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Editorial: Marking the Anniversary of the Universal Declaration; The Irish No and the Lisbon Treaty

Marking the Anniversary of the Universal Declaration

The interest of *EJIL* in, and its commitment to, the study, research and reflection on the place of fundamental human rights in the international legal system is an ontological facet of *EJIL*'s identity. This is not surprising given the biography and/or bibliography of its founding editors as well as, of course, that of my long-serving predecessor as Editor-in-Chief, Philip Alston. It is, thus, equally unsurprising that there has hardly been a year in which at least one or two pieces on human rights have not appeared in our pages. This engagement is carried through by the new members of our Editorial Board and Scientific Advisory Board.

We are marking the anniversary of the Universal Declaration in a very *EJIL* way: not by celebratory articles on the UDHR itself but simply by an even higher dose than usual of human rights scholarship this year. We have already published one symposium this year, tellingly composed mostly of unsolicited articles submitted to *EJIL*.

In this issue, which somewhat arbitrarily we decided to designate as the Declaration Anniversary Issue, we the editors played a more active role. We have tried consciously to showcase human rights scholarship, not only at its best but at its most diverse from a disciplinary perspective – doctrine, theory, social science all come to the fore – as well as pushing the material frontiers of the inquiry.

The lead article by Christopher McCrudden focuses on that key term which the Universal Declaration helped place at the centre of human rights legal discourse – dignity. Given the importance of the topic, the breadth of the inquiry, the ambition of the article and, indeed, the special occasion, we have allowed a far longer piece than is our usual practice. I am convinced that our readers will concur with this editorial decision once they have completed this *tour-de-force*. It is intuitively understood that Dignity is an under-specified term and naturally it has been the subject of debate, often fierce, among legal and political theorists. But the huge interest and value of this article is in discovering its myriad usages in different jurisdictions, different contexts and different fora and in a conceptual discussion, with which one may agree or not, which is based on such careful research. The article has its fair share of subversive elements: after all, given the constitutional gravitas of human rights in general and human dignity in particular (a foundational feature of the European approach, at times contrasted with

the American one) and oft a vehicle of empowerment for the judiciary, the *empirical* findings of such careful comparative analysis indicating the highly indeterminate nature of the term can be disconcerting, even normatively worrying, which makes it all the more interesting to consider the conclusions put forward by McCrudden.

When the European 'Constitution' bit the dust (a fate now threatening its ignominious successor, the so-called Lisbon Treaty of Reform, see *infra*), among the shrillest cries of woes were those bemoaning the concomitant fate of the Charter – which had pride of place in the former and has been surreptitiously smuggled into the latter. I for one am yet to read an article which persuasively argues that the adoption or otherwise of the Charter will make a material difference to the reality of human rights violation and protection in the European legal space. The cries of woe are emblematic of an approach which is either concerned with prestige and appearances (typical of many of the Brussels Mandarins) or, whilst interested in substantive protection, pays too much attention to formal legal institutions and too little even to well-worn notions such as Access-to-Justice and the reality of legal vindication of rights.

Goodman and Jinks take us well beyond that earlier generation of sociological reflection on rights represented by the Access-to-Justice movement and finding its roots in domestic civil procedure. Whether or not one agrees with their notion of, and the importance they give to, *acculturation*, the article is a luminous example of serious sociological research in the field of international protection of human rights. It is also instructive in its concern for the physiognomy of law (the need for social internalization of norms as a yardstick for success) rather than the pathology (concern with breach and its remedies), a huge correction to an endemic professional deformation which chronically afflicts the discipline. It is always the 'case' before a court or tribunal that draws attention. The efficacy of the 'sanction' in the case of breach and state responsibility. But is that the measure of legal health in the field of human rights? Which is the more important in the fight against AIDS – the most recent hugely expensive cocktail of retroviral drugs or the more mundane internalization of norms of safe sex and, sigh, needle usage?

Stephan Gardbaum renders a huge service. It is probably the advent of the European Union and the so-called constitutionalization of the EU Treaties (long before anyone dreamt of dressing them formally in constitutional garb) that turned what was hitherto at best a clandestine love affair into a more general romantic pining of international law for the solidity, gravitas and, above all, compliance and enforcement pull of constitutionalism. It is in many, if not most, instances a misguided quest; but whereas in earlier days it was exceptional to speak, even of the Charter of the UN, in constitutional terms, today there are claims or clamourings for a growing number of organizations and international regimes to become 'constitutional'. Gardbaum takes his cue from the frequent practice of referring to the *UDHR*, *ICCPR* and *ICESCR* as the 'international bill of rights' – a clear case of constitutional cross-dressing. We are then treated to a most careful, subtle and fresh analysis of the international–constitutional interface. The questions are central: To what extent or in what sense, if any, has international human rights law become constitutionalized and, thereby, similar and closer to most domestic bills of rights? Secondly, regarding 'international', do the major

international human rights instruments simply duplicate domestic bills of rights or provide a generally inferior substitute for them where unavailable – as a certain strand of human rights scepticism suggests? Or do they perform any distinctive functions over and above domestic bills of rights that make a novel and unique contribution to the development of constitutionalism? The answers are at times unexpected.

From these very comments the reader will have gauged that, to put it mildly, I do not find myself in agreement with either the central thesis or the detailed working out of the article by Ernst-Ulrich Petersmann. Agreeing with the Editor-in-Chief is, however, neither necessary nor sufficient a condition for publication in *EJIL*.

Petersmann is among the most powerful voices for the constitutionalization of intergovernmental international economic legal obligations, namely, their transformation into individual rights enforceable by domestic courts. His voice, and this article, reflect an important strand in the literature and we would be remiss not to make it part of this symposium. The value of the article transcends its conclusions with which, of course, one may agree or disagree. It raises significant issues on the relationships between the rule of law, domestic and ‘international’ democracy, the legitimacy (and indeed the consequences) of the judicial empowerment which constitutionalization produces, to name but a few. It also raises interesting issues of ‘comparative international law’ – notably the applicability and transferability of systemic and material legal norms across an increasingly fragmented international legal order. The article is passionate and trenchant in its conclusions, paradoxically helping in defining counter arguments and different conclusions.

In this issue we introduce an occasional series dedicated to Critical Reviews of Jurisprudence – the precise court and subject matter to vary from review to review. Appropriately, we publish in this special Human Rights issue a review of Gender Equality in the Jurisprudence of the European Court of Human Rights by Ivana Radacic. We would like this to serve as a model for future such Critical Reviews. Radacic achieves a felicitous balance between information and analysis, doctrine and theory, learning and wisdom.

Last but not least, the ‘orphan’ article in this issue: Thomas Schultz, Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface.

As we go to press, the flap over restrictions of internet access in China during the Olympics has erupted. So have the contrasting decisions of French and US courts on copyright protection on Ebay. The starry-eyed dream of cyberspace as a borderless world with unrestricted information has long disappeared, if ever it was true. We baulk, of course, at crass political censorship. We are more cautious about unrestricted pornography easily available to minors (the various virtual netnannies are always, it seems, one step behind every computer savvy kid) and often, sadly, exploiting them. And it is increasingly difficult to find advocates for a copyright-free internet, except, of course, for those who enjoy the licence to steal. Whatever view one takes on these and related issues, one must readily agree that different societies, even different liberal democracies, may draw different lines on these issues. And herein lies the potential for tricky normative and legal questions: How does one carve up the internet pulled and pushed in so many directions? The article by Schultz is timely, informative and thoughtful – and in a deep sense extremely consequential, not only to the future of the

internet but to central issues of multiculturalism in a globalized world. The internet is a conceptual microcosm of some of the most delicate questions of individual, communal and global self-understanding.

Lisbon and the Irish Question

EJIL is decidedly not a journal of European Union law. But sometimes the lines blur and, paradoxically and ironically, they blur most at the Union's great constitutional moments, when its roots as an international Treaty requiring ratification by all Members, are exposed.

In the heady days of the 'Constitution' there were only few of us, Europhile lawyers, who contested the need for, the content within, and the prospects of, that ill-fated document. Yet even the slightest familiarity with the reality of the 'Constitutional Convention' should have given pause. (Today, of course, it is difficult to find anyone who will admit to having supported the Constitutional Treaty. Everyone it seemed belonged to *La Resistenza*.) It is equally difficult to find those who have anything positive to say about the Irish vote. I shall stick my head out.

Consider the following famous example of Jewish humour:

Moishe and Chayim, two fur traders, meet at Warsaw Railway Station. 'Where are you going?' asks Moishe. 'To Lodz', answers Chayim. 'Oy, you are so dishonest!', says Moishe. 'You tell me you are going to Lodz because you want me to think that you are going to Krakow. But actually you are really going to Lodz! So why are you fibbing?'

Begin to wrap your mind around the subtle and multiple layers of deception and irony encapsulated in this little exchange. Now imagine a variant: Moishe says: 'You tell me you are going to Lodz because you want me to think that you want me to think that you are going to Krakow and that I will therefore think that you are actually going to Lodz; but you are, in fact, going to Krakow.' Reach to your bottle of aspirin. And now you are in the right frame of mind to uncover the multiple layers of deception in the ongoing saga of the European Constitution and the Treaty of Reform.

The Original Sin was to confuse the Institutional with the Constitutional and to peddle the idea that Europe was in need of a Constitution. What it really needed was a serious institutional face lift, updating its decisional processes to a Union of 27. Constitutionally, Europe was doing just fine – notably in the critical area of the relationship between the European Union, the Member States and European citizens. Not only had this relationship followed for decades a constitutional rather than an international law sensibility and discipline, it was original and noble: the Member States accepted the supremacy of European Union law, individuals could rely on their European rights even against conflicting state norms, the European Court of Justice developed a robust doctrine of protection of fundamental human rights – long before anyone even thought about the Charter.

The second deception was to pretend that the legal mongrel produced by the Convention was a Constitution.

It did not look like a constitution: in its English version it weighed in at 154,183 words! For comparison sake, the American Constitution is 5,800 words long and the Charter of the United Nations 8,890. The actual weight of the official two-tome printed version of the so-called European Constitution was just under one kilogram.

It did not read like a constitution: constitutional opening phrases are typically of a magisterial style and make reference to the ultimate constitutional authority under-riding the document – the People. Thus, for instance:

We the people of the United States, in order to form a more perfect union....

Le peuple français proclame solennellement son attachement aux Droits de l'homme et aux principes de la souveraineté nationale tels qu'ils ont été définis par la Déclaration de 1789...

Im Bewußtsein seiner Verantwortung vor Gott und den Menschen, von dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen, hat sich das Deutsche Volk kraft seiner verfassungsgebenden Gewalt dieses Grundgesetz gegeben...

The opening phrase of the Document put before Europe's peoples was equally revealing. It was the very same phrase used since the very first treaty establishing the European Coal and Steel Community in 1951:

His Majesty the King of the Belgians ...!

This was followed by the long list of Heads of State.

The President of the Czech Republic [etc. who].... Have designated as their plenipotentiaries ... Guy Verhofstadt Prime Minister[,] Karel de Gucht Minister for Foreign Affairs [etc.].... Who, having exchanged their full powers, found in good and due form, have agreed as follows...

This is *EJIL* territory, not *ELR*.

Consider the concluding phrases:

This Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements. The instruments of ratification shall be deposited with the Government of the Italian Republic.

Followed by:

IN WITNESS WHEREOF, the undersigned plenipotentiaries have signed this Treaty....

Res Ipsa Loquitur.

What of the content of that 'constitution', its substance? It was for the most part, including the integration of the Charter of Fundamental Rights, the kind of content which one had hoped to see in the Treaty of Amsterdam and certainly in the Treaty of Nice in the countdown to enlargement: a sensible though far from radical amendment of the institutional architecture and decision-making processes of the Union; some meaningful but equally non-radical nods towards further democratization; the Charter and some sensible cleaning up of language. There were also some problematic features – does Europe really need two Presidents? Was this not simply a ploy to weaken the Commission? The Treaty revision procedures, though amended to provide a multi-tiered process ultimately required unanimity among the Governments of the High Contracting Parties and ratification by national procedures in all Member States.

At its moment of truth, Europe goes international. Interestingly, that is part of its constitutional equilibrium.

Europe paid a heavy price for this double deception. Had it been presented for what it really was rather than misrepresented as a Constitution (based on the earlier deception that one needed a constitution) the peoples of Europe in their wisdom would have welcomed it for what it really was: a Reform Treaty adapting the European Union to enlargement. No one would have used any superlatives to describe its content, it would have attracted very limited public attention or debate in most Member States, we would have been saved the embarrassment of its pompous self-celebratory Preamble (at which crassness even Americans blush), it would certainly not have generated the numerous referenda which the Constitution did and there would have been no talk of the need for a Constitution (except, perhaps, among the European federalist fringe). No Convention, no European Philadelphia, no Constitution-speak. Europe would have been today where it now wants to be.

Instead, once presented as a Constitution, it was only natural that a totally different standard be applied to the document. A constitution after all is a document with far greater gravitas than a reform treaty. In a constitution one wants to find not simply sensible reform but a statement of identity, of ideals, of the type of society and polity one not only is but one wants to believe one is. And against this, appropriate, standard the mongrel document, the Treaty pretending to be a Constitution, which found favour with bureaucrats, Eurocrats and government Ministers, was found wanting, and rightly so, by the peoples of Europe, and was rejected.

(Make no mistake: it was not a rejection by a freak vote in two Member States. Are we meant to be impressed by the ratification with Ceausescu-type majorities in some of our national parliaments? Does anyone have any doubt that, for example, had the Dutch and French votes come at the beginning of the process, one would have had similar rejections in quite a few other Member States?)

The segue was of course priceless – even Houdini would marvel at the magic. Take the Treaty which masqueraded as a Constitution, do some repackaging, and now it is a Constitution masquerading as a Treaty. The repackaging is pretty crude: strip away the word constitution. Pretend the Charter of Fundamental Rights is not part of the Reform Treaty, but actually has a little legal provision which integrates it through the back door. So legally it is included, but presentationally it is airbrushed out – and all this whilst pontificating on the need for transparency. There are learned articles galore which point out punctiliously the differences between the two documents. Make-up does make a difference. Ask any starlet.

So let us review: you had a reform treaty which was presented as a constitution. You strip away a word or two, leave the basic substance intact, and pretend that ‘The Constitution’ is but a Reform Treaty, whereas it is the very same Constitution that was rejected a year earlier which really was a Reform Treaty pretending to be a Constitution. Even Moishe now would need a bottle of aspirin. The Italians have a wonderful word to describe the manner in which the European public has been treated by its reigning mandarins: *Meschinità*! Is there not some poetic justice in the Irish *No!* vote?

Would the whole process retain even a scintilla of credibility if, by hook or by crook, the unanimity requirement were set aside?

Europe did not have the courage to present to its peoples, even in the so-called Constitutional Treaty, a project which would allow, as in any mature constitutional federal system, amendment by a majority of Member States. Indeed, in the very Lisbon Treaty, the peoples' of Europe ratification was sought on the clear understanding that in any future amendment any one Member State would be entitled to a veto. But how is one to believe that if, when a clear majority of one people do just that, they are accused of 'not playing the game' and Brussels Eurocrats and officials of our various governments are already reaching into the well-known bag of constitutional tricks, to try and avoid – well, to avoid that annoying old norm: *pacta sunt servanda*. The Irish Prime Minister is invited 'to explain' this vote, a new referendum is openly discussed, and, *mirabile dictum*, the President of the French Republic, on assuming the Presidency of the Union, issues barely veiled threats to the Irish should they not tow the line. This from the country which just a year earlier scuttled the 'constitution'.

One is reminded of Brecht's vicious quip – the people have disappointed, let's change the people.

JHHW

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