

increasing number of topics involving mixed competence, I have little doubt that there will be an ever-increasing need to use the mixed agreement format.

**REMARKS BY FRANCESCA BIGNAMI\***

The rise of a new constitutional order in the European Union will have profound consequences for international law. It is true, as Per Lachmann has just observed, that Europeans have multilateralism in their blood. But we can also expect that the emergence of the European Union as a liberal democracy will sometimes frustrate multilateralism and international cooperation. This contribution outlines the constitutional transformation that has been underway since the early 1990s; it then explores this transformation's possible impact on external relations by examining the recent EU–U.S. dispute over privacy safeguards for airline passenger data.

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Today, the European Union is a federal union—albeit a *sui generis* one—that adheres to the basic principles of liberal democracy. Less than fifteen years ago, it was still an international organization. A number of institutional reforms have contributed to this constitutional transformation.

First, legislative powers are no longer exercised by the European Commission and the Council of Ministers alone. The directly elected assembly, the European Parliament, also decides. This “co-decision,” which gives the Council *and* the Parliament the power to approve legislative proposals, was introduced in the Maastricht Treaty of 1992 and has since been extended to a variety of policy areas. Under the Constitutional Treaty of 2004, which still awaits ratification, co-decision would apply even more widely. And the somewhat esoteric term would be changed to the more apt “ordinary legislative process.” This steady expansion of Parliament's internal powers increases Parliament's influence over external relations dramatically since any international agreement entailing an amendment of an act adopted under co-decision must obtain the assent of the Parliament before it can be concluded.<sup>1</sup>

The impact of parliamentary empowerment on European politics is best appreciated if the Parliament is seen to act in a separation-of-powers—not a parliamentary—system of government. In other words, members of parliament are selected independently of the public officials responsible for the other two main legislative bodies (the Commission and the Council of Ministers). Parliamentarians do not control the other participants in the legislative process, nor are parliamentarians' choices dictated by those other participants. Consequently, parliamentary empowerment will pluralize the European system of government even further, and it will bring to the European Union the kind of competition between the legislative and executive branches to which we, in the United States, are accustomed.

Second, today, not only *how* the European Union decides but *what* it decides bears a strong resemblance to national government. Responsibility (competence) for a wide array of non-internal market policies has been transferred to the European Union. Until 1986, the European legislator was limited, with few exceptions, to actions promoting the common market and the four freedoms: free movement of goods, workers, capital, and services (including freedom of establishment). Today, because of additional competences in the governing treaties, legislation is being issued in areas such as civil justice, social policy, and the environment. The

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<sup>1</sup> TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, art. 300(3), O.J. (C 325) (2004).

expansion of competences is even more dramatic if the Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters are counted. This transfer of competences is significant for European citizens because European institutions decide more matters and matters of greater consequence—not merely economic questions relating to the common market but questions relating to values and lifestyle choices. As Pieter Jan Kuijper and Per Lachmann explain, this change will require that states in the international system deal increasingly with the European Union—not with individual European states.

Third, because of these extensive powers, the European Union today possesses a highly symbolic catalogue of fundamental rights: the Charter of Fundamental Rights of the European Union. The Charter was signed by the Council, Commission, and Parliament in 2000, and it has been incorporated into the Constitutional Treaty (and therefore would also become formally binding and legally enforceable upon ratification). These are rights European citizens can invoke against the decisions of European institutions; they are also rights European institutions have a duty to promote. In the European Union, fundamental rights operate as a shield against government action (enforceable in the courts) and as a set of entitlements to such action (generally not enforceable in the courts but invoked routinely in political life outside the judicial branch).

The European Union of 2005 is thus a liberal democracy. This characterization will remain true even if the Constitutional Treaty fails to be ratified in upcoming national referendums. What are the implications of the European Union's new constitutional order? What, in particular, are the implications for politics and lawmaking in the international realm? The attribution of government powers to a directly elected legislature that can decide issues of great importance and that does so to further fundamental rights carries the potential for discord in international relations. Many issues once decided by civil servants in the European Commission and supervised by civil servants in trade ministries of the Member States must today be approved by directly elected European parliamentarians. Thus another set of public officials must now be satisfied with the results of negotiations, and these newcomers answer directly to diverse sets of voters and political parties. Moreover, although such decisions were once perceived as merely technical and regulatory, today they are framed as fundamental value choices that affect all European citizens and that, consequently, deserve their attention. So the rise of democratic politics might very well operate as a source of friction in EU foreign relations.

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The recent dispute over transfers of European airline passenger data to the United States for anti-terrorism purposes illustrates some possible consequences of the new European politics for international law. The long history of the U.S.–EU relationship starts with the Marshall Plan and the Truman administration's support for a federal Europe. For most of the post-war period, however, the United States engaged in political dialogue and treaty-making with individual European states, not the European Union as a whole. That changed in 1990. Bush Sr.'s "Transatlantic Declaration" and then Clinton's "New Transatlantic Agenda" prompted a series of high-level bilateral meetings, which resulted in a number of EU–U.S. agreements. Among the most significant ones were the Mutual Recognition Agreement on product certification, the Customs Cooperation Agreement, and two agreements on anti-trust enforcement. On the European side of these negotiations, the Commission and the Council dominated; the Parliament's role was marginal.

Recently, however, the European Parliament has insisted that it too should have a say in transatlantic relations. Under the EU Data Protection Directive, personal information may

be transferred abroad only if the destination country “ensures an adequate level of protection” for the privacy of such information. But in the aftermath of the terrorist attacks of September 11, 2001, the U.S. government began demanding access to passenger information kept by European airlines (Passenger Name Records or PNR) before their planes landed in the United States. It was clear to all concerned that U.S. law on information privacy did not afford an “adequate level of protection”: few limits are set on the purposes for which the U.S. government may use personal information; many types of personal information may be transferred freely among government agencies; and, once collected, personal information may be stored and used indefinitely, without any time limitations. Thus, airlines flying between the European Union and the United States were put in a bind: if they complied with U.S. demands, they could be prosecuted by European authorities for breaking the Data Protection Directive; if European airlines failed to comply, on arrival in the United States, they faced extensive delays, intrusive passenger searches, and fines.

In December 2003, after almost a year of intensive negotiations, the European Commission and the U.S. Bureau of Customs and Border Protection reached a tentative agreement. Under the PNR Agreement, the U.S. government committed to a number of privacy safeguards, and the European Union agreed to recognize that U.S. law afforded an “adequate level of protection” for European passenger data. The Council approved the agreement on May 17, 2004. But throughout the negotiations, the European Parliament had been highly critical of the concessions being made by the Commission and, shortly before the agreement was to come into force, the Parliament brought a challenge in the European Court of Justice seeking to have it declared unlawful. Notwithstanding the pending lawsuit, the agreement entered into force on May 28, 2004.

In the Parliament’s lawsuit, the impact of Europe’s new constitutional order on foreign affairs is articulated with extreme clarity. First, the Parliament claims that because it had the power of co-decision over the internal Data Protection Directive, it also has the power of assent over international agreements in the privacy field. According to the Parliament, the PNR agreement alters the terms of the Data Protection Directive—by finding that U.S. law affords an “adequate level of protection” when, allegedly, it fails to do so; therefore the Council should have obtained Parliament’s assent. Second, the Parliament claims that the PNR agreement violates the fundamental European right to privacy as set down in Article 8 of the Charter of Fundamental Rights, Article 8 of the European Convention on Human Rights, and the case law of both the European Court of Justice and the European Court of Human Rights.

The case will be decided in spring of 2006. If the Court of Justice holds in favor of the European Parliament, democratic politics will have succeeded in stymieing transatlantic cooperation. Even if the Parliament loses—if the Court finds the agreement does not alter the terms of the Data Protection Directive or breach the fundamental right to privacy—the lawsuit will serve as a warning to the Commission and the Council. In international treaty negotiations, the Commission and the Council will have to pay careful attention to the demands of European parliamentarians if the results (arguably) alter the terms of existing European legislation adopted by co-decision or undermine fundamental rights.

With the PNR dispute, all three elements of the European Union’s new constitutional order come together to frustrate international relations and treaty-making. The Data Protection Directive, adopted through co-decision, was passed to facilitate the free flow of personal data in intra-European trade. Now that the Commission and the Council wish to act internationally on the privacy issue, they must also accommodate the views of the European Parliament.

Accommodation might not always be possible; even if it is, accommodation may alter the nature of the bargain with third countries. Moreover, although both the internal legislation and the external PNR agreement are designed to promote trade, they do so out of a concern for privacy and the potential for national differences over privacy to disrupt trade. Hence, Parliament's interest in the PNR issue indicates that, in the future, it will be active on other, non-economic foreign relations matters. Framing privacy as a "fundamental right" since the adoption of the Charter of Fundamental Rights, renders the issue—and negotiations with third countries on the issue—even more salient in the eyes of European parliamentarians and their voters.

The United States and other countries that engage with the European Union in the international sphere should take this dispute over privacy as a harbinger of things to come. Democratic politics at the European level will, in all likelihood, serve as a source of friction in international relations. For some, this is a welcome development. Not only will parliamentarians and their voters benefit, but an active European Parliament might serve as an additional source of bargaining power for the European Commission when it negotiates with third countries. But for states in the international system that must deal with the European Union, the new European politics is likely to cause not a little frustration.

#### **REMARKS BY PIETER-JAN KULJPER\***

Which factors will influence the present situation of the European Community/Union, if and when the Constitution is ratified by all member states? First, there are difficulties inherent in the duality between the "old" Community, with its external policies linked to the common market, common policies (trade, competition, transport, regulation, etc.) with a central role for the European Commission, and the "new" Union, with its common foreign and defense policy running along intergovernmental lines and with an important role for the Presidency and the Secretariat of the Council. In addition, the following points can be mentioned:

- Increased preemption on the internal Community level. The Community legislates in increasingly more areas internally, and this has consequences on the long-standing case law of the European Court of Justice dealing with the parallelism between internal legislation and the exclusive character of the external powers of the Community.
- The increase in the number of Member States brings an increase in the sheer weight of the Community/Union on the international scene. This may have negative consequences for negotiating international agreements.
- The enormous growth in the use of the Union's powers in the field of the Common Foreign and Security Policy (CFSP, or the "second pillar"). There are now operations in the Balkans and in the Great Lakes district in Africa; special representatives have been nominated for the Balkans, the various areas of the Caucasus, and other areas. There is a strong growth of a foreign policy bureaucracy in the Council, with Mr. Solana playing an increasingly prominent role. On the downside remain the difficulties of maintaining a boundary line between the foreign and military policies of the Union and subjects which traditionally have been Community policies executed by the Commission: development, trade, and sectoral external policies of the Community.

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