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Lecture I:

THE DYNAMICS OF EUROPEAN UNION LAW: MAJOR CONSTITUTIONAL CHANGES BY THE TREATY OF MAASTRICHT OF 1992

I. The Dynamic Nature of European Law and its Historic Background

European Union law comprises the law of the three Communities as the core of the Union as well as the law relating to the Common Foreign and Security Policy and the law on Police and Judicial Cooperation in Criminal Matters. The last mentioned two areas have the quality of traditional international law – also called the intergovernmental pillars – while the so-called Community pillar possesses supranational character, which basically means that the rule of law is the governing principle including the compulsory control of the European Courts in Luxembourg.

Unlike any other legal system, the legal order of the European Union is characterized by its inherent dynamics that means that its substantive and procedural rules are in a permanent process of evolution and development. This does not, however, mean that laws in other systems do not change and progressively develop in accordance with the needs of a given society. This applies both to international law and to the numerous national legal systems. However, the difference to European law lies in the latter's inherent object and purpose, as had

been proclaimed – back in 1957 – in the first sentence of the Preamble to the Rome Treaty for the „Establishment of the European Economic Community“. Here, the founding fathers, namely France, Germany, Italy, the Netherlands, Belgium and Luxembourg, have solemnly declared, “to lay the foundations of an ever closer union among the peoples of Europe”. This ambitious aim constitutes the root of all further efforts to unite this old continent. The dynamics of Community law are, therefore, the corollary to that postulate proclaimed in the opening sentence in the Preamble of the EC Treaty. Such dynamics include in terms of power sharing the gradual deepening of existing areas of powers and the widening through the inclusion of new areas in the Communities’ legal system. Therefore, such an ever closer union requires also the inclusion of additional fields of Community competences. The postulate also includes the extension of the Union to new members. Unlike the charters or constitutions of other international organizations, such as the UN, the basic treaties of the Communities have been programmed *ab initio* with a dynamic element, with a „chain reaction“, as the prominent writer on European Law, *Léontin Constantinesco* , used to call it. *Walter Hallstein*, German foreign minister and President of the Commission has even gone so far to say, that the Community is to be compared with a cyclist: if he/she does not move the wheels or pedals the cyclist will fall to the ground. Henceforth, if the Community or the European Union discontinues to move further both in a qualitative as well as quantitative manner, the European integration is doomed to fail.

At this point we shall have to take a brief look at the historic and political background of this development, which is commonly called European integration.

First, one must consider the actual idea of European integration. It was, in fact, very simple, namely to eliminate war on this continent and, in particular, in the Franco-German relations. Europe’s history since the Middle Ages until the end of WW II can produce only some ten years during which no war was waged in any of the corners of this bellicose continent. That situation has been deplored by a great

number of writers throughout the last, say, 800 years. Almost four hundred poets, philosophers, lawyers, politicians, etc. have conceived numerous forms and institutional structures for alternatives to war. They ranged from *Pierre Dubois's* "European confederation" to *William Penn's* "European Diet or Parliament" and *Immanuel Kants* "Eternal Peace". The Austrian Count *Nikolaus Coudenhove-Kalerghi* developed in his work "Paneuropa", which was published in Vienna in 1923, the notion of the "United States of Europe". However, all these visions had little impact on Europe's *realpolitik* Nevertheless, they contained valuable thoughts and suggestions as to future structures for a pacific settlement of Europe's international disputes.

It was not until After World War II, when two French politicians, *Jean Monnet* and the Foreign Minister *Robert Schuman,* developed the most remarkable idea of merging the French and German coal and steel industry, which constitutes the infrastructure for any war machine. This idea was whole heartedly welcomed by the legendary German post-war Chancellor *Konrad Adenauer* and led to the proclamation, on May 9, 1950, of the so-called *Schuman*-Plan, according to which the management of the heavy industry of both nations should be entrusted to a supranational "High Authority" which would have all powers to legislate in this sector of industry. A court would guarantee the compliance with the law so enacted. Such an "organization" would make future war between both archenemies impossible.

After the Benelux countries and Italy have also welcomed that idea the *Schuman*-Plan became the foundation of the first European Community, the ECSC, based on the Treaty of Paris of 18 April 1951, which, in turn, represents the core of the present European Union.

Unification of Western Europe was no longer a utopian idea. On the basis of the maxim "when goods do not cross borders, soldiers will" the functionalist

theory of integration became a widely accepted model for further steps. This theory was developed by *David Mitrany,* a political scientist at Oxford University, in the thirties and simply stated that economic integration should not be (and is not) an aim in itself but has an inherent "spill-over-effect" which means that it may spread to other field, in particular to political ones. In other words, close economic cooperation, by way of a kind of natural chain of events, will lead to a closer political understanding and cooperation and, eventually, to the creation of a political union and even to a federation of States, a kind of "United States of Europe", as envisaged by Count *Coudenhove-Kalerghi*. in the twenties of the last century. This theory became very attractive to the (Western) European leaders after the successful experiment of the Coal and Steel Community.

Because in view of Europe's history it was clear from the beginning, that a more unified Europe could not be established at once, but had to pass through the various degrees of integration. And this proved to be correct. By the Treaties of Rome of 27 March 1957 the European Economic and the European Atomic Energy Community were established which were based upon a customs union, according to Article 23 EC Treaty. This original customs soon has graduated to the common and, subsequently, to the internal market. The Treaty of Maastricht of 1992 that had established the European (Political) Union had just obtained the „higher blessings" of an economic and monetary union with a single currency, the EURO, as the sole legal tender in twelve member States.

The European Union is, however, not the beginning of the end. It is rather the end of the beginning. Europe is united in a kind of pre-federal structure and, in the near future, will also comprise countries whose peoples, for some fifty years, were bound to live in a planned economy atmosphere with little personal freedoms. The Union, therefore, has to face new and unprecedented challenges. At no time in its history it had to cope with such a great number of candidate countries knocking at its door.

For these reasons, the most recent Treaty of Nice of 26 February 2001 is attempting to solve some of the most difficult problems. In addition, the Summit Meeting at Laeken last December passed a Declaration on the Future of the European Union that identified the forthcoming constitutional issues. These issues are to be debated by a "Convention" which began its work on 1 March 2002. This body is composed not only of representatives of governments (15) but also of those of national parliaments(30: 2 of each MS) and of those of the European Parliament (16) The Commission is represented by two persons.. Its Chairman is Mr. *Guiscard D'Estaing*, who is assisted by two Vice-Chairmen, namely Mr. *G. Amato* and Mr. *J.L.Dehaene*, all appointed by the European Council. Its task is to prepare what is called a draft "Constitutional Treaty" as a basis for the work of the next intergovernmental Conference of 2004.

This is the present stage of development. Since the "great leap forwards" was made by the Treaty of Maastricht in 1992, I shall now discuss its major innovations and the reasons for this first major reform.

II. The Economic and Monetary Union

The idea of the EMU dates back to the late sixties. Until then, on the basis of the Bretton Woods system, in which the dollar was the anchor currency, exchange rate stability was taken for granted. In the European Economic Community the customs union was completed and also its core policy, namely the Common Agricultural Policy (CAP), was established which, in turn, was – somewhat naively (Ungerer 153) – had been built on the assumption of unchangeable exchange rates. Turbulences in the exchange market resulted in the large devaluation of the French Franc in 1968 and the subsequent revaluation of the Deutschmark causing a serious disruption of the CAP. In 1969, at the first summit meeting of the six founding members, it was decided to entrust a Committee under the chairmanship of the

Prime Minister of Luxembourg, *Pierre Werner*, with the task to work out a plan of an EMU. Although the Werner Plan largely failed because it did not take into account matters like convergence of economic performance, price stability as a primary aim for monetary policy or the independence of the planned European Central Bank, it nevertheless gave the impetus for the European common margins arrangement, the „snake“ and subsequently for the European Monetary System, a kind of mini „International Monetary Fund“ which, from 1979 onwards, produced a high degree of exchange rate stability. The European Currency Unit ECU, assessed on the basis of a basket of European currencies, became the artificial currency but the Deutschmark remained the anchor currency. The Maastricht Treaty established a three stage program, as envisaged in the Werne Plan, for the completion of the EMU: the first stage entailed the obligation to remove any remaining barriers against capital movement, the second, from 1996 onwards, the creation of the European Monetary Institute which, among other things, had to cope with the enormous task of preparing the production of banknotes and coins; in the third stage, beginning from 1 January 1999, it became the ECB in Frankfurt to manage as a supranational body the European monetary policy. At the summit meeting in 1995 in Spain, the original name of our currency was changed from „ECU“ into „EURO“ much to the dismay of France. During 1214 and 1653 A.D. (Fischer/Köck 636) a small gold coin, called *ecu*, was in circulation in that country. From 1 January 2002 onwards the EURO is the only legal tender in twelve member States.

What are the major benefits of an EMU? The major benefit lies in the fact that no cost would occur because of the necessity to convert one currency into another. Business enterprises would no longer be obliged to keep books in different currencies. Furthermore, the EURO eliminates the risks of exchange rate viariability and uncertainty. This, in turn, is a further element in the dynamics of European law and integration which certainly has also political implications in terms of furthering a European identity, internally as well as externally. This is best shown by its critics. The eurosceptic politicians, like Haider and Le Pen, are afraid

of a United Europe for which the single currency constitutes not only an important symbol but also a powerful vehicle. A few years ago, Haider has, however with very little support, has organized a *Volksbegehren* (People's vote) against the EURO in Austria, and Le Pen has recently even called the EURO „a currency of occupation".

This critique cannot be taken seriously. The acceptance of the EURO has reached the 90 percent mark within the twelve Member States, while some countries outside EURO-Land, in particular Sweden, are giving a second thought for joining the EMU in the near future.

Another major innovation of the Treaty of Maastricht is the introduction of a

III. Citizenship of the Union

The Maastricht Treaty had not only introduced the EMU but also this concept (Art. 17 et seq). In a way , it had a similar purpose. While the EURO not only intends to achieve an optimal realization of the single market it, at same time, also brings the idea of Europe closer to the citizen. It is a good feeling for every tourist travelling, say, from Finland to Spain or Portugal without any obligation to change money there at exorbitant costs.

Exactly the same idea of a „Citizen's Europe" stood behind the introduction of a „European citizenship". Before the establishment of the European Union ordinary citizens in the Member States felt that the Community was something for the „Eurocrats" in Brussels and had little relevance for them. „Europe was too far away" was a general feeling. In order to bring Europe closer to the citizen, the so-called passport-union was formed in the early eighties. A uniform model for passports was issued by the Member States, bearing, on the cover, not only the name of the issuing Member State but also the legend: „European Community". After Maastricht, the latter was changed into „European Union". The creation of a „citizenship " of the European Union was the next step. This concept is unknown

to traditional international organizations. It is the bond or the link between a physical person, a human being, and a State entailing mutual rights and obligations, in particular those derived from allegiance.

Although neither „nationality“ nor „citizenship“ has been defined in the EC Treaty, there is a general assumption that both concepts have in common the above mentione link but differ from one another insofar as nationality is the external while citizenship the internal aspect of that bond.

According to Article 17 EC Treaty a citizenship of the Union is created, wherby a national of a Member State is automatically such a citizen. Citizenship of the Union is , therefor, an „overlay“ [1] over and an addition to ciitizenship of a Member State. This includes a number of rights (Art. 18), such as freedom of movement and residence within the territory of the Member States. This right goes beyond the original EC Treaty which confined it to economic activities. On the basis of this provision, the members of the former ruling House of Habsburg, who were banished by the Habsburg Law of 1919 from Austrian territory, had to be re-admitted again in 1996 because they were nationals of Austria and therfore citizens of the Union. In a way, this was the first „victory“ of European Union law over Austrian constitutional law.

Apart from political rights, like the right to vote and stand for election in the Member State in which the Union citizen resides and to petition the European Parliament (Arts. 19,21), the citizen is granted diplomatic and consular protection in a third country in which the Member States of which he is a national is not represented. Such protection is to be given by any other Member States on the same conditions as towards their own nationals.

This unprecedented concept is hitherto unknown in international law which is primarily based on the so-called „nationality of claims“-rule, giving only the home State the right to protect its nationals vis-à-vis third countries. The idea of his new European rule has a practical background: not all Member States can afford to

establish diplomatic and/or consular representations in all the countries which have emerged after the breakup of the Soviet Union or have, such as Eastern Timor, become independent since. If a citizen of a Member States happens to be in such country and is faced with problems, such as loss or theft of passport, serious illness, criminal prosecution, arrest, etc. He or she can address him/herself to the Embassy or the Consulate of any other Member State for help.

This new concept has two implications: it gives, on the one hand, the citizen the feeling to belong to, and to be protected by, an entity above its nation State, and, on the other hand, third countries will also realize the special identity[2] of the Union as such, although diplomatic and consular protection is not (yet) extended by the Union but by their Member States.

To sum up: The single currency as well as the concept of Union citizenship are major steps not only towards bringing the Union closer to the citizens but also a decisively new stage in the process of European integration which is unique in the development of international law and relations.

Hoverer, the side of this coin, namely of the dynamics of European law, was the growing tendency of the Community legislators, primarily the EU Council, to enact laws whose objectives could perhaps have been achieved in the same way by individual Member State's legislation. This tendency was facilitated by the very general rules relating to the power sharing between Member States and Community. Its basis principle, as contained in Article 5 para 1 EC Treaty, is that of "conferred powers" or "competences attribuées", according to which „the Community shall act within the limits of the powers conferred upon it by this treaty and of the objectives assigned to it therein". In other words, *in dubio* all powers lie with the Member States except those that have been "conferred upon the

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[1] Peter E.Herzog, Article 17 EC Treaty, in Hans Smit/Peter E. Herzog, The Law of the European Community. A Commentary on the EEC Treaty (New York 1976 -2000), § 17.02.
[2] This point is similarly made by Herzog, *op.cit.*, § 20.01.

Community". This limitation of powers has, however, loopholes. In the first place, there is no catalogue of what constitutes an exclusive or a shared "Community power" because the Community competences are often only generally defined by their "objectives", tasks (Art. 2), "aims" or "activities" (see Article 3). The latter ("activities") include, for instance, a common commercial policy, a common transport policy, approximation of laws required for the functioning of a common market, etc.; tasks include the promotion of the raising of the standard of living. Secondly, the Council, by virtue of Article 308, possesses the power to act if it should prove necessary to attain, in the course of the operation of the common market, one of the objectives in the course of the operation of the common market and the Treaty "has not provided the necessary powers". In such a case, the Council, however acting unanimously on a proposal of the Commission, may, so to speak, arrogate such powers which have not expressly conferred, as long as the procedural conditions – in particular the unanimous vote – have been fulfilled.

Before Maastricht, the Council has made amply use of that provision. A striking example was the directive concerning the quality of bathing water, adopted in 1975[3], which was justified on the ground that surveillance of bathing water is necessary in order to attain the Community's objectives as regards the "improvement of living conditions, the harmonious development of economic activities throughout the Community etc." Numerous similar examples of the Community's enthusiasm for a Europe-wide legislation can be found which, however, led to a serious critique culmination in the British Prime Minister Margaret Thatcher's speech at the College d'Europe in 1988 in which she said:

"But working more closely together does not require power to be centralized in Brussels or decisions to be taken by an appointed bureaucracy…We have not successfully rolled back the frontiers of the state in Britain, only to see them

[3] Directive 76/160 [1976] OJ L31.(amended version).

reimposed at a European level, with a European super-state exercising a new dominance from Brussels[4].

In order to meet these harsh critiques a new principle was discovered and included in the Treaty of Maastricht:

IV. The Principle of Subsidiarity

Subsidiarity was acclaimed as a "magic word" and as a "word that saves Maastricht"[5]. This principle was actually not so new: It was formulated in Pope Pius' famous Encyclical *Quadragesimo Anno* in 1931, in which he wrote :

"It is an injustice, a grave evil and a disturbance of the right order, for a larger and higher association too arrogate to itself functions which can be performed efficiently by smaller and lower societies"[6].

Applied to the European Union is simply means that public power should be located at the lowest tier of government where it can be exercised effectively[7], namely on the Member State's level or even below on their constituent subdivisions, as in federal states like, Germany, Austria or Belgium.

This concept was introduced In the Maastricht Treaty in various forms: first, as a political concept "permeating the constitutional order" [8] In Article 1 para. 2, according to which in the Union so established "decisions are taken…as closely as possible to the citizen". It may also be the principle which guides the hand of the constitution-maker in allocating powers between the Community and its Member

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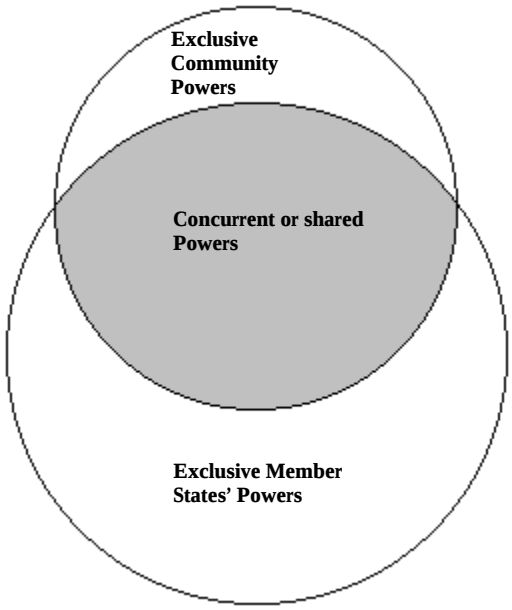
[4] Schima, 55
[5] Deborah Z. Cass, The Word that saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community, in: 29 *CMLR* (1992), 1112ff.;
[6] Quoted from Wyatt and Dashwood's *European Union Law* (4th ed. London 2000), 156.
[7] Ibid.
[8] Ibid.

States. This is the case in the field of culture (Article 151 EC Treaty), according to which action by the Community is confined to encourage cooperation between Member States and to support them, inter alia, in the conservation and safeguarding of cultural heritage of European significance. The leading role belongs to the Member States (see also 137 social policy).

The most important field of application of the principle of subsidiarity extends, however, to those areas in which both the Community as well as the Member States are entitled to act. These are the so-called “shared” or “concurrent” powers. Which are to be distinguished from the exclusive powers of either party. A diagram may illustrate that situation:

The Power-Sharing System in the European Communities
(Article 5 EC Treaty)



Community Actions in the area of shared or concurrent powers will cause an extension of the area of exclusive Community powers and, simultaneously, a shrinking of the other two areas.

Most of the Community competences of powers are shared with the Member states. There is, however, a uncertainty about what constitutes an exclusive

Community competence. Since there is no catalogue of competences, one has to rely on the jurisprudence of the Court. Common commercial policy and fisheries conservation are, beyond any doubt, examples of such an exclusive Community competence. The above-mentioned monetary policy must also to be added to that list. On the other hand, matters like the facilitation of the functioning of the internal market, transport policy, intellectual property law, services, research and technological development, protection of the environment, etc. are mattered falling under the shared powers. And this is the area in which the subsidiarity principle comes into play.

As said before, it is designed to reduce Community action in these fields. According to para. 2

"In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action **cannot be sufficiently achieved** by the Member States and can, therefore, by reason of the scale of effects of the proposed action, **be better achieved** by the Community".

According to this formula, any planned piece of legislation must undergo two tests: the **insufficiency test**, which means that it is impossible to attain its objectives Member States and, secondly, the **"value added" element** or the superior efficacy at Community level. Subsequent acts, such as the Amsterdam Protocol of 1997 and the Vienna Conclusions of the European Council of 1998, have added further guidelines clarifying the somewhat, in legal terms, vague criteria, by requiring the "transnational aspects" of the proposed action or by saying that action by Member States alone or lack of Community action would conflict with the requirements of the Treaty. The most important requirement to justify a specific action in the light of the subsidiarity principle in particular emphasized in the Vienna conclusions which, subsequently was taken seriously by the Commission who, as the initiator of Community legislation, has primary responsibility for ensuring the effective application of that principle.

On that basis, the Commission, under the title "Better Lawmaking" is now submitting annual reports to the EP and the European Council in which it gives factual account of how the principle of subsidiarity have ben applied , using real-life examples from the Community's legislative work[9]. The last report mentions a proposal for a Council Directive relating to a Common European Asylum Regime. The Commission states herein:

"With a view to meeting the objectives laid down in the Treaty concerning asylum and other policies and other policies connected with the free movement of people, Community action is justified in that the objectives cannot be met adequately by the Member States but can, because of the scale and effects, be dealt with more effectively at Community level. Such is the case for the proposal for laying down minimum standards for the reception of asylum seekers in the Member States. The fact is that common minimum standards on asylum policy constitute an essential element in the common European asylum regime armoury. Having a single Member State responsible for a particular asylum application would be seen by the asylum-seeker as more equitable if all the Member States offered the same minimum standards. In addition, these minimum Community standards will help to limit the scale of secondary movements of asylum-seekers resulting from disparities in reception conditions from country to country, and will thus have a positive effect on the national systems' effectiveness on asylum (2.2)."

Similar justifications are given to all other acts proposed by the Commission. The reports show that the numbers of such acts have decreased considerably since the Maastricht Treaty, the Amsterdam Protocol and the Vienna Conclusions because the subsidiarity test has to be made on each and every of such act. In addition, some Member States, such as Germany, submit also such acts to this test. If , in a given case[10]during such a subsidiarity test on the national Member States' level results into doubts as to its conformity with this principles, the German government will enter into negotiations with the Council. This can lead to a clarification of the situation and/or to amendments or, perhaps, withdrawal of the proposal. This procedure resolves the conflict in 99 per cent of all cases. If, in a very rare case, the act is nevertheless adopted against the misgivings of Germany,

[9] Commission Report 2001. COM/2001/0728 final

[10] See the examples given in the *Bericht über die Anwendung des Subsidiaritätsprinzips im Jahr 2000*, p. 6.

the latter could challenge it on those grounds before the ECJ, in accordance with Article 230 EC Treaty. Up until now, however, in no such case an action for annulment had been successful.

To sum up: Maastricht had indeed been the great leap forwards in view of the three areas which have been discussed: the establishment of the EMU brought Europe – or at least a part of it – on a higher level of integration; the EU citizenship has brought Europe closer to its citizens and, last but not least, the principle of subsidiarity , due to its tests on the Community an on Member States' level, had fulfilled its purpose, namely protecting the member States prerogative from EU institutional encroachment, as one recent writer has put it[11] . The numbers of the Commission's proposal has considerably decreased.

[11] Anthony R Zito, The evolving arena EU environmental policy: the impact of subsidiarity and shared responsibility, in: Ute Collier/Jonathan Golub/Alexander Kreher (eds.), *Subsidiarity and Shared Responsibility: New Challenges for EU Environmental Policy* (Baden-Baden 1997);16.