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**European Identity(ies) in matters of institutional law:
1st and 3rd Pillars: Proper Community Identity *versus* Classic
Intergovernmental Identity of the European Union.**

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1st and 3rd Pillars: Proper Community Identity *versus* Classic Intergovernmental
Identity of the European Union.**

A. Looking at the facts

1. — The Community legal order
2. — The Community institutions
3. — The decision-making process
4. — The relations with the member States
5. — The relations with the subnational level

B. Drawing conclusions

1. — "Specificity" of the European institutional law
2. — Those "specific" features are not new in international law
3. — The two faces of European institutional law
4. — Tensions between the two identities of European law
5. — What about future evolutions ?

Introduction

Is there a European identity ? This is the question addressed in this panel dedicated to the "European Identity". If I were a specialist in Science Fiction, I could analyze European Science Fiction, and see if there are original aspects in comparison to Science Fiction produced elsewhere in the world. But I'm not a specialist in Science Fiction. Rather, unfortunately for you, my specialty is institutional law.

So, as I'm asked if there is a European identity, I will try to answer the question "is there a European identity in matters of institutional law". But what does this question mean exactly ?

First of all, let's remember that European law is part of International law. Let's also remember that the European Community is an international organization. Just like NATO, the Council of Europe, and so on. If we want to see if there is a European identity in matters of institutional law, we will have to compare the European Union with other International Organizations, and compare its institutional law with general international law.

In other words, we will try to see if there are some specificities in European law in comparison to general international law. And we will try to detect if there are particularities in the European Union in comparison to other international organizations.

Therefore, let's have a look at five aspects of European institutional law. After looking at the facts, we will try to draw some conclusions.

A. Looking at the facts

1. — The European legal order

First of all, let's have a look at the European legal order. Just like any other International Organization, the European Community has created an autonomous legal order. In this Community legal order, there is a major principle : the so-called principle of direct applicability of Community law to the national legal orders.

"Direct applicability" is the mechanism which insures automatic application of rules concluded in the international legal order to national legal orders. In other words, it's the ability of a rule made by international law to be applied in a State without requiring any national enforcement measure.

This principle resolves a recurrent problem found in classic international law : Normally, a rule of international law binds the State to the international legal order. As such, this rule has no direct effect on individuals within the national legal order. If a treaty contains rights for individuals, generally the State having agreed to the treaty must first implement the international agreement in its national law. Often, States don't do it. And individuals cannot do anything about it. This is one of the traditional problems of classic international law.

The theory of direct applicability aims at bypassing the frequent obstinacy of States in the area of international relations. If a State concludes a treaty which grants rights to individuals, the individuals can take advantage of these rights in national jurisdictions, even if the State didn't take the measures of execution that it agreed to take. This bypasses

the inertia of States which drag their feet when executing their international obligations.

That theory of direct applicability was not invented by Community law. It's a finding of classic international law. But in classic international law, it is not frequent at all.

Why is direct applicability not frequent in International Law ? The condition for a rule to be directly applicable is the intent of the States. The States must have the clear intent, when signing the act, of directly granting the rights to their citizens. This condition poses a problem. It is not frequent for States to explicitly acknowledge in a treaty that they are bound in relation to individuals. The fact that this condition generally fails to be met, limits direct applicability in classic international law.

In contrast to classic international law, there is a considerable extension in Community law of the principle of direct applicability.

The ingenuity of the Court of Justice was to objectively presume the intent of the States of granting rights to individuals. It's an application of the so-called teleological interpretation : given the goal of the Treaty of Rome, that is integration, the States are assumed to have the intent of directly granting rights to individuals. Considering the Member States' will as objective, because of the "very nature of the treaties establishing the European Community", the direct applicability of a provision in Community law can be presumed.

Thanks to this jurisprudence of the Court of Justice, the theory of direct applicability is very developed in Community law. This has permitted Community law to impose its will even if, still too often, States are obstinate about executing their international obligations in their national legal orders.

2. — *The Community institutions.*

Secondly, let's have a look at the institutions. We can say the same thing about the institutional system of the European Community that we said about the Community legal system. It's not by their nature that the institutions of the European Community are different from institutions of classic international organizations. It is actually fairly common for international organizations to have an institutional system which is consistent and complete.

But the Community institutional system is much more developed and more independent from the member States than in most international organizations.

Let's take the example of the European Parliament. Frequently, international organizations have a parliamentary assembly. This is the case, for example, of the Council of Europe or the Western European Union. But the European parliament is very different from any other international parliamentary assembly:

First, right from the start, the Treaty of Rome gives the European Parliament a great importance compared to the parliamentary assemblies of other international organizations. These are always composed of national MPs. For these MPs, the mandate they have in the international assembly is only a secondary occupation. The European Community Treaty, on the contrary, planned that the European Parliament would be directly elected. This very new idea in international law indicated, from the beginning, the importance given to the Parliament in European integration.

Next, it gives an incontestable democratic legitimacy to the European Community. Even if the European Parliament doesn't yet have all the prerogatives of a national parliament, the European Community is still the only international organization to give real power to its assembly. And indeed, the codecision procedure gives power to the Parliament to participate in the legislative process of the European Union.

So, the importance that the European Community gives to its Parliament is indeed quite original in comparison to other international organizations.

3. — The decision-making process

Thirdly, let's have a look at the decision-making process. The decision-making process is most interesting, because it shows us the relations between the different institutions. These relations between Community institutions were arranged with a level of originality never attained before. Two examples demonstrate this:

The first example concerns the power of initiative in the decision-making process. The initiative doesn't belong to the institution representing the interests of the member States, as is generally the case in international organizations. A member State cannot initiate the decision making process. On the contrary, the initiative belongs to the Commission which is independent and represents the general interest of the Community.

The second example concerns the decisions themselves. Generally speaking, decisions in international bodies are taken by the unanimity of the member States. These decisions by consensus are a form of protection for member States' sovereignty. Indeed, unanimity gives each member State a veto. If a State doesn't agree with a proposition, it can block the proposition.

In the European Community, however, a large number of important decisions are taken by the majority of member States. This is not frequent at all in international organizations. It implies, of course, that States will accept to follow decisions they didn't agree with. The majority vote keeps the Council decisions free from the threat of a veto with which any member State could oppose the entire Community. This makes the decision-making process considerably more efficient.

4. — The relations with the member States

Fourthly, let's have a look at the relations of the European Union with the member States. The Community institutions are globally more independent in relation to the States than institutions in classic international organizations.

An example of this independence vis-à-vis the member States is the status and the role of the Court of Justice. Its autonomy is clear in two important ways.

The first is that the Court of Justice has a monopoly on the interpretation of the whole Community law. This is not frequent at all in international law. In classic international law, apart from exceptions, it's essentially the national judge who interprets international law! The international courts, when they exist, have only a limited role. In contrast to classic international law, one of the strongest points in European integration was the institution of a single Community judge. As a result of the Court of Justice's monopoly on interpretation of Community law, varying and contradictory applications of the law

within each member State are avoided.

The second way in which the Court of Justice is independent from member States is the importance of the powers that are entrusted to it. The Court of Justice has the power to sanction the member States to a degree still unequalled in other international organizations. For example, the Court of Justice can fine a member State for not respecting European Union Law or for not executing the rulings of the Court of Justice.

5. — The relations with the subnational level.

Fifthly, let's have a look at the relations of the European Union with the sub-national level. The European Community is more than an agreement between States where the only ones concerned are the States. The subjects of the legal Community order are not only the States, but also the citizens. This feature is not exceptional for an international organization. Many international organizations make rules applicable to citizens. But in the case of the European Community, this is systematic.

What's more, a true European citizenship is developing. It's not only economic and social rights which are conferred on European citizens. There are also political rights which are granted to Union citizens. For example, the Maastricht Treaty gives the citizen the right to participate in European elections and in local elections, even in a country of the Union which is not their own. Another example is that the Maastricht Treaty instituted a European Ombudsman and accorded the European citizen the right to petition.

The European Union is thus far from limiting itself to relations with member States. It has established direct relations with the citizens. It has also established direct relations with local and regional authorities, without intervention of the member States. For example, the Committee of Regions of the European Community make it possible for cities and regions of the member States to participate directly in the decision-making process. Another example is that, in certain cases, it's the ministers of the regions who take part in the Council decisions, without intervention of national ministers.

B. Drawing conclusions

We have looked, rapidly, at some specificities of European institutional law as compared to general international law. What conclusions can we draw? We can pull out four points.

1. — Specificity of the European institutional law

The first point: we can say that, indeed, there is a European identity in matters of institutional law. European institutional law has particularities that general international law doesn't. The European Community has specificities that we cannot find in other international organizations.

These original features of the European Community define it as a new type of international organization, confederal or quasi-federal, using specific supranational methods to attain integration. This is the case for large fields of the first pillar of the European Union. These features allow a true Community institutional identity.

2. — Those "specific" features are not new in international law

The second point: however, these original features are not new in the history of international organizations. Any international organization has them to various degrees. But the European Community has these features with especially strong intensity. For example, all international organizations create an autonomous legal order. But the Community legal order is particularly complex, complete, and efficient. Another example is that many international organizations make rules applicable to citizens. But in the case of the European Community, it's systematic.

Actually, when talking about Community law, it must be remembered that it is part of international law. Community law functions somewhat like international law, but goes further and is able to solve the deadlocks of international law, for example by obligatory judges, efficient sanctions, etc.

3. The two faces of European institutional law

The third point: if there is indeed a specific, European identity in matters of institutional law, this isn't the only feature of European law. Indeed, there is another, different, identity which coexists in European law.

We have already looked at the first institutional identity, the supranational features of the European Union. But other features of the European Union make it comparable to a classic international organization. In some fields, indeed, the European Union works with the usual intergovernmental methods in order to further cooperation. This is notably the case in matters of Justice and Internal Affairs — the third pillar of the European Union.

This intergovernmental identity, in some fields of the European Union, consists of features such as the equality of States in the Union and the right to veto accorded to each one in the decision-making process. In these fields, the decision-making process is more or less diplomatic, and spectacular results are just not possible.

4. Tensions between the two identities of European law

Ever since European integration started, tensions between those two identities — specifically supranational or simply intergovernmental — could be observed. A definite choice between these two identities in the process of European integration hasn't been made. It is not yet clear if the European Union will remain a hybrid structure by being a classic international organization but with supranational specificities. Or will the supranational aspect be strengthened, at the expense of the intergovernmental nature?

5. What about future evolutions ?

The treaty of Amsterdam, negotiated on June the 16th and 17th, doesn't seem to have made a choice between the two identities of the European Union. As it was difficult for the member States to agree on the necessary institutional reforms, they just didn't put any institutional provision in the new treaty. They postponed to 2002 or 2005 the moment of a choice in the institutional matters.

Janus had two faces. The European Union, like Janus, will keep his two different identities — a specific supranational identity *and* a classic intergovernmental identity — for a long time.

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