ARBITERS AND ARBITRATION IN EUROPE SINCE THE BEGINNING OF MODERN TIMES

Arbiters and Arbitration in Europe since the Beginning of Modern Times

Anne-Sophie NARDELLI-MALGRAND
Albane PIALOUX

ABSTRACT

The figure of the “arbiter of Europe” represented an aporia as far back as the early modern era, since it combined the ideal of hegemony with the political ideal of wise and disinterested judgement. The appearance of a “European public reason,” for lack of a genuine public opinion, necessitated a growing development of the latter. Although we can discern a great variety of political practices of arbitration, the seventeenth and eighteenth centuries showed a growing need for legal definitions, which the flaws of the nineteenth century’s Concert of Europe only served to reinforce. Hence, in modern times the figure of the arbiter positioned itself in relation to two poles: on the one hand was the arbiter embodied in a power, which enjoyed the advantages and prestige of this honorific and often self-proclaimed title; and on the other was an arbiter using influence to guide negotiations in respect of the new international law of arbitration. Attempts to reconcile the two poles clearly show the political difficulty of this notion of arbiter, which cannot be fully resolved solely within the domain of law.

Hark! Hark! The Dogs Do Bark! 1914

The expression “arbiter of Europe” is one that is both common and poorly defined, thus posing problems for the international position of its bearer. The notion—widely used during the first half of the nineteenth century to refer

to Charles V or Henry VIII, and also illustrated in almanac engravings from the reign of Louis XIV—designated rather different situations according to the period: it could be an individual, such as an emperor, sovereign, pontiff or expert, but it could also be a state, an association of nations, or a supranational institution. As relations among states became increasingly regulated by international public law, and then by the laws and norms of European construction, one would think that the notion of arbiter of Europe would lose its relevance in politics, given the possibility of thinking in terms of procedural law for arbitration. Yet it appears that there has been no true loss of interest in this notion. For example, on October 25, 2011, when the acceptance of the European financial rescue plan seemed to hang on the approval of the German parliament, the French press ran the headline, “The Bundestag, arbiter of the European debate.”

With its ideal of consolidating peace, European construction has maintained more or less explicit hierarchies among states that do not all have the same power or leadership, and which impose themselves in varying degrees in a “Concert of Europe.” On the other hand, a key aspect of the process of pacifying tensions was arbitration as legal process, mediation, or simple “good offices.” In short, the expression “arbiter of Europe” designated either a power imposing its order on others, or a mediator seeking to potentially benefit from a position as conciliator.

We will therefore attempt to refine this definition by focusing on three areas. Firstly, we will identify the “arbiter,” specifying the extent of its power and understanding the concrete manifestation of arbitration, along with the hierarchies it entailed. We must then turn to the populations concerned by these different types of arbitration, which proved more or less imposed in nature, while asking whether public opinion itself did not represent an arbiter of Europe. Finally, a certain number of models and political theories have constructed international systems based on a form of arbitration, for instance through the balance of power, or a kind of arbitrational Diet.

Through an analysis of European balance of power at the beginning of the early modern period, Christoph Kampmann has provided three definitions of “arbiter” in the political sense: the arbiter in terms of decisions, the arbiter as a mediator recognized by the conflicting parties, and finally the arbiter as a coalition builder, able to tip the scales one way or the other, to make or unmake coalitions. The first definition reflects attempts to establish a continental order, from the Holy Roman Empire on to Bismarck, the Napoleonic Empire, or Russia’s temptation with hegemony at the Congress of Vienna (1815). In the Europe of sovereigns, the idea of imposing oneself as arbiter of Christianity fuelled dreams of universal monarchy through policies of conquest, attempts at imperial types of hegemony, and major negotiations and peace treaties that confirmed the state of power, while glorifying the one able to impose peace. Charles V, Richelieu, Louis XIV, and James II of England sought ultimately to impose their power and their preferred order, but also to appear as the peacemaker of Europe. They consequently had to garner acceptance for an arbitrational course in conformity with Christian morality and denominational balance, which then put them in a position as guarantor of the signed treaties, in short bringing together the three definitions into a single actuality. Concretely, this involved imposing a European order—which entailed ratifying territorial modifications, conquests, transfers of sovereignty, and even changes in governing régime for states—as well as fixing a hierarchy of powers in Europe, from leaders imposing themselves via their authority, to the countries subject thereto. On the symbolic level, protocol was the most visible indicator of the order of power. In courts, just as in major international conferences, everything served to display this hierarchy to the eyes of the world: precedence, titles, number of coaches, and numerous other signs were calibrated with meticulous precision, and prompted, where necessary, genuine diplomatic incidents.

In this Christian Europe, the papacy, which still invested the Holy Roman emperor, sought to conserve a spiritual and universal superiority. However, the centrality of Rome clashed with sovereigns who also sought to establish themselves as political leader of Christianity, and who contested the legitimacy in this domain of a pontiff who also wanted to be a temporal sovereign. After a long period of decline, and once free of the “Roman question,” the Holy See succeeded in establishing itself as a moral power and playing the role of conciliator, serving to this day as an international agent of peace instead of a dominant force. The example of the papacy clearly shows how important

it was for an arbiter to resolve any tension on its own territory in order to impose itself as a viable authority.

This is moreover why the French Revolution attempted to impose France as an arbiter of Europe that could spread the republican model, and act in the name of the people's sovereignty. Seeking this role was also a way of strengthening the Republic within France itself. Over a century later, the Belgian Paul Hymans attempted to secure a pragmatic role of arbiter for his country in the Polish-Lithuanian conflict (1920) and the Corfu Incident (1923). He did so in order to confirm Belgian abandonment of neutrality, and to forge Belgium's place in Europe's new hierarchy by founding a tradition of Belgian international expertise. The political recompositions brought about by the rise of nations and wars clearly highlight the tensions already visible during the early modern era, between the dominating arbiter and the mediating arbiter, between great powers imposing by force, and small states seeking to play a crucial role through an intermediary position. But they also reinforced other already-existing debates, other ways of conceiving a more collective arbitration, even one that is less associated solely with political power.

The twentieth century saw the transition of the arbiter as a power to an arbiter possessing soft power, which implies acting in accordance with rules and with respect for pluralism rather than in arbitrary fashion. During the interwar period, the French implementation of collective security brought forth an aspiration to religitimize power, but within a system founded on arbitration. This took the concrete form of a French guarantee of treaties of arbitration and understanding—and possibly of mutual assistance—concluded between rival states, such as the Greco-Serb treaty of 1926. The flaws of arbitration procedures for collective security, which revealed themselves in striking fashion during the escalating dangers of the late 1930s, were combatted in the post-1945 international system, implemented via the UN, through a mix of democratic pluralism and hierarchical verticality. If the cold war distorted this system for forty years in re-establishing the notion of a hegemonic arbiter in the form of the two superpowers, the international system as it has developed since 1991 has demonstrated both an attachment to the figure of the arbiter, whose position is justified through power, as well as a desire to limit its role through rules of good conduct combining "good offices" and respect for international law. It is from this viewpoint that we can analyse the establishment of contact groups on the world level, which bring the primary powers together to discuss possible arbitrational solutions to be presented to the parties involved. On the European scale, Germany informally plays the role of political arbiter in keeping the United Kingdom in the European Union, or in presenting a common European position regarding the Ukrainian crisis, while simultaneously maintaining dialogue with Russia. The arbiter thus appears as a mediator among peers, a power whose dominant position legitimizes its role, but that does not all the same justify imposing its order.

To the extent that it is publicized, arbitration prompts reactions from the public opinion of peoples faced with changes in leadership, or with arbitrations both imposed or desired, brutal or patiently negotiated: opinion can hence act as a theatre in which the arbiter's models compete. Without going further into the notion of a European public opinion, exploring the figure of the arbiter of Europe entails observing a few of these reactions and interactions.

A part of an arbiter's strength is drawn from its renown, what seventeenth century Europeans called fama. During the early modern era, a close link existed between the hierarchy of powers and the reputation of their sovereigns, as demonstrated by the polemics surrounding the Holy Roman emperor's arrest of Don Edward of Braganza at the behest of the king of Spain. From 1641-1649, his release was a major issue of Braganza diplomacy, who sought in this affair to make the public sphere a court for the actions of sovereigns.
Moreover, in order for its arbitration to be accepted, the arbiter must suggest an acceptable arbitration policy, and hence create consensus around its decision or—more politically—around its way of orienting international relations. In this context, opinion was broadly appealed to, whether it was the "world opinion" of the first half of the sixteenth century, the "court of opinion" of the eighteenth, or the "European public reason" of the nineteenth. One of the first occurrences were the lampoons published in connection with the conflict between Charles V and Francis I between 1525-1547. This collection of texts, intended to circulate broadly, and thus to form a genuine publications

campaign, testifies to the utilization of representations that sought to justify a sovereign's disturbance of the peace. The intended effect was to forge a reputation, to show the honour of a cause, and to discredit the enemy. It was a strategy for legitimizing entry into war, one in which there was a direct appeal to opinion. The rivalry of James II of England and Louis XIV over being awarded the role of arbiter of Europe made use of the same type of campaign. This is demonstrated by the famous engraving of the 1682 almanac entitled "The King and His Council: Arbiter of Peace and War," as well as by Protestant propaganda, which through the diplomat Ézechiel Spanheim strove to show the illegal and especially immoral character of the engraving, since it did not represent foreign powers.

If opinion presented an informal authority of judgment beginning with the early modern era, that nevertheless was not enough for it to be an arbiter of European relations. The growing publicity of legal affairs during the eighteenth century made publicity of international relations increasingly necessary, and the source of a new morality for international relations. Beginning in the nineteenth century, this dynamic fostered the creation of a European public space, before the sanction of Wilsonianism presented public opinion as the voice of reason against the amorality of the state: Paul Hymans situated himself in the wake of this new tradition by emphasizing popular consultation in the area of foreign policy. From the conflicts between Christian sovereigns to the incapacity of the Concert of Europe, European public opinion appeared as a regulator in systems where a more coercive regulator was lacking. In this regard, opinion ably played its role as an arbitrational authority that bestowed reputation and legitimacy.

The idea gradually imposed itself that the position of arbiter of Europe was not directly proportional to military might alone, but also had other political and moral sources; the notion was broadened from hegemon to also include that of a model, leading to competition among political theories in the construction and legitimization of the position of arbiter.

The very possibility of an arbiter of Europe was initially connected to a realistic theory, in which the key factor is a state's desire for power. Yet this contained the seeds for the evolution of this notion of arbiter of Europe. To the extent that realism implied resignation to a state of division and pluralism among Christian kingdoms, the early modern era fought against this through a dual nostalgia for arbitration: one linked to the pope, and the other to the Holy Roman emperor. Their relative political and military weakness led to an evolution of the figure of arbiter toward the model of conciliator and mediator.

From this point of view, the seventeenth and eighteenth centuries exhibited a conceptual turning point, where the need for legal definitions superimposed itself over the great variety of political practices. In the late seventeenth century, the title of arbiter of Europe consecrated political predominance, a tendency entirely refuted by legal theories of the arbiter. The decisive contribution of a thinker such as Leibniz was in bringing about the shift from arbiter to arbitrium, from the arbiter of Christianity to the arbiter of Europe, which was no longer a norm personified in a monarch, but a more abstract form of influence, a role that could even be occupied by a republic. In this legal theory of the arbitrium rerum, the arbiter exercises a jurisdictional supremacy. This does not necessarily involve deciding by way of restrictive judgments, but rather assuming a role of guarantor for treaties and state obligations. In his Project for Making Peace Perpetual in Europe (1713), the Abbé de Saint-Pierre demanded a return to law and, noting the weakness of the international legal order, conceived a perpetual arbitration founded on judgments that were definitive, restrictive and executory by recourse to collectively executed force. In this theory, the arbiter or arbiters must be sufficiently powerful in order to dissuade, but are not thought of as embodied entities. The French Revolution and its aftermath, which sought to endow the international system with working rules, further assured the depersonalization of the arbiter. Adam Czartoryski conceived Tsar Alexander I's role as arbiter of Europe by linking it to a politics claiming to be "great," "just," and "disinterested": the morality of the arbiter henceforth had to be embodied in a principle of law, thus sanctioning the depersonalization of this figure.

The nineteenth and twentieth centuries thus inherited a certain number of political models that they applied and expanded. If the century of the Congress of Vienna saw the juxtaposition of realist conceptions of the hegemonic arbiter with that of the arbiter as a focal point for the balance of power, it also saw the appearance of a more structured model for an arbiter as a common public authority in charge of defining the common interest and ensuring its implementation. The gradual conversion of French pacifists to arbitration between 1840-1890 thus took place as part of a demand for the democratization of international life. The idea that a European court should of necessity have a democratic legitimacy began to impose itself in this context. After the First World War, collective security in theory gave way only to an arbiter defined by law, as an emanation of states mobilized by law, and not an expression of a power imposing itself by force. The failure of collective security nevertheless led to a more or less hidden return of the arbiter state, both as guarantor of respect for mandatory arbitration procedures, and as guarantor of the political and military alliances that seemed to better ensure the continent's security. What ultimately amounted to a leadership function intensified the realist theory of arbitration. These efforts to reconcile arbitration and guarantee—arbitration as doctrine and as act of arbitrating—opened the way for a form of global governance that, aside from the UN, materialized by way of European construction.

The transition was thus made from an arbiter-power to an arbiter-cog, an actor in a political system in which the arbiter's identity can potentially vary. Within European construction, the arbiter appears fragmented, and the models tentative. In a post-Westphalian order, the role of arbiter played by states—or even one state—remains fundamental. This is demonstrated by the institutionalization of the French-German union after the Élysées Treaty of 1963, the granting of full-fledged institution status to the European Council in the Treaty of Lisbon, and by Germany's role as arbiter in economic or financial matters betwen France and other EU members, as well as between European countries and rating agencies. This state of facts has broadly fostered the intergovernmental theories of European construction, which conceive of arbitration as a bargaining among states, and which define arbiter as the entity exercising predominance. These theories nevertheless obscure the role of other arbiters, especially community institutions that help guide public policy: for example, the Court of Justice quite independently exercises its role of arbitration in conflicts arising from interpretation of the principle of subsidiarity.

The figure of the arbiter of Europe is a fundamental aspect of the respective place of law and politics in international relations. If the role of arbiter played by collective institutions has been regularly maintained, from the wishes of the Abbé de Saint-Pierre up to the European Union, we nevertheless do not see the state being surpassed. If there has been an evolution—from the hegemonic arbiter to the mediating arbiter via the arbiter as guardian of international law—the combination of law and politics is still most often embodied in a state, which can henceforth play the role of arbiter, without necessarily engaging in war, but in helping establish a balance of norms that it inspires.

BIBLIOGRAPHY

ARCIDIACONO, Bruno, *Cinq types de paix. Une histoire des plans de pacification perpétuelle (XVII^e^-XX^e^ siècles),* Paris, PUF, 2011.

BRAUN, Guido (dir.), *Assecuratio pacis : französische Konzeptionen von Friedenssicherung und Friedensgarantie, 1648-1815*, Münster, Aschendorff Verlag, 2011.

BRUNETEAU, Bernard, CASSIS, Youssef, *L'Europe communautaire au défi de la hiérarchie*, Berne, Peter Lang, 2007.

KAMPMANN, Christoph, *Arbiter und Friedensstiftung : die Auseinandersetzung um den politischen Schiedsrichter im Europa der Frühen Neuzeit*, Paderborn, Schöningh, 2001.

Ticchi, Jean-Marc, *Bons offices, médiations, arbitrages dans l'activité diplomatique du Saint-Siège de Léon XIII à Benoît XV*, Rome, MEFRIM, vol. 105, 1993.

Source URL:
https://ehne.fr/encyclopedia/themes/political-europe/arbiters-and-arbitration-in-europe-beginning-modern-times/arbiters-and-arbitration-in-europe-beginning-modern-times