COLLEGE OF EUROPE Studies

Scrutinizing Internal and External Dimensions of European Law

Les dimensions internes et externes du droit européen à l'épreuve

Liber Amicorum Paul Demaret

Inge Govaere & Dominik Hanf (eds.)

College of Europe
Collège d'Europe
Brugge
Natolin

P.I.E. Peter Lang

This book is written in honour of Paul Demaret, an exceptional academic who has made a significant contribution to the development of European Law and more generally European Integration. It is dedicated to him as he finishes his second term as Rector of the College of Europe. In this book, his colleagues and friends, fellow academics and practitioners, will analyze the current state and future perspectives of the various dimensions – both internal and external – of European legal integration. The contributions included cover *inter alia* fundamental rights protection and EU citizenship, institutional aspects of European integration, the internal market and its flanking policies, EU competition law and practice, external aspects of EU integration, international trade and foreign policy.

Le présent ouvrage rend hommage au Professeur Paul Demaret, un universitaire exceptionnel qui a contribué de manière très significative au développement du droit européen et de l'intégration européenne de manière plus générale, à l'occasion de l'achèvement de son deuxième mandat de Recteur du Collège d'Europe. Ses amis et collègues, universitaires et praticiens, analysent l'état et les perspectives de nombreux aspects – internes et externes – du droit et de l'intégration européenne. Les contributions couvrent notamment la protection des droits de l'homme et la citoyenneté européenne, les aspects institutionnels de l'intégration européenne, le marché intérieur européen et ses politiques d'accompagnement, le droit et la politique de la concurrence, les aspects extérieurs de l'intégration européenne, le commerce international et la politique étrangère de l'Union européenne.

Inge Govaere is Professor of EU Law, Jean Monnet Chair in EU Legal Studies at Ghent University and Director of the European Legal Studies Department at the College of Europe, Bruges.

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III. Aspects institutionnels de l'intégration européenne/Institutional Aspects of European Integration

Préface

Dans sa préface, le président du Conseil européen, Herman Van Rompuy, nous rappelle l'importance de la contribution du Collège d'Europe pour l'intégration européenne moyennant, d'une part, l'analyse de ce processus politique, économique et juridique passionnant et, d'autre part, la création continue de liens de solidarité interpersonnels à travers et au-delà des différents pays européens.

La contribution de Paul Demaret au développement du Collège d'Europe est exceptionnelle, et ceci non seulement en raison du fait qu'elle s'étend sur 33 des 64 années de vie de cette institution.

D'une part, c'est sous la responsabilité du directeur d'études Demaret (1981 à 2003) que le programme des études juridiques du Collège a été fermement établi comme une des premières adresses pour tout jeune juriste européen désirant se spécialiser en matière de droit européen.

Il a lui-même décrit les différentes étapes franchies au cours de ce processus de modernisation, de professionnalisation et de développement continu du programme d'études juridiques.[1] Nombreux anciens étudiants – tout comme la liste des enseignants – de ce programme travaillant dans la magistrature, au barreau, dans l'administration publique ou encore en tant qu'universitaires témoignent de cette réussite remarquable.

D'autre part, c'est sous le double mandat du recteur Demaret (2003 à 2013) que le Collège dans son ensemble a été davantage professionnalisé et préparé pour répondre à des nouveaux défis. L'on soulignera, sans être exhaustif, en premier lieu une ouverture accrue du Collège au-delà de l'Europe, notamment la création du nouveau programme sur les relations internationales de l'Union européenne, le renforcement continu du programme d'études interdisciplinaire à Natolin ainsi que le renforcement du corps académique non-visiteur (professeurs à temps plein et titulaires de chaires). Son nom restera également associé au nouveau site « Verversdijk », à Bruges, qu'il a réalisé en dépit de difficultés qui paraissaient insurmontables en 2003.

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1 Voir Paul Demaret, « Les études juridiques au Collège d'Europe (Bruges) », in P. Demaret, I. Govaere, D. Hanf, *Trente ans d'études juridiques européennes au Collège d'Europe*, Bruxelles, PIE Peter Lang, 2005, pp. 15-26.

Tout cela est d'autant plus remarquable car le recteur Demaret a appliqué avec succès au Collège les principes de comptabilité que le professeur Demaret avait été obligé d'enseigner à ses étudiants liégeois dans les années 1980. Il s'inscrit ainsi dans la ligne du recteur Lukaszewski qui l'avait invité à s'investir au Collège.

Finalement, nous rendons également hommage au professeur Demaret, un universitaire exceptionnel.

D'une part, il a formé des générations de juristes européens et en provenance d'autres régions du monde moyennant ses enseignements à Liège (ou il dirigeait également un programme de DEA/DES en droit européen) et à Bruges ainsi que dans nombreuses autres universités du monde. Ni les cours (qui débutaient généralement à 8 heures ou 8 heures 30) ni les examens du professeur Demaret n'étaient réputés d'être faciles. Mais l'on apprenait toujours quelque chose même – et surtout – lorsque l'on connaissait, ou croyait déjà connaître, la matière. Ce n'est donc pas surprenant que la note d'un candidat obtenue « chez Demaret » constituait un critère de sélection de poids pour nombreux employeurs.

D'autre part, Paul Demaret a contribué de manière significative au développement de la recherche du droit européen et international, et ceci non seulement moyennant ses propres publications dont nombreuses restent toujours des textes de référence. En sa fonction de directeur de l'Institut d'études juridiques européennes « Fernand Dehousse », il a également sans cesse activement encouragé des chercheurs, jeunes et expérimentés, à conduire et publier des recherches, notamment dans le cadre d'un grand projet de recherche en réseau de portée européen (« PAI »). Il n'est donc pas surprenant qu'une des premières mesures prises par le recteur Demaret était d'encourager les assistants académiques du Collège, moyennant l'introduction d'une clause spécifique dans les contrats d'emploi, à publier du moins un article par an.

Dans tous ces domaines, l'action de Paul Demaret était caractérisée par une rigueur sur le plan académique et conceptuelle, une ouverture exceptionnelle envers des nouveaux développements, une flexibilité d'accommoder des difficultés et situations imprévues et un sens très marqué pour l'intérêt de son institution pour laquelle il n'hésitait jamais à prendre ses responsabilités lorsque ceci s'imposait. En même temps, et ceci explique sans doute pourquoi autant de personnes ont eu le plaisir et l'honneur de travailler avec lui, Paul n'hésite pas à faire confiance aux autres et de leur accorder des responsabilités – même lorsqu'il existe un risque d'en être déçu. En règle générale, et le grand nombre d'amis et collègues ayant favorablement répondu à notre initiative de rendre hommage à Paul en témoigne, les déceptions on fait exception.

Ceci nous a confrontés au problème que le nombre des personnes susceptibles de contribuer au présent ouvrage en honneur de Paul était à un tel point élevé qu'il risquait de mettre en péril la réalisation même de ce projet. Un critère de sélection s'imposait. Nous avons finalement retenu celui des amis et collègues, professeurs de droit et directeurs d'études, du Collège car cette *Festschrift* est offerte à Paul Demaret à l'occasion de l'achèvement de son rectorat au Collège d'Europe.

Last but not least, nous souhaitons remercier très chaleureusement Valérie Hauspie qui a assuré de manière particulièrement engagée et efficace le secrétariat ainsi que la mise en page du manuscrit final. De même nous remercions Marc Abenhaïm, Sara Benedi Lahuerta, Svetlana Chobanova, Ziva Nendl, Kletia Noti, Julie Probst et Laurence Van Mullem, assistants au département juridique du Collège, pour leur aide ce qui concerne la première lecture très attentive des épreuves.

Ad multos annos !

Bruges et Alicante, le 15 janvier 2013

Inge Govaere

Director of European Legal Studies,
College of Europe
Professor of European Law,
Jean Monnet Chair in EU
Legal Studies,
Ghent University

Dominik Hanf

Administrator, First Board of Appeal
Office for Harmonization
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Visiting (and former permanent) Professor,
European Legal Studies, Former Director
of European Interdisciplinary and of
European General Studies, College of Europe

Foreword

Among our Union's founding moments, the Hague Congress of 1948, which saw the foundation of the College of Europe, holds a very special place. Bringing together hundreds of delegates from many countries, only three years after the end of the Second World War, it inspired Europeans all over the continent, and opened some perspectives for the future.

Speaking in the margins of the Congress, Winston Churchill captured the energy that united the supporters of this new Europe. Addressing a crowd of some 40,000 people on Dam Square in Amsterdam on 9 May – by a happy coincidence two years to the day before the Schuman declaration – he called for "*a Europe in which men will be proud to say, 'I am a European'.*" He continued: "*We hope to see a Europe where men of every country will think as much of being a European as of belonging to their native land, and that without losing any of their love and loyalty of their birthplace. We hope wherever they go in this wide domain, to which we set no limits in the European Continent, they will truly feel 'Here I am at home. I am a citizen of this country too'. Let us meet together. Let us work together. Let us do our utmost – all that is in us – for the good of all.*"

The College of Europe, which was conceived that very week in The Hague by some of Europe's prominent founding figures, remains one of the most lasting legacies of this "Congress of Europe". There could have been no better birthplace for an institution devoted to deepening not only the understanding of Europe but also understanding between Europeans.

Though I have not myself had the chance of studying at the College of Europe, I have always felt close to what many refer to as the "*Spirit of the College*". A culture of openness and of curiosity, a layered sense of belonging and of identity, of feeling at home in any place that other Europeans call home. I became familiar with this spirit in 1965 thanks to Father Verleye, one of the founding fathers of the College and a close friend of Rector H. Brugmans. When I was 17, Father Verleye spent three full days teaching us about Europe.

A haven for unexpected encounters and discoveries, the College of Europe has always fostered solidarity and mutual understanding among its students. As a pioneer in the field of European studies, it has contin-

uously broadened our knowledge of this political work in progress that is our Union, examining it from an ever increasing range of perspectives, and mobilising new tools to deepen our understanding of who we are and what we do together.

Paul Demaret spent thirty years at the service – and at the helm – of this unique institution. He invited me to Bruges to deliver my first major speech as President of the European Council, to speak about a common European foreign policy. I still remember the enthusiastic reaction from this audience of young people. It was a great start of my mandate.

What the College has achieved in over six decades since its creation is truly exceptional. By pursuing excellence in European matters, may it continue to teach generation after generation of excellent Europeans.

Herman Van Rompuy
President of the European Council

Curriculum Vitae Paul Demaret

Personal

Born 24 September 1941, Ostend, Belgium, Belgian citizen, four children

Education

1975, J.S.D., U.C. Berkeley

1971, LL.M., Columbia University

1969, "D.E.S. en droit économique" (graduate degree in Economic Law), University of Liège

1967, "Licencié en sciences économiques" (B.A. in economics), University of Liège

1963, Docteur en droit (J.D.), University of Liège

Present Position

Since 1 February 2003 (until 31 August 2013), Rector of the College of Europe (Bruges/Warsaw, Natolin)

Previous Positions

2003-2006, "Professeur extraordinaire" (Part-time professor), University of Liège

1982-2003, "Professeur ordinaire" (Full-time professor), School of Law, University of Liège, Jean Monnet chair in European Economic Law (1990)

1981-2003, Director of European legal studies (bilingual programme French/English), College of Europe, Bruges

1984-2004, Director, Institut d'études juridiques européennes, Fernand Dehousse, University of Liège

1978-1982, "Chargé de cours" (Lecturer), School of Law, University of Liège

1978-1982, "Senior Research Associate", National Foundation for Scientific Research, Belgium

1973-1978, "Research Associate", National Foundation for Scientific Research, Belgium

1969-1973, "Research Fellow", National Foundation for Scientific Research, Belgium

1964-1969, "Research Fellow", National Foundation for Scientific Research (1965-66: military service), Belgium

1963-1964, "Research Assistant", Professor Ch. del Marmol, University of Liège

Visiting Positions

1981-2003, Visiting professor, College of Europe (1981-1985: European Law and Intellectual Property; 1982-2003: European Economic Law)

2001, Visiting professor, World Trade Institute, Bern, (Environmental Protection, Public Health and EU Law) (May 2001)

2000, Visiting professor, Center for European Studies, Peking University, December 2000, (EU and WTO law)

1999-2001, Visiting professor, Pontificia Universidad Catolica del Peru, Lima, (The Single European Market – Internal and External Aspects)

1999, Visiting professor, University of Coimbra (The External Dimension of the Internal Market and WTO)

1998-1999, Robert Schuman professor (EU-China Higher Education Cooperation Programme), Peking University, (EU & WTO law), 15 May-15 June 1999

1999, Visiting professor, University of Paris II (The External Dimension of the Internal Market)

1999, Visiting professor, Institut universitaire international Luxembourg (The Extra-territorial Application of European Competition Law)

1994-1996, Visiting professor, Colegio de Mexico (The Single European market – Internal and External Aspects) (Regional Integration from a Comparative Perspective)

1993-2000, Visiting professor, Barcelona autonomous University (The External Dimension of the Internal Market)

1992, Academy of European Law, European University Institute, Florence (The External Dimension of the Internal Market)

1989, Director and visiting professor, Session juridique, Institut International Universitaire, Luxembourg (European and International Aspects of Industrial Property)

1989-1996, Visiting professor, University of Lusiada, Lisbon, (European Economic Law and Free Movement of Goods)

1988-1993-1994-1995, Visiting professor, Catholic University of Lisbon (The External Dimension of the Internal Market)

1990-1991-1992, Visiting professor, University of Geneva (Introduction to the Four Freedoms of the Common Market)

1987-1988, Visiting professor, University of Fribourg, Switzerland (Free Movement of Goods and Persons in the European Community) (December 1987 and February 1988)

1977 and 1980, Visiting professor, European Centre, University of Nancy (European Competition Law)

Selected Service and other Activities

1999-2000, Member of the WTO panel Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef

1999, Co-organisor, Workshop on "Legal Issues in EU-China Trade Relations", Center for European Studies, Peking University, 6-10 December 1999

1998-1999, Member of the WTO panel India BOP Measures

1999-2003, Member, Collège doctoral européen, Université Robert Schuman, Strasbourg

1998 to date, Member of the editorial board, Journal of International Economic Law, Oxford University Press

1997-2007, Member and then Chairman, Legal Science Committee, National Foundation for Scientific Research, Brussels

1990-2004, Coordinator of a research programme sponsored by the Belgian federal government, Law of European Economic Integration, (together with Professor M. Maresceau, Universiteit Gent and Professor M. Dony, Brussels Free University) (twice renewed)

1995-1999, Member, Curatorium de l'Institut Universitaire International Luxembourg

1995-2003, Member, Board of directors and Executive Committee, College of Europe

1994-1996, Executive Director, Association internationale pour l'étude de l'intégration européenne, Responsible for the Organization on behalf of the European Commission of a month-long programme of European Studies at the Colegio de Mexico destined to Latin American graduates and civil servants. Also responsible for the organization of conferences in Lima and La Paz in October 1995

1992, Co-director, Seminar "Legal and economic aspects of regional integration. The European experience", Colegio de Mexico, 25-29 May 1992 (ULB – ULg. – European Commission)

1991-1995, Member, Administrative Board, University of Liège

1987-1991, Co-chairman, Belgian Society for European Law

1990, External consultant, "Cellule de prospective", European Commission, (External relations in the environmental field, trade policy and investments)

1985-86, Chairman, Selection Boards A 408 et A 409 (Recruitment of lawyers), European Commission

Subjects Previously Taught (University of Liege and College of Europe)

1982-2006, European Economic Law

1979-2003, Economic Law in a Comparative Perspective (US Federal law and European Economic Law)

1993-2003, The External Dimension of the Single European Market

1991-2003, The Law of European Integration (course for economists)

1982-1989, Accounting for Lawyers – Introduction

1976-1990, International Economic Law

1981-1985, European Law and Intellectual Property

Languages

French: mother tongue

English: fluent

Dutch: oral and written

Spanish: passive knowledge

German: reading

Publications

A. Books and monographies

- Author

Concurrence et distribution en droit communautaire, Fasc. 510, Juris-Classeurs concurrence, Paris 1984, Editions techniques

Patents, Territorial Restrictions and EEC Law, "IIC Studies", Max-Planck Institute for Foreign and International Patent Copyright and Competition Law, Munich, Vol. 2, Verlag Chemie Weinheim-New York, 1978

- Editor

30 Years of European Legal Studies at the College of Europe (Liber Professorum 1973-74 – 2003-2004), PIE Peter Lang, Brussels 2005 (Co-eds. – I. Govaere & D. Hanf)

Regionalism and Multilateralism After the Uruguay Round: Convergence, Divergence and Interaction, Bruxelles, Presses Interuniversitaires Européennes, 1997, (Co-eds. J.F. Bellis & G. Garcia Jimenez), 862 p.

Trade and the Environment – The Search for a Balance, Cameron May, London 1994, Vol. 2 (Co-eds. J. Cameron & D. Géradin)

Trade laws of the European Community and the United States in a Comparative Perspective, College of Europe, Vol. 47, Story Scientia, 1992 (Co-ed. J. Bourgeois et I. Van Bael)

Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels, Collège d'Europe, Vol. 45, Story-Scientia, 1988

"Aides et mesures de sauvegarde en droit international économique/Aids and Safeguard Measures in International Trade Law", Paris, FEDUCI, 1980 (XXXII^{e} Séminaire de la "Commission Droit et Vie des Affaires")

"Aspects juridiques de la recherche scientifique", Liège et Martinus Nijhoff, 1965 (XV^{e} Séminaire de la "Commission Droit et Vie des Affaires")

B. Articles

L'accès au marché des services réglementés: la libéralisation du commerce des services dans le cadre du traité CE, in *Revue internationale de droit économique* 2002, No. 2-3, pp. 259-291.

Parallel Imports, Free Movement and Competition Rules: The European Experience and Perspective, (co-author Inge Govaere), in Th. Cottier & P. Mavroidis (eds.), *Intellectual Property: Trade Competition and Sustainable Development*, The World Trade Forum, Vol. 3, University of Michigan Press, 2002, pp. 147-175.

L'application du droit communautaire de la concurrence dans une économie globalisée. La problèmatique de l'extraterritorialité, in J.F. Bellis (ed.), *La politique communautaire de concurrence face à la mondialisation et à l'élargissement de l'Union européenne*, Session d'études 1999 de l'Institut universitaire international Luxembourg, Vol. 32, Nomos Verlag, 2001, pp. 13-52.

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The Respective Powers of the European Community and Member States in the External Relations of the European Union (with particular reference to Transatlantic Relations), in G. Bermann (ed.), *Transatlantic Regulatory Cooperation*, Columbia conference, 17-18 April 1999, Oxford University Press, 2000, pp. 431-449.

The Non-Discrimination Principle and the Removal of Fiscal Barriers to Intra-Community Trade in Th. Cottier & P. Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination, World Trade Law*, The World Trade Forum, Vol. 2, University of Michigan Press, 2000, pp. 171-190.

Politique extérieure de la Communauté européenne (ou la face communautaire de la politique extérieure de l'Union européenne), in *Droit et politique étrangère*, Conseil de l'Europe, Commission européenne pour la démocratie par le droit (Commission de Venise), 1998, pp. 149-177.

The Reciprocal Influence of Multilateral and Regional Rules: A Framework of Analysis, in *Regionalism and Multilateralism* (*supra*), 1997, pp. 805-838.

Le juge et le jugement dans l'Europe d'aujourd'hui: la Cour de justice des Communautés européennes, in R. Jacob (ed.), *Le juge et le jugement dans les traditions juridiques européennes*, L.G.D.J., Paris 1996, pp. 307-380.

A Short Walk in the Realm of Subsidiarity, in R.M. Buxbaum, G. Hertig, A. Hirsch, K.J. Hopt (eds.), *European Economic and Business Law (1996)*, Vitznau Conference, Institut d'études juridiques européennes, Université de Genève, 1996, pp. 13-31.

The Working of E.C. Policies on Competition, Industry and Trade: A Legal Analysis, in P. Buygues, A. Jacquemin & A. Sapir (eds.), *E.C. Policies on*

Competition, Industry and Trade: Complementarities and Conflicts, Edward Elgar, Publishing Ltd, 1995, pp. 65-114.

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Border Tax Adjustments under GATT and EC Law and General Implications for Environmental Taxes, in 28 *Journal of World Trade*, 1994, No. 2, pp. 5-65 (co-author R. Stewardson).

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Les droits de propriété intellectuelle et la circulation des marchandises et des services, *ibid*., pp. 97-130.

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L'extraterritorialité des lois dans les relations transatlantiques: une question de droit ou de diplomatie?, *Revue Trimestrielle de droit européen*, 1985, 1-39 (enlarged French version of the previous article)

L'Europe et les moyens de communication, Rapport belge, 32 p., in Vol. 1, *Europe and the Media*, 11e Congrès FIDE, La Haye, 1984 (co-author P. Lewalle).

Mesures nationales d'ordre public et circulation des personnes entre Etats membres – A propos de l'arrêt Adoui, *Cahiers de droit européen*, 1983, pp. 261-303 (co-author B. Ernst de la Graete).

L'utilisation de la propriété industrielle comme cartel clandestin, in *Rapports belges au XIe Congrès de l'Académie internationale de droit comparé*, 1982, pp. 509-526.

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Non-Academic Activities

A. In the legal field (before February 2003)

Occasional consultant (licensing contracts, European competition law, State aids, internal market, EC external relations, GATT /WTO law)

President of an international arbitral tribunal in a case opposing a State and a foreign business firm (1996-1997)

B. In the environmental field

Member of the board, Domaine de Virelles (Aves-R.N.O.B. – W.W.F.), (1983-1995)

Member, Conseil consultatif de gestion, Réserves domaniales du Plateau des Tailles (since 1986)

Member of the board, (1978 to 1985) and later chairman (1990-1995), Aves a.s.b.l. (Ornithological society)

Co-author of "Pollution Wallonie", survey made on behalf of the Walloon Region (1978)

Author of articles on birds

C. In the political field

Member of the International Advisory Board for Bulgaria set up by the Prime Minister of Bulgaria in order to advise the Government of Bulgaria concerning its relations with the European Union (2008-2009)

I

L'ENSEIGNEMENT/ON EDUCATION

On Transnational Education

Some Options and Questions

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1. The development of the concept of transnationality is not the first attempt ever made to break though the boundaries set by the practice of using the nation to justify political power. The classic approach may be seen in the international law concept of internationality. However, internationality presupposes the nation; after all, it refers to the relations between nations. The concept transnationality goes much further; it means in effect abandoning the concept of the nation. Yet "*trans*" means, first and foremost, nothing more than "*beyond*", and 'transnational' must therefore be understood to mean "beyond the national".[1]

The concept of national sovereignty will acquire a fundamentally different meaning:

> Recent thinking revises earlier distinctions based on legal ownership and challenges the notion that the "public good" can be defined on a national basis. It focuses on the social character of the "goods" whether public or private. It argues that higher education in one nation has the potential to create positive and negative externalities in another; and all higher education systems and institutions can benefit from collective systems e.g. that facilitate cross-border recognition and mobility.[2]

Under "transnational education" is understood all types of higher education study programmes, or sets of courses of study, or educational services including those of distance education in which the learners are

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1 Richter I., Berking S. and Müller-Schmid, R., Introduction, Richter I., Berking S. and Müller-Schmid, R. (eds.), *Building a Transnational Civil Society. Global Issues and Global Actions*, Palgrave, 2006, pp. 8-9.

2 Margison S., "The Public/Private divide in Higher Education: A Global Revision", *Higher Education*, Vol. 53, No. 3, 2007, pp. 307-333.

located in a country different from the one where the awarding institution is based. In the case of transnational education, an educational institution or the programme may belong to the national education system of another country, or it may be independent of any national system, which has consequences on the legal aspects of the recognition of qualifications granted under such programmes.

In the "*Education & Training 2010*" work programme, transnational learning in other Member States is becoming an essential component. In 2003 a set of policy recommendations on access to mobility, quality in mobility and the opening up of Europe to the wider world was prepared by the Commission. A second recommendation of the European Parliament and the Council in 2005 on transnational mobility within the EU for education and training purposes is in progress. The recommendation invites the Member States to adopt the "European Quality Charter for mobility". The charter lays down a set of principles in the field of mobility for education and training purposes to be implemented by the Member States on a voluntary basis. The Charter is intended to become a reference instrument to help increase exchanges, develop the recognition of study periods spent in other countries and establish mutual trust between authorities, organisations and all mobility stakeholders concerned.

A study produced by the Academic Cooperation Association on behalf of the European Commission in July 2008 named: *Transnational education in the European context – provision, approaches and policies*, stipulated:

> For the moment, transnational education has not made it to the core of the internationalisation debate in Europe: little attention is given to its potential or impact in either the Bologna Process or the Education and Training 2010 programme of the European Commission. However, transnational education should be seen as an integral part of the European higher education offer, and a central tool for the achievement of several common objectives: internationalisation, research cooperation, brain gain and access.[3]

2. The rise of transnational education is closely linked to the new possibilities offered by information and communication technologies or for-profit companies. It responds to a demand for higher education to which the national system does not respond, e.g.: a kind of programme that does not exist in the national system, the national system is elite higher education that excludes the participation of qualified applicants, the national system does not provide HE in minority languages or has restrictions on access for specific groups (e.g. women).

[3] http://ec.europa.eu/education/erasmus-mundus/doc/studies/tnesum_en.pdf.

In the case of student mobility, students move to study in another country and return with their credentials that are obtained in another country. The recognition of the qualifications falls under the *Lisbon Convention*. The *Lisbon Recognition Convention* is an agreement between States that covers qualifications issued by national higher education systems.

In the case of transnational education, the students do not move – they study in their home country or even at home – but the credentials are awarded in the name of a foreign institution. In is not the student but the diploma that "travels" across the borderline.

3. What Is the Main Agenda, Dealing with Legal Issues?[4]

A. Joint Programmes

Joint programmes such as programme twinning, joint or double degrees, are the result of co-operation among higher education institutions in different countries. If both higher education institutions and/or the programmes are recognised in their own countries, this kind of transnational education should not lead to too many problems.

B. Branch Campus

When higher education institutions establish branch campuses in other countries and the mother institution is a recognised institution in its own country, the questions arise whether the recognition/accreditation of the mother institution can be transferred to the branch, which quality assurance bodies check the quality of the mother institution, and the branch, in what way is it ensured that quality is the same as in mother institution, are the programmes in the branch campus identical to the ones in the mother institution or adapted to the needs of the receiving country, if the programmes are adapted to the needs of host country, are they still the same degrees/qualifications as in the sending country, is the teaching staff in the mother institution and in the branch campus the same, is it a professor of the mother institution visiting branch campus or is education provided by a well trained local who teaches the branch campus, if it is a well-trained local, is it guaranteed that the students feel the culture of the foreign institution in whose name the qualification will be awarded, what quality of education is ensured if the person teaching is an external?

[4] A review on the literature shows the minor interest to legal issues: VLK, A., *Higher Education and GATS. Regulatory Consequences and Stakeholders' Responses*, Enschede, CHEPS, 2006; see also De Groof J., Lauwers G. and Dondelinger G., *Globalisation and Competition in Education*, Nijmegen, Wolf Legal Publishers, 2003.

C. Franchised Programmes

In the case of franchising, the foreign institution allows some institution in the receiving country to deliver its programmes and award qualifications in the name of the foreign sending institution. The franchisee can be a recognised or a non-recognized higher education institution of the host country, a non-higher education institution, a company running courses or established with the purpose to run franchised programmes.

The same questions asked about a branch of a foreign institution are also valid for franchising. Additional questions are whether the franchised programmes are provided in compliance with the laws of the receiving country and of the sending country, is there any quality check at all from the side of the sending country, do the authorities of the receiving country have enough reliable information to judge about the quality of the franchised programmes, do the students studying in a franchised programme get any impression about the culture and education system of the sending country at all, if provided in the language of the receiving country, do the programmes still resemble the equally named programmes in the sending country.

D. Offshore Institutions

Offshore institutions do not have a mother institution in the country, they claim to belong to. In the case of offshore institutions it is unclear to which education system it belongs to.

E. International Institutions

International institutions do not belong to the education system of any particular country and no particular country is responsible for the quality of education provided. As a result, qualifications awarded by international institutions are not recognised within the framework of the Lisbon Recognition Convention.

F. Distance Education

Recognition of a credential awarded through distance education by a foreign institution requires answers to the same questions as in the case of a branch campus or offshore institution such as: are the students at the end familiar enough with the traditions of awarding institution, if the programme is adapted to the receiving country's needs, does it still resemble the same programme provided in the sending country, is there an evidence that the awarding institution fully controls the quality of provision, etc.

4. Transnational arrangements should be so elaborated, enforced and monitored as to comply with the national legislation regarding higher education in both receiving and sending countries. Whenever possible, there should be written and legally binding agreements or contracts setting out the rights and obligations of all partners.

Academic quality and standards of transnational education programmes should be comparable to those of the awarding institution as well as to those of the receiving country. Awarding institutions as well as the providing institutions are fully responsible for quality assurance and control based on specific criteria, which are transparent, systematic and open to scrutiny.

Information given by the awarding institution, providing organization, to students should be consistent and reliable. The nature of a collaborative arrangement and the responsibilities of the parties should be clearly outlined.

The admission of students, the examination and assessment requirements for educational services for transnational education should be equivalent to those of the same or comparable programmes delivered by the awarding institution. The academic workload in transnational study programmes should be that of comparable programmes in the awarding institution.

If transnational programmes comply with the provisions of the legal framework, the qualifications issued through transnational education should be assessed in accordance with the stipulations of the *Lisbon Recognition Convention*.[5]

5. Could the adoption of the Regulation establishing "*The European Grouping of Territorial Cooperation – EGTC*" in July 2006 cause a major change in the legal framework for territorial cooperation?[6]

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[5] See also: De Groof J., "European Higher Education in Search of a New Legal Order", in B.M. Kehm, J. Huisman and B. Stensaker, *The European Higher Education Area: Perspectives on a Moving Target*, Rotterdam, Sense, 2009, pp. 79-104.

[6] Regulation (EC) No. 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), *Official Journal of the European Union*, L 210, pp. 19-24; Report from the Commission to the European Parliament and the Council, The application of the Regulation (EC) No. 1082/2006 on a European Grouping of Territorial Cooperation (EGTC), COM(2011)462 final, dd. 29-07-2011; Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No. 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and implementation of such groupings, COM(2011)610 final, dd. 6-10-2011.

The Regulation was the first EU instrument with regulatory scope in the field. It focused on cooperation between authorities located in different European states. It allows for possible involvement of states, alongside local and regional authorities and territorial cooperation entities with their own legal personality.

In recent decades, there has been a rapid internationalisation in European higher education and research. An international market for higher education and research is developing in which universities compete to attract students, researchers and the scant resources for research. Besides this international competition – for various reasons – there is also an increasing need for international collaboration. With regard to research, scale is becoming an important factor in the competition for research projects and funds. Within the framework of the *Bologna process*, collaboration in the field of education has moved up a gear.

The way in which universities give shape to this collaboration has many modalities. Institutes collaborate at many levels and to varying degrees. There are also more and more collaborative links between universities from different countries. Although the introduction of collaboration regarding the Bachelor-Master-PhD structure in Europe (between programmes) does facilitate this to a certain extent, there are still many obstacles to collaboration. *Transnational collaboration cannot always develop optimally in education and research due to restrictions on collaborative arrangements*. These obstacles relate to matters such as student registration, programme accreditation/quality assessment, the length of the programme, the award of diplomas, the recognition of academic and professional qualifications, social security and student loans of grants.

Universities hoping to become leading institutions for education and research in Europe in the coming years will have to rely on international collaboration, for example in consortiums. The obstacles they meet on their way must be removed. Universities themselves have some control over this, particularly with regard to the removal of internal obstacles. There are, however, also restrictions that cannot be influenced (or only with difficulty) by either individual institutions or in collaboration with other institutions. Such (sometimes insoluble) problems for collaboration are caused by differences in national legal frameworks.

A specific factor in the creation of collaborative arrangements is geographical distance. It is easier to finance and share facilities such as education and student facilities when institutions are relatively close to each other. It also means that programmes can be offered and supplemented, even if there is no critical mass in an individual institution. This is why governments encourage *cross-border collaboration*. Until 2000,

for example, the Dutch and Belgian (Flemish) governments actively stimulated transnational collaboration with the "*Grenslandenbeleid*" ("Border Lands policy"). The 2001 evaluation of this policy showed that measures aimed at internationalisation in the border lands or in *Euregions* can have a different character from internationalisation over longer distances; according to the respondents from the evaluation, both forms have their own right to exist. As regards cross-border collaboration, shorter distances and (with Flanders) the language similarity are important factors. They reduce the transaction costs of collaboration projects and student and teacher mobility compared with more distant internationalisation partners. More frequent exchange or closer collaboration is therefore possible in border areas.

6. The "*transnational Universiteit Limburg*" was created in order to take an important step in collaboration. This university (*tUL*) is a unique collaborative arrangement between *Universiteit Maastricht* (UM) and *Universiteit Hasselt* (UHasselt, Hasselt/Diepenbeek, formerly "Limburgs Universitair Centrum"). The *tUL* can be considered as one university with a base in two countries, providing an interesting example of transnational collaboration and of internationalisation and regional collaboration in higher education and research in Europe. One university conglomerate combines research and education – especially in the field of life sciences, law and ICT – on two campuses in two different Member States. UM and UHasselt invest resources and complementarity of mutual expertise in the *tUL* to start new programmes and research lines.

Combining the strengths of the two universities with regard to education and research capacity not only adds value to the quality of education and research, but also to the effectiveness of investment of resources by the two institutions. However, operating within two different legal systems creates specific problems, a fact that was also recognised at the start of *tUL* and the drawing up of the *tUL* Convention between the Netherlands and Flanders. Partly for this reason, an evaluation provision was incorporated in the *tUL* Convention. Pursuant to Article II of the *Convention between the Kingdom of the Netherlands and the Flemish Community of Belgium regarding "transnationale Universiteit Limburg"*,[7] the governments of the parties to the Convention appointed a Joint Committee whose task was to evaluate the operation of the Convention. This should have taken place five years after the implementation of the Convention, i.e. in January 2006. Although the evaluation – as confirmed by both governments – stressed the unique opportunities and the concrete progress made within the *tUL* framework, not all

[7] Signed in Maastricht (The Netherlands) on 18 January 2001.

areas had the benefit of long experience, for example, the research resources.

But the *tUL "experiment"* revealed that several crucial questions could not get relevant answers. What interesting collaborative arrangements currently exist, what are their goals, what problems do they encounter and what can their potential be for the *tUL* with regard to the optimisation of education and research? *The aggregated question is what obstacles exist for the creation of international collaboration*? This is further operationalised and developed into collaboration at institutional level and at programme level. Where possible, a bottom-up approach should be proposed.

Instead of binding tUL and similar institutions to national regulations, a research project, decided by both governments, should study what instruments should be used to promote the achievement of the collaboration objectives.

Both universities, UM and UHasselt, committed themselves to a research project with formal support of both governments.

The aim will then be to produce recommendations that are important to European higher education as a whole. This also makes the project interesting to other institutions and countries. What kind of collaboration would offer a solution to the problems identified? Experiences with tUL should provide the necessary information, but there are also other collaborative arrangements in Europe that could provide an important contribution. In France, for example, there are various collaborative arrangements with neighbouring countries (including the French-Netherlands, the French-Italian and the French-German University) and Germany works together with Poland in Frankfurt an der Oder. Remember too the collaboration that has been achieved in multilateral European context with the European University Institute in Florence.

7. Based on these findings, recommendations can be formulated that result in a framework for transnational collaboration. This framework – or "Statute" – should study the relationships between the legal systems and the position of this kind of collaboration. It might also be possible to include joint education programmes (and perhaps even joint degrees, which often have a very complex position in national legislation). This would allow the Statute to be used by other institutions striving for far-reaching collaboration or even a (partial) merger. The "Statute" can thus act as a boost for internationalisation and transnational university collaboration, eventually strengthening the regional and Euregional imbedding of higher education and research in Europe.

Such a structure also makes the project interesting for parties like the European Commission, the Council of Europe and the European Uni-

versity Association. In consultation with the national governments, the research will be brought to the attention of the Committee, focussing on the strengths and weaknesses of the *European Grouping of Territorial Cooperation* as a concrete vehicle for transnational cooperation in the domain of higher education and research.

The research must not only focus on an evaluation of the past and offer a clear analysis of the problems; it seemed also important that the findings are translated into solutions and concrete recommendations, perhaps also with regard to the *tUL Convention*.

The critical findings of this report ought to lead also to a review of the EGTC Regulation. Opportunities for trans-border university cooperation would be strengthened if the practical consequences of such a rethinking will be put on the agenda in the short term by all concerned authorities.

8. An "official" review of the EGTC Regulation has already been a joint initiative of the Committee of the Regions, the Trio of Presidencies of the Council of the European Union (Spain-Belgium-Hungary), the European Commission and the INTERACT programme. The consultation focuses mainly on the legislative aspects that should be improved or modified for the next revision, and also considers the added value and potentialities of this legal instrument.

The principal legal issue concerns the differences in the legislation of the individual Member States. In particular, this relates to the diverse legal status of existing EGTCs, which stem from the divergent decisions taken by Member States as part of the national implementation process, as permitted under the Regulation. Difficulties have also been reported with defining the content of conventions and statutes as well as their approval procedures. In general, there is a need to simplify procedures. Information, communication and technical assistance are also needed at European and national level. Respondents are in favour of a European structure and support the networking, communication and support carried out by the Committee of the Regions.

The issue of third country participation reveals a stark difference between the position of the Member States, which believe that the participation of third countries should be limited, and that of the other stakeholders (EGTCs, LRAs, Associations and experts) who are in favour of revising the present rule and introducing less stringent provisions.

The conclusions of this review are very positive about EGTCs acting as a managing authority and joint technical secretariat, as this embodies the principle of subsidiarity. Some national authorities are reluctant to delegate programme management. There are many advantages to using

EGTCs to implement European Territorial Cooperation (ETC) projects; the main problem, however, concerns EGTC eligibility.

The overall research consider the EGTC to be the EU's main legal instrument for territorial cohesion. It is also a laboratory for multi-level governance,[8] creating a two-tier communication channel and acting via a bottom-up approach. It may act as facilitators in solving various border issues.

[8] De Groof J., "Multi-level Governance in the EU and the role of CoR", at the Round Table on Multi-Level Governance, European Training Foundation (ETF), Torino (Italy).

Teaching Environmental Law in Europe

A Luxury?

Ludwig KRÄMER

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When Paul Demaret served and lectured at the College of Europe, he decided that the College should also offer a course on European and international environmental law. Thus, he might find some interest in these lines which try to plead for a strengthened role of environmental law in the legal teaching in the European Union.

Historically, environmental law teaching shared the development of environmental policy in Europe. While water management and nature protection policy and law had a relatively long history, due to their neighbourhood to economic development and agriculture/land use in general, other aspects of environmental concern such as air pollution, noise impairment or waste management only came gradually into the focus of policy makers, and a coherent view that there was a policy topic such as "environment" was building up not earlier than in the 1960s. From there it might not be exaggerated to consider the publication of Rachel Carson's book on "The Silent Spring" (1962) as the birthday of environmental concerns of the public, policy makers, journalists and academics.

Academic teaching of environmental law started at the end of the 1960s or in the beginning of the 1970s at several universities in Europe, again with a strong emphasis on nature protection and water law. Several factors contributed to this development, in particular: the creation of ministries for the environment, environmental agencies and other administrative structures at national or regional level in several European countries; the emergence of EU environmental legislation which required concertation at this level and common planning of environmental policies; the growing awareness of the public of environmental problems (nuclear concerns, petrol accidents, waste management scandals, *Waldsterben*); and the beginning of discussions on globalization (tropi-

cal forests, human rights of indigenous people, post-colonization and the misery of developing policy). Environmental law teachers very quickly discovered the immense broadness of the subject and enlarged their classes by more or less all facets of environmental law. At the same time, the number of universities and other academic institutions which offered courses in environmental law increased rapidly and spread to all Western European countries. In the countries under the influence of Soviet Union, this evolution went at a much slower pace, since the State and State-owned companies were the biggest polluters and it was, for ideological reasons, not possible or not opportune to address environmental concerns and the imperfections of environmental law too openly.

Environmental law courses were offered on an optional basis: the students could choose such courses, but were not obliged to do so. This was, of course, different where environmental law was taught as part of public or administrative law, as these topics were compulsory in all universities. However, normally environmental law was not subject of (final) examination of students and whether students opted for participating in classes on environmental law, remained their choice. And this situation has not changed until today, 2013. With very few exceptions (Finland, Estonia and some individual universities or other academic institutions in some countries), environmental law is optional but is not part of the topic which a law student needs to know, when he leaves the *alma mater*.

It is submitted that this is no longer up to date, not even under the Bologna straitjacket which intends to streamline academic lawyers into smoother legal managers for economic purposes. I see good reasons for making courses on environmental law compulsory. A young lawyer who has finished his legal education, should in any circumstance know at least the basic elements of environmental law and policy, whether he later goes into private business or public administration, whether he becomes an independent lawyer or whether he chooses an academic or yet another professional career. Institutions that train young lawyers should therefore revise their programmes and make environmental law courses compulsory for a successful study of the law. There are, in my view, a good number of reasons for changing the present, voluntary, approach.

1. Environmental Law deals with Fundamental Issues of State and Society

Environmental problems are omnipresent and influence political, administrative and private decisions every day more. The "big five" of environmental concern are – without this being a list of priorities.

Climate change. The warming up of this planet with its consequences on sea level rising, change of temperatures, food production and human migration, to name but a few, will have dramatic influences already on the life of the next two or three generations – thus our children and grandchildren. It will influence private housing, production and consumption, energy use and life in agglomerations and will therefore interfere with our daily life in unimagined dimensions. Knowledge about ways and means to fight climate change and to mitigate its effects appears elementary for a lawyer.

Loss of biodiversity. The disappearance of species of fauna and flora, caused by human activities, has reached a worrying speed. A planet that will host, within thirty to forty years, nine billion people, will see this development continue, with considerable economic and human consequences. Soil erosion and desertification are just the most obvious consequences, but one should also realize what a world without elephants, whales or tigers will mean for humans.

The omnipresence of chemicals. Chemicals are everywhere, in food and feed, in cosmetics and pharmaceuticals, in houses and outdoors. They have beneficial effects and create new risks for human, animal and plant health. Many undesirable side effects or cumulative effects provoke problems, and frequently persons are not sufficiently warned of risks linked to the use of chemicals. New technologies – nanotechnology, fracking – raise new problems, where first the chemicals are used and then their impact on human health and the environment is gradually discovered.

Resource management. The departure from fossil fuels, required by the fight against climate change, is but one of the numerous problems. Nine billion people will need food, shelter, energy, water and a decent way of living. Resources are limited, and waste generation and treatment, the recycling and a more efficient way of production and consumption will inevitably lead to new forms of resource management.

Poverty. While concern for the natural environment will have to remain great, it must not be forgotten that humans are in the centre of any environmental concern. Climate change and other environmental events led to predictions that within forty years there might be 200 to 250 million environmental migrants in the world; their destination will, first of all, be the rich countries. Pure egotistical considerations should

thus lead policy-makers and lawyers to re-think the present post-mercantilistic development policy strategy and try to prevent migration by reducing the gap between rich and poor on this planet.

The protection of the environment includes, of course, the protection of humans. This brings the discussions on environmental law into close neighbourhood of human rights issues, in particular the right to life and to health of persons. Next to the above-mentioned over-arching concerns, there are more local concerns concerning water quantity and quality, air pollution, in particular in urban agglomerations, noise levels, waste management and the conservation of nature. These concerns are almost all linked to human health and safety rights; they are diversified enough to ensure that literally every lawyer will be confronted with such problems during his or her professional life.

2. The Originality of Environmental Law

Already these specific environmental concerns might raise the reflection, whether it is not appropriate to ensure that any lawyer has some basic knowledge about environmental issues and the legal problems which they raise. However, this is not all. Indeed, environmental law developed, during the some fifty years of its existence, a remarkable number of features which are specific to environmental law, but are not encountered in general administrative or public law:

A. Environmental Law tries to Protect an Interest without a Voice

Agricultural law is the law of farmers; fishery law is the law of fishermen; transport law of those who transport persons or goods or those, who are transported; industry law is the law of persons active in industrial undertakings; competition law the law of competitors, and energy the law of person who produce, supply and demand energy. In all these sectors there are powerful, well-organized vested interest groups, which shape and influence the making of the provisions, lobby parliaments, governments, advisory and scientific bodies, campaign for changes of the rules, when these rules contradict their interests, and work on public opinion, in order to create a climate of law-making and law-application that is favourable to their interests – however these are defined.

There is no comparable social group behind environmental law. Environmental organizations – Greenpeace, Friends of the Earth, World Wildlife Foundation, etc. – are too scattered, too poor in human and financial resources and not numerous enough to be a factor in political elections, the main concern of politicians. Moreover, environmental organizations typically act altruistically, not for increasing their profit.

This is a marked difference to vested-interest groups and their bargaining power in discussions with administrations or policy. In power terms, thus, the environment is weak; this is why it needs the protection of the law. Social groups with power do not need the law that much, as they influence, shape and implement it themselves.

B. Environmental Law is Horizontal in Nature

The environment knows no national frontiers. The above-mentioned concerns are, in one way or the other, concerns that are encountered in any organized society. For this reason, legal instruments to help solving these problems, are very often similar in the different legal systems. European examples are:

- The huge number of international agreements concerning environmental issues which were developed over the last fifty years, and which reach into all environmental sectors, water and air, products and waste, noise and nature;
- environmental impact assessments which examine the effects of infrastructure or other projects on the environment, the search for alternatives and for minimizing negative effects, before the construction permit is granted and which since spread from the environmental sector to law-making in general and to other parts of policy-making;
- the development of transboundary water management structures, such as river basin management for international waters; common management of transnational rivers and of regional seas;
- the development of common networks for nature conservation, such as Natura 2000.

The horizontal character of environmental law has two other dimensions. First, environmental law is inter-generational. The environmental commonplace, that we did not inherit this planet from our parents, but borrowed it from our children and grandchildren, materializes more and more in the recognition that the effects of our present action must also be assessed with regard to their impact on future generations. The realization that the Via Appia in Italy, built some 2,300 years ago, impacted on the location of villages and cities and influenced the shaping of the Italian cultural landscape, might influence our considerations on the impact which the construction of a new motorway might have in the future. And the US and German policy on the location of nuclear waste disposals requires a site which is stable against seismic events, landslides and other events for one million years – knowing quite well the effect of nuclear energy production on future generations. Norbert Elias mentioned once that the unborn have no lobby and that future

generations are not represented in today's discussions: the environmental lawyer could and should bring into discussions also such elements.

Also, environmental law is an integrated policy which is transsectoral. It impinges on almost all sectors of economic activity within countries, requires

– When policy-makers develop a strategy on *transport* issues, they are nowadays unable to do so without taking into considerations the environmental impact, such as noise, air pollution, impact on climate change, land use, etc.

– *Energy* policy planning will have to discuss the departure from fossil fuels, the role and importance of renewable sources of energy, the impact on climate change, the issues of transporting energy or electricity, the role of nuclear energy, waste issues, etc.

– *Agricultural* policy cannot properly be conceived, elaborated and implemented without taking into consideration the use of chemicals (pesticides and herbicides, fertilizers), the impact of biotechnology, land use, agriculture effects on water and groundwater, soil protection and nature conservation.

– *Fisheries* policy strategies will have to address the diminishing fish stocks, the impact of fishing methods on the marine environment, the protection of non-target species, third countries concerns and other issues.

– *Industrial* policy strategies need to address air, water and soil pollution, waste generation and handling, accident prevention, the location of industrial plants, climate change issues and corporate environmental responsibility, product-related issues such as eco-design or the use of dangerous materials (ozone-depleting substances, greenhouse gases, heavy metals, dangerous chemicals), and the use of energy and water during production and use.

– *Competition* policy will have to deal with environmental standards of competitors, State aid for environmental-friendly activities, or public procurement.

– *Development* policy will have to be aware of the global environmental problems mentioned above and likely to increase the population pressure on the industrialized countries. It will have to try to enable developing countries to ensure a future for their people and develop a sustainable policy which reduces the development distance to richer countries. This in turn has – better, should have – implications on the agricultural, fisheries or industrial policies of European countries. Indeed, neither Europeans nor Americans have as yet any strategy how to prevent the genesis of some 200 million environmental migrants which scientists expect by 2050.

– *Trade* policy strategies need to recognize that a policy which consists in claiming that each euro invested in the third world should bring a profit of three euros just has no future and needs replacement by a better-balanced policy. Some twenty years ago, Paul Demaret discussed the importance of trade-related environmental matters, and these legal problems have not diminished in importance since then.

For a young lawyer, it is an added value, not to remain restrained in his or her national legal system, but to become aware of the concrete implications which the progressive globalization has and will have on daily practical work. Hardly any other sector of public law offers similar perspectives, while being connected to environmental civil law and environmental criminal law.

C. Environmental Law Has Specific Features

Environmental law in Europe generated, over the years, a considerable amount of original and rather unique features which are normally not encountered in other administrative law sectors. Among these features are:

– The fact that in all Member States of the European Union, national environmental law is derived, to 70-80 per cent on average from EU environmental law; in more than half of the 28 EU Member States, this figure is very close to 100 per cent (the thirteen countries which adhered since 2004; Greece, Portugal, Ireland, Spain, Italy, Luxemburg). National environmental law cannot be understood and taught without proper reference to EU environmental law.

– New economic technologies – nuclear technology, biotechnology, nanotechnology, carbon capture and storage, shale gas production and others – mainly raise human health and environmental problems which common administrative law does not full assess.

– The precautionary principle and the polluter-pays-principle are legal principles which were developed in environmental law and apply, at present, horizontally in several sectors of law.

– Emission limit values and concentration values – terminology differs – are specific instruments to assess and control pollution;

– Trade in greenhouse gas emission allowances introduced a new concept to administrative law in Europe.

– (Environmental) impact assessments for plans, programmes and projects were largely unknown in administrative law, until environmental law introduced these concepts.

– Access to information on the environment was constructed as a procedural human right and generated the political request in several

States that general access to information should be granted widely; environmental law stands for openness, transparency and accountability of public administration, principles which are and should be leading principles for any open society.

– Application of the regulatory provisions in practice is the most important legal problem, as the environmental protection rules are not applied by themselves, and administrative inertia all too often leaves the environment without protection. Unless practical application and enforcement of existing environmental provisions receive the necessary attention, environmental law risks sharing the fate with the ten commandments or other religious provisions: they are abundantly quoted in official speeches, but neglected, forgotten or despised in day-to-day life.

– As the environment is not the property of the administration, administrative acts – permitting, infrastructure planning, monitoring data, enforcement measures – need to be controlled by civil society forces. This requires information, participation and judicial procedural rights for citizens and environmental organizations, in order to protect the environment against administrative abuse.

The present trend in legal education undoubtedly goes towards a stronger accentuation of economic issues. Perhaps has the financial and economic crisis since 2008 demonstrated that economic profitability is not the miraculous solution to the numerous global problems. In October 1972, when the Heads of State and Government of the then EEC decided to set up a European environmental policy, they stated:

> Environmental expansion is not an end in itself. Its first aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all the social partners. It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind.

These words keep their importance, even forty years later. They also might be useful, when academic institutions reflect on legal curricula and on the question whether environmental law teaching should not be made compulsory. Such a compulsory teaching of the most horizontal of all public law sectors would also be an acknowledgment of the fact that the environment can survive without humans, but humans cannot survive without the environment. This is illustrated by the comparison between the present financial crisis and climate change: we are able to overcome the financial crisis, but we will not be able to overcome climate change, once it has become a reality.

The objective of environmental law teaching is not the economic-oriented streamlined law-manager, but a democratic citizen, who is aware of the public interest and able to apply and promote the rule of law, in particular in favour of the weak; and who would doubt that the environment is a weak partner in our society?

A basic knowledge of environmental law should be in the luggage of any young lawyer in Europe, who enters into the legal profession. Compulsory environmental law teaching is not a luxury, but simply an adaptation to the legal, political and economic reality of the 21st century.

Teaching Law in Bruges

Ole LANDO

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From 1989 till 2000 I taught a course at the Legal Studies Department of the College of Europe. The subjects were first comparative contract law and later European private international law.

Paul Demaret was then head of the Department. He has a peculiar aptitude for inspiriting confidence among those who work with him. I was always looking forward to the meetings we had with him on organizing the teaching. They were pleasant and encouraging. It is partly due to him that teaching in Bruges was a pleasure. Another reason was the students. I have seldom taught students, who were more motivated than the law students of the College of Europe.

1. Teaching Law and Teaching Justice

What is the law? In order not to make it too complicated, you may use the famous definition of *Oliver Wendell Holmes*: *The prophesies of what the courts will do and nothing more pretentious are what I understand by law*.[1] There are professors, many of them in the Latin Countries, who instead teach their own ideas of what the law should be. They do the same in their writings.[2] Their doctrine is sometimes far away from the law as it is practiced by the courts, and which the professors, who are at the same time practicing lawyers, invoke when they plead their cases and advise their clients.

If you teach law, you must teach the students what the law is.

Prophesies of what the courts will do. Is that always the law? If in class you embark upon international commercial arbitration, this definition of law is not very accurate. Then you have to focus on the arbitrators. However, the prophesy of what the arbitrators will do is difficult to

1 "The Path of the Law", *Harvard Law Review*, Vol. 10, 1897, pp. 457f.

2 See on this habit David, R. & Jauffret-Spinosi, C., *Les grands systèmes de droit contemporains*, 11th ed., 2002, No. 111.

make. The only thing you can tell your students is that in international commercial arbitration, the arbitrators have to operate within the limits of different standards of public policy, but that they have an extensive freedom to do whatever they like. In many cases, they apply the law, but they often use their freedom to render awards that differ from what a court would do. That is not always bad. In some cases, they use their freedom to disregard law rules that are ancient relics of a dead past.

Should you also tell the students what you think that the law should be, teach them your conception of justice? That has been discussed. Some Nordic writers[3] have maintained that a scholar should not disclose his own attitude. He should state the various views and then let the reader or the audience take their stand. This attempt at objectivity is connected with the view that law and justice are based on value judgments that are neither false nor true. The legal science is not a science if it makes value judgments.

I agree with the assertion that value judgments are neither true nor false, and that you should focus more upon the law as it is than on your own pronouncements, but that has not prevented me from now and then expressing my view as to what the law should be. As *Ernst Rabel* once said: "*We lawyers… obsessed by the wish to improve the law as we are, are simply not capable of denying us the prospects of the better law*".[4]

I do not care whether I am a scientist or not, when I state my attitude.

However, when you do that, you must tell the students that there are other views, and you should give them a fair account of the other views. To do that often requires self-mastery, because the temptation to disclose your contempt for some of these views is sometimes very strong.

When teaching the students your conception of justice, you should not hide from them that you express a political view. Some professors pretend that their view is the objective truth and that they do not attempt to politicize. That, in my view, is not correct. As mentioned above, law is based on value judgments, and so is justice. There is no law that expresses any objective truth.

There are, however, some legal values that are commonly accepted by most lawyers. On certain points, there is a considerable universal agreement.

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3 One was the prominent Swedish professor *Knut Rohde* (1909-1999), see for instance his *Lärobok I obligationsrätt (Textbook on the law of obligations)*, 4 ed., Stockholm, 1975.

4 Here cited from Drobnig, "Die Geburt der modernen Rechtsvergleichung. Zum 50. Todestag von Ernst Rabel", *Zeitschrift für europäisches Privatrecht*, 2005, pp. 822, 830.

For example: Several rules of the United Nations Convention on Contracts for the International Sale of Goods (CISG), of the Principles of European Contract Law (PECL) and of the Unidroit Principles of International Commercial Contracts are identical. Many of these rules have been adopted in the Proposal for a Common European Sales Law, which the EU Commission published in October 2011, and they also appear in several recent national legislations. Considering that one may think that after all there is a number of principles expressing a common core and having a lasting value. Maybe those who invented Natural Law were not so silly after all. I know that colleagues share this double feeling of sympathy for and rejection of Natural Law. But one should not forget that those who framed these common rules were perennial figures. The Unidroit Group and the Commission on European Contract Law worked on these texts at the same time. Five scholars were members of both groups, and three of them worked as reporters in both Groups. So the two Groups influenced each other. In PECL, for example, we had introduced a rule that set-off should only have an *ex nunc* effect. Set-off discharges the obligations as from the time of notice by one party. That was contrary to most continental laws where it has an *ex tunc* effect. Set off discharges the obligations *ipso jure* from the time at which being suitable for set-off they first confront each other. When the issue came up in the Unidroit Group, the reporter had proposed an *ex tunc* rule, but *Arthur Hartkamp* made a strong plea for the *ex nunc* effect, and referred to the PECL solution. When a group of European lawyers, he said, could select that solution, it must be right. And he convinced the Unidroit group.

If you teach the students comparative law, you should tell them about these signs of something which might be called the "Modern Natural Law", but you should, of course, add that there is no such thing as a law arising from nature.

2. Cour Magistral or Socratic Method

In 1955-56 I spent a year as a student of the University of Michigan Law School in Ann Arbor. There I saw how the case method was applied in the teaching of law and became convinced of its merits.

Christopher Columbus Langdell (1826-1906) was a professor at Harvard Law School, and is said to have invented the case method, although historians have found out that others were teaching by this method before him. *Langdell*, however, made the case method famous.

He said: "Mr. Jones, will you state the facts in the case of *Hadley v. Baxendale?*" In 1870, *Langdell* forever changed the way lawyers learned the law in the United States. No longer would American law

students, as many students in Europe still do, sit passively and take notes, while their professor lectured or read out of a legal treatise. The case method makes the student read the reports of actual court cases and requires him/her to discuss them in class. In a Socratic dialogue the professor and the student distill the rule of law.

The case method activates the students, and active students are generally motivated students. It trains their fluency in law. It confronts them with the different views of the parties to litigation, and of the majority and minority among the judges, and it shows them the complexity of life and the shortcomings of the doctrines. It also gives the student an insight into the bad habits of some courts, see on this below.

When I told the then rector of the College of Europe *Jerzy Lukaszewski* about the method I intended to apply to my teaching, he told me to adopt the *cour magistral*. I would talk sense, he said, whereas the students would talk nonsense. However, I did not obey the rector.

Most of the students did not talk nonsense, and some even threw new light on the problems we discussed. It happened that the teaching went both ways.

However, it was not unproblematic to use the case method in Bruges. I taught in English, and several students came from countries, where the teaching of English in the schools had been inadequate. It was therefore a great effort for them to prepare a case. I could not, as does the American professor, expect all the students to be able to present all the cases for each class. I had to select the students who in the following lesson were to make the presentation of the cases.

The case method also has certain shortcomings. The pedagogical value of the published judgments of many Continental European courts is often limited. Their rendering of facts is very short, and their reasons are incomprehensible for the normal student. They have to be accompanied by notes explaining their meaning.

To this must be added that there are statutory provisions and doctrines which the students must learn, and they must get an overview of the main principles of a subject. The cases cannot teach them that. They must be taught in a lecture and in a textbook. So the best method is to combine the case method with the lecture and with a text. Today, many of the case books are no longer case books in the strict sense of the word. They contain *Cases, Materials and Texts* and the materials and texts are often analyses and doctrine.

3. Should You Teach the Students to Be Critical?

Most legislators, courts and writers try to establish harmony and to avoid anomalies, and many legal scholars represent their legal system as a harmonious and consistent whole.

That is, however, an illusion. That is shown by the way the courts make their decisions. There are two typical ways in which courts have solved a legal problem. The first is the loyal way that obeys statute and precedent. The second is the creative and imaginative way. Those who take the first way follow the rules, even when their sense of justice tells them not to. They are the true servants of the law, and they see it as their task to be loyal to the legislator, to obey the precedent and to provide certainty and predictability. Those who take the second way follow their sense of justice, and now and then they bend or disobey the existing rules. They see it as their task to renew or amend the law when they feel that there is a social need to do so.

Should you teach the students that the legal systems are imperfect, and should you encourage them to be critical of the authorities and to be disobedient? If you teach them that, their criticism may become a boomerang. Can you teach them what the law is and at the same time teach them to be critical of it?

Yes you can. There are important cases in which a court is expressing its own political views, rather than basing its decision on law or prior precedent. They are often cases in which the court realizes that the development of society has called upon them to act, or where the court faces an unforeseen situation to which it would be unacceptable to apply the law. If you teach EU law, you cannot avoid these cases. The European Court of Justice (ECJ) is famous for its judicial activism. Without any legal basis in the Treaty Establishing the European Community, it has held that the European Community Law took priority over national law, and that the Community Law replaces national laws that deviate from Community law.[5] It has entered rules into force which the Community legislature should have, but has failed to enter into force before a prescribed date.[6] It has made directly applicable provisions of directives conferring rights on citizens which, under the directives, national authorities should have conferred on them, but where they had failed to do so at the due date. It has established that European Union Member States may be liable to pay compensation to individuals, who have

5 *Van Gend en Loos v. Nederlande Administratie der Belastingen*, Case 26/62, ECR l. 1962.375.

6 *Defrenne mod Sabena* (No. 2), Case C-43/75, ECR. 1976.455.

suffered a loss by reason of the Member State's failure to transpose an EU directive into national law.[7]

On several occasions, the Court has claimed that the European Communities has established a new and independent legal order and invoked the purpose of the Treaty to support its policy. It has in this way made these premises into a kind of basic norms. When *Hjalte Rassmussen*[8] showed this activism in 1986, the Members of the ECJ protested loudly; they were not disobedient, they followed the law. If you teach EU law, you should point out that *Hjalte Rasmussen* was right, but you may then add that by its activism, the Court has repaired the shortcomings in the functioning of the EC, which the passivity of the EC legislature and the Member states had caused.

All this the students must learn. And students who study the Constitution of the United Sates will also face judicial activism. It has been practiced by the German courts and it has in a way been canonized in the Dutch Civil Code Art 6(2) providing: "*A rule binding upon (the parties) by virtue of* law*, usage or judicial act does not apply to the extent that, in the given circumstances, this would be unacceptable according to the criteria of reasonableness or equity*". Disobedience and activism are widespread phenomena.

4. Do You Have to Reveal the Bad Habits of Some Courts?

In Europe, many courts render their decisions in a language that is incomprehensible for the average citizen and even for lawyers. Sometimes a case note in a law review is necessary in order to make it possible for lawyers to understand a decision and its relationship with previous decisions and the literature.

Private international law has been a favourite playground for covert techniques. In the latter half of the 19th and the first half of the 20th century, the courts in England, France, Germany and other countries professed the rule that in the absence of an express or tacit choice of law by the parties, a contract was to be governed by the law, which the parties must be presumed to have intended. It was obvious that in many of the decided cases, the parties had not given a thought to which law they would apply, and that it was impossible to tell which law they would have agreed upon if they had reached agreement. The presumed intention of the parties, which the courts invoked, was (a) fiction. This was confirmed by the fact that the courts very often found that the parties had intended the law of the forum country to govern their contract. The

7 *Frankovic v Bonifaci*, Sagerne C-6 og 9/90, ECR. 1991. 1 5357.

8 Rasmussen, H., *On law and policy in the European Court of Justice*, Kluwer, 1986.

courts used the presumed intention of the parties as window dressing.[9] By applying the law of the forum country, the courts or the parties were relieved of the often difficult task of acquiring and assessing the information that they could get on the contents of foreign law.

A teacher should not hide these phenomena. And if you tell the students about the disobedience and the bad manners of some courts, you should not dissuade them from being critical themselves.

[9] See *Lando* in the International Encyclopaedia of Comparative Law, Vol. III Private International Law, 1976, Chapter 24, Contracts No. 115ff, and Lando, *Kontraktstatuttet*, (1962) 34 f (France), 85f (Germany) and 121 (England).

Constructing Europe

On the Role of the College of Europe United in Diversity

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1. Elites and the European Construction

A. On the Relevance of Topic: Socialisation Matters

There are many ways to tell the story of how the European integration developed over sixty years from a limited scope of common policies among six founding members to a state like agenda (see Article 2-6 TFEU) of 27 states. Political narratives and theories of many academic disciplines offer a differentiated set of descriptions, analyses and assessments. We observe a rich menu of explanations and evaluations of the EU polity in the making.

I would like to take up the issue of "elites" and the "construction" of the EU system. This Article does not want to test the often simplistic claim that the European integration is just elite driven and ruled by a closed group of unaccountable bureaucrats who were weakly legitimized for a longer period by a permissive consensus. Also the definition and typologies of elites is not my specific topic.

The term "construction" is chosen on purpose as it implies two dimensions of European integration. On one side "construction" relates to the creation and revisions of the constitutional and institutional architecture of the EU-polity. This dimension focuses on building the EU by Treaty making and by accessions. On the other side the use of the term "construction" is inspired by the ontological view that stresses the importance of shaping and framing the understanding of the European Union. This position is based on the assumption that the European

integration process was and is not just an automatic spill-over (Schmitter following an automatic *Sachlogik* (Hallstein) determined by functional needs. It is also more than just a reaction to exogenous shocks and pressures from global markets or a reaction to geo-political structures and challenges of the international system, even though they might be important factors and forces in certain historical constellations. The forming of the EU polity is also more than just the result of logics of domestic preference building and of the dynamics of intergovernmental bargaining (Moravcsik). I assume that real actors play a prominent role. In this view activities and actions of persons are based on perceptions and evaluations of the process of European integration. "*Leitbilder* for Europe", "visions of the finality", and "mental maps" of where to locate the EU need to be taken into account. These factors are a necessary ingredient of studying past developments and designing future strategies.

Of course, both dimensions are closely interrelated. The construction of the constitutional and institutional architecture is not independent from the perception of players active in the EU-system like the views of generations of constitutional architects are influenced by the developments in the EU system. Following these assumptions such sets of personal attitudes, of appropriate norms and of normal behaviour are socially constructed. For my argument it implies that a socialisation via a year in the College of Europe has an impact on the students' attitudes, skills and behaviour and with that on their later profile in their professional life.

B. On the College of Europe

Based on the relevance of the two dimensions of constructing Europe I want to discuss the role of an institution which – since the late forties of the last century – offers a specific programme for advanced pre-professional studies on Europe. The College of Europe, now with two campuses in Bruges and Natolin (Warsaw), is a specific set up in which generations of later policy makers, civil servants and academics spent one year of their postgraduate education. When mentioning the College of Europe, the discourse on European elites refers mostly to alumni and alumnae who made their career in prestigious positions shaping and constructing in some way or another and on different levels the European and international polity, politics and policies. We find graduates of the College in high positions in political institutions and regional, national, European and international administrations, in law firms, multinational companies and in academia. Records of many years show that graduates from the College had and have a high success rate in the selection process, the *Concours*, of EU institutions including

newer ones like the European Central Bank. Beyond this carrier pattern we find former College students all over the Brussels arena in many NGO think tanks and law firms, but also in Foreign Offices and other ministries of Member States, in regional administrations and in multinational companies. Some have also made a political carrier. Looking at political leadership only in 2012, we find that one prime minister, one vice prime minister and a European minister have passed a year in Bruges. Some graduates also went into academia and contributed significantly to the development of integration studies. Of course, many students have gone also into other professions.

Regularly the value of the College's intergenerational network is mentioned. The often used term "Bruges mafia" claims that the socialisation into the European group has a positive effect on further careers. Early architects of the College have liked to call the College the 'ENA of Europe or a European "*Kaderschmiede*".

When referring to political and administrative elites in the European constructions we should be however aware that there is significant difference to elites formation in national political systems. In most EU Member States we can identify certain patterns of getting into the higher and closer circle(s) of political and administrative power. Well-known cases are the French carrier pattern via *les grandes écoles*, *Sciences Po* and ENA or elite universities in the UK. In each country the access to higher positions in the hierarchy is different, some are more open and pluralistic, some more restricted, as it has been the case with the lawyers' nearly exclusive dominance in German administrations for a long time.

From decade long experiences I would like to offer some insights, experiences and lessons on the ways the College of Europe contributes to the construction of Europe. These considerations are certainly not all-inclusive but they might serve as a point of departure for a later, richer empirical study which needs to take up individual carriers of a larger number of College graduates of several generations. Thus I cannot offer any impact study but I start from the assumption that a year spent at the College had an influence on the motivations, attitudes, behaviour and skills of the students.

This essay is a specific homage to Paul Demaret who has like no other influenced fundamental features of this set up *sui generis* in the last decades, first as head of the legal department and then as a rector, whose profile and performance is characterized by a rare mix of academic excellence, entrepreneurial spirit and administrative skills.

2. Contributions to constructing Europe

A. Professional skills and personal experiences

Thus the basic question is if and in what way this postgraduate set up has contributed to the making and working of the EU polity. I claim that there is no College doctrine or ideology in a narrow sense, but that a year at the College of Europe either on the Bruges or on the Natolin Campus had and has a considerable impact though certainly different from person to person. With a considerable degree of variations we observe the forming of a certain group spirit and of norms of working with sustainable impact.

For many students the College year was a memorable and important year of their education. Leading European figures claim that they had a "truly unique experience"[1] in Bruges. For many it had a lasting impact on their further professional and personal life. It opened the gate to new job opportunities especially in and around Brussels (but not only there). In a considerable number of cases students found friends for their life – including also many marriages.[2]

Of course, without an extensive empirical research it is rather difficult to assess how and in how far the College year has really contributed to the personality of the student and their future perceptions and work.

Let me point at certain factors.

One remarkable feature of forming elites for the on-going construction of the EU polity has been an early involvement and integration of students from applicant countries. It socialised young students from future members into European affairs.

One specific and illustrative case was my group of German students in the fifties who saw themselves (re-)integrated in the Western European family. Some played later a significant role in the German Foreign office and EU institutions; two of them later returned to the College as rectors in difficult times.

In the following decades, students from southern and then from eastern European countries on their way to "return to Europe" went through the College education and started from there a European carrier. With the necessary caveats, it might be argued that the administrative integra-

1 See e.g. Prime Minister Helle Thorning-Schmid at the Opening Ceremony of the 63rd Academic Year, available at http://www.coleurope.eu/sites/default/files/speech-files/statsministeriet_-_the_danish_prime_ministers_address_at_the_opening_ceremony_of_the_college_of_europe_bruges_17_october_2012.pdf, last access 15 November 2012.

2 *Ibid*.

tion of many accession states went smoothly because of the experiences representatives of these states gained at the College (and, of course, in other academic institutions). A similar function is currently pursued with extending scholarships for students from the EU's neighbouring countries.

Following one theoretical perspective, prominent in the study of international relations, the College might even be seen as one of the Union's most successful instruments to exercise "soft power" (Nye). It has been useful to spread the Unions *acquis* to coming elites in future Member States and in the "ring of friends" in the near neighbourhood. It serves to shape the regional milieu.

B. Mix of Academic Cultures

The College's concept for the formation of European elites is based on a diversified academic programme with experts from all over the world. One major advantage is the system of visiting professors, which enables the College to get leading academics from different national backgrounds and experienced civil servants from EU institutions. As they get one-year contracts the programme can be swiftly adapted to upcoming subjects and new approaches. Compared with traditional universities the flexibility is much larger. During the absence of the teaching personal the assistants play an essential role in helping the students to fulfil the academic requirements.

Its privileged geographical position – close to Brussels or to Warsaw – makes it easier for the College to involve European policy-makers into its academic life. Organizing conferences with e.g. European Commissioners discussing on-going challenges is a long tradition of the College. This also guarantees a formation of elites which corresponds to the "*Zeitgeist*" of the Union's development. Another particularity in this aspect is the role of the Development Office offering "executive education" for students and professionals.

Thus one significant feature is the multi-disciplinary and multicultural nature of the institution. There is no dominance of students or professors from one nation. The College is not a department within a larger national university, which would dominate directly or indirectly the respective academic culture.

This advantage leads to the co-existence of several academic cultures: from the "*cours magistral*" to workshops and seminars and simulation games. Each of the professors pursues her or his own teaching style – strongly influenced by their own academic education. Students are offered a large variation of methods to which they have to adapt. Some of them have difficulties to face these challenges. As part of this

challenge the College demands students to attend courses in several disciplines and two languages. For later working in multi-national institutions or networks such a learning process is highly useful.

Perhaps even more important than the impact of the variations in the academic programme are socialisation processes in the annual "promotion", which is each year dedicated to a European personality. Students are confronted with fellow students from different academic and national backgrounds. The shared daily life in the residencies, canteens, library, lectures, simulation games and seminars has an intensive impact on most students. Shared anxieties about examinations add to this group building process. The smaller Natolin campus even leads to an even higher intensity of contacts.

Such an intensive living together leads to life-long memories of their year at the College. Promotions then meet in fixed intervals to celebrate specific decades of their graduations. Most students identify with the patron and name of their respective promotion. Sport competitions such as football games between different promotions reflect the College spirit in its real sense.

C. United in Diversity

One persistent critic about European institutions is that their civil servants lose their national roots and turn into bloodless technocrats without "*patrie*" in their national background.

One characteristic, which you might not expect in this European set up, is the way national background comes to the forefront. Social highlights during the year are national parties – in earlier decades starting with a Vienna style ball. Quite often students of different national backgrounds are proud to show cultural properties of their countries. Also in the daily cooperation you see personal characteristics, which are, perhaps sometimes too easily, attributed to traditional notions of national political and social cultures.

At the same time I discover some kind of European spirit – difficult to define, describe and operationalise. Varying from promotion to promotion, the feeling to belong to a group of young Europeans working for some kind of shared and common future develops during the year. Often this spirit is detected only later. At first we see an on-going interest in dealing with EU affairs. Some came already with this interest to the College. Others were infected with the "Brussels Virus" during that year. Though difficult to prove, it seems that also idealistic motivations and a certain feeling of belonging to a group are elements of that kind of European spirit.

As a *sui generis* academic institution, the College of Europe provides the very fundament for developing such a spirit and lifestyle. It offers the opportunities of a multicultural and multinational community based on the constitutional Treaty's motto of "United in Diversity". Mental and societal structures of the students change throughout the academic year. National reservations and past assumptions towards one or the other nation – either historically pre-given or personally influenced – are put into perspective with the European spirit the College offers.

D. Constructing a Polity in Full Change

The challenges for qualifying future elites were and are considerable. The College has regularly pursued a strategy to mix continuity and adaptations in an adequate form.

As a child of the Congress of Europe in The Hague 1948 and directed by a prominent member of the Dutch resistance the College had a certain federal vocation to bring young Europeans together. With the growth to the EU system the agenda for the *curriculum* has become much broader. Treaty revisions, legislative processes in the institutional triangle, rulings of the Court of Justice of the EU, as well as activities and actions in internal crises and facing external shocks have each year led to a considerable increase in the relevant *acquis* of the EU. Changes in the topics taught are considerable. At the same time the disciplinary state of the art, the *acquis académique*, has evolved. Students and professors alike are confronted with a differentiated set of often contradictory approaches. The academic debate is lively and full of controversies. Thus, also the teaching in the College reflects a pluralistic and fragmented state of the art. The College is thus not a closed shop of just old and perhaps out-dated theories and insights. However, as it can be seen in academia as well, keeping older events, developments and theories in the *curriculum* is part of the agenda. The vocation, as documented by the College's library, is to preserve and conserve earlier state of the arts. It is also a special quality and skill to take up to latest political and academic developments without letting heritages disappear.

At the same time, in a close look at the moving realities of the EU polity the College has taken up new programmes. Thus, with a view to the European External Actions Service, created by the Lisbon Treaty, the College introduced even before the instalment of this service a new International Relations Department.

The evolution of the Union has led to major changes in the academic landscape in which the College is moving. Many national universities have created programmes, some also transnational, which offer well based promotions. A certain exclusivity for inter-disciplinary debates

about features and trends of the European construction, which the "*semaine de Bruges*" offered in the early decades, got lost. Other set ups like the European University Institute in Florence, but also many think tanks, Erasmus and EU financed programmes offer a rich debate in lively discourses which increases the competition.

The Bologna university reforms have changed the academic landscape too. The Erasmus programme and other forms of inter-university contacts have led to a Europeanization of many relevant study programmes which form a good pre-requisite for a deeper study later on in the College.

E. Constructing Europe: Increasing Challenges

European leaders – recently the Danish Prime Minster Helle-Thorning-Schmidt – raise great expectations in their speeches at the Opening Ceremonies of the respective Academic Year. The reminder by the Danish Prime Minister "dear students, don't forget to serve. You must do your part to forge the EU of tomorrow" indicates that the "leaders of tomorrow"[3] (this is how students of the College of Europe are often called) face considerable challenges when coming to the College of Europe: academic formation and professional orientation go hand in hand, which is one of the College's main success recipes.

Also the challenges for the College increase. To build-up on the success story so far, the College of Europe will have to keep and diversify the level of academic formation. At the same time, it will have to meet the expectations of a constantly moving European and global political and academic landscape. The need for more skilled European elites has even increased given the consequences of the Great crisis years from 2008 onwards.

[3] *Ibid*.

II

DROITS DE L'HOMME ET CITOYENNETÉ/ HUMAN RIGHTS AND CITIZENSHIP

Les institutions nationales de défense des droits de l'homme et la Cour européenne des droits de l'homme

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1. Introduction

Les institutions nationales de défense des droits de l'homme (« les INDH ») jouent un rôle important dans la promotion et la protection des droits de l'homme, notamment en œuvrant pour la bonne application des normes internationales en matière de droits de l'homme au niveau national. Ces dernières décennies en particulier, elles ont activement contribué à cette promotion et à cette protection à l'échelle mondiale comme à l'échelle régionale. Cette interaction entre les INDH et les mécanismes internationaux de protection des droits de l'homme a bien sûr pour origine les « Principes de Paris » adoptés en 1993 par l'Assemblée générale des Nations unies.[1] Ceux-ci indiquent entre autres que les INDH ont parmi leurs attributions celle de coopérer avec l'Organisation des Nations unies et tout autre organisme des Nations unies ainsi qu'avec les institutions régionales et les institutions nationales d'autres pays qui ont compétence dans les domaines de la promotion et de la protection des droits de l'homme.[2]

À l'échelle européenne, les INDH collaborent avec les principaux mécanismes régionaux, dont ceux du Conseil de l'Europe.[3] Conscient de

1 Résolution 48/134 de l'Assemblée générale des Nations unies (20 décembre 1993) sur les institutions nationales pour la promotion et la protection des droits de l'homme.

2 *Ibid*.

3 Pour une vue d'ensemble de la relation entre les institutions nationales de défense des droits de l'homme et les mécanismes internationaux de protection des droits de l'homme à l'échelle mondiale et à l'échelle européenne, voir Mac Aodha, É., et

l'importance croissante de ces institutions pour ce qui est de la promotion et du respect au niveau national des normes internationales de protection des droits de l'homme, le Conseil de l'Europe encourage ses États membres à mettre en place des INDH conformément aux Principes de Paris. Il a progressivement établi des structures formelles de coopération avec les INDH et d'assistance à celles-ci.[4]

La situation est assez différente en ce qui concerne la relation entre les INDH et la Cour européenne des droits de l'homme (« la Cour »). Si elle fait partie des mécanismes de protection des droits de l'homme du Conseil de l'Europe, la Cour est une juridiction internationale établie par la Convention européenne des droits de l'homme (« la Convention »).[5] Elle statue sur les requêtes dont la saisissent des particuliers ou des États contractants relativement à l'interprétation et à l'application des garanties des droits de l'homme énoncées dans la Convention et ses protocoles.[6] Elle peut aussi émettre des avis consultatifs.[7] Étant une juridiction indépendante supranationale, elle n'entretient pas de relations structurelles ou institutionnelles avec les INDH.

En outre, à la différence du système interaméricain,[8] le système européen ne reconnaît pas aux INDH la qualité pour agir devant la Cour au nom d'une victime alléguée : en vertu de l'Article 34 de la Convention, qui garantit le droit de recours individuel, il faut que la personne qui introduit la requête devant la Cour soit directement touchée par l'acte ou l'omission allégués dont elle se plaint ou qu'elle ait avec la

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Roberts, K., « National Human Rights Institutions in Europe », *European Yearbook on Human Rights*, 2011, pp. 527-537 ; de Beco, G., « National Human Rights Institutions in Europe », *Human Rights Law Review*, 2007, pp. 331-370 ; Carver, R., « A New Answer to an Old Question. National Human Rights Institutions and the Domestication of International Law », *Human Rights Law Review*, 2010, pp. 1-32, et le manuel publié par le PNUD et le HCR : *Toolkit for Collaboration with National Human Rights Institutions*, chapitre 3, Roles and Responsibilities of NHRIs, décembre 2010, pp. 31-50.

4 Voir, en particulier, la recommandation R (97) 14 du Comité des ministres aux États membres relative à l'établissement d'institutions nationales indépendantes pour la promotion et la protection des droits de l'homme (30 septembre 1997), la résolution (97) 11 sur la coopération entre les institutions nationales pour la promotion et la protection des droits de l'homme des États membres et entre celles-ci et le Conseil de l'Europe (30 septembre 1997) et la résolution (99) 50 sur le commissaire aux droits de l'homme du Conseil de l'Europe (7 mai 1999).

5 Article 19 de la Convention, tel que modifié par le Protocole n° 11.

6 Article 32 de la Convention, tel que modifié par le Protocole n° 11.

7 Article 47 de la Convention, tel que modifié par le Protocole n° 11.

8 Voir *Janet Espinoza Feria et al. c. Pérou*, affaire 12 404, décision du 10 octobre 2002, où la Commission interaméricaine des droits de l'homme a déclaré recevable une communication présentée notamment par le médiateur péruvien au nom de victimes potentielles alléguées.

victime directe un lien personnel et spécifique. De fait, la Cour a toujours déclaré irrecevables *ratione personae* les requêtes ou les griefs que lui ont soumis des organisations non gouvernementales (ONG).[9] Il en irait de même de tout grief présenté par des INDH au nom d'une victime alléguée.

De plus, en règle générale, la Cour ne considère pas les recours devant les INDH tels que les médiateurs comme des recours effectifs qu'il est nécessaire d'exercer pour épuiser les voies de droit internes avant de la saisir d'une requête comme l'exige l'article 35 de la Convention, car les médiateurs n'ont pas le pouvoir de rendre des décisions contraignantes permettant de remédier à une éventuelle violation.[10]

Il n'y a donc pas entre la Cour et les INDH une interaction semblable à celle qui peut exister entre les INDH et les mécanismes de protection des droits de l'homme des Nations unies. Pourtant, les INDH ne sont pas désarmées et disposent de plusieurs moyens pour jouer un rôle ou exercer une influence à l'égard du système de la Convention : contribuer au développement de la jurisprudence ; collaborer à la surveillance de l'exécution des arrêts ; participer aux projets relatifs à l'avenir de la Cour.

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9 Voir par exemple *Van Melle et autres c. Pays-Bas* (déc.), n° 19221/08, 29 septembre 2009, *Association du « 21 décembre 1989 » et autres c. Roumanie*, n^{os} 33810/07 et 18817/08, 24 mai 2011, et *Ligue des musulmans de Suisse et autres c. Suisse* (déc.), n° 66274/09, 28 juin 2011.

10 Voir par exemple *Janatuinen c. Finlande* (déc.), n° 4692/04, 20 janvier 2009. Dans l'affaire *Ananyev et autres c. Russie* (n° 42525/07 et 60800/08, § 106, 10 janvier 2012), relative aux conditions de détention, la Cour a expliqué sa logique dans les termes suivants :

« Pour qu'un recours soit considéré comme effectif, il doit être propre à redresser les griefs de celui qui l'exerce. Or les médiateurs, qu'ils soient régionaux ou fédéraux, n'ont pas le pouvoir de rendre une décision juridiquement contraignante qui soit de nature à apporter une amélioration à la situation de ceux qui les saisissent ou qui puisse servir de base pour l'obtention d'une indemnité. Leur tâche est différente : ils repèrent différents problèmes de droits de l'homme à partir des plaintes individuelles et des autres informations dont ils disposent, ils en rendent compte dans leurs rapports annuels et ils s'efforcent d'y trouver des solutions en coopération avec les autorités régionales et fédérales (…). Si leur action peut contribuer utilement à l'amélioration générale des conditions de détention, ils demeurent incapables, du fait des fonctions qui leur sont attribuées, de redresser les griefs de particuliers comme l'exige la Convention. Il s'ensuit que la plainte devant un médiateur ne constitue pas un recours effectif. »

2. Les INDH et le développement de la jurisprudence de la Cour

Les INDH contribuent au développement de la jurisprudence de Strasbourg de deux manières : indirectement, en établissant des rapports qui pourront être utilisés par la Cour et, directement, en se portant tiers intervenant dans certaines affaires.

A. Les rapports des INDH

Lorsque l'affaire s'y prête, la Cour s'appuie sur les rapports et les informations du domaine public provenant des INDH, notamment lorsqu'elle examine les circonstances factuelles d'une affaire. Cela vaut en particulier pour les travaux des ombudsmen ou médiateurs, qui existent aujourd'hui dans de nombreux pays du Vieux Continent, y compris dans des pays d'Europe centrale et orientale où ils sont apparus après la chute du Mur de Berlin.

De surcroît, il arrive qu'une affaire ou une question ait été examinée par une INDH avant d'être portée devant la Cour. En pareil cas, celle-ci tient dûment compte de l'évaluation qui en a été faite par l'institution. Elle ne peut non plus ignorer que l'affaire ou question en cause est souvent révélatrice d'une situation de caractère général.

Par exemple, dans l'affaire *Rantsev c. Chypre et Russie*,[11] qui concernait le décès d'une jeune femme russe âgée de vingt ans et venue de Russie pour travailler à Chypre en tant qu'artiste de cabaret, la Cour s'est appuyée sur les rapports du commissaire aux droits de l'homme du Conseil de l'Europe et de la médiatrice chypriote sur le régime d'entrée et d'emploi des femmes étrangères en tant qu'artistes dans des lieux de divertissement à Chypre pour relever qu'il y avait dans le pays un grave problème de traite et d'exploitation sexuelle des artistes de cabaret. Les informations figurant dans ces rapports lui ont permis de conclure que les autorités chypriotes avaient connaissance du fait qu'un nombre important de femmes étrangères étaient introduites à Chypre au moyen de visas d'artistes dans le seul but d'être exploitées sexuellement par des propriétaires et des directeurs de cabaret.

Dans une autre affaire récente, *Mandić et Jović c. Slovénie*,[12] qui posait le problème des conditions de détention dans une prison slovène, la Cour s'est appuyée sur les conclusions du médiateur slovène des droits de l'homme pour juger crédibles les allégations des requérants selon lesquelles les températures dans les cellules de l'établissement étaient excessivement élevées en été.

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11 *Rantsev c. Chypre et Russie*, n° 25965/04, 7 janvier 2010.

12 *Mandić et Jović c. Slovénie*, n^{os} 5774/10 et 5985/10, 20 octobre 2011.

Dans une affaire antérieure, qui concernait des allégations de mauvais traitements par la police, la Cour avait reproché à l'État chypriote de ne pas avoir mené d'enquête pénale sur les allégations « défendables » de mauvais traitements.[13] En effet, le procureur général, qui était responsable de l'ouverture des poursuites pénales, n'avait pas agi malgré le rapport du médiateur, où celui-ci concluait que le requérant avait été maltraité en deux occasions, et citait nommément certains des agents responsables.

Ces exemples démontrent que la Cour considère les INDH comme une source d'informations fiable et utile et qu'elle est disposée à s'appuyer sur leurs rapports ou autres documents.

B. Les tierces interventions des INDH

L'article 36 de la Convention, tel que modifié par les Protocoles n^{os} 11 et 14, est ainsi libellé :

> 1. Dans toute affaire devant une chambre ou la Grande Chambre, une Haute Partie contractante dont un ressortissant est requérant a le droit de présenter des observations écrites et de prendre part aux audiences.
>
> 2. Dans l'intérêt d'une bonne administration de la justice, le président de la Cour peut inviter toute Haute Partie contractante qui n'est pas partie à l'instance ou toute personne intéressée autre que le requérant à présenter des observations écrites ou à prendre part aux audiences.
>
> 3. Dans toute affaire devant une chambre ou la Grande Chambre, le commissaire aux droits de l'homme du Conseil de l'Europe peut présenter des observations écrites et prendre part aux audiences.

Cette disposition permet aux INDH de jouer un rôle important dans l'interprétation et l'évolution de la jurisprudence des organes de la Convention, soit en soumettant en leur propre nom des observations de tiers intervenant soit en apportant au commissaire aux droits de l'homme du Conseil de l'Europe leur collaboration et leur assistance pour l'élaboration de ses propres observations de tiers intervenant.[14] Au

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[13] *Egmez c. Chypre*, n° 30873/96, 21 décembre 2000. Cette affaire est aussi intéressante en ce que, exceptionnellement, la Cour y a admis qu'en portant ses griefs devant une institution nationale de défense des droits de l'homme, le requérant s'était acquitté de son obligation d'épuiser les voies de recours internes.

[14] Le commissaire aux droits de l'homme du Conseil de l'Europe a présenté des observations en qualité de tiers intervenant dans les affaires suivantes : *Mamasakhlisi c. Géorgie et Russie*, n° 29999/04 (affaire pendante), *Ahmet Ali* (n° 26494/09) *et treize autres requêtes c. Pays-Bas et Grèce* (affaires déclarées par la suite irrecevables), *M.S.S. c. Belgique et Grèce* [GC], n° 30696/09, 21 janvier 2011, et *Centre de ressources juridiques (Despre Centrul de Resurse Juridice) au nom de Valentin Campeanu c. Roumanie*, n° 47848/08 (affaire pendante).

cours des vingt dernières années, des INDH se sont portés tiers intervenants en de rares occasions. On ne peut donc pas dire qu'elles aient été particulièrement dynamiques dans ce domaine, en particulier si l'on compare le nombre de leurs interventions avec celui des ONG. On peut cependant relever plusieurs exemples fort éclairants.

L'une des premières interventions par une INDH fut celle de la Commission des droits de l'homme d'Irlande du Nord (*Northern Ireland Human Rights Commission*). En 2000, celle-ci se porta tiers intervenant dans plusieurs affaires[15] concernant un défaut allégué d'enquête de la part des autorités britanniques après le décès de proches des requérants en Irlande du Nord. Dans ses observations, elle s'appuya notamment sur les normes internationales applicables en matière de droit à la vie pour soutenir que l'État était dans l'obligation de mener une enquête officielle effective lorsque l'un de ses agents était impliqué dans une situation où le recours à la force avait entraîné mort d'homme. Elle pointa également les failles des mécanismes d'investigation en Irlande du Nord et pria la Cour de saisir cette occasion pour préciser quelle forme devaient prendre les enquêtes menées sur le recours à la force meurtrière par des agents de l'État.[16]

Plus récemment, une autre INDH, la Commission britannique pour l'égalité et les droits de l'homme (*Equality and Human Rights Commission*), a présenté des observations en qualité de tiers intervenant dans plusieurs affaires dirigées contre le Royaume-Uni et relatives à différents sujets (logement, immigration, droit de la famille, emploi). C'est ainsi que dans l'affaire *Bah c. Royaume-Uni*, qui concernait le refus d'une autorité locale d'accorder à une mère et à son fils mineur, tous deux ressortissants de Sierra Leone, une place prioritaire dans la liste d'attribution des logements sociaux, elle a critiqué le droit interne et dénoncé ses points faibles.[17] Dans l'affaire *Greens et M.T. c. Royaume-Uni*, qui portait sur le manquement continu du Royaume-Uni à modifier la législation imposant aux détenus condamnés une interdiction générale de voter aux élections nationales et européennes, elle a présenté des observations visant à expliquer les dispositions concernées du droit interne.[18] Elle n'a pas hésité non plus à intervenir dans une affaire politiquement très délicate, *Al-Saadoon et Mufdhi c. Royaume-Uni*, où les requérants – deux Irakiens accusés d'avoir participé au meurtre de deux

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15 *McKerr c. Royaume-Uni*, n° 28883/95, *Kelly et autres c. Royaume-Uni*, n° 30054/96, *Shanaghan c. Royaume-Uni*, n° 37715/97, et *Hugh Jordan c. Royaume-Uni*, n° 24746/94, 4 mai 2001.

16 *Hugh Jordan c. Royaume-Uni*, *supra*, § 101.

17 *Bah c. Royaume-Uni*, n° 56328/07, 27 septembre 2011, §§ 33-34.

18 *Greens et M.T. c. Royaume-Uni*, n° 6004/08 et 60054/08, § 65.

soldats britanniques en Irak – se plaignaient de leur remise par les autorités britanniques aux autorités irakiennes, au risque selon eux que celles-ci les fassent exécuter ; elle a considéré que lorsque les obligations de l'État en vertu de la Convention se trouvaient en concurrence ou en conflit avec ses obligations en vertu du droit international, il ressortait de la jurisprudence de la Cour qu'il y avait lieu d'accorder la priorité aux premières sur les secondes.[19]

Une évolution positive s'est dessinée récemment avec l'intervention dans deux affaires du Groupe européen des institutions nationales de promotion et de protection des droits de l'homme (« le Groupe européen des INDH »),[20] lequel représente trente-quatre INDH existant dans des États membres du Conseil de l'Europe. Il a d'ailleurs été relevé que ces affaires étaient les premières dans lesquelles un groupement régional d'INDH intervenait en qualité de tiers devant une juridiction internationale. Dans l'affaire *D.D. c. Lituanie*,[21] où la requérante se plaignait d'avoir été internée contre son gré dans un hôpital psychiatrique, le Groupe européen des INDH a présenté des observations sur les changements normatifs quant à la notion de capacité juridique en droit international des droits de l'homme et en droit comparé. Dans l'affaire *Gauer et autres c. France* (n° 61521/08), qui concernait la stérilisation de cinq femmes handicapées mentales en l'absence de leur consentement éclairé, il a présenté des observations portant sur les normes internationales des droits de l'homme applicables, en particulier la Convention des Nations unies relative aux droits des personnes handicapées.

3. Les INDH et l'exécution des arrêts de la Cour

L'effectivité du système de la Convention et la confiance des justiciables dans ce dernier dépendent dans une large mesure d'une exécution complète et rapide des arrêts de Strasbourg, en tout cas de ceux qui contiennent un constat de violation. Les INDH peuvent jouer un rôle à cet égard, aussi bien au niveau européen qu'au niveau national.

A. Devant le Comité des ministres du Conseil de l'Europe

Organe politique du Conseil de l'Europe, le Comité des ministres est chargé par la Convention de surveiller l'exécution des arrêts de la Cour. Il reconnaît que les INDH peuvent l'aider à cet égard, en lui fournissant

19 *Al-Saadoon et Mufdhi c. Royaume-Uni*, n° 61498/08, 2 mars 2010, § 113.

20 Le Groupe européen des INDH est l'un des quatre réseaux régionaux d'institutions nationales de défense des droits de l'homme au sein du Comité international de coordination des institutions nationales pour la promotion et la protection des droits de l'homme, qui coordonne ces institutions au niveau européen.

21 *D.D. c. Lituanie*, n° 13469/06, 14 février 2012.

des informations pertinentes et actualisées. En effet, la règle 9 § 2 des Règles du Comité des ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables prévoit ceci :

> Le Comité des ministres est en droit de prendre en considération toute communication transmise par des organisations non gouvernementales, ainsi que par des institutions nationales pour la promotion et la protection des droits de l'homme, concernant l'exécution des arrêts conformément à l'article 46, paragraphe 2, de la Convention.

Le dialogue avec le Comité des ministres sur l'exécution de l'arrêt ou du règlement amiable dans une affaire donnée est une manière constructive d'informer le Comité pour l'aider à contrôler la suite donnée à l'affaire au niveau national. Cela revêt d'autant plus d'importance que le requérant n'a pas voix au chapitre, puisqu'il est tenu à l'écart de la procédure de surveillance. En outre, l'INDH présente l'avantage d'être une institution publique mais en principe indépendante de l'exécutif de l'État défendeur.

La plupart des arrêts dans lesquels la Cour constate une ou plusieurs violations de la Convention ont des conséquences « réparatrices ». Celles-ci ont d'ordinaire une portée individuelle : l'octroi d'une « satisfaction équitable » à la victime consistera dans une indemnité d'un montant plus ou moins élevé, ou dans le retrait d'une mesure, etc. Elles ont parfois une portée générale : l'arrêt provoquera ou accélérera une réforme législative ou réglementaire, un changement de politique ou de pratique, une évolution de la jurisprudence, etc. En pareil cas, la règle 9 paraît fort opportune, dans la mesure où elle devrait permettre au Comité des ministres de prendre de la hauteur et du champ.

Il faut cependant noter – et regretter – que jusqu'à présent rares sont les INDH qui ont exploité la procédure prévue par la règle 9. En l'absence d'explications officielles, il est très malaisé, voire impossible, de connaître les motifs de cette passivité ou de ce désintérêt. On peut seulement en imaginer certains : manque d'information sur l'existence de cette faculté et sur la marche à suivre ; insuffisance de la publicité sur les actions entreprises dans le passé par des INDH ; absence d'illusions quant aux chances d'être pris en considération par le Comité des ministres ; souci de laisser les coudées franches au gouvernement de l'État défendeur face à ses pairs.

Cela dit, la procédure en question n'est pas restée lettre morte. Parmi les récents exemples de son utilisation, on trouve les rapports présentés par la Commission des droits de l'homme d'Irlande du Nord sur les affaires précitées concernant l'action des forces de sécurité en Irlande du Nord. À signaler aussi le rapport présenté en mars 2011 par la Commission britannique pour l'égalité et les droits de l'homme sur l'affaire

Gillan et Quinton c. Royaume-Uni,[22] laquelle mettait en cause les pouvoirs d'interpellation et de fouille conférés à la police par la législation antiterroriste. La Cour avait estimé que les pouvoirs en question étaient trop larges et dépourvus de garanties adéquates contre les abus, au mépris de l'Article 8 de la Convention (droit au respect de la vie privée). À noter enfin le rapport soumis en juillet 2011 par la Commission irlandaise des droits de l'homme (*Irish Human Rights Commission*) sur l'affaire *McFarlane c. Irlande*.[23] Le requérant dénonçait l'absence dans son pays de recours effectif pour se plaindre de la durée d'une procédure pénale, et la Cour avait conclu à la violation de l'article 13 de la Convention (droit à un recours effectif devant une instance nationale).

On remarquera qu'à ce jour chaque INDH qui s'est prononcée l'a toujours fait à propos de « son » État, même si bien des arrêts de la Cour ont une portée qui dépasse le cadre purement national.

B. Dans l'ordre juridique interne

Le principe de subsidiarité veut que les États soient en première ligne pour prévenir, constater et réparer les violations de la Convention, la Cour n'intervenant qu'en cas de défaillance ou de manquement à leurs obligations internationales. Sans cesse mis en avant par les gouvernements européens – parfois de manière obsessionnelle –, il devrait pousser les INDH à s'intéresser de très près au « service après-vente » des arrêts de Strasbourg. Leur contribution semble, pour l'instant et dans la plupart des pays, relativement modeste. Elle pourrait pourtant s'avérer très utile. Les domaines d'action ne manquent pas. On songe à la traduction dans la langue nationale des arrêts les plus importants. On pense aussi à l'information des milieux judiciaires (juges, procureurs et avocats) et des médias, notamment audiovisuels. On évoque surtout les interventions auprès des autorités gouvernementales et législatives pour que soit rapidement tarie la source des violations. Cela est d'autant plus nécessaire quand la Cour a constaté un dysfonctionnement systémique ou structurel et a recouru à la procédure de l'arrêt pilote.

4. Les INDH et l'avenir de la Cour

Deux questions relatives à l'avenir de la Cour et plus généralement celui de la Convention et de sa mise en œuvre suscitent un vif intérêt auprès des INDH, et parfois des préoccupations de leur part : celle de la réforme de la Cour et celle de l'adhésion de l'Union européenne à la Convention.

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22 *Gillan et Quinton c. Royaume-Uni*, n° 4158/05, 12 janvier 2010.

23 *McFarlane c. Irlande* [GC], n° 31333/06, 10 septembre 2010.

A. La réforme de la Cour

La portée jurisprudentielle, institutionnelle et géographique de la Convention s'est étendue depuis l'adoption de cet instrument le 4 novembre 1950.[24] Victime de son succès, la Cour voit son efficacité sérieusement menacée par le nombre de requêtes toujours très important dont elle est saisie (128 100 étaient pendantes au 31 décembre 2012). Au cours des vingt dernières années, elle a fait l'objet de différentes réformes, issues des efforts qu'elle a déployés conjointement avec le Conseil de l'Europe et les États contractants pour tenter de réduire le nombre d'affaires en souffrance.

Tout naturellement, les INDH se sont intéressées au processus et ont entrepris des démarches consistant à soumettre aux gouvernements des États membres du Conseil de l'Europe des observations écrites par l'intermédiaire du Groupe européen des INDH.[25] Ce dernier a d'ailleurs eu le statut d'observateur aux conférences ministérielles de haut niveau sur l'avenir de la Cour, tenues à Interlaken en février 2010, puis à Izmir en avril 2011 et enfin à Brighton en avril 2012. Par la bouche de son président, il a ainsi eu l'occasion d'exprimer non seulement la volonté des INDH de contribuer à la réforme de la Cour mais aussi leurs préoccupations à ce sujet.

D'une manière générale, le Groupe européen des INDH a adopté des positions empreintes d'ouverture. Il s'est montré hostile à tout ce qui pourrait limiter le droit de recours individuel, comme le raccourcissement du délai pour introduire une requête (de six à quatre mois après la décision interne définitive), l'instauration de nouveaux critères de recevabilité ou la modification du critère du « préjudice important » introduit par le Protocole n° 14 (suppression de l'exigence d'un examen préalable par un tribunal interne), ou encore l'obligation pour les requérants de payer des frais de justice. De même, il s'est dit opposé à ce qui pourrait restreindre la compétence de la Cour, comme la mention de la marge d'appréciation dans le préambule de la Convention, la limitation et a fortiori la suppression du pouvoir d'accorder une « satisfaction équitable » aux victimes de violations de la Convention, le droit de regard des agents des gouvernements sur les amendements au règlement de la Cour. En outre, le Groupe européen s'est déclaré réservé quant à la possibilité pour la Cour de donner des avis consultatifs, sans pour autant

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[24] Helfer, L.R., « Redesigning the European Court of Human Rights : Embeddedness as a Deep Structural Principle of the European Human Rights Regime », *The European Journal of International Law*, 2008, p. 126.

[25] Voir les commentaires écrits du Groupe européen des INDH sur le deuxième projet de déclaration de la Conférence d'Interlaken (13 octobre 2010) et sur le premier projet de déclaration de la Conférence de Brighton (16 mars 2012).

en rejeter l'idée. Par ailleurs, il a beaucoup insisté sur le devoir des autorités et juridictions nationales d'appliquer la jurisprudence de Strasbourg et de traiter les problèmes structurels ou systémiques qui génèrent de très nombreuses requêtes répétitives. À ce propos, il a plaidé pour que les INDH soient associées aux mécanismes parlementaires mis en place pour contrôler l'exécution des arrêts de la Cour.

À noter enfin que le rôle des INDH dans l'application de la Convention au niveau national a été reconnu dans la déclaration d'Interlaken : les États parties sont appelés « à s'engager à (…) continuer à renforcer, le cas échéant en coopération avec leurs institutions nationales des droits de l'homme ou d'autres organes, la sensibilisation des autorités nationales aux standards de la Convention et d'assurer l'application de ceux-ci ».

B. L'adhésion de l'Union européenne à la Convention

De même, le Groupe européen des INDH, qui a aussi le statut d'observateur au Comité directeur pour les droits de l'homme (CDDH)[26] du Conseil de l'Europe, a communiqué au Groupe de travail informel du CDDH sur l'adhésion de l'Union européenne à la Convention (CDDH-UE) des commentaires écrits (29 novembre 2010 et 9 mars 2011) dans lesquels il exprimait ses préoccupations et présentait ses propositions. Il regrettait le manque de transparence du processus de négociation dans la mesure où ni les INDH ni les organisations de la société civile n'avaient la qualité d'observateurs. Il formulait des réserves quant à la possibilité pour la Cour de justice de l'Union européenne de donner à la Cour des avis consultatifs sur des matières relevant du droit de l'Union dans le cadre du mécanisme de codéfendeur, et quant à la possibilité pour la Cour de surseoir à statuer en attendant une décision de la Cour de justice. Par ailleurs, le Groupe européen des INDH faisait plusieurs recommandations : que le requérant ne soit pas tenu, quand l'Union européenne serait codéfendeur, de démontrer qu'il y avait eu épuisement des voies de recours offertes par l'Union européenne ou d'entreprendre des démarches procédurales supplémentaires ; que le règlement de la Cour tienne compte de l'inégalité des armes entre le requérant et le codéfendeur et prévoit des délais plus longs pour le premier ; que la procédure de tierce intervention se déroule après la communication de la requête au défendeur ; que les arrêts de la Cour

[26] Le Comité directeur pour les droits de l'homme, qui est composé de représentants des États membres du Conseil de l'Europe, vise à développer et à promouvoir les droits de l'homme et à améliorer les procédures de protection de ces droits aux niveaux national et européen.

identifient lequel des codéfendeurs serait responsable d'une violation de la Convention.

Un projet d'accord a vu le jour en juillet 2011. Cependant, de nouvelles négociations ont été jugées nécessaires. Elles ont repris en juin 2012, avec un format différent, entre le Groupe de négociation *ad hoc* du CDDH et la Commission européenne. Le Groupe européen des INDH n'y est pas associé et n'a pas encore soumis d'observations.

5. Conclusion

Ces dernières années, les INDH ont été davantage enclines à intervenir devant la Cour et le Comité des ministres sur les affaires soulevant des questions importantes. Elles se sont ainsi familiarisées avec le système de contrôle de la Convention. On ne peut que se féliciter de cette évolution, qui doit être encouragée. De plus, l'implication du Groupe européen des INDH dans le processus de réforme de la Cour est particulièrement importante, malgré d'évidentes réticences de plusieurs gouvernements. Ces tendances récentes démontrent la volonté des INDH européennes de jouer un rôle accru dans la protection et la promotion des normes relatives aux droits de l'homme énoncées dans la jurisprudence de Strasbourg, tant au niveau national qu'au niveau régional.

Il n'en demeure pas moins que les possibilités offertes par la Convention sont loin d'être pleinement exploitées. L'approche des INDH est encore souvent timide, et exclusivement nationale si l'on ne tient pas compte de l'action du Groupe européen des INDH. Cette situation s'explique peut-être par la grande hétérogénéité des INDH, dont l'ancienneté, la composition, les moyens, l'indépendance, le prestige et l'influence varient – parfois beaucoup – d'un pays à l'autre. Sans oublier que treize États membres du Conseil de l'Europe ne sont pas encore dotés d'une INDH.

On pourrait imaginer que les INDH aient à cœur de conseiller les requérants potentiels sur les possibilités mais aussi les limites des ressources offertes par la Convention. Ainsi, il serait naturel qu'elles les éclairent sur les conditions de recevabilité, en particulier celle de l'épuisement des voies de recours internes, sans même parler de la notion malaisée à saisir du défaut manifeste de fondement. D'aucuns considèrent même qu'elles pourraient servir de filtre national afin de soulager la Cour, mais une telle idée se heurterait à des obstacles juridiques et pratiques sans doute insurmontables si l'on entend préserver le droit de recours individuel, véritable pierre angulaire du système de Strasbourg.

Le préambule de la Convention affirme que les libertés fondamentales « constituent les assises mêmes de la justice et de la paix dans le

monde ». Dans cet esprit, les INDH ont vocation à relayer ou à amplifier les efforts souvent remarquables des organisations non gouvernementales de défense des droits de l'homme. Les unes et les autres ont beau avoir un statut différent, elles poursuivent en réalité le même but, un but intrinsèquement lié à la mission de la Cour et à la construction de l'Europe.

The European Union, its Citizens and its Foreigners

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1. Introduction

It is a pleasure to be included in this volume in honour of Paul Demaret. His contribution to the European Union's development has been outstanding. In my area, citizens of the Union and their transformations, the work of Professor Demaret has been very important. The objects of my research are the beneficiaries of the efforts of Professor Demaret and our colleagues to take forward the EU integration agenda.

This chapter focuses on how our understanding in the European Union regarding who is a migrant has changed from 1957 to the present. Starting with the EU fundamental freedom, the right of free movement of persons, I examine how EU nationals themselves moved from being perceived as migrants in the territory of other Member States to EU citizens while at the same time the EU enlarged to include an ever wider number of countries. The importance of the creation of EU rights which individuals could access and claim even against the volition of a Member State's authorities plays a key role in this development. In the second part of this chapter, I will examine how the EU has developed its powers in respect of third country nationals and pose the question whether in the process of legislating on the admission and residence of third country nationals in the EU a parallel process is now occurring as regards these persons as has taken place in respect of EU national migrants.

2. The Time Line of Workers' Rights

The acquisition of rights for migrant workers who were also nationals of the Member States takes place incrementally from 1957 until the current time. The EEC Treaty 1957 provided for free movement of

workers in what is now Article 39 EC. However, transitional provisions applied to workers until 1968. Article 40 EEC (as it then was) required the Council to take progressive steps to achieve free movement of workers (the right of free movement for establishment and services was not subject to limitations indicating the difference in perspective between workers as agents of market upheaval and the self employed or service providers as a relatively benign group of actors). In 1961 the EU first adopted implementing legislation towards free movement of workers – Regulation 15/61. This was followed in 1964 by a deepening of the rights of workers in Regulation 38/64. According to the recital of the first regulation, the objective is the abolition of all discrimination based on nationality between workers of the Member States as regards work, pay and other conditions of work. The objective requires also the elimination of waiting periods and other restrictions which constituted an obstacle to free movement by the end of the transitional period in 1968. The first stage of the transitional period lasted two years (similarly to that of the transitional arrangements for nationals of the 2004 Member States).[1]

The second stage of the transitional period for free movement of workers arrived two years later and was accompanied by the adoption of a new Regulation 38/64 which was designed to take forward the integration of the EU labour market. In the preamble to this Regulation, one finds references to different categories of workers – permanent, seasonal and frontier. For the first time the situation of workers who are the employees of service providers and as such sent across EU borders is mentioned (an issue which is still, in 2012, a matter of concern in some Member States).[2]

At the end of the transitional period, 1968, Regulation 1612/68 was adopted which replaced the previous rules providing a clear set of rights for migrant workers. At the same time, Directive 68/360 was adopted which provided the rules on procedures for the treatment of EU migrant workers. Interestingly, Directive 64/221 which sets out the rules of exclusion and expulsion of migrant workers was adopted in 1964 and continued to apply until the citizens of the Union Directive was adopted in 2004 (2004/38).[3]

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1 Guild, E., *European Immigration Law*, The Hague, Kluwer Law International, 2000, pp. 110-120. I examine in depth there the Regulation in comparison with the subsidiary legislation.

2 Carlier, J.Y., *La condition des personnes dans l'Union européene*, Brussels, Larcier, 2007.

3 Condinanzi, M., Lang, A. and Nascimbene, B., *Citizenship of the Union and Freedom of Movement of Persons*, The Hague, Martinus Nijhoff, 2008.

In 1993, EU nationals were designated as citizens of the Union through changes to the EC Treaty which came into effect then. While this change had little immediate impact on the rights of EU nationals, over the 20 years since its introduction it has become a central part of the right to move and reside of EU nationals. The most important EU measure providing for entry and residence rights of EU nationals and their third country national family members has been adopted under this power – Directive 2004/38 – which builds on the rights gradually acquired by EU nationals over the time line described above. While it may be something of a misnomer to call EU nationals citizens of an entity which is not a state, nonetheless the legal framework provides them rights which approximate those of nationals, at least as long as they can find work or support themselves. EU nationals and their third country national family members are entitled to move and reside in any Member State for three months, no questions asked. Thereafter, if they are workers or self employed they are entitled to residence and access to social benefits if they qualify for them; if they are economically inactive or students they have at least to declare themselves self sufficient. After five years residence they acquire permanent residence which gives full access to all social rights which may have been limited before. After 10 years residence an additional protection against expulsion applies. EU nationals, through the acquisition of rights, most importantly to move, reside, exercise economic activities, equal treatment with own nationals and protection from expulsion, have moved from being foreigners or immigrants in the eyes of most citizens of the Union to being fellow citizens.

3. Who are Immigrants in the EU?

The power to decide who is an immigrant and who is not remained a national prerogative until 1999 when the Amsterdam Treaty was adopted giving competence to the EU to adopt legislation in the area. Since then, in the area of legal migration, the EU has adopted a series of measures which regulate the longer term entry and residence of third country nationals. Ireland and the UK have opted out of these measures. The first and most important measure is the Directive on Family Reunification. This was adopted in 2003 and had to be transposed by the Member States by October 2005. The objective of the Directive is to create a right to family reunification for third country nationals who reside legally in the Member States. The way this is pursued is by establishing minimum standards for the admission and treatment of third country national family members. Family reunification is an EU right, according to the Directive, for spouses and minor children. The conditions for its exercise are:

- Stable and regular resources to support the family;
- Adequate housing;
- Comprehensive sickness insurance.

Member States are permitting to apply an integration measures condition to family members either before or after admission to the state. This is a derogation from the right to family reunification.[4]

In October 2008, the Commission published the first report on implementation of the Directive in the Member States (COM (2008) 610 final). In general, the Commission expressed concern that the Directive, which is aimed at creating a level playing field for third country nationals' family reunification, in fact seems to be resulting in very substantial variations in access to the right.

The CJEU has been asked on a number of occasions by 2012 to give an interpretation of the Directive. By September 2012 the most important decision has been one in response a reference from a Dutch court.[5] The key issues were two fold: what income could Member States require of a third country national seeking family reunification with his or her spouse and what constitutes social assistance for the purposes of the Directive. The relevant Dutch law which transposed the Directive requires a sponsor to have an income equivalent to 120% of the minimum wage. However, Dutch law provides that there are two categories of social assistance – a lower level called general assistance which is the minimum wage – and special assistance which is the equivalent of 120% of the minimum wage. Which level then was applicable for the application of the Directive? If only the general social assistance level, then Mr Chakroun's income was sufficient, if the special assistance level applied then it was not.

The problem was compounded by another specificity of Dutch law – where a couple marry before either of them move to the Netherlands, then the applicable rate for income for family reunification is the lower general assistance level. But if the couple marries after one of them has moved to the Netherlands (as Mr and Mrs Chakroun had done) then the higher special assistance level is applicable to the income requirement. The couple complained that this constituted unlawful discrimination in light of the Directive's objectives. The CJEU pointed out that the Directive creates a right of family reunification which an individual can rely upon. There is no margin of appreciation for the Member States. Because the Directive creates this, the conditions for the exercise of the

4 Van Oers, R., Ersboll, E. & Kostakopoulou, D., *A Re-definition of Belonging? Language and Integration Tests in Europe*, The Hague, Brill, 2010.

5 C-578/08, *Chakroun*, 4 March 2010.

right must be restrictively interpreted. In other words the Dutch legislation was found fully incompatible with the Directive. In its finding the CJEU relied not only on the European Convention on Human Rights for guidance but refers to the EU Charter of Fundamental Rights on numerous occasions as a source of interpretation.

The second substantial measure which the EU has adopted in this field is the Long Term Residents' Directive. The Commission will produce a report on the implementation of the Directive in 2011.[6] A number of studies which have been undertaken by academics indicate substantial variations across the Member States.[7] The principle of the Directive is that any third country national, not coming within an excluded group (such as students or diplomats), who has resided lawfully in a Member State for five years will obtain a long term residence status in EU law so long as three conditions are fulfilled:

- The individual fulfills the residential requirement;
- The individual has stable and regular resources to support him or herself and dependents;
- The individual has fully comprehensive sickness insurance.

However, similar to the Family Reunification Directive, a fourth condition may be applied by the Member States – that the individual complies with integration conditions. It is this requirement which has been the source of most concern among academic researchers regarding the implementation of the Directive.[8] Once an individual acquires EU long term residence status under the Directive this can only be lost in accordance with the terms of the Directive, which are very limited. Further the person is entitled to full equal treatment with own nationals within the Member State where the status was acquired (with exceptions for political rights and economic activities which are not open to EU nationals). Finally the status gives an entitlement to move and exercise activities, economic and otherwise in other Member States subject to a (fairly limited) labour market conditions test. With this Directive, the EU has made very important progress towards the objective it stated in Tampere in 1999 to treat third country nationals resident in the EU fairly and consistently.

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6 This report was issued on 28 September 2011 COM(2011)585 final.

7 Halleskov, L., "The Long Term Residents' Directive: A Fulfilment of the Tampere Objective of near Equality?", *European Journal of Migration and Law*, Vol. 7, No. 5, 2005, pp. 203-211.

8 Guild, E., Groenendijk, K., Carrera, S., *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Farnham, Ashgate, 2009.

The third measure which has been adopted and provides immigration rights for third country nationals is Directive 2009/50 on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment (the Blue Card Directive). This Directive seeks to regulate highly qualified migration to the EU in pursuit of the EU's objective of becoming the most competitive and dynamic knowledge-based economy in the world. It only applies to highly qualified employment which is defined as that which requires adequate and specific competence as proven by high professional qualifications. These are attested by means of any diploma, certificate or other evidence of formal qualifications issued by a competent authority attesting the successful completion of a post-secondary higher education programme on condition that the studies lasted at least three years. Professional experience of at least five years can be substituted. In order to qualify for a Blue Card, the individual must hold the necessary qualification and the employment proposed in the Member State must pay at least 1.5 times the average gross annual salary in the Member State concerned. After 18 months employment in one Member State, the Blue Card holder is privileged in the movement to another Member State for highly qualified employment.

The fourth measure which the EU has adopted regarding long stay migration for economic activities is regarding researchers. In October 2005 the Directive on admission of third country nationals for the purpose of scientific research was adopted.[9] According to the preamble, it is intended to contribute to achieving the goal of "opening up the Community to third-country nationals who might be admitted for the purposes of research".[10] By doing this, the institutions believe that the EU will be more attractive to researchers from around the world, which in turn will boost its position as an international centre for research. Attention is paid in the preamble to the question of brain drain and back up measures to support researchers' reintegration in their countries of origin. In accordance with the Lisbon process, fostering mobility within the EU is also an objective.[11]

The Directive defines research, researcher and research institution in wide terms. Research means creative work undertaken on a systematic basis in order to increase the stock of knowledge of humanity, culture and society, and the use of this stock of knowledge to devise new applications. A researcher is someone who holds higher education

9 Directive 2005/71.

10 The goal does not appear to have been reached.

11 The Lisbon Process, http://www.eu2005.lu/en/actualites/documents_travail/2005/-03/22lisboa/index.html.

qualifications which give access to doctoral programmes. A research organisation must have been approved for the purposes of the Directive by a Member State in accordance with legislation or administrative practice. As the Directive is written in terms of a research institution holding the key to mobility, Member State control over access to the territory for researchers takes place through the qualification of a research institution. According to the Directive, the research institution must initiate the procedure.

As set out above regarding legal immigration, before the adoption of the TFEU, a number of key areas have been the subject of harmonizing measures which are based on the principle of minimum standards. Specifically, family reunification, long term resident status, highly qualified migration and admission of researchers have all enjoyed some degree of harmonization in this way. Further proposals are outstanding as at September 2012 regarding other areas of first admission for labour market access, specifically, seasonal workers and inter-corporate transferees. When these measures are adopted, the EU will have fulfilled much of its objective of creating a common EU migration system composed of legal instruments which provide clarity and certainty to individuals, businesses and state authorities.

4. Who is an Irregular Migrant in the EU?

The EU institutions prefer to use the term "illegal" immigration rather than irregular or undocumented migration favoured by other international organisations and institutions.[12] This is notwithstanding the fact that not only has the Council of Europe's Parliamentary Assembly called on the EU institutions to use more neutral language, but also the European Parliament has similarly done so with noticeably little effect.[13] In this area the EU institutions have been quite active, adopting over twenty measures since acquiring competence to do so. The most controversial of the measures has been the Returns Directive (2008/115) which, for instance, has been denounced by the heads of state of all countries in South America.[14] What the Directive seeks to do is establish clear, transparent and fair rules for an effective return policy which the

[12] Council of Europe High Commissioner for Human Rights, *Criminalization of Migration in Europe: Human Rights Implications Council of Europe*, Strasbourg 2009.

[13] Carrera, S. and Merlino, M., *Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-Making*, Centre for European Policy Studies, Brussels, 2009.

[14] Acosta Arcarazo, D., *Latin American Reactions to the Adoption of the Returns Directive*, Centre for European Policy Studies, Brussels, 2009.