The Birth of Transnational Constitutionality

Renaud Dehousse

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THE BIRTH OF TRANSNATIONAL CONSTITUTIONALITY

Europe in the year 2000 seems to be a victim of a constitutional fever reminiscent of the birth pains of liberalism in the nineteenth century. While a "convention" of European delegates debates the utility of a charter of fundamental rights for the European Union, initiated by Joschka Fischer's Berlin speech, several heads of state have evoked the perspective of a European constitution in the relatively near future.

To fully understand the scope of the present debates, it is useful to situate them in their historical context. The idea of a European constitution in fact appears as one of the avatars of a reform movement (started in Europe at the end of the Second World War) that tended to substitute a logic of cooperation for the logic of power that had essentially characterized relations between European nation-states until 1945. If this logic is often associated with the idea of a transfer of sovereignty to supranational institutions – which stirred up so much controversy after the Maastricht treaty – we still must not forget other aspects that are equally important: the submission of decisions of state – individual or collective – to the rule of law; the granting of powers of oversight to judicial bodies; and the possibility for individuals to interfere in relations between states by submitting disputes affecting their interests to these bodies.

These elements constitute the political and institutional nurturing ground in which European integration was able to develop. Incontestably, they inaugurated a new era in which not only certain limits to the liberty of states were accepted, but also checks regarding the application of these principles were possible.

Even though the novelty of this construction has often been underscored, the present debates seem to indicate that it is worth our renewed

attention. In fact, it seems we proceed too often as if concepts and institutions could simply be transposed from the national level to the regional level. This means losing sight of a basic truth. The originality of regional integration is that its objective is to unite states without assimilating them into a common state structure. In this unprecedented political venture, it is certainly possible to have recourse to techniques borrowed from state constructions since pure and simple inventions are rare in institutional matters. Nonetheless, these tools must be handled with prudence, taking into account the different context in which they must be used. A constitution or a declaration of rights cannot have the same significance at a regional level that it does at a national one. As for the role of institutions, it must be designed according to the central role that the states play in the European edifice.

II

States Subject to Law

The reexamination of the primacy of state sovereignty constitutes the framework of the European system of regional integration. Following two world conflicts that bled Europe dry, it was clear to the pioneers of the European cause that it was necessary to go a step farther than the system inherited from the Peace of Westphalia. That system was built on the principle of unlimited sovereignty of nation-states, and the relations between them were above all a balance of power. The idea of a new system, in which these "cold monsters" would be submitted to a body of regulatory principles, seemed the only alternative to the "natural state" in which state governments had existed until then.

It was natural that this reorganizational effort should first concern human rights. This was before Jean Monnet and Robert Schuman discovered, with the idea of "de facto solidarity," the means for creating a virtuous logic of collaboration, since the necessity for building safeguards against the atrocities that marked the Second World War was vastly consensual. The preamble of the European Convention on Human Rights, signed in Rome on November 4, 1950, and which outlined "a common heritage of political traditions, ideals, freedom and the rule of law," should not delude us. In a discourse strongly tinged with jus naturalism, we clearly discern a political will to submit the action of states to the control of what was not yet called the international community. It is precisely because this "common heritage" did not prevent these atrocities that it was necessary to apply the force of law to these superior principles, which no government would be able to escape. Moreover,

for many partisans of a European Declaration on Human Rights, the binding nature of the convention was essential: it was necessary to go beyond declaratory principles, where the Universal Declaration on Human Rights had stopped in 1948. [1]

The first objective of this undertaking, like the international protection of human rights as a whole, was to tie the state into a network of international commitments that could be invoked in support of sanctions against governments if they threatened democracy and fundamental rights. The internationalization of the protection of fundamental rights thus took on the same function as their recognition at a constitutional level: in both cases, essential principles were upheld as higher rules, in order to protect them against the questionable behavior of the odd majority. The events that followed were to show, moreover, the lasting nature of this constitutional type of logic. Did we not witness how the French government, once the death penalty had been abolished, encouraged the adoption of a protocol "confirming" abolition in the context of the European Convention on Human Rights? The meaning of the maneuver was clear. As [minister of justice] Robert Badinter later stated: "The vampire still had to be nailed in his coffin. To make it impossible to go back, the ban had to be written into the European Convention." [2]

This form of "international constitutionalization" in many ways represents the prolongation of constitutionalism that we have at a national level. Certainly, the scope of these higher rules varies: at an international level, we try to regulate relations between states as well as relations between governments and the governed. And we know that the effectiveness of international standards is well below that of national rules. These differences should not, however, obscure the community of thought that we find at the root of these two types of constitutionalism. In both cases, the objective is the same: combating absolutism and arbitrariness by subjecting the acts of governments to the rule of law (*l'empire du droit*, *Rechstaat).*

If the "constitutionalizing" ambition of the European Convention on Human Rights is clear, this is not necessarily the case with regard to community treaties. It is true that treaties establish a revolutionary

1. On the origins of the convention, see Emmanuel Decaux, "Les États parties et leurs engagements," in *La Convention européenne des droits de l'homme,* ed. Louis-Edmond Pettiti et al. (Paris: Économica, 1995), 3-25.

2. Interview in *Le Nouvel Observateur*, August 31, 2000, 62.

institutional architecture, based on the idea of transfers of sovereignty to supranational bodies. However, in their original version, the treaties seem first to be a catalog of essentially technical provisions, as would be expected of functionalism. This did not prevent a German school of thought – ordoliberalism – from seeing in them a recognition of the market economy, constituting a guiding metalegal principle for building a number of interpretations of the treaty and community jurisprudence, and therefore indirectly the behavior of member states. Even though this vision of the "economic constitution" has never been unanimous, [3] it is symptomatic of a will for a constitutional reading of European integration.

IV

It is, however, the Court of Justice in Luxembourg that worked most towards a "constitutionalization" of the treaties. Starting with the "Van Gend en Loos" ruling of 1962, [4] the court gave an extremely wide interpretation of the ban on discrimination contained in the EEC Treaty, upheld as a source of rights that the complainants could cite before national jurisdictions, even when the wording of these provisions showed clearly that they were mainly addressed to member states. By transforming the treaty into a catalog of individual rights, it also opened the door to a whole range of arguments that private individuals have been able to use every time they esteem that national authorities are violating their rights. Next, despite the silence of the treaties on this question, the court soon stated that in case of conflict with national provisions – even if they were constitutional law – community rule would always prevail. [5] Finally, replying to the concerns expressed by some national jurisdictions, which feared that the primacy of community law might lead to a reappraisal of constitutional provisions concerning the protection of fundamental rights, the Court of Justice progressively admitted that it should monitor the conformity of community decisions, followed by national decisions related to them, with "the fundamental rights recognized and guaranteed by [national] constitutions" as well as "international instruments relating to the protection of human rights with which member states have cooperated or to which they have acceded"

3. See the critical analysis of the debate in Léontin-Jean Constantinesco, "La Constitution économique européenne," *Revue trimestrielle de droit européen* (1977): 244-281. See also David Gerber, "Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe," *American Journal of Comparative Law* (1994): 25.

4. Case 26/62, *ECR* [European Court Reports] (1963): 3.

5. Case 6/64, Costa v. ENEL, *ECR* (1964): 1141.

(rather sibylline language, but which clearly targeted the European Convention on Human Rights).[6]

Step by step, community judges thus created a foundation for a legal structure imposed on member states. In order to do this, they adopted methods of interpretation much closer to those of constitutional courts than those of international jurisdictions. Far from adhering to the real or supposed intention of the contracting parties (a required reference in the interpretation of international agreements), they drew heavily on the final objectives of integration, laid out in the preamble of the Treaty of Rome.

If the "constitutionalization" of treaties[7] has been used in this context, it is because it was clear that by proclaiming the superiority of community law over national standards, this process was leading to an implicit displacement of the fundamental standard that tests the validity of all legal acts (Hans Kelsen's *Grundnorm*), creating in this way the basis of the conflict of sovereignty that shook Europe when the Maastricht Treaty was ratified.

The Legalization of International Relations

The submission of states to the law entailed the creation of international jurisdictions responsible for the implementation of the higher principles defined in the basic texts. The novelty of the process was even more remarkable in that the states had long showed hostility to all forms of "legalization" of international relations, insofar as this might impinge on their autonomy. The wind of constitutionalism that blew over postwar Europe resulted nevertheless in the quest for counterbalances capable of opposing totalitarianism. The weakness of European parliamentary systems faced with the rise of Nazism and fascism that prevented parliaments from acting as guarantors of fundamental freedoms made it natural to turn to specialized bodies. The logic that led to setting up European jurisdictions was similar to that which prevailed at the creation of constitutional jurisdictions at a national level: in both cases recourse to a specialized jurisdiction seemed

6. Case 4/73, Nold v. Commission, *ECR* (1974): 491.

7. Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," *American Journal of International Law* (1981): 1-27; G. Federico Mancini, "The Making of a Constitution for Europe," *Common Market Law Review* (1989): 595-614; Joseph H. H. Weiler, "The Transformation of Europe," *Yale Law Journal* (1991): 2405-2483.

indispensable for guaranteeing the effectiveness of fundamental rules that had just been solemnly recognized.

The willingness to break with the past that inspired these innovations is clearly seen in the speeches of Pierre-Henri Teitgen, Rapporteur of the draft convention at the Consultative Assembly of the Council of Europe:

"We are told that we have to take the sovereignty of the state into account and not give competence to a European jurisdiction to control internal legislation, executive, or judiciary acts of European governments. This is said to infringe on national sovereignty. Allow me to say, my dear colleagues, that sovereignty can be seen in two ways. On one side of the coin, maybe it is very beautiful and very grand. The reverse side sometimes means solitude and misery, especially today. Solitude and misery is also war. Moreover, when we wish to guarantee and protect
VI freedoms in Europe, it is not a question of diminishing the sovereignty of one nation-state in relation to another nation-state, to give preeminence to one nation-state over another nation-state. It is a question of limiting the sovereignty of states on the side of the law, and on that side, all limits are allowed." [8]

It would still be an exaggeration to depict this evolution toward forms of international judicial oversight as a triumphant march toward the light. To the contrary, what strikes us when we read the debates accompanying the birth of the European Convention are the objections raised by those steeped in the classical spirit of international law faced with what seemed to them, justifiably so, a threat to the omnipotence of nation-states. Moreover, the judicial system put into place by the convention multiplies the barriers, seeking a synthesis between legal action and diplomatic action. Prior to addressing the court, the European Commission on Human Rights was invested with an investigatory and conciliatory role. [9] Following the submission of a report by the Commission, when the court was not addressed, the Committee of Ministers, a political body par excellence, was entrusted with a judicial task (to decide "if there was or if there was not a violation of the convention"). [10] And above all, in the absence of a majority in favor of a compulsory Court, the court's intervention had to be accepted individually by each signatory of the convention. [11]

8. Quoted by Emmanuel Decaux, "Les États."
9. Art. 28.
10. Art. 32.
11. Art. 25.

Compared to the painful birth of the European Court of Human Rights, the decision to set up a Court of Justice does not seem to have caused as much alarm when the Community of Coal and Steel was created. It is true that it did not target the states as much as the High Authority. The latter being accorded significant powers of management, it was natural to allow for a judicial review of its decisions. In the same way, granting the Council of Ministers the power to decide by a qualified majority made it necessary to introduce the right of appeal for states whose rights might have been neglected. The ECSC treaty thus contains a whole range of remedies inspired by French administrative law. [12] Along the same line, the member states accepted the court's authority, whose jurisdiction was compulsory. The treaties also confer on an autonomous body, the European Commission, an essential role in the repression of infractions of community law: guardian of the treaties, the Commission can go as far as addressing the court when it esteems that a state has neglected its obligations. [13]

This centralized model of judiciary control contrasts with the principle of free choice, by the states, of dispute-settlement processes that remain the rule in international law. The Court of Justice concluded that the system of remedies under the treaty prohibited member states from using the range of unilateral countermeasures under international law. [14] Compulsory submission to the arbitration of the court in case of dispute among member states constitutes a fundamental aspect of the logic of the regulation of relations between states that characterizes the community system. Admission to European society not only entails the states' acceptance of a body of substantive rules, but renunciation of one of the earliest rights (which says a great deal concerning the "natural state" that still exists in international society): the right for a state to render its own justice. What would Europe have looked like if it had been possible for each government to invoke the rule of reciprocity to sanction its partners' potential failings? It is a good bet that going from reprisals to retaliatory measures, we would have witnessed a progressive unraveling of the principles contained in the treaties. Under these conditions, how could we contemplate a legislative program that was the slightest bit ambitious?

12. Maurice Lagrange, "La Cour de justice des Communautés européennes du Plan Schuman à l'Union européenne," *Mélanges Fernand Dehousse* (Paris-Brussels: Nathan-Labor, 1979), 127-135.

13. Art. 226 (ex-art. 169) of the EEC Treaty.

14. Related cases 90 and 91/63, Commission v. Luxembourg and Belgium, *ECR* (1964): 1217.

Despite early reservations about judicial control, its importance was gradually recognized in the system provided for under the European Convention on Human Rights. Starting with their first decisions, the supervisory bodies established by the convention stressed that the latter aimed at ensuring an objective protection of fundamental individual rights, rather than conferring on the signatory states subjective rights advantageous in the pursuit of national interest. This recognition of a veritable "community public order of free democracies of Europe" [15] goes much farther than the traditional principle of diplomatic protection, allowing a state to claim protection for the rights of its citizens on the international scene. It opens to all signatory states of the convention what we could call the right of judicial interference in case of the violation of human rights, a right that made it possible to introduce a motion against Greece under the colonels or the Turkish military régime by states that acted without self-interest.

Optional declaration after optional declaration, the first signatories of the convention ended up accepting the court's jurisdiction, accrediting by the same token the idea of an indissoluble link between adhesion to the Council of Europe and full acceptance of the convention, an idea that proved most useful following the collapse of the Communist regimes, when Central and Eastern European countries, soon followed by Russia, came knocking at the Council's door. By making the court's jurisdiction compulsory, while putting an end to the role of the Committee of Ministers, Protocol no. 11, open to signature in 1994, crowns this evolution. It thus consecrates the lesson of several decades of the application of the convention: "Human rights are better and more surely protected by impartial and independent judiciary bodies than by political bodies where 'reasons of state' are liable to prevail." [16]

A Right to Individual Appeal

Ubi ius, ibi remedium: proclaiming a body of "constitutional" rules was insufficient, as their effective application had to be assured. The establishment of international jurisdictions represented a step in the right direction, but it remained insufficient since in numerous cases a

15. Decision of the Commission in Austria v. Italy, app. 788/60, *Annuaire de la Convention européenne des droits de l'homme*, vol. 4, 139 ff.

16. Peter Leuprecht, commentary on Article 32, in *La Convention,* ed. Louis-Edmond Pettiti et al., 709.

government would prefer to close its eyes, in the name of the superior interests of the nation, rather than interfere in what is discreetly referred to as the "internal affairs" of its partners. The constitutional logic underlying European integration called for a further step: granting the holders of these newly created rights the possibility of legal action to protect them.

The qualitative leap was a major one. It allowed the emergence on the international scene, traditionally reserved to states, of individuals over whom they had no control. It is not surprising, therefore, that this met with determined opposition. During debates on the European Convention on Human Rights, there were many who, like the Belgian internationalist Henri Rolin, considered that "the indictment [of a state] before a Court of Justice called upon to pronounce judgment is of such gravity that the responsibility for it lies with the governments of the different member states of the Council of Europe, whether acting individually or collectively." [17] These reservations led to limited recognition of the possibilities of individual complaints to the regulatory bodies of the convention. The possibility of authorizing individual petitions was left to the sovereign appreciation of each state [18] and the filter of the Commission was established to avoid direct complaints to the court by individuals.

The same reservations are seen with the negotiations of the Rome treaties, clearly stamped by the will to restrict the possibilities for direct access open to individuals. Going back on the more liberal interpretation that had triumphed in the context of the ECSC, the government officials who drew up the treaties reserved the right to appeal for cancellation to persons only "directly and individually" [19] concerned by Community-institution decisions. They were also careful to close the door to the possibility of individual appeals against those states guilty of violations of community law.

However, the passage of time changed many of these reservations. In Strasbourg, individual petitions have always constituted the principal driving force of the activity of regulatory bodies. State applications, which were never very numerous, have practically disappeared today. The practice is such that individual petitions are no longer perceived as an anomaly; they appear today as an inseparable complement of adhesion to

17. Cited by Decaux, "Les États," 10.
18. Art. 25.
19. Art. 230 (ex-art. 173).

the Council of Europe. Protocol no. 9 took note of this by recognizing the right of natural persons or nongovernmental organizations to refer cases directly to the court.

In Luxembourg, the Court of Justice itself opened the doors of the courtroom to individuals. Whereas the Treaty of Rome reserved the right for the Commission to initiate infringement procedures to sanction violations of community law, the court accepted to rule on the behavior of states in the context of the preliminary ruling system established by Article 234 (ex-art. 177) of the treaty. Having recognized that these rights arise not only where they are expressly granted by community law, but also by reason of "obligations which the treaty imposes in a clearly defined way upon individuals," it accepted to determine often unambiguous questions submitted by national jurisdictions as to the compatibility of national provisions with community law. [20] This decision, which encouraged private individuals to apply to national jurisdictions when they felt that a national ruling ignored their rights under community law, was to have a major impact on the evolution of community litigation. Today, it is essentially through the channel of preliminary ruling procedure (and thus indirectly at the initiative of private individuals) that the behavior of member states is subject to the judgment of the court. The success of this form of "constitutional" oversight has never failed. This is what explains the volume of preliminary rulings that today represent half of the decisions of the Court of Justice each year. And it is following individual applications that some of the major rulings of community jurisprudence have been given. The alliance between the Court of Justice and private individuals has thus changed the course of European integration more than once. [21]

This revolution, which makes the individual an actor in the process of integration, does, however, have its limits. Applications to Strasbourg and Luxembourg remain a veritable obstacle course, both long and costly, closed to those who lack specialized advice or the financial means. At the community level, remedies for institutional decisions available to individuals remain limited, even if the Court of Justice has occasionally extended them in the name of the rule of law. [22] Moreover, even supposing that we find an answer to this criticism, we must keep

20. Case 26/62, Van Gend en Loos, *supra.*

21. See on these points Renaud Dehousse, *La Cour de justice des Communautés européennes* (Paris: Montchrestien, 1997), 32-38.

22. Case 294/83, Ecology Party Les Verts v. European Parliament, *ECR* (1986): 1339.

in mind the intrinsic limits of constitutional justice. It was conceived to protect individual rights and democratic debate; its object is not to supplant the latter.

From Constitutional Revolution to Democratic Revolution

The transnational constitutionalism to which Europe gave birth after the Second World War was in line with the liberal trend that inspired the development of constitutional guarantees at a national level in the nineteenth century. By accrediting the idea of limits to state sovereignty and judicial review of acts of government, it created the basis for a new society, where what went on inside national borders no longer constituted a nation-state's private domain, and where remedies exist to allow individuals to protect themselves from arbitrary decisions.

Europe has thus gone past the primitive stage when relations between nation-states were above all a balance of power, to progressively enter a world of regulations. This incontestable progress has, however, only enjoyed a relatively limited form of transnational socialization. Europeans define themselves first and foremost in relation to their country; at best, European identity takes a second place. Hindered in particular by the absence of a shared language and political culture, European political debate remains limited, and transnational movement, relatively weak. Despite incantatory references to European citizenship contained in the Maastricht Treaty, it still remains difficult for ordinary people to make their voices heard. A relatively small elite makes decisions affecting the greater good of the community.

Pushing the point, we could say that like bourgeois societies of the last century that fought arbitrary decisions while ignoring both women and the poor, European society must now complete its constitutional revolution with a democratic revolution. This requires a qualitative leap, a Europe no longer founded on the defense of subjective rights but on the possibility for citizens to weigh on the decisions that are made at the European level. Along that line, the contribution of a charter of fundamental rights can only be a weak one. What is the point of making a great fuss over new rights when at best they will only be available to a small minority?

ABSTRACT

After inventing constitutionalism without a constitution, Europe must now lay the foundations for a new construction: a political system that gives a greater place to its citizens without reducing the role of the states – with which these same citizens still identify – to the smallest share. A difficult task surely, but is it not in keeping with the universalistic ambitions of the promoters of European integration?

Renaud Dehousse, professor at the Institut d'études politiques de Paris where he heads the Centre européen, he is the author of numerous publications on European issues, in particular, *La Cour de justice des Communautés européennes* (1997), and *An Ever Larger Union? The Eastern Enlargement in Perspective* (1998).