THE EU AS A GLOBAL ACTOR IN A MULTIPOLAR WORLD

This panel was convened at 9:00 am, Friday, April 5, by its moderator, Daniel Halberstam of Michigan Law School, who introduced the panelists: Piet Eeckhout of University College London; Andreas Paulus of the University of Göttingen and the Federal Constitutional Court of Germany; and Ineta Ziemele of the European Court of Human Rights.

The Constitutionalization of European Foreign Policy

By Piet Eeckhout[*]

The basic argument that my remarks aim to make is that there is a process underway of gradual constitutionalization of foreign policy. I will try, in a nutshell, to produce some evidence in support of this argument. I will also argue that this process of constitutionalization is appropriate, in light of the ever increasing interconnectedness of ''internal'' and ''external'' policies in a globalizing world.

The term ''European foreign policy'' refers to what the Lisbon Treaty calls the EU's external action. This includes all of the EU's external relations policies, rather than simply the Common Foreign and Security Policy (CFSP). Such a broader concept of European foreign policy is appropriate for a couple of reasons. First, all of the EU's external action is, after Lisbon, subject to a common set of unified constitutional principles, set out in Articles 3(5) and 21 of the Treaty on European Union (TEU). Second, the term foreign policy is, in its ordinary meaning, a lot wider than the scope of the CFSP. It includes external economic policies, such as trade policy, which is an important component of EU external action. But my conception of European foreign policy is even broader. It is clear that, increasingly, the EU's external action affects the foreign policies (again broadly conceived) of the EU member states in a number of ways. Moreover, much of the EU's external action is characterized by cooperation between the EU and its member states, for example, through the conclusion of so-called mixed agreements (which have both the EU and all of its member states as contracting parties).

When using the term ''constitutionalization,'' I mean that European foreign policy is increasingly subject to constitutional-type discipline and to constitutional adjudication; that constitutional concepts such as the division of powers, federal loyalty, and the protection of human rights are applied to foreign policy decisions and measures. I do not advance any particular concept or version of constitutionalism. My claim is at a more basic level: it is simply that there is a tendency to apply broadly the same constitutional rules, principles, and disciplines to European foreign policy as are applied to the EU's internal policies.

It may further be noted that there is also a process of constitutionalization of foreign policy under way as a result of the case law of the European Court of Human Rights (ECtHR) in Strasburg. But that process is discussed in the contribution of Judge Ziemele.

So what is some of the evidence for my claim? I have six exhibits.

My first exhibit is the way in which the Treaty of Lisbon has strengthened the constitutional values which underpin the EU's external action. It is worth quoting the first sentence of TEU Article 21(1), as amended by Lisbon:

[*] Of the Faculty of Laws, University College London.

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> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Obviously, such ambitious and idealistic constitutional language can be criticized as involving no more than a form of political grandstanding destined to fail in the realist world of foreign policy. There is little doubt that this provision sets a very high bar for the EU's external action. But in assessing the relevance of these constitutional values as objectives there are two features of EU governance which should be borne in mind. The first is that the EU continues to be a functionalist organization, in which treaty law plays a very significant role. Other than a sovereign state, the EU is fundamentally limited by the objectives which it pursues, and the powers conferred upon it to achieve these objectives. That arguably makes those objectives weightier than they may be in a state constitutional setting, where the emphasis is often more on the primacy of the political. The second feature, in many ways resulting from the first, is that the EU is characterized by a strong rule of law and of lawyers. In the absence of political primacy and as a result of EU functionalism, the founding treaties—which are prolific—are being read as the ultimate, and strictly binding, guide to policymaking.

My second exhibit is the increasing judicialization of European foreign policy. The EU courts are confronted with ever more cases concerning EU external action and issues of international law. The famous Kadi litigation is but the tip of the iceberg.[1] On sanctions alone (both counterterrorism and regime sanctions) there have been dozens of judgments, and there is a huge number of pending cases. Also in other areas, such as external competences, institutional disputes, and the obligations of member states, there is growing case law. It is true that the jurisdiction of the EU courts in CFSP matters continues to be restricted. Article 275 of the Treaty on the Functioning of the European Union (TFEU) speaks of an exceptional jurisdiction, which is limited to ''restrictive measures'' (sanctions) against individuals and issues of delimitation of CFSP and other policies (and their institutional dimension). But the exception may well become the rule. Sanctions policies are at the heart of the EU's CFSP. The EU's accession to the European Convention on Human Rights will put further pressure on the EU courts to construe their jurisdiction broadly to extend to any cases in which fundamental rights are alleged to have been violated.

My third exhibit is connected to the second one. The case law on EU external action shows few signs of anything like a ''political question'' or *acte du gouvernement* approach to foreign policy issues. Again, *Kadi I* is but the tip of the iceberg. Even in the face of an issue as political and sensitive as counterterrorism, combined with the exercise of jurisdiction by one of the highest international organs—the UN Security Council—the EU Court of Justice emphasized respect for fundamental rights. The rest of the sanctions case law has followed suit. That does not, however, mean that the debate is completely resolved. At the time of writing, the Opinion of Advocate General Bot in *Kadi II* constitutes a strong plea for judicial deference to the UN Security Council.[2] If the Court

[1] *See* Kadi & Al Barakaat v. Council & Commission, Joined Cases C-402 & 415/05 P, [2008] ECR I-6351.

[2] Council, Commission & UK v. Kadi, Joined Cases C-584/10, C-593/10, & C-595/10 P, Opinion of 19 March 2013.

were to follow that Opinion, it would clearly be introducing an EU version of a political-question doctrine.

My fourth exhibit is the expansion of EU external competences. There is more than a bit of competence creep at work in EU external action. The Lisbon Treaty has significantly widened the scope of the EU's trade policy, by more clearly confirming that all WTO matters are covered, and by extending the policy to foreign direct investment. The latter means that what used to be in essence member state external policies, embodied in hundreds of bilateral investment treaties, will in future be largely centralized. But there is also another, silent EU external competence expansion at work. The ERTA principle of implied powers, according to which internal EU legislation creates external competences, requires EU involvement in any international negotiation which ''affects'' EU legislation.[3] The undeniable growth of EU legislation is constitutionally coterminous with the growth of EU external competences.

There is a clear constitutionalizing effect of this expansion of competences. Questions of EU external competence are frequently litigated before the Court of Justice of the European Union (CJEU), and such litigation is clearly of a constitutional nature. Also, the expansion of EU competences restricts and disciplines the scope for independent international action by the member states.

My fifth constitutionalization exhibit is the case law on the duty of cooperation between the member states and the EU institutions in matters of external action. Over the last decade, that case law has imposed an ever tighter discipline on the member states, in particular in the implementation of mixed agreements. The outstanding instance is the *PFOS* case, which shows that a member state cannot even nominate a chemical substance for inclusion in the Stockholm Convention (a mixed agreement) because that interferes with EU policymaking on such inclusion.[4] It is clear now that there is very little scope for independent member state action under mixed agreements.

My last exhibit concerns the projected EU accession to the ECHR. That accession may further contribute to the constitutionalization process. It is clear that the CFSP will not be excluded from the jurisdiction of the ECtHR. Again reference can be made to Judge Ziemele's contribution.

These are just some of the exhibits in support of the claim that a constitutionalization process is under way. But is such a process appropriate? Is a mature polity not better served with conceiving of foreign affairs as a domain which requires or at least tolerates greater political and executive discretion than the conduct of internal affairs? Strong constitutional discipline is appropriate for policies affecting a polity's own citizens, but foreign affairs are about making judgment calls on how best to protect those citizens' interests outside the borders of the realm—so the argument against constitutionalization would go.

My claim is that in a 21st-century shrinking and globalizing world, the conceptualization of policymaking in terms of internal and external, domestic and foreign, is becoming increasingly meaningless—at least from a perspective of constitutionalism. This is so because there is often no clear borderline between the internal and the external; because internal and external policies are closely intertwined; and because external policies may have as much of an impact on citizens as internal ones.

[3] Commission v. Council, Case 22/70, [1971] ECR 263.

[4] Commission v. Sweden, Case C-246/07, [2010] ECR I-3317.

Within the confines of these brief remarks it is again impossible to offer more than some initial examples in support of my claim. Within trade policy it is increasingly clear that the use of classical trade protection instruments, such as anti-dumping, is becoming more precarious because of globalized supply chains. They risk hurting domestic companies as much as assisting them, as the debate about EU duties on footwear from China has shown. Counterterrorism is another example of a policy where it is next to meaningless to distinguish between the internal and the external, because terrorism knows no borders. Similar considerations extend to, for example, data protection policies—with an Internet cloud covering the whole globe—and financial services policies in a world of money swirling through markets in split-second computerized transactions. Not to mention climate change policies.

This erosion of borders has a strong effect on international law. Even if multilateralism is in a state of crisis, it is clear that international treaties and conventions increasingly have a domestic lawmaking function. They form part of external policies, but their effects are often as much internal as external.

All of this means that there is a strong case for subjecting foreign affairs to equivalent constitutional discipline as domestic policies. I would add that the case for this constitutionalization process is particularly strong as regards the EU. The EU has a system of governance, but not a government. There is no executive to which foreign policy powers have been conferred by a constitution or parliament, and which is accountable to that parliament (or to the electorate). That, of course, is a characteristic which itself merits deeper constitutional reflection. But in the present state of affairs, it is at any rate clear that in the absence of an effectively functioning EU-wide representative democracy, other constitutional-type disciplines are called for: a strong rule of law; the protection of fundamental rights; a clear division of powers; and an effective system of checks and balances.

Human Rights Protection in a European Network of Courts

By Andreas Paulus[*]

Introduction

Europe is a laboratory of a postmodern multiplicity of human rights protections and their interaction. The following remarks deal with the way domestic jurisdictions are coping with this new situation that appears, at first glance, to endanger the role of their legislative and judicial branches as exclusive makers and arbiters of the law. From a domestic perspective, the new networks also raise the question of the limits of the acceptance and implementation of international regimes of human rights protection. I conclude my remarks by asking what we can learn from this relationship with regard to the external relations of the EU towards general international law, using the *Kadi* saga involving the terror lists of the UN Security Council as an example.

The combination of many similar but nevertheless distinct systems of human rights protection has led to the emergence of an informal European network of constitutional courts that also encompasses the European Court of Justice in Luxemburg and the European Court of

[*] Professor of Public Law; Director of the Institute of International and European Law of the Georg-August-University Göttingen (Germany); Justice of the Federal Constitutional Court (First Senate). The views expressed herein reflect the personal views of the author only.

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