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NATIONAL SOVEREIGNTY AND THE EUROPEAN UNION

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National Sovereignty and the European Union

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1. Sovereignty in its classical sense has long since disappeared. International law binds states in many respects. In the second half of the twentieth century a sort of "International Sovereignty" evolved, with manifold and far-reaching limitations of state discretionary power, growing dependence on multi-state co-operation and globalisation of economy, technology and politics.

In Europe, integration has led to the new form of "shared sovereignty", a supra-nationalised form of sovereignty, with the common exercise of powers transferred from the individual states to the European Communities.

2. The legal foundation of this new form of integration is the "transfer of sovereign powers", that is, the transfer of internal competences from the member State to the Community level. Most of the constitutions of the fifteen EU member States have a normative basis for such a transfer. Thirteen constitutions contain dispositions which allow either a "transfer of sovereign rights" (as Germany in Art. 24 and now in Art. 23 Basic Law) or a "limitation of sovereignty" (as France, in the Preambule of the 1946 Constitution, or Italy in Art. 11) or, very similar to the first example given, "a transfer of competence" (as in Spain, Austria or Denmark). There are some differences in the text: Some constitutions allow only the transfer of "determined" or of "singular" competences (Austria, Denmark) and some restrict what the supranational institutions should be able to do as regards the "exercise" of the competences transferred to them (Spain, Greece, Portugal). This latter formulation suggests that the supranational power does not acquire full internal competence, but only the right to exercise these competences which remain in the member States' hands.

Besides this textual divergence, it can be said that in only a few cases (as in Germany or Sweden) the constitution lays down express limits of this transfer: The general principles of German Constitutional Law as Rule of Law, the protection of fundamental rights and federalism must not be overruled by supranational law, or, as in Sweden, fundamental rights must not be violated.

Two member States, Great Britain and Finland, show a particular situation: In Finland no such constitutional permission to allow the transfer of sovereign power existed, rather Finland's entry into the Common Market in 1995 was effectuated on the basis of an international treaty whereby the transfer of sovereign powers was made possible for a State as a result of its sovereignty. The constitutional reform of 1 March 2000 introduced dispositions into the Finnish constitution which show that the constitution incorporates membership into the EU.

In Great Britain, where in the absence of a formal constitution in the continental sense, the constitution is instead based on its superiority over "normal law" (i.e. Acts of Parliament), the solution is a pragmatic one. The European Communities Act provides for a mechanism which ensures obedience to EC Law by legislative means, a mechanism which conforms to Great Britain's fundamental principle of "Sovereignty of Parliament".

3. What are the legal consequences of a transfer of sovereign powers to the EC?

(a) First, a general remark: In spite of textual divergence within the various constitutional dispositions which authorise such a transfer, the legal effects are the same. It results from the creation of the EC as being autonomous legal orders whose institutions adopt legal acts with immediate effect in the member States and with priority over national law (according to the European Court of Justice, even over national constitutional law). Autonomy, immediate effect (i.e. immediate validity and immediate applicability) as well as priority over national law, are the three main characteristics of the supranational body of EC Law. This refers to EC Primary Law (i.e. the basic EC Law, in particular the foundation treaties, the accession treaties and the reform treaties, protocols to them, and so on), as well as to EC Secondary Law (which are the legal acts adopted by the EC Institutions on the basis of Primary Law).

(b) As the German Constitutional Court has stated, a transfer of sovereign powers can be qualified in the following way: The member State "opens" the formerly closed internal order, it opens the shield of sovereignty to allow external law to come in from the supranational EC. The transferring State renounces its claim for legal exclusivity, which means this State no longer reserves validity of legal norms within its territory and no longer admits validity exclusively to legal norms produced by internal institutions.

(c) Shared, integrated and supra-nationalised sovereignty is a suitable term to describe the situation. Entering into the Communities means to share sovereignty, but to codetermine the Europe-wide economic and political decisions. Staying outside means to formally maintain national sovereignty, but to remain outside of the big EU Block with great economic and political potential connected to the WEU security system. Shared sovereignty within the EU is much more efficient than isolated sovereignty outside. Shared sovereignty entails diminution of formal sovereignty, but increase of substantial sovereignty.

4. What are the essentials of EU integration which have impact on national sovereignty?

We can distinguish three groups of criteria in this context: (a) substantive; (b) institutional and (c) value criteria.

(a) The main substantive criterion refers to the dimension of the mentioned transfer. Nearly all substantive matters have shifted from the State to the EC, not only economic fields, but also culture, general and professional formation, health, environment etc. Although the EC has not obtained exclusive competence in all these fields, but shares these competences with the member States, it has a far-reaching power to make use of the full content of these competences. Only a few fields such as general economic politics, social politics and taxation have remained in the hands of the member States, but are nevertheless submitted to a great extent to EC influence. There are only a couple of competences (introduced by the Treaty of Maastricht) where clear limits of Community actions are laid down, for example, in culture promotion where the Community action is limited to a “contribution” to national measures. This means the Community can only adopt measures in addition to national measures but not full extent measures which the member States must do. Besides this, harmonisation of national laws is clearly forbidden in order to keep alive national diversity. These limitations, however, exist only in fields with specific importance and with reference to the national sphere.

The wide competence power of the EC is partly, but not yet completely, equalised by the principle of **subsidiarity**, a principle which leaves to the member States the priority to take measures (a sort of action priority) in the wide field of shared competence, while the EC takes over action only if member States’ measures are deemed to be insufficient.

This principle, made more concrete by a Protocol to the Amsterdam Reform Treaty of 1997, has diminished legislative action of the EC, but is not yet completely efficient. This key instrument must be further sharpened so that it will contribute to the equilibrium between the EC and member States' power. To prevent EC competence preponderance, the creation of a "competence charter" as part of a future European Constitution is in discussion. A total shift of competence from the national to the supranational level is excluded in any case by Article 6 of the EU Treaty which guarantees the member States' identity.

(b) A further impact on national sovereignty results from the EC institutional system. Here we can state **vertical** and **horizontal** criteria: The first group of criteria has already been mentioned: The autonomous EC order has **direct effect** in the member States' legal orders and **priority** over them, which is totally different to the traditional international law mechanism based on sovereign equality of states. **Priority** of EC Law is of particular importance for national sovereignty. The more EC Law priority interferes with national law, in particular with national constitutional law, even invading into its nucleus, the more sovereignty is reduced. In this context, one can detect a certain reticence of member States' Constitutional Courts to accept such intrusion in the State's **inner sanctum**. I will treat this issue later in its own chapter.

Horizontal institutional criteria, the second group of criteria, which affect sovereignty refer essentially to the decision-making process in the EC. Horizontal, in this sense, means: concerning the institutions of the EC which are on the same level in their horizontal relations. Majority rule has widely replaced unanimous rule in Council decisions, which is normally a trademark of sovereignty. This rule had been applied in practice for a long time since the 1966 Luxembourg agreement, even against the express EEC Treaty dispositions, giving way to the pressure of France which was at that time unwilling to agree to shared sovereignty. Qualified majority decisions reappeared in the 1980s and have become the principal decision modality since the Amsterdam Reform in 1999. The extension of this modality to nearly all EC matters, which is soon to be discussed for the Nice Conference in December, is strongly opposed by Great Britain.

The new instrument of codecision (introduced by the Maastricht Reform Treaty in 1993 and now applicable to 70-80% EC matters) is based on qualified majority rule and the European Parliament's co-operation. Efficiency and supra-nationality on the one hand and democratisation by strengthening the EP's power on the other hand are connected with the codecision procedure. This procedure, embodied in Article 251 EC Treaty, seems to be crucial for new developments in

the EC institutional system, developments which characterise the new institutional reform approach in the enlargement perspective. The more efficient the institutional system is made for adapting it to an enlarged Community, the more the supranational features will increase, while national sovereignty will be reduced.

Strengthening the EP's power, thus increasing the democratic legitimisation of the Community order is also an institutional development which contrasts with national sovereignty. Shifting democratic legitimisation from national parliaments to the EP and initiating a European political process giving impulse to the shaping of EU wide parties and electorate systems (processes only in beginning) are tendencies which contrast with sovereignty.

(c) A third group of criteria is important for this issue: The question of **values**. First, in the EU as unwritten judge-made fundamental rights, conceived as general principles of Community Law. These are later anchored in an express reference to them by Article 6 of the EU Treaty, recently shaped in the form of a Charter to be proclaimed by the Nice Summit in December and also by the EP. These values are, to a great extent, not divergent to those embodied in national constitutions, but a supranational layer of determining and guaranteeing values has emerged. Values (fundamental rights, as well as fundamental orientations as Rule of Law, democracy, social welfare, environment protection etc.) converge in Europe with common convictions. Instruments of guaranteeing and enforcing values (fundamental rights) may considerably differ, but the content of protection is widely the same. Especially of primordial importance are human dignity, individual freedom and "anthropocentrism."

The new approach goes far beyond a mere declamation of making values enforceable before courts and by political guarantee systems. Article 7 of the EU Treaty is the main example of such a mechanism of enforcement to be completed, as it is put forward as a consequence of the Austria case, by a mechanism of an "early warning unit". The claim for a European Constitution and an enforceable Fundamental Rights Charter is a clear expression of the supra-nationalisation of values.

5. Some critical issues on sovereignty: sanctions on the obedience to EC Law - exclusion and retirement from the EU?

EC Law has developed a couple of sanctions: **explicit** and **implicit** sanctions.

The main **explicit** sanction (apart from the aforementioned Art. 7 of the EU Treaty) is Article 228 II EC Treaty, existing since 1993 but only once used, showing the high respect for supranational law by the member States. This sanction is not a political but a legal one, the verdict which is pronounced by the ECJ on the proposal of the Commission, the guardian institution for assuring obedience to EC Law. Such a sanction is the result of non-obedience to an ECJ decision, not of a mere political decision of a Community institution. The court therefore plays the main part in enforcing EC Law. An implicit sanction is the example of directives: A directive adopted by the EC institutions is an important type of the Community legal acts which need the implementation by member States for their coming into force. Member States must put the directive's contents into national law, often by means of an Act of Parliament. This is implementation of the directive. If member States fail to implement the directive in time (a time limit being foreseen by the directive itself), an individual can nevertheless realise the benefit that the directive wants to give him. The fact that the member State has not fulfilled its duty to implement the directive in time cannot be an obstacle for the individual to invoke his right resulting from the directive immediately. Member States' failure to fulfil Community obligations is thus sanctioned by making the directive immediately applicable. The ECJ has developed such an implicit sanction in its jurisprudence.
A further sanction developed by the ECJ is that breaches of Community Law entail the responsibility of the member State concerned for damages resulting from this EC Law violation for the individual.

A further issue referring to national sovereignty is the following: Neither retirement nor exclusion is foreseen by the EC Treaty. The EC / EU Treaties are concluded without time limits (except the Coal and Steel Treaty which has a duration of fifty years), a fact from which results that the EC shall be a community incapable of being dissolved. The transfer of sovereign powers from the member States to the EC is not a revocable process but creates a new supranational order, which definitively embraces the fusion of competences transferred to it. There is not only an "exercise transfer" : The EC Institutions do not exercise a collection of fifteen member States' competences but an individual Community power which is separate to the member States' powers. As a result, there is no sovereign right of a member State to leave the Community, even in extraordinary situations. The retirement of a state would be a violation of Community Law and often is imported by fact: The independence of the member States' economies does not allow such a retirement, otherwise the damage to this state's economy would

be enormous. The same must be said for the exclusion (but this is not significant to the question of national sovereignty).

EC and National Constitutions

Constitutions are the very nuclei of the States' legal orders. If EC Law can invade them without limits, national sovereignty is threatened. The ECJ position is clear: EC Law is superior to national constitutional law in all respects.
In contrast to this position, the national constitutional courts have a different view. The Spanish **Tribunal Constitucional** denies priority of EC Law over Spanish constitutional law, stressing the formulation of Article 92 of the constitution. This article permits the transfer only of competences which are "derived from the constitution", which means that unconstitutional Community acts are not covered by the competence transfer to the Communities. Thus, in the view of this court, the Spanish constitution prevails over Community Law.

The Italian **Corte Costituzionale** does not go as far. The court accepts priority of EC Law over Italian constitutional law except the "principi generali della Costituzione" (the general principles of the constitution) and Human Rights. Thus, priority of Community Law is only partial.

The German **Federal Constitutional Court** has developed a position which is most favourable to European integration, a concept of "functional substitution" in the field of values, especially in the field of fundamental rights. It is accepted that legal acts adopted by the Community Institutions must conform to the Communities' rights protection and not to national fundamental rights if there is a sufficient protection standard at the Community level.
In 1974, in the famous Solange I decision, the constitutional court found that there was a lack of fundamental rights protection in the Communities. The consequence was that the national fundamental rights, written down in the German Basic Law were considered to be applicable. In 1986, at the time of the Solange II decision, the situation had changed. The Luxembourg judges in the ECJ had developed a judge-made Charter of Rights, equivalent in its content and function to the national fundamental right guarantees. This leads to a new position of the court: German fundamental rights are no longer the criteria for the control over Community action. The judge-made general principles of Community Law thus take over the part of national rights. The control function is now placed into the hands of the ECJ, no longer in the German Constitutional

Court. The national court assumes the function as a guardian of the individual rights in general. If this protection is assured at the EC level in a sufficient way, the national court refrains from mobilising the national rights. Thus priority of EC Law over national constitutional law (insofar as fundamental rights are concerned) has been assured.
If the high standard of individual protection by the Communities is essentially reduced, the constitutional court reassumes its jurisdiction on the basis of national constitutional law. Article 6 of the EU Treaty excludes such a possibility because it imposes on all the EC Institutions the obligation to respect the general principles of EC Law and the ECHR.

A last remark concerns the problem of French sovereignty. National sovereignty is dealt with by Article 3 of the Fifth Republic Constitution of 1958. European integration must conform to these provisions; otherwise the constitution has to be reformed. In addition, the Preambule of the Fourth Republic Constitution of 1946 allows “limitations” of sovereignty which are deemed to be necessary in order to assure peace. On this basis, France created in the 1950s the European Communities where no doubts arose in the context of sovereignty. Later, when the **Conseil Constitutionnel** was created, European integration led to some controversy. In its decisions the Conseil accepted, in a first phase, that the developments within the EC were merely “limitations” of French sovereignty and not a transfer of it. In a second phase, which was characterised by an intensified integration and the accumulation of power at Community level, the Conseil stopped the Maastricht Reform Treaty and even criticised the Amsterdam Treaty. In the Maastricht decisions made by the Conseil Constitutionnel the Treaty was stated to be unconstitutional as it affected the “conditions essentielles de la souveraineté”. The constitution was reformed in order to restore constitutional conformity by introducing a chapter dealing with the EU into the constitution.
Thus, the political way of reform eliminates unconstitutionality. This way can be realised without difficulty if a large majority of society favours the idea of strong European integration. A similar solution was achieved in Ireland before the ratification of the Single European Act in 1987. In this case, the creation of a Common Foreign Policy was held unconstitutional and had to be approved by the people.

Conclusions

European integration is based on a new form of sovereignty: shared sovereignty. National constitutions allow this form of shared sovereignty. Other constitutions (France, Ireland) had to be reformed in order to correspond to these requirements. National constitutional courts have not stopped the integration process but have made some reservations concerning the very core of their national constitutions.

Seen as a whole, national sovereignty is no obstacle to further integration. The integration system has developed mechanisms in order to preserve member State identity, to give them the necessary sphere of autonomy and to give them the possibility of a fair and acceptable codetermination of common affairs.

Bibliography

R. Arnold, Koncepcje suwerenności w konstytucjach państw członkowskich Unii Europejskiej a integracja europejska, in: Suwerenność i integracja europejska, ed. by W. Czapliński, J. Lipowicz, T. Skoczny, M. Wyrzykowski, Warsaw 1999, p. 79 - 83

R. Arnold, Die europäischen Verfassungsgerichte und ihre Integrationskonzepte in vergleichender Sicht, in: Staat - Verfassung - Verwaltung, Heinz Schäffer/Walter Berka/Harald Stolzlechner/Josef Werndl (ed.), Festschrift für Friedrich Koja, Wien 1998, p. 3 - 22

R. Arnold, L'exposition des constitutions européennes aux influences externes, in: Festschrift 20 Jahre Portugiesische Verfassung, Jorge Miranda (ed.), Coimbra 1997, p. 673 - 694