Committee VI
Values and the Social Order

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Commentary on Frank Vibert's

VALUES IN THE TREATY ON EUROPEAN UNION

by

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Mr Vibert's paper is very stimulating and interesting.As it is usual for a discussant I shall try to stress the points of disagreement rather than those I agree upon. And I believe that I agree much more on the pars destruens of his paper rather than on its pars construens.

1. The first remark is a methodological one. I am not sure if Mr Vibert's careful analysis of the descriptive and normative interpretations of the term "European Union" as it stands in the Maastricht Treaty can bring us very far. Diplomatic treaties are more or less by definition an inexticable mix of descriptions and prescriptions. We should therefore be not too much surprised by the fact that several tensions arise from a reading of the text. Furthemore it is no novelty that linguistic and conceptual ambiguity of the treaties is often the only way of reaching an agreement amongst the parties.

The main result of Mr Vibert's analysis is that "It seems ... that the assertion of Union as a value above all others is a misuse of what is in other parts of the Treaty a qualified value" (p.7). I am not sure if this is entirely true. Of course the Treaty does not claim that the European Union is a value above all others - e.g. above basic human rights. But I believe that there are several arguments in favour of the thesis that the Union is the leading political value. Mr Vibert reminds us that "the Union is itself a contract between Member States (from which they can withdraw) and in important respects has the

character of what is traditionally viewed as an intergovernmental cooperation agreement" (pp.7-8). But this is just a part of the story - and perhaps not the most important one. If we refer to the existing Constitutional practice of the Community two basic elements justify this claim.

In the first place, contrary to the basic principles of international law, the Treaty of Rome endorses the Community with powers which apply directly to the citizens of the States concerned. This is established, for example, by article 189 of the Treaty. In this way the citizens of the member States are subject both to their national law and to Community law. By the same token, as Michel Massenet writes, "contrairement aux traités internationaux de type classique, les traités communautaires confèrent aux particuliers des droits que les jurisdictions nationales ont le droit de sauvegarder" (1). Individuals can protect the rights guaranteed by the Treaty by appealing to the Court of Justice. According to article 187 of the EEC Treaty the sentences of the Court of Justice are valid directly in the territory of the member States. National authorities are obliged to enforce the sentences of the Court against their nationals without an exequatur (art.192). This also constitutes a strong element of difference between the Treaty of Rome and classical international treaties.

Secondly, the jurisprudence elaborated by the Court of Justice in interpreting the Treaties has constantly ruled in favour of the preminence of the Treaties over national laws. Already in the

famous Costa sentence (1964) the Court ruled that the Treaty "ne se borne pas à créer des obligations réciproques entre les différents sujéts auxquels il s'applique, mais établit un ordre juridique nouveau qui règle les pouvoirs, droits et obligations desdits sujéts...le droit né du traité ne pourrait ...en raison de sa nature spécifique originale, se voir juridiciarement opposer un texte interne quel qu'il soit, sans perdre son caractère communautaire et sans que soit mise en cause la base juridique de la Communauté elle-meme... En instituant une Communauté de durée illimitée, dotée d'attributions propres, de la personalité, de la capacité juridique... et plus précisement de pouvoirs réels issus d'une limitation de compétence ou d'un transfer d'attribution des Etats à la Communauté, ceux-ci ont limité, bien que dans des domains restreints, leurs droits souverains" (2). This limitation is definitive. In another famous sentence the Court ruled that "le droit communautaire ne saurait etre invalidé sur la base du droit interne, fut-il constitutionnel, en vigueur dans l'un ou l'autre des Etats membres" (3). A monistic point of view (in the sense used by Hans Kelsen) is followed in the relationship between the Treaties and derivative jurisprudence on the one hand, and national law on the other. In particular, the national judge is obliged to apply Community law and to consider, by his own authority, as invalid any national law (be it past or future) which might contrast with it.

Since the statement "The aim of the Maastricht Treaty is to create a European Entity stronger than that emerging from the Treaty of Rome" is a quasi-analytical truth I believe that there

are few doubts about what the juridical consequences of the Maastricht Treaty will be. One cannot help but to agree with Mr Vibert that "the current text on European Union is open to misinterpretation and to abuse" (p.9). But I believe that ,in the light of all that we know about the political and juridical story of the "acquis Communautaire" his statement that "unless clarified the references to 'Union' can be put to illiberal use" expresses a fear which will hardly wanish with some work of philosophy of language to be performed by the European leaders.

2. The problem at stake here is hardly the precise wording of the Treaty. The problem is if there is de facto any way for avoiding that a confederal (or "federal" in the liberal sense) framing will inevitably become an Einheitsstaat. Obviously we have no general theory in these matters, but there is no lack of examples. And all point in the direction that confederations/federations soon or late face the alternative between unification and separation. Switzerland is probably the only (partial) exception.

We should never forget a not so-much remembered explanation given by Ludwig von Mises of why the United States become centralised. (As James Buchanan said a couple of years ago, "It is a mockery to use 'federalism' or 'federal union' in descriptive reference to the United States of 1990, which is, of course, simply a very large nation-state") (4). According to Mises the autonomy of the states as guaranteed by the Constitution was possible only if there was not a public

intervention in the economy. The centralisation of the United States was not the result of any deliberate attempt by Washington bureaucrats and lobbies to deprive the states of authority and to create a centralised government. And can in no way be considered as unconstitutional. The equilibrium between the states and the federal government was disrupted because the new powers created by public intervention in the economy went to the federal government. This was absolutely necessary for the unity of the internal market to be preserved. It was not possible to leave to each state the power to control the economy according to its own plans. Voting in favour of governmental control over economic activities the citizens, implicitely, albeit unwillingly, voted in favour of higher centralization (5).

The obvious logical consequence of this argument is that creating an European internal market under the present level of State intervention in the economy (much higher than that of the United States at any time except the Second World War) will inevitably result in the creation of a European nation-State. And this even without considering the deliberate aim of creating (at least some) European political bodies.

As far as I know the logic of von Mises argument stands unrefuted. If valid the argument rules out the possibility that any kind of constitutional engineering could be effective in avoiding the centralization of federations.

3. A point of strong disagreement I have with Mr Vibert is about his treatement of Hayek's evolutionary view of social rules and

institutions. Mr Vibert believes that "A free market view that rules are legitimised by evolution and not by acceptance of a conscious design ...is undermined by the Hayekian acceptance of the need for rules to govern a free market order. Those rules themselves have to be legitimised. Neither does an evolutionist view address the practical situation where a new order is being established..." (p.19. The italics are mine).Even if I am myself not a great admirer of Hayek's evolutionary theory (6) in my opinion this is a completely wrong way of understanding Hayek's views - and more generally, any kind of evolutionary theory.

By definition an evolutionary view does not give specific solutions. The evolutionary point of view simply prescribes that institutions should never be such as to embody end-state principles. They should constitute a framework where the free interactions of the individuals will generate patterns of behaviour ("rules") which will eventually come to be largely shared. If applied (even analogically and loosely) to the European institutional setting as described/prescribed by the Maastricht Treaty it is quite obvious that the evolutionary view is in contrast with it. The simple reason is that 1. the Treaty is full of end-state principles, and 2. several alternative institutional frameworks can be conceived which would allow the European citizens to interact more freely than under the present situation and under the situation which will result from the Treaty (7).

Mr Vibert adds that "a failure to put forward a view of market

order will inevitably leave the field clear for advocates of statist tradition... There is yet another contemporary example where new rules of market order are being established and that is in Central and Eastern Europe. In this context the importance of the general acceptance of the norms of a civil order and the shortcomings of 'uncivil economic activity' have been stressed in a recent analysis. It is a return to a key point of the neo liberals" (pp.19-20). Taken at its face value the first statement is trivially true. But both statements are false as a critique of Hayek's evolutionism (which is of course a cultural evolutionism). As a matter of fact it is perfectly justifiable, from an evolutionary point of view, that those rules which proved to be more effective as practicized by one population are adopted by other populations in replacement of their (ineffective) own.

4. To conclude, my main overall disagreement with Mr Vibert is that he considers the Maastricht Treaty as a constitutional framework which is open both to liberal and to centralistic/dirigistes consequences. I am by far more pessimistic. I believe that it is very unlikely that politicians will not exploit all the dirigistes opportunities which are open by the Treaty. And it is well known that the European public opinion is more than largely in favour of a centralised Europe, not against (8).

Europe's institutional future is becoming a favourite field for the exercise of constitutional ingenuity. Mr Vibert reminds us - correctly, I believe - that "there is not a single major issue

relating to Europe's constitutional future on which liberals are agreed" (p.29). This should not surprise us. If there is anything that the political history of the last 100 years has taught us this is precisely that constitutions are largely unuseful as a way of containing the growth of power. There is no reason to expect that this will not be true in the case of the creation of a new power -as an European Union will necessarily be. This explains why liberals do not agree on a reasonably precise set of constitutional features for the future European Union: for each proposal which is put forward it is quite easy to show that there are good reasons for believing that, under realistic conditions, it will not work in containing the growth of a European Leviathan.More generally, there are good reasons for believing that the overall result of the attempt to create an European Union will be anyway an increase of the <u>total</u> amount of power in Europe.

Liberals who believe in the effectiveness of constitutional devices normally prefer to ignore a fact which is just trivial truth for any historian. The limited size of the State till the beginning of this century, and the limited redistribution actuated by the State were the result of restricted (and often very rescricted) franchise - franchise depending from income (and therefore from taxes paid) (9). Constitutional devices for containing power (and especially the power to tax) were the consequence of this state of affairs,not the cause (10).This was perfectly clear to the generation of liberals which immediately preceeded and followed the First World War, and justified their

pessimistic views about the survival of the liberal political and economic order. Unfortunately they proved to be largely right. Should we be more optimistic today about the fact that the European Union will not erode the liberal order beyond the present level?

NOTES

1. M. Massenet, Le droit de l'Europe, Paris, Institut Euro 92, 1990, p.11

2. Costa 15.07.64

3. Comptoir de vente de la Ruehr 15.07.60. The italics are mine.

4. J.M. Buchanan, Europe's Constitutional Opportunity , in J.M.Buchanan et alii, Europe's Constitutional Future, London,IEA, 1990;p.6. For a criticism of Buchanan's main theses see my Views on a European Constitution, paper presented at the Karl Brunner Symposium, Interlaken, 1991.

5. See the Introduction to Mises' Bureaucracy, London, Yale University Press, 1983. See in particular section 2.

6. See my Note on von Hayek's Theory, in M. Alonso (ed.), Organization and Change in Complex Systems, New York, Paragon House, 1990. See also my Evoluzionismo liberale? in "Biblioteca della libertà", XXI (1986).

7. On this point see G. Radnitzky, Vers une Europe des societés libres: La concurrence evolutionniste ou le projét constructiviste?, in "Journal des Economistes et des Etudes Humaines", II (1991).

8. See my "Views on an European Constitution", cit..

9. An excellent study on the relationship between voting rights and redistribution has been recently made by Allan Meltzer. See his Diritti di voto e redistribuzione, in "Biblioteca della libertà",XXV (1990).

10. The most sophisticated tools have been conceived by contemporary contractarians in order to justify the possibility of taming the Leviathan under the assumption of universal franchise - i.e. of the lack of any link between income and

voting rights. I believe that there is scarcely any need to stress how unrealistic the basic premises of these attempts are, and how unlikely the idea is that the growth of the State and of redistribution will eventually be stopped by the acceptance of the contractarian principles by a stable majority (not to say the totality) of voters.