

The Future of the Constitutional Treaty for Europe and the European Court of Justice

The Rt Hon Sir Francis Jacobs KCMG QC

Keynote address at BIICL's Annual Conference, 16 June 2006

Introduction: Relaunch of European and Comparative Law Programme at the BIICL

Sir Francis began by recalling the long and rich tradition of European Law at the British Institute of International and Comparative Law (BIICL). The annual London-Leiden meeting became an established event more than a decade before the United Kingdom joined the European Communities. Considering the pioneering role of the BIICL in European Law development over the years, the relaunch of the European and Comparative Law Programme under the direction of Professor Cees van Dam is to be warmly welcomed.

The BIICL will be holding an important conference on the *Role and Future of the European Court of Justice* early in 2007 to mark the 10th anniversary of the well recognised and highly influential 1996 BIICL study on the same topic.

Sir Francis then turned to the actual topic of his speech.

Future of the Constitutional Treaty

After the rejection of the Constitutional Treaty in the referenda of certain member states the next steps to be taken in European Law reform remain unclear. One view is that the Constitutional Treaty should be revised or specific parts of it. Other people feel the Constitutional Treaty is dead.

There is often an objection to the concept of a European Constitution. Concerns are expressed that a Constitution implies the notion of a state, and in the European Union (EU) context, an EU superstate. This argument is weak in that it fails to appreciate what the EU has already become. The division of competences

between the EU and member states, based on concepts such as the supremacy of EU Law, is already firmly established. The existing Treaties have been described by the European Court of Justice (ECJ) as the "Communities' basic constitutional charter", which is to be interpreted by the ECJ in carrying out its task of judicial review. The need for an EU Constitution is similar to the position of member state Constitutions, to ensure the EU institutions exercise their wide-ranging powers in accordance with fundamental constitutional principles such as the rule of law, democracy and human rights.

ECJ and Three Pillar System

The Treaty of Maastricht introduced the *Three Pillar System*, confining most of the ECJ's jurisdiction to the First Pillar Community Law matters. The Amsterdam Treaty amended the Pillar System slightly, transferring parts of the Third Pillar to the First Pillar, with optional and limited jurisdiction in certain cases. In the end there was a blurring of the Pillars, leaving the ECJ with a patchwork jurisdiction that is confusing and impractical. The Constitutional Treaty attempted to achieve greater clarity in defining the ECJ's jurisdiction, by abolishing the Pillar System and further extending judicial review to areas such as criminal law that have important constitutional aspects.

ECJ and Charter of Fundamental Rights

The Constitutional Treaty addressed the issue of human rights protection in the EU, by incorporating the EU Charter of Fundamental Rights (The Charter) into the treaty and by providing for EU accession to the European Convention on Human Rights (ECHR). The ECJ has endeavoured to remedy the absence of formal EU human

rights protection by recalling the fundamental rights found in the constitutional traditions of member states and the ECHR, under the label of “general principles of law”. The Amsterdam Treaty consolidated this practice, stipulating in Article 6(2) that the EU shall protect fundamental rights.

The Charter currently has no legal force and has not been relied upon by the ECJ as a legal source. Several Advocates-General and the Court of First Instance (CFI) have only referred to the Charter as a non-binding authority on human rights. In many respects it is preferable that the EU has its own human rights law appropriate to its own competence and nature. The Charter is confusing and misleading. It can be criticised for simply replicating similar rights in the ECHR and including judicially non-enforceable economic and social rights.

The idea behind EU accession to the ECHR is to fill a gap, by allowing an individual to bring a case against the EU, as well as member states. A problem exists where the ECJ has no jurisdiction in respect of matters under the Second and Third Pillars that impinge on the basic human rights of individuals. Extending the jurisdiction of the ECJ is preferable to EU accession to the ECHR. The ECJ needs to be given a wider role to ensure respect for the rule of law in important areas that require effective judicial review.

ECJ and principle of subsidiarity

The Constitutional Treaty attempted to establish a clearer demarcation of EU and member state competences. The ECJ has a constitutional role in policing the jurisdictional boundaries.

The principle of subsidiarity was strengthened by the Constitutional Treaty. A greater responsibility was given to the ECJ in ensuring that the EU institutions respect the principle of subsidiarity. The role of the Parliament in relation to the principle of subsidiarity was also enhanced to improve EU legitimacy.

Defects of the Constitutional Treaty

The Constitutional Treaty had many defects as well as merits. The Constitutional Treaty, with over five hundred pages, attempts to cover too much material and is simply too long. It was unwise to include Part Three, containing the existing Treaties. One consequence of keeping areas such as competition and transport within the Treaty framework is that any amendments must be carried out within the confines of the long and cumbersome Treaty revision procedure. By elevating all the Treaty provisions to Constitutional status it makes it more difficult to introduce amendments. Does a change in transport policy really require a national referendum? Greater flexibility is preferable.

Future of the EU judicial architecture

The future of the EU judicial architecture is based upon a three-tier judicial system. The European Union Civil Service Tribunal (EUCST) is the first judicial panel to be created, and it now functions alongside the CFI and the ECJ. In the future there may be a further reallocation of jurisdiction and the establishment of new courts.

(Report: Seán Ó Toghda, LL.M.; British Institute of International and Comparative Law)