Luxembourg Locuta, Causa Non Finita

Lucas Prakke*

Monica Claes, *The National Courts' Mandate in the European Constitution* (Oxford, Hart Publishing 2006, Vol. 5 in the series Modern Studies in European Law), XLIV and 771 p., ISBN 10: 1-84113-476-7 and 13: 978-1-84113-476-5.

This bulky book is the ever-so-slightly adapted version of the author's doctoral dissertation, defended in June 2004 at the Faculty of Law of the University of Maastricht. Her foreword to this edition is dated October 2005, but the conclusion of the Treaty Establishing a Constitution for Europe in October 2004, and its rejection in the French and Dutch referendums the next year, were events that happened after she had finished her work (p. 732).

The author's Europe, then, was the European Union of fifteen member states, and the focus of her attention was the way in which the national courts have gradually developed into Community courts of general jurisdiction (p. 3; on the same page she also speaks of 'juges communautaires de droit commun', on p. 16 'juges communs de droit communautaire' and elsewhere 'common courts of Community law', p. 19, or 'common courts of European law', p. 39). As this example demonstrates, her choice of words tends to be unsettled. At times this can become a bit confusing, for instance when she refers to subdivisions of her book as parts, themes, stages, moods, story lines, narratives, periods or sections, whereby the word section can mean a number of pages (p. 19), or one of the three main parts of the book (p. 44), or one of the 25 chapters (p. 47). When she is dealing with courts which refuse to apply a legal norm because they consider it incompatible with a higher norm, she variously uses verbs like 'to set aside', 'to quash', 'to annul', 'to invalidate' or 'to disapply'. Sometimes one gets the impression that shades of meaning are intended, but it remains unclear what they are. By the way, the word 'mixity' does not exist in the English language (p. 212: 'mixity of legal orders').

Having cleared away these minor points, let us consider the main outline of the book. Ms Claes is first and foremost a Community lawyer, but she is also keenly interested in the national legal systems of the then fifteen member states.

* Member of the EuConst Advisory Board.

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Indeed, as we said earlier, her main objective was to describe how national law, particularly national courts, have over the years coped with, and gradually absorbed, the initially new and unfamiliar phenomenon of Community law. To this end, she introduces the concept of 'mandate', to which she devotes an entire chapter or rather a number of pages ('The Theoretical Framework', pp. 27-38). Throughout her book she uses the word mandate a great many times, but she has not convinced me that it adds anything useful to the analysis and description of the vast material with which she is dealing: more current expressions such as 'proper place, function, role' and so on would have done quite as well.

In Part I, The National Courts as Common Courts of European Law (pp. 39-383) the author confronts us with the early established doctrine of the European Court of Justice that Community law is directly applicable and supreme. This is what she calls the '*Simmenthal* Mandate' (p. 69 ff and *passim*), which was in fact only a restatement in unequivocal terms of 'Costa v. ENEL' (p. 208). For good measure the European Court also ruled that not only courts, but administrative authorities as well, are under a duty to directly apply Community law, and to disregard national law to the extent that it is incompatible with Community law. This is the '*Costanzo* Mandate' (pp. 266-278). Up to a point it is highly theoretical stuff: local government officers have better things to do than to review the constitution of their country for its compatibility with minor Community decisions (to push matters to extremes, which the European Court actually does with gusto). And then comes another encore, the '*Francovich* Mandate' (pp. 279-383), according to which member states of the European Union are liable in their own courts for breach of Community law. It is all perfectly straightforward and simple: *Luxembourg locuta, causa finita*. But Luxembourg has reckoned without Monica Claes. She makes it abundantly clear that the 'strict Community orthodoxy does not do justice to reality' (p. 464). Indeed, her whole book could be aptly summarised with the words *Luxembourg locuta, causa* non *finita*. This is especially true where national *constitutional* courts are concerned. In part I she describes how by the end of the 1980s most *ordinary* national courts had accepted the twin doctrines of direct effect and supremacy. This was not accomplished without much judicial fussing and fuming at both the European and national levels. Ms Claes describes these developments at great length for nine out of the fifteen EU member states, and even some of the six countries she leaves aside, mainly for linguistic reasons (Austria, Finland, Greece, Portugal, Spain and Sweden) are taken into consideration from time to time.

Ms Claes deserves great credit for her efforts. Her capacity for work is impressive, and her scholarly appetite seems boundless: as soon as she perceives a problem she wants to deal with it, often in lengthy footnotes in even smaller print than

the main text. There is a downside, which is the inordinate amount of repetition in her book. The same points are laboured over and over again; the same quotes keep reappearing. At times I was reminded of Voltaire, who wrote a letter to his sister in which he said 'I am writing you this long letter because I don't have time to write a short one'. I do however welcome and appreciate the sustained interest and sympathetic attention she devotes to national constitutional concerns and preoccupations. She is therefore an entirely credible intermediary between Community lawyers on the one hand, and constitutional lawyers on the other, who, as she rightly points out 'start from different premises' (p. 213).

Things come to a head in part II, entitled 'The Court of Justice and National Constitutional Jurisdictions: *La Guerre des Juges?'* (pp. 385-650). Here the *causa* is not yet *finita* even today, although in the period after the notorious Maastricht-decision of the German Bundesverfassungsgericht the edge has been taken off the conflict. It is entirely understandable that constitutional courts, whose duty it is to protect and defend the national constitution, cannot easily accept the repeated rulings of the European Court of Justice that Community law in all its forms, down to the most insignificant decisions, must prevail over all forms of national law, the national constitution included. Ms Claes points out that even Advocates-General and members of the European Court have acknowledged as much (p. 426), and she herself expresses her reservations by referring to the supremacy doctrine of the European Court as 'a theory' (p. 212), 'an assumption' (p. 426), or 'an axiom' (p. 666). Little does it matter whether one calls the sometimes violent clashes between the European Court and the national constitutional courts a '*guerre des juges*' or not, but there have most certainly been sharp differences of opinion. Ms Claes herself speaks of 'threats' and 'warnings' by the Bundesverfassungsgericht (p. 492), and says that the provisional outcome of 'the battle' is that the constitutional courts 'have not surrendered' (p. 388), but that there has been a 'peace offering' by the Bundesverfassungsgericht, followed by 'an express retreat' from Maastricht (p. 482). This is the language of war, but happily this war has been a civilized war of words between judges. The world of today is the same grim place it has always been, but at least in parts of the Western world constitutional struggles are no longer decided by the force of real arms. In 1862, the newly appointed prime minister of Prussia Otto von Bismarck addressed the Budget Committee of the *Abgeordnetenhaus* and spoke the famous words: 'nicht durch Reden und Majoritätsbeschlüsse werden die großen Fragen der Zeit entschieden – das ist der große Fehler von 1848 und 1849 gewesen –, sondern durch Eisen und Blut'. This was not meant as a war cry, but rather as a statement of the obvious. Shortly thereafter the question whether the United States Constitution allowed the southern states to secede from the Union was answered on the battlefield. In the case of

Texas v. White (1869) Chief Justice Salmon P. Chase summed up the result: 'The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'.

Which brings us to Part III of the book under review: 'The National Courts' Mandate and the Future of the European Union' (pp. 651-733). As we said earlier, Ms Claes was unaware of the fate awaiting the projected Constitution for Europe when she was writing her book. She did, however, know the text of the Treaty as it would be signed in Rome in October 2004. In the light of the foregoing remarks about the American Union, it struck me that she makes no mention of Article I-60 of the now defunct Treaty, which for the first time expressly stipulated the right of EU member states to withdraw from the Union, thus marking a distinct difference from the federal US Constitution.

Let me end this brief announcement of Ms Claes' hefty volume by saying that despite its imperfections,[1] I consider this to be an important book. I admire the author for the vast amount of work that she has put into it, and for the impressive knowledge she has acquired not only of Community law in its complicated development over half a century, but of many national constitutional law systems as well. Indeed the balanced approach from the standpoints of both a Community lawyer and a constitutional lawyer is to me the greatest attraction of her work. In 2006 the Dutch Constitutional Lawyers' Association awarded her its triennial prize for best doctoral dissertation. It was an honour well deserved. I understand that Community lawyer Monica Claes has now been appointed Professor of Constitutional Law at Tilburg University, and that too is entirely fitting.

[1] A regrettable technical defect is the fact that the book contains neither a list of abbreviations, nor an index of either persons or subjects. This makes the book less accessible and user-friendly than it could so easily have been.

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