremely helpful criteria in the elaboration and definition of public policy. The moment has come then, to shift to the European area.

2. FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION

It could seem obvious to ascertain that fundamental rights in the EU find an adequate protection and are inspiring elements of the legal orders of European States. What then, is the point? This second part of the chapter is concerned with two manifestations of fundamental rights. On the one hand it is ascertained that the latter have been traditionally the Member State's competence. Only with time has the ECJ changed its position about human rights. This is not the place to reproduce a subject that has been at large studied, analyzed, criticised and applauded by scholars. Therefore, the first aspect that is to be dealt with is the understanding of human rights in the EU at a domestic level. That is, which are and how are these rights applied and defended in Member States; to what extent there is a community of rights and how do they shape the relations between Member States on the one hand and the Member States and the Union on the other hand. It is argued that human rights are an essential element in the process of integration in the EU sphere. The second point that will be dwelt on regards the role of human rights in the EU, independently of Member States. These two perspectives will provide a sufficient background to tackle human rights as a constituting element of Community public policy.

2.1. Member States and human rights

a. A common core of European fundamental rights?

Member States have progressively settled a rather complex system of definition and protection of human rights. Constitutions, legislation of diverse ranks and the ratification of international treaties and conventions set in the European area a structure of rights with a parallel system of protection. European States have traditionally fostered the defence of fundamental rights. No need to come back to the French Declaration of 1789 to sustain that European States held fundamental rights as an essential element in/of democratic systems. Indeed, recent democracies (as Spain and Portugal) enshrine the most exhaustive catalogues of human rights in this European area. Such protection is completed with the ratification of the conventions on human rights prepared by international organisations. Thus, European States have signed the Universal Declaration on Human Rights of 1948 and many other Resolutions and Declarations of the Assembly.[56] Other international treaties, despite the fact of not being directly concerned with human rights, introduce reference points for Member States. Such treaties deal with the most diverse areas: civil and commercial matters, international liability, etc.[57]

However, in the European sphere, and within the area of human rights, the most relevant international text is the European Convention on Human Rights (ECHR).[58] The ECHR is mainly concerned with civil and political rights. However, the interpretation undertaken by the Strasbourg Court has progressively enlarged the scope of this protection to encompass

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[56] Among them could be cited the two Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (Resolution 2200 [XXI] of 16.12.66), the Conventions on the Rights of the Child (of 20.11.89 UN General Ass. Resol. 44/25), the Convention on the Elimination of all forms of Discrimination against Women (of 18.12.79 UN General Ass. Resol. 34/180). This outline is completed with some Declarations on Social and Legal Principles Relating to the Protection and Welfare of Children (of 3.12.86 UN General Ass. Resol. 41/85), on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief (of 25.11.81 UN General Ass. Resol. 36/55), etc.

[57] See for instance some of The Hague Conventions: of 5.10.61, on the competence and applicable law on minor's protection; of 18.3.70 on securing evidence abroad in civil and commercial matters; of 25.10.80 on civil aspects of international abduction of minors, etc.

[58] Concluded by the Council of Europe in Rome, on the 4.11.1950.

unexpected features. Thus, recent concerns as environmental protection find a place under the convention's protective realm.[59] The Convention sets for a two-fold system of protection and control by the Commission and the Court, that have competence to rule on the matters that come under the scope of the convention. Such organs further a protection which is the last stage once the domestic level has been exhausted. The protection thus provided -despite being faulty and insufficient, slow and *a posteriori*, is fundamental for the reinforcement of human rights in Europe. This, for two reasons; firstly, because an 'enforceable' right is always more effective; secondly, because court's decisions help to delineate with more precise boundaries what is the content of a concrete right and how it is to be understood, under the light shed by the precise circumstances of the issue at stake. The more defined the right is, the easier to invoke it on further occasions with a certainty of the potential outcomes about this invocation.

It could be wondered, nevertheless, whether such control is sufficient. Doubts may be cast in this sense. Indeed, the protection afforded can be said minimal. This may be explained because the ECHR does not have harmonising purposes. The integrative effect that may come about is only a byproduct of the functioning of the system. Moreover, the two main guide-lines of the interpretation of the Court, namely the respect of the principle of proportionality and the reliance on the national appreciation by Member States, introduce sometimes disruptive elements. If the margin of appreciation of Member States appears as a fair demand, recourse to the principle of proportionality may become abused at the ECHR sphere. The combination of both conditions, if not correctly understood, provides the Court with a means of avoiding severe judgments which question the responsability of the State.[60] The excesive

[59] In case *López-Ostra v. Spain* (9.12.94, Series A, vol.303-C) the Court admits that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. Thus, through the right to a dwelling, the right to environment is introduced (no evaluation of the judgment will be advanced here).

[60] See for instance case *Kokkinakis* (of 25.5.93) Series A, vol.260. Rigaux (1995:415) in a critical analysis of the recent case-law of the Strasbourg court, stresses the lack of courage of the Court which relies exclusively on the control of the respect of the principle of proportionality therefore eluding the analysis of the legitimacy of the interests of the State. Hence, the Court could not conclude further infringements of Greece.

and growing reliance of the Court in the principle of proportionality raises some concerns.[61]

Though some doubts may be casted about the effectiveness of the protection of human rights in the ECHR sphere, it is contended that this convention (completed with the European Social Charter) reflects the normative universality (that was referred to in the first part of the chapter) at the European area. Such normative universality will not avoid conflicts arising within the ECHR framework since not all rights have the same weight and the circumstances in each State stress one aspect or another while solving these conflicts. It is argued that the solution of these conflicts constitutes a reflection of the dynamic character of the convention. Indeed, this dynamic character permits us to be hopeful about the future evolution of human rights protection in Europe. In this sense it is notable that courts of several Member countries quote decisions of the European Court or the Commission of human rights when they apply the Convention as part of municipal law.[62] At a time when a global discussion on the meaning of human rights and fundamental freedoms is taking place it is of increasing importance that the European States develop a common system for the protection of human rights. This may influence practices in other States, but it also may bring about and articulate a common standard for those European States where such a standard does not yet exist.

Despite the previous comments, the ECHR appears at the center of a common core of European rights.[63] One could wonder what does this common core consist of. It would be adventurous to try and settle in a definite manner which rights pertain to the common core.

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[61] In this line of argumentation, Eissen,1993:145 and Rigaux,1995:406. The later indicates how the Court exerts mainly the control of the proportionality principle neglecting the fact that it is subsidiary to the other two other conditions required by the text of the Convention, namely that the exception responds to a legitimate interests of the State and is in accordance with the law. The following cases reflect this tendency of the Court: case *Jersild v. Denmark* (of 23.9.94, vol.298, Series A), case *Otto Preminger Institut v. Austria* (of 20.9.94, vol. 295, Series A), case *Open Door Dublin v. Ireland* (of 29.10.92, vol.246, Series A) and case *Kokkinakis* (of 25.5.93, vol.260, Series A).

[62] This tendency exists even in countries where the convention is not internally applicable, as in the Scandinavian States or the United Kingdom, where the courts sometimes refer to the Convention and sometimes directly to the case-law (Frowein,1986:329). Indeed, in the UK, courts will solve the cases using the interpretation which is more in accordance with the ECHR. See for instance, *Waddington v. Miah* [1974] 1 WLR 683 or *R v. Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi* [1976] 1 WLR 979. English courts may also refer to the Convention to help develop and clarify existing common rules: *Attorney-General v. BBC* [1981] AC 303.

[63] In this sense, M. Merle (as cited in Cohen-Jonathan,1989:13) contends that the ECHR *"apparaît dès lors comme le commun dénominateur de ses membres, l'expression juridique de la forme de civilisation que les États de l'Europe s'attachent à défendre"*.

Indeed, what seems more reasonable is to identify the 'spirit' of this common core, according to which it may be checked whether a right is accepted or, on the contrary, runs against the shared values.

Thus, the first and basic right to acknowledge within a European context is the right to life. This right is the basis for the rest: once the character of human being is acknowledged, he is entitled to enjoy other rights. It is explicitly recognised in Article 5 of the ECHR.[64] Human beings, just because of existing, are recognised a dignity and equality. The former entails the acknowledgment of privacy. The latter is understood both, as non-discrimination of any kind and as equality before the law. To this common core pertain then, the prohibition of discriminations because of sex, religion and any other criteria based on accidental elements such as birth inside or outside wedlock, etc. The precise boundaries of these features admit several readings. The European Court of Human Rights still has to pronounce on many of these issues. The progress of science and recent discoveries in the fields of life-engineering introduce disruptive elements in this area. However, it is argued that a solution to the problems that may arise should regard the essential parameters here individuated, namely life, equality, dignity and non-discrimination.[65]

The logical corollary of these bases is the protection of the subject of these rights. Indeed, in order to live a human life, the need to be granted a work and social protection appear as indispensable. In this sense, the common core of human rights is completed with the right to a dwelling and the right to education, which are essential requirements to live in a dignified manner. Moreover, some human beings deserve more specific protection, either because of their specific condition as women and children, or because of the particular role they fulfil in society as for instance, workers and families. Since the human being - as a social individual, realises himself in society, within this common core should be included those

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[64] It could be argued that not even the right to life is peacefully admitted in the European sphere in these terms, since the euthanasia is legally admitted at least in one State (The Netherlands). In opposition to such opinion it is argued that indeed the basis of that position is the right to live a life with dignity, which in actual fact presupposes the admittance of the right to live.

[65] In actual fact, the European Court of Human Rights tends, for the time being, to resolve these thorny cases (that have reached the court up to now) precisely on the basis of the non-discrimination principle. See for instance case *Modinos v. Cyprus* (22.4.93) A Series vol.259, in relation to homosexuality and the Requete 17557/90 at the European Commission of Human Rights of 30.6.93, *D.N. v. France* in a case of transsexualism.

rights that help men to attain such realisation: enjoyment of essential freedoms (of assembly, of expression and of association), the right to access to justice and the protection of the common heritage of the world for future generations (in relation to cultural goods and environment).

Within a European area the latter rights are progressively being encompassed in conventions and treaties. Such development confirms the actual sharing of this basis. It is argued that these rights will exhibit many variations, in accordance with the cultural and ideological orientation of a State. Such variability stands, however, at the basis of the future developments of the common core, that will evolve according to the requirements of the most progressive answers to the most felt needs. This common core of European values is to be completed by the acknowledgement of the existence of other constitutional principles. Although they do not belong to the category of rights, they are essential elements in order to understand them. Two types can be singled out. The first ones exhibit a universal value which is part of the *common constitutional heritage* of Europe[66] as the choice of the democratic system of organisation of Member States. The others, always at a constitutional level, contemplate specific national values. Despite the fact that they reflect idiosyncratic choices they can be deemed to pertain to a common core of European values. A clear example of this aspect is represented by the respect of linguistic diversity.[67]

Such distinction brings about again the idea of *communio iuris*. It is suggested that a sort of *communio iuris* exists at an European level in relation to human rights. Parallel to it, each State keeps its peculiarities. This explains why some States have maintained provisions which seem to run counter the general acceptance without the system being shaken as in the case of the Irish constitutional prohibition to enact laws on divorce.[68] The *communio iuris* leaves margin enough for those deviations as well as for the balance of conflicting rights. Moreover, rights shared at the international level but that do not find reflection in the internal orders

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[66] De Witte,1991:7 (emphasis added).

[67] See namely Spain, Ireland, Belgium and Italy that introduce in their Constitutions the recognition and guarantees of pluralism of languages.

[68] See footnote 129 in chapter I for further references on this subject.

(such as data protection, environmental protection or protection of the cultural heritage) find here a correct formulation. The same applies for general principles as proportionality which do not necessarily find constitutional enshrinement but shape the understanding of human rights and their exercise. Thus, the reference to a 'common European heritage' (in the words of Article 128 of the European Union Treaty) which respects the cultural identity of Member States (always according to Article 128) finds all its sense. Such understanding will prove to be of great importance as regards public policy. Indeed, the defence of these rights becomes a matter of common public policy, a true European *ordre public*, distinct from the internal and international ones.[69]

b. Clashing with the EU?

It has been underlined that human rights have been under the Member State and Strasbourg organs exclusive protection because of the initial restricted scope of the EEC. A Community with apparently exclusive economic concerns showed no interest in commiting itself to human rights and their protection against violation. However, the exclusive competence of Member States as regards human rights was rapidly contested by the ECJ that assumed the possibility to rule on these matters whenever they came under the scope of EC law. This position still leaves human rights as an essential national issue that reflects Member States idiosyncrasy and keeps a clear delimitation between the competence of the EC and its Member States.

In fact, fundamental rights were the first cry of rebellion for Member State's courts with the aim of contesting Community legislation. National constitutions provided certain levels of protection that Member States were not ready to renounce to because of the fact of belonging to the EC. Well known are the preliminary rulings asked by the German and Italian constitutional courts in the 1970s.[70] A later decision of the German Constitutional Court[71]

[69] See Velu, 1973:258.

[70] In 1973 the Italian Constitutional Court affirmed that in case of an aberrant interpretation of Article 189 of the EEC Treaty, the guarantee of its own constitutional review would remain assured "on the enduring compatibility of the Treaty [with the]... fundamental principles of our [the Italian] constitutional order" [Decision No.183 of December 27, 1973, Rac. uff. 503(1973)]. In 1974 the German Constitutional Court (BVG) despite acknowledging that the ECJ had to that moment been "manifestly favorable to human rights", defended that the lack of a catalogue of fundamental rights and a directly elected Parliament imposed a review of the compatibility of Community rules with the German constitutional protection of fundamental rights (*Solange*, 37 BVerGE 271).

confirms, nonetheless, that the former concerns had been overcome. The final outcome of this 'conflict' (if it can be envisaged as being so) is the following: the BVG has put a kind of surveillance to the ECJ; if the latter respects *de facto* fundamental rights, the German constitutional court will abstain from verifying that secondary legislation satisfies the requirements of the GG.[72]

In this conflict probably a vindication of national sovereignty is underlying. Indeed, the process of integration in the EU implies renouncing to an important extent to national sovereignty. At a European level human rights have become one of the main parameters to limit the cession of sovereignty that entails belonging to a supranational organisation. The most recent example in relation to this difficult matter is to be found in the judgment given by the BVG in relation to the compatibility of the Maastricht treaty and the GG.[73] Thus, despite the progressive integration and cession of competence, controversial aspects will remain between the EU and its Member States, particularly in the sensitive area of human rights. The challenge is to make out of the national constitutions building blocks of European unity rather than bulwarks of sovereignty.

The conflict is still latent. On the one hand, national constitutional courts seem to have ceded but they still keep a stern position. On the other hand, the ECJ has acknowledged that it would react in order to prevent a generalised recourse to human rights by Member States with the purpose to derogate EC law. One may wonder if it has succeeded in doing so. Accepting new 'escape clauses' as the general good (as will be seen in the next chapter) leaves an open door to the recourse to human right exceptions.

This tension, as well as risks of conflict, reappear when the ECHR is concerned.

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[71] *Wünsche Handelsgesellschaft* of 22.10.86, BVerGE 73,339.

[72] It is argued that, however, a certain prudence is still present. The same assertions can be reproduced for the Italian case. The Constitutional court maintains its reserve to "verify through constitutional review of the implementing law if any norm of the Treaty, as such interpreted and applied by Community institutions... is not attentive to inalienable rights of the human person" (Decision No. 232/89 of April 13,1989). For further details, see Mengozzi (1992:188).

[73] BVG, of 12.10.93, 2BvR 2134/92 & 2BvR 2159/92, Maastricht judgment [1994] 1 CMLR 57.

Theoretically the ECHR and the EC Treaty keep separate competences, and distinct organs ensure the correct observance of those instruments. However, the progressive enlargement of the scope of Community law has put at stake the convenience of finding a compromise between the two systems.

The ECJ has no competence to control the application of human rights if not under the scope of Community law. However, the ECJ has been confronted with the interpretation of ECHR provisions in cases that seemingly exceed the expected scope of Community law. The correctness of such interpretation raises certain skepticism. Indeed, on some occasions, the Court has definitely given an interpretation which runs counter to the one given by the Strasbourg Court. This contradiction is evident in cases such as *Hoechst* where the Court denies the right to privacy to a moral person, while the Strasbourg Court recognises it[74] or case *Orkem*[75] where the ECJ rejects the claim that Article 6 of the ECHR includes the right not to give evidence against oneself, a position which appears clearly confronted to the *Funke* judgment of the Strasbourg court.[76] A last well-known example regards the abortion cases.[77] While A.G. Van Gerven contended that no infringement of Article 10 ECHR was likely, the ECJ ignored the human rights question. Indeed, since the defendants were not economic operators, the ECJ found that it needed not enter the matter. On the contrary, the Strasbourg court found that the breach of Article 10 had taken place. Admittedly, the ECJ judgments were previous to the Strasbourg cases. However, the clash is still likely where the ECJ does not feel obliged to follow Strasbourg's interpretation.

Indeed, on other occasions, the ECJ has decidedly ignored the latter while confronted with similar cases. Though the outcome does not necessarily clash, the result reached is not

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[74] Indeed, the European Court of Human Rights in case *Niemietz* (of 16.12.92) Series A, vol.251 (at pp.29-31) implicitly criticized the considerations given by the ECJ in case 227/88 *Hoechst* [1989] ECR 2859.

[75] Case *Orkem v. Commission* [1989] ECR 3283.

[76] Case *Funke* (25.2.93) Series A, vol.256-A.

[77] Case *Open Door and Dublin Well Woman* (29.10.92) Series A, vol.246-A and case C-159/90 *S.P.U.C. v. Grogan* [1991] ECR I-4685. The cases were concerned with the right of student associations in Ireland to give information about abortion provided in another Member State where the Constitution of the former prohibits abortion.

justified on the correct basis: case *Konstantinidis*[78] for instance, tackles the right to a name in exclusively economic terms, regardless of the importance that such right has as it reflects personal identity. Although Mr Konstantinidis was recognised the right, the stress on the economic aspects of the right did not afford sufficient protection of his rights. This situation, if continued, may lead to the undermining of the authority of both Courts. However, the most worrying problem which arises from such a situation is the position in which is left the individual whose rights are infringed by the ECJ. Since the EC has no standing in the ECHR sphere no possible protection seems available. The solution to this problem could be proposed in terms of the EC adhering to the ECHR. This is not the place to argue about the convenience, advantages and disadvantages of such accesion, but we advance a favourable view.[79]

2.2. The European Union and fundamental rights

Before Maastricht treaty there was the void... or to be more precise there was the vagueness. This chapter does not endeavour to draw a new monograph on human rights in the EC. We shall content ourselves with some outlines, leaving further explanations for more detailed works.[80] Certainly, it is difficult to maintain that the original treaties enshrined human rights as such (in contrast with the project of a European Constitution that will be examined later). However, the presence of some rights can be traced throughout the Treaty together with the recognition of some essential principles of the system.[81] This point will firstly concentrate

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[78] Case C-168/91 *Konstantinidis* [1993] ECR 1-1191.

[79] In favour of this position see the Memorandum of the European Commission (of 4.4.79) Bull. EC 4-1970 (No. 1.3.1) Suppl. 2/79, relaunched in 1990 in the Commission Communication 10555/90. As legal scholars are concerned, see Lawson (1994:223), Jacqué (1993); Schermers (1978). For further debate, see Economides & Weiler (1979) and Pipkorn (1993).

[80] See for instance the series of the EUI: Cassese (1991), Frowein (1986) and many others: Chueca Sancho (1989), Fernández Tomás (1985), Foster (1987), Hilf (1976), Jacobs (1994), Krogsgaard (1993), Lawson (1994), Lenaerts (1991), etc.

[81] Article 36 admits the protection of industrial and commercial property; promotion of fundamental rights is enshrined in Article 118(1); professional secrecy comes under the scope of Article 214 and Article 222 admits Member State protection of property. Together with them some essential principles existed and have found more defined profiles through case-law. Apart from the four basic freedoms (free movement of persons, of goods, of

on human rights as result from the ECJ's case law (since this appears as the primary source of human rights at the European sphere) and then analyse the expected evolutions of the matter.

a. A glance to the case law

In a quick review of the situation, it is reminded that case *Stauder*[82] was the first judgment where the Court acknowledged that fundamental rights constitute a part of Community law. The development of this first statement came in later cases such as *Internationale Handelsgesellschaft*[83] and *Nold.*[84] A sort of compilation of twenty years of case law is summarised in the following paragraph of case *Wachauf*[85]

> "fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the court. In safeguarding those rights, the Court has to look to the constitutional traditions common to Member States so that measures which are incompatible with the fundamental rights recognised by the constitutions of those States may not find acceptance in the Community. International treaties concerning the protection of human rights on which the Member States have collaborated or to which they have acceded can also supply guidelines to which regard should be had in the context of Community law"

The ECJ has been confronted with the protection of certain rights. Probably the most relevant, either because of their repeatedly appearance or because of the particular stress of the Court are the following: right to property,[86] privacy and inviolability of domicile,[87]

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services and of capital), the basic pilar of EC law was the principle of non-discrimination. As enshrined in Article 7 it concerned nationality grounds; it found an important complement in Article 119 which excluded discriminations on pay between men and women. Progressively the comprehension of the principle has been enlarged and it can be said to reach (almost) any kind of discrimination.

[82] Case 29/69 *Stauder v City of Ulm*, [1969] ECR 419.

[83] Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle Geldtreide* [1970] ECR 1125 at paragraphs 3 and 4.

[84] Case 4/73 *Nold v Commission* [1974] ECR 491 at paragraph 13.

[85] Case 5/88 *Wachauf v Federal Republic of Germany* [1989] ECR 2609 at paragraph 17. Even more recently, see paragraph 16 of case C-177/90 *Kühn v. Landwirtschaftskammer Weser-Ems* [1992] ECR I-35.

[86] Case 44/79 *Hauer v Land Rheinland Pfalz* [1979] ECR 3727, paragraph 17.

access to courts,[88] right to a fair hearing,[89] right to the judicial control of decisions,[90] syndical rights,[91] freedom of expression,[92] freedom to association, of religion and protection of the family.[93] The Court also admits essential principles of law such as non-discrimination (both as regards nationality and sex discrimination, either in an open or a covert manner),[94] legitimate expectations,[95] legal certainty,[96] *non bis in idem*,[97] prohibition of unjust enrichment[98], prohibition of double penalties,[99] and non retroactivity of criminal provisions.[100]

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[87] Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859; C-62/90 *Commission v Germany* [1992] ECR I-2575 confirmed by case C-404/92 *X v. Commission* [1994] ECR I- n.y.r in a case of control of the AIDS of fonctionnaires.

[88] Case 98/79 *Pecastaing v Belgium* [1980] ECR 691, paragraph 13.

[89] Cases 100-3/80 *Musique Diffusion Française et al. v Commission* [1983] ECR 1825, paragraph 10. These cases regard anti-dumping practices but this right has also been applied as regards Community servants cases and has even enlarged as to including the benefits of choosing the language of the procedure (case 137/84 *Mutsch* [1985] ECR 2681).

[90] Case 222/84 *Johnston v Chief Constable of the R.U.C* [1986] ECR 1651, paragraph 18.

[91] Case 36/75 *Rutili* [1975] ECR 1227 at paragraph 31.

[92] Case C-23/93 *TV 10 SA & Commissariaat voor de Media* [1994] ECR I- n.y.r.

[93] Case 266/83 *Samara v. Commission* [1985] ECR 189; case 273/83 *Michel v. Commission* [1985] ECR 347; case 130/75 *Vivien Prais v. Council* [1976] ECR 1589; case 267/83 *Diatta* [1985] ECR 567; case 249/86 *Commission v. Germany* [1989] ECR 1263.

[94] Case 149/77 *Defrenne v Sabena* (III) [1978] ECR 1365, paragraphs 26-27.

[95] Case 81/72 *Commission v. Council* [1973] ECR 575.

[96] Case 48/72 *Brasserie de Haecht v. Wilkin-Janssen* [1973] ECR 77 (in relation to competition matters) and case C-262/88 *Barber v. Guardian Royal Exchange Assurance* [1990] ECR I-1889 (relating to the temporal effects of the ECJ's judgments).

[97] Joined cases 18 & 35/65 *Gatmann v. Commission* [1966] ECR 103.

[98] Case 36/72 *Meganck v. Commission* [1962] ECR 289.

[99] Case 323/82 *Intermills v. Commission* (1984) ECR 3809; joined cases 296 and 318/82 *Netherlands and Leeuwarder Papierenfabriek v. Commission* [1985] ECR 1651.

[100] Case 63/83 *Regina v Kent Kirk* [1984] ECR 2689 paragraphs 21-22.

On many occasions the ECHR is the main reference in the judgment of the Court.[101] The ECHR appears thus, as a support for general principles of law that can already be found in the constitutional traditions of Member States.[102] No misleading conclusion should be reached here. The Court does not equate fundamental rights with the ECHR. Not only does it refer to constitutional rules and practices in the Member States, but it also goes beyond the protection offered by the ECHR confirming new rights protected by the EC legal order, mainly as regards rights of workers and economic agents, as for instance freedom to pursue trade or professional activities[103] and the free choice of economic partners as an expression of the latter,[104] the protection against insolvency[105] or the safeguarding of employees rights in the event of transfer of an undertaking.[106] The features of some of these cases were so distinctive that they appear to have been influenced the development of the ECHR and the judgments of the European Court of Human Rights.[107]

Admittedly, there is also a different concern underlying both systems which justifies the ECJ going beyond the ECHR. The Strasbourg organs intend to ensure that parties to the ECHR observe at least a minimum standard of human rights protection in domestic law without

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[101] None the less, it is recalled that Advocates General usually provide the Court with opinions based on the ECHR that the court will conveniently ignore in order to shape the issue as purely an economic one. This happened in cases *SPUC v. Grogan* (C-159/90 [1991] ECR I-4685) and *Konstantinidis* (C-168/91 [1993] ECR I-1191). The same bias can be noted in relation to intellectual property rights. In this respect it is acknowledged that the cultural aspects of the right are neglected in favor of the economic rights that derive from intellectual property (in this sense, Rigaux,1992:525).

[102] For an interesting study -although somewhat outdated, of the actual incorporation of the ECHR into the Court's case-law see Foster,1987.

[103] Cases 201-2/85 *Klensch v. Sécrétaire d'Etat* [1986] ECR 3503. It should be noted, however, that such right exists in some of the Member State's legal orders, see namely Article 12 German Constitution, Article 11(6) Danish Constitution and Article 38 Spanish Constitution.

[104] Case C-307/91 *Association Agricole Luxlait v. Hendel* [1993] ECR I-6849.

[105] Case C-334/92 *Wagner Miret v. Fondo Garantía Salarial* ECR [1993] ECR I-6911.

[106] Case C-392/92 *Schmidt v. Spar-und-Leihkasse* [1994] ECR I-1311.

[107] See Mendelson (1983:99) who gives some examples to illustrate this influence: the *Marckx* case (Series A, vol.31) refers to case *Defrenne v. Sabena* [1976] ECR 455; *Funke* case (Series A, vol.256-A) refers to case 374/87 *Orkem* [1989] ECR 3351 and case *Vosper PLC v. UK*, Applic. 9262/81 (1983)5 EHRR 465, where arguments were put forward concerning the development of indirect discriminination by the ECJ.

imposing uniform standards throughout the contracting States. On the contrary, the EC pursues unification of goals among several different legal standards. The adoption of lower standards than those protected by the Member States individually could lead to potential (even actual) constitutional problems while impairing economic integration. The necessity for the ECJ to go beyond the minimum standards required by the ECHR is thus explained. A different question is to evaluate whether the protection granted at the ECJ in actual fact improves the Member State's standards.

Despite the innovative character of these devices, most of the case law of the Court concentrates on features already recognised by Member States constitutions or the ECHR. What does this constitutional tradition of Member States entail? Does this approach set for a maximum or a minimum standard? The court has followed diverse techniques, one of them, the comparative approach. The success of the comparative approach to Member States' constitutions has been regarded with sceptical eyes. Sometimes it may lead to a maximalist aception of the rights[108] while in other occasions the Court seems to have adopted the common lowest denominator.[109]

It is interesting to note that the court makes reference to the constitutional traditions common to Member States searching for "the fundamental rights recognised by *the* constitutions of those States".[110] The use of this article shows that the Court in actual fact observes a maximum standard by means of which any Community rule which is in conflict with any of the rights guaranteed by any of the Member States' constitutions will be invalidated.[111] This statement seems none the less rather weak. Indeed the Court has usually

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[108] An example of this approach (in the sense of excluding a right from the EC scope) is given by the ECJ in case 227/88 *Hoechst* [1989] ECR 2859: it was settled that, in Community law, the inviolability of domicile is a principle protecting private homes but not business premises, because in respect to the latter, there are major differences between national legal systems. See criticisms to this position in De Witte (1991:11).

[109] See case 374/87 *Orkem v. Commission* [1989] ECR 3283.

[110] Case 5/88 *Wachauf v. Federal Republic of Germany* [1989] ECR 2609.

[111] Hilf,1976:149. In the same line of argumentation, Pescatore (1980:341) sustains that the taking into consideration of national constitutions helps to square two exigencies: finding solutions adapted to Community construction while at the same time avoiding conflicts with constitutional rules of any Member State since the Court will prefer the highest standard of protection.

been confronted with cases where the human rights at stake were largely recognised by all the Member States. One could wonder what would happen if the controversial issue regarded only one State. The clearest example that can be thought of regards the Irish constitutional clause whereby the protection of the unborn is granted. Already noted is the case *SPUC v. Grogan*, in which the Court deliberately avoided any reference to human rights. Just a coincidence? It may be argued that usually these matters will not come under the scope of Community law. However, immediately the pervading reach of Community competence raises itself.[112]

A suspicion comes to mind; that is, the Court cares for human rights when it does suit its particular interests, regardless the degree of community it finds in the Constitutions of Member States.[113] A clear example is to be found in those cases where the right is admitted as a means of ensuring the actual fulfilement of the market or the effective application of the freedoms. This is the case of the right to a name[114] and the right to use one's own language in legal proceedings.[115]

The initial approach to human rights has been progressively more active, respecting nevertheless a clear distinction between what comes under Commmunity law and what does not. The question becomes then to delimit what comes under EC protection. One could worry about the 'territorial' scope of Community protection. It would mean that the protection of human rights is activated when the exercise of the right is impaired or it is likely to hinder

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[112] Rigaux (1992:533) in the same line of argumentation.

[113] From a more general point of view it has been admitted that "the judges [of the ECJ] consider less the common nature of a principle than its ability to enter in the Community legal order and the ability of this order to absorb it; they choose the solutions which appear to be most progressive, those in accord with the economic and political climate of the Communities and their objectives, not the mean quantity between solutions prevailing in the national legal systems. Sometimes, the law of one Member State may suffice if it serves the best the Community purposes..." (Bredimas,1978:126). Such opinion joins the one of Advocate General Lagrange according to which the Court may choose "from each of the Member States those solutions which, having regard to the objective of the Treaty, appear to it to be the best" (Case 14/61 *Hoogovens v. High Authority* [1962] ECR 253 at 283).

[114] In case C-168/91 *Konstantinidis* [1993] ECR I-1191, the ECJ states that the risk of confusion of identity on the part of potential clients determines a violation of Community law that activates the protection of the latter (p.16).

[115] The ECJ grants it since it plays an essential role in the integration of a immigrant worker and thus, in achieving the objective of free movement of workers. See p. 16 case 137/84 *Mutsch* [1985] ECR 2681.

a Community policy in the EU territory. As a principle, matters that come exclusively under the national sphere since they are internal to the Member State are excluded from EC intervention.[116] However, this 'internality' does not ensure it having repercusions in other States, coming thus, under the Community realm.[117] In this sense, it could be argued that the 'effects' theory (as applied in competition law matters) finds a reflection in this area. Sometimes, on the contrary, such a territorial theory seems not to play and retreats in favour of a nationality criterion.[118] In this sense, relatives of an EC-national (irrespective of their nationality) can benefit of the rights granted to the former. In practical terms, as derive mainly from Regulation 1612/68,[119] they include the right to install themselves with the holder of the original right, a conditional right to remain permanently in the host State, admision to normal education on the same condition as nationals, the right to take up work and access to social security benefits of the State.[120] Seemingly, loosing the link with the EC-national entails the lost of the conferred rights.[121]

In recent years the case law of the Court seems to have gone further. After some hesitations the Court now ensures that not only the Community institutions but also the Member States respect human rights where they are acting within the field of Community law.[122] However, such incorporation is probably strongly linked to the sphere of the four freedoms. It should be noted however that it is not because there is a lack of Community law that the matter

[116] Case 175/78 *Regina v. Saunders* [1979] ECR 1129 at p.11.

[117] Case 126/80 *Salonia v. Poidomani e Giglio* [1981] ECR 1563 at p. 15.

[118] Case 12/86 *Demirel* [1987] ECR 1573.

[119] Council Regulation (EEC) of 15.10.68, OJ L 257/2 (19.10.68).

[120] See Joined cases 35 & 36/82 *Morson & Jhanjan* [1982] ECR 3723, Case 238/83 *Meade* [1984] ECR 2631 and Joined cases C-297/88 & C-197/89 *Dzodzi* [1990] ECR I-3763.

[121] See case 267/83 *Diatta* [1985] ECR 567.

[122] This proves to be particularly important in the case of the UK where the ECHR has not been enacted into national law and which has no constitutional protection for human rights. The problem becomes, again to ascertain when a case comes under EC law scope. It is precisely this limitation the factor that introduces most of the confusion at this level. First of all because the sphere of Community law is not clearly established in many ocasions. Secondly because it would seem that the rights thus acknowledged appear as a logical complement to the free movement of persons in the EC. Third, because even if the Court has assumed competence at this level, it is not ready to give the moral evaluations that such cases require (as happened in case *Grogan*).

comes outside the scope of EC concern. Where the matter belongs to an exclusive competence of the Member States, as human rights are concerned, there is also a Community interest, since when a Member State is acting under an express Treaty derogation it is acting within the scope of Community law.[123] Furthermore, it can be argued that some precise Community rules are specific manifestations of more general principles enshrined in the ECHR. In this sense, a violation of the general principle would constitute a violation of Community law, even where the Community rules were not distinctively violated.[124]

Through this enlargement of ECJ control of the respect of human rights by Member States as regards their citizens, the Court introduces non-economic values in the system. The main handicap that such mechanism entails is the strong link of these values to the sphere of Community freedoms. The question becomes thus to establish whether the matters fall within the scope of Community law. Nothing appears as definitely excluded. The most recent cases brought before the Court show the unexpected reach that protection of human rights may have in the EC sphere and the problems which raise therefrom: cases *Demirel*, *Grogan*, *Konstantinidis*, etc.[125] Although it is admitted that the ECJ cannot impose uniform standards of human rights observance throughout the territories of the Member States - and seemingly it would be not desirable,[126] this attitude of the Court can be criticised because of its softness.

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[123] Jacobs,1994:563. Usher (1993:113) argues further that in this case the State is compulsory bound by the principles derived from the ECHR. This view is upheld by the opinion of A. G. Gulman in case *Bostock* [1994] ECR I-955 (at paragraph 31), according to which "the legislation of the Member States may be assessed on the basis of the fundamental rights applying in the Community legal order at least in two situations: first, where the national legislation implements Community rules (paragraph 19 of the judgment in *Wachauf*); secondly, but more indirectly, in cases ***where a Treaty provision derogating from the principle of freedom of movement is relied on by a Member State in order to justify a restriction on freedom of movement*** stemming from that Member State's legislation. The more indirect significance of the fundamental rights applying in the latter group of cases results from the fact that the Court uses the fundamental rights in order to give a restrictive or extensive interpretation of the derogations laid down in the Treaty from the principle of freedom of movement". (emphasis added)

[124] This theory is advanced by Weiler(1992:81). He takes as an example the rules of Community law which limit the power of Member States to control aliens, rules that are "a *specific manifestation of the more general principle* (emphasis added) enshrined in Article 8, 9, 10 & 11 of the ECHR" (Case 36/75 *Rutili*, [1975] ECR 1219).

[125] These cases are respectively concerned with family regroupment, abortion, right to a name and respect of the own identity.

[126] In a parallel to the position of the ECHR, see Hall,1991:475.

Indeed, Advocates General have proposed stronger readings of human rights in the framework of the EU. Several examples can illustrate this conjecture. Firstly, in the *Konstantinidis* case[127] Advocate General Jacobs contends that any violation of human rights of a migrating Community national should be considered as a violation of Community law, as each violation is likely to impede free movement of persons. He further suggests that every citizen of the Union may rely on the fact that he will be treated in accordance with a 'common core of fundamental values'.[128] In case *SPUC v. Grogan*[129] Advocate General Van Gerven reformulates the problem at stake as "a *question of balancing* two fundamental rights, on the one hand the right to life as defined... by a Member State, on the other the freedom of expression, which is one of the general principles of Community law". Furthermore, Advocate General Gulman in case *Bostock* appears to retire to the 'moderation' of the Court and does not dare to tackle the possible horizontal effect of human rights between individuals at the Community sphere, although it is "in fact of fundamental importance".[130]

Summing up, despite a progressive enlargement of EU concerns as regards human rights, an economic shade is still very present in the Community approach to human rights. The Court seems to hesitate between a more progressive reading of Community law as regards human rights (as its Advocates General sometimes prompt) and the fear to enter into too complicated and sensitive areas which are best dealt with at a national level. Still, the Court is the engine that has stimulated the development of non-economic criteria within the Community. Towards what direction is the Union striding? Some of the future developments expected receive the attention of the next pages.

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[127] Case C-168/91, [1993] ECR I-1191.

[128] Advocate General's opinion at paragraph 46. Such an opinion is contested by his colleague, A. G. Gulman in case C-2/92 *Bostock* [1994] ECR I-955, who deems this suggestion to be 'too reaching' (at p. 971).

[129] Case C-159/90, [1991] ECR I-4685, paragraph 34, p.4725.

[130] Case C-2/92 *Bostock*, [1994] ECR I-955 at paragraph 39 of the Advocate General's opinion.

b. Future developments expected

Further developments of human rights in the context of the EU are likely to happen. Here three possible means of development are suggested: the exceptions allowed to Member States, the legislative development of the rights and the project of a European Constitution.

i. Exceptions to the Treaty

Many of the human right issues will enter the EU sphere precisely through the escape valves that the four freedoms allow, particularly free movement of persons, goods, establishment and services. For instance Article 36 and the interpretation of mandatory requirements undertaken by the ECJ puts at stake intellectual property, cultural goods' protection, environmental protection, weak parties' protection. This web of exceptions likely applicable by Member States encompasses largely what we have defined as third generation rights. The problems arise when Community law evaluates the adequacy of these exceptions to EU requirements since it lacks elements of reference -unless the purely economic ones are considered.

These problems will be analysed while dealing with the notion of public policy and the general good.[131] It is advanced, however, that the case law of the ECJ in relation to these exceptions has been at the basis of the elaboration of a Community general good, in which most of the national features were reflected. One should trust a similar continuation of the process, despite the fact that such a process may have to face more and more sensitive issues. Indeed, the difficulties the ECJ may encounter are rather similar to the ones that the European Court of Human Rights faces when it endeavours to decide whether the restriction that a contracting State alleges based on morality grounds is permissible or not.

ii. Community legislative developments

The second point of these remarks refers to the legislative developments that human rights

[131] See chapter III, pages 149ff.

may undergo in the Community sphere. In this sense, already some principles have been developed under EC law and thus, have been endowed with a particular Community shade. This is the case namely of the principle of non-discrimination: the general statement of the UN Universal Declaration finds a deeper content with precise profiles as regards discrimination on nationality grounds (Article 7 of the EC Treaty) or in relation to conditions of payment (Article 119 of the Treaty). Moreover, it is argued that the secondary legislation fulfils a completing function as regards other aspects of the principle. Thus, Regulations on social security matters provide further elements for understanding the principle that has become common for all Member States.[132]

Together with these already settled principles an increasing number of Community inroads in human rights matters is noted. Such inroad can introduce some distorting elements. Thus, the Parliament has enacted a Declaration on Human Rights and has proposed other texts.[133] Secondary legislation is also concerned with human rights: some Directives and Regulations put at stake issues which are already the object of international conventions. The first areas to be affected by this phenomenon are the social and economic ones which were already under the scope of ILO conventions. Progressively this process is taking place in the sphere of the third generation rights for instance, the protection of cultural patrimony. The two recent texts dealing with this issue[134] should be read under the light shed by the Unesco convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14.11.70. A third example of this legislation parallel with international texts is the proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data[135] which will concur with the

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[132] The inter-action between the EU and its Member States works also in the opposite sense; therefore, the influences that State principles may have in Community definition is not to be disregarded.

[133] See for the Declaration (12.4.1989) OJ C120/51. See also the Resolution on a European Charter of Rights of the Child (A3- 0172/92 OJ C241 p.67 of 21.9.92).

[134] Council Regulation EEC N0.3911/92 of 9.12.92 on the export of cultural goods (OJ L395 of 31.12.92) and Council Directive 93/7/EEC of 15.3.93 on the return of cultural objects unlawfully removed from the territory of a Member State (OJ L74 of 27.3.93).

[135] COM(90) 314 final SYN 287 (OJ C277 of 5.11.90). In the same line of legislation, there is a Proposal for a Council Directive concerning the protection of personal data and privacy in the context of public digital telecommunications networks, in particular the integrated services digital network (ISDN) and public digital mobile networks (COM(90) 314 final SYN 288, reference in the OJ quoted).

European Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (of 28.1.81).

It is noted that these directives (or proposals) summarise most of the Community background on human rights as defined by the ECJ and reflect the most recent trends on the matter in the framework of the EU.[136] However, clashing of regulations is not wholly eradicated and the ECJ has already had to solve cases on these matters, namely the *Levy* case which concerned the understanding of an ILO Convention and social and working legislation in the European Community.[137] Such clashing of regulations is not exclusive of the EU. Indeed, in the ECHR's sphere the problem has raised in similar terms as regards the compatibility with the convention of sanctions taken on the basis of Danish legislation passed as result of the 1965 Convention on the Elimination of All Forms of Racial Discrimination.[138] It is argued that the EU, no doubt, will provide a thorough protection on human rights in the long run since its attitude confirms its will to do so. Nevertheless two dangers should be noted: firstly, as indicated, potential clashes with already existing international texts; secondly, the partial approach to human rights that may be biased in favour of EU policies. Both of them are to be avoided. The good sense of the Union is trusted.

A last comment is devoted to the innovations that the European Union Treaty introduces in relation to human rights. The newest provision in relation to human rights is introduced in

[136] Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data stresses the concern of the EU to "promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States and in the European Convention for the Protection of Human Rights and Fundamental Freedoms" (para.1). Moreover, since national legislation tends to protect fundamental rights "the approximation of laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community" (para.7).

[137] Case C-158/91 *Ministère Public et direction du travail et de l'emploi v. Jean Claude Levy*, [1993] ECR I-4287. It is interesting to note that the ECJ returns the problem to the Member States' courts by assessing that *"ce n'est pas à la Cour dans le cadre d'une procédure préjudicielle, mais au juge national qu'il appartient de vérifier quelles sont les obligations qui s'imposent, en vertu d'une convention internationale anterieure, à l'État membre concerné et d'en tracer les limites de manière à determiner dans quelle mesure ces obligations font obstacle à l'application de la directive"* (p.21). It could be wondered whether the answer provided responds to the fact that effectively, it is a preliminary ruling or it would be answered in different terms in the context of another procedure.

[138] Case *Jersild v. Denmark* (23.9.94) vol.298, Series A. The European court evaluates the issue according to the control of the necessity -within the meaning of Article 10(2) ECHR- of the measure based on that legislation.

Article F(2) of the EU Treaty.[139] As results from its text, the first verification is the acknowledgment of the ECHR as a direct source of EC law. In this sense, the Convention appears as formally integrated in the Community sphere, a circumstance that finds support in the express mention of the convention in the context of other Treaty provisions.[140] It is arguable whether this acknowledgment really improves the protection granted by the Court up to that moment. As was pointed out before, sometimes the Court seems to go beyond the protection allowed by the ECHR.[141]

The incorporation of the ECHR into the EU does not eradicate many of the potential conflicts that may arise between the two systems, either from a jurisdictional point of view (for instance, as regards the competence to interpret the convention where the two Courts are involved since the ECJ has no jurisdiction in relation to Article F(2) EUT) or from a substantive point of view (as each one of them keeps a clearly differentiated shade: the ECHR stands for civil rights while the EU exhibits a more economic vision). The answer to these conflicts may not be established definitely in advance. It can however be defended that the ECHR should prevail.[142] Furthermore, the prior commitment to the ECHR would advance an argument of public international law to so admit. The Maastricht Treaty does not seem to incorporate anything really new but a confirmation of the results reached by a committed ECJ in the absence of a catalogue of fundamental rights.

iii. The project of Constitution of the EU

The project is the latest proposal as regards the introduction of new rights and further protection for the existing ones. Lately a project of Constitution for the European Union was

[139] It reads as follows: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States as general principles of Community law".

[140] See Article K(2). See also Kroogsgaard (1993:108) for further analysis of the point.

[141] See Mendelson,1981:125; Lenaerts,1991:367; Clapham,1990:331.

[142] This is the conclusion reached by Kroogsgaard (1993:110) while he re-reads the *Grogan* case in the light of the Maastricht Treaty.

proposed.[143] This text exhibits the interesting feature of including a system of human rights. Most of the rights enshrined in the project belong to a common tradition of the different Member States. This list collects the case law of the ECJ and the most recent trends in relation to human rights. In this sense three points should be noted: the admittance of civil and political rights in the line of traditional declarations, the precision in the definition of social rights and the incorporation of the third generation group rights (namely in Article 15 -right of access to information- and Article 21 -respect for the environment-). These rights are connected to the well settled international treaties. One may venture that, in a certain manner, they are the conjunction of the most refined developments in the matter.[144]

However, some features could be reproached for still keeping too economic an approach. Indeed, the balancing between an economic reading of human rights and the overcoming of purely economic views has not been reached yet. The former tendency can be corroborated by having a look of Article 2, that shapes human dignity in terms of economic welfare. In contrast, the latter is suggested by Article 1, by means of which the EU proposal inserts in the first place the right to live.[145] It is nevertheless as regards social rights that this project shows an progressive attitude. Indeed only the most recent Constitutions of the Member States have incorporated them and not even all of them: right to strike and take collective action (Article 12c) or the right to negotiation (Article 12b) are by no means accepted uniformly but respond to a will of a legal-geographic area especially concerned with economic and social welfare of its citizens. In this sense the project of Constitution is a culmination of the task undertaken almost forty years ago.

The incorporation of the third generation rights, which confirms the tendencies followed by recent constitutions, is positively evaluated. In this sense, the acknowledgment of the right

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[143] See the Resolution A3-0064/94, PV 59 II (10.2.1994), PE 179.622.

[144] For instance, Article 17 (which regards access to courts) enshrines most of the requirements stemming from the ECHR (as interpreting Article 6) and Member States' constitutions.

[145] One could wonder what is the sense of this Article in the framework of the Union since in most of the Member State's constitutions it is only implicitly admitted. Moreover, one could wonder if a judgment as the *Grogan* case might have had an influence on this choice or, on the contrary, it reflects a turn on the conception of the Community legal order, meaning that the economic view has to cede place to more spiritual values.

of access to information (Article 15) as well as the respect for the environment (Article 21) reflect the concern already expressed by the ECJ in its case law. The lack of reference to consumer rights, however, is surprising. Seemingly the EU would content itself with the results achieved by Community secondary legislation. This may be one of the most surprising absences of the EU Charter if the previous EC background is taken into account. However, it is not the only one since no mention is made of the protection of cultural goods, historical and archaeological patrimony and the rights of minorities and other particularly unprotected groups. This exclusion is moreover inexplicable because the protection of the latter suits perfectly the welfare scheme that the project promotes. The former, on the contrary, deserve a specific mention in the preamble as well as environmental protection, a fact which increases doubts about the convenience in excluding it from the list while environmental protection appears. Despite these 'reproaches' the project would actually confirm that human rights have an existence of their own, regardless of the fact that they impinge on or are impinged by Community freedoms and irrespective of the possibility they are under or outside Community scope.

Doubts arise about the convenience of this European catalogue where the Member States keep their national constitutional catalogues that might grant not only a larger scope to the rights, but also a more thorough protection.[146] Indeed, potential conflicts between this text and national Constitutions can arise since certain of the rights encompassed in the project are at large ignored in the Member States' supreme law. Probably if the project is accepted it will entail the reform of national constitutions in that respect. The divergencies are not however, of such a degree as to impel Member States to withdraw from the Union; particularly if it is taken into account that the project is, as indicated, a kind of conclusion of a logical process that all Member States are following with greater or lesser enthusiasm. Doubts may arise, nevertheless if some precedents are remembered, namely the UK's position in relation to the EC Charter on fundamental social rights of workers. Probably the principle of supremacy of Union law will provide final criteria of clarification. In this sense the Union might follow the

[146] Indeed these doubts were suspected to take place already before the enactment of this text: "the adoption of a written catalogue of fundamental rights... while certainly desirable and useful, would not provide a miracle solution either...[since] the uncertainty lies not so much in the identification of the rights, as in the interpretation of their scope and of the permissible restriction on their exercise" (De Witte,1991:19).

same path undertaken in the USA by the Supreme Court as regards human rights and the principle of supremacy of federal law.

Problems will still arise since there are rights left outside the project. Some of them had already been granted Community protection but are now ignored, namely consumer rights. The question which follows is who has the competence to deal with this right and furthermore, according to what criteria are clashes between interpretations to be solved? It could be argued that, finally, it is only a question of sovereignty. Indeed the project does not reject the sovereignty of Member States in human right matters. One may wonder, on the contrary, whether the Union acquires it to an extent as to solve all these open questions. A balance between a too aggressive attitude of the Union and a too conservative position of Member States appears as the right answer.

c. Evaluation of Community human rights

Seemingly it was the Court's fear to ensure the principle of supremacy of Community law rather than philosophical considerations of a humanitarian kind that led to the introduction of the concept of human rights.[147] In spite of this origin, the EU can be said to elaborate its own system of values which applies to both national and Community institutions and contains, together with economic principles, a range of ethical principles. These values would be a reflection of collective morals.[148] These rights exhibit differentiated features that let them be individuated as Community rights.

It would appear thus, that the EU has created a consistent system of human rights protected when the issue at stake falls within the scope of Community law and then, within the competence of the ECJ. Such a system encounters two main shortcomes, namely the restricted

[147] Hartley,1988:132 and Mendelson,1981:130. Whether the ECJ has evolved and undertaken a more 'committed' position or whether it is still a bulward of Community supremacy may still be discussed. In this sense, see Weiler & Lockhart, 1995:61ff.

[148] Hetsch,1982:554. In the same line of argumentation, Temple Lang (1990:656) speaks of the Community law as having a *moral* objective.

material scope of protection that rights may be endowed with (since the violation of the same right outside the framework of the Treaty would not stimulate the protective reaction of the Community) on the one hand, and the personal restriction to citizens of the Community on the other hand.[149] The European Constitution, if accepted, would present other shortcomes, namely the risk of fixing in a too tight corset these rights and the incompleteness of the list, which leaves outside EC's scope some matters that may require a response based on human rights criteria. Indeed, it has already happened (the *Demirel* and *Konstantinidis* cases). It is argued that sooner or later, the EU will have to take action, at least at a jurisdictional level, in order to both avoid stagnation of the tradition on the one hand, and to adapt to the continous challenge of human rights on the other.

As they stand now, human rights in the EU sphere show then this restricted approach. This inconvenience is a defining characteristic of the EU rights, since they are read in the light of market fulfilment. This serious limitation -read together with the potential (and actual) clashes with the Strasbourg case law, looms as a risk for the construction of a Union which offers global legal protection to its subjects. However, the benefit of doubt in favour of an enlargement and progressive commitment of the Union as far as human rights are concerned is still promoted. Such enlargement will entail accepting new rights as coming under the scope of Community law and therefore, being granted protection.[150] As pointed out above, a possible way to do so could be by accession to the ECHR. In any case, a more coordinated interpretation according to the criteria settled by the Strasbourg organs is necessary.

Certainly some devices stemming from the latter's case law seem to have found acceptance in the ECJ's case law. Thus, the principle of proportionality emerges as the touchstone of the

[149] Clapham (1993:248). It is argued that Mrs Demirel -Turkish national, wife of a Turkish immigrant in Germany (see footnote 118) would have found better protection of her rights under the ECHR. Indeed, the latter grants complete coverage since it does not regard nationality as a criterion to activate the system.

[150] The importance of a Community protection is even greater where still some Member States do not adhere to the ECHR. Moreover, the rulings that the ECJ gives have an effect *erga omnes*, while the Strasbourg Court only rules *inter partes*.

compatibility of the right, of the evaluation of the admitted restrictions[151] and as the criterion to solve potential clashing of rights. Precisely as regards the clash of different rights, A. G. Van Gerven argues that restrictions on a right may be imposed only when the other right responds to requirements of proportionality. Three questions should be answered in the affirmative in order to satisfy the proportionality requirements: does the measure respond to an imperative social necessity? If it is so, are the means necessary in a democratic society? Are these means proportional to the aim pursued and is the fundamental right concerned impinged upon as a result?.[152] This threefold question brings to mind the three layer control undertaken by the ECHR. The Court must be aware of the risk in unconciously gliding to an abuse of the proportionality principle (as criticised in relation to the Strasbourg Court). Additional care should be recommended to avoid a biased reading of proportionality in the sense that the 'imperative social necessities' only reflect Community internal market purposes.

Summing up, human rights are a living reality that will still develop in the EU sphere. If the activism of the ECJ has been both praised and despised, in relation to human rights the Court becomes the engine of promotion and defense of the European area. Probably the Court has never executed a predefined strategy; however its role has been and will be essential to promote and update the Union's position as concerns human rights. Such evolution admittedly regards the material scope of human rights, but also the personal scope, that is, the holder of the rights.[153] This will certainly imply a close cooperation with State constitutional courts[154] and further coordination with Strasbourg organs.

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[151] See for instance the indications given by the Court: "In determining the scope of any derogation from an individual right such as the equal treatment of men and women [...], the principle of proportionality, one of the general principles of law underlying the Community legal order, must be observed. That principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view" (Case 222/84 *Johnston v. RUC* [1986] ECR 1651 at para. 38).

[152] See opinion of the Advocate General in case C-159/90 *SPUC v. Grogan* [1991] ECR I-4685 at p. 35.

[153] If the Court is ready to protect certain non-EC citizens when they exhibit a family link with an EC national, such protection should be extended to whoever stays in the EU territory, if the Union intends to fulfil a reading of human rights which goes beyond nationality boundaries.

[154] In this line of argumentation stands the decision of the BVG (B.2.c5) - Maastricht Treaty judgment, whereby it is settled that "the Bundesverfassungsgericht and the European Court are in a relationship of co-operation for the guarantee of constitutional protection [of human rights], under which they complement one another" ([1994] 1 CMLR 57).

3. EUROPEAN *ORDRE PUBLIC* AND HUMAN RIGHTS

Once the existence of a common core of rights in the framework of the European States has been ascertained and a parallel common core of Community rights - which stems both from legislation and case law, is clearly delimited, the question arises whether a common core of European human rights exists and, furthermore, whether this core is at the basis of a European public policy.

Both Member States and the EC have defined a system of protection different from each other. This separation does not imply, however, that no interpenetration between them exists. Indeed, it has been shown how the EU is inspired by the constitutional traditions of Member States. At the same time it is acknowledged that pertaining to the Community, entails a reading of national law according to the guide-lines which stem from the latter, namely as regards interpretation of human rights within the Community. The common reference point of the two systems appears to be the ECHR. The Convention provides a minimum standard especially as based on the interpretation of the European Court of Human Rights. The rules that are developed by the Court become a tool of clarification of the common basis and entail a certain standarisation of European criteria.[155] Indeed, they help to promote legal integration.[156] A certain standarisation however, does not ensure a absolute uniform understanding of human rights within a European area, namely as limitations to the rights and solution of conflicts between them are concerned.

Indeed, although the protection of human rights seems to be expanding to a large extent, it would seem that at a European level (both at the Community and at the Council of Europe level) one may not speak of a European morality yet. Indeed, as the Court [ECHR] has observed, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the

[155] Moreover, it has been defended that the Convention be at the basis of common European legislation, *"en tant qu'elle favorise l'harmonisation des concepts juridiques"* (Vélu,1973:329).

[156] Frowein,1986:327. This vision fits perfectly with the proposals made in the first chapter, by means of which, public policy stands at the basis of substantive legislation that fulfils material justice.

requirements of morals as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.[157] Although the convention does not provide such a uniform understanding, it makes an essential contribution to the EU legal order since it introduces within the European Community rights other than socio-economic. This is so even where they may be read in an economic light. Such incorporation implies a progress within a European area. The improvement here noted is further promoted by the ECJ. Indeed, it is recalled that the latter has sometimes gone beyond the ECHR in admitting of rights when confirming new rights coming under the protection of the EC legal order (as for instance, freedom to pursue trade or professional activities).

These reflections clearly point at a community of interests in the protection of human rights existing in the European area. Such common interests have been individuated as a *communio iuris* and are to be found both as regards the strict State level and the Community level. The *communio* is conformed by a common core of human rights to which the States adhere while they keep a web of features that reflects the idiosyncrasy of each State in human right matters. A peaceful coexistence between the common core and the particularities of States seems to be therefore ensured.

This *communio* must be tackled from a dynamic point of view. The continous arisal of conflicts between rights and the urgency to respond in human rights terms to the evolutions of society so require. Thus, individual States will have to find answers to the new problems that are arising in relation to human rights, namely as regards bioethics, data protection, etc. Indeed, human rights, as a living doctrine will adapt to the requirements that progress is creating. The same applies for the EU, where the interaction with Member States entails an openness to new criteria. Exceptions to the Treaty provisions (as admitted in Article 36) will provide further ways of introduction for human rights in the EU sphere; of health protection or consumer protection (Article 36 of the EC Treaty) respond to this scheme. It is argued that application of these exceptions - as allowed by the Treaty and/or enlarged by the ECJ, will have to be respectful of the Community structure. Certainly, this dynamic approach entails a permanent accomodation of the European *communio iuris* and Member State's idiosyncrasy.

[157] See case *Handyside v. UK* (7.12.76) Series A No. 24 p.22 at para. 48.

In this light public policy may be then tackled. The incorporation of human rights to public policy should not be understood as fostering an illimited recourse to public policy but as a mechanism to introduce within correct terms human right criteria in the sphere of private international law. Seemingly, the common core of human rights individuated in the European area would constitute the main reference for such notion of public policy. A European public policy based on human rights puts at stake the notion of a true international public policy. Its true international character - as defined in chapter I, would be confirmed by two factors, namely the absence of a (territorial) link with a particular State and it being inserted in a broader international context of protection of human rights.[158] The notion keeps nevertheless a distinct European character since it is mainly focused on the ECHR.

It has been sustained that the ECHR should be the source of a Community *ordre public*.[159] However, voices may certainly arise contending the uselessness of a Community *ordre public* since the protection of human rights granted at a European level (non-EC) stays already at the basis of a true European *ordre public*. This notion not only encompasses the normative universality of the European texts but it is inserted in a wider movement of international protection of human rights. Therefore, if a true international (European) *ordre public* on human rights exists, it would seem that there is no need to have recourse to a Community *ordre public*. This is furthermore so when the outcoming notion risks to exhibit such a relative character both as regards its economic bias and the necessary link to Community competences in order to be operative.

Certainly, the problem of the identification of the matters which come under Community

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[158] Indeed, some judgments of the Strasbourg Court so confirm: the extension of the protection ensured by European States as human rights are concerned is acknowledged in case *Soering* (7.7.89, Series A, vol.161) where the question was raised as to the violation of the ECHR by a non-contracting State, namely the United States. The insertion of such protection in a wider sphere stems from case *Jersild v. Denmark* (23.9.94, Series A, vol.298) which, in order to evaluate the necessity of the State measure as conformed to the ECHR criteria, refers to the 1965 UN Convention for the elimination of all forms of racial discrimination. Admittedly, these cases did not involve private international issues but they constitute a guide-line in private international law cases. In this framework could be read the judgment given by the Cour d'appel de Paris, *Osmar B. v. Procureur de la Cour* (14.6.94), RCDIP, 1995:308. According to it, the application of the national law of an Argentine should be rejected as violating the right to privacy of anybody domiciled in France as protected by the ECHR and French law. No further considerations as to the convenience of reading cases about transsexuals on terms of respect to the right to privacy are undertaken. Suffice here the acknowledgement that human rights may be at the basis of a European public policy.

[159] Martiny,1991:12.

scope remains crucial and difficult to solve. The risk of adhering to an exclusive economic reading is latent and some issues should absolutely be saved from this incoming tide; otherwise there is a danger of becoming insensible to human values that would disappear under economic criteria.[160] However, the existence of a notion tainted of economic shades entails to a certain extent an improvement on the traditional conception of *ordre public*: a Community reference introduces the protection of specific rights that are left outside the normative sphere of public policy hereto analysed. Indeed, the protection of economic agents has reached very high level of development in the EU and constitutes a minimum that should be respected as essential to the Union. As will be seen later on, such protective standards are being enshrined in Community legislation under the shape of mandatory rules (namely as far as social security, employees and consumer protection are concerned).

Moreover, there is a second reason to defend the importance of a reference to Community parameters, though partially coincident with already existing notions. Even where the protection granted at the EU coincide exactly with that provided by Member States or the ECHR system, the Community order introduces an essential element, which is the integrative effect and the sense of identification that human rights incorporate.

The existence of a notion which favours integration and identification signs should not be disregarded. This notion will be referred to as Community public policy, but indeed, it should be understood as a European notion improved with the latter characteristics. Certainly, to admit a notion of the kind entails further consequences in the context of the relations between the Union and its Members on the one hand and the States between each other on the other hand. Will Member States public policy undergo any change because of the existence of a Community *ordre public*? What are the consequences as regards the potential conflicts between Member State notions?

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[160] Indeed, one could wonder what would it happen if (in a not so hypothetical case) the regulation of euthanasia was settled for the whole EU by a judgment of the ECJ establishing that it pertains to freedom to provide services: would it break out in strange manoevers of "shopping" around for the best country to die or would it compel Member States to review codes on ethics, constitutional settings, etc? The critical issue becomes setting a limit on this expansion. As Zagrebelsky (1992:172) contends, where pluralism of values is understood in the sense of 'transactionable' goods, the risk exists that economic values assume the leading place. Admittedly, this would entail the end of pluralism.

The first question cannot be answered without bearing in mind the fact that Member State's public policy will apply both in relation to other Member States and outside the Union boundaries. Moreover, it seems necessary to distinguish between the matters that come within and outside Community competence. The former find necessarily Community delimitation, irrespective of the fact they apply inside or outside the territorial boundaries of the Community. The criteria that the latter dictates - as for instance in relation to consumer protection, becomes a minimum that Member States may enlarge but needs to be ensured in any application of State public policy.

In relation to the issues that are not necessarily a Community competence, Member States are invited to bear in mind the choices undertaken by the EU. The question is to what extent should these indications be respected. Indeed, it could be feared that the competence the Community assumes in relation to human rights is overwhelming the system and bringing national notions of public policy to an excesively restricted economic reading. There is no need to reproduce the criticisms raised in relation to the cases *Konstantinidis* or *Grogan*. Admittedly these cases did not involve international public policy issues in the sense of private international law. It is contended however, that cases already solved in Member States may find difficult accomodation if they had to be solved with similar criteria as those developed in the referred to cases. Such an event is particularly prone to happen where civil public policy is concerned. Would the *mères porteuses* question - as solved by French courts, necessarily undergo a Community reading in terms of provision of services? If so, would it affect connected areas such as filiation and adoption? Indeed, the issue becomes even more entagled when public policy is called to apply in relation to non-EC States.

The risk exists that inconsistencies within a State legal system arise due to the application of two different standards. In fact, apart from the discrimination that may be lingering, the need to observe different criteria presupposes a degree of refinement in the judge's appreciation that he is likely to lack. Moreover, as the most essential choices of a State are concerned, it is explainable that a certain coherence within the legal system should be ensured. Therefore, it is argued that the EU will have to soften its attitude of control of Member States in so far human rights are concerned (understood that the latter are consistent with the ECHR). Such contention is in line with a more determined protection of the Member

States' cultural identity.

As regards the conflicts between Member States' notions, likewise two States' public policy may conflict where one of them forwards a mandatory rule (e.g. on consumer protection) and the second one refuses it on the basis of public policy principles, (e.g. the right to privacy) where both public policies pertain to a general European public policy. Indeed, the conflict of public policies can be 'translated' on many ocasions into a conflict of fundamental rights. The solution of this clash presents many difficulties already at a purely domestic level. The criteria according to which to solve the conflict is not clear. The principle of proportionality may be suggested as a criterion in order to cope with this difficulty. A restrictive use of the exception of public policy as well as the necessary understanding that a right may cede in front of another one should be the essential guide-lines in the solution of the conflicts. Indeed, a clash of public policies may likely reproduce the conflict between the Community and the Strasbourg case law as human rights are concerned. It is argued that further criteria of solution will stem from ECJ's case law and the European Court of Human Rights while solving these clashes.

Envisaged in these terms, Community public policy may likely be incorporated to a kind of constitutional parameter (of particular reinforced strength) seemingly interpreted by the ECJ in the same sense that constitutional courts of Member States delineate the parameters of State public policy. Indeed, the role of the Court will be essential, not only in order to pin down the exact contents of public policy as far as human rights are concerned, but moreover to solve the arising conflicts. Certainly, the distinction of what comes under Community public policy and what remains under the State public policy still needs to be worked out. However, the existence of a *communio iuris* based on pluralism permits conciliation of the possible conflicts arising between them. The *communio iuris* notion, read in conjuction with a progressive concern for the protection of the cultural identity of States, give the adequate answer to the questions here raised. Indeed, they permit us to accept that several criteria of public policy based on human rights exist. Secondly, they permit avoidance of an exclusive economic reading of public policy as far as human rights are concerned. Thirdly, they ensure a certain coherence as regards the application of public policy in relation to both Member States and non-EC States.

Europe is striding to a better protection of human rights. The role of the EU in this process must be essential. Bearing in mind that public policy should remain an exception and therefore of restricted recourse, it should be admitted that a European public policy based on human rights appears then as a means of effectively protecting such rights. Indeed, the human rights context appears as the starting point of a true European public policy.

CHAPTER III:
EC LAW AND STATE LAW: PUBLIC POLICY AND THE GENERAL GOOD

INTRODUCTION

Chapter I has defined the boundaries of international public policy as well as its differences with other notions of public policy. This chapter is devoted to one of the latter, namely public policy in the sense of the EC Treaty. Public policy appears here also as a safety clause but in a different context: indeed, it is to be invoked against the EC and not against other States. This phenomenon - which finds an equivalent in the ECHR system - functions in a vertical and not in a horizontal manner (i.e. between the State and the Union). There are however, similarities enough to invite the analysis of the Treaty public policy. Indeed, as a protective mechanism of the State legal order it will tend to reproduce State criteria of public policy.

The integrative purposes of the EC Treaty reinforce the restrictive interpretation of a notion which hinders the success of the enterprise. Surprisingly, it may be ascertained that together with the strict understanding of public policy dictated by the ECJ, the latter generates new escape valves between the Member States and the Union, namely the general good. Although this notion - well known in State law, here exhibits exclusively Community features, it projects State criteria of public policy into the EC system. The incorporation of the general good into the EC system confirms the liveliness of the protective mechanisms of a legal order.

Public policy and general good appear inserted in the Community system as fulfilling a sort of constitutional role whereby States are allowed to derogate from the Treaty provisions. Once this functional role is admitted, the question arises whether such a constitutional clause does not incorporate substantive contents. In other words, is it possible to speak of a Community general good and a Community public policy in the sense of the Treaty? If this is so, it would confirm that State public policy is somewhat moulded or reproduced in the framework of EC law; the parallel acknowledgement of Community exceptions of a similar nature would set out a true Community public policy in the sense of private international law.

1. PUBLIC POLICY ACCORDING TO THE TREATY

The notion of public policy appears as a ground of justification for national discriminatory rules in all areas of free movement regulated by the EC Treaty, except for movement of capitals. However, even in this last area, the Treaty on the European Union includes public policy as a ground of justification (see Article 73d(1)(b) of the Union Treaty). The precise wording of the public policy concept is not identical throughout the provisions that refer to it. However, the presence and identical function of the public policy in those fields makes it clear that there must be some underlying common features. The analysis of public policy in relation to each of the four freedoms and the viewpoint of Advocates General will provide the necessary background to undertake a global evaluation of the notion in the light of the ECHR.

1.1. The four freedoms

a. Freedom of movement of persons (Article 48.3)

The ECJ states its basic position in relation to the notion of public policy in the case of *Van Duyn v. Home Office*: "the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement of workers, must be *interpreted strictly*, so that its scope cannot be determined unilaterally by each Member State without being *subject to control* by the institutions of the Community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an *area of discretion within the limits* imposed by the Treaty".[1]

Some basic aspects of the appreciation of the public policy defence are developed in *Rutili*.[2]

[1] Case 41/74 *Van Duyn* [1974] ECR 1337 p.18 (emphasis added).

[2] Case 36/75 *Rutili* [1975] ECR 1219 at p.32.

According to it, public policy is likely to be invoked in order to protect the interests of a 'democratic society'. Since reference is made to the interests of a society, it is admitted that only interests *uti universi* may be invoked under this exception (excluding thus, interests *uti singuli*). The evaluation of the latter should be similar to the evaluation undertaken in the context of the ECHR. The position of the Court is recapitulated in case 30/77, *Bouchereau*, where it confirms that the *ordre public* exception must be strictly construed, that its scope cannot be unilaterally determined by the Member States without control of Community institutions, that its scope may legitimately vary according to time and place and that Member States enjoy an area of discretion. Furthermore, the Court states that "recourse by national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a *genuine and sufficiently serious threat* to the requirements of public policy affecting one of the *fundamental interests of society*".[3]

The indications which stem from the case law on public policy regarding movement of persons are likely to apply to the other freedoms. The main point to individualise then is the identification of those fundamental interests of the society. Admittedly, they may exhibit different sides according to the freedom at stake.

As regards free movement of persons, the threat to fundamental interests which activates the public policy exception can only have at its basis the 'personal conduct' of the individual against whom the exception is invoked. By personal conduct is meant an act (or omission to act) on the part of the person concerned.[4] Any restriction of free movement must therefore be justified on grounds related to the individual case and cannot then be established in advance, as a preventive measure. Therefore, it cannot be considered to be a condition precedent to the acquisition of the right to entry and residence. In *Royer*[5] the ECJ confirms

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[3] Case 30/77 *Boucherau* [1977] ECR 1999 pp.33 to 35 (emphasis added).

[4] Case 41/74 *Van Duyn* [1974] ECR 1350 p.17. Further precision of the personal conduct criterion is to be found in case 67/74 *Bonsignore v Köln* [1975] ECR 297 that excludes the adoption of measures of a general preventive nature from the scope of the exception (p.6).

[5] Case 48/75 *Royer* [1976] ECR 497.

that public policy can be regarded as providing the possibility, in individual cases where there is sufficient justification, of imposing restrictions on the exercise of a right derived directly from the Treaty. Such construction is confirmed in two other judgments of the Court, namely *Regina v. Pieck*[6] and *Roux*[7] and finds specification in negative terms in further case law of the ECJ.[8]

The evaluation of the 'genuine and sufficiently serious threat' to the interests of a democratic society remains a State parameter that must respect criteria of proportionality. The latter appears as the test according to which evaluate the rightness of the measure undertaken. The Court has had recourse to it on several occasions.[9] No further guidance is provided by the Court in this sense but the assertion is that, even if proportional, the measure must comply with the principle of non-discrimination. In the words of the Court,

> "although Community law does not impose upon the Member States a uniform scale of values as regards the assessement of conduct which may be considered as contrary to public policy, it should nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct".[10]

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[6] See case 157/79 *Regina v. Pieck* [1980] ECR 2185.

[7] Case C-363/89 *Roux* [1991] ECR I-273, p.30.

[8] Accordingly, failure to comply with the legal formalities concerning the entry, movement and residence of aliens does not in itself constitute a threat to public policy (case 48/75 *Royer* [1976] ECR 497 p.47). Public policy cannot be invoked to justify the refusal to issue a residence permit to a Community national on the ground that he is not carrying on his activity in conformity with the social legislation in force (case C-363/89 *Roux* [1991] ECR I-273). It can neither cover the requirement of a single cabinet imposed on physicians, dentists and veterinary surgeons, on the basis of the *'intuitu personae'* character of the medical contract, in order to assure the permanence of the medical care and the good functioning of emergency services (case C-351/90 *Commission v. Luxembourg* [1992] ECR I-3945).

[9] See case 30/77 *Boucherau* [1977] ECR 1999 at p.34; case 118/75 *Watson v. Belmann* [1976] ECR 1185 at p.21; case 8/77 *Sagulo* [1977] ECR 1495 at p.12; case 157/79 *Regina v. Pieck* [1980] ECR 2171 at p.19 and case C-265/88 *Lothar v. Messner* [1989] ECR 4209 at p.14.

[10] Cases 115-6/81 *Adoui & Cornuaille v. Belgium*, [1982] ECR 1665, at p.8.

In an area where conflicts may easily arise, these criteria, although essential, are probably not sufficient. Admittedly the free movement of persons (and its limitation) entails essential considerations of human rights. It is striking that the Court has not explicitly imposed the respect of human rights as a guiding criterion in relation to this freedom as it has done, on the contrary, in the sphere of freedom of services. The only reference that can be traced at this level is the Court's assumption that "these limitations placed on the powers of Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention [ECHR] which provide in identical terms that no restriction on the interests of national security or public safety shall be placed on the rights secured by the above quoted Articles other than such as are necessary for the protection of those interests in a democratic society".[11] The inspiration that the Court may find in the European Court of Human Rights' interpretation of the criteria of 'national security or public safety' stemming from Articles 8 to 10 of the ECHR or Article 2 of Protocol IV will be analysed later on.

b. Free movement of goods (Article 36)

As was indicated above, the generic considerations on public policy set up by the Court in relation to movement of persons may also apply at this level. However, as regards free movement of goods, the notion of public policy may be construed in a more restricted manner due to the fact that it is surrounded by many more grounds of exception than the other freedoms.

In a broad outline, there are two main points of reference at this level. On the one hand, the necessary aim of protecting an essential interest of society. On the other hand, the requirement that recourse to public policy appears as a proportional measure. What constitutes an essential interest of society as concerns the circulation of goods? States probably will be tempted to transpose internal criteria to the Community sphere. Thus some aspects which reflect internal public policy (understood both as *ordre public de direction* and *ordre public de protection*)

[11] Case 36/75 *Rutili* [1975] ECR 1219 at p.32.

have been advanced by the Member States and refused by the ECJ. In this sense, the ECJ states that the defence of national currency is not covered by Article 36.[12] Nor does public policy apply to the fairness of commercial transactions[13] and "whatever interpretation is to be given to the term 'public policy', it cannot be extended so as to include considerations of consumer protection".[14] The only admission as public policy seems to indicate that measures closely linked to the exercise of sovereignty may come within this provision. Thus, "a ban on exporting such coins [old gold coins] with a view to preventing their being melted down or destroyed in another Member State is justified on grounds of public policy within the meaning of Article 36 of the Treaty, because it stems from the need to protect the right to mint coinage which is traditionally regarded as involving the *fundamental interests* of the State".[15]

The main guiding line of the Court appears to be in broad terms, the exclusion of elements of economic nature as coming within the realm of public policy. This clearly stated exclusion of economic concerns finds however a striking exception in case 72/83 *Campus Oil*.[16] While insisting on the exclusion of economic interests from the scope of public policy, it makes them come within the concept of public security. The judgment has encountered critical opinions because it transforms the notion of public security to include the economic concerns that were at stake.[17] It is still doubtful whether this was an isolated case explained because

[12] Case 95/81 *Commission v. Italy* [1982] ECR 2187.

[13] Case 113/80 *Commission v. Ireland* [1981] ECR 1625.

[14] Case 177/83 *Kohl v. Ringelhan & Renett* [1984] ECR 3651, p.19. See also case C-239/90 *Boscher et al. v. British Motors Wright* [1991] ECR I-2023, p.22.

[15] Case 7/78 *Regina v. Thompson* [1978] ECR 2247, p.34 (emphasis added). However, not just any reflection of sovereignty justifies recourse to the notion. The Court has asserted that "legislation does not come within the ambit of the concept of public policy within the meaning of Article 36 of the Treaty merely because it carries penal sanctions" (case 16/83 *Prantl* [1984] ECR 1299, p.33).

[16] Case 72/83 *Campus Oil Ltd v. Minister for Industry* [1984] ECR 2727, p.37. The case was concerned with the supply of petroleum products. The Court puts the stress on the importance the latter have in the country's existence, since "not only its economy, but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, whith the consequent danger for the country's existence could therefore seriously affect the public security that Article 36 allows States to protect" (p.34).

[17] See for instance Mattera,1988:514.

of the nature of the good (petrol) or whether it has left open a new path as an exception to the traditional interpretation of the Court.[18]

Proportionality is a condition inherent in any of the elements cited in Article 36. Indeed, it is well established doctrine of the Court that "in order to avail themselves of Article 36, Member States must observe the limitations imposed by that provision both as regards the objective to be attained and as regards the nature of the means used to attain it".[19] This, of course applies to public policy.[20] Such a requirement imposes on the Member State the need to prove the actual threat to public policy and the adequacy of the measure undertaken so to avoid that it restricts intra-EC trade more than absolutely necessarily[21].

The profile of public policy designed by the Court in relation to free movement of goods appears somewhat blurry, prone to overlap with public security, public health, public morality and public order. Despite its efforts to delimit a non-economic notion, the ECJ may end up by admitting economic exceptions at this level.

c. Freedom of services and establishment

In areas such as establishment and services, where it is accompanied only by the additional grounds of public security and public health, the concept of public policy could be more broadly construed than in the area of goods. Apart from the above mentioned extension of

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[18] In this sense, it could be considered that this line of reasoning is followed by case 118/86 *Nertsvoerderfabriek Nederland* [1987] ECR 3883, where the Court confirmed that the application of Article 36 is not automatically excluded because the national provisions justified by the objective circumstances corresponding to the needs of the interests referred to therein, enable other objectives of an economic nature to be achieved as well (p.15).

[19] Case 7/68 *Commission v. Italy* (Art Treasures case I) [1968] ECR 428.

[20] Thus, the Court has assessed that measures undertaken in order to prevent the licencing of stolen cars (which result in the restriction of importation of vehicles) are not proportionate to the aim pursued and cannot be justified on grounds of public policy (case 154/85 *Commission v. Italy* [1987] ECR I-2717 at p.14).

[21] Case 231/83 *Cullet v. Leclerc* [1985] ECR 305, p.32/3 (in relation to pricing of petrol). The Court settles that "it is sufficient to state that the French Government has not shown that it would be unable, using the means at its disposal, to deal with the consequences which an amendment of the rules in question in accordance with the principles set out above would have upon public order and security".

Article 48(3) interpreting lines to any other public policy clause of the Treaty, an analogous application of the other grounds included in Article 36 has been accepted by the Court in case 262/81 *Cine Vog Films v. Coditel*[22] in respect to services. The Court insists on the fact that public policy constitutes an exception and therefore its effects must be limited to that which is necessary in order to protect the interest that it seeks to safeguard[23] and has once again recourse to the principle of proportionality. The latter plays, as regards the evaluation of public policy in the framework of the Treaty, the same balancing role as in relation to the other freedoms analysed.

The definition of public policy as regards freedom of services and establishment is also a negative one, of exclusion rather than positive delimitation. The exclusion of economic grounds appears as the main point stemming from the case law of the Court. This statement was clearly settled in case 352/85 *Bond van Adverteerders* and has repeatedly been referred to in subsequent judgments.[24] However, even exceptions based on non-economic grounds have been unsuccessfully alleged.[25] Seemingly, the exception of public policy should not find much application in this field. However, it is in this sphere that economic considerations may be easily invoked by Member States.

These comments reproduce in some way the schemes of the freedoms analysed previously. However, an extremely interesting feature appears at the level of freedom of establishment and services, namely the explicit acknowledgement by the Court of the necessity to take into

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[22] Case 262/81 [1982] ECR 3381.

[23] Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, p.36.

[24] "Economic aims, such as that of securing for a national public foundation all the revenue from advertising intended especially for the public of the Member State in question, cannot constitute grounds of public policy within the meaning of Article 56" (p.34 of case 352/85 *Bond van Adverteerders* [1988] ECR 2085). It is reiterated in case C-288/89 *Gouda* [1991] ECR I-4007 (p.11) and in case C-17/92 *Fedicine* [1993] ECR I-2239 (p.6).

[25] Thus, public policy cannot cover the refusal, for reasons of confidentiality and security, to award contracts involving the purchase, design, programming and operation of data-processing systems for the public authorities to companies which are not directly or indirectly controlled by the Member State in question (Case C-3/88 *Commission v. Italy* [1989] ECR 4035).

consideration human rights in order to appreciate the exceptions to the freedom.[26] The importance of human rights, otherwise ignored as far as the free movement of persons is concerned, is thus protected (to a certain extent). The transposition of this requirement to the other freedoms appears necessary, moreover where the ECHR becomes an essential point of reference in the evaluation of public policy (as stems from case 36/75 *Rutili*).

d. Free movement of capital

The Union Treaty has introduced a new Article 73(d) according to which the public policy clause may be invoked in relation to free movement of capitals. This Article essentially reproduces the first paragraph of Article 4 of the 88/361/EEC Directive,[27] but further incorporating public policy. The effectiveness of tax controls and the fight against illegal activities, such as tax evasion, money laundering, drug trafficking and terrorism are aims which justify restrictive measures on the free movement of capital. Seemingly other measures may also be permitted in so far as they are designed to prevent illegal activities of comparable seriousness.[28] No further case law has been given on Article 73(d), but it is suspected that these exceptions cover all the possible cases that could be encountered. It is difficult to envisage other excepting grounds since they reflect already public policy understood in a domestic sense.[29] On the contrary, it may be wondered whether it makes sense to admit these exceptions to the Treaty freedom where they constitute matters of common interest of Member States - as embodied in Article K.1 EU Treaty.

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[26] In case C-260/89 *ERT* [1991] ECR I-2925, the Court deals with a dispute of broadcasting services and restrictions of access to that market. The Court decides that "In such a case it is for the national court, and if necessary, the Court of Justice, to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the ECHR, as a general principle of law the observance of which is ensured by the Court" (p.44).

[27] Of 24.6.88 for the implementation of Article 67 of the EC Treaty, OJ 1988 L178/5.

[28] See paragraphs 21 & 22 of Joined cases C-358/93 & C-416/93 of 23.2.95, not yet reported.

[29] Poillot-Peruzzetto (1993:179) contends that public policy which may be invoked here will reflect what, in an domestic sense, is identified as *ordre public économique de direction*. It is nevertheless noted that precisely these grounds may also be at the basis of a true international public policy as set out in part 3.2.c.i, chapter I.

e. The Advocates General viewpoint

A complete review concludes with the light shed by Advocates General of the Court on the matter. In principle, there is agreement between the Court and its Advocates General. A general definition summing up the preceding ideas may be provided by the following quotation:

> "Il resulte de la definition *stricte* de la notion d'ordre public et de la condition de la *proportionalité* que, pour des reglementations nationales, dans la mesure où elles exercent un effet sur la circulation des services entre les Etats Membres, cette notion ne peut être *invoquée qu'exceptionellement*. Bien que son contenu puisse, dans une certaine mesure, varier d'un Etat membre à l'autre, cette notion vise en effet exclusivement 'une menace réelle et suffisament grave, affectant un *intérêt fondamental* de la société' En outre elle *n'inclut pas les objectifs économiques*, ce qui implique que les reglementations nationales ou regionales pursuivant, exclusivement ou principalement, sous couvert de protection des intérêts fondamentaux, un but économique, n'en relèvent pas. Enfin, même lorsque la reglementation a pour objectif le maintien de l'ordre public, elle ne peut être admise que si cet objectif ne peut pas être atteint au moyen de reglementations moins restrictives, moins discriminatoires, ou *non discriminatoires*".[30]

The non-economic character of the notion is insisted upon by A.G. Mayras: "the concept of public policy used in Article 36 cannot cover any and every decision taken for economic reasons, or at least it only refers to considerations which, while they are self-important for each Member State, they are not or are only to a lesser extent, of a strictly economic nature... the reference to public policy in Article 36 is irrelevant if the measures to be taken for the preservation of order, for reasons of urgency or of *economic* expediency are dealt with in other provisions of the Treaty and if specific provisions [...] have been prescribed for this purpose... In other words the public policy mentioned in Article 36 does not refer to *monetary* public policy. On the other hand I would like to refrain from giving this concept of public policy a *moral* tinge and assimilating it to the concept of public morality".[31]

However, the absence of moral tinges in the notion may be reviewed in the light of the

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[30] A.G. Van Gerven in case C-17/92 *Fedicine* [1993] ECR I-2239, p.18 (emphasis added).

[31] A.G. Mayras in case 7/78 *Regina v. Thompson* [1978] ECR 2247, p.2281 (emphasis added).

words of A.G. Van Gerven: "Such an objective [the protection of the unborn enshrined in the national constitution and the prohibition of abortion inherent therein] is justified under Community law, since it relates to a policy choice of moral and philosophical nature the assessment of which is a matter for the Member States and in respect of which they are entitled to invoke the ground of public policy referred to in Article 56 read together with Article 66 of the EEC Treaty".[32] The most interesting aspect that stems from Advocate General Van Gerven's opinion is the possibility that, although the concepts of public interest and public policy are defined to a considerable extent by the Member States, "that does not mean that they should not *be justified and delimited in a uniform manner for the whole Community under Community law* and therefore taking into account the general principles in regard to fundamental rights and freedoms which form an integral part of Community law and the observance of which the Court is to ensure".[33] This view seems to be upheld by Advocate General Gulmann in *Bostock*.[34]

In general, the position of the Advocates General does not exhibit serious differences with the view followed by the Court. Only the proposal of Advocate General Van Gerven to accept the possibility of introducing a uniform criterion of public policy in the Community is clearly one step ahead of the Court. Such a proposal could be defendable since it appears firmly based in the 'acquis' up to now reached. I will comment later on the potential this has for the Court's future actions.

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[32] A.G. Van Gerven in case C-159/90 *SPUC v. Grogan* [1991] ECR I-4685, p.26. It is not clear from the Advocate General's opinion whether this is so because of the nature of those choices or because the latter have found constitutional enshrinement. Our view would be inclined towards the second option, as he procedes asserting that those values which, in view of their incorporation in the constitution, number among 'the fundamental values to which a nation solemnly declares that it adheres' (in the words of A.G. Darmon p.21 in case *Groener* [1989] ECR 3967) fall within the sphere in which each Member State possesses an area of discretion 'in accordance with its own scale of values and in the form selected by it' -judgment p.14 case *Conegate v. HM Customs & Excise* (1986) ECR 1007-. In a way he equates the notions of public policy and public morality.

[33] A.G. Van Gerven in case C-159/90 *SPUC v. Grogan* [1991] ECR I-4685, p.31 (emphasis added).

[34] Case C-2/92 [1994] ECR I-955. In p.31 the A.G. assumes the existence of a Community definition of the notion on a human rights basis: "the Court has already taken them [human rights] into consideration while giving a restrictive or extensive interpretation of those derogations [to freedom of movement]".

1.2. Nature of the notion

One could easily admit the national character of the exception of public policy in the sense of the Treaties since it enshrines the Member State's faculty to ignore (or even run counter to) Community imperatives. However, voices have been raised concerning the Community nature of the exception. Indeed, the delimitation of the boundaries of the notion is controlled by Community institutions (as *Van Duyn*). The choice should be made then among one of the two: either it is a national notion delimited by Community criteria; or it is a Community notion with a national content. Despite the preference for the first alternative, it is admitted that finally, adopting one position or the other, the final outcome is the same. Indeed, both elements, Community and national, are equally necessary for a whole definition of the notion.

The supporters of the Community nature advance poor arguments in favour of their position.[35] More consistent on the contrary, appear the contentions in favour of a national nature. There are four reasons advanced to reject the likeliness of the Community character of public policy in the sense of the Treaties. Firstly, it is argued that public policy reflects sovereignty and, since the European Community cannot be defined as sovereign, no possible Community public policy can exist. Secondly, it is contended that the Treaty assumes that each Member State possesses its own notion of public policy and consequently designs the Treaty on that basis. Thirdly, the possibility that Member States may define the notion appears as a justification of the State character of the latter. Fourthly and lastly, it is argued that a unique public policy can only come out of a political community that has achieved complete integration.[36]

The latter positions seem more realistic since the public policy provision appears in the

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[35] Hubeau (1981:213) collects the following: the Treaty definition of the concept, the necessity to establish a Community delimitation of the sphere of application *ratione personae* of the Treaty and the compatibility of the Community notion with national concepts of public policy which have to accomodate the former.

[36] See Hubeau (1981:213) for the references and further details.

Treaty as a State safeguard which reflects sovereignty.[37] This is not an unknown feature in international treaties that may encompass similar clauses. A clear example stems from the ECHR that enshrines in several Articles of its text a reference to the exception. Without a doubt, public policy in the sense of the Treaties finds strict delimitation through the ECJ's case law.

This view seems to be the one most followed by scholars. The national character of the notion does not exclude that in the long run a Community notion may appear as regards the matters enshrined in the Treaty. It has been contended that such Community notion would substitute for the national ones as a result of progressive integration within the EC.[38] This notion would apply solely to extra-Community relationships while it would disappear within the EC.[39] It is argued, on the contrary, that both notions should coexist, in a two layer scheme, internal and extra-Community. Within the boundaries of the EC the national notion will still be applicable since it is a balancing safeguard clause in the system. Its application should be, nevertheless, progressively restricted. As the external relationships of the Union are concerned, the delimitation of a Community notion appears as essential in order to establish clear and uniform orientation of the Union.

1.3. Further analysis

a. The ECHR and public policy

Throughout the preceding pages it has appeared that the ECHR is a complementary element in order to understand the notion of public policy in the sense of the Treaty. Further reference to the former seems necessary at this stage. The interest in the Strasbourg case law is twofold: on the one hand, a parallel to public policy in the EC Treaty can be drawn with the exception

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[37] The exception of public policy as a reflection of State sovereignty in a Community framework is generally admitted. Against this view, Lenaerts (1990:220) contends that no sovereignty has been left to Member States that can be opposed to the Community.

[38] Chesné,1962:162, Touffait,1976:170.

[39] Hubeau,1981:216 at footnote 45.

of public policy as in the ECHR framework. Indeed, Articles 8 to 10 of the ECHR and Article 2 of Protocol IV on the Convention permit States to restrict the exercise of the rights on the basis of public policy. On the other hand, human rights may constitute the basis of an exception to Community freedoms.

The European Court of Human Rights adopts the view that it is for States to select the requirements of morality that justify recourse to the notion of public policy:

> "it is not possible to find in the domestic law of the various Contracting States a uniform conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them... Consequently, Article 10(2) [ECHR] leaves to the Contracting States a margin of appreciation... Nevertheless, Article 10(2) does not give the Contracting States an unlimited power of appreciation. The Court is empowered to give the final ruling on whether a restriction or penalty is reconciliable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision... The Court's supervisory function oblige it to pay utmost attention to the principles characterising a 'democratic society'... This means, amongst other things, that every... restriction or penalty imposed in this sphere must be proportionate to the legitimate aim pursued".[40]

The criterion of "necessity in a democratic society" is not defined at the ECHR level. However according to the Strasbourg Commission, this term implies a 'pressing social need' which must be assessed in the circumstances of a given case and which may include the 'clear and present danger' test as formulated by the US Supreme Court.[41] The deciding element appears to be the respect of the principle of proportionality. As said above, such principle may be abused by the Court that tends to stress its importance in detriment of the two other conditions required to permit the restriction of fundamental rights, namely that the exception is in accordance with the law (*prévue par la loi*) and it reflects a legitimate interest as the protection of national security, public safety or the protection of the rights of others

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[40] Case *Handyside*, of 7.12.76, Series A, paras. 48 & 49 of the Court's judgment.

[41] Application No.7050/75 [1978] 3 EHRR 218 at p.95.

(*intérêt légitime*). The margin of appreciation which is left to the Court may be excesive.[42]

A similar tendency may be observed in the EC sphere. The ECJ also relies on the State appreciation of public policy with a power of review left to the Community institutions. As results from the Court's case law, the criterion of proportionality tends to become the touchstone of the admisibility of the escape clause. Having recourse to this device permits the Court to avoid moral/ethical opinions. The same criticism raised in relation to the ECHR may be reproduced at this level, since the Court enlarges its margin of appreciation. Indeed, the principle of proportionality, which should advance a clarifying criterion, introduces further elements of complication.

The transposition of the criteria applied by the ECHR to the ECJ is helpful but not perfection. Indeed, one would be tempted to transpose the exception of public policy to the right of movement and residence in Article 2 of the Protocol IV to the Article 48(3) of the EC Treaty. The similarity of the notions would induce one to draw a parallel between them. However the different objectives that the ECHR and the EC Treaty pursue bring about slightly different understanding of the public policy exception.[43] Thus, the ECHR limitation of the exception of public policy is less restrictive than the carried out by the ECJ since the latter has to ensure the fulfilment of integration aims that do not appear in the former. Therefore, it cannot leave wide margins of discretion to its Member States in any area of concern coming under the EC Treaties.[44] Despite these differences, the ECHR sheds some light on the ECJ's case law. Indeed, the ECJ indicates that the evaluation of the interests that deserve protection in a democratic society must be evaluated in a similar manner as undertaken in the context of the ECHR.[45]

Both the ECJ and the Strasbourg court leave discretion to the States under two conditions:

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[42] See chapter II at point 2.1.

[43] See in general lines the distinction in chapter II.

[44] For a full and thorough comparison of these two notions, see Hall,1991:488.

[45] Case 36/75 *Rutili* (1975) ECR 1219.

firstly, that States make a restricted use of the exception and secondly, that such recourse remains subject to the supervision of the supranational authorities. The supervision of the EC may be activated in three possible cases: where the Member State measure hinders Community aims; where it is contrary to non-discrimination; where it limits fundamental rights as protected by the EU.[46] Precisely this last question brings about the second aspect to which reference had been made at the begining of this point, namely the interaction of the ECHR and the EC Treaty in relation to public policy and the possibility to invoke the rights encompassed in the former as ground of public policy in the context of the latter. The ECJ requires that the Member States respect human rights as enshrined in the ECHR when they invoke the exceptions to the EC Treaty explicitly only in relation to freedom of services. Seemingly, this requirement extends to the other freedoms.

Infringements of fundamental rights which involve the protection of an economic right which is among the specific objects of the Treaty are subject to Community control. Up to this point, there seems to be no controversy. The question is more complicated under another formulation, that is, is it possible to directly have recourse to human rights to derogate from Treaty freedoms? The question is whether also in this case the Court would possibly exert a control. On the one hand, it is admitted that States keep an area of discretion in accordance with their own scale of values and in the form selected by them. These values are usually enshrined in constitutional texts as the result of a solemn declaration. Admittedly human rights fall within these values and appear consequently as a justifying ground for the public policy exception. This position, which has been sustained by some Advocates General of the Court, may not be immediately accepted by the Court.[47] On the other hand, it could be argued that this control is likely since any measure constituting a *prima facie* violation of the prohibitions of the Treaty becomes a matter of Community law and consequently comes

[46] In case 118/75 *Watson & Belman* [1976] ECR 1185, A.G. Trabucchi asserts that "without impinging upon the jurisdiction of other courts, this Court too can look into an infringement of a fundamental right by a State body, if not to the same extent to which it could do so in reviewing the validity of Community acts, at least to the extent to which the fundamental right alleged to have been infringed may involve the protection of an economic right which is among the specific objects of the Treaty".

[47] This would be namely Van Gerven and Darmon position - see footnote 32 of this chapter.

within the control of the Community.[48]

Admittedly, the ECJ does not seem ready to allow an indiscriminate recourse to human rights that may hamper the complete fulfilment of the Treaty freedoms. Therefore, recourse to public policy based on human rights will be stopped by the Court when it constitutes a mere transposition of an internal conflict (engaging an individual against a Member State) to the EC sphere. Indeed, the satisfaction of individual interests does not suit the exception of public policy as defined above. On the contrary, it is argued that the invocation of human rights defending a collective interest should be accepted by the Court. Indeed, it is not discarded that 'collective' conflicts take place and find a reflection in the EU sphere, for instance in the case of environmental protection. In such a case, probably the ECJ may tend to understand that exceptions to the Treaty freedoms come within the realm of its control. One could wonder then, what would happen if a Member State had recourse to the ECHR's interpretation of the right to a dwelling as encompassing a right to environment and on that basis adopt legislation hindering the establishment of enterprises which are likely to pollute in its territory[49]?

The main controversial point remains the acceptance by Member States of an indiscriminate Community competence also as regards human rights. The biggest difficulty which recurrently looms is the identification of the realm of Community sphere of application. Which are the limits of a Community control on the ground of human rights? According to what criteria would it solve them? As pointed out above, the ECJ may not impinge on the jurisdiction of other Courts[50] and has no jurisdiction to rule on the ECHR. Seemingly, the evaluating parameter is the definition which comes out of the interpretation of the EC Treaty. If this is so, the ECJ may be confronted with the solution of conflicts of interests within the Union and will have to decide whether human rights' protection is at variance with achievement of economic integration in the same sense that an internal court is called on to solve conflicts between competing rights. Member States are seemingly not ready to accept such equation

[48] Weiler & Lockhart,1995:76

[49] Such hypothesis could result from the recent case *López-Ostra* of 9.12.94, Series A, vol. 303-C.

[50] See Advocate General Trabucchi in case 118/75 *Watson & Belman* [1976] ECR 1185.

of fundamental freedoms of the Treaty and human rights. However, the conflict between Community freedoms and human rights does not entail that they are both of equal importance. Indeed, in balancing such a conflict, the court could well favour the human right aspect.[51]

It is argued that, despite the growing assumption of competence by the Community, States may still invoke human rights at the basis of the public policy exception understood as defined above, that is, in the defence of collective interests. Moreover, since human rights appear also as a manifestation of the cultural identity of States - in compliance with Article 128 of the Union Treaty, they need be granted protection in the EU sphere.

b. A final evaluation

After the review of the ECJ's case law and the interrelation with the ECHR it is possible to outline some final considerations. The notion of public policy appears as an exception to the Treaty freedoms which reflects sovereign powers and aims at the protection of the fundamental interests of a democratic society. The delimitation of those interests is a matter that comes within State competence. Member States have the faculty to decide when those interests are threatened, since "Community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy".[52]

Since public policy appears as an exception, recourse to it must be restricted. Moreover, its application is subject to control by Community institutions (in a parallel scheme to that enshrined in the ECHR). Thus, not only will Member States have recourse to it on restricted occasions, but they will also have to conform to the limitations established at Community

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[51] Weiler & Lockhart (1995:596) so contend. If the solution proposed is agreed, the reasoning that leads them to such a conclusion is not. They base their argumentation on the fact that the Court admits less grave competing values than human rights in order to defeat fundamental freedoms. It will be seen that, on the one hand, that those exceptions reflect the State's general good, which on many ocasions can be translated into 'human rights' terms. On the other hand, an exclusively economic reading of freedoms has been surpassed by more 'spiritual' considerations in the Union.

[52] Joined cases 115-6/81 *Adoui & Cornuaille v. Belgium* (1982) ECR 1665, p.8.

level in such a case. Such limitations exhibit rather blurry features. The main guiding criterion in this evaluation is the imposition of a proportionality test. Further delimitation of the principle can be achieved by referring to the European Court of Human Rights in its interpretation of the condition in the ECHR framework.[53] A warning is put on two features. On the one hand, the insistence on the principle of proportionality is justified only to the extent that it is not denaturated.[54] On the other hand, it must be remembered that despite a coincident sphere, the two systems pursue different aims and thus, no absolute identity between them is likely.

These indications still give a rather vague idea of the limits of public policy within the Treaties sphere. Further (but not so helpful) criteria are hinted at by the Court and its Advocates General. Accordingly, public policy cannot reflect economic interests and seemingly it neither has a moral tinge. However, these assertions are blended according to the freedom at stake. Thus, as regards free movement of goods the public policy exception exhibits a very limited scope since Article 36 admits many other grounds to exclude the notion. On the contrary, Articles 48 and 56 enshrine a larger concept of public policy. Moreover, the inter-action of public policy with other excepting clauses admitted in the EC Treaty leads on some occasions to clear overlaps namely with public security[55] and possibly also with public health.[56]

If economic reasons as well as moral grounds are excluded from the realm of public policy, the question arises what are those fundamental interests that States may protect against Treaty

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[53] In this sense, Advocate General Van Gerven in case C-159/90 *SPUC v. Grogan* [1991] ECR I-4685 at p.35, assumes that "the Court, in accordance with its general approach [...] as regards the application of the principle of proportionality, will take into account in particular the way in which that principle is employed in the ECHR and in the case-law of the Court and Commission".

[54] See in chapter II the critical comments on the non-reflective recourse to this notion both at the ECHR and the ECJ level.

[55] See case 72/83 *Campus Oil* [1984] ECR 2727 (for a criticism, see footnote 16 and accompanying text).

[56] It is interesting to note that Council Directive 64/221 (of 25.2.64 on the coordination of special measures concerning the movement and residence of foreign nationals) lists in its Annex the diseases that can justify a refusal to admit entrance to an immigrant or to grant him a residence permit. According to it, drug addiction and mental illness are regarded as possible threats to public policy or public security, but surprisingly not to public health.

freedoms. The fundamental interests of a society are likely to be reflected in its constitution as the highest expression of State sovereignty and may therefore qualify as public policy.[57] However, it is not clear whether the EU is ready to acept constitutional parameters as valid exceptions to the Treaty freedoms. Seemingly to admit the constitutional parameter would enlarge the exception to unreasonable limits according to Community criteria. The debate is still open.

As stems from the analysed case law, it would appear that the exception of public policy allows for discriminatory treatment within the framework of the Treaty (in opposition to other excepting clauses admitted in the Treaty, namely the general good -to which reference shall be made in the second part of the chapter). The question which follows is to what extent is discrimination permitted. Indeed, the Treaty freedoms not only promote the elimination of barriers within the Community territory but also foster the disappearance of discrimination. The Court has only made an evaluation on non-discriminatory grounds in relation to free movement of persons. One could wonder whether this admission has any relation to the personal character of this freedom and the possible human rights' implications that may derive therefrom.[58]

In this context, what are the future evolutions that could be expected in forthcoming years? What are the consequences that can be drawn in the general context of this thesis, namely the Community public policy (in the sense of private international law)?

As regards the evolution of the use of this clause, a reinforcement of the restricted recourse to the notion must be emphasized. Such restriction derives from the the need of cooperation between Member States. Its disappearance, nevertheless, does not seem possible since it would imply renouncing a safeguard of the system. Paradoxically, the necessity of elaborating

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[57] De Witte (1991:21) suggests that constitutional value judgments should generally qualify as an expression of a country's public policy or as mandatory requirements.

[58] Case 41/74 *Van Duyn* [1974] ECR 1350. Hartley (1978:168) on the contrary, argues that public policy as concerns free movement of persons must be necessarily discriminatory. He correctly argues that a State cannot refuse entrance to the territory to its own nationals while it can in relation to foreigners. However, discrimination should not be understood only in the sense of punishing equally national and foreigner, but as reacting on the same grounds against both of them.

a Community safeguard of the Community legal order is felt in the European sphere and may lead the Court to elaborate a Community notion of public policy in the sense of the Treaty in the fashion Advocate General Van Gerven seems to suggest. This elaboration will seemingly reproduce State schemes into the Commmunity level. Indeed, if Member States tend to reproduce at this level the internal *ordre public de direction* and *ordre public de protection*,[59] one cannot see why the EC would not reflect on its side the same Community internal public policy. Such internal public policy would not only exhibit an economic nature, but mainly a strong administrative shade as far as the foreigners policy is concerned.[60]

The application of such notion is not a utopia and may find quick application in the framework of the Shengen agreements.[61] Indeed, although it is not a Community convention, the Schengen convention introduces the same clause for all the territories of the Union. At this level it is very important to remember that the Community application of public policy by a Member State does not imply that other Member States accept the same measure as valid. However, in the Schengen framework, where a State refuses entrance to a non-EC national, such a refusal is valid for all the other States.[62] Therefore, the necessity of a common notion appears very clear at this level. The acceptance of such notion is not made unaware of the risks looming. Indeed, the risk exists to transfer the suspicion against the foreigner from EC nationals to non-EC nationals. Such an attitude must be avoided since it would imply a recesion in the construction of Europe.[63]

Secondly, the conclusions drawn in relation to the public policy in the sense of the Treaties

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[59] Such assumption could even be extended in some cases to a reflection of a true international public policy: see footnote 29 and accompanying text.

[60] In the opposite sense, Hartley (1978:153) who refuses the possibility to have a Community public policy determined by a Community authority in immigration matters (though he admits it in other areas).

[61] Shengen agreement of 16.6.85 which was followed by the Schengen convention of 19.6.90.

[62] See namely Article 5 of the Schengen convention, but also Articles 2(2), 23(3), 79(2) and 83.

[63] The Community has evolved quite a lot since Lyon-Caen (1966:693) felt the threat of a Community public policy that would become a police control on any national moving within the EC. If Article 48(3) has proved not to be so within the EC, the risk exists that it becomes so in relation to non-EC nationals (see in this sense, Weiler,1992; Rigaux,1989).

have relevance as regards the relationship between Member States and the use they make of international public policy. The latter works in the relationship between Member States while the former contemplates the relation between the States and the Union. These seem to be two different levels where no comparison is possible. However, the inter-action of the two layers is not excluded. This is so because both notions appear as protective mechanisms of the legal order. Therefore, they share common features, namely the defence of essential interests of society and a restricted sphere of application.

The interaction is noted in two senses. First of all, the notion of international public policy may be called on to apply in the context of specific conventions which exhibit a straight link to the Community, namely Brussels 1968 and Rome 1980. Indeed, the tendency to compare Article 27(1) of the Brussels convention and Article 48(3) EC Treaty is rather frequent.[64] A second point of convergence emerges from the fact that the application of international public policy among Member States may be likely to hinder the Community freedoms. Seemingly this is the case when the application of Member States' public policy (or mandatory rules) reflects Member State dirigism of economy which clashes with free regulation of the market in the EC. In this sense, the prohibition on Member States availing themselves of economic exceptions comes about. Therefore, the way of operation of private international law public policy of Member States should take into account the criteria which delimit the application of public policy in the sense of the Treaties. Seemingly, the contended cooperation between Member States should reappear also at this level.[65]

[64] This parallel will be analysed in chapter IV, part 2.3.a.

[65] See chapter IV, point 4.

2. THE GENERAL GOOD

2.1. A first approach: the general good in the ECJ's case law

a. Definition of the notion

The general good is a notion that can be found throughout a series of decisions by the ECJ that go back quite some time.[66] It is an elaboration of the ECJ with a logical significance in the context of Community law.[67] Its definition appears, however, as rather vague and difficult. The notion entails a variable meaning which leads to uncertainty. A first approach assimilates the general good to the public interest.[68] It addresses certain national measures which regulate the socio-economic order of a country but which constitute an objective barrier to the Treaty principles of freedom of movement.[69] Because of its origin in case law, in order to locate a more precise definition of the notion reference needs be made to the ECJ case law. General good would encompass all the circumstances that have been admitted by the ECJ as justified measures of the Member States which jeopardise the free movement of services or goods. The conditions which allow for an exception to the normal functioning of

[66] The following cases refer to the notion in their judgments: case 427/85 *Commission v. Germany* (25.2.88), case 206/84 *Commission v. Ireland* (4.12.86), case 252/83 *Commission v. Denmark* (4.12.86), case 220/83 *Commission v. France* (4.12.86), case 279/80 *Webb* (17.12.81), joined cases 110-111/78 *Ministère Public et al v. Van Wesemael* (18.1.79), case 71/76 *Thieffry v. Conseil d'avocats* (28.4.77), case 33/74 *Van Binsbergen* (3.12.74).

[67] In domestic law it is frequent to find reference to such a notion (*intérêt général*) as the basis of public policy. In a classical approach, *intérêt général* coincides with the sum of individual interests. Evolution of the notion understands it as the interests of the collectivity. The abstract, rigid and immovable notion is substituted by a concrete, flexible and variable notion. As Chapelle (1979:245 No.224) points out, *"de l'intérêt général conçu comme celui de la société, on passe alors à l'intérêt général, expression d'intérêts sectoriels"*. It is precisely under the light shed by this last remark that the Community general good is to be read.

[68] Already this definition shows certain deficiencies because the reference to public interest (as referred to in case 352/85 *Bond van Adverteens* at p.38) is likely to be rephrased under the general interest (see case 52/79 *Debauve* at p.15) or other equivalent expressions. The difficulty is to discern whether these differences are purely stylistic or whether there is actually a difference between terms. To hint that the general good can be *assimilated* to the public interest indicates that they are not exactly the same thing. Further doubt arises if it is considered that other concepts are also closely related to these two notions. As a compromise should it be understood that they are the same, at least in order to obtain some clarity in the attempt to define the general good. As a working hypothesis, it will be considered then that they all refer to the same issue.

[69] P.Pearson, in the Opening Address to the Conference on Insurance Law hold at the EUI, *"International Insurance Contract Law: the Directives"* (1993:7).

the market, find their origin in the *Cassis de Dijon* judgment.[70] Since then, an important flow of case law has referred to the notion. Initially it was applied to free movement of goods. The evolution of the case law and the flexibility that the general good conveys -since it is a functional notion- have provided an extension of its application to freedom of establishment and services. According to the caselaw of the ECJ:

1) national provisions that jeopardise intra-community trade can only be imposed on other Member State citizens where there has not been Community harmonisation;

2) even where there has not been harmonisation, Member States are forbidden to maintain rules that lead to discrimination between the citizens of Member States (either open or disguised) on the basis of nationality;

3) once it is admitted that a rule is non discriminatory, it must satisfy the following conditions:

- this national measure must be necessary and proportionate to the aim pursued;
- there must be no other means available that would be less restrictive of free trade;
- it must be justified by the general good reasons that are listed in Article 36 of the EEC Treaty;
- or it must be the logical response to a mandatory requirement, recognised as such by the ECJ in the framework of its caselaw.[71]

The Treaty of Rome establishes a free market where no restrictions are permitted unless they are listed in the provisions that admit them (namely Articles 36 and 56, as referred to in Article 66). Otherwise they must adjust to the imperative requirements as understood by the Court in its interpretation of Articles 30 and 59 of the Treaty. The kind of parallelism which is drawn between free movement of goods and freedom of establishment introduces a certain confusion, as it stems from the revision that Advocate Van Gerven makes of the

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[70] Case 120/78 *Rewe Zentrale v. Bundesmonopolverwaltung für Brantwein* [1979] ECR 649.

[71] The first group of exceptions is to be interpreted in restricted terms. As stems from the Court's case-law, "since it derogates from a fundamental rule of the Treaty, Article 36 must be interpreted strictly and cannot be extended to cover objectives not expressly enumerated therein" (case 229/83 *Leclerc v. Au blé vert* [1985] ECR 1, p.30). On the contrary, interests listed by the Court of Justice do not see to have a limited character.

grounds of public interest that the Court had admitted until that date (11th June 1991):

> "as regards the Article 30 imperative requirements, the Court accepts in its case law a limited set of unvarying reasons (namely consumer protection, protection of working conditions, effectiveness of fiscal supervision). In contrast, in the sphere of the freedom to supply services, the Court appears [...] to have delimited the cluster of imperative requirements of public policy interest less precisely. Nevertheless, here too the grounds in question are similar to those set out in Article 36 (protection of intellectual property and of artistic and archeaological treasures) and/or to the grounds coming under Article 30 (protection of workers and consumers, in particular policy holders)"[72]

The paragraph shows that a certain confusion can arise since some grounds of public interest enshrined in Article 36 (namely the protection of artistic and archeological treasures) are quoted as imperative requirements in relation to freedom of services. In fact, there seems to be a certain tendency towards the transposition of the requirements established in relation to free movement of goods to freedom to provide services. In the sphere of the case law of the ECJ it can be ventured that interests under the scope of freedom of services might be assimilated to those already admitted on grounds of free movement of goods:

> *"une telle application par analogie peut s'appuyer sur la jurisprudence de la Cour [-namely cases Coditel I, points 14 et 15, and Coditel II, point 13], sur des conclusions d'avocats généraux, et sur la doctrine. Selon nous, le fait que la justification énoncée à l'article 36 est plus étroite que la protection du patrimoine culturel propre, ne constitue pas un obstacle, bien que la Cour ait admis que l'énumération de l'article 36 était limitative. En effet, cette prise de position ne peut pas empêcher que soit attachée aux justifications énoncées à l'article 36 une signification conforme à l'évolution du droit communautaire indiquée".*[73]

Moreover, it has been suggested that "the Court also appears to be prepared (...) to subsume under the 'Article 30' imperative requirements or under the 'Article 59' public interest grounds also choices that 'reflect certain political and economic choices' and are connected with 'national or regional socio-cultural characteristics, [which], in the present state of

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[72] Opinion for the case C-159/90 *SPUC v. Grogan* [1991] ECR I-4685, p.23.

[73] A.G. Van Gerven's opinion in case C-17/92 *Fedicine* [1993] ECR I-2239 par.27.

Community law, is a matter for the Member States'".[74] This trend seems also to be the opinion fostered by the Commission. In the insurance cases, it settles its position as being the following:

> "[the Commission] considers that, in all essential respects, Articles 30 and 59 should be construed in identical fashion [...] In connection with the freedom to provide services as in the case of the matters governed by Article 30 of the EEC Treaty, any cross-frontier service provided lawfully in the State of origin is permitted"[75]

However a complete identification might not be correct according to the opinion of Advocate General Gulmann in the *Lotteries* case:

> "There is a large degree of correspondence between the case law concerning Article 30 and Article 59 of the Treaty. It should, however, be pointed out that the Court has not hold with regard to Article 59, in the same way as it has with regard to Article 30, that any restriction capable of hindering, directly or indirectly, actually or potentially, the free movement of services is covered by the prohibition under the Treaty. The area of services is at least to some extent different from that of goods in particular because of the important personal element in many services and the consequent importance of distinguishing between conditions applying to access to the activity in question (personal qualifications and the like) and the conditions applying to the exercise of that activity"[76]

Despite the Advocate General's precision, it would seem that such an identification is clearly admitted in the context of the excepting grounds.[77] A complete view of the matter requires then a reference to the interests recognised by the Court as related to the general

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[74] Paragraph 23 of the Advocate General's opinion in case C-159/90 *SPUC v. Grogan*, [1991] ECR I-4685.

[75] Case 205/84 *Commission v. Germany*, [1986] ECR 3755 at p.3766 & 3771.

[76] Case C-275/92 *Her Majesty's Customs & Excise v. Schindler -Lotteries* [1994] ECR I-1039 at p.1059.

[77] This is confirmed when the notion is extended to freedom of establishment. See as an example of the progressive enlargement of the notion, the following quotation: "freedom of movement for persons may be restricted only by rules which are justified in the general interest and are applied to all persons and undertakings pursuing those activities in the territory of the State in question, in so far as that interest is not already safeguarded by the rules to which a Community national is subject in the Member States where he is established... in addition, such requirements must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected" (Case C-106/91 *Ramrath v. Ministere de Justice* [1992] ECR I-3351 paras. 29 & 30).

good. A list of them is laid down in case *Gouda*[78] which lists professional rules intended to protect the recipients of services, the protection of intellectual property, the protection of workers, consumer protection, the conservation of the national, historic and artistic heritage and the widest dissemination of knowledge of this heritage.[79] This is not an exhaustive enumeration but rather one that can be enlarged by other interests such as environmental protection, social policy choices,[80] economic policy,[81] cultural policy,[82] taxation,[83] fair trading, protection against damage produced by a not properly qualified provider,[84] etc.

b. Recent developments in the matter

As stems from the previous point, a progressive enlargement of the number of conditions that may be at the basis of measures hindering the free movement of goods or services in the internal market is apparent. At the same time a closer parallelism to public policy is noted. A third acknowledgement concerns the progressive incorporation of human rights criteria in order to judge these matters. The following paragraphs shall try to shed some light on the recent case law on the matter.

An important expansion of the notion of the general good has taken place with regard to broadcasting services (see for instance cases C-260/89 *ERT*[85] and C-288/89 *Gouda*[86]). The

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[78] Case C-288/89, [1991] ECR I-4007 at paragraph 14.

[79] Cases Guides touristiques: C-154/89 *Commission v. France* [1991] ECR I-659; C-180/89 *Commission v. Italy* [1991] ECR I-709 and C-189/89 *Commission v. Greece* [1991] ECR I-727.

[80] As opening stores on Sunday, cases C-145/88 *Torfaen Borough Council* [1989] ECR I-3851 and C-306/88 *Anders* [1992] ECR I-6457.

[81] As for instance, control of inflation, see case 181/82 *Roussel* [1983] ECR 3849.

[82] Cases 60-1/84 *Cinéthèque* [1985] ECR 2605.

[83] Case C-204/90 *Bachmann v. Belgium* [1992] ECR I-249.

[84] Case C-76/90 *Säger* [1991] ECR 4221.

[85] Case C-260/89, [1991] ECR I-2925.

complete fulfilment of freedom to provide services may contrast with national interests and it is not unusual to find national references to the defence of fundamental rights (namely, under invocation of Article 10 of the ECHR) in order to found the recourse to the exception. Indeed, the considerations that appear in these cases may be found again in other judgments. Likewise, the protection of the cultural national patrimony, according to Member States, deserves particular care which is respected by the Court. These grounds of cultural nature show different aspects: the dissemination of knowledge of a Member State's heritage (case *guides touristiques*),[87] the freedom of expression through a pluralistic system of social mass-media (case *Gouda*),[88] the protection of the plurality of languages within a Member State - encompassing the particular defense of the national language- (case *Groener*)[89] or some of them contemporarily (case *Fedicine*[90] puts at stake a linguistic policy and the protection of the national film industry of a Member State).

Further developments of the notion of general good might appear as new interests are taken into account, namely considerations of protection of the *ordre social* and State reputation. The ECJ has thus admitted that maintaining the good reputation of the national financial sector may constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services.[91] In case C-275/92 *Lotteries*, the Court assumes that the specificities of an activity such as gambling imply "national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain

[86] At paragraph 27 it can be read that "restrictions on the braodcasting of advertisements,(...) a limitation of the duration or frequency of advertisements or restrictions to enable listeners or viewers not to confuse advertising with other parts of the programme, may be justified by overriding reasons relating to the general interest. Such restrictions may be imposed in order to protect consumers against excesive advertising of, as an object of cultural policy" (case C-288/89 *Gouda* [1991] ECR I-4007).

[87] Cases Guides touristiques: C-154/89 *Commission v. France* [1991] ECR I-659; C-180/89 *Commission v. Italy* [1991] ECR I-709 and C-189/89 *Commission v. Greece* [1991] ECR I-727.

[88] Case C-288/89 [1991] ECR I-4007.

[89] Case 379/87 [1989] ECR 3967.

[90] Case C-17/92 [1993] ECR I-2239.

[91] Case C-384/93 *Alpine investments v. Minister van Financiën*, [1995] n.y.r. at p.44.

order in society."[92] The rationality of the restriction of a legislation on lotteries is justified "in view of the concerns of social policy and of the prevention of fraud".[93]

It would seem that States still retain their competence in many areas, namely those which have not been harmonised and have not been transferred to Community authorities. These constitute the realm of Member State *compétences residuelles* in which they can define what is to be understood by the general good.[94] This faculty that Member States retain has, as the only limit, that it does not go further than is objectively necessary to attain the objectives it pursues (as regards both, competences that are still within the scope of EC law or objectives that relate to aims outside it[95]). The question arises whether it is possible to delimit an individuating criterion of those interests which "reflect certain political and economic choices and are connected with national or regional socio-cultural characteristics" that at this stage of Community law still pertain to State *compétences residuelles*.

Such criterion does not seem possible to set but some indications can be drawn from Advocate General Van Gerven's opinion in case C-306/88.[96] His conclusions lead him to admit that there are *particular* requirements that can be added to the list of interests, which concerns specific social and economic policies, social and economic cohesion, technological research and the improvement and protection of the environment. However, the possibility of deducing a *general* justifying clause does not seem feasible in the short term, since the Court adheres to its case law which contains specific exceptions that it has already accepted. Nevertheless, according to Van Gerven, there is national legislation that goes beyond Community competence and although they are not consistent with the fundamental objectives of the Treaties, they are neither contrary to them. The latter would include questions of a

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[92] Paragraph 61 of case C-275/92 *Lotteries* [1994] ECR I-1039.

[93] Paragraph 63 of the same case.

[94] Gavalda & Parleani (1992:71) refer to the flexibility of the European Court of Justice in determining what are the legitimate objectives that a Member State can pursue. This results in Member States keeping competences that, although residual, are nevertheless considerable when taking into account the present state of Community law.

[95] See Van Gerven, case C-159/90 *SPUC v. Grogan* [1991] ECR I-4685 p.4719.

[96] Case C-306/88 *Anders* [1992] ECR I-6457.

political, ethical or religious nature, as well as issues regarding protection of the cultural or linguistic identity of a nation.[97] They require, in the absence of evidence to the contrary, a national appraisal.

The main criteria that should guide the national authorities are the two limits established by a constant case law: proportionality and non-discrimination. However, it is already felt that the case law might need to be "softened". As Advocate General Van Gerven hints, concerning non-discrimination *"Il ne sera pas rare que des mesures prises pour protéger le patrimoine culturel d'un État membre ou d'une de ses régions comportent un avantage direct ou indirect en faveur de ses propres artistes ou institutions culturelles... Même lorsque de telles mesures concernent des prestations de services relevant du champ d'application de l'article 59 du traité CEE... elles peuvent, néamnoins encore, le cas échéant, entrer en considération aux fins d'une justification au regard du droit communautaire".*[98] However, in order to prevent a plethora of justifying clauses, these should try to remain as far as possible within the justifying interests already admited in Article 36: Community aims and fundamental rights.[99]

This last remark brings back the previous indication about the progressive importance that human rights are acquiring in the solution of these matters. For instance, in case *ERT*, the Court makes an important assessment of the role of fundamental rights in the evaluation of the adequacy of exceptions to the rules established in the Treaties, without distinguishing really in a clear way between general good reasons or public policy grounds: "where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights" and then concludes that "the limitations imposed on the power of Member States to apply the provisions referred to in Articles 56 and 66 of

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[97] This last point is particularly interesting since the Union Treaty establishes the respect of national identities (see Article F) as one of the main principles of the Union. Indeed, one could suspect the existence of a Community general good, parallel to Member State's general good. It is also interesting to note that national identity in the field of Community freedoms might be reconducted to economic interests that defend essential socio-cultural choices.

[98] Paragraph 27 of the A.G.'s opinion in case C-17/92 *Fedicine* [1993] ECR I-2239.

[99] Opinion of case C-306/88 *Anders* [1992] ECR I-6457, at paragraph 24.

the Treaty on grounds of public policy [...] must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the ECHR".[100]

Despite this opening to human rights, the Court stays a step behind its Advocates General where the issues become too sensitive. Thus, Advocate General Van Gerven sustains that

> "such an objective [the need to prevent abortions by prohibiting the distribution of information thereon in its territory] is justified under Community law, since it relates to a policy choice of a moral and philosophical nature the assessments of which is a matter for the Member State and in respect of which they are entitled to invoke the ground of public policy referred to in Article 56 read together with art 66 (and also Article 36) of the EEC Treaty...... There can, in my estimation, be no doubt that values which, in view of their incorporation in the Constitution, number 'among the fundamental values to which a nation solemnly declares that it adheres' fall within the sphere in which each Member State possesses an area of discretion 'in accordance with its own scale of values and in the form selected by it'"[101]

The Court, on the contrary, excludes any reference to the issue.

This does not mean that the Court remains ignorant of these aspects, indeed it admits that "in fact, it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States".[102] However, it sticks to the delimitation of economic criteria to explain both the terms in which public policy and general good are to be understood. Thus, in case C-17/92 (*Fedicine*), summarising its precedent case law as regards freedom to provide services, the Court settles that *"des réglementations nationales qui ne sont pas indistinctiment applicables aux prestations de services quelle que soit l'origine ne sont compatibles avec le droit communautaire que si elles peuvent relever d'une disposition dérogatoire expresse tel que l'article 56 du traité auquel l'article 66 renvoie. De ces arrêts, il ressort encore que des objectifs de nature économique ne peuvent constituer des raisons d'ordre public au sens de cet article".*[103]

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[100] Paragraphs 43 and 45 of the judgment, case 260/89 *ERT* [1991] ECR I-2925.

[101] Case C-159/90 *SPUC v. Grogan* [1991] I-4685 at p.26 of the opinion.

[102] Case C-275/92 *Lotteries* [1994] ECR I-1039 at p.60 of the judgment.

[103] Case C-17/92 *Fedicine* [1993] ECR I-2239 at para. 16.

What can be concluded from these comments? The Court does not give precise elements of evaluation for national jurisdictions to judge whether a measure can be maintained on grounds of public policy, general good or whether it is not permitted under EC law. It could be questioned whether this lack of clarity of the Court has not an origin in the fact that it tries to reconcile diverging interests, economic policies and defense of human rights. That is, the Court is continously hesitating between a reaffirmation of the supremacy of EC law (at any rate from an economic point of view) and the acknowledgement of other values which are outside its scope and lead it to slippery areas, namely fundamental rights. That might explain why it tends to refer to the principles of non-discrimination and proportionality that, without providing a clear-cut answer, delineate the profile of a Community exception. The new criteria that the Court acknowledges encompass either economic or political choices, cultural policies and fundamental rights. Progressively, the Court opens the door to admitting other criteria that are still particular but enlarge the excepting valves to Community law whenever the respect of the principles of non-discrimination, proportionality and human rights is ensured. Where the general good is so delineated by the Court, it appears as a kind of "more easily acceptable" public policy, keeping the term of public policy to actual grave and/or extreme threats.

2.2. The innovation brought about by the notion: general good in EC legislation

Although the general good finds its origins in the case law of the ECJ when it interprets and clarifies the scope and boundaries of the free movement of services and goods, its recent developments are to be found in legislation. Therefore, attention must be drawn to the directives that employ this concept in order to respond to several questions: how does the notion of the general good work? Does it introduce a new element into the conflict of laws system? Are we dealing with a national or a Community notion? Can it be perceived as different from other notions such as public policy or mandatory rules?

Directives dealing with the notion of general good have a very specific substantive scope, namely securities, insurance and banking regulation, therefore aiming at national economic interests. In this sense it has been said that the legal or regulatory provisions protecting the

general good refer to the public economic law that regulates these specific areas. Thus, it would encompass all *national* organisational measures regulating production, distribution and consumption of services, together with the rules aimed at the fairness of economic transactions and consumer protection.[104] It remains unclear whether there is actually a difference between these two visions (i.e. from a viewpoint of case law or directives) of the same notion. In any case, and as a starting point, it can be assumed that the general good refers to national economic interests closely linked to consumer protection. This statement will be subject to revision in the following pages.

The banking, securities and insurance directives belong to the so-called second generation directives. They aim at the harmonisation of these specific areas of trade and financial services in the framework of the EC. This harmonisation tries to conciliate both EC and Member State interests. Thus, on the one hand, they lead to the free movement of services and impose mutual recognition; on the other hand they still allow a margin for national interests to be protected in so far as they do not conflict with this fundamental freedom. The means of achieving this is termed the "general good".[105]

The banking directive[106] deals with the notion of general good in relation to the conditions of operation of credit institutions (Art.19), the enforcement of sanctions against a guest credit institution, not complying with national provisions (Art.21.5) and advertising in the host Member State (Art.21.11). These provisions refer to a set of substantive conditions that must be respected by guest credit institutions to be permitted to act in the host Member State. Therefore, the general good appears as a substantive requirement and a positive means of defence for the Member States. This seems to be more or less the same intention behind the

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[104] See Biancarelli,1992:1095.

[105] In the words of the securities Directive, (of 11.6.93, OJ L141 at p.29,) "whereas the Member States must ensure that there are no obstacles to prevent activities that receive *mutual recognition* from being carried on in the same manner as in the home Member State, as long as they do not conflict with the laws and regulations protecting the *general good* in force of the host Member State" (emphasis added).

[106] Second Council directive 89/646/EEC of 15.12.89 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending directive 77/780/EEC.

securities directive.[107] Here, the notion of the general good regards the conditions of establishment of a securities company (Art.18.2) or a branch thereof (Art.17.4) and also to the measures taken in order to prevent or to penalise irregularities (Art.19.6). A last reference concerns advertising (Art.13). The general good plays a similar role in relation to insurance directives. In the third life insurance directive[108] the general good is referred to in relation to enforcement and advertising (Articles 21.5 and 21.11). The third non-life insurance directive[109] makes the same reference to the general good in relation to conditions of operation (Art.32) and advertising (Art.41). All these are substantive requirements that aim at the protection of the host Member State's national interests. However, in the two last directives attention must be focused on Article 28 since it introduces a rule of uncertain nature into the systems.[110]

The understanding of this provision requires a reference to the second generation Directives. As concerns Article 28 of the third Life Directive, there is common agreement among scholars that its immediate predecesor is Article 14(5) of the Second Life Directive.[111] The wording of Article 14(5)[112] is somewhat unclear, since it refers to public policy but apparently not in a private international law sense. This provision does not encompass a conflict rule, but just restrains Member States in their ability to prohibit the insurer from

[107] Council directive 93/22/EEC of 10.5.93. Another proposal of 10.2.93 for a Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities -Ucits- (OJEC C59/14, of 2.3.93) also enshrines the notion of general good in the terms that will be studied here.

[108] Council directive 92/96/EEC of 10.11.92.

[109] Council directive 92/49/EEC of 18.6.92.

[110] Its wording is the following: "The Member State in which a risk is situated shall not prevent a policy holder from concluding a contract with an insurance undertaking authorised under the conditions of article 6 of Directive 73/239/EEC, as long as that does not conflict with legal provisions protecting the general good in the Member State in which the risk is situated".

[111] See namely Morse (at p.50) and Roth (at p.76) in *"International Insurance Contract Law: the Directives"* (1993); see also Levie (1992:251), who makes a positive assessment of the substitution of the notion of public policy by the notion of the general good, because it is *"plus conforme au droit des Communautés et à la jurisprudence de la Cour"*.

[112] It reads as follows: "Member States may not prevent the policy-holder from entering into any commitment which may be lawfully undertaken in the Member State of establishment unless it is contrary to public policy in the Member State of the commitment".

concluding a contract that is valid under the law of the insurer's home seat except for the defense of the *ordre public.* The choice of law rule is to be found in another provision, namely Article 4(1)(2).

In this framework it seems rather logical to accept that Article 28 of the third life Directive does not enshrine a conflict rule. Firstly, it is not shaped as a traditional conflict rule, and secondly, its wording is half way between substantive law and choice of law rules. Moreover, understood as a conflict rule, Article 28 would be incompatible with the solution settled in Article 7 of the Second non-life insurance Directive and Article 4 of the Second life assurance Directive.[113] In actual fact, it has been pointed out that it "is probably directed at rules of substantive law rather than at rules for the choice of law in a strict sense. Nevertheless, it is possible that it will have an indirect effect on the scope of permissible party autonomy".[114] The general good, as stems from the directive, is an *"exigence de l'ordre public communautaire"* that will shape the understanding of the whole system of conflict rules.[115]

In this provisional setup the general good seems to have a precise role to play, namely to fill in the gaps that the sometimes contradictory Community legislation entails. The third Life Insurance Directive tries to reconcile the Community principle of mutual recognition -as a consequence of the case law previously examined- which imposes the law of the State of origin of the services, with the private international law principles of party autonomy and protection of the weaker party -which reflect namely in mandatory rules. The principle of mutual recognition - which is admittedly restricted to aspects of the public law of the State of origin, facilitates the fulfilment of the internal market.[116] This being so, national conflict

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[113] Dubuisson,1994:743 No.789.

[114] Morse, in *"International Insurance Contract Law: the Directives"* (1993:45).

[115] These are the terms used by Bigot (1994:68).

[116] The articulation of these two interests is particularly complex. Indeed, the principle of mutual recognition (which imposes the law of the State of origin) would contrast with the conflict law rules settled by the Directives (which impose the law of the taker of the insurance or the law of the place where the risk is located). Moreover, it has been wondered whether other aspects of the issue which do not come under the scope of the public law regulation but may also produce restrictive effects, should also be subjected to the principle of mutual recognition. Apart from considerations of compatibility of the latter principle with the conflict rules, the problem can be aggravated if it is considered that the law of the State of origin may not always provide the greatest protection to the consumer. Then,

rules that lead to a different choice might be judged contrary to Community principles, unless they are justified on grounds of the general good.[117] In this sense, general good is a means of prioritising the national law of host States with respect to foreign institutions (either credit or insurance entities) legislation. The Community principle of mutual recognition is counterbalanced by the protection of those national interests that respect the conditions laid down by EC law. Thus, the general good becomes a filter of the compatibility with Community aims (in cases of non harmonisation) which has as parameters of comparison the principle of non-discrimination, proportionality and the pursuit of an objective justified as an interest of particular importance. The general good would work then at a double level:

- as imposing the host Member States' specific protecting rules (that comply with the above-mentioned criteria of proportionality and non-discrimination) if they are confronted with the Member State of origin's legislation.[118] This remark is to be understood as referring to mandatory rules. Thus, legal provisions that defend the general good would be those rules that deserve special protection from Member States, rules that are to be applied even without the consent of the parties. Summming up, for many scholars, provisions protecting the general good are on many occasions mandatory provisions.[119] In these conditions the notion appears as national general good.

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it would seem that a blind imposition of the law of the State of origin may cede in favour of more specific and protecting measures, namely mandatory rules (that can find a limit in the prohibition to hinder Community aims).

[117] Radicati di Brozolo (1992) undertakes a very interesting study of the manner of operation of the principle of mutual recognition as regards different possibilities of conflict rule (namely those which refer to the *lex causae*, those which refer to other rules - adjacent to the latter - or even the exceptions to these: mandatory rules and public policy). He ascertains that there are two kinds of requirements that must be taken into account. On the one hand, those which reflect substantial choices; on the other hand, those requirements that do not affect the essence of the service. Whereas the latter do not have to pass the control of compatibility with the fulfilment of the internal market, the former do have.

[118] In this sense it could be considered that the principle of mutual recognition is a kind of implicit conflict rule, which imposes the law of the Member State of the origin of the services (or goods). The logical consequence to draw from this would lead one to consider that the general good fulfils a role rather similar to the one of public policy as regards conflict rules in private international law.

[119] Lando's intervention in *"International Insurance Contract Law: the Directives"* (1993,101), sustained -in a large definition of mandatory rules- that "they include the 'directly applicable rules', the public policy of the forum and the 'legal provisions protecting the general good'". At the same conference, see the position of Fallon (p.129) who recalls that despite the fact that the term 'provisions protecting the general good' is unknown in private international law, it is ascertained that "they correspond to a general concept of public administrative law regarding the intervention of public authorities in social and economic activities, and as they are referred to by the Court of Justice, they certainly cover 'mandatory rules' which are their equivalent in private law".

- as impeding the choice of law rules becoming unduly restricted by the application of national mandatory rules[120] or any other mechanism that would lead to the same result in favour of the forum law.[121] Thus, the general good becomes a control of compatibility with EC principles which may even be extended to public policy of the forum.[122] In these terms, the notion appears as a Community one.

As defined in the Directives, the notion of the general good refers mainly to national general good, which adopts the shape of mandatory rules. At the same time the Community general good becomes an essential element of reference to evaluate the national general good. The former exhibits thus, its twofold nature: on the one hand it is a Community notion which ensures the functioning of the market.[123] On the other hand, it appears as an element of private international law introducing a sort of rule within the EU without a located interest, but that applies against the outcomes that traditional Member States' conflict rules may entail.[124] Therefore, it shapes the understanding of national mandatory rules, because besides the considerations of national interest that justify mandatory rules, the interpreter must take into account other interests which are justified by the Community general good.[125]

National private international law rules have coexisted without problems with Community law for a long time. However, the developments that Community law is undergoing have raised the doubt as to the compatibility of certain kinds of national legislation and Community aims. In this sense, the notion of the general good appears as an acknowledgment of national mandatory rules in the sphere of Community law while it delimits the terms under which such

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[120] Smulders,1992:796.

[121] Bigot,1994:69.

[122] See Radicati di Brozolo,1992:417 and Dubuisson,1994:831ff.

[123] In this sense the reference to the general good as a constitutional clause - as proposed by Dubuisson (1994:756), finds all its sense.

[124] Duintjer Tebbens,1994:474.

[125] Such statement is confirmed by paragraph 15 of case C-169/91 *B & Q* [1992] ECR I-6635, according to which *"le contrôle de la proportionalité d'une reglementation nationale qui pursuit un but legitime au regard du droit communautaire met en balance l'intérêt national à la realisation de ce but avec l'intérêt communautaire à la libre circulation de marchandises"*.

a notion is permitted. Such delimitation acts both in relation to the State's own mandatory rules, and other State's mandatory rules, since the Community general good becomes the parameter according to which the latter are accepted or refused. In the same sense, restrictive conflict rules can be admitted in the Community sphere where they are justified by the general good. Otherwise they are excluded. It could be wondered then which system is at the basis of this rejection, whether EC law or private international law. Seemingly, it is still the national system of private international law which permits such rejection since EC law excludes any kind of control of the compatibility of other Member State's legislation with Community law. Such rejection admittedly results from the activation of the public policy mechanism. If this is so, it appears that Community general good becomes a necessary reference to incorporate in national public policy.

2.3. Attempting further delimitation

a. Nature

When the first definition of the general good was proposed, it was referred to as those national measures which regulate the socio-economic order of a country. This definition draws a national notion which is concerned with the defense of Member State interests. Contemporarily it has been ascertained that the notion of the general good finds its roots in the case law of the Court, that admits these measures -even though they are hindering the internal market, so far as they pursue justified aims with regard to Community law and reflect socio-economic or socio-cultural choices that are consistent with the *Community* general good.[126]

Throughout the two preceding points both national and Community general good have appeared. The distinction has been made mainly according to the interests they endeavour to protect. In this sense, national general good reflects national (Member State) interests, while Community general good aims at the protection of European Union interests. None of these

[126] See opinion of A. G. Van Gerven in case C-306/88 *Anders* [1992] ECR I-6457, at paragraph 15.

two notions has *raison d'être* outside the framework of the European Union. National general good is an exception to the normal functioning of the market as conceived in Community law. This fact raises the doubt about the true nature of national general good.

From a purely formal viewpoint it must be ascertained that Community law draws on a national notion. However, it reshapes it and gives it a different function. It can be questioned whether its adoption by EC institutions is sufficient to make it a Community notion. Indeed, could not one of the following alternatives be suggested: that it is a Community notion with a national content or a national notion with a Community delimitation. This is linked to the vision one accepts as the basis of the notion of general good. Thus, where it is assumed that national residual competences justify this concept, the notion is a national one within Community boundaries. The control that EC law undertakes can be justified in a hierarchical conception of the legal system in which the inferior rule entails a restriction or derogation of the superior rule that is accepted where it pursues a legitimate interest, where the measure appears as proportionate and if so, it does not entail unnecessary restrictions.[127] Where the notion is based on the idea that Member States exert Community competences, then it can be considered as a Community notion with a national content.[128]

In former paragraphs it has been stated that the Community general good establishes the standards according to which national interests are to be evaluated. The consequent question is what are the parameters of a Community general good. This question is to be responded having regard to the interests at stake. A helpful orientation is given by Advocate General Van Gerven, in his opinion of cases C-312/89 & C-322/89[129] concerning the so-called Sunday trading cases. He hints at the fact that there are indeed two kind of interests at stake. At paragraph 10 he says

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[127] Rigaux,1989:132. It has also been suggested that this control that Community law exerts is rather close to an objective control of constitutionality such as the full faith and credit clause in the American (USA) system (Dubuisson,1994:756 -No.801).

[128] See Gavalda & Parleani,1992:78. The question as to the residual or essential character of these competences goes beyond the reach of this thesis. It may be argued that - as Gavalda & Parleani contend, despite the denomination of *compétences residuelles*, these are areas where the intervention of the EC is subsidiary.

[129] [1991] ECR I-997 and I-1027.

"the crux of the matter... is the need to classify the numerous potential justifications as far as possible under a general but exhaustive rubric. It is clear... that such rubric cannot, in view of the vague concepts which it expresses, provide a firm line of action. Nevertheless, it can, to some extent, serve as a rough guide. It is clear, for instance, that the designation of Sunday as a general day of rest falls under that rubric [political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics], as the Court indeed indicated in the *B & Q* judgement: the imposition of at least one weekly rest day is undoubtedly a policy choice directed at the protection of the working environment and of the health of humans, which are objectives recognised by the Treaty. The designation of Sunday as the day of rest is a choice suited to the specific socio-cultural characteristics of the Member State in question".

This corroborates the conclusion first reached, i.e. that there are two notions of general good, the Community one, with the interests already encompassed in the Union Treaty, and the national general good, which protects other national/regional specificities.[130] To a certain extent their scope is coincident, but the national one has a wider scope. In fact, the Community interests would be some already recognised in the Single European Act (namely environmental protection -Articles 130R to 130T of the EEC Treaty-[131]) and those admitted by means of case law, now enshrined in the Union Treaty, namely consumer protection, public health and respect of the cultural identity of Member States.[132] The national general good would encompass these interests and all those which "reflect certain political and economic choices' and are connected with 'national or regional socio-cultural characteristics, [which], in the present state of Community law, is a matter for the Member States".

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[130] Fallon (1993a:250) argues that a correct distinction should be made on the basis of the inspiring source, but not in the nature of the objectives of the general good since the 'national general good' is actually tolerated because of its adequacy to the 'Community general good'. It would seem thus, that Member State's general good is but a reflection of Community general good.

[131] It should be recalled that environmental protection had been largely defended in the case-law of the Court. Two examples illustrate this position of the Court: in case C-370/88 *Marshall* [1990] ECR I-4071 the Court stated that limitations to the right to fish were "justified by the general interest, since they are intended to ensure the conservation of the species in question" (paragraph 28); in Case 240/83 *ADBHU* [1985] ECR 531 is was ascertained that measures taken in order to implement a directive were not hindering intra-Community trade since they were not "discriminatory nor go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection, which is in the general interest" (paragraph 15).

[132] See Articles F and 128 as concerns culture and cultural identity; Article 129 in relation to public health and Article 129A in relation to consumer protection. Such Community concerns have found protection in the case-law of the ECJ: case C-238/89 *Pall Corp. v. Dahlhausen & Co.* [1990] ECR I-4827, provides an example of substitution of the national conception of consumer protection by a Community one (in relation to a case of registered trade marks).

b. Competence

The question who has competence to determine what the general good is still has a controversial response. Seemingly, a distinction must be made between national and Community general good. As regards the former, it would seem that the national authorities of Member States retain this competence, both to indicate which are the dispositions that defend the general good and to justify them when they are contested. It has been suggested that, since they defend national interests and so to avoid the risk of national discrepancies, competence should be given to the Commission. Thus, a kind of coordination would be achieved.[133] However, this suggestion ignores the important role of the ECJ that has been highlighted in the sphere of the Commission's functions. For example, Sir Leon Brittan, with regard to the Second Banking Directive and the notion of general good stated that

> "The extent to which host countries will be able to impose specific national rules justified by the general good is limited by the conditions laid down in various rulings of the Court of Justice of the European Community... It will ultimately be up to the Court of Justice to examine whether any national rules restricting the freedom of banking services are compatible with these strict conditions"[134]

The line of argumentation indicated in the reply above is supported by scholars and is the logical response to the inherent function of the general good. The general good protects national interests and the determination that the Commission has competence to give a harmonised content to the notion "seems to overlook the deep roots that 'general good'

[133] Van Gerven (1991:46) delineates a kind of cooperation between Member States fostered by the Commission of the Communities. This would lead to a clarification and harmonisation of the provisions based on the general good and would incorporate the advantage of obtaining *"un contenu précis et harmonisé et cela de manière plus efficace et rapide que ne pourrait le faire la Cour dans le cadre de recours en manquement ou des procédures préjudicielles"*. It is important to indicate that Van Gerven, in later texts, in his function of Advocate General, will recomend recourse to the case-law of the ECJ (see his opinion in case C-306/88, commented in footnote 140 and accompanying text).

[134] Written Reply of Sir Leon Brittan on behalf of the Commission (24.1.90) OJ C139/14. Although it is claimed that the delimitation of the boundaries of the general good is a competence of the Court, it would not be so readily accepted that the ECJ should review the compatibility of national rules to the previous definition of general good. This statement would imply that the Court is given a power that it has not been given for the moment, and moreover, it does not want to accept (as the ECJ has repeatedly stated, its competence is not to interpret national law, but to provide national courts with the necessary elements so that they can carry out this interpretation according to EC law by themselves).

provisions tend to have in the culture of the individual Member States".[135] Therefore the logical consequence is that the ECJ corrects (as understood in the avant-last footnote) the national appreciation of the general good and establishes the limits that must be respected in order to consider the general good as a *Community* notion.

In this procedure the Court might take into consideration the opinion delivered by the Insurance Committee.[136] This advisory organ (composed of representatives of the Commission and the Member States) exerts its consultive function mainly with regard to the Commission. However, this Committee is endowed with the power to "examine any question relating to the application of Community provisions concerning the insurance sector, and in particular Directives on direct insurance".[137] A possible application of this provision could be the interpretation of the notion of the general good as established in the third generation directives.

The definition of the notion by the Court of Justice should run parallel to and be completed by the delimitation of other concepts that are directly linked to it, namely proportionality.[138] If not, the Court would leave to the interpreter a broad discretion that would result in uncertainty. The ECJ has already been confronted with this problem. Despite the absence of a clear doctrine to be traced in the case law of the Court, an approach to the *état de la question* can be illustrated by the opinion of Advocate General Ven Gerven in the so-called Sunday Trading cases.[139]

Confronted with the question of who has the faculty to review the necessity and proportionality of a measure with regard to Community law, he reaches the following conclusions. First, he considers that a close collaboration between national Courts and the ECJ

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[135] See Katz,1992:22.

[136] This Committee was established by Council Directive 91/675/EEC of 19.12.91, OJ L 374/32 of 31.12.91.

[137] Wording of Article 3(1) of the Directive.

[138] See Radicati di Brozolo,1993:422. Also insists in the importance of proportionality Karydis,1994:556.

[139] Case C-306/88 *Rochdale Borough Council v. Anders*, [1992] ECR I-6457.

is required. This would result in an exchange of information: the national court provides the factual elements of the case at stake (which the ECJ cannot evaluate); then, the ECJ provides the national court with the legal elements according to EC law. The latter must then ascertain whether the national measure is compatible with EC law. Secondly, transposing this general scheme to the principle of proportionality, Advocate General Van Gerven concludes that

> *"il incombe selon nous à la Cour, et à elle seule, d'indiquer en termes clairs et impératifs dans sa jurisprudence les critères de cette appréciation. Il incombe ensuite conjointement à la Cour et à la juridiction nationale d'appliquer ces critères jurisprudentiels, déduits des arrêts anterieurs, au contexte réglementaire et factuel en cause... S'il ressort des constatations faites par la juridiction nationale et/ou des débats contradictoires devant la Cour qu'un doute n'est pas permis, la Cour indiquera généralement elle-même le resultat de l'appréciation au regard du droit communautaire... Si la Cour n'est pas en mesure de se prononcer elle-même sur la base des éléments qui lui ont été fournis, la juridiction nationale doit alors se forger une opinion personnelle sur l'application de l'exigence de la proportionalité, éventuellement après un examen complementaire du contexte réglementaire et factuel et à la lumière de la reponse de la Cour à la reponse préjudicielle"*[140]

The criteria according to which a national court has to determine whether the national measure responds to a proportional requirement (and thus, can be accepted as a measure justified by the general good) are to be found in the case law of the ECJ. The more precision in the Court's general definition, the more certainty for Member State courts when confronted with the individual cases. This assertion takes into account thus, the fact that the delimitation of the correct application of an exception to a general rule of law is to be established by the courts in relation to every single case. Therefore, it is not possible to settle *a priori* a list of the exceptions.[141]

As regards the Community general good, it is argued that its main definition (and boundaries) shall be delimited by the Court according to the position up to now followed.

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[140] Opinion of the Advocate General at paragraph 20.

[141] The efforts of two scholars are to be noted as regards this individualisation. Van Gerven (1991) in relation to banking regulation, and Dubuisson (1992) in relation to insurance directives, try to discern among the existing legislation what national rules could be deemed to be justified on grounds of the general good. Nevertheless, this is an effort that can never be completely fulfilled. One could list the existing reasons but it is not possible to establish what the forthcoming legislative outcomes will be.

Indeed, as has been pointed out, inspiring criteria will be found in the Union Treaty. This also seems to be the logical procedure as regards the notion enshrined in the directives.[142] The interpretation that national courts may undertake of the notion will also help to delimit its correct boundaries, when the courts refer to the ECJ, preliminary rulings in order to ascertain the correctness of their interpretation.

c. Distinction from public policy (in a Community law framework)

The general good tries to define its ambiguous position in a system where it appears akin to mandatory requirements, while on other occasions the resemblance with public policy is evident. The differentiation of the notions of general good and public policy becomes rather laborious. Scholars sometimes hesitate when delimiting the general good and find it difficult to distinguish it from *ordre public*. It has thus been asserted that "no clear distinction could be found between the rules of the general good on the one hand and related phenomena on the other, the latter being [...] the rules of the *ordre public* of the forum".[143] It has also been said that the "public policy and related elements of Article 36, as well as the mandatory requirements of Article 30 are close relatives of the general good".[144]

There are several points of divergence and convergence of these two notions. A first distinction between them concerns their scope of application. According to the case law of the Court, it would seem that the general good is a notion closely linked to the free movement of goods and services and may extend to establishment. Public policy, on the contrary, would extend its scope of application to all the freedoms envisaged by the Treaty of Rome (as amended by the Union Treaty, which also includes the exception in the new Article 73 as regards free movement of capitals). Thus, the scope of the general good seems more restrained than the scope of public policy.

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[142] Duintjer Tebbens,1994:471.

[143] Conclusions in *"International Insurance Contract Law: the Directives"* (1993:195).

[144] Katz,1992:32.

From the viewpoint of sources, public policy appears more in legislation, while the general good is elaborated more by courts. However, such a distinction should not be regarded as essential, since public policy has found precise boundaries through the case law of the Court. The ongoing process of delimitation may indeed bring closer the two notions that already have to respond to some similar requirements, namely the principle of proportionality. The development of the case law of the ECJ precisely sets another criterion of differentiation, namely discrimination. Thus, public policy appears as the only criterion to admit discrimination (on grounds of nationality) within the EC context. The general good, on the contrary, stands as a restriction which is not discriminatory since it aims at all kinds of regulations which are addressed both to nationals and non-nationals from Member States.

Thirdly, a criterion of distinction would concentrate on the material limits of the notions that have been delimited by the Court. In this sense, the general good would be concerned with mainly economic interests while public policy could be invoked as regards any subject apart from economic interests. In this sense, it would appear that the general good is the complementary notion to the public policy, since precisely the matters excluded from the scope of the latter belong completely to the scope of the former. However, such exclusion is not definite. Indeed, it could be argued that whenever a matter is not explicitly excluded from the scope of public policy it may come indistinctly within the general good or public policy.[145] It could be suggested that public policy assumes the defence of 'higher' values while the general good sticks to the economic ones.[146] It should be borne in mind that the notion of the general good is progressively enlarging and encompasses other 'spiritual' values of essential importance within a Community where economic criteria cede in favour of other constructive elements such as the respect of cultural identities.

It is ascertained that the general good provisions tend to have deep roots in the culture of the individual Member States.[147] In this sense, the resemblance with public policy is

[145] In this sense, see Karydis,1994:558.

[146] This would be the line of argumentation followed by O'Leary (1992:148) who defends that, although they express elements of the discretion of the State, their application should be kept separate, since resort to public policy implies a greater restriction and a national interest which would justify a higher level of protection.

[147] Katz,1992:23.

astonishing. In both cases, EC law permits Member States to have recourse to a functional notion that fulfils an important role more because of its function than because of its content. Both of them also reflect a deep link with the notion of sovereignty. Moreover, in both cases the presence of human rights can be traced. As regards public policy it appears more related to civil and administrative rights (in the sense of rights in front of the administration). On the contrary, the general good would be more in the line of socio-economic rights and rights of the third generation.

A final evaluation of the relationship between these two notions appears as rather hazardous. The boundaries are by no means clear. Sometimes they mingle to a criticisable extent. Indeed, it has been said that the general good, in actual fact, encompasses the public policy.[148] The most definite criterion of distinction appears to be the principle of non-discrimination since, as regards the contents, despite a certain originary division of areas, they tend to overlap and then become complementary. Such tendency sets a kind of double standard in the EC that finds no justification. For instance, why should consumer protection be excluded from the scope of public policy and then admitted under the general good? Both notions work within an intra-Community sphere but it would seem that, in the way they are conceived, the general good may potentially be extended to other areas such as private international law.

2.4. A critical appraisal

The general good has appeared at the beginning of this chapter with a deep Community shade, somewhat vague as regards its content and functions and with an uncertain nature. Now it is time to attempt a more accurate definition of the notion and its relation to international public policy.

As results from the preceding pages, under the term of the general good, two notions are referred to, namely Member State (national) general good and Community general good. The

[148] In the words of Biancarelli (1992:1095) *"dès lors, selon nous, cette notion de raison d'intérêt général vise aussi bien la notion d'ordre public qui s'applique en cas de reglementation nationale discriminatoire, que celle de raison impérieuse d'intérêt général, utilisée lorsque la legislation est apparament indistinctement applicable aux nationaux et aux autres ressortissants communautaires"*.

general good finds its origin in the case law of the ECJ and then appears under legislative shape in secondary legislation. The ECJ has defined the notion both as national and Community notion. In secondary legislation reference may be made to national and Community general good. Although both of them are called on to apply within the Community framework, it is not less true that they exhibit close links to international public policy (or public policy in the sense of private international law). National and Community general good need be approached from a substantive and a functional point of view.

National general good, from a substantive point of view reflects national values and policies of Member States that are admitted under Community law as restricting internal trade if they comply with specific requirements, namely the respect of the principles of non-discrimination and proportionality.[149] Where the ECJ's case law and Directives are evaluated as a whole, national general good appears to encompass the most diverse interests of Member States: firstly, it defends economic and social policy interests which reflect on the one hand the protection of weak parties as workers and consumers[150] and the defence of State interests,[151] taxation[152] or fair trading[153] on the other. Secondly, it refers to ethical-moral values[154] and thirdly, it collects a sample of State idiosyncratic components such as linguistic diversity[155] and national policies such as environmental protection,[156] cultural dissemination[157] or protection of intellectual property.[158]

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[149] See point 2.1 of this chapter.

[150] As results from the Directives on insurance, banking and securities. See point 2.2 of the chapter.

[151] Namely, commercial regulation on Sunday trading, Case C-306/88 *Rochdale Borough Council v. Anders* [1992] ECR I-6457.

[152] Case C-204/90 *Bachman v. Belgium* [1992] ECR I-249.

[153] Case C-76/90 *Säger v. Denmark* [1991] ECR I-4221.

[154] Case C-275/92 *Lotteries* [1994] ECR I-1039.

[155] Case 379/87 *Anita Groener v. Minister for Education* [1989] ECR 3967.

[156] Case 240/83 *ABDHU* [1985] ECR 531.

[157] Cases Guides touristiques: C-154/89 *Commission v. France* [1991] ECR I-659; C-180/89 *Commission v. Italy* [1991] ECR I-709 and C-189/89 *Commission v. Greece* [1991] ECR I-727.

In this enumeration the scent of fundamental rights appears repeatedly. Indeed, the general good turns up as protecting not only economic rights, but almost every field concerned with human rights. It is also noted that particularly rights of the third generation find, in this feature, acceptance. Another point that should not be disregarded is that the general good - as regards directives -will usually adopt the shape of mandatory rules. Summing up, the general good appears both as principle or rule and it exhibits a substantive scope almost coincident to international public policy.

From a functional point of view the general good is a reflection of national sovereignty that permits Member States to resist the Union. In more concrete terms, it permits that Member States to hinder (within Community boundaries) the fulfilment of the internal market, either by excepting the principle of mutual recognition (as enshrined in the Service Directives) or by limiting the access of goods and persons to national markets[159]. It should be born in mind that general good provisions tend to have deep roots in the culture of each Member State[160]. In this sense the general good is closely linked to public policy as understood in a Community framework. It would seem that they fulfil complementary roles. Indeed, all the fields in which according to the ECJ it is not possible to invoke the public policy clause - such as economic grounds[161] and consumer protection[162], come under the scope of protection ensured by the general good. It is surprising to acknowledge this double standard favoured by the EC which refuses protection on the one side and then admits the same feature under another name. However, this seems to be the approach selected by the Community as regards directives of the third generation. Since the Court has rarely admitted the public policy exception in relation to freedom of services,[163] the Directives refer to the general good.

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[158] Case 62/79 *Coditel* [1980] ECR 881.

[159] Case 379/87 *Anita Groener v. Minister for Education* [1989] ECR 3967.

[160] Katz,1992:23.

[161] See case 352/85 *Bond van Adverteerders v. Netherlands*, [1988] ECR 2124.

[162] See case 177/83 *Kohl v. Ringelhan & Rennett*, [1984] ECR 3651.

[163] Case 7/78 *Regina v. Thompson* [1978] ECR 2247; case 352/85 *Bond van Adverteerders* [1988] ECR 285.

In fact it could be argued that national general good is a transposition of Member State's international public policy into the EU sphere. In other words, since the exception of international public policy has no role to play in the relations between Member States and the Union, it would appear that the notion of international public policy develops then into general good within the European Union framework. At the same time it fulfils its defensive function in a different way, that is, not against the threats of another State's legislation or decision, but as a means of safeguarding the national identity against a supranational system that sometimes tends to be all pervading. Indeed, the admission of the general good can be inserted with no trouble in a general context of respect of Member States cultural identity (Article 128 EU Treaty).

The Community general good can also be tackled both from a substantive and a functional point of view. From a substantive point of view *"ces valeurs communautaires, sans doute constitutives de ce qui pourrait apparaître comme une culture communautaire, couvrent un large champ. On y trouve la prise en compte de valeurs patrimoniales... mais d'autres valeurs apparaissent également, telles la protection de l'environement, de la santé, de la vie privée, de l'intégrité physique de la personne, de la liberté d'expression".*[164] They stem from the ECJ's case law and sometimes find legislative confirmation (namely the respect of cultural identity or the protection of human health). They reflect the bigger concern of the Union in relation to matters other than economic regulation.[165] The Community general good puts at stake principles that are applied because of the values they enshrine and not because of Community freedoms requirements[166]. In this sense, the Community general good appears as the Community instrument to ensure the prolongation of the protection of human rights in

[164] Fallon,1993a:250.

[165] *"Des nombreux arrêts montrent que la Cour n'est pas insensible à cette diversité et aux besoins politiques spécifiques qu'implique la la recherche de la conservation de l'identité culturelle"* A.G. Van Gerven in case C-17/92 *Fedicine*. In this line of reasoning, Karydis (1994:559) further argues that such a position *"implique le devoir général de la Communauté d'en tenir compte dans son action [de cette diversité]. Cette disposition impose des limites à la compétence communautaire et à toutes ses actions, concernant les politiques communautaires. Nous estimons qu'elle fait partie du bloc de la légalité communautaire".*

[166] Fallon,1993a:251. This appears with particular clarity in relation to consumer protection. Indeed, in the insurance cases (cases 206/84, 252/83 and 220/83), the Court evaluates the general good exclusively from the point of view of consumer protection, disregarding the financial consequences in the insurance market within each Member State (Bigot,1994:70).

a European Union framework.

However, the role that the notion fulfils is still set in the framework of Community law. From a functional viewpoint the Community general good appears as a sort of constitutional clause, that settles the procedure according to which control of the 'compatibility' of Member State's activity within the EC, particularly as regards conflict rules and the public policy exception. Community general good could also be thought of as an 'internal' public policy[167] whereof parties (in this case, Member States) cannot dispose freely since they have to comply with the principles that such a notion entails. The Community general good appears as an evolution of Community law, that ensures the supremacy of the latter but introduces new essential elements that denote material concerns. Accordingly, the general good reconducts Member States' international public policy to the right terms within the EC. This implies that the Community general good becomes in itself a public policy criterion for Member States.

Summing up, from a functional point of view the Community general good appears essentially as a 'constitutional' clause with a clear function of ensuring the respect of the guidelines it lays down from a substantive point of view. It would seem then, that such a notion contains elements enough to consider it as the basis of a notion of public policy in the sense of private international law, a true Community international public policy.

[167] In the terms established in point 2.1. of the first chapter.

3. CONCLUSIONS

Public policy and the general good clause appear as two loopholes in the context of the EC Treaties which protect sovereignty of Member States in the face of the Union. As a reflection of sovereignty they are concepts deeply rooted in the Member States and usually are embodied in the constitutions of Member States. Admittedly they incorporate a precise conception of human rights.[168] In this sense, both the public policy and the general good may be deemed to constitute manifestations of the cultural identity of Member States recognized and protected in the EU sphere.

The two notions appear as complementary, the general good covering those areas which are excluded from the sphere of the public policy. Since their respective scopes are not too clearly set, the distinguishing criterion tends to accentuate the discriminatory or non-discriminatory character of these notions. However, even the boundaries thus delimited become blurry where the possiblity of discriminatory measures of general good is admitted.[169] It is interesting to point out that, in a logical structure, the only freedom where the general good clause has not been foreseen, namely free movement of persons, has been the sole area where the criterion of non-discrimination has been given relevance from a public policy point of view. As regards the content of the notions, one could advance that the general good enshrines all those exceptions that have importance as regards the State's idiosyncrasy, while the public policy is reserved to the most critical threats to the forum. In other words, the general good would appear as a more easily acceptable public policy.

It is acknowledged that both notions undertake a sort of transposition of internal criteria to the sphere of Community law. In other words, public policy as alleged by Member States would tend to reflect internal public policy (in the sense above indicated of *ordre public de direction et de protection*),[170] while the general good tends to mould the international public

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[168] As argued, public policy would be more inclined to civil and/or administrative rights, while the general good would incorporate the economic and third generation rights.

[169] See footnote 99 and accompanying text.

[170] Although it is not excluded that it may also envisage (true) international public policy: see footnote 29.

policy of the Member States into a Community shape. Although the transposition of the internal criteria to the Community level does not seem the most correct one, since the functions they fulfil are different, the deep link between those excepting clauses is acknowledged. Indeed, sovereignty signs do not disappear at the European Union sphere, they just accomodate to the framework in which they materialise. This contention seems to have found acceptance in the EC sphere: though the notion of public policy may be further restricted by ECJ interpretation, the general good occupies the place left by public policy. Seemingly, these clauses constitute exceptions to the Community system and therefore they are to be read in a restrictive light. It is contended, nevertheless, that a rigid delimitation of the exceptions should be relaxed where human rights are involved. A contention of the kind responds also to the engagement of the Union to respect the cultural identity of Member States. In practical terms it entails that human rights - as a reflection of the cultural identity, are accepted as constituting elements of public policy and general good.

Member States tend to defend their identity (that may be indeed understood as a manifestation of sovereignty) against the Union with the explicit acknowledgement of the Community system. The latter has embodied the public policy and the general good in a sort of constitutional framework. Meanwhile, the Community system begins to acknowledge the existence of identity signs of the Community that are pinned down precisely in contrast with Member States' identity signs. In other words, the progressive integration within the Union leads to the potential arousal of Community notions of public policy and general good. While the existence of a Community general good has already been ascertained through case law indications, the possible definition of a Community public policy may also be envisaged. The Advocates General of the Court seem to be readier than the Court itself to accept these Community notions. Possibly, the identification of Community rights underlying those notions will constitute a means of reaffirming the latter in the EC sphere. Indeed, they could incorporate - in a parallel to the State notions, civil, socio-economic and third generation rights. These features are of essential importance not only because they shall become a sort of constitutional-Community parameter to correct Member State's notions; but moreover, they introduce basic elements to identify a EU notion of international *ordre public* which incorporates human right considerations.

In this procedure of identification and definition of State and Community notions, the role of judges is basic. Indeed, they are given enlarged powers as proportionality becomes one of the main evaluation grounds of the acceptability of the two exceptions. The relevance is great because they not only apply the law, they also create it, in a progressive conception of judges closer to common law structures. The ECJ will have to assume the task of defining the Community notions of public policy and general good as well as delimiting the correct understanding of national notions as exception to Community freedoms. Such delimitation will also have effects with regard to public policy in the sense of private international law, as will be seen in chapter IV.

CHAPTER IV:
PUBLIC POLICY IN THE RELATIONSHIP BETWEEN MEMBER STATES

INTRODUCTION

Public policy finds application both as a result of the national systems of private international law and the international conventions concluded between States. This chapter delves into those conventions concluded between the Member States of the EU, namely the 1968 Brussels convention on jurisdiction and recognition and/or enforcement of foreign judgments and the 1980 Rome convention on the law applicable to contractual obligations. These conventions have particular characters, which deserve specific attention. They exhibit particular features that cannot fit into a well-known patern of international treaty nor be understood as 'standard' Community law. It is argued that in some private international aspects (which are closer to the fulfilment of the internal market) the Community is favouring the delineation of Community criteria. Even scholars supporting a non-Community character of these two conventions may accept that they reflect an essential agreement between European States which is the basis for a common set of European criteria.

These conventions introduce notions of public policy which are to be distinguished from Member States' public policy in the sense of Community exceptions to the Treaty. This is so despite the possibility of drawing a parallel in respect to the notion of public policy as enshrined in the 1968 Brussels convention on jurisdiction and recognition and/or enforcement of foreign judgments, which introduces what has been called the fifth freedom of the EC. This point raises one of the recurrent issues of the chapter, namely the interaction of international public policy and Community law.

Member State's international public policy is thus approached in the framework of both conventions to see how does the notion work in a Community sphere, to ascertain the changes it undergoes due to the influences of Community law and to advance a system of articulation with Community public policy.

1. INTRODUCTION TO THE CONVENTIONS

1.1. Nature of the conventions

This question has generated controversy ever since the elaboration of the Brussels convention in 1968 and the polemics can be extended to the 1980 Rome Convention. Seemingly, it still has no definite answer. There are as many arguments in favour of considering it Community law as arguments to consider it simply international law. In order to establish the position defended, namely a Community nature, arguments both in favour and against Brussels convention be Community law will be analyzed.

Scholars who defend the non-Community viewpoint[1] argue that conventions concluded under Article 220 of the EEC Treaty are subject to the general rules of international law and because of this fact, States keep the power to modify their contents. Moreover, States can make reservations to their content in order to exclude the application of certain dispositions on their territories. The particularities of Community law provide further grounds to sustain the international nature of these conventions. For instance, Member States do not sign these conventions at the same time as the original treaties but after a renegotiation of the convention. Another ground to be taken into consideration is the fact that the European Court of Justice cannot rule on the conventions unless the States give it jurisdiction through the Protocol. Moreover, if they were Community law, Member States could be compelled to ensure their application through the procedures of Articles 169 to 171 of the EEC Treaty.[2]

Once the reasons to defend the international character of these conventions have been

[1] This is the opinion of Bernhardt (1982), Rasmussen (1978), Louis (1990), Schwartz (1987), Pipkorn (1991), Saggio (1991), Capotorti (1992), Duintjer Tebbens (1993) and Rigaux (1994b).

[2] Precisely in this line of argument a counter argument has been advanced: since Member States must comply with an obligation that derives from a special clause of the EC Treaty - for in the words of Article 220, they shall "so far as necessary", enter into negotiations... - Community organs are competent to supervise the fulfilment of this condition (i.e. the obligation to negotiate) and in the case of Member State's omission, to resort to the legal remedies made available by Article 169 (Constas,1981:204).

displayed, attention is to be drawn to the Community position.[3] Firstly, these conventions were elaborated according to a particular procedure in which Community instances took part and were published (as well as the new versions after each renegotiation) in the Official Journal of the Communities. Secondly, they are not open to every country but only to the Member States of the Communities.[4] Moreover, these States have the obligation to accede to the conventions under Article 220. Although Member States have to negotiate the convention with every new accesion, the negotiations can not be used as an opportunity for the Members to reopen the debate on the convention.[5] Thirdly, these conventions have the same geographical scope as the EEC Treaty and furthermore, they cannot enter into force until all Contracting States have deposited their ratification instruments. Fourthly, they concur on the realization of Community aims and probably they would not have existed if there were not the European Communities. Such contention is moreover confirmed by the existence of a proceeding of consultation to the European Court of Justice that suits the schemes of preliminary rulings as settled in Article 177 of the Treaty of Rome. The consultive power of the Court will shed some light on this dispute.

Indeed, the elaboration of the Community legal order has been viewed as the construction of a gothic cathedral.[6] This is a process which requires time to be completely fulfilled mainly because of the complexity that the task entails. Taking progressive steps is a way of avoiding the risk of collapsing the whole structure. Therefore, the conventions signed by Member States are to be seen as the trimmings of the construction: they support European integration, contribute to fill the gaps of the treaties and tend to solve the difficulties arising from the existence of different juridical systems. Further elements to confirm this viewpoint are to be

[3] Defend this opinion Hauschild (1975), Hartley (1988), Isaac (1989), Luzzatto (1990), Struycken (1992) and Betlem (1993).

[4] The clearest confirmation of this fact is to be found in the Lugano convention 1988, which was drafted according to the Brussels convention but with a wider geographical scope of application so to include the Members of the EFTA. If the Brussels convention were a purely international convention, the former would have no reason to exist. The effective incorporation of most of the EFTA countries to the European Union from January 1995 introduces a new element in the relationship between these conventions and puts at stake the issue of succesion of conventions.

[5] See Jenard on his Report, p.62 (OJ C59 of 5.3.79).

[6] Struycken,1992:292.

found in the Union Treaty. Article K.3(2)(c) seems to continue the line opened by Article 220 while it reinforces the role of the Council in this procedure.[7] Moreover, it settles the possible attribution of competence to the Court of Justice in order to rule on the disputes regarding their application. The matters which are likely to be under the effect of this provision are listed in Article K.1 which regards them as elements 'of achieving the objectives of the Union'. Summing up, the latter appear as the culmination of the path opened by Article 220, namely in relation to judicial cooperation in civil matters.

Since there are sufficient grounds to accept one or the other position, the hint for a solution could be found having regard to the European Court of Justice's position in relation to this point. The Court has only ruled in relation to the Brussels convention. Though it has not pronounced on the nature of the latter, some judgments may shed some light on its position. The first case that deals with the matter is *Tessili v. Dunlop* in which the ECJ states that "the Convention was established to implement Article 220 and was intended according to the express terms of its preamble to implement the provisions of that Article [..] Accordingly the Convention must be interpreted having regard to its principles and objectives and to its relationship with the Treaty".[8]

With this paragraph the European Court of Justice establishes a direct link between the convention and primary Community law. The kind of link which exists is not specified in the Court's case law. However, there is a clear design stemming from it; that is, whatever their source -either Community or international law, the notions of the convention exhibit an independent nature from national references which may be defined through teleological and comparative interpretation. In words of the ECJ, the delimitation of a concept of the convention must "therefore be regarded as independent and must be interpreted by reference, first to the objectives and scheme of the convention and, secondly, to the general principles which stem from the corpus of the national legal systems."[9]

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[7] This Article establishes in the first paragraph that the Council "without prejudice to Article 220 establishing the EC, draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements."

[8] Case 12/76 [1976] ECR 1473, p.9.

[9] Case 29/76 *Eurocontrol I* [1976] ECR 1541 p.3.

As the Court has stated, this interpretation is based on the desire to ensure "in relation to the *Community law* that the Contracting States and parties concerned have equal and uniform rights and duties under the Brussels Convention. The principle of legal certainty in the Community legal system and the objectives of the Brussels convention in accordance with Article 220 of the EEC Treaty, which is at its origin, require in all Member States a uniform application of the legal concepts and legal classifications developed by the court in the context of the Brussels convention".[10] Indeed, the practice of the Court lays far greater emphasis on independent interpretation than on national classification. It has however never ruled that the terms used in the convention but not classified therein must, where the doubt arises, be interpreted necessarily in an independent manner. In any case, the Court has made it clear that the terms defining the scope of the convention must always be interpreted uniformly and independently of divergent national notions.[11]

Acknowledgedly such a statement does not automatically imply a recognition of the Community character of the conventions. Further support in this sense may be found in a second feature highlighted by the Court, namely the relationship with national law. According to the ECJ "[...] as the convention seeks to determine the jurisdiction of the courts of the contracting States in the intra-Community legal order in regard to matters of civil jurisdiction, the national procedural laws applicable to the cases concerned are set aside in the matters governed by the convention in favour of the provisions thereof".[12] The ECJ seems to follow the opinion of Advocate General Capotorti who had suggested that

> "independently of the question whether or not international treaties prevail over the laws of a State [...] the link between Community law and the convention created in Article 220 of the Treaty of Rome and the function entrusted to the court of uniformly interpreting the law are sufficient for one to reply that the rules of the convention must prevail over national law, even subsequent national law... *In other words, the position regarding the relationship between Community law and the laws of the Member States which has*

[10] Cases 9 and 10/77 *Eurocontrol II* [1977] ECR 1517 p.4 (emphasis added).

[11] See Kohler,1982:7ff. This position is in line with the traditional case-law of the Court, whereby the ECJ defines in 'Community' terms how a notion should be understood. See for instance case C-41/90 *Höfner v. Macrotron* [1991] ECR I-1979 for the definition of undertaking, case 75/63 *Hockstra (née Unger)* [1964] ECR 177 for the definition of worker and case 59/85 *Netherlands v. Reed* [1986] ECR 1283 as regards the definition of spouse.

[12] Case 25/79 *Sanicentral v. Collin* [1979] ECR 3423 p.5.

been laid down by this court must also apply to the convention envisaged by Article 220 of the EEC Treaty, the uniform interpretation of which this court is called upon to ensure".[13]

Brussels convention prevails hence over national legislation not because of its treaty status (i.e. some cases would not prevent it to be overruled by posterior national legislation) but because it has the same status as Community law and consequently, the same effects. Whenever the Court has the power to interpret conventions under Article 220 of the EEC Treaty it does not consider them as Community law but tends nonetheless to interpret them as if they were, assimilating their effects to the ones of Community law.[14] Furthermore, even those who adopt a purely international law point of view acknowledge a progressive 'Communitarisation' of the convention.[15]

In a recent judgment given in the framework of the Brussels convention 1968 the Court seems to further delineate this position. It states that "the provisions of that convention relating to jurisdiction and to the simplification of the formalities concerning the recognition and enforcement of judgments and also the national provisions to which the convention refers are linked to the EEC Treaty."[16] The Court follows the indications given by its Advocate General Tesauro, according to whom the circumstance that "Article 220 of the Treaty entrusts to the Member States, and not to the Community institutions, the task of attaining the objectives which it sets is due to the fact that jurisdiction in civil and commercial matters remains, in any event, a matter within the sòvereignty of the Member States; *however, that does not preclude the conclusion that the rules with which it is concerned fall within the*

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[13] See Advocate General's opinion p.3434 (emphasis added). This same conclusion is reached by the Court in case 288/82 *Duijnstee v. Goderbauer* [1983] ECR 3663 in paragraphs 13 and 14 where it concludes that the Convention "must override national provisions which are incompatible with it".

[14] See for instance case C-365/88 *Kongress Agentur Hagen v. Zeehaghe* [1990] ECR I-1845, where the Court indicates that no national procedural rule can be an obstacle to the *effet utile* of the convention (in particular the fulfilment of the competence rules established therein). The same kind of reasoning is followed by the Court in relation to the Treaties as a consequence of Article 5 of the EC Treaty.

[15] "The international dimension of the Brussels convention is in danger of being overwhelmed by the pulling power exerted by the Community legal order... In short, there is an unmistakable tendency to 'comunitise' the Brussels convention" (Duintjer Tebbens,1993:474). Also Hartley (1993:506ff) refers to the unnecessary Europeanisation of the convention.

[16] Case C-398/92 *Mund & Fester v. Hatrex Internationaal* [1994] ECR I-467 p.12.

scope of application of the Treaty for the purposes of Article 2."[17] Certainly, there is no definite adjudication as regards the Community nature of the convention. However, it is the closest declaration that the Court makes in that sense.

With the previous premises, it may be concluded that the supremacy of the convention over national laws and the fact that the ECJ tends to consider it EC law are grounds enough to deem the convention to be Community law as regards the effects of the principles stemming from it and which shall be incorporated by legal orders of Member States. Probably these conventions pertain to a *tertium genus* that in many cases is balanced in favour of a Community nature, particularly as regards its effects.

1.2. Further considerations on the relationship between the conventions and EC law

Once a position on the nature of these conventions has been displayed, the question now is to establish how do these conventions find articulation in relation with Community (originary and secondary) law. Community law, both in the shape of treaty provisions and of secondary legislation, incontestably ensures its primacy over the conventions. The latter include clauses that establish the withdrawal of the convention where Community law (or its national implementation) lays down rules on particular matters which nevertheless, concern the convention.[18] The supremacy of Community law thus ensured can be justified by the fact that these conventions are essential to the fulfilment of the internal market. Therefore, a certain control by the Community is required. It has been furthermore defended that the same outcome would be reached if the conventions did not enshrine such clauses. The founding Treaty prevails even where the conventions are posterior in time since these conventions cannot be presumed to have any intention to amend the founding Treaty. The same reasoning would apply for secondary legislation.[19] EC law appears as *lex specialis* which prevails over

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[17] A.G. Tesauro's opinion at p.8.

[18] Such a provision is to be found in Article 20 of the Rome Convention 1980 and Article 57(3) of Brussels convention 1968.

[19] For more thorough reflections on the matter, see Hartley,1988:94-5.

the general rules of the convention that remains *lex generalis*. Nonetheless, Member States were aware of the risk of a divergent policy of legislation in private international matters which would consequently entail a risk of overlaps and contradictions between regulations. That is why the commitment of the EC institutions to adopt legislation in accordance to the provisions of the convention was contemplated in the Rome convention 1980.[20]

The terms of this relation are seemingly completed by the interpretation of the ECJ. The two conventions foresee the possibility to endow the ECJ with the power to give rulings on their provisions. The 1968 Brussels convention on jurisdiction, as well as the 1980 Rome convention regulate this function of the Court in two specific protocols.[21] The procedures are not identical for all cases. However, they respond to a system of preliminary rulings to which courts can have recourse in a more or less constraining manner on the basis of the procedure of Article 177 of the EEC Treaty. The obligation to ask for the ruling depends on the type of court, the existence of further recourses in the national system and the convention at stake. Such a system provides for a uniform interpretation of the conventions.[22] At the same time, it ensures a certain respect of Community aims, since national interpretations of the conventions which may hinder the internal market will not be accepted by the Court. In the context of this interpretation, the ECJ may also define the links between the Brussels and Rome conventions. Probably the importance that these conventions have in order to

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[20] The Joint Declaration on the Convention reads as follows: "Anxious to avoid, as far as possible, dispersion of choice of law rules among several instruments and differences between these rules, [Member States] express the wish that the institutions of the European Communities, in the exercise of their powers under the Treaties by which they were established, will, where the need arises, endeavour to adopt choice of law rules which are as far as possible consistent with those of the convention". A similar provision appears in the Lugano convention 1988.

[21] Competence to interpret the Brussels convention is given to the ECJ in the Protocol signed at Luxembourg of 3.6.71 (in the same Protocol competence is given to interpret the Brussels convention 1968 on the mutual recognition of companies). As regards the Rome convention on applicable law, see the Protocol of 19.12.88, in OJ L48 (28.2.89).

[22] In the context of the Rome convention there is no obligation for the national court to refer a preliminary question to the ECJ. The question remains thus, for the free decision of the supreme national courts, in contrast to the obligation imposed on the same courts as regards the Brussels convention on jurisdiction. Some of the shortcomings that the system exhibits may be overcome by means of Article 3 of the First Protocol on the Rome convention which reproduces Article 4 of the 1971 Protocol on the interpretation of Brussels convention. It authorises the competent authorities of contracting States to refer questions for preliminary rulings "if judgments given by courts of that State conflict with the interpretation given either by the Court of Justice or in a judgment of one of the courts of another contracting State". Indeed, in a restricted scheme of access to the ECJ, the weight of the interpretation relies on Member States courts. The recourse foreseen in these Articles helps a certain homogeneity.

definitively achieve freedom of movement tends to disregard the 'formal' differences in favour of a teleological perspective. Thus, it would appear that

1. These conventions constitute a complex web of rules which exhibit deep connections between them.
2. They relate with primary and secondary Community law in terms of subordination. The latter, on its side is asked to take into consideration the criteria set forth by the conventions.
3. They fulfil integrative purposes which are essential to the EU. Such aim implies the above mentioned relation with Community law and the consequent control by the ECJ.

2. THE JURISDICTION AND ENFORCEMENT CONVENTION OF 1968

2.1. Brussels convention: a previous setting

It is not the aim of this introduction to dwell again on a subject which has been thoroughly studied.[23] In a context of the substantive approach to private international law, a first approach to the convention will concentrate on material aspects. These features seemingly indicate the path to read correctly public policy in the framework of the convention.

Indeed, despite the aseptic character that a convention setting rules on jurisdiction may exhibit, some substantive features can be said to inspire the text. The convention enshrines within its sphere the principle of non-discrimination which is the logical outcome of the principle of mutual recognition. In other words, any person resident (or domiciled) in the territory of the EU may take advantage of the system settled by the convention, that is, having access to any court endowed with jurisdiction and obtaining, where required, the recognition and/or enforcement of the judgment. Probably this obligation of mutual recognition (which leads to a reciprocal trust among States) reflects the obligation of cooperation established in Article 5 of the EEC Treaty. Such obligation regards both a vertical relationship (between

[23] As an indicative list of basic texts, see for instance Byrne (1990), Droz (1972, 1987, 1990), Gothot & Holleaux (1985), Hartley (1984), Kaye (1987), Weser (1975).

Member States and the Community) and a horizontal relationship between Member States.[24]

The principle of non-discrimination has been said to constitute the engine of the convention.[25] One of the clearest manifestations of such principle regards the exlusion of exorbitant fora in the convention. The latter introduce unbalancing criteria of jurisdiction in favour of one of the parties. In a system where equal bargaining powers is settled in litigation, the elimination of such fora appears as necessary. Securing equality of powers to both parties permits overcoming differences based on nationality, the provisional presence of the defendant in the forum or the situation of litigious assets. The alternative criterion to attribute jurisdiction becomes thus, the domicile of the defendant, regardless of nationality.

The elimination of discrimination as introduced by the convention is nevertheless only operative within the sphere of the latter. In other words, where the defendant is not domiciled in a Member State, exorbitant fora may be activated against him as a result of the application of national provisions or particular conventions.[26] Thus, a criterion of non-discrimination within the EU is counterbalanced with a clearly discriminatory treatment to those non-domiciled in the European Union.[27] Such double treatment has raised critical voices, mainly from American scholars.[28] A clause for solving these conflicts is provided in Article 59 of the convention. The latter foresees the possibility to draft new conventions, with third States

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[24] Lasok (1980:20) and Temple Lang (1990:671) corroborate this opinion which is moreover upheld by the following case-law: case 42/82 *Commission v. UK* [1983] ECR 1013 and case 272/80 *Frans-Nederlandse Maatachappij voor Biologische Produkten B.V.* [1981] ECR 3277.

[25] Mengozzi,1981:139.

[26] The jurisdictional rules of those conventions "are to be regarded as if they were special provisions of the 1968 convention itself, even if only one Member State is a Contracting Party to such a special convention", Schlosser Report, p.140 No.240.

[27] It should be noted however that a certain correction to the exorbitant German fora has been introduced by the BVG in case *M v. T* (of 2.7.91, 115 BGHZ 90). The BVG has contended that, though Article 23 ZPO (German procedural code) is neither unconstitutional nor contrary to international law, jurisdiction under it could be justified only if the cause of action has some link to the forum. None of the other States in the Union which still keep clauses of the same kind have undertaken a similar correction for the time being.

[28] See for instance, Juenger (1983), von Mehren (1980), Hartley (1986) and Bartlett (1975). Cheshire (1987) points out a risk of retaliation where more elastic criteria are not taken into consideration. The American system of jurisdiction nevertheless is not inmune to exorbitant fora. Indeed, the transient jurisdiction seems to be perfectly applicable despite the arising criticisms about its conformity to the due process clause.

that felt particularly affected by the discriminatory treatment that may derive from the application of rules of exorbitant jurisdiction.[29] American scholars however look at this feature with certain scepticism.[30]

The maintenance of a distinction between domiciled and non-domiciled in the EC remains unexplainable. An EU-national (temporarily) non domiciled in the EU may be subject to exorbitant rules of jurisdiction while such rules would not apply had he remained in the EU territory. Such distinction probably introduces discrimination and certainly a serious legal puzzle for the courts. It may be wondered whether Article 7 EC Treaty (Article 6, after Maastricht Treaty) has any role to play.

The question here raised has not found for the time being a too satisfactory solution in the framework of the ECJ's case law. A recent judgment of the ECJ has put at issue this difficulty.[31] The Court has ruled that a German procedural provision which does not run counter to the convention provisions can nevertheless be contrary to Community law on the basis that it is covert discrimination as forbidden by Article 7 EEC Treaty.[32] The interest of this judgment lies in its introducing a criterion of evaluation for Member State's judges. According to it, where the national provision is likely to entail discrimination between Member State nationals, it should be avoided. On the contrary, no consequence results where it regards non-EC nationals. Similarly it could be argued that the maintenance of exorbitant fora by Member States - although permitted by the convention- introduces discrimination in the sense of Article 7. Indeed, although it does not discriminate directly against non-nationals, it introduces a more favourable treatment for nationals. The negative aspect of this judgment

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[29] Such a possibility has resulted in the conventions between Germany and Norway (17.6.77), the Nordic convention between Denmark, Norway, Sweden, Finland and Iceland (10.11.77) and between the UK and Canada (24.4.80).

[30] For all, Juenger,1984:1211. Most of it derives from the fact that an agreement between the USA and the UK has not yet been reached, despite the similarity of the legal systems.

[31] Case C-398/92 *Mund & Fester v. Hatrex Internationaal* [1994] ECR I-467.

[32] The German provision at stake foresaw the possibility to adopt provisional seizure of the goods when the judgment is to be enforced outside Germany, without distinguishing between European or non-European States. The ECJ understood that no distinction should be drawn between Germany and the rest of the EU States since they all belong to the same area and jurisdiction convention and no objective justification can explain to keep such notion operative.

appears in the re-introduction of the nationality principle. Such criterion results in a complication of the procedure, since the judge has to inquire not only if there is residence/domicile within the territory of the EU, but also what nationality the parties have in order to then procede to establish whether there is any kind of discrimination at stake.[33]

Interpreted strictly, this projection of Article 7 to the convention may have negative effects in the sense that the principle of non-discrimination based on domicile settled by the convention applies regardless of nationality. The criticisms as to the unnecessary Communitarisation of private international law are in this respect well founded.[34] However, the problem still exists and needs to be solved. Until a new revision of the convention is undertaken - as a result of the incorporation of the new Member States to the Union, the answer is to be found in the principle of securing equal bargaining powers. In the context of effective protection of procedural rights such exorbitant fora may not be permitted any longer, especially where such protection is admitted as one of the inspiring principles of the Brussels convention and EC law.

In practical terms, it means that a Member State which is confronted with the recognition of a judgment resulting from an exorbitant forum of another Member State may refuse such recognition despite the prohibition of the convention to do so. Public policy appears as the means through which Member States may keep a coherent protection of their legal orders either within or outside the convention. Legal certainty, which is an inspiring principle of EC law, is thus ensured. It also reduces the risk of forum shopping and it permits Member States to comply with the obligation to protect human rights.

Together with the non-discrimination principle, the convention exhibits a clear biased orientation as regards the protection of the defendant, usually the weaker party in the

[33] Van Doorn,1994:987. She further points out the dangers of this judgment in relation to the uniform interpretation of the Lugano convention (see point 2.2), which is threatened when exclusively Community solutions are envisaged.

[34] See for instance Hartley,1993; Duijnter Tebbens,1993:474. One of the main problems that this 'comunitarisation' of private international law raises is the articulation that such Community notions would find in relation to the Lugano convention.

proceedings.[35] While there are several provisions on consumer protection as well as insurance matters, workers are governed by the general rules.[36] This concern of the Convention - which finds a reflection in relation to applicable law rules (1980 Rome convention), is coincident with the general aims of the EC that, as pointed out above, act in these areas under the rubric of the general good. Such bias responds to the same principle of equality of bargaining powers. The previous characteristics could be subsumed under a more generic aim, namely the protection of the rights of the parties since "the Convention is meant to strengthen legal protection and legal certainty in the Common market".[37] Although the convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments, "that aim cannot be attained by undermining in any way the right to a fair hearing."[38] Indeed, any other purpose of the convention becomes thus "second in importance to the observance of the rights of the defence."[39] This implies consequently, the securing of equal procedural guarantees, a prohibition of any discrimination and the provision of specific protective measures in favour of the weaker party.

2.2. Other texts in the matter: Lugano convention 1988 and secondary EC law

A global presentation of the judicial area in Europe could not neglect the Lugano convention. Otherwise known as Parallel Convention, it appears as an extension of the Brussels convention to the EFTA countries.[40] Its signature is at the basis of some of the

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[35] "It emerges from an examination of the provisions of the Convention that in establishing special or even exclusive jurisdiction for insurance, instalment sales and tenancies of immovable property those provisions recognise that the rules on jurisdiction too, are inspired by concern to afford proper protection to the party to the contract who is the weaker from the social point of view" (Case 133/81 *Ivenel v. Schwab* [1982] ECR 1891 at p.16).

[36] This fact has provoked a certain criticism, mainly because of the difficulties in regulating relationships of work where the obligation takes place in several countries, even outside the EU sphere. Indeed, it has been suggested that a new section should be created within the Convention to solve these problems (Droz,1990:12).

[37] A.G. Mayras in case 125/79 *Denilauler v. Couchet Frères* [1980] ECR 1565 at p. 1575.

[38] Case 49/84 *Debaecker v. Bouwman* [1985] ECR 1793 at p.10.

[39] A.G. Mayras in case 125/79 *Denilauler v. Couchet Frères* [1980] ECR 1565 at p. 1577.

[40] The text can be found in the OJ L319 (25.11.88) with its correspondent Report, conducted by Jenard and Möller, in OJ C189 (28.7.90).

modifications that the last version of the Brussels convention has undergone (namely the San Sebastián version of 1989).[41] The recent incorporation of three EFTA countries to the EU, namely Austria, Finland and Sweden, gives new importance to the Lugano convention as the renegotiation of the Brussels convention is to be undertaken again.[42]

Probably the most complicated device that this convention raises regards its articulation in the Community area. Point I of Protocol 3 to the Lugano convention stands for the supremacy of Community law, reproducing almost in identical terms Article 57(3) of the Brussels convention. Despite the parallel declaration done in the Final Act -by means of which the respect of the rules established in the convention will be ensured when Community legislation is drawn up, the prevalence of Community law may surprise some as it is imposed on non-EC States. Seemingly, the creation of a European uniform judicial area - in which the Lugano convention is inserted, will undergo an inexorable process of communitarisation, moreover where the territorial scope of the two conventions tends to coincide. Such a process is reinforced by the mutual taking into consideration of the principles laid down by the courts in both areas (as stems from Article 1 of Protocol 2 and the Declaration by the Representatives of the Goverments of the signatory States to the Lugano convention).[43] In order to facilitate this aim, a complex net of gathering, rationalising and redistributing information is foreseen (according to Articles 2 and of Protocol II). Such system may prove to be insufficient. Therefore, scholars seem to prefer the possibility to endow the ECJ with the faculty to interpret the Lugano convention. It is proposed that, where the ECJ has to asume this interpretation, the necessity to create another court (as the Court of first instance) or panel of the Court specifically concerned with these matters is considered. A renegotiation of the convention may introduce such modifications.

The second part of these considerations regards secondary Community law concerned with

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[41] For further analysis, see Minor,1990, Saggio,1991; Droz,1990; Mercier,1991; Duintjer Tebbens,1993, etc.

[42] The differences between the two conventions - apart the fact that the Lugano convention is an open convention, while the Brussels convention is confined to States pertaining to the Community - concern three aspects of jurisdiction, concerning namely Articles 5(1), 17 (last indent) and 16(1). The Lugano convention also adds another ground to refuse recognition to a foreign judgment in Article 54 B(3).

[43] Lugano convention, OJ L319 of 25.11.88 at p.37.

jurisdiction matters. Three texts introduce rules on jurisdiction, namely Directive 93/7/EEC on Cultural Goods, Regulation No.40/94 on Community Mark and EC Council Regulation No.2100/94 of 27.7.94 on the Community Plant Variety Rights.[44] The Directive on Cultural Goods introduces the simplest scheme since it establishes in Article 5 the jurisdiction of the court where the good is presently found. Then, in Article 15 it remits to the Brussels convention to regulate the civil law claims. The two Regulations, on the contrary, are more elaborated. It is interesting to note that while the Mark Regulation refers to the Brussels convention, the Plant Regulation surprisingly remits to the Lugano convention. They both have in common the enlargement of the forum of the defendant by encompassing not only the domicile but also the establishment. Moreover, they propose alternative fora in default: thus, subsidiarily, the plaintiff's domicile constitutes the criterion of jurisdiction. In default of a known domicile, the place of location of the Office constitutes the last and definitive criterion.[45] In principle any court (ordinary courts in the case of the Plant Regulation, especially created courts in relation to the Community mark) may have jurisdiction in respect of infringements alledged to have been committed in any of the Member States. However, the claims for infringement limit the jurisdiction of the court to the infringements alledged to have been committed on the territory of the Member State where it belongs.

These provisions reproduce the scheme embodied in the convention of 15.12.75 for the European Patent in the Common Market[46] which takes precedence over the Brussels convention. Seemingly these texts are envisaged to favour the fulfilment of the EC area through the elaboration of a unified jurisdictional area. However, severe disruptions can be noted. It is disputable that a coherent system arises in the European territory where some of the criteria are enshrined in a Directive and others in Regulations. Moreover, although the conventions are almost similar, it is striking that the EC refers to the Lugano convention. Summing up, the risk exists that such legislation introduces more inconveniences than improvements to the European system of jurisdiction.

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[44] See respectively OJ L74/74 of 27.3.93, OJ L11/1 of 14.1.94 and OJ L227/1 of 1.9.94.

[45] See Articles 101 of Regulation No.2100/94 and 92 to 94 of Regulation No.40/94.

[46] OJEC 1976 L17/1.

2.3. Public policy and other excepting clauses: Article 27

The convention settles a system of automatic recognition of judgments coming from whatever Member State belongs to the convention. This automatic nature is favoured both by the simplification of the enforcement procedure and a reduction in the number of grounds which can operate to prevent the recognition and enforcement of judgments. Such system of 'automatic' recognition has frequently brought about the American institution of the full faith and credit clause.[47] As has been indicated, the only impeding factors are those listed in Articles 27 and 28 of the convention, the first of which is public policy. Before addressing the relationship between these clauses, we shall firstly inquire why a convention such as the one at stake keeps a clause which introduces impeding elements to the free movement of judgments. With this background, it will be possible to consider what the contents of this public policy clause may be.

a. Criticisms, justification and interpretation of the clause

The Brussels convention establishes a quasi automatic mechanism of recognition. The mere existence of the *ordre public* clause opens a breach of it and suggests a certain contradiction to the spirit of the convention. Indeed some scholars have regretted the presence of the clause.[48] The question is why should this mechanism of defence be maintained in the framework of the convention. The incorporation of *ordre public* shows a lack of courage and mutual trust, esepcially if the following two factors are taken into consideration. Firstly, the convention intended to fulfil a "simplification of the formalities governing the reciprocal recognition and enforcement of judgments", as set out by Article 220 EEC Treaty, among the six founding States. Indeed, the Convention could be read as introducing the fifth Community

[47] The American system does not distinguish on the basis of domicile or residence criteria. Moreover, another constitutional clause - due process -completes the enforcement schemes. While full faith would apply in relation to Member State judgments, due process would be invoked as regards all judgments, forbidding thus any discrimination (Von Mehren,1980:101). Despite the criticisms pointed out, it is noted that "strange as it may seem [...] discrimination has not posed much of a practical problem" in the life of the convention (Juenger,1984:1212). A certain reciprocal inspiration of both systems could be suggested to overcome the deficiencies that a comparative approach highlights.

[48] Bellet,1975:36; Franchi,1985:79; Mosconi,1989:124.

freedom.[49] Secondly, the scope of the convention is circumscribed to civil and economic relationships, although some of them are expressly excluded, namely matters where the *ordre public* exception traditionally applies such as status and legal capacity of natural persons. The latter were precisely excluded because they cannot be regulated independently of public policy considerations.[50] The existence of public policy in a convention which deals with economic matters has been found disputable.[51] However, no definite judgment should be advanced as it has already been discussed how public policy is progressively assuming more relevance in economic matters.

Some explanations have been put forward in order to explain why the drafters of the convention did not dare to suppress the clause. Thus, a compliance with the inertia that a traditional use of public policy implies appears as a possible justification. Otherwise it has been hinted that such a clause prevents the arousal of suspicions, and so favours then, a quick acceptance of the convention and its entry into force.[52] Indeed, *ordre public* appears as *"un élément tendant à faciliter la ratification du traité en 'rassurant' les États contractants... un baume destiné à apaiser le sentiment de souveraineté internationale"*.[53]

Whatever the reason may be, the clause exists and since it constitutes an exception to the

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[49] See Jenard's Report (OJ C59, of 5.3.79), where he asserts that "the free movement of judgments is after all the ultimate objective" (p.7). It has been pointed out, however, that such an aim is not the only one that the convention pursues. Indeed, it would appear that the convention should also (even in a preeminent manner) reinforce the legal protection of individuals within the Community (Mengozzi,1981:131). Recent case-law on the convention upholds this view: see case C-129/92 *Owens Bank v. Bracco* [1994] ECR I-117 at p.20.

[50] See Jenard Report, OJC 59 of 5.3.79 at p.10. All litigation and all judgments relating to contractual or non-contractual obligations which involve the status or legal capacity of natural persons, wills or succession, rights in property arising out of a matrimonial relationship, bankruptcy and social security are excluded from the convention as subject matter of a proceeding. On the contrary, under Article 27(4) they may come before the court as a subsidiary matter.

[51] Droz,1972:309.

[52] Iglesias,1977:121.

[53] Droz,1972:309. Indeed, public policy still appears in the Brussels convention as a reflection of national sovereignty (see Mengozzi,1981:124; Parisi,1991:19).

rule, it needs to be given a restrictive interpretation and use.[54] Such indication does not stem directly from the ECJ's case law since the Court has no specific ruling as concerns Article 27(1). However, as seen in chapter III, the interpretation of the requirements that national public policy should comply with the framework of Community law may shed some light on this issue. This view has been supported due to the lack of rulings on the convention.[55] Moreover, a logical parallel may be raised where the convention is seen as introducing the fifth Community freedom. One may wonder, however to what extent this approach is valid. In this line of critical argument it has been sustained that the interpretation of Article 27(1) Brussels convention should be less restrictive than that of Article 48(3) EC Treaty since the former includes consideration of human rights protection (arguably, procedural rights). If this is so, it achieves the protection of Community aims and moreover, it strengthens the judicial protection in the Community of the persons therein resident. Summing up, whereas Article 48(3) would exclusively protect Member State interests, Article 27(1) would also encompass the protection of EC interests.[56] A mid-way is proposed. Decidedly *ordre public* should be of restrictive use since it is an exception and in a way it hinders the purposes of the convention. However, this strictness should relax as concerns the rights of the parties in litigation. The latter appear as a justification of the maintenance of the clause. Consequently, public policy is called to play a larger role than expected.

b. Relationship between public policy and the other excepting grounds in the convention

The convention foresees in Article 27 five clauses on which the addressed court may rely in order to deny the recognition and/or enforcement of a judgment that has been granted by

[54] A fear for an abuse of public policy is found in the Jenard Report and is a constant recollection throughout the Reports. See Jenard at pp.11 & 46 and Schlosser at p.45.

[55] See for instance Betlem,1993:278.

[56] See Mengozzi,1981:132. Such an opinion is completed with the suggestion advanced by Condorelli(1985:132) in *"La convenzione giudiziaria di Bruxelles e la riforma del processo civile italiano"* who argues that Article 27(1) covers the protection of the principles of the convention - in a logical understanding of the Brussels convention as Community law. Mengozzi further contends that the *ordre public* protected by Brussels convention takes into consideration also the requirements of Article 6 ECHR (p.139). We cannot see why these proposals would not be extended to Article 48(3) too since it can be envisaged as fulfilling a similar function which encompasses the protection of other human rights. Moreover, the Court has held that in order to be in accordance to Community law exceptions to the Treaty have to respect fundamental rights (see case C-260/89 *ERT* [1991] ECR I-2925).

another Member State's court. They are the following: contrariety to public policy of the addressed State, respect of the procedural guarantees of the defendant in default of appearance, irreconciliability with another judgment given in a dispute between the same parties in the addressed State, contrariety of a preliminary question concerning matters outside the scope of the convention to the rules of the addressed State (unless the same result would have been reached by the application of the rules of private international law of the latter) and the incompatibility with a judgment given between the same parties on the same question in a non Contracting State. These causes can be reduced to the two first ones since "conflicting judgments, preliminary questions, review of jurisdiction in relation to certain specific topics can, in fact, be regarded as akin to public policy."[57] Also Article 28 makes a reference to public policy. The close link between the paragraphs will colour the following considerations on the relationship between the notions.

Paragraphs 1 and 2 of Article 27 relate in rather a confused manner. If Article 27(1) has been read under a restrictive light, Article 27(2) is, on the contrary, usually given a more extensive interpretation. The protection of procedural guarantees is deemed to be such an important interest as to grant it a large scope.[58] However, the terms in which this paragraph is drawn are rather strict.[59] Indeed, one could understand that the provision refers exclusively to defendants in default of appearance and not to all of them but those who cannot be found liable of being in default. Where the default of appearance is due to the negligence of the defendant, his procedural guarantees do not come under the scope of this Article. This provision exhibits some failures if the following hypothesis is presented: what about a defendant who could not attend because of reasons of *force majeure*? Moreover, is it so that physical presence ensures the granting of all the guarantees? Fraud will prove that this is not so. Member State's courts had traditionally included the protection of procedural guarantees

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[57] Jenard Report at p.47.

[58] Spadatora,1984:63.

[59] Gothot & Holleaux (1985:157) uphold a restrictive interpretation of Article 27(2) by quoting *Klomps* (16.6.81) that foresees the refusal of recognition in the *exceptional* cases where the guarantees of the State of origin and the convention are insufficient. If this is an exceptional measure, it should not be interpreted extensively. The counter-argument that can be advanced regards the possible denial of justice in which the State may incur when a too restrictive interpretation is followed.

under the scope of public policy. The coming into force of the convention does not seem to have introduced any changes in this situation. It seems rather illogical that rights which are protected either at a domestic or at a Community level find no place under the scope of the convention.[60] This is no doubt a failure of the convention, which probably can only be solved in the same manner it has been dealt with by national courts, that is, by enlarging the notion of public policy as to encompass all the procedural guarantees not covered by paragraph 2.

Paragraph 3 of Article 27 refers to the incompatibility between the judgment the recognition of which is sought and another one given in a dispute between the same parties in the addressed State. The ECJ has clearly delimited the sphere of application of both paragraphs. According to the Court, "the use of the public policy clause, which 'ought to operate only in exceptional cases' is in any event precluded when, as here, the issue is whether a foreign judgment is compatible with a national judgment; the issue must be resolved on the basis of the specific provision under Article 27(3)".[61] Therefore, a more specific clause prevails over public policy. *A contrario*, recourse to the *ordre public* exception is not precluded if the special clause does not cover all the particulars at stake.

Article 27(4) contemplates the refusal of the foreign judgment where the granting court, ruling on a preliminary question (concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession) decides in a way that conflicts with the rule of the private international law of the State in which recognition is sought unless the same result would have been reached by the application of the rules of private international law of that State. This provision restricts the indiscriminate recourse to the forum conflict rules, eliminating thus the abuses that have frequently been found in Contracting States. It is noted, however, that the matters referred to in the Article concern particularly sensitive public policy areas.[62] In this sense, this clause could be conducive to public policy.

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[60] Spadatora, 1984:66. More thorough reflections on this matter will be undertaken in part 2.4 of the chapter.

[61] Case 145/86 *Hoffmann v. Krieg* [1988] ECR 645.

[62] This is precisely the reason why they were excluded from the scope of the convention (Jenard Report p.10).

Article 28 excludes the control of the competence of the granting court unless the question at stake corresponds to one of the competences envisaged in sections 3 to 5 of title II. Such sections refer to matters that appear as particularly important to the convention, namely consumer protection, workers protection and exclusive fora. The importance of this provision explains that it applies also when the judgment comes from a non-contracting State. In this case no discrimination is undertaken between Contracting and non-Contracting States and to them is applied a unique uniform criterion.[63] One may wonder, why could not the same approach be followed as regards exorbitant fora? It is interesting to note that these matters are of special concern also at a Community level. Indeed, the Community definition that the matters imply may entail a revision of their interpretation where the recognition of the judgment based on them is denied.[64] To the point of revision of Community law as the basis of the refusal, we shall return later.

As regards the relationship between Article 28 and public policy, the convention provides a specific provision, by means of which no revision of jurisdiction on grounds of public policy is allowed to the recognising court. Such prohibition to review jurisdiction relies on the fact that the convention settles direct rules of jurisdiction within the EC and exclude exorbitant fora where the defendant is domiciled in any of the Member States. Exorbitant rules may still be kept though if the defendant is not domiciled in the European Union.

This construction of the convention compels Member States to adopt a twofold criteria that may convey some confusion and countersenses since under national law the court coud repell through public policy a judgment given on exorbitant basis while under the convention it is obliged to recognise it.[65] This outcome is criticised not only because it introduces discrimination in relation to non-domiciled persons - as American scholars insistently recall, but also because it introduces clashing criteria in national systems based on unfair grounds. The duplicity of systems is repulsed where it leads the national judge to such a schizophrenic

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[63] This has been referred to as the *effet réflexe* of the convention (Gothot & Holleaux,1985:175 No.313).

[64] Gothot & Holleaux,1985:179 No.318.

[65] See for instance the Spanish case, where no exorbitant fora exist. With the convention Spain is obliged to run counter to the essence of its procedural system.

situation. Furthermore, when the control of jurisdiction in certain matters is allowed against judgments coming from non-Contracting States,[66] the introduction of a discriminatory criterion is tenable with difficulty. It would seem that sometimes the judge is compelled to act upon a discriminatory basis while in cases of similar weight, he is permitted to apply a uniform criterion to both Community and extra-Community judgments. Indeed, as argued above, a correct reading under EC law would imply the abolition of any discrimination and let Member States have recourse to public policy as far as no other measures are undertaken in this sense. Hopefully the renegotiation of the convention will provide the means to do so.

If Article 27(1) protects not only national principles but also the principles that stem from the Brussels convention, then the possible refusal of the exorbitant jurisdiction applied by the granting court is allowed.[67] Such a viewpoint is to be understood as the distinction between rules and principles. That is, the prohibition affects the review of jurisdiction rules, but not of the principles of jurisdiction. Indeed, Article 28(3) reads as follows: "Subject to the provisions of the first paragraph, the jurisdiction of the court of the State in which the judgment was given may not be reviewed; the test of public policy referred to in Article 27(1) may not be applied to the *rules relating to jurisdiction*." Such a choice admits then the rejection of exorbitant fora when no other means of rejection of a judgment given in such a forum is available. Moreover, it helps to avoid schizophrenia in Member State's courts that can in this way maintain a uniform implementation whatever the context in which they may be called on to rule.[68]

Summing up, the previous considerations confirm that in fact the five clauses of Article 27 can be reduced to the first two. It is moreover ascertained that national courts may have some problems of delimitation between the different paragraphs, especially as regards procedural

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[66] See footnote 63.

[67] Condorelli,1985:132 in *"La convenzione giudiziaria di Bruxelles e la riforma del processo civle italiano"*.

[68] The Lugano convention only partially corrects the faults that the system exhibits. Thus, in Article 54ter(3) it permits EFTA States to refuse to recognise judgments of the courts of an EC Member State which have assumed jurisdiction in relation to an inhabitant of an EFTA State and have failed in the process to take into account the Lugano Convention. Such hypothesis regards different jurisdiction fora as settled in Articles 5(1), 16(1)(b) and 17 (last paragraph). However, the Lugano convention still has not adequate provisions regarding the procedures connected with third States.

guarantees and the control of exorbitant jurisdiction. Without proning an excesive or abusive recourse to the exception, it is argued that on many occasions the only way out for these questions will be the public policy clause. Such a position, that seems to have been felt by Member States courts, could find the aproval of the ECJ if it were confirmed that public policy remains a subsidiary excepting clause where no other means is available. Such a solution is particularly important as regards the relationships that Member States assume with non-Community States.

c. Contents

The definition of the contents of a provision like *ordre public* in the Brussels convention is a rather difficult task. The first problem lies in the fact that they are national notions that may change according to the legal systems of each Member State. Moreover, the notion of public policy in this area shows blurry limits that complicate efforts to distinguish it from other notions (as for instance fraud). Thirdly, the usual approach to public policy is a negative one. In other words, it is usually stated what does not pertain to public policy. The tools we dispose of in order to delimit the contents of public policy are the Reports on the convention (in the several versions as modified by the new accessions) and national case law since, as was previously indicated, the ECJ has not yet ruled on Article 27(1) of the convention.

i. Reports on the convention

They provide the first elements in order to undertake a delimitation of the contents of public policy in the sphere of the convention. It is to be regretted that the approach they have is mainly a negative one. The first point which stems from Jenard Report is that *ordre public* should not be used to criticise the decision of the court which gave the judgment. The role of the judge should be limited to the ascertainment of the compatibility of the effects of the judgment within the addressed State territory.[69] This is the logical consequence of the prohibition to review both the substance of the decision and the jurisdiction of the granting

[69] Jenard Report, p.44.

court on grounds of *ordre public*.[70] The control of the applicable law is not permitted by the convention. Thus, even if the judgment reveals that the conflict rule applied by the granting State favours forum law - and consequently, discriminates against foreign laws, the court may not refuse recognition on grounds of public policy (as contrary to equality). However, Jenard indicates that public policy of the State addressed can be activated in specific matters (namely as concerns protection for employees) if the court of the State of origin has failed to apply, or has misapplied, an essential provision of the law of the State addressed.[71] The latter will usually be shaped as a mandatory rule. Such a hypothesis confirms the close connection between public policy and mandatory rules, because where the granting State has not applied the mandatory rule of the addressed State, the latter can impose it at the recognition stage under the shape of public policy.[72] It is furthermore confirmed that Article 27 aims at the protection of a substantive public policy.[73] The extent of this substantive protection needs to be delimited as regards two features, namely fraud and Community law.

The first reference to fraud can be found in the Schlosser Report. The matter had to be dealt with as a consequence of the incorporation of the Common Law States to the convention. In the United Kingdom and Ireland fraud and *ordre public* traditionally stand as different grounds justifying refusal of recognition. In England a judgment will not be recognised if either the court granting it was guilty of fraud or if the party in whose favour it was granted obtained it by fraud. The question arose whether this feature could be encompassed under the realm of public policy in the framework of the convention -that is, in relation to contracting parties.[74] From the original viewpoint of the convention an admision of fraud as embodied in *ordre public* appears in a way as nonsensical. If it were admitted, it would imply to re-

[70] Jenard Report, p.46. He reminds that under Article 28(3) "the rules of jurisdiction are not matters of public policy within the meaning of Article 27 [...] this again reflects the Committee's desire to limit so far aspossible the concept of public policy".

[71] Jenard Report, p.24.

[72] Position defended by Condorelli(1985:133) in *"La convenzione giudiziaria di Bruxelles e la riforma del processo civile italiano"*.

[73] Gothot & Holleaux,1985:147 No.257.

[74] In fact, the conventions concluded by England and France (of 18.1.34) on the one hand and England and Germany (of 14.7.60) on the other hand, included an express mention to fraud.

examine the merits of the case by the addressed court, which is forbidden by Article 29 of the convention. The Schlosser Report however - in accordance with a large litterature on the matter[75] and the legal tradition of Member States,[76] deems it possible that fraud leads to the application of the doctrine of public policy.

Fraud is thus admitted under restricted terms. It should not be alleged for the first time in the procedure of recognition. In that case the addressed court will probably suggest to resort to an extraordinary recourse in the granting court's State, with the consequent staying of proceedings until the recourse is decided (in the terms of Article 30 of the Convention). In other words, no other means of restoring the situation in the State of the granting court must be available.[77] This premise restricts the possibility to allege fraud under the exception of *ordre public* to two cases: firstly, when there is evidence of fraud which was unavailable and unexamined earlier in the proceedings; secondly, when the evidence arises at such a late stage that it cannot be raised on appeal in the State which granted the judgment.[78] It is underlined that fraud which comes under the protection of public policy does not cover the notion of fraud in a private international sense. In actual fact, most of the cases of fraud regard infringement of procedural requirements. An enlargement of the public policy as to encompass procedural guarantees stems therefrom: if fraud comes under the protective scope of public policy and most of the manifestations of fraud cover the right to defense, then, infringement of procedural rights may be further argued as pertaining to Article 27(1).

A second point that needs to be clarified is the status of Community law in relation to

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[75] Indeed scholars who belong both to the Common law and civil traditions have sustained this view: Droz,1972:313; Hartley,1984:85; Gothot and Holleaux,1985:148; Cheshire & North,1987:417; Rigaux,1987:366.

[76] See for national acknowledgement Batiffol & Lagarde (1993, No.727) in France, Espinar Vicente (1993:890) in Spain.

[77] Schlosser Report, p.128, No.192.

[78] As results from Article 30, recognition may be granted even where the possibility to raise an appeal on the State of the granting court still exists, since the recognising court is not obliged to stay the proceedings of recognition. This implies both a discretional appretiation of the judge and the existence of an appeal already lodged. In contrast, as regards enforcement, Article 38 also considers the possibility to stay the proceedings where the appeal has not been lodged but the time to do so is not yet over. Such situation is nugatory to the interests of justice, as the resolution of the recourse may convey the annulation of the decision that has been granted recognition. That is why it has been suggested to introduce the possibility to stay the proceedings in the recognising court (Droz,1972:312 No.496).

recognition and/or enforcement. Although the issue is not addressed in the Reports, we sustain that Community law, as results from the ECJ's interpretation, plays a role in the delimitation of public policy understood in the sphere of Brussels convention. Indeed, it has been suggested that an infringement of the ECJ's case law could be at the basis of refusing recognition to a judgment on grounds of public policy.[79] In more general terms, the possibility that the convention permits control of the exact application of Community law should be considered. In other words, is there place under *ordre public* to refuse a judgment which neglects the (correct) application of Community law?

The question has already been brought up in the terms analysed in the following pages. It is contended, however, that it is not correctly formulated. Indeed, in these terms it entails that Member States may be entitled to judge the compatibility of another Member State's legislation with EC law. Seemingly this is not possible under the EC Treaty. A correct interpretation should entail that Member State's public policy encompasses the engagement not to hinder Community freedoms and aims. Therefore, the question does not become the compatibility of the legislation of the granting State, but the evaluation of whether the recognition of the foreign judgment would entail an infringement of EC law by the recognising Member State. If this is so, it should reject such a judgment by means of public policy. In order to fulfil this evaluation, the case law of the ECJ appears essential. Such a viewpoint is in accordance with the obligation to interpret national law according to Community law as results from Article 5 of the EEC Treaty. In an extensive reading the latter Article requires that Member States do not encourage, facilitate or confirm a breach of any rule of Community law, or to allow their courts to be used to facilitate any such breach, or to deprive any rule of Community law of its *effet utile*.[80] Moreover, it respects the obligation not to review the applied law but the effects of its application, that might entail an infringement of Community law by the recognising State.

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[79] See Weser,1975:331.

[80] Temple Lang (1990:665) extends this line of reasoning to arbitration and contends that Member States must not enforce arbitration awards which have been made without respecting Community law, including in particular Community competition law.

ii. The case law

The limited case law on recognition matters - the absence of ECJ judgments, is a good indicator that the system installed by the Brussels convention does work. Within this case law material elements can be identified to define what is felt to pertain to public policy in Member States. Usually the approach is a negative one. In this respect it has been found that it is not contrary to *ordre public*:

1. To establish paternity on the basis of the mother's statement where there exists supporting evidence (namely a comparative investigation of the blood groups);[81]
2. The breach of the right to a fair hearing when it is due to the sole negligence of the defendant;[82]
3. The existence of different provisions concerning burden of proof and the freedom of the judge to weigh evidence as well as the reliance on apparent authority;[83]
4. A default judgment without motivation even where no contradictory process has taken place since the 'contradictory aspect' has not been eliminated but postponed to the opposition that can be raised according to Article 36;[84]
5. The absence of the guarantee of the reinstatement of the parties to the previous position (which according to German law may constitute the basis for an infringement of public policy) where neither under German law is the possibility of reinstatement likely in the case at stake;[85]
6. The absence of indication about the nature and deadlines of an eventual appeal;[86]
7. The absence, or insufficient motivation of the judgment where other documents may

[81] Cour d'appel de Lyon, (18.4.78) *Theillol v. Office de la Jeunesse de Fribourg*, Clunet 1979,383.

[82] Cass. 1re civ. (20.11.79) *Cozzi v. Capurro & others* (Bull. civ. 1979, I, 233).

[83] Corte di cassazione, sez.I, case *Roccaplast SpA v. Jaffre-Fetas* (12.3.84).

[84] Corte di appello Milano (16.6.75) R.D.I.P.P., 1973,801.

[85] Oberlandesgericht Stuttgart, Order 17.9.84 -5W 40/84.

[86] Cass. 1re civ., (3.6.86) *Guigou v. SPRL Favel*, Bull. civ. 1986,I,150.

provide such information;[87]

8. The judgment given in default of appearance where it cannot be proved that the default obbeys to deceit of the defendant;[88]

9. The violation of the right to defence in the initial phase of procedure since it is covered by Article 27(2);[89]

10. A unilateral form of procedure, moreover when a similar procedure is provided in the recognising State (since it respects the defendant's right to a fair hearing);[90]

11. The French injunction to pay 'interim' damages because similar provisional judgments are to be found in the addressed State;[91]

12. The enforcement of a judgment before it becomes final;[92]

13. The adjudication by the granting court on a matter which was already *res iudicata*;[93]

14. The different interpretation of legal terms such as 'monopole de droit' and 'concesion exclusive' (because the judge does not have to assess the compatibility of the foreign judgment with domestic *ordre public* but whether its effects are contrary to public policy);[94]

15. The enforcement of a judgment to pay which implies a transfer of money abroad while the maintenance for individual parties of the obligation to comply with French currency legislation is kept;[95]

16. To place a contractual penalty on a debtor who acts in bad faith, unless it is deemed to

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[87] Cass. 1re civ., (12.1.94) *SRAL Audio Prestige v. Soc. Nexon Distribution*.

[88] Rechtbank van le aanleg Antwerpen, Order 2.3.93 *PVBA Linea v. SpA Delia*. *A contrario*, one would understand that had the deceiving attitude been proved, public policy would have been activated.

[89] OLG Hann, Order 28.12.93 -20 W 19/93. It would confirm that in latter stages public policy is operative.

[90] Cour d'appel Paris (16.3.79) *Soc. FIR v. Héritiers Baas* (R.C.D.I.P., 1980,121).

[91] OLG Celle, order 2.6.77 -8W 161/77 (RIW 1979,129); Corte d'appello Milano, *Frigomat Sas v. Carpigiani* (19.7.79).

[92] OLG Celle, order 2.6.77 -8W 161/77 (RIW 1979,129).

[93] Trib. 1re. inst. Bruxelles, *Gronowska v. Pfeiffer* (18.12.79).

[94] Trib. gr. inst. de Troyes (4.10.78) *Almacoa v. SA Ets Moteurs Ceres* (C.D.E. 1979,390).

[95] Cour d'appel Paris, (11.12.81) *De Courcy v. Soc. I. D. Herstatt*.

be extortionate interest on the principal debt;[96]

17. The sentence to pay interests on the interests;[97]

18. The judgment which accords four times the principal sum originally owned, the remaining three quarters consisting of currency adjustments over a period of ten years and interest charges on the resulting amount over a period of nine years;[98]

19. The allowance to a party of more extensive claims than the available under national (German) legislation (according to Article 12 EGBGB a tort committed abroad against a German cannot give rise to higher claims than those that could be founded in German law. However, the principle to secure is the fullest possible compensation for the victim);[99]

20. To fix a global assessment of damages without any indication of the basis of assessment (since the main test lies in the contrariety of the effects that recognition of the judgment entails);[100]

21. The maintenance award against a husband separated from his wife in the form of an authorisation to attach a portion of social security benefits;[101]

22. The allowance of maintenance on the basis of a set of norms;[102]

23. The fixing of the fees of the legal counsel according to the legislation of the granting court where such fees are not established according to the result of the case;[103]

24. The judgment which may be fault with fraud in the granting court where there is a possible remedy against it in the granting State;[104]

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[96] Cour d'appel de Lyon, (5.10.78) *SARL ets Morris v. NV Oudenaardse Textielfabrieken* (Gaz. Pal. 1979 Somm. 58).

[97] Oberlandesgericht Hamburg, Order 5.11.91 -6 W 43/91.

[98] Bundesgerichtshof, Order 4.3.93 -IX ZB 55/92, E. Cur. L., 1993, part 12 No.193.

[99] Bundesgerichtshof, order 22.6.82 -VIII ZB 14/82, JZ 1983,903.

[100] Bundesgerichtshof, order 26.9.79 - VIII ZB 10/79.

[101] Hoge Raad (29.1.79) case *X v. Y* (NJ 1979, No. 399).

[102] Cass. 1re civ. (26.1.94) *Charles Bruder v. Huguette Kieffer*, (Gaz. Pal. 1994 II Panor. p.127).

[103] Cass. 1re civ. (28.2.84) *Klopp v. Holder* (R.C.D.I.P., 1985,133).

[104] High Court of Justice (England), QB Division, Commercial Court (1.5.91) *Interdesco SA v. Nullifire Ltd*, E. Cur. L., 1992, part.4 No.61. It reasons on grounds of reciprocity: a foreign judgment is not contrary to public policy if an English judgment would not be contrary to public policy.

25. To overrule a limitation of liability clause;[105]

26. The petition to enforce a decision according to the Brussels convention when the application of the latter was successfully contested in the State of origin;[106]

27. The absence of control of the merits of the agency contract (*mandat ad litem*);[107]

On the contrary, it has been considered that the following run counter to public policy

28. The judgment which lacks a statement of the grounds upon which it is based[108] as well as the judgment which lacks adequate statement of the grounds unless there are documents that can fill such absence and which enable therefore recognition;[109]

29. A judgment which is given by abusing the foreign judge and deceiving the defendant who is consequently impeded to defend himself against an action based on inexact facts;[110]

30. The infringement of procedural guarantees (the right to be heard) where they come outside the realm of Article 27(2);[111]

31. To enforce a judgment condemning the agent (that according to the law where the judgment is given represents the respondent in procedural law) against the respondant where the latter had no knowledge of the claim and had not been served with the judgment;[112]

32. The judgment which condemns someone to implement a securityship given without the

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[105] Oberlandesgericht Frankfurt am Main, order 9.12.75 -20 W 185.

[106] Oberlandesgericht Zweibrücken, Order 30.6.92 -3 W 13/92.

[107] Oberlandesgericht Düsseldorf, Order 14.12.92 -3 W 358 & 359/92.

[108] Cass. 1re civ. (17.5.78) *Vanclef v. Soc. TTI Trans Traide International* (Clunet 1979, 381); Cass. 1re civ. (9.10.91) *Polypetrol v. Soc. Générale Routière* (RCDIP 1992,516).

[109] Cour d'appel Paris, cases *Py v. Diamedo* (18.1.80) RCDIP 1981,113 and *Soc. Fir v. Heritiers Baas* (16.3.79) RCDIP 1980,121; Corte di appello Genova (21.4.76) *Thiesen K.G. v. Bertella*, RDIPP 1976,583; Appel Versailles (26.9.91) *Lab. France Parfum v. Codipar*, RCDIP 1992,517. It is interesting to note that in the last judgment the court seems to settle the inversion of the burden of proof, that would lie then, on the defendant. Such an approach is criticable (see for instance Kessedjan,1992:527 -commentary on the judgment).

[110] BGH, Order 10.7.86 -IX ZB 27/86, IPRax 1987,236. It should be noted that this judgment makes fraud come under the scope of public policy.

[111] OLG Düsseldorf, Order 11.9.91 -3 W 361/91 and BGH Order 21.3.90 -XII ZB 71/89, IPRax 1992,33.

[112] Landesgericht Hamburg, case 5O 335/77 (27.12.77) RCDIP 1978,422.

authorisation required by Italian exchange policy (according to law-decree of 1956 to avoid the flight of capital);[113]

33. (it may be contrary) to be condemned to the expenses;[114]

34. The exoneration to pay moral and *lucrum cesans* prejudices because of the public nature of the functions exerted by the debtor;[115]

35. The obligation to fulfil a distributorship agreement which has not been authorised under Italian exchange control requirements.[116]

These judgments given in the framework of the Brussels convention reflect a national understanding of the provision that deserves some comments. Firstly, it should be noted that the only reference to human rights as being at the basis of public policy is focused on the right to defence of the parties. Procedural guarantees (mainly of the defendant) are given great importance particularly in some countries like France and Germany.[117] Despite the clear distinction and restrictive interpretation that the Court of Justice makes of Article 27(2), Member State's courts still tend to refer to public policy to solve the problems that may arise - either to accept or to exclude the applicability of the clause. In this sense, it is suspected that the restriction imposed on the terms of public policy is not definitely agreed by Member States at least as regards the procedural guarantees.

A second point that should be underlined is the relative variety of matters that come under the protection of public policy. The points listed cover areas such as procedural guarantees,[118] economic matters,[119] family law,[120] tort law,[121] contractual terms[122],

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[113] Corte di appello di Milano, (5.6.90) *Mobilia Italia s.p.a. v. Clairval s.r.l.* (RCDIPP 1992,1001).

[114] Cass. 1re civ. (5.5.93) *Times Newspaper Ltd v. Pordea*, Gaz. Pal. 1994,I,382.

[115] BGH, Order 16.9.93 -IX ZB 82/90 *Sonntag v. Waidmann*, JZ 1994,254. This case gave rise to a preliminary ruling to the ECJ solved in case C-172/91 [1993] ECR I-1963.

[116] Corte di appello Bologna (19.4.83) *Malanca Motori SpA v. Soc. des Ets. B. Savoye SA.*, Giur. Commerciale, 1984,II,76.

[117] See judgments 1 to 5, 28 and 31.

[118] Points 1 to 9 and 28 to 31.

[119] Points 14, 15, 32 and 35.

the substance of the sentence[123] and the quality of the judgment.[124] This review of the case law confirms the link of public policy and fraud[125] and proves that public policy indeed enters the game in relation to economic matters. Moreover, it does so in relation to movement of capital[126] and competition law,[127] that is, aspects which come under the public law sphere and usually take the shape of mandatory legislation (*loi d'application immédiate*). Courts tend to be aware that it is the effects of the judgment rather than the judgment itself which should be evaluated in confrontation with public policy. They also seem to be rather cautious as regards the analysis of the conditions of the judgment in order to refuse recognition. Indeed, they remain somewhat uncertain. The nature of the proceedings at the granting State or the quality of *res iudicata* are excluded by the Member State's courts as being at the basis of public policy exceptions. We can evaluate this fact in a positive way.

Four of these judgments deserve more thorough analysis due to the reference make to Community law in order to reach a solution. Thus, the *Hoge Raad* does not deem to be contrary to public policy the jugdment that accords a maintenance award to a wife which constitutes such a weight for the husband that he may be forced to claim benefits under the Assistance Law. This solution is reached on the basis that the free movement of judgments in the Community outweighs such an unfortunate circumstance.[128] This solution appears as too zealous, so much as to admittedly cause unfairness from a substantive point of view.

[120] Points number 21 and 22.

[121] Numbers 19, 20 and 34.

[122] See point 16 and in a large sense, also points 23, 25 and 27.

[123] See points 17 to 19.

[124] See points 10 to 12 and 24.

[125] See points 24 and 29.

[126] Although the case-law cited in points 15, 32 and 35 may not be any longer possible as results from the 1989 Directive on capital movements.

[127] Point 14.

[128] See reference in point 21.

The second judgment that refers to the impact of the Community is the Order given by the *Oberlandesgericht* Suttgart.[129] The court says that it is for the defendant to take the measures to secure his position. If he is not diligent in the consideration of the situation as it stands in the Community (European Market), he is the only one to blame for the mistake. Such judgment deserves also a critical consideration. That is, the uniformaty of criteria is desirable but imposing on the parties the knowledge of the whole systems of the EU appears as somewhat excesive.

A third reference is made to the ruling given by the *Tribunal de Grande Instance de Troyes.*[130] The court claims that at the recognition stage a control of the conformity of the judgement given by the granting court to the dispositions of the EC Treaty must be undertaken. This controversial judgment needs be tackled from a twofold point of view. From a material viewpoint it can be deemed that fundamental principles of EC law are part of the public policy applicable in a Member State.[131] By means of the application of public policy thus understood an affirmative answer could be advanced.[132] From a technical point of view, the admission of this position has raised more difficulties. Under Community law the normal consequence of this negligence would be an action against failure to act based on Articles 169 and 170 EEC Treaty. A doubt comes up whether under the convention rules Member States are endowed with extraordinary powers, since *"reconnaître aux juridictions nationales le droit de vérifier si le tribunal d'un autre État membre a appliqué le droit communautaire et l'a appliqué correctement reviendrait à ajouter (aux) articles 169 et 170."*[133]

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[129] See point 5 of the list.

[130] Cited in point 14.

[131] See in this sense the judgment given by the Bundesgerichtshof (27.2.69) RDI 1969,626, according to which *"Die Normen des EWG - Vertrages sind zwar sog. Gemeinschaftsrecht, sie sind aber bei dem Inkrafttreten des EWG - Vertrages in die Rechtsordnungen der Mitgliedstaaten aufgenommen worden und vor ihren Gerichten anzuwenden. Sie gehoren daher, soweit ist die Grundlagen des Gemeinsamen Marktes betreffen und nicht nur aus blossen Zweckmassigkeitserwagungen getroffen sind, zu der in der Bundesrepublik geltenden - offentlichen Ordnung -".*

[132] Spadatora,1984:74.

[133] Gothot and Holleaux,1985:148 No.259.

A similar problem is raised in the BGH case *Sonntag v. Waidmann.*[134] where EC law appears as a reference in order to evaluate public policy and its applicability. It is not clear, however, what is the extent of this reference. The BGH exerts a control of the Italian law assuming that it objectively infringes Community law while the German rule - which, happens to be a public policy rule, complies with EC law. In order to confirm the rejection of Italian law, it procedes to draw a comparison with EC Regulation No.1408/71. Although the latter regards workers and the case at stake is concerned with students, the BGH deems German law applicable as regards the exoneration of responsibility. It concludes thus that a different reading would be contrary to EC law and free movement of citizens.

It seems as if the first contention was softened by a final evaluation as to the effects of the case in relation to EC freedoms. The infringement of Community obligations to which the recognising court would be compelled to if it recognised the judgment given under such premises seems to entail a too severe consequence for the State where recognition is sought. Thus, the view of accepting *ordre public* as the means of avoiding this procedure appears as reasonable.[135] The German judgment may likely be criticised for the same reasons as the French case. The consideration of EC criteria should be present nevertheless at the recognition stage. Certainly, it should not attain such zeal as demonstrated by the first two judgments. It should neither lead to raw evaluations as to the compatibility with EC law. In this sense, no recognition will be admissible in any Member State if the effects of such recognition resulted in a discrimination or in a hindrance of free competition within the EU. Furthermore, since the links between this clause and other excepting clauses of the EC Treaty have been ascertained, it is possible to admit the refusal of recognition in cases of menace to other Community interests (namely as conforming to the general good requirements, i.e., environmental protection, consumer protection, etc).

Admittedly, the courts may be conscious of the fact that States belong to the Community and such appurtenance entails some consequences as regards recognition of judgments. Furthermore, the evolution of public policy should also find a reflection in this area. In this

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[134] See point 34.

[135] Juris-classeur Europe, vol.5 fasc.3040, convention de Bruxelles, page 8.

respect some of the judgments previously referred to could not find justification now in the framework of the EU. For instance, a review of public policy on exchange matters according to the liberalisation of finantial markets seems indispensable.

It has been excluded that the European Court of Justice controls the application made by Member States of the clause since public policy in the sense of Article 27(1) is a national notion which applies exclusively in relation to other Member States.[136] However, the "naiveté" of such a position has been put forward. Indeed, the Court has already given interpreting principles as regards other public policy clauses, mainly Article 48(3) EEC Treaty, since the necessity to avoid national interpretations which affect the *effet utile* of the instrument is strongly felt.[137] The Brussels convention fulfils the same integrative process as the Treaty, since no perfect achievement of free trade can be attained where the legal protection of economic parties is not conveniently ensured (by both a system of jurisdiction rules and the enforcement of judgments). Furthermore, if public policy in the sense of Article 27(1) is to be interpreted in respect of the general principles of Community law, the protection of human rights will allow such a control of the Court.[138] This position appears to be confirmed by the words of Advocate General Capotorti in case 21/76 where he states that "the interpretation conferred upon the Court of Justice may clarify the meaning of this provision [public policy], avoiding distorted interpretations of the notion and risks of abuse"[139] (and indefension). The very sensible approach to the exception (even too zealous) of national courts up to now has made unnecessary any 'correction' by the ECJ.

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[136] See namely, judgment given by the BGH of 26.9.79 (JZ, 1979,815) that restricts the control of the ECJ to the interpretation of the convention but not to the national notion that *ordre public* is. Such a position is agreed by Gothot & Holleaux (1985:147 No.256).

[137] In this sense, see Jurisclasseur Europe on the Brussels convention, fasc. 3040 at p.7; see also C. Kessedijan in her comment to Cass. 1re civ. (9.10.91) RCDIP 1992,516ff and Betlem (1993:278) who tackles the question as a matter of free movement.

[138] Betlem,1993:279. He further argues that the interpretation in conformity with fundamental rights applies to all public policy Articles of Community law.

[139] Case 21/76 *Bier v. Mines de Potasse d'Alsace* [1976] ECR 1735 at p.1757.

2.4. Procedural guarantees

In the context of the previous pages it has come out how close procedural guarantees and public policy are. In order to better define the latter, further reference to the former seems necessary. The Brussels Convention introduces a new expression of procedural guarantees in a Community sphere. The Court has settled a well established case law in the framework of the interpretation of both the constituting Treaties and the Brussels convention.

This is not the place to come back to the reflections on the protection of human rights in the Community. May it suffice to remember that the Court can be expected to intervene against national jurisdictional practices that jeopardise fundamental rights within the Community reach. The general criteria as settled by the Court in relation to Community law will constitute a point of reference (and enlargement) in the interpretation of the Brussels Convention. A second aspect that comes about in relation to procedural matters is the use that the ECJ makes of the ECHR. Procedural rights constitute, no doubt, a very sensitive issue that has generated a large case law at Strasbourg. In fact, on many occasions the same inspiring principles seem to enlighten both jurisdictions. Seemingly, the ECJ will find a source of clarification in the European Court of Human Rights' case law. Without pretension of being exhaustive, this feature will find therefore a place in the following considerations.

a. Procedural guarantees in the EC sphere

i. Right of access to court

Community law protects the right of access to court in the sense given at the Community level, and not exclusively in the formulation of Article 6 ECHR as construed by the Strasbourg Court. Although the latter is of great importance for the application of the Community right, the ECJ develops the requirements of Community law independently. As stated by Advocate General Darmon "this Court [ECJ] may therefore adopt, with respect to provisions of the Convention [ECHR], an interpretation which does not coincide exactly with that given by the Strasbourg authorities, in particular the European Court of Human Rights.

It is not bound, in so far as it does not systematically have to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities".[140]

The applicability of Articles 6 and 13 ECHR in the Community legal order has been affirmed by the Court in a general statement in *Johnston*.[141] An important application of the principle of access to the courts can be found in *Heylens*:[142] the Court considered the existence of a remedy of a judicial nature against a decision by a national authority in relation to the free access to employment essential for the effective protection of that right. Effective judicial review, according to the Court, is a requirement of EC law.[143] Neither the parties nor the Advocate General referred to Articles 6 or 13 ECHR. It is significant that the Court itself introduced the general principles of law which are used to review the national law of a Member State independent of a Community provision prescribing a legal remedy, as was in the case *Johnston*.[144]

If access to courts is granted at a Community level, the plaintiff's entitlement and interest to sue are evaluated according to national law. The Court, in cases C-87-89/90 *Verholen*, following Advocate General Darmon's position, has nevertheless stated that two 'Community checks' must be respected: national law may not impede the application of the principle of access to the courts and it may not render it virtually impossible to exercise a Community right.[145]

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[140] Opinion of A.G. Darmon in case 374/87 *Orkem v. Commission* [1989] ECR at 3338.

[141] Case 222/84 *Johnston v. R.U.C* [1986] ECR 1651.

[142] Case 222/86 *Heylens* [1987] ECR 4097.

[143] See case 36/75 *Rutili* [1975] ECR 1219. The same reasoning applies to administrative decisions. In case 98/79 *Pecastaing v. Belgium* [1980] ECR 691 at p.13 it is stated that Member States have "the obligation to provide for the persons covered by the directive protection by the courts which is not less than that which they make available to their own nationals as regards appeals against acts of the administration including, if appropriate, the suspension of the act appealed against".

[144] See Betlem,1993:117.

[145] Cases C-87-89/90 *Verholen* [1991] ECR I-3757. See Advocate General's opinion at pp. 33 and 34 . The first point follows from cases 222/84 *Johnston* [1986] ECR 1651 and 222/86 *Heylens* [1987] ECR 4097, the second from case 199/82 *San Giorgio* [1983] ECR 3595.

ii. Right to a fair hearing and right to defence

The right to defence also constitutes a fundamental principle in Community law which is ensured by the Court.[146] No direct reference to the notion of equality of arms as stems from the Strasbourg organs' case law is found in the Community's sphere. Many of the manifestations of equality of arms find nevertheless reflection in the latter. In this sense, it ensures the right to be provided with the justification of the reasons on which the decision is founded[147] and the right to be notified in order to secure defence.[148] The latter implies a certain colaboration of the defendant, that cannot rely on the right when he does not act with due diligence.[149] Other rights admitted by the Court are the right to legal representation (from the preliminary inquiry stage of procedure[150] and even in those cases where parties are normally not represented by a counsel),[151] the right to confidentiality in the relationships between the party and his advocate,[152] the right not to give evidence against oneself[153] and

[146] Case 322/82 *Michelin v Commission* [1983] ECR 3461, p.7; cases 97-99/87 *Dow Chemical v. Commission* [1989] ECR 3165, p.11; case 85/76 *Hoffman-La Roche* [1979] ECR 511, p.9.

[147] Case 222/86 *Heylens* [1987] ECR 4097 at p.15. See also case 36/75 *Rutili* [1975] ECR 1219 at p.39 where it states that the notification of the decision is necessary in order to "give him a comprehensive statement of the grounds for the decision, to enable him to take the effective steps to prepare his defence". Similar references in the ECHR sphere can be found in Appl. 5460/72 *The Firestone Tire and Rubber Co. v. UK*, Yearbook XVI (1973), p.152; Appl. 8769/79, *X v. Federal Republic of Germany*, D & R 25 (1982), p.240.

[148] Case 36/75 *Rutili* [1975] ECR 1227. Case 66/74 *Farrauto* [1975] ECR 157 requires that such notification takes place in a language that the addressee understands. According to the Strasbourg organs, the conditions of the notification are evaluated according to the circumstances of the case, the relationship between the party and his lawyer and the nature of the procedure (Appl. 7909/74 *X & Y v. Austria*, D & R 15 (1979) p.160).

[149] Case T-12/90 *Bayer v. Commission* [1991] ECR II-219.

[150] Cases 97-99/87 *Dow Chemical v. Commission* [1989] ECR 3165, p.13. The ECHR does not explicitly provide the right; nevertheless, it is understood that the right of access to the courts entails the obligation for the contracting parties to make legal aid available, if otherwise the person in question would be faced with an insuperable barrier to defend himself adequately (see *Airey*, 9.10.79, Series A vol.32, pp.11-16).

[151] Case 115/80 *Dermont (II)* [1981] ECR 3158 at p.11.

[152] Case 155/79 *AM & S Europa Ltd v. Commission* [1982] ECR 1575 at p.18 which follows its A.G. Slynn's opinion (p.1654).

[153] Although it is restricted to individuals and in competition proceedings, as stems from case 374/87 *Orkem v. Commission* [1989] ECR 3283.

the right to require that proceedings take place in a specific language.[154] The Court remains cautious with regard to means of proof in connection with the right to defence. No explicit case law seems to be available but some references may be found. For instance, in cases 97-99/87 *Dow Chemical v. Commission* the ECJ seems to advance a guarantee of legality as far as means of proof are concerned.[155] The Court has also defined the right to defence in negative terms, by excluding certain features, as for instance the *cautium iudicatum solvi* since it entails discrimination,[156] or by providing that the right to defence does not entail an unfettered access to documentation.[157]

The guarantees laid down by the Court exhibit, to a certain extent, a bias due to several reasons such as the nature of the proceedings (in many cases of an administrative character - namely they regard competition and civil servant cases) or the personal scope of its beneficiaries. The ECJ has acknowledged that the guarantees to the right to defence in administrative cases are necessarily different from the guarantees in a civil procedure.[158] Such a position finds a parallel in the delimitation undertaken by the Strasbourg organs between the guarantees under paragraphs 1 and 3 of Article 6 ECHR according to the kind

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[154] Case 137/84 *Ministère Public v. Mutsch* [1985] ECR 2681: the Court confers the right to use the own language in proceedings before the courts of the Member State in which he resides, under the same conditions as national workers, since it plays an important role in the integration of a migrant worker and his family and thus in achieving the objective of free movement of workers (p.16). The Strasbourg court interprets such a requirement in the sense to have the free assistance of an interpreter if he cannot understand or speak the language used in the court as a means of ensuring a fair hearing (Report of 18.5.77, case *Luedlicker, Belkalem & Koç*, B.27 at p.26).

[155] Cases 97-99/87 [1989] ECR 3165 at p. 12. This case seemingly reverses the dangerous and criticisable result attained in case 145/83 *Adams v. Commission* (case 145/83 [1985] ECR 3539). The Court considered the protection of an employee who had been dismissed because of his providing the necessary evidence to the Commission that led to the sanction because of anti-competitive practices of the company where he worked. The judgment condemns the Commission for not having adequately protected M. Adams, who was consequently condemned by a Swiss court for disclosure of information. The judgment of the ECJ deserves criticisms since it seems to permit the validity of whatever means of evidence in order to protect competition within the Community. This unfortunate decision has not been followed.

[156] Case C-20/92 *Hubbard v. Hamburger* [1993] ECR I-3777 which furtherly contends that no justification on grounds of reciprocity may be admited.

[157] Such a restriction is explained in the context of competition law cases, where the interests at stake imply to restrict the access to those documents exclusively to "the facts upon which complaints are based" (Cases 56-58/64 *Grundig* [1966] ECR 338).

[158] Case C-60/92 *Otto v. Postbank* [1993] ECR I-5707 at p.15.

of proceedings at stake, either civil or criminal.[159] The main guiding criterion remains the equality of arms of the parties. On the contrary, the Court of Justice may be suspected of adopting a clear 'instrumental' approach to the guarantee in the context of favouring Community freedoms. This has been, for instance, the case of the admission of the right to have proceedings in a specific language, since it confers this right on a 'worker who is a national of one Member State and habitually resides in another Member State (...) when workers who are nationals of the host Member State have that right in the same circumstances'.[160] The same applies for case *Hubbard v. Hamburger*[161] where the ECJ rejects the *caution iudicatum solvi* as discriminatory against foreign executors in so far the latter are providing a service. At the same time, it confers the protection on persons who are both nationals of Member States and residents in the EC. Such a position may be dangerous where it leads the Court to excesive restrictions.

b. Right to defence in Brussels convention

In the framework of the Brussels Convention the respect of rights to defence - which is an essential aim of the convention[162] - is secured in Article 27(2). According to its wording, this Article applies exclusively to defendants in default of appearance. Admittedly, the default must be not sought by the defendant but must result from a lack of knowledge. The evaluation of the default is made according to the legislation of the State of origin. However,

[159] However, it should not be understood that all the guarantees enshrined in paragraph 3 are excluded in civil suits. If a party to civil proceedings is denied the rights mentioned in the last paragraph, under certain circumstances that may entail that there is no question of a fair hearing in the sense of the first paragraph. Moreover, the Strasbourg court has stated that States cannot rely on the domestic nature of the proceedings to exclude the operation of the fundamental clauses of Articles 6 and 7 of the Convention. To leave such a sovereign will to States may lead to results incompatible with the object and purpose of the Convention. The *Öztürk* case (of 21.2.84, Series A vol.73) applies this doctrine to certain proceedings that had been previously decriminalised in Germany to conclude that, despite the administrative nature of such proceedings, Article 6(3) had been infringed.

[160] See p.18 of case 137/84 *Mutsch* [1985] ECR 2681.

[161] Case C-20/92 *Hubbard v. Hamburger* [1993] ECR I-3777

[162] Paragraph 13 of case 125/79 *Denilauler* [1980] ECR 1553 reads as follows: "All the provisions of the convention (...) express the intention to ensure that, *within the scope of the objectives of the convention*, proceedings (...) take place in such a way that the rights of defence are observed" (emphasis added).

the ECJ has already pointed out in which terms the default of appearance should be understood. The interpretation that the ECJ gives to the concept of 'default' is essential in order to see whether Article 27(2) should be given an extensive or a restrictive interpretation. Thus, the larger the notions are defined, the more extensive the reach of the Article is.[163] The ascertainment that the right to defence is a fundamental principle in EC law ensured by the Court justifies an extensive interpretation of Article 27(2).[164] This is so despite the risks that an extensive interpretation of Article 27(2) has.

Two are the conditions that must be fulfilled in order to consider it respected. In *Lancray* the Court summarises as follows: "Article 27(2) lays down two conditions, the first of which, that service should be duly effected, entails a decision based on the legislation of the State in which judgment was given and on the conventions binding on that State in regard to service, whilst the second, concerning the time necessary to enable the defendant to arrange for his defence, implies appraisals of a factual nature".[165]

The court of the State where recognition is sought has then the obligation to evaluate whether these two conditions have been fulfilled. It cannot simply proceed on the assumption that the tests which were conducted by the court that gave the judgment by default were sufficient.[166] The presence of only one of them does not provide sufficient guarantees and

[163] Against an extensive vision of Article 27(2) see Borrás (1991:58); Droz (1972, No.489); in favour of this extension, see Huet (comment to case *Denilauler*, J.D.I, 1980,939 at p.943). The ECJ seems to make an option in case *Denilauler* (case 125/79 [1980] ECR 1533 p.8) for a restrictive interpretation since "these provisions were clearly not designed in order to be applied to judgments which, under the national law of a Contracting State, are intended to be delivered in the absence of the party against whom they are directed and to be enforced without a prior service to him." Such judgment is in clear contrast to the indications given by the Advocate General who considers that "Articles 27(2) and 46(2) apply to proceedings in which the adoption of provisional measures is ordered without the other party having been heard". Indeed, Advocates General seem readier to admit an extensive interpretation. Thus, A.G. Reischl admits that "provisions having such a content are not to be interpreted restrictively, that is to say they must not be construed as curtailing the powers of the courts which are responsible for their application" (case 228/81 *Pendy Plastic v. Pluspunkt* [1982] ECR 2723, p.2743). In this sense, it must apply to any kind of decisions where there is no specific provision excluding its application to them (A.G. Mayras in case 125/79 *Denilauler v. Couchet Frères* [1980] ECR 1553, p.1579).

[164] Spadatora,1984:64.

[165] Case C-305/88 *Lancray* [1990] ECR I-4625, p.14.

[166] A.G. Reischl in case 228/81 *Pendy Plastic v. Pluspunkt* [1982] ECR 2723, p.2744.

is a sufficient ground for refusal to recognise a foreign judgment.[167] In this evaluation the court is not bound by the qualification that the granting court has given.[168] This control, in order to be compatible with the prohibition to review the substance of the case (in the sense of Article 29 of the convention) should be understood as a 'procedural' review.

In addition, the court must take into account special considerations and the defendant's attitude while reviewing. The former may "warrant the conclusion that, although service was duly effected, it was, however, inadequate for the purposes of enabling the defendant to take steps to arrange for his defence."[169] The introduction of these exceptional circumstances has been criticised on several grounds, namely because they are based on negative criteria and they do not provide any solution if these circumstances actually concur.[170] Moreover, the risk that an objective conception of 'timely notification' is overwhelmed by a strictly subjective conception of the notification - in the hands of the judge, has been pointed out.[171] Seemingly, the defendant's attitude plays a role in the evaluation of these conditions. Thus, if the notification has been made in correct terms, the negligence or absence of the defendant -which impede the actual notification- run against him. However, his behaviour is not to be relied on exclusively. Indeed "the defendant's behaviour cannot automatically rule out the possibility of taking into account exceptional circumstances which warrant the conclusion that service was not effected in sufficient time. Instead, such behaviour may be assessed by the court in which enforcement is sought as one of the matters in the light of which it determines whether service was effected in sufficient time".[172] The relations between the plaintiff and

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[167] Case C-305/88 *Lancray* [1990] ECR I-4625, p.18.

[168] Case 228/81 *Pendy Plastic v. Pluspunkt* [1982] ECR 2723, p.14 and case 166/80 *Klomps v. Michel* [1981] ECR 1593, p.16.

[169] Case 166/80 *Klomps v. Michel* [1981] ECR 1593, p.19. and case 49/84 *Debaecker v. Bouwman* [1985] ECR 1779, p.15.

[170] See Huet's comment to case 166/80 *Klomps v. Michel*, J.D.I.,1981:900.

[171] See Bischoff's comment to case 49/84 *Debaecker v. Bouwman*, J.D.I.,1986:467.

[172] Case 49/84 *Debaecker v. Bouwman* [1985] ECR 1779.

the defendant are also an element to be considered by the court.[173]

A balance must be found between the two policies that underlie the understanding of the conditions of the service. A 'formalistic' approach to the latter tends to favour the interests of the plaintiff, while the 'actual' service protects best the defendant. Admittedly the ECJ makes an option for a strict interpretation where it states that the non compliance with these provisions cannot be cured by the fact that the defective service of notice actually reached the defendant or by the possibility to lodge an appeal in the granting State against the judgment given in default of appearance as a result of an improper notification.[174] If the notification was not properly effected, the granting of sufficient time to prepare defence does not correct the former vice.[175] This option does not find uncontested acceptance among scholars since it may run counter to the purposes of the convention[176] and may favour fraudulent attitudes of unscrupulous defendants.[177]

Thus, the main difficulty to tackle is that the convention solely considers defendants in default of appearance and in relation to two aspects of the notification (duly made and in sufficient time). While the Court stresses these two points - which could arguably be relaxed,[178] it has not decided upon any other infringement of procedural guarantees, which

[173] Case 166/80 *Klomps v. Michel* [1981] ECR 1395, p. 20; it also lists the means employed for effecting service and the nature of the steps which had to be taken in order to prevent judgment from being given in default.

[174] Case C-123/91 *Minalmet* [1992] ECR I-5661, p.21.

[175] See A.G. Jacobs in cas C-305/88 *Lancray* [1990] ECR I-4625, p.16.

[176] Schlosser (1995:38-9) contends in this sense that the trend in Europe would point more to the position *"pas de nulité sans grief"*. Indeed, a too strict approach would lead to hinder the free movement of judgments in the EU territory.

[177] In this line of criticism, see Droz's comment on case 228/81 *Pendy Plastic v. Pluspunkt* (RCDIP, 1983:528). Also judgment 305/88 *Lancray* [1990] ECR I-4625 has been keenly criticised. It permits a defendant who has become aware of a procedural defect during the first proceedings, through his own failure to act, provides the grounds for refusing to authorise enforcement. He stops thus at the frontier a foreign judgment duly served upon him, when he could have lodged an appeal or an objection against the defect in question before the court which gave the judgment (*Civil Jurisdiction and Judgments in Europe*,1992:267). The evaluation of the circumstances that define a due and timely notification may then also be read against the defendant who makes on purpose the conditions to be reached particularly difficult.

[178] See the two preceding footnotes.

are completely ignored as means of proof or the accessibility to certain documents. It is argued that a judgment obtained on the basis of insufficient proof or relying upon false documents infringes procedural rules. The same applies when the access to documents is restricted to one of the parties or where documents have been obtained in an irregular manner. At the stage of recognition, the Brussels Convention foresees the possibility to stay the proceedings if the defendant condemned on those grounds has appealed to the superior court in the granting State. But the addressed court is not compelled to wait for the result of such revision procedure. Thus, actual infringements of procedural guarantees may be possible under the convention. Where procedural rights are granted both at a domestic and at a Community level, it makes no sense that they are excluded from the convention's sphere.[179] What practical consequences can be drawn from this fact? There is certainly a direct incidence as regards public policy. If Article 27(2) becomes too restricted, the 'natural' effect is to have resort to Article 27(1) to protect the rights that are excluded from the former paragraph.

c. Conclusions

The preceding analysis of procedural rights within a European area indicates that a truly European notion may be identified as regards procedural matters. This is so for two reasons. Firstly, because there is a coincident list of procedural guarantees granted at several levels. Secondly, because they are given an autonomous interpretation. Indeed, Article 6 ECHR is given a truly European sense, detached from the interpretations of the States.[180] Furthermore, the ECJ, on its side, tends to adopt an independent interpretation of procedural rights, distinct from the ECHR's definition. The autonomous interpretation that procedural guarantees are given by both the Strasbourg court and the ECJ indicates the outline of true European concepts. The case law of these two courts must be understood as offsprings of a contemporary trend in Europe not to leave it entirely to the national legal orders how to

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[179] Spadatora,1984:66.

[180] The autonomous interpretation of the European Court of Human Rights endows Article 6 ECHR with *"un sens 'européen' valable pour chacun des Etats contractants"* (Eissen,1990:142).

ensure fairness and efficiency in civil procedure.[181]

Critical voices may raise as far as the integrality of the protection afforded is concerned. Indeed, it can be tainted of sectorialism since each of the spheres referred to addresses a particular kind of procedure. In addition, some important devices remain out of the protection up to here granted, for instance, means of proof. Where some outlines may be sketched in the framework of the ECHR, no precise concern in the EC sphere stems -despite the alleged possible infractions that can take place, for instance as regards the obtention of documentation. Moreover, at the EC level, further restrictions may be encountered where particular links are required, either because of the selection of domicile and/or residence as connecting link (in the context of the Brussels convention) or because of the requirement of a Community nationality or the instrumentalisation of procedural guarantees in order to ensure Treaty aims.

Such criticisms may be overcome through a complementary reading of the two areas, EC and ECHR. While the latter defines the procedural rights as civil and criminal procedures are concerned, the EC is mainly drawing a set of procedural rights in the framework of administrative jurisdiction (understood in a large sense, namely as encompassing entry of foreigners, civil servants jurisdiction and competition matters). The case law of the Court defines thus, the guarantees that have to be respected in the framework of Community procedures. At the same time, the ECJ defines the understanding of procedural rights in the context of national law, as far as the interpretation of the Brussels Convention -which is necessarily read under EC parameters, is at stake. Allegedly, the deficiencies that this system exhibits will be covered by the procedural guarantees granted at the ECHR level. Indeed, a sufficient web of basic principles exists - mainly based on the principle of equality of bargaining powers of the parties. Its particular developments will come out and shape in precise rules in order to cope with the inconsistencies of the legal system. Thus, a Community definition of procedural guarantees in the civil and commercial litigation sphere is also outlined. The consequences that such a definition entail may have a wider scope than expected if some proposals advanced at the Community level materialise such as a convention

[181] Schlosser,1995:35.

draft on the recognition of family law judgments[182] and the proposal for an enlargement of the Brussels convention's scope to enshrine competition matters.[183] The latter will provide the testing ground for a global notion of procedural guarantees in which these levels articulate definitively.

In this context, we advance an extensive approach to the rights to defence. In the light of the right to defence the criteria of jurisdiction find clearer interpretation.[184] Exorbitant fora can be invoked to restrict the right of access to justice. Their exclusion appears as a logical consequence of the defence of procedural guarantees since the equality of bargaining power of the parties is thus ensured.[185] A second but not less important consequence, requires the court to ensure the protection granted by every possible means available in the legal order. Granting equal procedural chances to both parties usually plays in favour of the defendant who remains the most vulnerable party. However, this viewpoint does not entail disregarding the rights of the plaintiff, who also deserves legal protection and has the right to see his rights satisfied in a correct manner. Indeed, the safeguarding of procedural guarantees should be granted to parties, either present or in default, and whatever their nationality or residence. Otherwise illogical solutions may be reached, such as the protection of a non-EC-national but resident in the EC who is in default of appearance while an EC-national present at the proceedings could be left defenceless. If it is admitted that non-discrimination is an essential

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[182] See Council of the EU, Luxembourg Council Meeting of Justice and Home Affairs of 20.6.94, Press Release 7760/94 (Presse 128).

[183] See the Notice on Cooperation between national courts and the Commission in applying Articles 85 & 86 EEC Treaty (OJ C39/6 at p.44 of 13.2.93) where it studies the possibility of extending the scope of the Brussels convention to competition cases assigned to administrative courts. In the Commission's view, competition judgments are already governed by that convention where they are handed down in cases of a civil and commercial nature.

[184] In this line of argumentation there exists some case-law in the Brussels convention. See namely case 150/80 *Elefanten Schuh* [1981] ECR 1671 at p.14 where it states that a narrow interpretation of Article 18 would in fact "be contrary to the right of the defendant to defend himself in the original proceedings, which is one of the aims of the Convention".

[185] The same issue finds a parallel addressing in the American system. It has been argued that the American clause of the due process stays at the basis of the elimination of most of the exorbitant fora of the American system of jurisdiction (Juenger,1983:45). Whether the US Supreme Court has definitely taken this stride does not seem so clear, but it is important to acknowledge that the reasonableness of transient jurisdiction is measured in terms of due process. In the current attitude of the US Supreme Court towards transient jurisdiction (upholding it) see *Burnham v. Superior Court*, 110 S.Ct. 2105 (1990). Previously, however, the Court had cast some doubts in the opposite direction in case *Schaffer v. Heitner*, 97 S.Ct. 2569 (1977).

principle of both the Brussels Convention and EC Treaty, such a result cannot be admitted. Hence, the need to find inspiration in the ECHR is strongly felt. Moreover, such a need becomes an obligation under the mandate of Article K.2 of the Maastricht Treaty to interpret civil matters (as envisaged in Article K.1) according to the ECHR.

In the context of the Brussels convention such an interpretation will imply an enlargement of the notion of public policy as to encompass all the procedural guarantees which are left outside Article 27(2). Indeed, from the fact that Article 27(2) precludes the recognition where certain rights of defence have been infringed, it may be inferred "that *a particular aspect* of the protection of the rights of the defence has been ensured by the authors of the Brussels Convention by means of *a provision other than public policy*."[186] *A contrario*, all the other aspects of the protection of that right may come within the scope of public policy. Otherwise, it would not be possible to sustain that the convention strengthens the protection of persons established in the EC.[187]

2.5. A procedural Community *ordre public*?

Procedural public policy has been defined in chapter I as a means of defence of procedural rights. The acknowledgment of a European common core of procedural guarantees leads us to address the question whether such a European procedural public policy exists. It is contended that procedural rights are at the basis of a procedural public policy as a specific manifestation of the European public policy based on human rights. This notion would cover the protection of procedural rights and fairness in jurisdiction, the latter encompassing both the prohibition of discrimination and the protection of weak parties. In actual fact all these aspects could be reduced to one, namely granting equal defences to both parties at the procedure.

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[186] A.G.'s opinion in case 27/81 *Rohr v. Ossberger* [1981] ECR 2431 at p.2444 (emphasis added).

[187] See footnote 37.

The notion, understood in those terms, has already been applied by national courts[188] and in some States appears as a constitutional requirement that governs international procedural public policy.[189] Such configuration finds also acceptance in the framework of the Brussels Convention. Indeed, it may be admitted that "courts in certain States which have a particularly strict concept of the rights of the defence would refuse to grant an enforcement order for judgments ordering a provisional or protective measure at the conclusion of *ex parte* proceedings on the ground that such judgments are contrary to national public policy."[190]

The common converging point at the international level is focused in Article 6 ECHR which embodies a comprehensive declaration of those fundamental rights on which general agreement exists in modern societies. It has been sustained that Article 6 ECHR exhibits the character of a disposition of public policy by means of which the judge would be compelled to apply *ex officio* the rules foreseen in Article 6 where they are more favourable to the defendant than the domestic rules. If this is so, the notion thus delimited may sustain a true international (European) procedural public policy.[191]

Is it possible then to speak of a Community procedural public policy? The preceding pages have so contended. Indeed, at the EC level a set of principles exists, based on non-discrimination and the securing of equal barganing powers to the parties. The ECJ's case law goes beyond the interpretation of Article 6 ECHR and procedural rights find development in specific rules of the Brussels Convention in the provisions on notification (due and timely service), the election of the defendant's domicile as the basic criterion of jurisdiction or the imposition of specific fora which protect 'weak parties' by means of chosing the best known forum. Such criteria pin down at the jurisdictional level the concerns already identified in the

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[188] See for instance, Auto Tribunal 1ª Instancia No.3 Barcelona (6.2.84) in relation to the right to be informed of details and in a language that the addressee can understand; Tribunal 1ª Instancia Gijón (13.10.86) in relation to means of proof and Trib. civ. Bruxelles (of 23.1.67, J.T., 1967,74) as monetary sanctions are concerned.

[189] See for instance, the Spanish Constitutional Court according to which notification must be done under specific requirements since procedural rights appear as constituting elements of forum's public policy (S.TC 43/86 Sala 1ª, 15.4.86).

[190] A.G. Mayras in case 125/79 *Denilauler v. Couchet Frères* [1980] ECR 1553, p.1579.

[191] Velu,1973:258 and Cappelletti,1973:687.

Community sphere. At the Brussels Convention level the notion is given a procedural shade that would confirm the existence of a Community procedural public policy.

The main question to solve is in which conditions should such a notion apply. Understood as a true international public policy, procedural Community *ordre public* could be referred to in cases of international litigation between Member States and third States. More complex is the question as to the applicability of this notion between Member States. It is contended that, in the framework of the Brussels convention such an application could be possible. This is so for many reasons: although it has been argued that the convention does not create a common notion of public policy for all States - they keep their own notion as a safety valve-[192] the reference that is made in the convention to public policy does not restrict it strictly to national public policy. Furthermore, a Community notion of procedural public policy not only is compatible with the convention but, actually stems from it. Therefore, where public policy permits to overcome the deficiencies of the convention (restricted approach to procedural rights and exorbitant jurisdiction if the EC national is resident outside the convention) true international notions may be invoked under Article 27(1). Moreover, as argued above in relation to human rights, the exclusion of such an application may result in a breach of the international commitments of Member States (as regards the ECHR).[193]

Two aims seem to rule in the sphere of the Brussels convention, namely the respect of international harmony and the preservation of the internal equilibrium of the forum. The acknowledgement of a Community public policy would surely favour the latter. Indeed, it becomes seriously affected since a permanent 'unfolding' of criteria in respect of jurisdiction (which admittedly entails discrimination) as concerns public policy is present. The existence of a Community notion that secures the equality of rights of the parties and applies to cases both within and outside the scope of the convention would avoid such an illogical unfolding. This is why in those cases where it has been contended that Member States may have recourse to public policy against the wording of the convention, recourse should be had to Community procedural public policy. Respect of international harmony could also be

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[192] Gothot & Holleaux,1985:135 No.238.

[193] See footnote 37 and accompanying text in chapter II.

promoted with such Community procedural public policy. In fact, the Member State's notions would become closer under the shade of the former. Moreover, a common position of the EU in this sense would help to change the adverse attitude of non-EC States with regard to the judgments given by Member State courts.[194]

The admission of a Community procedural public policy does not entail the disapperance of Member States' notions. The latter are still applicable in the Brussels framework but under two conditions. Firstly, recourse to public policy must be restricted. The second condition imposes public policy to be read in accordance to EC aims. In other words, no possible recourse to the clause is permitted where it leads to hinder EC freedoms.[195]

One may wonder what the effects of this Community notion of procedural public policy would be. Two cases should be distinguished. If the reason that has activated the exception of public policy is the infringement (non-respect) of the rights to defence, a solution that could be in accordance with the free circulation of judgments could be to reset the proceedings to the moment in which the infringement of the right took place. If the public policy exception has been applied against an exorbitant fora, then no alternative solution seems possible. Admittedly, if the judgment is refused in one State on grounds of Community public policy, such a foreign judgment will not be liable of recognition in any other Member State of the Union. If the judgment, on the contrary, is refused recognition on the basis of national public policy, then the plaintiff may still search for another forum where the judgment may be enforced since the convention would allow him to do so.[196] If this is so, admittedly a Community notion of procedural public policy exhibits a clear advantage in

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[194] Desantes Real (1986:363) points out the particular difficulties that EC judgments encounter to be recognised in the US as a retaliation measure for the treatment that American judgments and citizens (mainly economic actors) are given in Europe. It is argued that a mechanism of rejection of exorbitant fora from which non-domiciled also benefit would open the path to a progressive recognition of the judgments in those States which do not see their nationals discriminated any longer.

[195] This would be the case of the judgments referred to in footnotes 95, 113 & 116 in relation to free movement of capital.

[196] Alternatively, Mosconi (1992:14) suggests the initation of new proceedings in the State where the recognition was refused. Such proposal introduces a disturbing element for it furthers the duplication of procedures (which is one of the shortcomes the convention tries to eliminate) in order to avoid the *non liquet*. It could be argued that the existence of Article 27(3) permits the duplication of such proceedings. The question arises then about the effects that the second judgment would be given.

relation to national public policy, namely that it avoids forum shopping as far as recognition of decisions is concerned.[197]

In the procedure of delimitation of a Community procedural public policy the ECJ will play an essential role.[198] Its competence to rule on both the Rome Treaty and the convention confers to the Court a priviledged position to do so. Furthermore, if a specific court or pannel of the court were constituted -as suggested- in matters of private international law at the EU sphere (with extended jurisdiction to the Lugano convention) the definition of such notion would come out as a natural consequence.[199] Moreover, if the procedural notion of public policy is put, as suggested, in terms of equality of procedural rights, the Court will be compelled to intervene, since it ensures the protection of the rights which come under the scope of EC law. Even where it is disputed whether the convention is Community law, the fact that the Court ensures the right of access to court should suffice to admit the previous assertion.[200]

The existence of a Community notion of procedural public policy is probably the most appropriate path to articulate a true European notion mainly based on the protection of procedural rights. Certainly, a Community procedural public policy will condense the core of these procedural rights under the shape of both principles and rules. These rights admittedly constitute one of the most developed aspects of the common European web of human rights.

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[197] The main difficulty that such proposal entails is the articulation of the Community public policy within the sphere of the Lugano convention. This difficulty may be overcome if the two following points are taken into consideration. First, as pointed out above, such notion does not entail the disappearance of the State notions, that are still applicable. Second, the aims achieved in the Community sphere (namely to avoid forum shopping on the one hand and attain legal certainty and security on the other hand) would be reproduced at the Lugano sphere. Certainly, it could be always argued that the Community bias is an unjustified imposition of the EU domination. Even if admitted, one could counter-argue that Europe seems definitely directed to become an European Union. If this is so, sharing common notions constitutes a basic step to build the structure.

[198] Spadatora,1984:73-74.

[199] Such proposal may encounter criticisms as far as the Lugano convention is concerned. However, the handicap of having one court that gives unique notions (probably biased in a Community sense) is overwhelmed by the fact that such notions ensure legal certainty and security and consequently, they favour the fulfilment of the two aims of the convention, namely the circulation of judgments and the respect of the rights to defence.

[200] Weiler (1992:82) argues in this sense that the fact that Member States are left a margin of action because of the absence of Community norms does not necessarily mean that this area is totally outside Community scope for the purpose of review by the ECJ.

Still, recourse to such notion must remain restricted. This is furthermore so in the framework of the Brussels convention where it may be invoked as a provisional solution to the inconsistencies of the convention in so far its text is not reviewed.

3. THE APPLICABLE LAW CONVENTION: ROME 1980

3.1. The setting

The following comments will only sketch some of the features that define the Rome Convention[201] and may have direct incidence in the delimitation of public policy. Certainly, the convention deserves more than these brief comments, but unfortunately, reference must be made to other works for more thorough analysis.[202]

The 1980 Rome Convention on the Law Applicable to Contractual Obligations appears as the logical complement to the 1968 Brussels convention on Jurisdiction and Recognition of Foreign Judgments in the elaboration of a European area of private international law.[203]

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[201] OJ L226/1 of 9.10.80.

[202] For further and more thorough analysis, see Kaye (1993), Plender (1991), Lando (1987), North (1982), etc.

[203] Giuliano & Lagarde Report pp.4/5. It is however, more than "a natural continuation of Brussels convention" since it has inspired some of the modifications undertaken in the 1978 version of the Brussels convention. Indeed, these two conventions seem to require a greater degree of coherence which was already felt at the drafting procedure. As the Schlosser Report points out, the new "provisions on instalment sales and loans have been incorporated in the new section, which also draws on Article 5 of the preliminary draft convention on the law applicable to contractual obligations" (p.117).

The close link between the two conventions has been asserted by the ECJ, in *Ivenel v. Schwab* (Case 133/81 [1982] ECR 1891). The question had arisen as to how Article 5(1) of the Brussels convention was to be interpreted when several obligations were involved. The ECJ ruled that the obligation characterising the contract was to prevail. This results then in an application of the characteristic performance test of the Rome convention to jurisdictional questions involving the two conventions. Thus, the Court enhanced what has been defined as "the hope of a common core of a future European conflicts law" (Jayme,1990a:38). However, the idea of uniting the two conventions to form a coherent body of European conflicts law was later abandonned by the Court in *Shenavai* (Case 266/85 [1987] ECR 239). In its interpretation of the same Article the Court not only returned to a national solution based on the conflicts law of the forum but also criticised the performance test. This solution has raised criticisms from scholars (Jayme,1990a:39); nevertheless it would seem that the court only deviated momentarily from its path with that judgment, since in case 9/87 *Arcado v. Haviland* [1988] ECR 1539 at p.15, it reaffirms the previous position of a link between the two texts.

However, despite the close relationship that links these two texts there are some notable divergencies. Indeed, the Rome convention exhibits an *erga omnes* nature[204] which the Brussels Convention lacks. In contrast to the illimited duration of the Brussels Convention, the Rome Convention has been elaborated for a limited period of time. Such limitation finds difficult explanation if the convention is viewed as part of the overall effort to harmonise private international law relations within the EU.[205]

Probably the most interesting aspect is the international (non-EC) penchant that the convention exhibits.[206] Not only are parties allowed, in the exercise of party autonomy, to chose the law of non-EC States but moreover, the latter may be imposed because of the existence of a mandatory rule so claiming. Precisely this latter point has been one of the most commented in the context of the convention. Article 7(1) consecrates thus, foreign mandatory rules in the framework of the convention. Despite the criticisms that this Article has raised, its introduction points out one of the main trends in contemporary private international law: it overcomes a purely formal conflict rules structure to incorporate a more substantive approach to the subject.

Indeed, the convention may be said to comply with the tendency of a substantive vision of private international law which was already initiated with the Brussels Convention. It incorporates protection of weaker parties in the persons of workers and consumers by introducing a set of specific rules in cases of disparate bargaining strength and contracts of adhesion; to this concern also responds the search for the closest connection (that may however, be rebutted by means of the *clauses spéciales*). Such options introduce no doubt elements of complication in the election of the governing law. This is why the growing importance of the role of judges should be stressed. Though most of the weight of the interpretation and application of the Rome Convention lies on Member State judges, the rulings of the ECJ will shed most valuable light.

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[204] Article 2 of the Convention; page 13 of the Report.

[205] Kaye,1993:35.

[206] We evaluate such an aperture for non-EC legislations very positively as it avoids the permanent unfolding of criteria that was pointed out in relation to the Brussels convention. However, as will be seen later on, problems may still arise as regards the relationship between these rules and Community legislation on the same matters.

3.2. Mandatory rules

a. Introduction

As pointed out above, one of the most innovatory aspects of the Rome convention was the definitive consecration of mandatory rules, especially the controversial applicability of third State rules under Article 7(1), in the European area.[207] Indeed, a tendency towards application of mandatory rules was developping in Europe well before its entry into force.[208] Furthermore, the incorporation of rules very similar to those embodied in the Rome Convention by national legislation had led courts of some of the Member States to handle these rules with a certain dexterity. This was the case of Denmark, Luxembourg, Germany

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[207] Article 7(1) permits the application of a foreign law (third law, which is neither the forum law nor the lex causae) to the contract when this rule *claims application* and it exhibits a *close connection* with the situation at stake. Despite the criticisms to introduction of the notion - see footnote 76 in chapter I, the convention merely enshrines principles that already existed in the laws of the Member States of the Community. The Report (p.26) makes special reference to the *Alnati* case (Hoge Raad, 13.5.66, RCDIP, 1967:522) although the latter did not uphold the application of the foreign mandatory rule (Schultsz,1983:282). The inconveniences that it could present led to the adoption of Article 22, according to which a reservation can be made on the application of this rule. On its side, this provision has also encountered critical voices (Prioux,1994:146). Seemingly, without it the convention might have never entered into force. The UK, Germany, Ireland and Luxembourg have introduced such reservation. The question arises what is the position of the other States that have accepted the provision as regards those States which have reserved their application. According to the general theory of the law of treaties, the mandatory rules of the latter would not find application in the former States. However, Member States are free to apply the mandatory rules of a State which has made a reservation on Article 7(1), though with a certain restraint (Treves,1983:38).

The close connection criterion -which brings about the American interest analysis doctrines (Lasok &Stone,1987:379), leaves a wide margin of appreciation to the judge. Although voices have been raised in favour of the obligatory character of the Article (Treves,1983:33 and Virgós Soriano,1986:820), its discretionary character is generally admitted. The judge, though, must be aware of being facing a departure from the basic principle of party autonomy and must be careful in order to avoid a "regrettable dismemberment of the contract [that] would have led to the application of mandatory rules not foreseeable by the parties" (Report, p.27).

To the end of *giving effect* to the interests of the country of the mandatory rule, the court is required to have regard to the nature and purpose of the mandatory rule - which is ascertained by reference to the legal system of origin, and the consequences of its application or non-application - that is evaluated according to forum criteria. The court in fact undertakes an evaluation as to the ressemblance of the foreign rule and substantive rules of the forum. Then, it must evaluate whether the application (or non-application) of the rule achieves the purpose it pursues and whether it does not defeat the legitimate expectations of the party who would be prejudiced by its application. If the court reaches an affirmative answer, it must clearly state why its choice has been this one instead of the proper law.

[208] Thus, in national case-law the convention would even appear as a criterion of confirmation of the solutions reached on the basis of national rules. In this sense the *Cour d'appel de Paris* (of 23.11.86, R.C.D.I.P., 1988,314 note Lyon-Caen) ruled that a dismissed worker has the right to chose between the legislation of the State of origin and the *lex loci executionis* where the latter is more favourable to him. It confirmed *ad maiorem abundantiam* that this would have been the solution reached in the framework of the Rome convention. See also the *Sensor* case (The Hague, R.D.C.I.P., 1983,474) where the court makes an anticipated application of the convention.

and Belgium.[209] The Rome convention refers to mandatory rules in several ocasions: Article 3(3), Article 5, Article 6, Article 7 and Article 9(6). Despite the uniform use of the term mandatory rule, and the confusion that can be easily traced among scholars, two kinds of rules can be identified. On the one hand, there are rules that cannot be derogated from by contract and set a limit to party autonomy in contractual relationships. Article 3(3) defines the concept, which is also to be found in Articles 5 and 6. On the other hand, there are rules which "are mandatory irrespective of the law otherwise applicable to the contract", that is, rules which have an incidence on the choice of law. Articles 7 and 9(6) refer to these rules. They could be respectively identified as contract and conflict mandatory rules.[210] Mandatory rules as embodied in the convention concern both the protection of weak parties, namely consumers and workers (Articles 5 and 6 of the convention)[211] and the defence of State interests namely general community interests (Article 7(1) & (2), 3(3) and 9(6)).[212]

The regulation of the economic sector is particularly prone to adopt the shape of mandatory rules. In this respect, it finds perfect enshrinment in the Rome Convention sphere. Many areas will thus reflect the fostering of one or the other concerns here identified or both concurrently. Thus, banking law is mainly governed by public interest rules which regard credit, interest rates, exchange rates, etc. On the contrary, consumer protection seems more directed towards private interests which reflect on the protection against risks for health and security, recovery of damages, etc. Insurance legislation on its side provides an example of mixed concerns. Certainly these areas are not watertight compartments and several mandatory rules encompassing private and State interests may concur: intellectual property regulation and competition law, consumer protection and banking regulation, etc.

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[209] For an interesting analysis of this phenomenon, see Frigessi di Rattalma,1992:819ff.

[210] In the classification proposed by Kaye,1993:72.

[211] The confinement of the concern exclusively to these two categories puts in evidence the insufficient protection that weak parties are endowed within the framework of the convention. Lando (1987:187) points out how non-professional parties, small farmers, fishermen, shopkeepers and artisans are left outside this protection, without necessarily being covered by Article 7.

[212] It should be pointed out that this distinction may find nuances in States. Thus, German scholars would reduce the category of mandatory rules to those which protect a 'general interest'. On the contrary, rules that aim at balancing interests of the parties are deemed to protect 'individual interests' and do not constitute therefore mandatory rules. See Martiny's comments on Article 34 EGBGB in *"Münchener Kommentar zum BGB, EG, Internationales Privaterecht"* (1990:1753).

The articulation of the different mandatory rules as well as the articulation of the latter with the applicable law resulting from other rules of the convention is not devoid of complexity. Some overlap between these various provisions' scope of operation will then be inevitable. Three possible levels of conflict can be individuated: (a) forum mandatory rule concurrent with foreign mandatory rule: Article 7(2) would favour the application of the former;[213] (b) several foreign mandatory rules: the judge may apply both in conjunction (when they are compatible), or he may make prevail one against the other, or lastly, he may not apply any of them and (c) several forum mandatory rules: the judge decides according to his own system.

The most interesting and complex case is the second one. Presumably, when this occurs, obligatory mandatory safeguards will be resorted to before those which are discretionary. Thus, Article 9(6) will impose itself over Article 7(1) in matters of form of contract, since it exhibits an obligatory nature that the latter provision lacks. A criterion of the kind is only relatively helpful since most of these rules (which exhibit different levels of compulsion) are discretionary for the judge. Only some of them may be of an obligatory nature, namely those which are at the basis of a true international public policy, as the fight against smuggling. The deciding element will rely on the terms and finality of the rule more than on its content. Another criterion points out that special subject-matter provisions will be applied rather than the more general: Articles 3(3), 5 and 6 would exclude (in case of concurrence of rules) the application of Article 7 because of reasons of speciality.[214] However, in certain cases the cumulative application has been advanced - namely if it favours employee protection.[215] It is also possible that the general mandatory rule encompassed in Article 7 takes precedence in some cases. Indeed, when the particular circumstances listed in Article 5(2) are absent, Article 7 will be fully applicable. Even when they are present, it is argued that a consumer should be permitted to opt for application of mandatory rules of Article 7 in place of those

[213] Kaye,1993:72; Prioux,1994:141.

[214] Treves,1983:37.

[215] Though Kaye (1993:231) indicates that there would be very little scope at all, if any for such cumulation to operate.

of Article 5 if the former provide higher level of protection.[216]

A certain confusion may also arise as regards the articulation of these rules with the law chosen by the parties in use of their contractual autonomy. The application of a more specific rule as Article 5(2) does not imply an immediate displacement of the law chosen by the parties. This will be so when the mandatory rule offers *greater protection* to the consumer. In such case, both the *lex contractus* and mandatory rule may be applied cumulatively.[217] The possibility to pick and chose from amongst individual rules of a mandatory rule so as to enjoy the maximum protection through the cumulative application of mandatory rules of the applicable law in the absence of choice and the chosen law does not seem feasible.[218]

State courts tend to apply forum mandatory rules and be prejudiced against applying foreign mandatory rules. In practice, they may only apply the latter when the *lex fori* itself contains a mandatory rule substantially similar to the rule in question. In that case, the court will apply, by means of Article 7(2), its own national mandatory rule.[219] In more general terms, if a State applies a foreign mandatory rule, presumably its own public policy principles will be close to the foreign mandatory rule. Indeed, the reasons that have been advanced to justify giving effect to third State mandatory rules, put the stress on the community of interests of the States together with traditional principles such as the respect of foreign sovereignty or *comitas gentium*.[220] To this list could also be added the notion of positive reciprocity, according to which, one applies foreign mandatory rules in order to see one's own rules

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[216] Kaye (1993:215) upholds this view.

[217] Indeed, an imposition of the mandatory rule disregards two essential points. Firstly, party autonomy is the guiding principle of the convention; secondly, the chosen law may provide better protection than the mandatory rule of the residence of the consumer. (Kaye,1993:213).

[218] Indeed, doubts have been cast about the convenience of applying cumulatively all the rules in order to obtain the maximum protection. Where the cumulation of mandatory rules is thus claimed, the previous choice of law has no longer any *raison d'être* (Kaye,1993:229, Plender,1991:142, Morse,1982:153).

[219] Lasok & Stone,1987:379.

[220] While Coing (1981:812) insists on sovereignty and excludes any reference to the principle of solidarity as a justification ground, Chapelle(1979:463) and Lando (1981:205) prefer the idea of comity.

applied.[221] Indeed, in a world where economic interests and policies tend to converge, the probability that States find in foreign mandatory rules a reflection of forum mandatory rules grows bigger and upholds the doctrine of positive reciprocity. Where this is not so and mandatory rules are disregarded, public policy may be then activated. Indeed, since they refer to matters of especial sensitiveness -either for State interests (as in banking regulation) or for social regulation (as regards the protection of weak parties), it has been contended that recognition of a judgment which has failed to apply them may be refused.[222]

This theoretical layout needs be made precise through the analysis of underlying interests. Indeed, behind the application of mandatory rules hides a web of State interests but also of private actors like companies and pressure groups. In the first sense it may be explained why a State permits to have recourse to a legislation depriving national consumers of the levels of protection ensured in national law in order to favour a policy of openess to international trade.[223] The refusal or application of foreign embargo provisions - which could be deemed to be mandatory in the sense of Article 7(1), may be dictated by the pressure of companies with interests involved.[224] Such interaction of interests is not absent in a EC framework. On the contrary, mandatory rules may appear as a means for Member States to reaffirm national specificities (through general good requirements) in a growing process of harmonisation. Thus, certain States will privilege consumer protection provisions while others will insist on the public law aspect of the regulations, namely in banking and insurance.[225] Furthermore,

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[221] Virgós Soriano,1986:819.

[222] Jenard Report (p.24), in relation to employment contracts, permits refusal on grounds of public policy if such legislation has been misapplied.

[223] *Tribunal d'arrondissement Luxembourg* (27.3.90), R.D.I.P.P.,1991,1092. The case was concerned with the provisions on consumer protection applicable to a loan for consumption concluded in Belgium between a credit institution and consumers both Belgian nationals (though the latter resident in Luxembourg). The interest rate foreseen in the contract was higher than the one foreseen under Luxembourg law. Since the *lex contractus* was Belgian, the court had to establish whether Luxembourg provision was mandatory in the sense of Article 5(2). In a restrictive interpretation of the conditions of the Article the court ruled that there was no place to appy it.

[224] Thus in the *Sensor* case (Tribunal d'arrondissement The Hague (17.9.82) R.C.D.I.P., 1983,473) the Dutch company intended to make prevail US embargo rules not to comply with its obligations with the French company. The Dutch court continued the track opened in *Alnati* and settled that since the links to a foreign law (US) were not sufficient the (embargo) mandatory rules of the later did not apply.

[225] The Luxembourg judgment quoted in footnote 223 is a clear example of this imbalance in favour of public law interests (namely the liberalising policy in international trade) to the detriment of consumer protection.

EC institutions are far from being neutral economic actors and introduce specific regulation which concurs with State mandatory rules.[226] Precisely to this interaction are devoted the following considerations.

b. Articulation within a EU framework

In the EU sphere it is possible to acknowledge the existence of mandatory rules in both a contractual and a conflictual sense. On the one hand, Community law has developed a set of rules that likely restrict or deny the autonomy of the parties in contractual relations.[227] These rules would constitute mandatory rules in a contractual sense. The following have been identified by scholars:[228] immovable values, environmental law, social law, competition law (which has effects on party autonomy as regards both contracts and company law),[229] consumer contracts,[230] intellectual property and company law. Freedom of establishment and service without discriminations based on nationality may also constitute a rule in this respect.[231]

On the other hand, Community law seems to have realised the importance of private international law in the framework of the Union. Since the 1980s, secondary Community law

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[226] Thus, in cases 172/80 *Züchner* [1981] ECR 2021 and 45/85 *Verband der Sachversicherer v. Commission* [1986] ECR 2351, the ECJ establishes that competition rules may indeed concur with banking and insurance regulation which is still subject to the latter.

[227] See A. G. Darmon in case 94/87 *Commission v. Germany* [1989] ECR 175: "this procedural autonomy is not absolute. It is limited by certain essential mandatory rules of the legal system. These mandatory rules, which are capable of modifying or even excluding the application of rules of domestic law, include the requirement that the exercise of a right or the implementation of an obligation flowing from Community law [...] should not be made virtually impossible" (pp. 6 & 7).

[228] This is the list Poillot-Peruzzetto (1993:181) suggests.

[229] Namely Articles 85 and 86 EC Treaty.

[230] See for instance Article 12 of the Council Directive (of 25.7.85) on the Approximation of the Laws of the Member States Concerning Liability for Defective Products.

[231] Steindorff (1977:138-9) contends that agreements of a private law nature which violate Article 59 EEC Treaty are null and void.

has progressively introduced conflict rules and mandatory provisions.[232] This trend has a twofold effect. On the onc hand, it harmonises legislation of Member States. On the other hand, it delineates a Community system of mandatory legislation which contemplates the most diverse areas: conflicts of laws in labour relations within the Community;[233] the posting of workers;[234] Social Security;[235] the approximation of the laws of the Member States concerning liability for defective products;[236] the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a time-share basis;[237] unfair terms in consumer contracts;[238] insurance law (life and non-life insurance);[239] Community mark;[240] the return of cultural objects unlawfully removed from the territory of a Member State.[241]

These texts are concerned with matters of special sensitivity for Member States. Indeed, these matters usually come under the scope of mandatory legislation since they protect weak parties and State interests. Such a tendency may be reproduced at this level of secondary legislation. In broad terms it is possible to extract two main concerns steming therefrom.

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[232] Clear examples are Regulation No. 1408/71 of 14.6.71 (OJ C138/1 of 9.6.80) on social security matters or Council Regulation No. 2137/85 of 25.7.85 (OJ L199/1 of 31.7.85) on EEIG. The current Community regulation of (bilateral) conflict rules is the result of the articulation of Member States' unilateral mandatory rules. In this sense, Forlati Picchio,1983:183.

[233] Proposal for a Council Regulation, OJ C 49/26 of 18.5.72. This text reflects most of the categories individuated in chapter I (3.2.c.iii).

[234] Proposal for a Council Directive 93/C 187/07, OJ C187/5 of 9.7.93.

[235] Council Regulation 1408/71 of 14.6.71, OJ L149/2 of 5.7.71, and its consequent modifications.

[236] Council Directive of 25.7.85, OJ L210/29 of 7.8.85.

[237] Parliament & Council Directive 94/74/EC of 26.10.94, OJ L280/83 of 29.10.94.

[238] Council Directive 93/13/EEC of 5.4.93, OJ L 95/29 of 21.4.93. Against the mandatory nature of this legislation, see Dubuisson,1994:568ff.

[239] Second Directive Non-life Insurance, 88/357/EEC of 22.6.88 (OJ L 172/1 of 4.7.88); Second Directive Life Insurance, 90/619/EEC of 8.11.993 (OJ L 330/50 of 29/11/90); third Directive Non-life Insurance, 92/49/EEC of 18.6.92 (OJ L 228/1 of 11.8.92); third Directive Life Insurance, 92/96/EEC of 10.11.92 (OJ L 360/1 of 9.12.92).

[240] Council Regulation No.40/94 of 20.12.93, OJ L11/1 of 14.1.94.

[241] Council Directive 93/7/EEC of 15.3.93, OJ L 74/74 of 27.3.93.

Firstly, the need to ensure a certain level of Community protection, moreover when the applicable law comes from a non-EC State. This interest is particularly felt in relation to consumer protection, as stems from Article 9 of the Time-share Sales Directive, Article 6(2) of the Unfair Contract Terms Directive or the Proposal for a Council Directive on the protection of consumers in respect of contracts negotiated at distance.[242] This interest can also be extended to the protection of workers.[243] The second concern focuses on fostering the internal market and avoiding distortions in competition.[244] Two consequences follow: the imposition of mandatory rules which ensure the desired levels of protection and the correction of Member State's private international legislation (mainly the interpretation and application of State mandatory rules).

Thus, an incipient web of Community mandatory rules is progressively defined in parallel layers to Member State's mandatory rules. Although there is no clear pattern about the territorial applicability of such rules, it can be advanced that it tends to be activated when the issue exhibits territorial connection to the EU.[245] It has been contended that nevertheless, when such specification is lacking, the minimum protection ensured by the Directive is imposed on the Member State's conflict rules irrespective of the connection to the territory.[246]

The articulation of these two layers (Member State and Community) becomes an essential

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[242] Parliament & Council Directive 94/74/EC of 26.10.94, OJ L280/83 of 29.10.94; Council Directive 93/13/EEC of 5.4.93, OJ L 95/29 of 21.4.93 and Proposal in OJ C308/18 of 15.11.93 respectively.

[243] See the Proposal for a Council Regulation Concerning Conflict of Laws in Labour Relations and the Proposal for a Council Directive Concerning the Posting of Workers.

[244] As results from Recital 1 of the Time-share Sales Directive, Recital 6 of the Unfair Contract Terms Directive or Recital 1 of the Liability for Defective Products Directive.

[245] See for instance Article 6(2) of the Unfair Terms Directive and Article 9 of the Time-share Sales Directive. However, it is noted that in the Proposal for a Council Directive on Contracts Negotiated at a Distance no connection of this kind is envisaged.

[246] This could be the case of the Directive on the Liability for Defective Products (footnote 236) when the product elaborated and distributed in the EC produces a damage in a non-EC State. The application of the law of the latter (as results from the game of the conflict rules) may not deprive the consumer of the protection granted by the Directive. Cerina (1991:362) contends this is so because the fundamental protective provisions of a Directive have become public policy in Member States.

question for the correct functioning of the system. In other words, how are EC rules and the Rome Convention to be read? Such articulation may be easily attained where secondary Community law and the Rome convention rules are intended to govern separate aspects of a sector. This is the case of insurance law or cultural goods protection. While the regulation of insurance issues when the risk is located in EC territory pertains to the scope of the Directives, the application of the convention is reserved to insurance where the risk is located outside the EU sphere. Although clashes are not possible, a certain interrelation still exists between Directives and convention. Indeed, the later may still be referred to as *lex generalis* when some particulars are concerned, namely material and formal validity of contracts or scope of applicable law.

More complex is the situation where the Directives exhibit a (totally or partially) coincident scope with the convention. This is the case for instance of legislation concerned with consumer protection. In other words, from a Community viewpoint the question is the following: is the protection ensured by the Rome Convention system of mandatory rules sufficient to satisfy the criteria set in the Directives? One could cast, on the contrary, some doubts about the sufficiency of the protection aimed (and afforded) by the Directives from a national viewpoint. Indeed, the convention may provide higher protection than the Directives. In this sense, several criticisms have been raised against Community secondary legislation, since it neglects the criteria set in the convention.[247]

Admittedly Article 20 of the Rome Convention foresees the supremacy of Community law (and State implementing legislation) over the provisions of the convention. Such solution may not be contested as directly applicable Community rules are at stake (this would be the case if the Regulation on Employment Contracts entered into force). The clash, on the contrary, may arise with all its impact as regards Directives unless the latter take into consideration the criteria set in the Rome Convention. The problem would be simplified if the implementation of the Directives was already satisfied with the rules established by the Rome Convention. If this were so, conflicts between the two levels of mandatory protection would be avoided.

[247] Jayme & Kohler (1995:38) insist on this fact as regards Directives drawn on the basis of Article 100 EC Treaty. One could contend that the Declaration on the Rome Convention has indeed remained a dead letter (see footnote 20).

Such has been argued to be the case of two Directives, namely the Unfair Contract Terms Directive and the Time-share Sales Directive.[248]

Further uncertainty may arise where not all Member States have timely implemented a Directive. This hypothesis gave rise to a series of judgments in Germany in relation to Directive 85/577.[249] Such a situation causes serious problems. A Community viewpoint would invoke the principle of supremacy and argue that the Directive has direct effect where its text is sufficiently clear.[250] Such a criterion encounters difficulties though since the text of Directives is not always so clear and if it were, it would entail to admit the horizontal effect between particulars.[251] A coordinate reading in both Community and private international law terms seems necessary to find an adequate response to this problem. It could be suggested that a sort of conflict rule which decides in favour of the implemented rule prevails where the second State has not implemented it in time.[252] Otherwise, it may be deemed that implemented law constitutes a mandatory rule in the sense of Article 7(2) and

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[248] In this sense argues Fumagalli (1994:15-32) and Jayme and Kohler (1995:23ff). The latter consider that when the Directive comes within the sphere of the convention, the protection ensured to consumers by Article 6(2) of the Unfair Contract Terms Directive and Article 9 of the Time-share sales Directive, is already guaranteed by Article 5 (if the conditions of the second paragraph are fulfilled) or Article 7 of the convention (where the case does not come within the second paragraph's criteria). Member States which have put a reservation on Article 7(1) should find, thus, a way to save the protection sought. Jayme & Kohler suggest as the best solution to withdraw from the reservation unless another means of applying the foreign (more protective) rule is foreseen in the national implementation of the Directives.

[249] The Gran Canaria cases concerned German tourists that had bought, during a tour in Spain, goods produced by German companies which were offered to them by Spanish companies and were to be delivered in Germany. When those tourist-consumers decided to withdraw from the contract in exercise of the right conferred on them by the Directive on Contracts Negotiated Outside Business Premises (of 20.12.85, OJ L372/31 of 31.12.85) they could not since Spanish law (admittedly *lex contractus*) had not implemented the Directive in time. The question arose then as to the applicability of the German implementation of the Directive or the direct application of the latter.

[250] In this sense decided OLG Hamm (1.12.88) IPRax, 1988,242 and OLG Celle (28.8.90) IPRax, 1991,334.

[251] Seemingly such reading is not possible after case 152/84 *Marshall* [1986] ECR 723.

[252] In this sense could be read the solutions reached by some German courts. The difficulty which rises here is the election of the mechanism through which to introduce the implemented rule. Thus, LG Hamburg (21.2.90, NJW-RR, 1990.495) and OLG Frankfurt (1.6.89, IPRax, 1990,236) have recourse to Article 3(3) (Article 27(3) EGBGB) arguing that all the elements of the contract were linked to Germany (although Spanish law was chosen as *lex contractus*). Admittedly this reading is contestable and this seems to stem from the judgment given later on by the BGH (19.9.90, IPRax, 1991,329). OLG Stuttgart (19.5.90, NJW-RR, 10990,1081) on its side undertook an analogic application of Article 5(2) (Article 29(1) EGBGB). However, this option does not seem either correct as the conditions to apply such provision were absent.

must therefore apply.[253] This proposal is not acceptable since it would entail a review by Member States of the compliance with EC law by another Member State. Such a possibility is excluded by EC law. As will be seen later on, a correct reading could be undertaken instead on public policy terms.[254]

A consequence of the articulation of these rules is the absolute equivalence of Member State mandatory rules. Since they satisfy the requirements claimed by Directives, the protection they afford is indistinctly applicable. It should be noted however that where the terms of the Directive are not so precise the margin for deviation left to States is bigger and the latter may profit from this to introduce by means of this valve the specificities of national legislation (admittedly under general good requirements). Where the equivalence of Member State mandatory rules is assumed, the deciding element to prefer one or the other would become the presence of a close link, such as territorial connection.[255] The general criteria advanced in the first point of this part may be reproduced here. Thus, forum mandatory rules would prevail over foreign mandatory rules unless this entailed a hindrance of the market fulfilment.

In general terms, though the articulation of the two systems can be saved, the evaluation to be made is not positive. A proposal may be advanced, namely the elaboration in the long run of a set of conflict laws in (civil and commercial) contractual matters based on the equivalence of Member State mandatory rules -in the same manner that it has happened with social security legislation in the European Community. In the meantime the difficulties arising could find a solution in the ECJ's framework. Admittedly membership to the EU will continue to shake the national systems of private law, as will be seen in relation to public policy.

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[253] Jayme,1990b:221.

[254] See point 3.3.

[255] Jayme & Kohler,1995:22.

c. Concluding remarks

The introduction of several provisions regarding mandatory rules is evaluated in a positive manner. Firstly, because it collects the most recent trends in private international law and a clear tendency to reflect material concerns. Secondly, because such rules protect the equality of bargaining powers and reflect State concerns of protecting weaker parties. Thirdly, because it endeavours to pay heed not only to domestic mandatory rules, but moreover to other (even non-EC) State's mandatory rules. The latter may find application as part of the proper law or even where they are not proper law. This is so irrespective of their private or public nature.[256] Presumably this could only happen in a framework of States sharing common (economic) interests.[257] Despite the criticisms raised against Article 7(1), the latter has not meant a real revolution in the European area for it reflects the existence of this community in Europe, together with the consecration of existing trends in private international law.

This initial positive evaluation encounters however some negative remarks. Indeed, the convention leaves broad lines of definition when it refers to these rules, a fact which leads to uncertainties and divergent interpretations. Domestic and international mandatory rules can be easily mixed; the obligatory or optional character of their application is not an undisputed matter; the relation between them is far from clearly set and it may favour *depeçage* of contracts by virtue of the several mandatory rules that may govern. A further criticism concerns the partiality of the afforded protection which is only attainable *a posteriori*.[258] It is further alleged that some contracts which in most legal systems must comply with mandatory requirements (e.g. leases of immovables and life and casualty insurance contracts) are left to the free choice of the parties.[259] Moreover, even where such protection is

[256] Although the convention is concerned with private law obligations, the forum will have to deal nevertheless with the effects of contravention of public law regulations of a country, upon contractual existence and remedies. The latter will necessarily fall within the province of applicable law and mandatory rules.

[257] Fallon,1984:171; Virgós Soriano,1986:819; Giardina,1981:814.

[258] Zanobetti (1990:58) insists on the fact that this system does not ensure legal certainty. Moreover, she argues that since most of the relationships involving consumers will not finish in court, the granting of more favourable protection is not necessarily secured.

[259] Lando,1987:184-5.

foreseen, it is defective since it is afforded solely to two categories of weak parties, namely consumers and workers (although admittedly, they are probably the most relevant ones in contractual relationships).

A last and more basic criticism focuses on the risk of definitively excluding party autonomy. If the ilimited recourse to party autonomy is to be avoided, this should not lead to an excesive State dirigism of international contractual relations. Moreover, this attitude runs counter to the liberalising system promoted by the EU, which Member States cannot ignore. The ECJ has acknowledged party autonomy as a principle governing contractual relations in the Community framework.[260] This acknowledgement is in accordance with the progressive restrictions that Community law imposes on exceeding protection of the market by Member States with controls such as the general good. Indeed, mandatory rules, and their integration in the Community sphere reflect the tension which exists between the Union and its Member States, the clash between market liberalisation and State dirigism.

It is important to highlight the essential role that the judiciary assumes in order to solve this tension. Indeed, it is for judges to find a balance between an indiscriminate use of party autonomy and the excesive imposition of State control of the market by means of mandatory regulation (also with a Community perspective). This is not a negative feature by itself, but it must be borne in mind that judges may not be able to control all the variables at stake. They will probably have to rely on their own knowledge since the collaboration of the parties seems difficult. Indeed, weak parties probably will be ignorant of the existence of more favourable rules that they could invoke. It may also be pointed out that the risk to put in evidence the infringement of mandatory legislation will lead the parties who are aware of the applicability of such mandatory rules to remain silent.[261] The judge may tend to incur in the easy escape of having recourse to the system he knows best, his own one, either by applying the national mandatory rules or by invoking the forum's public policy.[262]

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[260] Case C-339/89 *Alsthom Atlantic* [1991] ECR I-181.

[261] Rigaux,1977:365.

[262] Hopefully, examples in the opposite sense may be put forward: the *Bundesarbeitsgericht* (24.8.89, Der Betrieb, 1990,1666) ruled on a contract of employment concluded in England between two English parties and to be performed in a German ship navigating between the Netherlands and the United Kingdom. In the absence of choice

3.3. Public policy

In the same line of The Hague Conventions on Applicable Law, the Rome Convention includes a provision on public policy in Article 16. According to it, application of a rule of the law of any other country specified by the convention *may* be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.[263] Since no case law as regards the invocation of Article 16 is available, these considerations remain rather theoretical.

The reservation in favour of public policy is worded in precise and restrictive terms. Indeed, recourse to the exception must be limited to exceptional cases. Public policy is only to be taken into account when a certain provision of the specified law, if applied in an actual case, would lead to consequences contrary to the public policy of the forum. It must be the concrete application of the rule that offends the public policy of the forum. Since it can only be invoked under stringent conditions, the court must clearly specify the grounds that lead it to uphold the objection.[264] Therefore, no *a priori* judgment on the offense that the law in abstract may entail is a valid parameter to admit the exception. The criterion to evaluate such offense is in the *manifest incompatibility* with the public policy of the forum.[265]

The provision of public policy must also find accomodation with the complex web of mandatory rules. It has been contended that, in case of conflict, the clash should be solved

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of law the German court considered that English law had more connections to the contract, although it was seemingly less protective than the German law. It is interesting to note that the BAG rejects the recourse to public policy since the principle of consumer protection in German law admits restrictions and therefore may not be assumed as absolute.

[263] These are the words of the English version of Article 16 of the convention. This version of the text adopts the French heading in order to indicate that the provision's scope is limited to public policy of the forum in the sense of private international law, rather than in the sense of including domestic public policy. As Kaye (1993:345) points out, the French term *ordre public* has a broader connotation than the English private international public policy approach.

[264] Report, p.38.

[265] It is interesting to note that the Rome Convention explicitly refers to the manifest character of the incompatibility, in the same line as The Hague conventions. In contrast, the 1968 Brussels Convention on Jurisdiction neglects this 'correction'. Nevertheless, the 'manifest' incompatibility qualification does not seem to add much to the understanding and application of the notion.

in favour of the public policy provision.[266] Although this assertion is admitted as essentially valid, it is also contended that the community of interests that underlies the admission of foreign mandatory rules in the forum would restrict the recourse to public policy to a large extent. Indeed, the acknowledgment of foreign mandatory rules in the forum entails a recognition of forum public policy principles similar to the former rules. Where this is so, it seems nonsensical to admit a community of interests -by giving effect to the foreign mandatory rule, to then reject the rule on grounds of forum public policy. The correction that application of foreign mandatory rules in the forum may undergo on grounds of public policy is limited. However, the impossibility to renounce to a last safeguard clause in the forum implies admitting the theoretical superiority of public policy in the sense of Article 16.

Under the light shed by the preceding comment, which are the parameters that should guide the application of public policy? Indubitably, the principles and values that inspire the legal order must guide the judge.[267] In addition he must remember that the convention is included in a more complex web of Community regulation. Therefrom arises the obligation for courts to apply public policy in such a manner that it does not hinder Community freedoms and aims. In this sense, application of public policy should not lead to (overt or covert) discrimination. If public policy appears as an indiscriminate means of favouring recourse to forum law, its application should be rejected. The same applies where public policy is used to systematically exclude application of foreign mandatory rules. Indeed, one of the dangers that threatens the text of the convention is that it permits one to have recourse easily to public policy if particular mandatory rules are too narrowly construed.[268]

Once public policy has been activated, the question is posed as to the consequences of such application. In other words, it must be defined which is the law (if any) that should govern if public policy applies. Seemingly the answer will be found according to the Member State

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[266] Kaye,1993:350. In the same line, see Article I.1 of the Resolution, Ann. Inst. int. 56 [Wiesbaden session on 11.8.75] 550).

[267] The clearest 'translation' of this requirement is to be found in Article 6 EGBGB - which admittedly transposes Article 16 of the convention. Article 6 EGBGB incorporates as an evaluating parameter the respect of fundamental rights as granted by the German legal order.

[268] In this sense, *"International Insurance Contract Law: the Directives"* (1993:140).

legislation. Frequently, the non-application of a foreign rule of law on grounds of public policy will simply have the consequence that the contract is upheld or struck down, in contrast to the result that would have ensued from operation of applicable law. In some cases, however, a substitute rule of law may be needed in order to replace the inapplicable foreign law. It is not excluded that Member State law substitutes the rejected rule, but always with the restrain that it does not hinder Community aims. Further solutions could be advanced. If the rejected rule is a mandatory rule, it is possible to have recourse to the law that governed the situation (according to the rules of the convention) before the former was given effect.

In this context it can be queried to what extent the application of public policy permits a judge to control the application of a provision of Member State legislation implementing Community law. From a purely formal viewpoint such a contention would provoke the same criticisms that came up in the sphere of the Brussels Convention.[269] Neither from a material viewpoint would it be reasonable: if Member States have implemented EC law the outcome must be similar in the whole Community. Two points should be noted though. Firstly, the implementation of EC law still leaves a margin for divergence in Member State's legislation. Secondly, EC law has not excluded the recourse to *ordre public* between Member States when EC law is at stake. If this is so, the application of public policy is still permitted, provided that such application respects the above mentioned criteria namely, 'manifest incompatibility' and non-hindrance of Community aims.

As argued in the Brussels convention sphere, the problem is to be rephrased: would the Member State infringe EC law if it applied a non-implemented Directive? If this is so, then recourse to public policy may be permitted. Furthermore, it could be wondered whether this is not the correct framework in which a Community *ordre public* could find application. The reference to EC public policy made by the Reporters of the Convention would find then all its sense.[270]

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[269] See footnote 80 and accompanying text.

[270] See the comment on Article 16 in Giuliano & Lagarde Report (OJ C282/1 of 31.10.80). Probably the Reporters were not aware of all the implications that this affirmation entailed.

Indeed, the non-implemented law may be rejected on the basis of EC public policy. This technique ensures the supremacy of EC law through private international law channels and avoids the disruptions that a direct (when possible) application of the Directive would entail, namely horizontal effect. It is in these terms that the problem raised in the Gran Canaria cases may find a solution. The difficulty that the judge would then encounter is the effects of such a recourse to public policy: admittedly the notion only ensures a minimum without making a choice in favour of one or another rule. Would the German court simply declare that the contract is null and void or would it have recourse to an implemented law where the right to withdraw is admitted? Although the recourse to forum implementation is highly likely, the equality of Member States rules is thus ensured. Seemingly no definite solution may be given. The court where the question raises has to evaluate the effects in the forum of the substituted rule also as regards the fulfilment of EC aims. In other words, its actuation may not introduce any hindrance. Read under this light, the 'control' of Member State's legislation by another Member State finds explanation.

It results that the application of public policy is a very delicate matter entrusted to Member State courts and judges. It entails essential choices which affect not only the national legal order (that it safeguards) but also the fulfilment of supranational aims that claim priority. In this sense, public policy may find limited application between Member States, but preferably would be invoked as regards non-Community countries. A contention of the kind is particularly clear in areas such as insurance law where the convention is applicable if the risk is located outside EC territory. The same applies in banking law where the finantial institution has a non-EC nationality since, according to Article 4, the most connected law will be that of the State of origin of the bank. Seemingly, the progressive uniformation of economic legislation introduces similar provisions in State legislations. Admittedly, it is not because State legislation does not foresee the provision foreign law puts at stake that it necessarily runs counter State public policy. Despite these remarks, it is still possible to admit that recourse to public policy might be necessary.[271]

[271] Dubuisson (1994:615) suggests in relation to insurance law, that a foreign law could be rejected where the latter does not know the indemnity principle as known in forum law, where too large exceptions to the prohibition to cover intentional fault are admitted or where it permits that the insurance holder has no interest that the risk takes place.

Once again, the role that the ECJ assumes as interpreter of the convention is underlined. Its interpretative competence will help to shed some light on the boundaries of public policy. Questions like the general scope and meaning of public policy are matters for reference to the ECJ for interpretation under the Protocol. It has been argued that questions of application, such as the actual decision upon whether a rule of law falls within such a public policy exception, is one solely for the national forum's courts and not for the European court to adjudicate.[272] However, probably the ECJ will also control the application made by Member States of the notion.[273] Two other essential questions should also be clarified by the Court. Indeed, it is submitted that the ECJ is in the best position to interpret the relationships public policy may entertain with mandatory rules and to delimit what should be understood by the "Community public policy" as referred to by the Reporters of the convention.

3.4. Concluding remarks

The Rome Convention foresees a complex web of means to defend Member States' legal orders, both in the shape of public policy and mandatory rules. It also provides a mechanism of cooperation by setting the framework to favour the respect of mandatory rules of the other Member States. Such cooperation is enhanced by the Community regulation in some of these areas. Indeed, the harmonisation of State's legislation reduces the possible clashes between Member States' mandatory rules. Other problems may arise, however, like the absence of timely implementation of EC legislation of all Member States. Nevertheless, within the European Union the pursuance of the same aims imposes almost the interchangeability of the mandatory rules of the Member States.[274] Precisely because of this, the role of public policy is severely reduced.

At the same time Community regulation is bringing to light Community mandatory rules. These rules reflect the Community general good in the same manner that State rules reflect

[272] Kaye,1993:349.

[273] See footnote 137 and accompanying text for the same criticism in relation to the Brussels convention.

[274] See Jayme & Kohler,1995:22.

national general good - in the terms permitted by the Community. Such rules incorporate material concerns that have to relate with the criteria set by the Rome convention. Whether such relation is taking place in a correct manner is still to be debated. Thus, a national layer and a Community layer coexist, the former corrected by Community criteria. Seemingly, the evolution of the system could lead one to elaborate in the long run Community conflict rules which take into consideration Member State and Community mandatory rules as well as public policy principles. If this tendency proves to be the correct one, conflicts of mandatory rules will disappear within the European Union, which would exhibit a single pattern for its relations with non-EC States which is completed with the progressive delimitation of a Community public policy.

In this procedure the role of judges cannot be sufficiently underlined. They bear the responsability to have recourse to public policy and mandatory rules in correct terms. The responsability is increased at this level because of the little help parties will offer. If parties are usually unaware of the existence of national mandatory rules, such phenomenon is moreover accentuated at the Community level. It is for the judge to interpret Community mandatory legislation. Community secondary legislation implemented by Member States and the Rome Convention must find a harmonious reading. An essential guideline will be provided by the Community general good that will delimit the understanding of national mandatory rules (and also *clauses spéciales*). The judges risk being overwhelmed by this bulk of combinations. Trust is put in their good sense and commitment to the Community. It is important that the judge takes all the Member States' mandatory rules on the same footing when implementing Directives. In a Community framework, it is not only a question of reciprocity but also of legal coherence, since the same rule is at the basis of the (fifteen) implementations. National judges will no doubt find crucial help in the ECJ. The latter is called on to play a fundamental role since it may elaborate the criteria that protect the interests linked to the market functioning and the general values of Community legal order.[275]

[275] Treves,1983:41.

4. REREADING MEMBER STATES INTERNATIONAL PUBLIC POLICY

From the preceding pages it stems that traditional conceptions of application of the clause of international public policy are, if not superseded, at least deeply affected by requirements of Community law in the relations between Member States. This point tackles the terms in which international public policy is then revisited.

Member States have renounced to a part of their sovereignty in the context of the European Community. Has this renounce also implied the same loss as regards other Member States? It could arguably be so.[276] If it is so, what are the limits of the exercise of sovereign powers? To what extent may a Member State have recourse to its own notion of public policy against other Member States? Some contradictory facts can be singled out. On the one hand a certain unification of the interests, aims and policies of the Member States consequently reflects in a convergence of principles. In this sense, it appears hardly conceivable that the principles of one State might run contrary to those of another Member State. However, conflicts may arise when two different principles are at stake or when the concrete development of such principles in the shape of rules is concerned. On the other hand, the EU places at its basis the respect of the idiosyncrasy of Member States, which admittedly is mirrored in State public policy. Thus, Member States can keep a last safeguard clause, even where a Community interest exists.

The question arises to establish the correct limits of application of public policy in the EU framework. As a fundamental guideline, it is assumed that recourse to public policy is not allowed when it hinders Community aims: "when the national Courts apply their national law and the private international law of their State they must do so in a way which is in keeping with attainement of the objectives of the Treaty. Thus a strained and consequently unsuitable interpretation of the principle of *ordre public* for example might in fact constitute an infringement of the EEC Treaty".[277]

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[276] Ortino (1993:257) contends on his side, that this loss results also in a gain, since Member States become likely to define the other Member States' public policy.

[277] Case 15/78 *Koestler*, [1978] ECR 1971 A. G. Reischl, p.1988.

Such a criterion is completed by the obligation of cooperation between Member States as enshrined in Article 5 of the Treaty. It is argued that the principle of solidarity among Member States imposes the respect and application of their rules, also those encompassing public law rules of the other Member State.[278] The evolution of private international law promotes solidarity so as to include the respect and application of mandatory rules of Member States. Another possible reading of this cooperation principle would exclude the excesive recourse to public policy in order to impose forum law. A persistent attitude in this sense would threaten the market.

The fulfilment of Community freedoms sets thus a limit to public policy. In this sense, the strict limits in which public policy in the sense of the Treaties is enshrined, may provide certain guidelines to this review of international public policy.[279] Thus, recourse to *ordre public* with a purpose of protecting national economy should be avoided. It furthermore means that non-discrimination between EC-nationals must ensue from the application of such notion and it entails the adjustment to the ECHR. Such control takes place when application of the public policy comes within Community scope. Once again the problem is focused on the delimitation of the scope of Community law. Seemingly, the cession of sovereignty which allows such control by the EC is mainly restricted to economic matters. Thus, economic public policy of Member States is more likely to undergo such restriction. The question arises whether areas other than economic may also be affected by this loss of power and consequently come under Community control. Could certain areas of private law where public policy is particularly active (e.g. family law) be subject to a reading under Community parameters? The potential expansive character of EC law may lead one to so conclude. The Court has already opened a door to such enlargement in relation to Member State's immigration law, since this is an area likely to have effects on the market.[280] If the ECJ

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[278] Drobnig,1970:539.

[279] See point 1.3.b in chapter III.

[280] "The situation of employment and, in more general terms, the improvement of the conditions of life and work within the European Community may resent of the policy followed by Member States as concerns workers provenient from third States... it is necessary to compel Member States' immigration policy -as regards non-Member States- to take into account common policies and actions undertaken under the Community level, particularly within the labour market in order not to hinder its results" (p. 16 Joined cases 281, 283, 284, 285 & 287/85 *Member States v. Commission* [1987] ECR 3203).

continues this stride, the enlargement of EC competences towards civil law matters would consequently ensue.[281] A certain limit stems nevertheless from Treaty provisions, since these matters reflect thei dyosincrasy of Member States, and so they should be respected by EC law in compliance with Articles 3 and 128 after Maastricht Treaty.

On what grounds may the control of public policy be undertaken? In other words, what are the parameters of the correction? The only case where recourse to the international *ordre public* of a Member State was questioned, namely *Koestler*,[282] solved the issue on grounds of non-discrimination. The case concerned the action for recovery of the account owed by a German national to a French bank. This debt resulted of the time-bargain orders carried out in the stock market by the former on the instructions of the defendant. The German Court contended that recovery of a debt arising out of claims on time-bargain was contrary to the German public policy. The question arose whether such interpretation was in accordance to Community liberalisation of the provision of services. The Court of Justice settled that since the measure in question was non-discriminatory, it could be permitted under Community law. The judgment, which has met negative readings,[283] probably would find another justification if submitted now to the Court, and would confront the recourse to German public policy with the criteria of necessity and proportionality. Moreover, the link of the case to German public policy was indeed weak, since its invocation relied on the change of domicile of the debtor from French to German.

To these requirements of non-discrimination, necessity and proportionality responds precisely the criterion of the general good as results from the evolution of Community law and case law of the ECJ. The correct understanding of the general good restricts such control to the extent it comes within the Treaty scope. Thus, recourse to the public policy exception

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[281] Already in case C-168/91 *Konstantinidis* [1993] ECR I-1191 the ECJ pins down the importance of the name in the provision of services. Other cases may be imagined: the free movement of workers may have repercusions in the regulation of family allowances; cultural goods protection contemplated by Community law also will entail a review of inheritance transmisssion of property, etc.

[282] Case 15/78 *Koestler*, [1978] ECR 1971.

[283] See Rigaux,1993b and Dubuisson,1994. These criticisms stress the fact that the Court ignored the effects of the application of such a exception to rely on a simple discrimination test.

would be admitted where no harmonisation has taken place, where it is not discriminatory and where there is no other means of attaining the result which is less restrictive to market completion than this one. Although stress has been put in the absence of harmonisation so that the public policy could be operative, it is contended that in presence of harmonised legislation recourse to public policy is not excluded.[284] Indeed, in the latter case, recourse to public policy is still possible by means of Article 16 of the Rome Convention, in those areas where its sphere may coincide with Directives.

These reflections must be extended to cover mandatory rules, fundamental expression of the general good interests of Member States. Community general good, which defines the protective concerns of the Union, will delimit the conditions of application of national mandatory rules. The latter may not hinder the fulfilment of the internal market unless this hindrance is justified by general good reasons. The control of State mandatory rules is nevertheless limited to the European Union scope. That is, it is only possible in the sphere of the EC Treaty. However, even where this condition is fulfilled, not all the mandatory rules within the scope of the Treaty shall be subject to this control. Only essential features with direct and relevant incidence in market fulfilment are likely to undergo such control.[285]

Which are then, the features subject to review? The control that Community institutions are likely to impose on Member States' public policy concerns both principles and rules. A basis for this control can be deduced from the ECJ's case law.[286] Such control covers indistinctly applicable law and recognition of foreign judgments regardless of the basis underlying its invocation: Constitution or human rights. The following cases can be thought of:

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[284] Drobnig (1970:539) claims the necessary absence of harmonisation and he consequently contests enshrinement of the public policy exception in the 1968 Brussels Convention on the Mutual Recognition of Societies. On the contrary, if it is admitted that public policy applies in relation to contractual areas where there has been harmonisation (for instance in relation to consumer law), one cannot see why it would not be the same in society matters.

[285] Radicati di Brozolo (1993:417) suggests -in relation to insurance service provisions- that only those mandatory rules which hinder the conclusion of operations legally permitted in the country of origin or those which modify the content or affect the essential conditions and characteristics of the service are subject to such control.

[286] In case C-339/89 *Alsthom Atlantique* [1991] ECR I-181 the Court establishes that a rule laid down by courts may also fall within the prohibitions of the Treaty.

1. Application of public policy in relation to both applicable law and recognition of judgments, to the extent that it hinders one of the freedoms of the founding Treaty. Such a position may be furthermore emphasised if free circulation of judgments is addressed in terms of the fifth freedom of the EC. In any case, since the recognition of foreign judgments favours the fulfilment of the market, the control would be justified.

2. Application of forum mandatory rules if such application hinders the free movement in the market by unduly restricting the choice of law according to the Community criteria and is not justified by reasons of general good. This could be clearly the case of consumer protection[287] and intellectual property.[288]

3. Application of forum mandatory rules which are discriminatory.

4. Application of third State's mandatory rules if recourse to them is not duly justified and entails negative effects on the market as well as non-application of Member State's mandatory rules when they are likely to be applied. Possible examples mind regard mainly public law rules, as tax law, exchange control or competition rules.

5. An excesive control of the mandatory rules of other Member States on a public policy basis. Such control is excluded when it implies disrespect of the principle of mutual recognition and/or when the mandatory rules already incorporate the protection that public policy ensures.

Who is charged with this correction of the use of public policy? Seemingly, it is for State judges in the first place to undertake a correct reading of the notion. Further control, however, could be entrusted to the ECJ. Possibly the adequate means of exerting such control would be an action ex Article 170 EEC Treaty. The recourse to this means would be justified if the Member State's application of public policy hindered EC freedoms. Only sistematic infringements should give rise to this procedure. Summing up, if recourse to public policy is allowed in very restricted terms, membership to the EU further limits recourse to the notion.

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[287] If a Member State wants to impose its mandatory rules on consumer protection, it see regard whether the State of origin does not already cover such interests (since the ECJ has made clear that restrictions are only admissible insofar as the rules of the State of origin do not already achieve the necessary level of protection). One could think of rules concerning usury, compulsory terms in credit agreements and abusive clauses.

[288] According to case 78/70 *Deutsche Gramophon v. Metro SB-Grossmärkte* [1971] ECR 487, intellectual property rights may come within the exception of Article 36 as far as they appear indispensable for the protection of such a right.

5. CONCLUSIONS

The review of these two conventions has highlighted that public policy, despite its evolutions and adaptations to the requirements imposed by the construction of Europe, is far from being a fading feature in the European area. Public policy is not substituted or eliminated because of the ongoing convergence in economic matters. Certainly, the application of public policy in the traditional sense is progressively restricted. This ensues both from the establishment of a sort of full faith and credit clause as recognition of judgments is concerned and from a progressive admission of mandatory rules in legal orders which introduce substantive concerns in the system. In spite of it, the notion remains the last safeguard clause of State legal orders. The global character of the safeguard clause explains the close link between choice of law and recognition of judgments. It appears as the mechanism which permits refusal of the application of mandatory rules which threaten the forum, while it ensures the respect of forum mandatory rules by denying recognition to a foreign judgment which has disregarded them.

Admittedly, the framework of the EU introduces new factors to be taken into consideration since it implies a review of the protective mechanisms of legal orders and the growing bulk of mandatory rules developing in the EU according to Community criteria on the one hand, and it pins down a Community position in this respect on the other.

Indeed, the application of private international law rules of Member States undergoes influences due to membership of the EU. Member States assume the responsability to interpret and apply State law in accordance with Community parameters. Consequently, the restrictive recourse to public policy is further limited within the EC boundaries in order to reduce hindrances to the market and reach further integration. Such restriction complies with the duty of cooperation between Member States embodied in Article 5 EC Treaty. Accordingly, mandatory rules appear as having the same value. In this respect, the consideration of other Member State's mandatory rules finds justifiable application. It is still possible though, that Member States have recourse to public policy against other Member State's (even mandatory) legislation. Such contention does not mean that Member States are allowed to control the compatibility of another Member State's legislation to Community law through the application

of public policy. The correct terms in which the judge must tackle the question are whether the recourse to public policy in order to reject a foreign law or decision would not entail an infringement of EC law by the addressed State. Probably the general good becomes the criterion according to which so undertake the Community reading of public policy and mandatory rules within Community boundaries.

The EU not only redefines the Member States public policy, but introduces its own protective mechanism of the EC legal order. In other words, the existence of Member States' public policy is not in contradiction with an emerging Community public policy, which may adopt procedural features as well as mandatory shape - the latter as regards both the protection of weak parties and Community public law rules. Admittedly, the conventions have provided the adequate framework for the different aspects of this notion to grow and develop. The mention of the Community public policy in the comment to Article 16 in the Report on the Rome convention appears as a prophetic sign of the features that have been here outlined.

Can a system of relation between Member State and Community public policy be advanced? It has appeared that the coexistence of the two notions is not incompatible. Probably they will grow closer due to the 'corrections' of Member States' public policy according to Community criteria. However, this does not entail the substitution of Member States' public policy by the Community's. Seemingly, in economic matters (as dealt with by the two conventions here analysed) the possibility that they become close (even equal) grows bigger. The Community general good will play an essential role in this respect. However, the disapperance of national public policy does not seem reasonable. Indeed, within the sphere of the conventions, it is still possible that Member States have recourse to their national notions of public policy in the terms referred to above.

Admittedly, the Community *ordre public* will preferably find application in confront with non-EC States. This could be so in the framework of the Rome convention, as the applicable law (either chosen by the parties or imposed by means of a mandatory rule) may pertain to a non-EC legal order. Where Member State's courts have recourse to Community public policy they act as Community courts in a sort of *dédoublement fonctionnel*. However, it is not excluded that it applies between Member States as a means of overcoming inadmissible

disruptions such as the permanence of exorbitant fora in the context of Brussels Convention or the lack of applicable law due to non-implementation of EC Directives. The central role that State courts are called to play imposes the cooperation between the national courts (possibly through the provision of information channels between Member States' judiciary) on the one hand and between Member State courts and the ECJ on the other. Indeed, the ECJ will provide the courts with further elements of evaluation so far as the identification, interpretation and correction of notions of public policy is concerned.

CHAPTER V:
EUROPEAN UNION *ORDRE PUBLIC*

INTRODUCTION

Previous chapters have undertaken an analysis of public policy from almost all possible angles. The notion of public policy up to this point has proved to be perfectly operative in a private international law sense. At the same time, the fact that this notion applies on the territory of the European Union has an essential importance as regards the definition and application of the notion. The following question arises immediately: is this set up not enough? Why should a Community notion of public policy exist?

Throughout the preceding chapters the convenience of having a notion of Community public policy has been hinted at. Moreover, it has been pointed out how many features already existing may delineate its shape and functioning. This chapter endeavours to draw more precise lines of the notion. In order to do so, the framework where this notion is generated must be set up. Therefore, some of the main features of the Union connected to private international law will be analyzed.

Once this framework has been advanced, the notion of European public policy may be studied. Two main parts have been outlined. The first one regards the possibility of the notion, that is: what does public policy mean (according to the references introduced by scholars)? what is its content? and how does it apply? The second part, tackles the relation of this notion with the notions of the Member States, since it is contended that both of them have to coexist in the European sphere.

Many of the features analyzed in previous chapters will find reconsideration here. The risk of confusions as regards the different understandings of such a notion of public policy is also present. However, this chapter intends to prove that, as argued in chapter I, public policy is still alive, it just accommodates to the needs of its time. And now the time is ripe for the European Union public policy.

1. THE LEGAL-INSTITUTIONAL FRAMEWORK OF THE EUROPEAN UNION

1.1. The European Union, a federation?

The notion of a Community public policy must be inserted in its framework. Seemingly this framework is not the same as that delineated at State level. The European Union cannot be addressed in terms of a State exerting sovereignty, on the basis of which a notion of *ordre public* could be invoked. The nature of the EU looks complex and the many works that deal with this issue do not provide a definite answer. Supporters of the federal nature find serious opponents in the supporters of the confederation ideal.[1]

As some people argue, the EU exhibits a federal structure, the temptation exists to compare it to the US and transpose the American system to the European experience. Indeed, some studies have undertaken this analysis.[2] However, there is a major difference as regards the two systems. Thus, while the US (1776-87 Confederation) has always been endowed with sovereign powers, in the European sphere States have always kept their sovereignty. Indeed, as the BVG indicates, Europe is constituted by the peoples of Europe and not by the people of the European nation.[3] The question is whether from these original sovereign State powers the EC/EU can derive sovereignty. Admittedly, sovereignty of Member States has been

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[1] In favour of the federal vision of the Community are such qualified voices as Delors (at the College of Europe, Bruges, EUROPE.DOC. (No 1576) 1,5 (October 21,1989) and Kakouris (1987:344ff). Despite the elements diverging from a federal organisation, they allege that there are many grounds to bring the EU closer to a federation namely, the existence of two differentiated legal orders -EC and Member State-, reinforced by the principles of supremacy and direct effect of EC law; the division of competences between the EC and Member States; the coincidence of territories; the so-called *dédoublement fonctionnel* of Member State organs and the role of the ECJ as a forum of settlement of competence disputes.
The idea of the European Union as a confederation of States stems clearly from the judgment of the BVG on the Maastricht Treaty (of 12.10.93, 2BvR 2134/92 & 2BvR 2159/92, at C,I.2.b. of the judgment) and has also been defended by scholars, for instance Elazar & Greilsammer (1985:112) who ascertain that "It is still early days for Europe, but the trend of European integration so far has been rather confederal than federal in character, and is likely to continue so.... Indeed, the EC is already a confederation, but a new-style one". The advantage of conceiving the Union as a confederation is in the absolute respect of Member State's sovereignty.
A third option has been advanced, namely that of the community structure, which respects the - sovereignty of - States but obliges them to redefine their self-interest according to newly defined policy goals. For this proposal, see Weiler (1991:2471ff).

[2] See for instance Cappelletti et al., *"Integration through Law"* vol. I, book 1 (1986).

[3] BVG, at C, II, [1994] 1 CMLR, 89.

restricted by means of cession of powers to a supranational entity. It could be argued that the ceded powers constitute a gain of sovereignty for the EC. However, it could be counter-argued that sovereignty may solely be acquired by a sovereign entity. The option that nobody gains these powers can then be considered.[4] In the alternative it could be deemed that the EU sovereignty consists precisely in the collective exercise of the ceded competences.[5]

The discussion on the sovereign powers of the Union may yet be protracted for long. It is argued that it should be conducted in its correct terms as regards public policy in the sense advanced in the first chapter. In other words, sovereignty does not play the same essential role that it used to play in the past decades. Indeed the immovable, omni-comprehensive notion has been substituted by the power to legislate. In an excesive interpretation consumer sovereignty has been said to have supplanted the people's sovereignty.[6] Without adhering to the latter view, it is contended that the European Union has developed a sufficient power to enact legislation that may justify comparing it to the State legislative power. Admittedly, such legislation is not the outcome of legislative organs as traditionally understood at the State level, but results from a 'non-democratic' organ as the Council. Although this system could be argued as contrary to any formulation of sovereignty, it generates its own legislation which is likely to be enforced, both in the State sphere and in the Community sphere. Such an acknowledgement is essential for a definition of Community *ordre public* since it implies that the EU has the competence to enact mandatory legislation.

Possibly a more correct approach to the notion imposes to tackle the Community public policy as a truly international public policy. If this is so, any reference to sovereignty appears as indispensable, since its imposition comes out necessarily, as a kind of *communio iuris* which is beyond sovereign powers and repartition of competence. Only the fulfilment of

[4] MacCormick (1993:16) argues in this sense that sovereignty cannot be envisaged "as the object of some kind of zero sum game, such that the moment X loses it, Y necessarily has it".

[5] See Ortino (1993:257) and the BVG in its Maastricht judgment (p. C, II, 1.a). In this line of argumentation, Hanf (1994:422) further argues that "*cette idée traditionnelle de la qualité de l'État a perdu sa pertinence. À l'heure actuelle, il convient d'interpréter 'l'étaticité' au sense d'un exercise commun de la souveraineté*".

[6] Ortino,1993:10.

European integration becomes relevant.[7] The European Union experience appears, despite the differences, as a natural prolongation of the *communio iuris*. Indeed, the European Community is organised along a much more defined pattern than the *iuris communio* had been. It is based on a complex legal system that is more precise than the general and vague principles of *ius gentium* or public international law. Furthermore, there is more than a 'spiritual link' between the Member States and the Community. Legal ties, duties and rights, obligations and commitments shape this relation in a varied way. On the contrary, other features remain untouched as concerns the relationship between the Union and its Member States. The *communio iuris* finds its guarantee in the single national systems that belong to it and will defend it against third parties. This implies the already noted existence of two levels of principles: a national level and a Community level, both created by States pertaining to the *communio iuris*. Member States assume the defence of EU values together with national values.

Paradoxically the integrative purpose of the EU will explain why the notion of public policy in the EU tends to be a relative one, as it is seemingly activated where the issue comes within EC competence, and possibly where territorial links are present. At the same time, it keeps an absolute character, as encompassing the core of the European *communio iuris* in relation to any of its pertaining States. The *communio iuris* appears as the point where value oriented choices in a framework of pluralism converge. Despite the fact that *communio iuris* cannot be understood exactly in the same terms as it was in the last century, it constitutes an interesting guiding point to a notion of Community public policy overcoming a strict view of sovereignty which helps the construction of a European Union.[8]

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[7] Kakouris,1987:345.

[8] Such an approach confirms that, as was seen in chapter I, public policy relies progressively on grounds other than sovereignty such as international solidarity, more in accordance to the requirements of contemporary world. (See footnote 20 and accompanying text in chapter I).

1.2. The private international law setup

The existence of a notion of *ordre public* which reflects a *communio iuris* excludes any reference to a system of private international law in which the notion is operative. However, it could be wondered whether it is also possible to reproduce in the EC sphere the (domestic) conception of *ordre public* as applicable in a Community system of private international law where it becomes inserted. The question arises immediately: does such a system exist?

One frequently reads about the Community private international law when referring to the Brussels 1968 and Rome 1980 conventions, despite the fact that a large majority of legal scholars do not consider them as properly Community law. This thesis, on the contrary, has sustained the Community nature of these texts, although their particular character has been pointed out (as a kind of *tertium genus*). The analysis of these conventions was already undertaken in chapter IV, and so these comments concentrate on another aspect of private international law of the Union. That is, is there a set of rules in secondary Community law concerned with private international law?

Throughout the preceding chapters, several manifestations of a Community regulation on private international law have appeared, namely in the sphere of harmonisation of State legislation. Secondary Community law introduces, with more or less success, both conflict rules and criteria of jurisdiction.[9] While on some occasions it can be said to successfully coordinate with Member State's legislation, in other contexts success is rare. An example of a successful relationship is to be found in the Regulation on the application of social security schemes to employed persons,[10] which overcomes the particularisms of Member State's mandatory rules to draw uniform conflict rules in a specially sensitive area. On the contrary,

[9] In the strict framework of the EEC Treaty, only one provision could be assimilated to a conflict rule, namely Article 215 in matters of contractual liability of the EC. As regards secondary legislation, the following pieces include conflict rules: Council Regulation (EC) No. 2137/85 (of 25.7.85) on the European Economic Interest Grouping (OJ L199/1 of 31.7.85); Council Regulation (EC) No. 1408/71 (of 14.6.71) on social security schemes (OJ C 138/1 of 9.6.80); see also the references given in footnotes 289 to 297 and accompanying texts in chapter IV. As jurisdiction is concerned, see Council Regulation (EC) No.2100/94 (of 27.7.94) on Community plant variety rights (OJ L227/1 of 1.9.94); Council Regulation (EC) No. 40/94 (of 20.12.93) on the Community trade mark (OJ L 11/1 of 14.1.94); Directive 93/7/EEC (of 15.3.93) on cultural goods (OJ L 74/74 of 27.3.93).

[10] OJ, English special edition, 1971 (II) p.416.

and despite the indications given by the States to the Community institutions, the articulation of the Rome convention with some Directives on consumer protection seems rather disappointing. Seemingly, at this level, only the interpretation by the ECJ could provide the converging point of these two uncoordinate bodies of legislation.

Other devices which have been generated in the EU sphere and may have repercussions as private international law is concerned need be referred to. One of them is the principle of mutual recognition which, as seen in relation to the general good, appears as a sort of conflict rule within the Community area. Secondly, the continuous evolution of Community law has introduced the concept of Community citizenship, which is an essential element in traditional private international law -as a connecting factor. Thirdly, the ECJ has prompted the extraterritorial application of Community rules, namely competition rules and social security rules, in the same manner that State courts apply State mandatory rules.

This picture would not be complete without a reference to several judgments of the Court where it is confronted with features of a typically private definition. These judgments result not only from the competence that the ECJ has to interpret the 1968 Brussels convention and the 19809 Rome convention, but also from its competence to interpret the above mentioned rules. Moreover, the capability of the Court to rule in private matters has been decidedly proved in the framework of Article 181 EC Treaty. In this context, the ECJ decides not only on contractual aspects of litigation but also solves jurisdictional considerations.[11] These strictly private law issues are combined with a progressive endorsement of private international law techniques.

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[11] Thus, the Court under compromise clauses, is given jurisdiction to rule on contractual matters. Thus, it has decided about contracts of the most diverse types (of private and public nature) and many aspects of contractual relationships: on the termination of contracts (Case 318/81 *Commission v. CO.DE.MI. SPA* [1985] ECR 3693), on the non-performance of contracts (Case C-209/90 *Commission v. Freilhauer* [1992] ECR I-2613), on the granting of damages and indemnities (Case 23/81 *Commission v. Société Anonyme Royale Belge* [1983] ECR 2685). As regards jurisdictional competence, the ECJ has ruled that, since it has competence to hear on the original claim (under the compromisory clause) it is also competent to hear the counterclaim arising from the same contract or facts (Case 426/85 *Commission v. Jan Zoubek* [1986] ECR 4057 at pp.11-12). It is argued that these cases, which exhibit a purely internal character, could open up to a private international framework where one of the contracting parties were non-EC nationals or entreprises.

Walrave & Koch[12] provides an example of 'tracing' the international case in the same way as State courts do. The Court was faced with a case which involved a 'foreign' piece of legislation (the UCI rules) which was located in a non-EC country (Spain, at the time of the case). The ECJ acted as a national court, verifying the existence of a connecting factor (the nature of the relationship, the place where it is created or it takes effect) to decide on the application of EC law (and find out that discrimination had taken place). Surprisingly enough, when confronted with a clear case of conflict rules where a ruling on the issue is asked, the ECJ ignored the question: in *Mrs P. v. Commission*[13] the ECJ had to solve whether a divorced woman was entitled to a survivor's pension accorded by the EC Staff Regulations to the divorced partner if the latter was not solely to blame. The parties had German and Italo-German nationality and the divorce decree had been granted in Belgium on a cross-petition of the husband to the originary petition of the wife. In the decree the wife was found to be at blame. Since the Belgian court did not consider that Mrs P. was solely to blame, the ECJ accorded the pension. Having accepted the first ground, the ECJ disregarded the other questions, namely Mrs P. contention that such a Belgian decree would not be recognised neither in Germany nor in Italy.[14]

On other occasions the Court imposes implied choices as private international matters are concerned. For instance, in *Meinhard v. Commission*[15] the ECJ inserts an incomplete rule of private international law, namely that "the existence and extent of the obligation on the part of the official to pay maintenance to his wife must in principle be determined in accordance with the law which governs the consequences of divorce". It still needs be specified which is the latter law. However, it may be understood that the Court implicitly chooses for the law

[12] Case 36/74 *Walrave & Koch v. UCI* [1974] ECR 1405.

[13] Case 40/79 [1981] ECR 361.

[14] On the contrary, A.G. Warner had analysed the convenience for the Court to develop a set of rules on private international law to be applied at the EC level. He concluded that the disparity of regulation in Member States as well as the risk to derive to judicial legislation did not advise to do so. Certainly such opinion favoured the silence of the Court in this point. Such position seems logical in the framework of a Community mainly concerned with the harmonisation of economic standards. However, the harmonisation of conflict rules in economic areas does not follow necessarily therefrom. See the divergent positions of Advocates General in this respect in footnote 79 of this chapter.

[15] Case 24/71 [1972] ECR 269.

of the State where divorce is granted. A further reference regards case C-369/90 *Micheletti*[16] where the ECJ seems to decide on the preference of Community citizenship when a choice between a non-EC and a EC citizenship is to be made.

Two cases may be considered as regards the interpretation of Community private international law rules. Case C-196/90 *De Paep*[17] solves in favour of a broad interpretation of the Council Regulation No. 1408/71 on Social Security Schemes and precludes the application of national mandatory rules in working relationships as far as it impedes the application of the conflict rules established in the latter. The choice the Court makes reminds one of a solution of a conflict of laws. The second case, C-60/93 *Aldewereld*[18], while deciding between the law of the place of residence and the place of establishment of the employer in favour of the latter, interprets Regulation No. 1408/71, giving it extraterritorial application to solve a case situated outside the EC.

The Court has sanctioned the principle of party autonomy (that is, the general freedom to determine the law applicable to contractual obligations), a basic principle of international contracting, in case C-339/89 *Alsthom Atlantique*[19]. At the same time it acknowledges the existence of mandatory rules that must be respected while contracting. In this sense, it settles that competition rules are mandatory and cannot be disregarded by a decision which is also a contract of private law[20]. Such mandatory rules may also restrict the acknowledged procedural autonomy[21].

This brief review of the ECJ's case law confirms that indeed, a private international law

[16] Case C-369/90 [1992] ECR I-4239.

[17] C-196/90 *De Paep* [1991] ECR I-4815.

[18] Case C-60/93 *Aldewereld* [1994] ECR I-2991, also solves on the application of the Regulation on social security matters.

[19] Case C-339/89 [1991] ECR I-107.

[20] Case 258/78 *Nungesser v. Commission* [1982] ECR 2015 p.89.

[21] A.G. Darmon in case 94/87 *Commission v. Germany* [1989] ECR 175, p.6.

setup exists and may be enlarged in the EU. The latter may materialise as a suitable framework in which a Community *ordre public* could be operative. Moreover, the ECJ appears as sufficiently qualified not only to interpret but, if necessary, to apply such a notion as a logical corollary of it solving conflict of laws.

2. THE GENERATION OF A NOTION

2.1. What does Community public policy mean?

The notion of public policy in the framework of the Communities exhibits a particular character to which reference has been made in chapter III. In this sense, it alludes to the notion as it stems from the Treaties. In a second sense, it is also possible to find references to Community public policy as an internal (domestic) *ordre public*. However, other references seem to give a different meaning to this notion, closer to *ordre public* in the sense of private international law. The approaches to the Community public policy have also been negative, by denying the existence of the notion. These different options will retain attention in the following pages.

a. Community Treaties sense

In chapter III reference has been made to the guide lines drawn by the ECJ on the notion as well as the nature of public policy. Here the question which arises is: can a Community notion of *ordre public* be construed? Some voices have denied the existence of this notion. It has been ascertained that

> *"il est extrêmement difficile de construire une 'notion communautaire' de l'ordre public, autonome et spécifique, destinée à garantir l'uniformité d'application du droit communautaire, et cela pour deux raisons essentielles: l'ordre public, par nature, est rebelle à toute définition conceptuelle a priori, d'une part, et, d'autre part, la répartition des compétences établie par le traité fait de l'ordre public une 'soupape de sûreté' entre les mains des États membres."*[22]

[22] Simon,1976:205.

In this line of argumentation it is further contended that

"il existe un ordre juridique communautaire mais pas d'ordre public communautaire. C'est pourquoi la Cour ne peut parler d'un ordre public communautaire mais doit faire intervenir d'autres éléments pour dégager, à titre transitoire, pourrait-on-dire, une conception communautaire de l'ordre public, sans pour autant mettre en question l'existence d'une multiplicité d'ordres publics nationaux".[23]

Such an approach would be confirmed by the words of Advocate General Mayras, according to whom "since... it is impossible to provide an exclusively Community definition of the concept of public policy which is in many aspects a relative matter, it seems more realistic to inquire precisely what limits the Treaty and the directives adopted in the implementation thereof have set on the powers of national authorities".[24]

However, this negative approach has been contradicted.[25] Indeed, the realization of Community aims seemingly entails the identification of a Community public policy:

"si la réalisation des objectifs du traité a des incidences considérables sur la définition nationale de l'ordre public et des libertés publiques, comme nous l'a montré l'arrêt Rutili, cette réalisation aboutit également à la mise en oeuvre d'une véritable conception communautaire des libertés publiques et conduit, comme nous le révèle la jurisprudence Nold, à la définition d'un ordre public communautaire, imposant à l'exercise des droits fondamentaux les limites exigées par l'intérêt général".[26]

Such an understanding presumably imposes a strong economic character to the notion. Thus, Advocate General Mayras -still sceptical about the notion, points out in an opinion, that "if a 'Community public policy' exists in areas where the Treaty has the aim or the effect of transferring directly to Community institutions powers previously exercised by Member States, it can only be an economic public policy relating for example to Community organisation of the agricultural market, to trade, to the Common customs tariff or of the rules on

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[23] Desolre,1979:40.

[24] Case 36/75 *Rutili* (1975) ECR 1219 at p.1242.

[25] Hartley,1978:152.

[26] Simon,1976:221.

competition".[27]

b. Domestic (internal) sense

As defined in chapter I, the notion of public policy in an internal sense reflects the necessity felt by the State legislator to make the public interest prevail over private will. It encompasses both essential principles and rules that impose themselves independently of the stipulations of the parties. Some of the references to Community public policy that can be found seemingly, satisfy this definition.

In a Community framework, the immediate reference to this kind of public policy points to economic matters. In this sense, it is possible to think of a Community public policy in competition law: "*il est indéniable qu'elle [la CEE] aussi fait peser son ordre public sur les contrats privés, par toutes les measures impératives et prohibitives qu'elle établit en vue d'assurer la libre concurrence ou d'y déroger. Ces defenses et prohibitions sont d'ordre public économique. Elles émanent... d'autorités économiques imposant aux contractants une technique économique*".[28] The notion can be said to affect, in general terms, whatever economic regulation. However, the latter is not the only sphere where it may possibly apply. Seemingly there exist mandatory rules in the Community "which are capable of modifying or even excluding the application of rules of domestic law, [and] include the requirement that the exercise of a right or the implementation of an obligation following from Community law should not be made virtually impossible".[29]

Thus, some scholars have gone further and have suggested that Community public policy would indeed constitute a general limiting rule to party autonomy. "*Sans doute eût-il été plus convaincant de commencer par le caractère impératif des règles communautaires pour prouver l'existence d'un ordre public communautaire... [car] la norme communautaire nie*

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[27] Case 41/74 *Van Duyn* (1974) ECR 1337 at p.1358

[28] Savatier,1965:39.

[29] In this sense, some light is shed by the words of Advocate General Darmon in case 94/87 *Commission v. Germany* [1989] ECR 175 at p.7.

en effet tout space à l'autonomie de la volonté".[30] Consequently, it has been argued that "*l'ordre public communautaire existe et est destiné à se développer, par example en tant qu'exception permettant de tenir en échec la volonté des parties à un contrat qui le viole.*"[31]

c. Private international law sense

The question arises then, whether it is possible to acknowledge the presence of a true notion of Community international public policy. In this sense, and in more generic terms, the existence of a genuine European *ordre public* has been advanced: "*Certains auteurs ont même pu parler de l'avenèment d'un ordre public européen, dont le contenu serait formé des éléments convergents décélés par l'analyse comparative dans l'ordre public national des États du Vieux continent.*"[32]

In an EU framework, the starting point stays the perception of a shared European culture. "*Dans le domaine juridique, cette culture européenne ne manquera pas de se refléter dans un trésor de principes juridiques et de normes de base qu'on pourrait dénomer l'ordre public du droit communautaire.*"[33] The delimitation of the principles which constitute this treasure will define the content of the notion of Community public policy.

> "*Si on réflechit sur ce que constitue l'ordre public du droit communautaire, on pensera en premier lieu aux droits de l'homme tels qu'ils ont été formulés dans le Traité de Rome 1950 et ses protocoles... [incorporés] dans le Traité de Maastricht*". However, "*l'ordre public communautaire a un contenu plus large que les seuls droits de l'homme... une distinction pourrait être faite entre, d'une part, des principes de droit communautaire qui expriment une valeur morale inattaquable, ou presque, et, d'autre part, des principes qui nous feront comprendre le système du droit communautaire. Il n'en reste pas moins que ces principes*

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[30] Poillot-Peruzzetto,1993:181.

[31] Hubeau,1981:216. In the same sense, Poillot-Peruzzetto,1993:180.

[32] Dudoit,1985:472. According to him public policy is the outcome of international collaboration and harmonisation. If such features exist at a Community level, the common notion of public policy should consequently ensue.

[33] Struycken,1992:275.

sont de droit impératif, les uns et les autres. Il n'est pas exclu que le même principe relève tant de l'une que de l'autre catégorie". Furthermore, "*l'ordre public du droit communautaire va comprendre... un autre principe... [que l'on] trouve énoncé dans le premier paragraphe de l'article F, [notamment] le respect de l'identité nationale des États membres.*"[34]

In other words, it could be assessed that the EU *ordre public* is construed by reference to the ECHR as a reflection of those human rights that "*expriment une valeur morale inattaquable*" and by what has been previously defined as Community public policy in the sense of the Treaties since "*la réalisation des objectifs du traité... conduit... à la définition d'un ordre public communautaire*".[35] In addition, the Community public policy is constituted by the principles and objectives of the founding Treaties.[36]

The question arises in what context would this notion apply. On the one hand, it has been advanced that Community public policy would be operative in the relations between Member States.[37] In the same line of reasoning, it has been contended that the Community public policy thus individuated would regulate the application (or exclusion) of a Member State's law. Community public policy would appear then as a kind of substantive rule according to which to solve conflicts within the EU.[38] On the other hand, other positions maintain that it should apply as regards third States: "*Nous ne nions pas qu'il puisse exister un ordre public réellement communautaire, mais cet ordre public communautaire ne pourrait être invoqué... qu'à titre d'exception dans les rapports entre la Communauté en tant qu'entité, d'une part, et les pays tiers, d'autre part.*"[39] The possibility that the Community notion applies as

[34] Struycken,1992:275,276,278.

[35] Simon,1976:221.

[36] García Rodríguez,1993:940. Van der Elst & Weser (1983:258) uphold this position in reference to the 1968 Brussels convention on the mutual recognition of companies: "*l'article 10 ["ne peuvent être considérés comme étant d'ordre public au sens de l'article 9 des principes ou des règles contraires aux dispositions du traité instituant la CEE"] confirme de son côté que les règles du Traité de Rome de 1957 sont d'ordre public international communautaire, qui a le pas sur l'ordre public de chaque Etat membre*".

[37] García Rodríguez,1993:940.

[38] Duintjer Tebbens,1994:478. In more precise terms, he suggests that Community public policy will correct the application of Member States' conflict rules if it hinders market schemes.

[39] Hubeau,1981:216. See also García Rodríguez,1993:940.

regards the relationship between the Member States and the Community, leaving the relationship with third States in the domain of other concepts has also been purported: "*la notion d'intérêt européen protège la Communauté de ses partenaires mondiaux (...) tandis que l'ordre public communautaire protège la Communauté des États membres que la constituent*".[40]

No definite position seems attainable. The same uncertainty exists in relation to other questions. Thus, there are several proposals of scholars in relation to the relation of this Community public policy with Member States' public policy. While according to some, the notion should impose itself on the national one,[41] proposals have been made about the incorporation of the Community public policy in the national public policy.[42] Lastly, others envisage a coexistence of both notions: "*soutenir par conséquent la possibilité d'une notion communautaire d'ordre public ne signifie pas du tout estimer que cette notion puisse sauvegarder exclusivement les principes fondamentaux du droit communautaire, mais les sauvegarder à côté des principes fondamentaux nationaux.*"[43]

In this complex presentation, can any conclusion be drawn? The absence of a jurisprudential delimitation of the clause given by the ECJ (which admittedly is the Community institution allowed to do it) does not facilitate the task of definition. In this context, one could be inclined to support the opinion that "it is too early to say that a Community concept of public policy has crystallized. In the circumstances national courts may be tempted to apply domestic rules...".[44] This assertion casts some doubts about the existence of a private international law notion of public policy. However, it does not exclude that the notion exists. Indeed, the most

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[40] Poillot-Peruzzetto,1993:182.

[41] Van der Elst & Weser,1983:258. In the same line, Loussouarn & Bredin (1969:507) insist on the fact that the drafters of the 1968 Brussels convention on the mutual recognition of societies "*ont manifesté nettement leur volonté (...) de marquer l'assujettissement des ordres publics nationaux à l'ordre public européen. On ne saurait, dès lors, opposer le premier à une situation dictée par les impératifs du second*".

[42] See Mayer (1991:664) and Giuliano & Lagarde Report on the Rome Convention (OJ C 282/38 of 31.10.80).

[43] Spadatora,1984:74.

[44] Lasok & Bridge,1980:74.

faithful and firm acknowledgement of its existence is to be found in the Giuliano & Lagarde Report, according to which "it goes without saying that this expression [public policy] includes Community public policy, which has become an integral part of the public policy (*ordre public*) of the Member States of the European Community."[45]

From the preceding pages it stems that the notion of public policy has found some support among scholars, who do not necessarily refer to it in the sense of the EC Treaties. Probably all the opinions advanced reflect partial sides of the notion that, no doubt, exhibits particular characters. The opinions here reproduced do not suffice to draw the profile of such notion. However, acording to them, it can be ascertained that scholars see Community public policy mainly as an economic notion that may evolve to include political shades.[46] If a genuine notion of Community *ordre public* in the sense of private international law exists, it will also fulfil a protective function in an internal sense (which affects contractual autonomy). Moreover, the fact that it is enshrined in the particular framework of the EU will also reflect in its features. Seemingly, EU *ordre public* may be a true international public policy, but also something more than that.

2.2. What is the content of EU public policy?

A definition of the content of Community *ordre public* raises the same difficulties found in chapter I. Indeed, no possible delimitation is definitely attainable without the risk of becoming immediately obsolete. However, certain guidelines may be outlined as constituting the main trends in this sphere. In this sense, the three layers identified as constituting a notion of public policy, namely ethical-moral values, national identity characteristics and economic-legal standards need then be tackled. Community public policy - as any other notion of public policy, despite its legal nature, is subject to political or contextual (economic) interferences. Such 'danger' will probably be accentuated in a framework where integration aims are

[45] Giuliano & Lagarde Report on the Rome Convention 1980, OJ C282/38 of 31.10.80.

[46] *"Si le caractère économique de l'ordre public communautaire s'impose, l'évolution du domaine d'intervention du droit communautaire risque d'engendrer un ordre public politique"* (Poillot-Peruzzetto,1993:181).

fostered. The risk of deviating to a view of public policy with political tinges must be avoided at any stake.

The EU belongs to a bigger international community, which influences it. International texts framed in such a sphere will also contribute to delimit the Community public policy. Since this is the same influence States undergo, a certain convergence between the Member States and the Community public policy can be noted. Probably the features where such convergence is noticed are at the basis of a truly international (regional) public policy. The main aspect in which such interaction may take place refers to human rights but not solely to these since the development of a certain collaboration between States as regards international trade will also have effects in the Community public policy. Public policy in the EU must necessarily reflect this plural conception of legal orders mainly in the framework of a Community which exhibits integrative purposes. These considerations shed enough light to undertake in correct terms the study of the content of Community public policy.

a. Ethical-moral values

Probably the first impulse as regards the EU is to exclude any kind of ethical reference which could be at the basis of a Community public policy. Indeed, ethics is probably the less developed aspect and one would suspect it is not likely to develop further. The delimitation of ethical (or moral) criteria at an international sphere seems rather hazardous. The delimitation of what kind of morality deserves to be protected remains a State competence. As has been repeatedly insisted, although ethical matters are addressed in the EC sphere, no agreement as to the existence of a common position in this sense may be reached.[47] Seemingly, the main difference between State and Community public policy will remain precisely at this level since the ethical layer is the element which mainly sets the differences between notions of public policy.

[47] Indeed, the ECJ has been confronted to the most diverse devices as gambling (case C-275/92 *Lotteries*), abortion (C-159/90 *Grogan*), obscene articles (cases 121/85 *Conegate* and 34/79 *Henn & Darby*), prostitution (cases 115-6/81 *Adoui & Cornuaille*), etc. The main handicap of the international sphere - as the Strasbourg case-law has acknowledged, is that no univocal answer to these conflictual matters can be given.

Certainly, agreement would exist upon the respect of the principle of non-discrimination - which is a basic pilar of Community law as enshrined in Article 7 EC Treaty, (now Article 6 as since the EU Treaty) as at the basis of a Community public policy. Admittedly discrimination on grounds of nationality (and sex as far as employment relationships are concerned -Article 119 EC Treaty) has been abolished within the Community boundaries. The evaluation of non-discrimination will remain an essential element of Community public policy, but admittedly it should not become absolute. This is so for two reasons. Firstly, non-discrimination is operative only as regards EC-nationals. The possibility to undertake discriminatory measures is still possible as regards non-EC nationals (or goods). The most flagrant example has already been alluded to, as far as the jurisdiction sphere is concerned, namely in the admission of exorbitant fora. Furthermore, to restrict the prohibition of discrimination to EC nationals (or non-EC nationals who exhibit a relation with a EC national) may be further argued to entail discrimination within the EU. Secondly, the protection of other interests in the Community framework may entail the acceptance of a certain discrimination.[48] In the end, the Union may finish as the ECHR, leaving a wide margin of appreciation to States in order to evaluate the gravity of the discrimination.[49]

The ethical component of Community public policy is to be completed with a human right's viewpoint. As argued in chapter II, the existence of a Community public policy notion based on human rights may be contested due to the particular restrictions on competence grounds to which it would be subject. This means that in a strict view, only the rights that come within the Community sphere may found a public policy clause in the European Union. However, it was also argued that a true European notion based on human rights at the basis of a *communio iuris* needed to be completed with Community considerations, particularly as social rights are concerned (namely workers and consumers). The latter incorporates an integrative character within the Union. In this sense, it could be spoken of as a Community public policy. Admittedly such a notion may find further development in areas other than economic, as suggested by procedural public policy.

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[48] Karidys,1994:560. See also A.G. Van Gerven, C-17/92 *Fedicine* [1993] ECR I-2239 at p.27.

[49] Such a tendency - as noticed by Eissen (1990:145), may find reproduction at the Community level.

b. Identity characteristics

The EU exhibits certainly some characteristics which differentiate it from other organisations. Clearly the main identifying element of the EC, the pursuance of economic integration, has progressively enlarged to encompass other aims. The defining characteristics have remained nevertheless essentially economic. Indubitably, the identifying sign of the Union will remain the fulfilment of the internal market as conceived in the EEC Treaty. The interpretation of such fulfilment however, has undergone variations, and now it can be said to constitute more than a purely economic choice.[50]

Such a framework has seemingly changed with the judicial development of the Community general good and has been definitely confirmed with the Maastricht Treaty. In this new context respect of cultural identity becomes one of the pillars of the Union. Consequently, it becomes a modelling element of Community public policy in the same way that it has been enshrined in other notions of public policy. Respect of cultural identity is essential in a world where the internationalisation of the economy (and trade) entails a progressive disappearance of frontiers with the subsequent risk that identity fades.[51]

Cultural identity as conforming Community public policy must be understood in two senses. On the one hand, it appears as an element which reinforces the individual identity of the States within the Union (Article 128 EU Treaty). Such understanding can take the most varied shapes: protection of language diversity, protection of cultural goods, etc. Identity exhibits however a larger scope than strictly cultural features. Indeed, civil law matters tend to reflect essential choices of legal systems as far as identity is concerned. Thus, family law or property

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[50] "A single European market is a concept which still has the power to stir. But it is also a market. It is not simply a technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicized choice of ethos, ideology and political culture: the culture of the market [...] It is also a philosophy, at least one version of which [...] seeks to remove barriers to the free movement of factors of production, and to remove distortion as a means to maximize utility. The above is premised on the assumption of formal equality of individuals" (Weiler,1991:2477).

[51] In rather dramatic terms it has been asserted that "culture is a part of totality, it's a comprehensive way of life for most people and it has to do with survival, it has to do with facing the problems of the world. [...] So here we have culture yet again not only as something which we can chose or take off if we like, but as an absolute essential for the survival of human beings within certain collectivities" (Stavenhagen,1990:258).

law define those elements that, though more contingent, are at the basis of the essential choices of the community where they apply.[52] In this sense, its respect becomes a sort of internal public policy or constitutional requirement. On the other hand, the Union protects the European culture against non-European partners. This European culture (which emerges and consolidates under the general good formula) has a large reach in which the most diverse areas are encompassed: protection of environment,[53] health,[54] cultural goods,[55] respect of privacy,[56] freedom of expression, etc. Many of these aspects will tend to adopt the shape of mandatory rules.

The question is posed whether identity signs other than strictly cultural choices exist in the EU framework. Despite the emerging (and/or enlarging) concern of Community law in these matters, the Union is still far away from reflecting essential choices in these areas which remain essentially under the Member States' sphere. Only time will establish whether areas as civil liability, extra-contractual obligations, alimony, and many others may develop as to generate the need of a Community public policy concerning them.[57] Respect of the cultural identity of Member States must constitute a characteristic feature of the EU identity signs. Thus, it ensues that "*le respect de l'identité nationale en ce qui concerne le droit pourra avoir pour effet [..] réserver dans l'ordre public communautaire une marge de déviation en faveur de l'ordre public des droits nationaux, pour ménager les spécificités de ceux-ci*".[58]

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[52] "Le droit de la famille reste lié aux traditions, aux moeurs et aux conditions sociales propres à chaque État à tel point qu'il touche à l'identité nationale" (Kohler,1992:237).

[53] Article 130R EU Treaty.

[54] Article 129 EU Treaty.

[55] Council Directive 93/7/EEC of 15.3.93 on the return of cultural goods unlawfully removed (OJ L74/74 of 27.3.93).

[56] Recital (7) of the proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data (COM (90) 314 final - SYN 287, OJ C90, 277/3).

[57] These are areas in which already Community legislation exists or has been drafted. See the Directive on liability for defective products (OJ L210/29 of 7.8.85), Commission Recommendation 81/76/EEC of 8.1.81 on accelerated settlement of claims under insurance against civil liability in respect of the use of motor vehicles (OJ L57/27 of 4.3.81), Draft convention on extracontractual relationships (1978).

[58] Struycken,1992:281.

c. Legal-economic standards

No doubt, if the identifying characteristics of the Union appear strongly tainted of economic shades, a Community public policy immediately brings about the idea of economic parameters. A common notion of public policy is particularly feasible in this field where the convergence of interests is remarkable. As pointed out above, such a converging tendency is inserted in a wider movement which is taking place at the international level. Indeed, the economic public policy of States does not differ in a sensible way. It is mainly the means to attain certain policies which introduces the differences between States. The European Union, as an important agent in the international trade, will also defend its policies and choices.[59]

Indeed, many of the areas in which economic public policy applies, as company law, bankruptcy or intellectual property are progressively attracting Community interest. Other areas, on the contrary, still seem to remain an exclusive State matter, namely immovable property and some features related to this like expropriation and nationalisation of goods.[60] The enlarging concern of the EU seemingly permits us to identify EU legal-economic standards in the terms defined in chapter I. This is so as regards matters which may have effect on international trade, such as monetary policy and the legality of the object of trade. As said above, the protection of cultural goods appears as one of the latest interests of the Union.[61] The existence of EU economic standards holds also true in the framework of specific protective policies both as regards Community interests and private interests. The former admittedly focus on competition matters. The protection of competition in a free

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[59] At the EU level it is also possible to find rules concerned with political measures which have an impact on international trade such as boycott or embargo: Council Regulation 877/82 (16.4.82, OJ L102/2) and Parliament Resolution (22.4.82 OJ C 125/73) on the embargo against Argentina. Judges will have to address these rules in the terms analysed in chapter I. The activity of the EU does not stop here though. Other concerns are progressively fostered by the EC institutions such as the fight against drugs (EU action plan proposed by the Commission to combat drugs in Press Release 7760/94 (Press 128) of Justice and Home Affairs Council Meeting of 20.6.94, Luxembourg, Council of the EU) or fight against money laundering (Council Directive 91/308 OJ L166/77 of 10.6.91 on prevention of the use of the financial system for the purpose of money laundering).

[60] Nevertheless, such features may progressively come within Community realm, as secondary legislation addresses it under the heading of consumer protection: see for instance the Parliament and Council Directive 94/74/EC of 26.10.94 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a time-share basis (OJ L280/83 of 29.10.94).

[61] See Council Directive 93/7/EC of 15.3.93 on the return of cultural goods unlawfully removed from the territory of a Member State (OJ L74/74 of 27.3.93).

market has been, since its very beginning, one of the main purposes of the Community which has developed a web of mandatory legislation in this area. On its side, the protection of private interests is concerned with social security, worker and consumer protection (under the most diverse aspects: banking regulation, insurance law, property rights, step door sales, product liability, etc). These areas -which also develop in an important manner under mandatory rules, are closely linked to economic and social rights. Such legislation implies thus, specific protective concerns which do not conceal a certain commitment as regards the latter.

No misleading conclusion shall be reached: it is not because the economic element has prevalence in the definition of Community public policy that the other elements are alien to it. Indeed, from such economic standards other criteria have arisen. In actual fact, a Community which aims at the "creation of an ever closer Union among the peoples of Europe"[62] must go beyond economic integration and foster other aims. Admittedly, legal-economic standards tend also to overlap with cultural identity. Moreover, economic integration only finds its whole sense where it is put to the service of raising the standard of living of its citizens and furthering the works of peace.[63]

The three levels exist in an EU sphere. Probably the economic one is the most relevant. However, it cannot be correctly understood if it is not read in conjunction with the two others. Indeed, the fulfilment of an economic market as an identifying feature of the EC also needs to be put in context with human rights protection and -extensively- ethical choices: protection of workers and their families. This is so in a context of pluralism of values. These comments bring about a notion which is in permanent evolution. They also reflect a notion which exhibits differentiated features as far as State notions are concerned, mainly oriented towards the economic layer and the fulfilment of a unique project in the 20th century.

[62] Article A(2) of the Union treaty.

[63] In the words of the preamble to the EC Treaty.

2.3. Functions of Community *ordre public*

In the particular framework of European integration it is especially important to stress the functional character of public policy. May the considerations made in general terms on the function of public policy be reproduced as far as EU *ordre public* is concerned? Community public policy in the sense of private international law should fulfil the three functions that are essential to the notion, namely the elimination of foreign law contrary to 'natural' law, the defence of the principles which are at the basis of the community and the safeguard of legislative policies. Seemingly the transposition of these functions to the European sphere may not be exactly undertaken. Indeed, the European Union would exhibit more an offensive character than a defensive one, thus insisting on the two last features more than on the first one. As stems from the analysis of the content of the notion and due to its offensive character, Community *ordre public* would confirm the tendency pointed out above to prefer public policy rules to public policy principles.

Ordre public as fostering certain policies introduces elements of international public policy which can be identified with internal notions of public policy in State law. This means that possibly an internal public policy also exists at the European Union level. However, no misleading conclusions should be reached. In actual fact, such a notion should be understood under private law terms. *Ordre public* as internal public policy means that party autonomy is restricted in contractual relations. Indeed, such is the outcome of certain provisions of Community law as Article 119 EC Treaty and the Directives on company law.[64]

In contrast to Member States' public policy, public policy in the European Union exhibits an integrative character. This feature is obvious when the notion applies in relation to third States. In such a case, it is irrelevant which Member State is having recourse to the notion, since an aggression against Community public policy will encounter the same answer whatever the place of the offence. The role that public policy plays is not only of 'formal' integration but also of substantive integration. In other words, the content of European public policy reflects European culture, its defining characters and idiosyncrasy. It contributes to

[64] In this sense, Poillot-Peruzzetto,1993:182.

reinforce a common identity. Furthermore, *ordre public* in the European Union appears as a means of fulfilling material justice because it entails substantive concerns and an offensive role which materialises in mandatory rules.

2.4. Application of the notion

The notion of public policy finds all its sense when it is applied. Therefore, two main points have to be discerned: the circumstances in which the Community public policy could be activated on the one hand; on the other, the consequences of the first question, that is, what are the effects of such application?

a. Invocation

The application of a notion of Community *ordre public* in the sense of private international law has to address several questions which reproduce to a certain extent the questions already tackled in a general framework of international public policy. What kind of link with the Union activates the clause? In other words, does *Inlandsbeziehung* apply at this level too? Another inquiry concerning the clause is: is it operative in intra-Community relations or should it be exclusively reserved for external relations?

A favourable position on the operativity of *Inlandsbeziehung* within the Union is advanced. Indeed, as stems from the ECJ's case law, the 'effects' doctrine plays an important role in the application of Community law. However, it is not only the territorial link which activates the intervention of Community law, but also other criteria which according to the Court exhibit such connection. Thus, in case *Walrave & Koch* the ECJ tackled the question of the applicability of non-discrimination on grounds of territorial effect: "by reason of the fact that it is imperative, the rule on non-discrimination applies in judging all legal relationships insofar as these relationships, by reason of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community."[65]

[65] Case 36/74 [1974] ECR 1405 at p.28.

As A. G. Darmon suggests in his opinion in the *Woodpulp* case, the conclusions reached in the former case may be transposed to competition law.[66] Accordingly the Court decides that "if the applicability of prohibitions laid down under competition law were made to depend on the place where the place of the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means to evade those prohibitions. The decisive factor is therefore the place where it is implemented."[67] Since the implementation had taken place in the Community the prohibitions were deemed to have been infringed. A further step as regards the localisation of Community competences has been recently taken in case *Aldewereld.* The ECJ, admittedly reproducing former case law, states that "the mere fact that the activities are carried out outside the Community is not sufficient to exclude the application of the Community rules on the free movement of workers, as long as the employment relationship retains *a sufficiently close link with the Community.*[68] The Court sets this link in the fact that the Community worker was employed by an undertaking from a Member State. The Court definitely opts for a large conception of the links with the European Union, consequently expanding the extraterritorial effect of Community law.

These cases regard essential areas of Community law (namely competition law and free movement of workers) in which relative public policy finds reflection. In other words, idiosyncratic elements of Community law are activated where there exists a particular connection to the forum. The latter may adopt various shapes, either the effects in Community territory, the nationality of a Member State, the domicile in a State of the Union (as far as the Brussels convention is concerned), etc. If Community *ordre public* is to be applied by Member State courts, the latter will activate Community public policy when it comes within the Community sphere of application: where no connection with Community is at stake, Community law withdraws and national public policy enters the game. Such relative character of Community public policy should not conceal the 'absolute' features of the notion which derive from the fact that it stands at the basis of the European *communio iuris.*

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[66] Case 89/85 *Ahlström v. Commission* [1988] ECR 5193 See p.17 of the opinion.

[67] Precedent footnote, p.16 of the judgment.

[68] C-60/93 [1994] ECR I-2291 p.14, emphasis added.

In what kind of relationships will public policy be invoked? A notion of *ordre public* in a private international law sense implies that recourse to the notion is excluded as far as the relationships of the Union and its Member States are concerned. Scholars who insist on the notion of public policy as governing such relationship have a biased starting point.[69] Indeed, the relations between the Member States and the EU are based on the principle of supremacy of the latter and a delimitation of the competences of both of them. Although the relation between the Union and its Member States may be envisaged in terms of conflicts of law (in the way it is fashioned in the US), it should be understood more in constitutional terms than in private international law terms. Since there is no conflict of legislation at stake, no public policy exception plays. Therefore, ther are two cases in which it may apply: in the relations of Member States with non-EC States on the one hand, and in the relations between Member States on the other hand. The guiding criterion in this procedure remains, however, the exigency of a restricted invocation of public policy.

i. In relation to third States (not belonging to the EU)

a) applicable law: as stems from the previous analysis, European *ordre public* will find application mainly in an economic sphere. Probably the 1980 Rome convention provides an adequate framework where the notion would be invoked. In this context not only general principles such as non-discrimination will find protection, but also EC mandatory rules will find application under Article 7(1) and probably also in the case of specific mandatory rules (namely as consumers and workers are concerned). Seemingly it is in competition matters that recourse to a Community notion preferably (but not exclusively) will take place. Any other area linked to the fulfilment of the internal market may be at the basis of an invocation of public policy. Indeed, these features which already exist at the national level need to find reinforced protection at the EU sphere.[70]

[69] This is the position defended by Poillot-Peruzzetto,1993:182.

[70] In this sense the Spanish Aud. Prov. Madrid (of 27.1.90) has ruled that the right to property and freedom of market, as constitutional principles - Articles 33 & 38 Spanish Constitution, prevail as public policy against Cuban legislation. Admittedly, pertaining to a supranational (economic) system entails that the securing of a free market is granted from a European perspective which overcomes strict State boundaries.

The Rome convention does not cover, nevertheless, all the possible areas where public policy may be activated. Seemingly the Community *ordre public* may find application under the *ordre public* provisions of The Hague Conventions.[71] Conceived in these terms, EU *ordre public* provides a uniform and firm position in front of third States in the same manner that, for example, the U.S. does. Furthermore, these reflections should insist on the fact that a Community public policy will progressively incorporate contents other than economic ones and activate therefore when the latter are threatened. This is seemingly the case of protection of cultural goods. However, in other areas as civil law, particularly family law, such a contention is not yet possible and probably not feasible. In such cases the notion that will be resorted to is the national one. Admittedly, where EC public policy is at stake, Member States may invoke it on the same footing as the national notion of *ordre public*.

b) jurisdiction and recognition of judgments: public policy would probably be activated at the recognition stage where the judgment which claims enforcement has disregarded essential EC mandatory rules. The case where this may most likely happen regards competition matters but other areas should not be excluded, namely those concerned with consumer protection (namely in cases of insurance, banking, etc). A progressive enlargement in the application of Community *ordre public* is not excluded to other fields, but it encounters the same limitations noted in relation to applicable law. Community procedural public policy is likely to be activated also at the recognition stage. Seemingly this is already so in the framework of competition matters, where a true procedural Community notion has developed. Only with more difficulties may procedural public policy be activated in civil law areas: this would be the case in relation to cultural goods protection. On the contrary, family matters or the regulation of means of proof as paternity is concerned seem still out of its reach. If a progressive evolution of Member States' public policy is foreseeable under the influence of EC law, time seems not yet ripe for a Community public policy in these areas yet.

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[71] For instance it is possible to think of its application in Article 18 of the *Convention sur la loi applicable aux contrats de vente internationale de marchandises* (La Haye, 22.12.86, not yet in force), Article 17 of the *Convention sur la loi applicable aux contrats d'intermediaires et à la représentation* (La Haye, 14.3.78, in the light shed by Council Directive 86/653/EEC of 18.12.86 OJ L382/17 of 31.12.86) or to Article 10 of the *Convention sur la loi applicable à la responsabilité du fait des produits* (La Haye, 2.10.73 in the light shed by Directive 85/374/EEC of 25.7.85).

The previous comments have understood that EC public policy will mainly be invoked by Member State courts. However, it is not excluded that other courts may have recourse to it. Seemingly the ECJ could have recourse to the notion in the framework of certain procedures, namely Article 181. Moreover, if a specific panel or court was created (as proposed in chapter IV) dealing with private international matters, such notion could be easily resorted to. Also arbitration courts could find in EC public policy a useful tool. Indeed, this notion is beyond State limits and exhibits thus a true international nature. Its highly accentuated economic character would favour recourse to the notion in the arbitration sphere. It could therefore be opposed to non-Community States as well as Member States.[72]

ii. In the relations between Member States

a) applicable law: from a theoretical point of view the invocation of Community public policy by a Member State against another Member State seems not possible since it may be understood as entailing the substitution by Member State courts of the role of the ECJ. However, recourse to public policy -although it must remain restricted- appears as necessary. Otherwise, the acceptance of the rule coming from the first State which runs counter to EC public policy would entail the infringement of Community obligations by the second State. Seemingly the most correct approach of the court of the latter State would require it to ask for a preliminary ruling to the ECJ.[73]

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[72] The control by Community institutions of the application of the notion by arbitration courts appears as somewhat complex. Indeed, it would consist on a cooperation procedure between the ECJ, State courts and arbitration courts by means of preliminary rulings. The ECJ has only admitted restrictively that arbitration courts have recourse to Article 177 to obtain the correct interpretation of EC law. However, the necessity to ensure the latter purpose has led the Court to admit such recourse under certain conditions: that the body is a permanent one, that the State is involved in the composition of the court, that the procedure is similar to that of a court, that the body is the sole competent court to decide the dispute and that it is bound to apply law and not decide exclusively on the basis of fairness (case 61/65 *Vaasen v. Beambtenfoonds Mijnbedrijf* [1966] ECR 261).

Seemingly, commercial arbitration courts will hardly fulfil such requirements. Nevertheless, the Court does not exclude its intervention upon demand of State courts. In case 102/81 *Nordsee v. Reederei Mond* [1982] ECR 1095, the ECJ has admitted that State courts may ask for a preliminary ruling in matters concerning arbitration awards when the court acts in request of assistance by the arbitrator, in review of an arbitral award or in request for leave to enforce the arbitral award. It appears thus, that the application of Community public policy would be the true international one because not linked to any State.

[73] See in the same line of argumentation García Rodríguez,1993:938.

Moreover, it is possible that two Member States endeavour to make prevail two different aspects of a Community public policy, for instance, where two mandatory rules conflict (in social security and employees protection) or when a mandatory rule and a principle clash (for instance, one of them invoked competition mandatory rules while the other invoked the right to privacy). Indeed, such appears as a conflict between different layers of the EU public policy. According to what criteria should it be solved? Several elements must be taken into consideration to obtain an answer. As advanced above,[74] principles should prevail over rules. But it has also been contended that probably the economic aspect should withdraw in favour of the non-economic ones.[75] Again, the role of the ECJ as interpreter of the system should shed the necessary light. It could further insist on the possibility that arbitration courts have recourse to Community public policy also in the controversies regarding Member States legislation.

b) jurisdiction and recognition: as has been contended in the framework of the Brussels convention, the application of a Community *ordre public* is possible between Member States. Although this recourse should be reduced to the greatest extent, it may not be excluded. A judgment can be refused in another Member State where the recognition by the latter will entail the infringement of Community law by the recognising court. If other conventions are drafted (or the existing ones enlarged) the notion of public policy may undergo a parallel enlargement. This could be the case if the extension of the Brussels Convention to competition matters was definitely undertaken.[76] On the contrary, the proposal for a convention on jurisdiction and recognition of judgments in family law matters will still set the framework for national notions to apply.[77]

A cautious recourse to a Community public policy could also be advanced as far as control

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[74] See chapter I, point 2.1.

[75] In this sense, Zagrebelsky(1992:172) argues that the excesive preeminence given to economic values risks banishing pluralism - which is admittedly a foundation of the European construction.

[76] Notice on Cooperation between national courts and the Commission in applying Articles 85 & 86 EEC Treaty (OJ C39/6 at § 44 of 13.2.93).

[77] See Press Release 7760/94 (Press 128) of Justice and Home Affairs Council Meeting of 20.6.94, Luxembourg, Counci' of Europe.

of jurisdiction is concerned. In principle, such control remains outside the scope of public policy in European tradition. However, it is contended that, as a reflection of procedural guarantees and as a manifestation of the non-discrimination principle, where there is no other means of covering the gap created by an exorbitant forum -as happens in the Brussels convention sphere- Community public policy could intervene. In this sense, Community public policy would act as a constitutional clause -in the same terms that due process in the US corrects the excesses which States of the Union may commit.

The invocation of Community public policy as governing the relations between Member States emphasises the existence of a sort of internal/domestic Community public policy, that is, a non-disposable set of principles and rules in the Union which remains outside the reach of party autonomy and State disposal. It may also become a means of solving conflicts between Member States in a framework of cooperation and fulfilment of EC aims.[78] Member States will respect this Community public policy as a kind of constitutional guiding criterion in the application of State public policy. Admittedly the EC is likely to reproduce State schemes in order to safeguard the survival of the Community legal order.

b. Effects

In general, the effects of applying Community public policy should be the same, both when invoked in relation to third States and when it is operative within the Union. A distinction is undertaken according to the field where public policy has been invoked.

i. Applicable law

Admittedly, Community public policy as enshrined in both, principles and rules, entails the activation of the positive and negative effect of the notion. Thus, where public policy principles are applicable, they delimit the framework of tolerance within the Union. If the clash is radical the rejection of the foreign law which runs counter to them follows. Such

[78] In this line of reasoning, García Rodríguez,1993:937.

rejection may be total or partial. Probably a manifestation of the *effet attenué* of public policy could be envisaged (mainly in relation to the principle of non-discrimination). The question arises according to what law establish the effects of the rejection or partial admission of the rule. Seemingly a substitute rule may be looked for. In logical coherence, this substitute rule should be Community law if it appears as forum law or *lex causae*. If there is a piece of Community legislation directly applicable which is a development of a public policy principle then, such rule would apply (for instance, the principle of non-discrimination as results from Article 119 EC Treaty or Regulations on employment or social security matters). On the contrary, in the case of no directly applicable text, recourse probably would have to be made to Member State's implementation (of Directives).

The question becomes, then, to select which of the (fifteen State) implementations should govern the issue. Since the implementation of Community public policy rules puts all the Member State legislations on the same footing, the application of one or the other would be indistinct. As the violation of Community public policy must have ocurred on the territory of a Member State, it is probable that the judge finds the implementation of the forum's law the most relevant-connected (and logical) solution to apply. However, where the forum had no 'interest' in the matter and/or the effect of the infringement would take place in another Member State, then the law of the latter is to prevail.[79] Either the forum law or the law secondly selected will decide the consequences of the application of EC public policy principle, whether it entails absolute nullity of the contract or whether a partial admission is possible.

A complete review of the EU *ordre public* requires a reference to mandatory rules either as they stem directly from Community legislation or as they result from Member States' implementation (of the Directives which introduce such Community mandatory rules). Mandatory rules will, on many occasions emphasise the territorial links of the rule to the

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[79] This reference to interests in the judge's evaluation may remind one of the American 'interest analysis doctrine'. A difference should be noted though. While in the United States the interest doctrine which activates public policy views the rejection of the foreign law, here it is proposed as a means to apply the law of another State. In the latter case, it exhibits integrative effects which are absent in the former. As an illustration, see *Owen v. Owen*, 444 N.W.2d 710 (S.D. 1989) which solves a case on grounds of South Dakota public policy and eventually emphasises Indiana's lack of interest and South Dakota's multiple contacts with the parties, adopting the "better law approach". See also *Laker Airways v. Sabena*, 731 F.2d 909 (D.C.Cir. 1984).

Community, and more precisely to the territory of its Member States. If these mandatory rules are directly applicable, for instance, Articles 85 and 86 EC Treaty in competition matters or when they are enshrined in a Regulation, then no problem arises but the discernment as to whether they are effectively applied or given effect. Such question, as well as the ensuing consequences deriving therefrom, will be decided according to the law of the forum which has recourse to the Community mandatory rule (as if it were a normal State mandatory rule). Such a position has already been upheld by the ECJ in competition matters.[80]

Where the mandatory rules have been implemented by Member States - as in the case of the Directive on Liability for Defective Products, the problem becomes, as in the preceding case, to decide which is the preferred implementation. A correct reading of these rules implies that one should pay attention to the *lex causae* which governs the issue. Probably an evaluation of the pros and cons of each rule, the interest the rule to be applied exhibits, the consequences of its application and/or non-application, and other factors (in a similar sense to the pointed out in relation to Article 7(1) of the Rome convention) will have to be undertaken by the judge. Seemingly, preference will be given to the forum mandatory rule, but the judge must be aware of the equality of all the mandatory rules at stake (since in theory they reflect the same Community mandatory rule).

ii. Recognition of foreign judgments

A foreign judgment may display in the forum its effects to the extent it does not offend the Community public policy. In the same sense as State public policy, the successful invocation

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[80] Indeed, in case 56/65 *Société Technique Minière v. Machinenbau Ulm GmbH* [1966] ECR 235 the ECJ held the nullity of contractual provisions which are incompatible with Article 85(1) adding that "the consequences of that nullity for all other elements in the agreement are not the concern of Community law". A. G. Roemer (at p. 357) further precised that "the law of the Treaty on competition only touches with nullity those parts of an agreement which have a bearing from the viewpoint of competition. For the rest, it is not necessary, in our opinion, to settle on the level of Community law, i.e., uniformally for all the Member States, the question of the effects on the partial nullity of an agreement on the whole of the undertakings included in the contract. For that question it is the applicable national law which can claim precedence (it should be determined according to the rules of private international law)". It should be noted though, that also in relation to choice of law, A. G. Reischl had suggested in case 15/78 *Koestler* [1978] ECR 1971 at p.1988 that the disturbances in the stock market due to the existence of different systems of private international law and the introduction by German law of unilateral rules could only be removed by a harmonisation of the stock exchange regulation followed by the establishment of a uniform system of private international law.

of public policy does not entail a wholesale refusal of recognition and/or exequatur but may be just a partial one. The existence of a unique judicial European area reflects in the application of a uniform notion of public policy as regards the recognition and/or enforcement of foreign decisions. In such a case, the risks of forum shopping are reduced. Where Community public policy has been activated, then, such offending judgment will find no recognition wherever it tries to be enforced. On the contrary, where the national public policy is activated, the preclusion of recognition in one State does not exclude the recognition in other States.

A distinction has been advanced in chapter IV concerning the violation of procedural guarantees and the infringement of jurisdiction criteria. It is contended that when the latter has been infringed, the successful invocation of public policy entails to simply refuse the judgment with no curing alternative. On the contrary, where there has been an infringement of procedural guarantees, the successful invocation of public policy will imply that one should reset the procedure to the moment of the infringement. This is so because it is the fairest solution in order to balance the right to defence and the interests of the applicant in not being denied justice. It may also be seen as an application of the *effet attenué* of public policy, as corrected by human rights considerations.

3. RELATIONSHIPS BETWEEN EU *ORDRE PUBLIC* AND STATE *ORDRE PUBLIC*

The existence of two notions of public policy in the European area is neither a contradiction nor superfluous. Indeed, it reproduces the debate already known in the context of a true international public policy and its relation with domestic notions of international public policy. One could argue that there is no need for a Community notion of public policy since the role it fulfils is already satisfied by Member State's public policy which incorporates Community law criteria. The risk that such a conception entails is to give raise to fifteen understandings of Community public policy. Such a danger certainly does not favour integration aims. The opposite risk appears when, while accentuating the integrative purposes of the Union, one admits that the acknowledgment of a Community (international) public policy entails the

substitution of the national notions.[81] The following comments will prove that neither of the two options is valid if some specific characteristics of the EU phenomenon are taken into consideration.

The starting point of these considerations is the separate sphere of competences that Member States and the Union keep. As seen above, Community public policy is applicable where Community matters are at stake, while in the other cases State public policy is still operative. However, it was argued that the latter may undergo 'corrections' according to Community criteria as far as an overlap with Community sphere takes place.[82]

The question arises to what extent is such correction to be undertaken. For instance, if an Irish court denied recognition of a judgment given in a Member State in which a certain amount of money was granted as a result of an abortion committed in the latter, would the Irish judge be obliged to review his application of public policy? Almost any area of the law is likely to fall within the scope of Community law because of its potential effects in the fulfilment of the market. It is argued that, to be correctly understood, Community public policy has to incorporate a margin of free appreciation of State public policy.

The separate spheres of State and Community law will delimit, then, the scope of application of the two notions. This means that a continous examination of the evolutions of Community law must be undertaken. If public policy appears as a variable notion in general terms, in the EU sphere this character is accentuated and does not escape strong political and economic influences. The progressive overlapping of Community competences may entail an expansion of Community public policy in detriment of Member State's public policy. It is not excluded thus, that the essential economic character of Community public policy enlarges to include more civil law contents, up to now an essential State area. It has already been seen how a procedural *ordre public* has taken shape at the Community level. Further developments are not excluded.

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[81] The respect of State sovereignty, despite a certain cesion of powers to the Union, entails that Member States keep their safeguard clauses in the private international law sphere (as seen in point 1 of the chapter).

[82] Such correction certainly fits in a federal context. The clearest example is provided by the US, where public policy of the Sister States has to be compatible with Constitutional clauses, namely the full faith and credit clause.

Has subsidiarity any role to play in this sphere? Seemingly, the question of competences is rather spinous. The restrictive recourse to a Community notion of *ordre public* is further delimited by the principle of subsidiarity. If subsidiarity is understood in the sense that matters should not be Europeanised without good reason,[83] it could be advanced that Community public policy is only operative when it ensures better protection than the national notion or when it solves problems arising in a more definite manner. A proposal in this sense has been advanced in chapter IV as far as procedural public policy is concerned. Closely linked to subsidiarity appears the principle of respect of national identity, which defines specific areas which should be kept under State realm. Indeed, it has been argued that the areas which reflect with more intensity cultural identity should come under the realm of subsidiarity. This is particularly so in the case of private law.[84] Admittedly, only at Member State level may new features be dealt with in convenient terms. Phenomena such as homosexual marriages and bioethics put at stake many questions that, for the time being, pertain to the State sphere. The consequences that derive for a correct understanding of public policy are obvious. However, inroads of the Union in this area are not excluded if the latter retakes the stride advanced some years ago as regards private law.[85]

Admittedly, the existence of two levels of public policy will entail certain conflicts. Such conflicts could appear as regards the relation of State public policy and Community public policy on the one hand, and between State public policies on the other. One would be tempted to solve them on grounds of supremacy. However, the previous comments should help us to understand that it is more a question of competences than of supremacy. This also means that criteria other than legal ones may enter the game. In a system of pluralism public policy

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[83] Hartley,1993:510.

[84] See in this line of argumentation Rigaux,1992:528, Fallon,1993a:250 and Kohler,1992:236.

[85] Already in 1983 the European Parliament (Resolution of the 9.6.83, referring to Articles 2 and 235 of the Rome Treaty) suggested to the Commission to devote special attention to "differing legal provisions in the Member States, and the possible consequent *need for Community action* in the following areas: the laws on adoption, the laws on custody of children where partners are separated or divorced, the rights of access to children by one divorced or separated spouse where custody has been awarded to the other...". In this same line, the Resolution of the European Parliament of 26.5.89 on action to bring into line the private law of the Member States (OJ C 158/400), states that "unification can be carried out in branches of private law which are *highly important* for the single market". This request was repeated on 6 May, 1994. Serious works have been undertaken in this respect. See namely the *"Principles of European Contract Law"* (1995) prepared by the Commission on European Contract Law.

appears as an area where contextual interaction is possible and leads to higher integration. If this is so, on what grounds are those potential conflicts to be solved?

The assumption of the principle of subsidiarity as constituting an element of the Union as well as the elaboration of a Community *ordre public* on the basis of the respect for cultural identity are the clues to solve such potential conflicts on the interpretation and articulation of Community and State *ordre public*. The admission of cultural identity criteria allows in certain 'dissident' elements in public policy. This means that States may have recourse to the ethical considerations of public policy without being dismissed by Community criteria. Such a contention will materialise mainly in the sphere of human rights protection. As was pointed out above, precisely those ethical considerations set the difference between notions of public policy. Community public policy may then balance two interests, namely the fulfilment of the market and the respect of cultural identity of its Member States in favour of the latter. Understood in this sense, Member State public policy (as reflecting State identity) is a particular constituent of the Community *ordre public*.

One may wonder whether the two notions may, nonetheless converge one day. Indeed, the existence of two notions that interact in a way or in the other may have the final effect of one being encompassed by the other. Thus, it has been advanced that Community public policy would be absorbed by Member State's public policy.[86] The question is debatable, mainly when two spheres of competence remain individuated. The fact that application of public policy remains essentially in the hands of national judges should not lead to such conclusion. Indeed, such problem has already arisen in relation to the application of a true international notion of public policy by State judges.[87] Several options may be put forward in reply. Thus, it has been contended that the judge does not apply an international notion as such, but as a component element of its own notion of public policy. Otherwise, it has been advanced that a reference to true international public policy would highlight a discrepancy with the forum public policy and therefore, indicate that one of the two is superfluous. In the latter case two

[86] Drobnig,1970:539.

[87] Goldman (Note Paris 19.3.65 Clunet, 1966.118 at p.137) argued that the true international notion of public policy would not find application in national courts although he reserved the possibility that it applies in arbitration and international courts.

are the options: either the international notion is eliminated, or it is imposed on grounds of the superiority of international law.[88] None of these two positions is valid. As seen above, where true international public policy conflicts with national concepts, the solution may not be exclusively tackled on grounds of supremacy.

The conclusion thus reached at a general level, is furthermore valid in the European Union framework. Member State courts have a twofold nature which results in a *dédoublement fonctionnel*. Judges assume both a national and a Community character. In this respect, acting as one or the other will entail the application of one public policy or the other. Two essential guidelines appear as fundamental for judges: on the one hand, Member State public policy cannot be understood if not in a context of Community integration; on the other hand, Community public policy must respect necessarily Member States' notions as a reflection of State identity. Thus, the possible coexistence of the two notions is viable. In this framework, the discernment of the application of one or the other notion relies on judges. They have to assume the responsability of identifying correctly the principles and rules at stake and then, chosing one of them. Education of judges is thus, essential. Insufficient instruction of judges may entail the danger that they have systematically recourse to their State public policy, which is the one they know best. Moreover, the interpretation of State *ordre public* under Community criteria will also come within the competences of the national courts.

The ECJ will also have to assume an important function. It is contended that it should not only limit to establish the reach and interpretation of Community public policy but it should also extends to the delimitation of the articulation of the latter and Member States' public policies. Such delimitation may be undertaken in the framework of the Brussels and Rome conventions, where a clause of public policy in the sense of private international law is inserted. The question is more complex in the framework of the founding Treaties, since no specific provision that would be at the basis of a preliminary ruling on Article 177 refers to public policy understood in this sense. On the contrary, as pointed out above, Article 181 may provide another testing ground for the application of a EU *ordre public* as well as its relation to Member State notions.

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[88] Chapelle(1979:490) defends the latter view, while Goldman (Note Paris 19.3.65 Clunet 1966:118) stands for the first one.

The previous comments lead to advance two premises of future developments. On the one hand, if the acknowledgement of a true international community as contrued by judges results from the application of true international public policy, this phenomenon is moreover accentuated at the EU, where application of EU *ordre public* will reinforce the already existing Community. On the other, the identification of a Community notion of *ordre public* with separate identity of the Member State notions entails the possibility to draw Community conflict rules in which such notion is incorporated, in the same sense that this phenomenon takes place at the national level. The definition and application of such public policy would then create "*quasi irrésistiblement une communauté des esprits européens, une conscience européene*".[89]

[89] Touffait,1976:170.

FINAL CONCLUSIONS

How unruly was the horse? Did we indeed jump into the void? Hopefully the preceding pages have proved that *ordre public* could be peacefully addressed. These conclusions are structured upon four features, namely a definition of a notion, an ascertainment of concurrent features, an answer to a question and a proposal for the judiciary.

1. A present-day definition of *ordre public.*

1. Public policy has appeared to be an evolving notion which changes according to time and space coordinates. Its understanding follows historic evolutions. Thus, a traditional conception of public policy as a defensive mechanism of the legal system which reflects national sovereignty progressively evolves to a vision which overcomes the strict national parameters. Indeed, it becomes an offensive instrument with integrative effects which may even acquire a true international character.

2. Each system generates its own notion of public policy. Under the meaning of *ordre public* State legal orders produce several mechanisms of protection from an internal and an international point of view. International public policy or, in more correct terms, public policy in the sense of private international law, appears as a national notion which protects the essential values of the system in which it is operative under the shape of both rules and principles. Since the former result from the development of the latter, seemingly principles prevail over rules in case of conflict between them. Public policy appears structured in three layers, namely ethical-moral values, idiosyncratic characteristics and legal-economic standards. These three layers - which are not hierarchally organised, are in continuous inter-action.

3. Admittedly public policy has overcome its role as last safeguard of the system - closely linked to a rigid system of conflict rules, and tends to reflect substantive concerns. Accordingly, it develops to satisfy the requirements of contemporary private international law. Such a trend finds reflection in the emergence of a parallel system of mandatory rules which,

together with the traditional scheme of individualisation of public policy, introduces substantive concerns in legal orders. Public policy can be thus either the outcome of the normal application of conflict laws or the result of having recourse to unilateral rules. In the former case, first a negative effect (rejection of the foreign rule) is felt; then, the positive effect (imposition of - generally - forum law) takes place. On the contrary, as regards mandatory rules, there is first a positive effect of imposition that is followed by the negative effect of excluding any other rule. Mandatory rules appear then as an inverted functioning of public policy.

4. The clear national defensive shade that public policy exhibits tends to be presently balanced by an 'integrative' effect of foreign public policy in the national legal order. That is, a progressive acceptance of foreign mandatory rules in the forum can be noted. This tendency - which is favoured by international conventions, reflects the forum acknowledgement of a certain coincidence of interests that permits one to accept the foreign mandatory rule. This feature also underlines the progressive susbtitution of public policy principles by rules in legal orders. Public policy appears then as a means of opening up of legal orders. The elaboration of conflict rules which incorporate the mandatory rules of diverse States becomes the foreseeable evolution of these notions, repositioning public policy into its exact role of excepting clause.

5. Such opening up of national legal orders has consequently pointed at the possibility of a true international *ordre public*. Admittedly, it appears only in an incipient status and it is preferably referred to in a regional context. Despite its precariousness, it looks necessary since it responds to the present aspirations of public policy. That is, instead of fighting dissident opinions it intends to favour the acceptance of essential truths. In other words, a true international public policy replies to the conception of public policy as an instrument not any more *of* but *against* national particularism and intransigence. A true international public policy which fosters the achievement of (international) material justice becomes the visible expression of the true international community.

6. This true international public policy clarifies the distinction between absolute and relative public policy. While the latter reflects the more idiosyncratic elements of every State, absolute

public policy relates to principles which are beyond the territorial boundaries and which are common to many States. They are of such an importance that they are defended even in the absence of a particular link to a State. The latter promotes them in the acknowledgement that they define its own system but they are not exclusive to the State. The ancient notion of *communio iuris* as delineated in the 19th century appears here updated to the parameters of the end of the 20th century. It is precisely this *communio iuris* which explains the coexistence of several notions of public policy which may even conflict. In other words, as far as a national legal order respects and defends the *communio iuris*, it is permitted that it keeps diverging conceptions of public policy. Seemingly, clashes between the different layers of public policy may take place in the same manner it happens at a strictly internal level. The solution of conflicts will not always be simple.

7. The evolution of international public policy tends to stress the legal-economic sides of the notion. This phenomenon is acknowledged both in the internal and at the truly international sphere. However, the aspiration to fulfil material justice introduces with renewed strength considerations of ethical character, namely human rights. If human rights reflect to a great extent the essential values of legal systems, public policy must necessarily refer to them. Indeed, the evolution of public policy follows the evolution of human rights. Recent concerns from a human rights viewpoint - as for instance cultural rights, find reflection in public policy - which appears thus committed to the protection of cultural identity. This phenomenon is in actual fact inserted in another wider phenomenon already referred to, that is, the progressive search for (material and not only formal) justice by legal orders and particularly in the framework of private international law systems. Indeed, fulfilment of material justice goes through human rights.

8. Admittedly, human rights are not an undisputed area and the relativity of human rights is repeatedly insisted on. However, human rights are necessary to delimit most of the features outlined as regards public policy. Furthermore, despite the alleged relativity of human rights, this thesis has contended that they may be at the basis of a true international (or regional) public policy. Moral and international normative universality of human rights find progressive spread admittance by States of the international community and constitute a *communio iuris* which is most probably at the basis of a true international public policy. Together with this

absolute public policy, a myriad of relative public policies define national and regional understanding of that common core based on human rights. The two kinds of public policy individuated, absolute and relative, reflect the flexibility of public policy as a protective mechanism. It is at the particular level that human rights protection adopts specific national profiles, sometimes under the shape of mandatory rules and acquires hence this relative character. Such acknowledgment explains that conflicts of public policies exist since on many occasions they conceal conflicts of human rights. Certainly, to admit human rights at the basis of public policy does not solve all the problems that may arise since human rights are in themselves a source of conflict: a balance between two conflicting rights must be solved in favour of one or the other. No possible absolute answer may be provided, but a criterion of international solidarity understood in the framework of a *communio iuris* which protects cultural identity and pluralism is desirable.

2. Concurrent and convergent notions in the European Union sphere

9. This thesis has contended that to understand a Community *ordre public* a reference to public policy in the EC is necessary. Indeed, Community public policy appears inserted in a complex web of protective notions in the European area. Although it differs from these notions, it cannot avoid influences from the latter. In the EU context, public policy is operative in both a vertical (in the relations between Member State and the Union) and a horizontal sense (between Member States).

a. A vertical mechanism: exceptions to the EC Treaty

10. The analysis of public policy in the sense of the Treaties has proved to be indeed helpful since it highlights the existence of several phenomena taking place concurrently. Firstly it is noted that the more legal relations tend to be regulated, the more exceptions arise. Thus, in the context of the EC Treaty, a progressive delimitation of public policy according to Community criteria is balanced by a correlative enlargement of excepting grounds under the general good clause. Public policy and general good exhibit a close relationship. They appear as complementary notions although the boundaries between the two of them are not easily

delimited. It would seem that the ECJ, by means of the general good, progressively opens the door to other criteria that enlarge the excepting valves admitted in EC law whenever the respect of non-discrimination, proportionality and human rights is ensured. The general good so delineated appears as a kind of more acceptable public policy, that remains reserved to prevent actual and grave threats to the system.

11. The second phenomenon regards the fact that diverse aspects of Member State public policy tend to find reflection in both the notions of public policy and general good. In this sense, Member States try to reproduce aspects of internal public policy while invoking public policy in the context of the EC Treaty. *Ordre public de direction et de protection* are put in front of the ECJ that systematically rejects this kind of invocation. On its side, under the general good exception, Member States tend to introduce the schemes of international public policy. State interests covered by mandatory rules find thus recognition in the sphere of the EC Treaty. Admittedly these notions, because of the Community context, are tainted with a strong economic shade. However, the evolution of EC law has permitted an enlargement of the interests protected towards the other two layers, namely the ethical and the idiosyncratic level. Once again, it is by means of human rights that such an evolution takes place.

12. Thirdly, as a result of the previous developments, the EC defines its own perception of these notions and gives them both a Community content and role. While the position of the Court is still somewhat hesitant in relation to public policy, the Advocates General seem to advance a more committed position that would lead the EC to adopt a sort of *ordre public de direction* as free movement of persons (mainly foreigners) is concerned. On the contrary, the position of the Court seems more clearly delineated in relation to the general good. The ECJ introduces concerns that to a certain extent coincide with Member State's notion of the general good, as for instance consumer protection. Thus, the interests covered by the State and the Community general good do not differ very much; they also may be said to play a similar role, since the Community general good is contended to apply in the same manner of a mandatory rule in State law. The main difference is in the 'constitutional' role that the EC general good assumes since it becomes the parameter according to which Member State's legislation and public policy are reviewed under EC schemes. Seemingly these features outline basic elements to identify a Community *ordre public.*

b. A horizontal perspective: relations between Member States

13. The starting point of the approach to public policy is based on a restrictive recourse to public policy between Member States both in relation to applicable law and recognition of foreign judgments. Admittedly such a phenomenon is accentuated in the sphere of the conventions analysed in chapter IV. The 1968 Brussels convention and 1980 Rome convention fulfil integrative aims in the framework of the EC. This latter feature permits one to accord them a Community nature, seemingly a *tertium genus*, different from Treaty and secondary law. Such integrative purposes impose a restrictive interpretation of excepting clauses. Indeed, the settlement of a sort of full faith and credit clause as the recognition of judgments is concerned on the one hand, and the development of a complex web of mandatory rules which already incorporate the substantive concerns to the sphere of applicable law on the other impose such restricted perspective.

14. No doubt, the close connection between these two conventions may result in a reactivation of public policy. Thus, public policy of the State addressed may be activated against a foreign judgment if the court of origin has failed to apply (or has misapplied) an essential provision in specific protective legislation - arguably under the shape of mandatory rule, of the State addressed. The Rome Convention has precisely ensured the applicability of national and foreign mandatory rules on the same footing. The application of foreign mandatory rules implies a recognition by Member States of the closeness of other Member States' mandatory rules to the forum's. Such phenomenon is particularly accentuated in an EU context where most of the legislation at stake may come from implementation of Community legislation. Where this is so, the absolute equality of these rules is sustained as equally purporting EC integration and equally granting EC standards of protection. In such context not very much space seems to be left for public policy to apply.

15. Further restriction in the use of public policy results precisely from its application in a Community sphere. Adhering to the latter entails an obligation for Member States not to hinder the process of European construction by introducing restrictive mechanisms in the system. A similar position disregards the conventions as fulfilling Community aims and the obligation ensrhined in Article 5 EC Treaty which imposes a duty of cooperation between

Member States. Such obligation does not entitle to a possible control by Member States of the compliance with EC law by another Member State's legislation through the public policy mechanism. This thesis has contended that such control may be permitted in restricted terms only where not doing so would entail an infringement of the Community commitment by the addressed State. Moreover, this perspective explains that protective mechanisms of State legal orders undergo corrections according to EC parameters. In this context, the clash between an EC conception of free market and the Member States economic *dirigisme*, which adopts the legislative shape of mandatory rules, imposes a solution under the light shed by the preceding considerations. The general good - admittedly restricted to the sphere of competence of Community law - appears as the means through which the EC undertakes such control. The recourse to public policy is thus severely reduced.

16. The restrictive application of public policy may be relaxed nevertheless, if two hypothesis are considered. The first one regards the possibility to apply *ordre public* in the framework of the Rome Convention in relation to third (non-EC) States. Recourse to public policy may thus adopt larger parameters, though seemingly the international cooperation and the convergence of interests of States still imposes a strict application of the notion. Secondly, the alluded incorporation of human right criteria in the private international law sphere designs public policy as a means of protection and furthering those rights. As argued above, envisaged in these terms, it constitutes the embryon of a true international (European) notion of public policy. This notion finds application and further definition in these conventions. This is no doubt, the case of procedural *ordre public* which has appeared in this context as a true European notion, that protects non-discrimination principles and also procedural guarantees. Although it applies mainly in a civil litigation context, it is not excluded that it enlarges to other areas like competition law procedures.

3. European Union *ordre public*: do tradition and innovation meet?

17. The whole system has been shaken. The peaceful and exclusive coexistence of national notions has been altered by the activity of the EC which makes inroads in the private international law area, not only to correct, but moreover, to create... presumably also a

European notion of public policy. Indeed, the background permits us to assert that the initial proposal for a EC public policy was not so ill-founded. Admittedly such a notion exhibits many of the characters of a traditional *ordre public* while it incorporates some distinctive features which make it differ from the latter.

18. The Community *ordre public* is constituted by *"principes d'une valeur morale inattaquable et principes qui font comprendre le systeme communautaire"*. Seemingly, such a notion covers the three layers individuated as pertaining to public policy: ethical-moral, idiosyncratic and legal-economic, although stress is put on the economic standards as far as Community public policy is concerned. Certainly Community *ordre public* cannot be understood in strictly the same terms as in the State sphere; admittedly, the main difference with Member State notions of public policy remains the ethical layer. However, also considerations of human rights seem to find enshrinement in this notion. The interaction of layers finds an excellent testing ground in the Community *ordre public.*

19. Community *ordre public* fulfils the traditional functions assigned to public policy, namely the elimination of foreign law contrary to the essence of the legal order, the defence of idiosyncratic principles of the system and the safeguard of legislative policies. At the same time it adds some specific devices, namely its interest as a means to reinforce common identity (mainly under the shape of European culture) while it fulfils material justice. This function, together with its particular insertion in the EC context, purport further consequences from a functional viewpoint: thus, Community public policy may be alternatively seen as a sort of internal public policy - which results in a restriction of party autonomy, and as a constitutional parameter according to which to control Member State's public policy - in terms of the general good - or to solve inconsistencies of the present system in the application of protective mechanisms between Member States. The exceptional recourse to public policy in the conventions to overcome the deficiencies of the conventions (namely as regards exorbitant jurisdiction, misprotection of procedural rights and faulty implementation of Community mandatory legislation by Member States) should be understood in reference to Community *ordre public.*

20. Community public policy appears thus, not only as a defensive means but as an

offensive and creative instrument directed to the construction of Europe. That is why in the long run, it may be conceived as a substantive conflict rule. Its introduction will contribute to the reinforcement of the Community, while the application of the notion with a separate identity of Member States' notions entails the possibility to draw Community conflict rules in which such EC public policy and mandatory rules are incorporated - in the same sense that this phenomenon has been contended to take place at the State level. Public policy would then regain its correct role of excepting clause. The gist of such a notion may not definitely be set, but the minimum core is ensured with the principles of non-discrimination and pluralism, the promotion of cultural identity and human rights and protection of the market. The definition and application of such clause would then create *"quasi irrésistiblement une communauté des esprits européens, une conscience européenne"*.

21. Forwarding the possibility of a European Union public policy is not made unaware of the complexities it entails. The effects that the application of this notion may exhibit appear on certain occasions difficult to make precise since there is no Community law which would fulfil the role of the *lex fori*. However, the correct implementation of the latter by Member States may provide the necessary points of reference in order to reach an answer. Another difficulty stems precisely from the fact that Community *ordre public* has to relate with Member States' notions of public policy. Indeed, the two levels must be kept separate. In the light shed by the former considerations, it is clear that a relationship of supremacy of the former over the latter may not necessarily be established between them. On the contrary, the alleged reproduction of a *communio iuris* which finds more precise definition in the principles of pluralism, subsidiarity and respect of cultural identity, provide a solid basis to prop up the final structure of the relations. Such a solution is also consistent with a human rights perspective. In other words, the admission of cultural identity criteria entails the admission of relative notions of human rights and public policy. Summing up, different notions of public policy co-exist based upon the assumption that State public policy is necessarily read in EC parameters and EC *ordre public* incorporates as essential constituting element the respect of State identity.

22. A conception of the kind fits in the large view of the *communio iuris*. The latter introduces the possibility of relative public policy without the system being utterly shaken.

Still, Community public policy could be charged with relativity, since its invocation and application are too linked to the EU boundaries. EU *ordre public* remains nevertheless a notion beyond States that have recourse to it precisely to defend the *communio iuris* in which it is inserted. The fact that they are necessarily linked to a territory and a legal system does not deter any value to this notion. While Member State's public policy is narrowed because of membership to the EC, the Community notion incorporates those interests which are common to all the States of the Union but not exclusive to them any longer.

23. Certainly, some risks arise from this view. The main one consists in the assimilation of the notion to a too strict market fulfilment and adopting a reading in which non-legal criteria take precedence. The definition of the scope of EC order needs then a careful reading. Another risk exists to become too parochial in the identification and application of such a notion as can be said to happen in the US system. The proposal for a Community public policy is not an invitation for an excessive recourse to public policy. On the contrary, it should remain of restricted use. Its existence is required because of the integrative character and the substantive commitment that such a choice entails mainly from a human rights protection perspective.

4. The increasing importance of judiciary

24. These considerations impose some final remarks in relation to the role of judges in the procedure of individualisation, application, creation and correction of public policy. Seemingly legal systems incorporate progressively functional notions. They reflect the trend to abandon a formalistic approach to law and introduce substantive concerns. Consequently, a new conception of the judiciary where the judge assumes further competence and his free discretion is subject to less control is felt. This phenomenon is acknowledged at various levels, which go from the evaluation of the principle of proportionality as regards restrictions to human rights to the application of mandatory rules. Such a phenomenon is evaluated in a positive way unless it degenerates to abuses (as may be suspected to occur at the Strasbourg level and it may ensue in the sphere of the ECJ if it follows the same path as the latter).

25. The responsibility left to judges is enormous and needs to be ensured by a steady education. Indeed, in the European Union framework this necessity of education is felt with urgency since the judge is faced in addition with the consideration of the integrative aims of Community law and the defence of supranational aims. The application of national and Community mandatory rules, the evaluation of national legislation and public policy according to the Community general good, are features which presuppose a Community commitment of the national judges. They have to overcome a strict national approach and assume that not only the State legal order but also the EC needs to be protected. In other words, they must assume their Community role as well as their importance as defender of human rights prior to international courts. Such a perception should also result in a collaboration between Member State courts. A regular exchange of updated case law, the possibility to find support in other Member State's jurisprudence or the elaboration of updated digests in these matters may be instruments to attain such purpose.

26. Admittedly national judges will find essential help in the ECJ. The latter certainly will have to identify progressively the Community public policy and decide on its application and articulation with Member States' public policy. The creation of a special panel of the Court (or a separate court) dealing with private international law matters in the EC would simplify the task of the ECJ in a branch of law which is increasingly growing in the Union. The application of Community public policy by this Court will confirm its internal character within the Union while its true international character will come as a result of the reference made to it by arbitration courts and its application by Member State courts in relation to non-EC States.

European Union *ordre public*, a utopia? Hopefully, this thesis has proved it is not so. European Union *ordre public*, a challenge? Indeed, and a fascinating one in which legal tradition and the innovation of the boldest legal experiment may find happy union.

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