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JURISPRUDENTIAL DILEMMAS OF EUROPEAN LAW[2]

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ABSTRACT. Making a first sketch of philosophical issues arising from European Community law I want to present a series of more or less obvious, and more or less interrelated dilemmas, or even 'double binds'. (i) Deepening the community becomes incompatible with widening membership. (ii) National states seem both necessary for and obstructive in articulating transnational problems. (iii) The more democracy is needed as a warrant for the public exercise of political power in Europe, the more the very concept of democracy on a European scale evades understanding. (iv) European unity presupposes a unifying rule of law, while member states have radically different conceptions of this principle. (v) Even the very core of European integration, the common market, is subject to two conflicting and, indeed, incompatible doctrines of competition. In explaining the nature of each dilemma I will try to take my cue from the Maastricht Treaty wherever this seems suitable. Then I will elaborate on the jurisprudential problems involved in it. Finally, each section will be closed by an attempt to state the nature of these problems in philosophical terms.

KEY WORDS: common market, democratic deficit, European citizenship, European law, identity of Europe

1. FIRST DILEMMA: EITHER EUROPEAN OR A COMMUNITY

Art A of the Union Treaty gives us the most all-embracing political aim that could be formulated in Maastricht in 1992. The Treaty allegedly marks: '(. . .) a new step in the process of an ever more solid compact between the peoples of Europe'. The suggestion of the phrase is that the name 'Europe' has an extension, the class of European peoples, and that these peoples should engage in a political

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process rendering the name 'Europe' a new intension, namely some form of intended uniting. European unity should be made out of a given entity, 'European peoples'. The given is supposed to be there, as a positum, for politics to manipulate in a certain way.[3a]

During a very recent and short period of time in European history, from 1950 till 1989, this was more or less correct. Though the start of the European community did not include all European countries, it was at least clear which countries were to be included in the future: a finite number. At least we knew which countries should unite and which should be banned from this enterprise, as they were on the other side of the great divide. Since 1989 however – the Fall of the Iron Curtain – we no longer know that. The existence of the Curtain since the Second World War had caused, of course, many problems. But it also solved at least one: the problem of where to put an end to Europe when it came to unity. But now, Europe has regained its peculiar status of being a continent missing one border. Many of the former Soviet satellite states have become serious candidates for joining the European Community, and so have parts of the former Soviet Union itself. Though there may still be geographical reasons to hold that 'somewhere' in Russia and Turkey a different continent begins, there is no political decision that transforms this 'somewhere' into a clear cut border. Europeans no longer know where 'us' stops and 'them' starts. In other words: we – the offspring of ancient Greece – have lost our barbarians.[3]

This situation is about to become the watershed for a well-known dilemma of policies in the EC: either widening or deepening the community. Both of these policies have awkward consequences of their own. The policy of deepening carries with it strategies of exclusion. The policy of widening runs the risk of making the Community unmanageable. To put it in another way: if you don't expand or widen membership, you will not have a *European* community (as it will not embrace all the European countries); but if you do expand, you will end up with great diversity and without a European *community*.

This dilemma in itself is far from new. It has been on the European agenda from the very start of the process of unification. Remember

[3a] See H. Lindahl, *Welfare and Enlightenment*. Leuven, Leuven University Press, 1995.

[3] Which (by the way) may be one of the explanations why we seem to try and invent them in our midst.

the growth from six to seven to nine to twelve members. Remember also the periodical discussions about whether and when members of the European Free Trade Area (EFTA) should enter or associate. But until recently, the great constructors of Europe were able to maintain that the policies of widening and deepening Europe have proven to go hand in hand. There are strong signs that this thesis has lost its persuasive force already with the recent growth of the EC. One example is the fierce criticism launched by the European Court of Justice, when the European Council in 1991 submitted that a new organisation of economic cooperation should be created: the EES (European Economic Space), which was meant, in the Council's mind, to become a sort of EEC revisited, especially designed for starters in European market cooperation, with its own council, committee and court. The Court of Justice in Luxemburg vehemently opposed what it regarded as a danger for the development of a unified European jurisdiction and, thus, as an assault on the authority of law in a European context. It has to be conceded that the EES Treaty of 1 January 1994 aims at a major effort to once more combine both expanding and upholding the EC's 'acquis communautaire', but it is fair to say that the size and complexity of this operation[4] nourishes serious doubts about its prospects in real political life. A second sign is found in the fact that 'the Europe of two velocities' (or 'multi-speed Europe') has gained not only a gradually increasing popularity as an issue for debate in the bodies of the EC (remember proposed solutions of the 'crises' caused by the initial 'no' of the Danish referendum), but also the status of an acknowledged strategy since the social chapter of the Maastricht Treaty allowed the UK to follow its own path. As a third indication may serve the 'talk of the town' (Biesheuvel) that the cases *Keck* and *Mithouard* (free trade of goods under art. 30 EC[5]), *Reiff, OHRA* and *Meng* (competition[6]) and *Schindler* (free trade of services[7]) show a new tendency in the Court's policy: to stand at ease when it comes to intensifying the proper character of European law. The common denominator in these cases is that the

[4] Biesheuvel, 'Een tussenstand in het European recht', in *Nederlands Juristenblad* (Kroniek), **69**, 1994, p. 41, notes that the full text of the Treaty with all its protocols and annexes would exceeded 200.000 pages.

[5] Comb. decisions 24-11-1993, C-267/91 and C-268/91.

[6] All decisions of 17-11-1993, resp. C-185/91, C-245/91 and C-2/91.

[7] Decision 24-03-1994, C-275/92.

Court chose to restrain (rather than to exhaust) the impact of certain paragraphs in the EC Treaty, and that it even constrained its own previous decisions. It is not certain whether this is indeed a more general tendency or whether there are perfectly good explanations for the separate cases. Anyway, the dilemma of widening and deepening takes a radically new plunge now that the very extension of the name 'Europe' seems to be a rather fuzzy set.

From a philosophical point of view, the basic problem is the following. With Claude Lefort[8] one may want to distinguish between *la politique* (politics in the empirical sense of the word) and *le politique* (the quality most characteristic of politics, i.e. its specific perspective). The latter is bound up with a sort of conceptual bootstrapping: if the political has to do with the management of society, it presupposes a society becoming transparent to itself as a limited whole. No point *within* society itself can mark the departure of this referential gesture, as it always designates particular spheres of interest. Therefore, a detour has to be made in order for this referential performance to be succesful. An imaginary staging of the original residence of power *beyond* the social group will have to be set up in order for this group to identify itself as a particular society in iuxtaposition with others. Thus, from the inner point of view of a certain society, politics begins by symbolic reference to an imaginary transsocial source where this society derives its identity from, as a first person plural, in contradistinction to its neighbours, the others. It will include 'us', by necessity excluding 'them'. Note that this is 'only' a conceptual implication of the political: though it will be a primary element in real politics, it will (hopefully) not be the only one. In my view, the characteristic quality of politics brought about by the virtue of *justice* will precisely work on making this inclusion/exclusion less definitive. But this cannot, never, mean that the inclusive/exclusive identification can be skipped, as long as it remains a fact that law and justice are political artefacts. It can be mitigated, and justice is mitigating it in advance, on one's own account, so to speak.

Under the regime of the great divide between western and eastern Europe, this self-inclusive reference to 'Europe' was readily under-

[8] See Cl. Lefort, *Essais sur le politique, XIX-XXme siècles* (Paris, Du Seuil, 1986), especially the essay 'Permanence du théologico-politique'.

stood as designating a clear-cut border which was both more than observable and very transsocial indeed (as it was the result of the World War). But now that the Iron Curtain is gone, where should 'we, Europeans' (as Nietzsche calls us) refer to in order to make Europe transparent for us as a limited whole? The European Community finds no such source any more to articulate its identity. It has lost its bootstrapping mechanism of politics. That explains why there is so much talk at the moment about 'a new identity for Europe', (quite comparably to the years immediately after the Second World War), with reference to human rights and democracy as the legitimate heirs of christendom and Ancient Greece. But must we, Europeans, really reassure ourselves of this self-proclaimed humanness? Can we really not afford to admit that elsewhere, in cultures different from ours, respect for humans and accountable government have taken on forms which we have not even begun to understand? Are we the champions before the game has even started? The facts are that, notwithstanding a fair level of democracy and respect for human rights in the member states, the Union (or the Community) itself has a history of poor performance in both respects.[9]

Perhaps we must acknowledge that the name of Europe has returned to its origin; which was, according to what J.-P. Faye calls a daring hypothesis,[10] to take part in a structure of oppositional references. From some first person point in the Middle East not known exactly to us here and now, reference was made to the land where the sun set (Erp, the semitic root *ereb* means: to lay down) and the land where the sun rose (Arb). This linguistic hypothesis is of course only a dummy for political identification. But it is at least

[9] As to democracy, there is general doubt about the EU's performance. As to human rights, even after Maastricht the relationship of the Union to the ECHR remains uneasy. In spite of art. F (imposing respect for human rights), the Court of Justice has no jurisdiction in this area (art. L, TEU). The recent advice 2/94 of 28 March 1996 by the Court contains the view that the EC Treaty does not allow the Community to become a party to the ECHR as this would exceed the expressly stated competence of the Community. The proposals for revision of the treaties by the Irish presidency (December 1996) do no mention any effort to change this. See D. Curtin and Y. de Klerk, 'De Europese Unie en het Europees Verdrag voor de Rechten van de Mens. Een nieuwe fase in een lat-relatie?', in *Nederlands Juristenblad*, **72**, 1997, pp. 202–210.

[10] J.-P. Faye, *L'Europe une. Les philosophes et l'Europe*. Préf. de Jacques Delors (Paris, Gallimard, 1992), p. 19.

a hint from our own history: perhaps Europe is bound to articulate its identity from what it is in opposition to, much as neighbouring villages gives opposite names to the roads that link them. Or, in a more down-to-earth vocabulary, what the European Union calls its 'external relations' may become much more important for the European identity in the future. For the time being, however, the agony of drifting Asia-bound will undermine rather than reinforce the identity of Europeans.

2. SECOND DILEMMA: NATIONALISM BETWEEN SUPRA-NATIONALISM AND REGIONALISM

The second dilemma to face – following from the first one – is this: that we seem to need the borders of national states in order to identify, to articulate, and perhaps even to solve the problems that transcend these borders, the transnational problems; and that, therefore, we will have to re-establish what we try to reach beyond. The text of the Maastricht Treaty conceals this dilemma in places as (among others) again para. A (where the Union is said to organise the relationships between both the member states and the peoples of the member states), and para. B where the principle of subsidiarity is introduced with reference to para. 3 B EEC. This is not a matter of semantics. The problem is not that the very meaning of 'transnational' still presupposes the meaning of 'national' being established. It is, rather, a matter of political culture.

Habermas, in an annex to his book on legal philosophy, observes that what is called the nation-state in western political culture is a hybrid historical amalgam that we will have to come to conceptual grips with, rather than a clear-cut political concept in itself. It contains elements of the following: (1) pre-political, rather small-scale ethnic associations (Kant uses the word 'Nation' in this sense), with characteristic differences among them in language, awareness of the past and culture; (2) large-scale political aggregations, based on (rare) federal agreement or (frequent) imperial conquering of territories (especially since the Middle Ages), functionally linked to united or separated markets and their economic forces (especially those of capitalism); (3) ideological referents of ascriptions of sovereignty (notably since the various Great Revolutions), i.e. virtual initiators

of democratic, collective political acting.[11] I think that a fourth one should be added: (4) more or less authoritative administrations of socio-economic welfare. What we see in actual contemporary practice in Western Europe are more or less stable democratic organisations of large-scale territorial states, in a more or less peaceful compact of ethnic differences, which are more or less succesful in administratively transmitting economically profitable spin-off to the social welfare of their citizens.

Therefore, the more European unity becomes a political reality, the more we must ask if we should not become very precise and possessive about our national states as the sole platforms where, at this point in history, a reflective equilibrium of political heterogeneity and homogeneity should be found. This question is neither inspired by romantic sentiments about regional cultural heritage (although that is a problem, too), nor by spontaneous distaste of Brussels' bureaucracy (although that is a nuisance even if not a problem). On the contrary, to be precise about our national states will turn out to include erasing these suspect sentiments. The real motive should be much more rational: it may well be that national states represent the largest scale on which we are able to discuss, if not to solve, supra-national problems. For instance, the supra-national problem of the pollution of the river Rhine by the Alsace potassium mines, to the detriment of Dutch greenhouse owners, can only be articulated as an environmental problem (rather than an insurance-problem or a waste-distribution problem) because it has to be moulded in terms of national interests on both sides.

However, this paradox, in spite of its theoretical attractiveness, has definite ambiguities. When we look at the two main official models of European integration, the federal model and the intra-governmental model, we see that they both presuppose this hybrid concept of a nation-state as a framework to understand the proper agents of European integration. Also note that these models of integration themselves are far from homogeneous. What is in fact aimed at is never a strong form of federalism or intra-governmentalism, but something in-between; a hybrid transnational off-spring, generated

[11] J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats.* 2. Aufl., Frankfurt a.M., 1992: 633ff. I am summarizing his argument here.

by agent-states that have to repress their own hybrid character in their generative acts in the first place. Thus, they run the risk of losing their own credibility as an integrating force on a more basic level while trying to integrate on a higher level. Moreover, the nationalism of the 19th and 20th centuries has shown that nation states can be very obstructive, if not downright generative, of transnational problems. Instead of being a framework for solving regional political problems, the borders of national states often became the very expression of these problems. Shifting national borders, as the experiences of the (re-)unification of Germany and the (re-)segregation of Czechoslovakia prove, seems to be a mode rather than a framework to articulate regional problems.

To bring these difficulties to a philosophical level, we will have to re-think the concept of state in a European context. At first sight we are inclined to say that European law is law without a state. But that is only true if we believe that the national state is the only one around, and that it is in need of revision. This does not have to be the case. The national state is not just something which has to be re-interpreted into something new; it is first and foremost already a specific interpretation of what the concept of state is supposed to mean in relation to a legal order. The concept of state itself, is analytically tied up with that of law, to the extent that it is implicit in the idea of law that its representatives form a collective body of law-enactment and law-enforcement that is itself subject to law. The concept of state is a concept which can be defined in terms independent from ethnic or national elements, though we may safely assume that it will impossible to give it any cutting edges without involving these elements in it. But the state, in many of its historical guises, is nothing more or less than an organisation of the *publicity* of the exercise of political power before the law. Even the national state was and is the servant of that primary purpose. What the French Revolution has achieved, and Kant acknowledged, was not only the change from ‘le roi’ to ‘la loi’ as the keystone of a legal order; it also achieved a change from ‘le secret du roi’ into ‘le publique de la loi’ when it came to giving this legal order its potential to act in unity. So what we will have to rethink in fact is how in our day and on a European scale, the public character of political power under the rule of law can be articulated and accounted for. Modern media

of mass-communication and their quality, international discussion among lawyers, joint enterprises of workers will perhaps turn out to be more inherent to the concept of state than we could ever imagine. For the moment, however, the poor public character of a host of European decision-making[12] makes us wonder how we can ever make any progress in forming this new concept of state. This is particularly worrying as neither the procedures of democracy nor the idea of the rule of law itself constitute real thresholds in letting the public character of political power slip away.

3. THIRD DILEMMA: THE LIMITS OF DEMOCRACY

Let us pass on to this third and famous dilemma of European Law: the more urgent the need of building a democratic and, thus, public Europe, the more the concept of democracy itself becomes evasive, in both its aspects of representation and participation.

The democratic character of the EC is often criticised on two points: a) on the level of institutions, the poor powers of the European parliament are laughed at by 'true democrats'; and the changes brought about by the Union Treaty of Maastricht (art. J.7) will not stop their laughing; b) the involvement with and commitment to the European political cause from the part of the citizens (see art. B) is less than modest. The way in which some national authorities try to mend these malfunctions by TV commercials ranks high on the scale of oversimplification. It is, in any way, not on a par with the nature of the problems at hand.

These are problems about our very understanding of what democracy is about.

– In speaking about the 'democratic deficit' on the institutional level, we pretend that we have some democracy scale by which we measure the European species of democracy and establish that it is less than we asked for. It is suggested that pleas for an increase of the (legislative) power of the European parliament, for constraints on the competences of the European Commission, for better procedures to elect judges in the Court of Justice flow

[12] Vgl. D. Curtin – H. Meijers, 'Openbaarheid in Europa', in *Nederlands Juristenblad*, **70**, 1995, 158–180.

from just such a measurement procedure. Of course, it is nothing of the kind. In fact we know very well that a simple enlargment of the democratic procedures from a national to a communitarian level, will not establish democracy in the European Union. It would be hard to imagine the European Parliament taking on full legislative power and control, regarding the Commission as its executive administration, claiming that it is democratically authorised to do so, while we realise ourselves at the same time that both the virtues and the vices of present national parliamentary practice would be painted on a larger canvass. We will have to address not only the question of how we can make Europe a more democratic place, but also the question what we would count as democracy? What concept of democracy makes us say that Europe 'is not democratic enough' rather than 'too democratic already'? How can we know of a democratic deficit without having knowledge of a democratic ideal?

– When it comes to the commitment of citizens to the European public cause, things tend to get even more vague, if not dangerous. It is readily understood as a deficit of a common 'feeling'. And it is easily suggested that such a deeply felt popular awareness 'that we are all Europeans',[13] would be a precondition for sound democratic structures on a supra-national scale. For how else, it is added, could parliament represent the will of the people, if there is no such thing as a people in the first place. This type of argument probably inhibits a major fallacy about the meaning of references to 'the people' in the concept of democracy. Although the doctrine of popular sovereignty is a rather received one on the national level, the mimetic character of these references is commonly misunderstood. In a philosophically feasible account of democracy, the phrase 'the people' stands for a virtual point of reference rather than an entity, let alone an empirical entity. But although it is a virtual, it is by no means 'unreal'. It is a sort of counterfactual grid that determines the format of parliamen-

[13] A phrase that cannot escape from Nietzsche's cynicism. For a more extensive account of Nietzsche's attitude towards Europe, see B. van Roermund, 'We, Europeans. On the Very Idea of a Common Market in European Community Law', in Fr. Fleerackers, E. van Leeuwen and B. van Roermund (eds.), *Law, Life and the Image of Man*. Festschrift Jan M. Broekman (Berlin, Duncker & Humblot, 1996), pp. 455ff.

> tary parlance. It is an obligatory format, rather than a piece, or even a source, of political argument, not unlike – according to Kantorowicz – 'the will of the King' was the proper and unique format of political argument under the Ancient Regime.

Though a feeling of 'we' is unnecessary and dangerous, democratic political institutions require a whole climate of democracy, a democratic culture, which constitutes the referent 'the people' in accounts of democracy. As an advice for political education, this is probably right. Democracy in politics could profit from a social climate of tolerance, from a less autoritarian style of government, from real participation by workers in the property of industrial enterprises. But on the other hand, as an account of democracy in philosophical terms, it raises a lot of questions. One of the most pertinent is this: is European culture such that it can grow democratic on its own account, or does that culture go against the grain of democracy? At first sight, European culture, especially since the days of Enlightenment, seems the very cradle of democracy. But can our culture, as it conceives of itself, be democratic in the sense that it allows equality in freedom for everyone in virtue of each and every person experiencing the other 'as of the same essence' – to use Kelsen's phrase? Both Rousseau and Freud, to mention just two critics of Western culture, doubted very much if it could. Democracy as a 'vaterlose Gesellschaft'[14] – a fatherless society – is at odds with a culture which cannot conceive of itself but in terms of a Great Legislator (an archetype Father) who is beyond the law. The best such a culture can do is to establish democracy as an artificial, mitigating counterweight to its inherent tendency of diversification and heterogeneity, inherent that is to the eternal quarrels about who is to be the legitimate heir of Reason (the sciences? technology? economics? the artists X or Y, mother Theresa?). But if it is indeed artificial, this implies that democracy will always be dependent on authoritative exemplification, endorsement, enhancement and enforcement. The question really is: Do we have the courage to face the dilemma between our concept of western culture and our concept of democracy?

[14] To borrow a phrase from Kelsen, which Kelsen himself borrowed from his Vienna co-citizen Freud.

4. FOURTH DILEMMA: EUROPEAN LAW AND THE LAW OF THE EC

I said that the concept of state on a European scale would have to return to its roots in the idea of 'public exercise of political power before the law'. In the previous section I touched on the problem of publicity, bound up with democracy. Now I turn to the other half of the phrase: the rule of law. The next dilemma I want to go into is this: European unity presupposes a unifying rule of law, while the very concept of the rule of law is fundamentally ambiguous among the member states of the EC. In fact there are radically different, even conflicting ideas on what parameters are determinative for the keystone of a legal order.[15] To simplify a bit, one could say that there are at least three main ghost-types that have haunted the castle of the EEC since a few decades: the French, the German, the English ideal type of what constitutes a legal order.

- The French idea of *legalité* circles around the presupposition of a self-referring, closed system of rules in a virtually deductive axiomatic order. Of course this is not the way law is applied in France on a day-to-day basis. It is the pattern that emerges when one tries to connect a series of remarkable dots in the legal landscape that is shaped by the Napoleonic tradition of civil law. And even then it emerges probably only under political or economic pressure. In the context of EC law, a few of these dots are: the remarkably reluctant attitude of France, in particular the Conseil d'Etat, in applying EC-law, in making preliminary references to the ECJ under Article 177, in vehemently using the distinction between acte claire and acte éclairée.
- The German ideas behind the notions of *Gesetzmäßigkeit, Verfassungsmäßigkeit* and *Rechtsstaatlichkeit* are considerably different from either the French or the English ideas. Again, this is not meant as a rigid designator of German judiciary: it is the tentative pattern that arises when one tries to connect several salient phenomena of handling the concept of law in Germany and other countries in the same tradition. This has led

[15] See J. Steenbergen, R. Foqué, G. de Clercq, *Change and Adjustment. External Relations and Industrial Policy in the European Community* (Deventer – Antwerpen, Kluwer/Kluwer Law and Taxation, 1983), pp. 95ff. Foqué renders these differences in what Weber called 'ideal types' – which are in fact tentatively meaningful patterns drawn from a host of fragmentary data.

to very awkward situations in the past, which still exist till the present day. The most salient of these is, undoubtedly, the conditional membership of Germany, as brought to the fore by the so-called *Solange* decisions of 1974 and 1986. To give a very brief summary, the German Constitutional Court (*Bundesverfassungsgericht*) declared at these occasions, that the EC Treaty would constitute valid law in Germany 'as long as' (*solange*) European law as upheld by the Luxembourg Court would be in accord with the protection of fundamental (human) rights as offered by the Constitution of the Federal Republic of Germany. Although it had nothing to complain as far as the decisions of the Luxembourg Court were concerned,[16] in 1993 the same *Bundesverfassungsgericht* has given an explicit and amply motivated decision on the constitutional legitimacy of the Maastricht Treaty in a similar vein.[17] So here we are: restricted membership of Britain and Denmark since Maastricht may have, perhaps, attracted attention, but the conditional membership of Germany has been a far more principled one for already more than two decades, in spite of all doctrines about *acquis communautaire*, that is, about the presumed continuing validity of all prior decisions and practices of community organs.

– I do not want to say much about the English idea of the *rule of law*, which, as comparative lawyers teach us, is rather different from either *legalité* or *Rechtsstaatlichkeit*. Though it is open, rather than closed, to extra-legal contexts (like the German, though unlike the French), it is open to social circumstances and policies rather than to moral standards. It combines the predictability of law with the sovereignty of Parliament, which gave rise to long debates and texts when the UK entered the common market.

[16] In all probability, Germany shares the general understanding among EC members, that the Luxemburg Court has done its utmost over the years to keep up with the ECHR in its own decision making. See however also footnote 9.

[17] See: R. de Lange, 'Het Bundesverfassungsgericht over het Verdrag van Maastricht: een nieuw Solange?' in *Sociaal-Economische Wetgeving* (SEW), **42**, 1994, pp. 418–436. Cf. also T. Koopmans's analysis: 'Rechter, D-mark en democratie: het Bundesverfassungsgericht en de Europese Unie', in *Nederlands Juristenblad*, **69**, 1994, pp. 245–251. The latter believes the style of argument of the Court to be totally obsolete, the former underlines the principled character of this doctrinal style of reasoning.

I submit that this heterogeneity in ideal types of what constitutes a legal order can offer an explanation both for the emphasis with which the Court has defended the *sui generis* character of European Community law, and for the revisited *utrumque ius* of European law in the broad sense, i.e. the fact that European law is not European Community law. Post-war European integration has created two European jurisdictions: the one of the Council of Europe, the ECHR en the Strasbourg Court, the other of the European Community, the EC-Treaties and their tails, and the Luxembourg Court. Lawyers sometimes pretend that this is a matter of learning legal vocabulary. Theirs is a profession that is able to tell the European Court in Strasbourg from the European Court in Luxembourg, or even the European Council from the Council of Europe. Things are, however, slightly more dramatic. The fact is that the political authority of the EC – say the presidents and prime-ministers – has been notoriously reluctant towards the ECHR. Only since the Maastricht Treaty, an explicit paragraph of the text itself is devoted to fundamental rights (see art. F). But even at this point in time, the EC as such did not consider to enter the ECHR. The EU cannot consider it, as it is not a legal person itself. Becoming a party to the ECHR could be interpreted by the member states as favouring one of the ideal-types of legality, namely the German one, at the cost of the others.

What we see here, in all its clarity, is the philosophical problem of legal pluralism. Of course it is easy to accept legal pluralism from the external point of view. How can one not recognise that different legal cultures are involved in most of our legal systems, that they often show traces of clashes and intertwinements, that they change over time, dependent on socio-economic circumstances such as migration of workers from third world countries to Western Europe? But this is the external point of view which a sociologist could take. If we try and formulate legal pluralism from the internal point of view, we often stop at the point where we realise that a legal order just cannot afford to refrain from affirming itself as a unity, and that therefore a plurality of ultimate points of references to ground a rule or a decision in such an order is inconceivable. The most we can (and do) conceive of is a certain complexity in the unity of a single legal order, such that it is elastic enough to integrate (very) heterogeneous elements into one framework. But this integration will always contain, or so

it seems, one final point of reference in case these heterogeneous elements come into conflict with one another. So from the internal point of view, legal pluralism seems to be a rather gratuitous phrase, to indicate a certain degree of tolerance inherent to the legal order.

We should also be careful not to confuse 'legal pluralism' with a certain political virtue called justice. Essentially, justice is self-imposed self-restraint in politics. It is politics which, of its own account, allows something to count against the very core of its planning and acting, the identity of the specific society it attempts to rule. So justice politics will already be 'pluralistic' in this profound sense. Now the concept of law, in as far as it is dependent on such an idea of justice, will share this pluralism in politics. But if it is to institutionalise this shared understanding of justice, it will have to do it in a way which is not in itself pluralistic again. In the end law is bound to be a monolithic institutional defense of political pluralism, or so it seems.

5. FIFTH DILEMMA: THE IDEA OF A COMMON MARKET

The last dilemma I want to present goes to the very self-professed heart of European community law: the idea of a common market. The problem here is that 'common market' seems to be a rather symbolic expression, which boils down to what is called an internal market as soon as we talk real legal business. And indeed, to go right to the core of the question: it seems that where there is a market, there is virtually no community (but self-oriented competition), while on the other hand, where there is community, there is no market (but co-operation). As the market is usually defined as the place where competing offers and demands meet, there is not much that is common in a market. Of course, as in the case of Europe, members of a 'community' may decide to join hands in order to protect their market from others. But in that joint effort, their acts are not acts 'in the market', as they do not amount to competing offers and demands. Let me be more explicit about this.

It is, of course, not so hard to explain the concept of a common market in economic or legal terms. Economically, a common market is a non-segmented market, with large areas for trade. Legally spoken, this economic phenomenon is translated in terms of the four

celebrated freedoms, together with the prohibition of false competition.

But that is not all there is to it. Signs of worry about the very concept of a common market in political parlance can be found in a shift of vocabulary that was going on already underneath the surface of communal politics, but which emerged first in the single European Act and now in the Union Treaty: the phrase 'internal market' is preferred over and above that of the 'common market'. As and for itself, this would be rather innocent, if it would be, indeed, a lexical matter which could be clarified unambiguously by authoritative interpretation. The fact is that it cannot. In a Dutch textbook on the law of the European Community,[18] the authors claim that *the common market is nothing but the internal market*. In their view, the latter is a clarification of the former and boils down to the four freedoms mentioned already. To substantiate their claim, they refer to some sources which, on closer examination, cast serious doubts on the feasibility of the initial thesis.

– The first reference is to P. VerLoren van Themaat, 'De Europese Akte', in: SEW, 1986: 464–473. This author, however, states that the common market embraces far more than an internal market, in particular the provisions against false competition and for equal development in solidarity with poor regions and a communal policy of trading in external relationships. That in itself is a surprising interpretation in the light of the next reference, which stems from Dutch parliamentary reports:

– The second reference is to an explanation by the Dutch government (TK, nr. 19.626, nr. 3 (MvT): 6–7; 11 en nr. B (NT): 4 (Statutory approval of the European Act). The Dutch government asserts in parliament that the internal market is committed to 'a more embracing concept of integration' than the common market. In other words, the Dutch government wanted to believe that both VerLoren van Themaat and Lauwaers/Timmermans are wrong.

[18] R. Lauwaers and Timmermans, *Europees Gemeenschapsrecht in kort bestek*. 3e herz. dr. (Groningen, Wolters-Noordhoff, 1994), pp. 139–144.

– This, again, is surprising in the light of the third reference, which is to ECJ 15/81, JUR 1982: 1431–32.[19] Here the Court of Justice itself declares: 'The concept of the common market, as developed by the Court in a coherent series of decisions, goes to the abolition of all impediments of intra-communitarian trading, in order to unify the national markets into one single market, which resembles the conditions of a national market as much as possible. It is important that the profits of this market go not only to trade companies, but also to private persons in case they perform transnational transactions.'

But – *pace* J.L. Austin's insights – things can not always be done by words. It is all very well dropping the common market vocabulary in favour of internal market vocabulary. However, Francis Snyder has argued, with regard to something as all-important as the EC's sheep meat policy, that the notion of an internal market, too, can be analysed in two different and conflicting ways, depending on what he calls two different 'ideologies of competition'.[20] Here is the dilemma regarding the conception of full competition underlying the notion of the internal market.

– The first view asserts that the primary, though perhaps not exclusive purpose of sheep meat policy has to be the establishing of a completely free internal market for sheep meat trade, even to the point where it would entail ignoring the sharp fall in income of farmers who would be the victim of the subsequent operations of the market. To mitigate the consequences for their positions would be rather a matter of blocking unwanted side-effects to the extent that it is compatible with the primary goal. By departing from this view, one may make a clear-cut distinction between what can and should be done on the internal level on the one hand, and what is desirable or permissible in external relations on the other.

[19] Responding to a prejudicial question ex. art. 177 EEC by the Dutch Court of Den Bosch in the case Schul/Inspecteur Invoerrechten en Accijnzen te Roosendaal, concerning the interpretation of pars. 13 and 95 EEC and art. 2. sect. 2 of the 6th Directive (Harmonisation VAT).

[20] F. Snyder, *New directions in European community law* (London, Weidenfeld and Nicolson, 1990) (Law in context).

– The alternative view believes it to be the task of a policy of 'full competition' to primarily provide a legal framework for negotiable mutual tuning of traditionally very different market structures presently existing in different parts of the EC. This is a process of gradual harmonisation which aims at developing all parts of the EC to a sort of 'competing competence'. Means such as pricing policy, import policy, supportive income policy are not derivative instruments, but primary goals to attain. Internal and external relations should, according to this view, be integrated. This is, by the way, what VerLoren van Themaat also stressed with regard to the idea of a common market in the article already mentioned.

These two radically different, indeed conflicting views on full competition bear directly on the interpretation of the core of European community law, the paragraphs 85–94 of the EC Treaty. As these paragraphs must be read in the light of the provisions on policy purposes, as formulated in paragraphs 2, 3 and 5, the dilemma of interpretation bears on the essence of the Treaty itself. What is to be understood, for instance, by fraudulent competition, is to a large extent dependent on which of the two views regarding full competition is to be preferred. According to the first view, it will be any impediment that could be expected to interfere with the free market. According to the second view, it will be to lift impediments without proper deliberation between partners.

It is of little use to ask which of the two ideologies is embraced by the Court of Justice, so that it can deemed the official one. It is by no means coincidental that the Court uses a rather neutral formula when it points to '(. . .) the abolition of all impediments for intracommunity free trade.' For the European market in the economic sense is not a homogeneous one. In some sectors, that is on some markets, almost full freedom and unprotected competition will work out well, while on other markets they would be disastrous, while these markets need prudential and even altruistic economical behaviour. It is clear, though, that when it comes to responding to social problems within the EC, the Court prefers the latter view over and against the former. Which shows that, given our confusing quotations, both authors and politicians are sometimes short-sighted concerning EC law.

Philosophically, it seems therefore worthwhile to investigate the idea of a common market more thoroughly. The hypothesis would be, that the 'commonness' apparently involved in it is not some romantic idea about the medieval market-place, but a meaningful element in the modern idea of a market, and which could well harbour intrinsically legal presuppositions. These presuppositions could form the anchor-points for a policy towards European law that would concentrate on what is needed for the market (which may be not a little thing), and which would refrain from intervening in each and every aspect of social and cultural life in the member states. Such research would concentrate on elements of communality inherent to the market, such as common peace necessary to let trade rather than robbery be the mechanism of 'getting what you want'; mutual understanding, indeed demonstration, of languages and cultures as a background of demands and offers; protection of a sustainable place over time (ecological commitment); limitations on capital interests in order to restrain the phenomenon of markets in markets; in short 'la douce commerce' that Montesquieu already mentioned.

These five dazzling dilemmas are, I take it, disturbing as well as wholesome. Disturbing for obvious reasons, as no one takes an interest in agonizing choices in law. But wholesome, because these dilemmas incite all those participating in European law to think for themselves, and to think twice: once with their legal minds, as they are trained to do, once with their philosophical minds, as they are perhaps not. European community law urges to answer very pertinent why-questions on law in general, transforming us all into temporary philosophers. Evrp – in another, Greek etymological interpretation the old root is said to mean 'the far-ahead regard'.

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