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"LEGAL ASPECTS: CONSTITUTIONAL REQUIREMENTS FOR SYSTEM TRANSFORMATION"

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REPORT

There are many legal aspects on constitutional requirements for system transformation. The short span of time allotted to me does not even permit me to give an overview. I will have to restrict myself to a few remarks on one fundamental question of international co-operation within the framework of the two great co-operation organisations in Europe, the European Union and the Council of Europe: the ongoing discussion on transfer of sovereignty.

Let me as an introduction briefly mention a judgment of the European Court of Justice, the EC Court, i.e. the Court of the European Community.

On the 4th of July 2000 this Court delivered judgment in open court in Luxembourg in a case between the Commission of the European Communities and Hellenic Republic[1] – Greece – concerning a garbage dump in the *Kouroupitos*-area on the Island of Crete. The Court found that Greece had failed to fulfil its obligations under the European Community Treaty in the handling of the garbage dump question. And therefore, the Court ordered Greece to pay to the EC Commission a penalty of 20 000 Euros for each day of delay in implementing the measures, which were necessary to comply with a judgment against Greece eight years earlier[2], until compliance was achieved. Both the matter of the case and the outcome were widely publicised in Europe. Two aspects of the case were most prominent in the debate:

– One Member State had not fulfilled its obligations for an unusually long time, and

-the EC Court had for the very first time ordered a Member State to pay a running penalty under Article 228 EC[3].

Especially this second aspect was underlined again and again: A sovereign state had been ordered to pay penalties by an external power, the EC Court! This order put the problem of sovereignty on the agenda in the context of international co-operation.

The decision of the court was based on Article 228.2 EC. This provision had been modified in 1992 by the Maastricht-Treaty, and the goal of the change was to really get the Member States to take their obligations seriously. All too often Member States had ignored judgments of the EC Court in which the Court already had declared that they had failed to fulfil an obligation.

To put that provision on penalty payments into the Maastricht Treaty was no small step of the Parties to the Treaty. And the EC Commission made it clear that it considered the provision to be a sharp instrument. This instrument really should be put to use. Therefore the Commission in 1996 and 1997 informed formally about its view on how to apply the new provision and how to calculate any possible penalties which the Commission would ask the Court to impose.[4] The

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[1] Case C-387/97, Commission v Hellenic Republic, 2000 ECR I-5047.

[2] Case C-45/91, Commission v Hellenic Republic, judgment 7.4.1992, 1992 ECR I-2509.

[3] Article 171 of the EC Treaty before the re-numbering by the Amsterdam-Treaty.

[4] Information from the Commission – Memorandum on applying Article 171 of the EC Treaty, Official Journal (OJ) 1996 C 242/6–8, Celex 31996Y0821(03); Information from the Commission – Method of calculation the

message conveyed was basically that there would be no symbolic amounts. The penalty should be imposed to have a deterrent effect and to cancel out any economic advantage which the Member State responsible for the infringement might derive in the case in point.[5]

It did work in the Greek case. In late February 2001 Greece took the necessary measures to implement the first judgment and paid a total of € 5 400 000 in penalty payments for the period from the judgment to the implementation.[6]

I will not go into further detail with European Union law on sanctions against Member States which fail to fulfil their obligations under the Treaties. The only point I want to make is that it now is possible to take measures against a sovereign Member State. By accepting the provisions of the Treaties the Member States have accepted to transfer part of their sovereignty to the European Communities and the European Union. And that later developed into first rate challenges for all of them: All Member States had to adapt their Constitutions to the requirements which were embedded in the provisions of the Treaties – i.e. *all* Treaties, not only the Maastricht Treaty, which was the point of departure in the Greek case.

For the old Member States – especially the six which concluded the original treaties in 1952 and 1957 – this transfer of sovereignty for better international co-operation had been a step by step process which had taken decades. And – I dare to say – in the process, the Member States were not really realising what they were doing and how far they had come with the transfer when they concluded the Maastricht-Treaty in 1992. It started in the 1950's with early judgments of the then Court of the European Coal and Steel Community, for example in the *Algera*-case.[7] It continued – slowly and step by step – with many famous judgments of the EC Court as in the case of *Costa v. ENEL*[8] or, just to mention one of the latest, the *Köbler*-case.[9]

Case law is difficult to handle, to understand and to explain – especially when the Court has to deal with customs law or agricultural subsidies for milk producing farmers, but within that task has to answer questions concerning constitutional law. Case law can often be interpreted in more than one way. And case law depends to a very high degree on how a case is brought to the Court and handled there. Case law therefore is an instrument which is very difficult to use when it comes to constitutional development. But it *is* used. And because of its opaque nature, it often can contribute to the development of an area of law without people really noticing.

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penalty payments provided for pursuant to Article 171 of the EC Treaty, OJ 1997 C 63/2–4, Celex 31997Y0228(01).

5 Cf. para. 8 of the 1996 Memorandum.

6 Nineteenth Annual Report on Monitoring the Application of Community Law (2001), COM(2002) 324 final, p. 14.

7 Affaires jointes 7/56, 3/57 à 7/57, Dineke Algera et al. contre Assemblée Commune, 12.7.1957, Recueil de jurisprudence 1957 p. 81, Celex 61956J0007.

8 Affaire 6/64, Flaminio Costa contre E.N.E.L., 15.7.1964, Recueil de jurisprudence 1964 p. 1141, Celex 61964J0064.

9 Affaire C-224/01, Gerhard Köbler v. Austria, 30.9.2003, Recueil de jurisprudence 2003 p. I-10239, Celex 62001J0224.

The conclusion of the Maastricht-Treaty forced public stock taking everywhere, in every Member State. What of the contents of the Treaty did only confirm established law, what was new?

Already in the early stages of this European debate, focus shifted to the relationship between Member States and the upcoming European Union. Matters of detail were not discussed as such but as parts of the more comprehensive question whether it was right or wrong, good or bad, to transfer any more sovereign rights to the Union for better international co-operation. And – even more important – the perspective was the States' perspective, and the question to be discussed – if not answered – became, if the *Maastricht Treaty* was in harmony with the Constitutions of the Member States. This was a 180-degree change of the direction of the discussion since the 1950's which had been focused on the question whether *Member States' laws and their Constitutions* were in harmony with the Community Treaties.

Matters of concern were not only traditional questions relating to the impact of norms deriving from Community institutions, i.e. mainly directives and regulations, and the relationship between EU institutions and national parliaments and governments as law making institutions. New was an upcoming realism about the role of national parliaments in international co-operation. The very latest matter of concern seems to become the role of national courts *vis à vis* the EC Court and, maybe, the co-operation and co-existence of the EC Court and the European Court of Human Rights.

According to many national constitutions the national parliaments were the sovereign of the land or the foremost representative of the people. That is a concept which is fundamental to democratic government in all European states. But are there means to safeguard that position in the sometimes fast moving policy making process of the European Union? That process can be easily influenced by governments and ministers. But can national parliaments or their members get a role in that play?

In this shape the discussion in the early 1990's reached the level of the Constitutional Councils, Constitutional Courts and other Supreme Courts in many Member States. And the decisions which were reached there had an impact on the constitutional development in the whole of Europe which cannot be underestimated.

Time does not permit me to go into any detail. The French *Conseil constitutionnel* dealt with the Maastricht Treaty[10], the German *Bundesverfassungsgericht* did[11], the Danish *Højesteret*[12] and many others. The overall result was acceptance of the Treaty in general. But the Courts and Councils also expressed a general reluctance and a feeling of insecurity concerning the relationship between national Constitutions and European Union law. And they touched upon many aspects of the broader question, to which extent a transfer of sovereignty could be

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[10] Conseil constitutionnel, Grande décision no 45 – « Maastricht I, II et III » ; 9.4.1992, décision no 92-308 DC, Journal officiel 1992 p. 5354 ; 2.9.1992, décision no 92-312 DC, Journal officiel 1992 p. 12095 ; 23.9.1992, décision no 92-313 DC, Journal officiel 1992 p, 13337 ; at http://www.conseil-constitutionnel.fr/general/decision.htm.

[11] Bundesverfassungsgericht, 12.10.1993, 2 BvR 2134, 2159/92, Entscheidungen des Bundesverfassungsgerichts 89, 155.

[12] Ugeskrift for retsvæsen 1996.1300, 1998.800.

acceptable and desired international co-operation was constitutional under the constitutions as they were written then.

This result obviously was not a stable one. I think it will be thoroughly questioned and again tested in the near future as part of the ongoing debate of the proposed Treaty establishing a Constitution for Europe.[13]

Let me now turn to the other important organisation of successful European co-operation, the Council of Europe.

The Council's impact on constitutional law is very closely connected to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the many challenging decisions of the European Court of Human Rights. But one should never forget the less publicised role of the organs of the Council, the Committee of Ministers and the Parliamentary Assembly, the Secretary General, the European Committee of Social Rights (which was established under the European Social Charter), the European Commission for Democracy through Law (the Venice Commission) and many others. They have to follow up the judgments of the Court and have to see to it that these are implemented not only *vis à vis* the parties to the case, but – as an outflow of the guiding function of judgments of the European Court of Human Right – by Council Member States in general.

Almost 200 treaties have been drafted as treaties of the Council of Europe.[14] The Venice Commission has given hundreds of opinions in matters of constitutional law. Etc. A complete list of Council of Europe activities and achievements in the field of constitutional law would be very long, indeed, and most of the topics would touch upon international co-operation.

Again I will have to refrain from going into detail. I would very much like to give a more systematic and comprehensive report on constitutional requirements concerning international co-operation as outlined in the *acquis* of the Council of Europe. But that is impossible because of time limits.

Let me only briefly follow up my earlier remarks on the ongoing development within the European Union and the rather ambiguous picture of the state of transfer of sovereignty which has developed there.

In my view, European Union law is forcefully influencing the constitutional law of all Member States. And there may be more of that in the future, if the proposed Treaty establishing a Constitution for Europe can enter into force. But the Member States have only started their processes of necessary adaptation to the demands of European Union law. They all are aware that they have to do something. But there is no clear answer how to proceed and what to do. And that is a problem which affects not only the *old* Member States. *All* Member States are affected, even those which acceded to the Union in 2004. And it seems to be even worse for them than for the older ones. The constitutional systems of the latest Members of the Club were established in the 1990's. Now it is quite clear that they have to change them once more; their recently transformed systems have to be transformed again in order to become fully compatible with the Union system. Not tomorrow, but today. But there are not yet established standards defined,

[13] Official Journal of the EU 2004 C 310/1.

[14] Cf. the complete list at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG.

which will have to be achieved and followed, or blueprints drawn up how to do that in important fields of democratic activity.

I think there is a similar development going on within the Council of Europe. It is quieter, almost hidden, but nevertheless a parallel to the European Union development.

Let me as one and only example mention a recent decision of the European Court of Human Rights, the judgment in the case of Caroline von Hannover v. Germany.[15] Caroline is the daughter of the Prince of Monaco. She is now married to a German prince belonging to the former Princely House of Hannover. For many years Caroline had been followed by paparazzi. They had taken many pictures of her in many very personal situations and they had sold these pictures to newspapers, which had published them extensively. Caroline had tried to get court protection in Germany against these intruders of her privacy. The courts, however, had found that there was a public interest in her life and that she – because of her very special position in public life – therefore in principle had to accept the situation as it was, regardless whether it was disturbing for her or not. Even the German Constitutional Court had found in a number of decisions[16] that the Court under the German Constitution could not give her the desired protection of her privacy.

Caroline therefore made an application to the European Court of Human Rights. And that Court, in June 2004 found unanimously in her favour. It said that there had been a violation of Article 8 of the European Convention. And this violation had its roots in the interpretation by the German courts – among them the Constitutional Court – of constitutional provisions on the freedom of the press.

This decision is not an easy one to accept for the German Constitutional Court. It again raises the old, but never fully answered question of the relationship between national human rights protection systems and the human rights system of the Council of Europe and the European Convention and the finer print of co-existence and co-operation of the two systems of rights and the two systems of court protection against human rights violations. Has any transfer of sovereignty really taken place in this specific context of international co-operation? If so: To which extent?

In the perspective of the Council and Court the question may be easy to answer. But that is not the case in the perspective of well established and successful systems for the protection of human rights on the level of national constitutions.[17] I think, it will be a very demanding task to avoid an outright confrontation of jurisdictions in this field of international co-operation. The European Court of Human Rights has not yet decided on the matter of just compensation for Caroline von Hannover who must have spent an enormous amount of money to get her case to the Court of Human Rights. Just compensation under Article 41 of the European Convention is the parallel sanction to the penalty payment under Article 228 of the EC Treaty which I mentioned in the beginning. Will Germany have to encounter a sanction for a wrongful decision

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[15] Application no. 59320/00, 24.6.2004; att http://www.coe.int.

[16] Bundesverfassungsgericht, 1 BvR 653/96, 15.12.1999; 1 BvR 1505/99, 1 BvR 768/98, all 4.4.2000; 1 BvR 150/98, 1 BvR 151/98, 1 BvR 2109/98, 1 BvR 2116/98, 1 BvR 2479/97, 1 BvR 158/98, 1 BvR 1213/97, 1 BvR 2080/98, all 13.4.2000; 1 BvR 758/97, 26.4.2001. All decisions at http://www.bundesverfassungsgericht.de.

[17] Cf. the interview with the president of the European Court of Human Rights, Luzius Wildhaber, in the German weekly newsmagazine Der Spiegel 47/2004 p. 50–54.

of its Constitutional Court – which seems to have its roots in unclear provisions on transfer of sovereignty and necessary, but not yet clearly defined constitutional requirements concerning the role of national courts and their counterparts on the level of the Council of Europe and the European Union?