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EUROPEAN UNION LAW AND NATIONAL CONSTITUTIONS

CONCLUSIONS

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The questionnaire was drafted with the intention not to repeat the subjects discussed in 1996, at the 17th Congress of FIDE "National constitutional law vis-à-vis European integration" in Berlin, but to revisit them in the light of the important developments which have occurred since then.

While the questionnaire focussed on the relations between national constitutions and a European constitution, the question of fundamental rights and the way national level of government is affected by the system of governance of the Union, the new constitutional perspectives opened by the Laeken Declaration gave a new dimension to the topic. Furthermore, for the conference proper, held on October 30 – November 2, 2002, we were helped and propelled by current events. We had the final reports of a number of working groups of the Convention (subsidiarity, Charter of Fundamental Rights, legal personality of the EU, role of national parliaments, complementary competencies). A preliminary draft Constitutional Treaty, drawn up by the Presidium of the Convention, had been presented by President Valéry Giscard d'Estaing at the plenary session of the Convention on October 28, 2002.

Each session of our working group was devoted to a specific topic related to some aspects of our general report, but equally inspired by recent developments on the constitutional scene of the European Union.

1 – Constitutionalism revisited : what does Constitution mean for the European Union ?

Is the concept of constitution linked with that of state? Like the notion and functions of the state, there was a broad consensus that the notion of "constitution" and its functions have changed. Given that national constitutions accept that national sovereignty might be subject to limitations or "pooled" and, in part, exercised in common, the question is raised of the possibility and coherence of two levels of democracy, two levels of citizenship : Union and States. What are the essential functions of a Constitution : setting up and organising a political system, running a society, imposing the rule of law, determining the relationship between the citizens and their public authority ?

Questions were put regarding Article 4 of the preliminary draft constitutional treaty which refers to "A Union of European States". Is it only an elegant arrangement ? Isn't there a risk of regression in comparison with what has already existed for years in the EC/EU system ? It was recalled that the concept of people of Europe was already present in the Preamble of the Treaty of Rome (EEC, 1957) and in the early case law of the Court of Justice (*Van Gend in Loos*, 1963). Is it admissible that a European Constitution be negotiated exclusively by those who speak for the people ? Would not a constitutional referendum be advisable ?

The need of a document figuring European Union was underlined. It is important to use the founding expression of constitution even if in the end the Fundamental Law of the EU is adopted along conventional practices (i.e. treaty). There is a need of something more than the

pure conventional level, something which could make clear to the European citizens that they have entered a sort of social contract.

2 – Supremacy and Pre-emption : Constitutional principles and national safeguards

Article 8 of the preliminary draft Constitutional Treaty establishes "the primacy of Union law in the exercise of the competencies conferred on the Union". Regarding terminology, the word primacy was generally preferred to that of supremacy. Its full recognition was felt inevitable in view of the principles of unity and equality, inherent to the concept of a legal norm. To include a clear provision on primacy in the Constitution could, however, cause difficulties for the Danish people to accept the new Treaty.

There is, indeed, a multifarious approach of supremacy, some legal orders pretending to their own supremacy upon European law. In practice the various national supreme courts of the Member States of the European Union try to avoid direct confrontation with the case law of the European Court of Justice which has clearly established the primacy of EC law upon national law of the Member States, including national constitutional law (see *Internationale Handelsgesellschaft*, 1970). There is a difference, thus, between theoretical announcements and reality. According to the periods of time, one may discover variations in the attitudes of national constitutional or supreme courts - which have re-insisted at least implicitly - on the primacy of national constitutional law in Germany, Italy, France for instance – without much significant practical consequence.

In search for unity, continuity, coherence between European Union law – the formula has been contested – and national law, it might be advisable to explore the existence and efficiency of remedies for those who try to use the rights which they draw from EC/EU law. Presently the Treaties do not establish a general principle of primacy; if such principle where to be inscribed in a constitutional treaty would it generate practical consequences ? It might even be counter-productive to introduce explicit provisions in a matter which is due to evolve.

EC/EU law is implemented by national institutions. Member States and candidates have adapted their respective constitutions in order to make them comply with EC/EU law (citizenship, single currency…). It has become a system of law the provisions of which are applicable to the citizens of the Member States along those of their domestic laws. The question on how to construe primacy in this "multilevel" legal system between European and the national law, as a hierarchy or as a system of functional preference (matrix) , was not resolved and left to academia.

3 – The European Charter of Fundamental Rights : legal status and judicial review

There was not much debate on the principle and general content of the Charter. The definition of fundamental rights was considered as being as necessary as the definition of competencies and powers of public institutions in an organised political society submitted to the rule of law. It must be given legally binding force as a (prominent) part of the Constitution. However some provisions were discussed in relation with the final report of Working Group N°2 of the Convention which recommended certain adaptations of the horizontal clauses, namely article 52 of the Charter. It was underlined that certain provisions referring to "principles" and not rights cannot have direct effect and should be implemented through the adoption of complementary acts. The proposed modifications to the final clauses were felt unnecessary but not a real damage. They are a remanence of a long standing opposition to social rights which have been included in the Charter proclaimed at Nice (December 2000), in line with the express willingness of the European Council of Hanover (June 1999).

Discussions took place on the practical conditions of integration of the Charter in the Constitutional Treaty, on the possible redrafting of the Preamble. But the main insistence was put on the question of remedies. It was again underlined that individual and legal persons should be able to refer to the rights inscribed in the Charter either in Community Courts or in national courts, it being recalled that a national judge is not entitled to declare that a community rule (secondary legislation) is contrary to the EC Treaty (*Foto Frost*, 1987). Where and insofar as the decentralised system of remedies under Article 234 EC would prove inefficient, there was a strong feeling that a revision of Article 230 IV EC is needed with a view to ensuring that the fundamental rights granted to the people are given teeth including with regard to directly applicable legislative acts.

4 – Providing for legal certainty and subsidiarity

Legal certainty regarding the division of responsibilities between the Europen Union and the Member States can be achieved by a more systematic and coherent definition of the competencies of the Union, simplifying and clarifying the existing provisions in the Treaties. This exercise must be distinguished, it was said, from the limitations to the exercise of competencies with regard to subsidiarity. The concept of subsidiarity is at the heart of federalism, it governs the sharing the competencies in each divided power system. There was agreement concerning the eminently political character of this principle. Though a need for an ex post facto judicial control of the respect of the principle of subsidiarity was underlined, it was also clear that such judicial control may not exceed a minimum control of a manifest error of appreciation. The proposal to create a special Court or Chamber at the ECJ to judge on subsidiarity was rejected as was that of an ex-ante judicial control on the initiative of national parliaments. On the whole the evaluation of subsidiarity was considered better to be left in the hands of the authors of the regulatory measures.

In this light, the "early warning system" proposed by the Working Group on subsidiarity was welcomed as a new idea, but criticised for giving too much powers to national parliaments. Various proposals were made in the direction of an ex ante consultative opinion given by a special body in which national parliaments would be represented - exclusively or together with other EC/EU institutions. Two risks, however, have been recalled: the risk of over-judicialisation and the risk of over-politisation. National parliaments might be tempted to overpass the only control of subsidiarity.

5 – Reorganisation of the European executive : giving the Union a face

A first reflexion was devoted to the analysis of the European executive referring to the present role of national administrations in the implementation of EC law, the distinction between the activity of regulation/decision and that of enforcement. It was also observed that the Member States would, in a medium term perspective, keep an eminent responsibility in the questions of defence, foreign policy, action against international criminality. It was asked to what extent the system should be modified in a new constitutional frame.

Another question was that of the institutions in charge of the executive in the European system. Attention was drawn to the fact that the Preliminary draft Constitutional Treaty refers to the presidency of the European Council (Article 16 bis), the Council (Article 17 bis), the Commission (Article 18 bis) only in "bis" articles: Have they been introduced "last minute"?. The crucial question is: Who appoints the President? A radical proposition was made by one of the general rapporteurs : a prominent personality would be elected by the European Parliament to become President of both the Council and the Commission. An even more radical proposal

suggested a direct election of the President by the people(s) of Europe - a solution which would, however, rather weaken the European Parliament. Dissenting opinions appeared quite numerous and vocal : is a unique president of the Union really necessary ? Such a change would be a revolution in comparison with the 50 years of practical division of the executive between the Council and the Commission, and co-operation between these institutions. On the other hand, it was argued, such a President of the Union could bring together the supranational and the intergovernmental branch of the European executive, and ensure the coherence of European policies.

The idea of a president of Europe was considered a question of image which is not devoid of political significance. It would contribute to bring Europe closer to its citizens; on the international scene, it would allow a single and visible representation of the EU.

Yet, less radical institutional solutions were considered as probably more realistic alternatives, such as maintaining the rotation of the Presidency of the European Council but providing for an election of the President of the Commission which would allow a stronger political control by the European Parliament, so that the President of the Commission would gain in political legitimacy and governmental authority.

6 – Enhancing Democratic Legitimacy and Control

With regard to the so-called democratic deficit, the question of the respective roles of the European Parliament and national parliaments was raised. Regarding the European Parliament, there was a broad consensus that co-decision should be the rule and that the Parliament should be given full control on the budget. It was proposed to give the Parliament also the right to elect the President of the Commission (or the Union?) as well as to vote on the appointment of the Judges of the ECJ.

Any increase of the role played by national parliaments at European level, however, was felt questionable. Reference was made to the experience of COSAC and to the idea of a Congress composed of representative of national parliaments ("Congrès des peuples") which could play a role in the election of the President and the revision of the European Constitution. But to whom could such a President be accountable? There was a general scepticism against any further mixing up the national and European levels of responsibility in a situation where the institutional reforms aim at enhancing efficiency, transparency and clear democratic accountability.

Another discussion took place regarding the ways and means of increasing the participation of the European citizens to the elections of European deputies. Though, the citizenship of the Union is already established, a European "demos" does not seem to exist yet. Could the adoption of a proper Constitution of the Union contribute to a European identity of the citizens, raise the feeling of solidarity to belong to a common supranational polity and, thus, give substance and existence to such a "demos" in a new sense ? At least, the debate on the Constitution of the European Union as it is lead in and around the Convention, and as we had it at the FIDE 2002 Conference in London, contribute to a Europe-wide public discourse on our common values and institutions, and this may be regarded as a first important step.

Finally, sailing between realism and utopia, various suggestions were made as regards the constitutional perspectives in Europe, the more radical being that of questioning the opportunity of maintaining national constitutions if a European Constitution were effectively to come to life.