

THE INTERACTION OF THE NATIONAL AND THE EUROPEAN LEGAL ORDER

WELCOMING SPEECH HELD AT THE OPENING OF THE CONFERENCE ORGANIZED TOGETHER WITH THE ROMANIAN MINISTRY OF EUROPEAN AFFAIRS (BUCHAREST, 27 APRIL 2012)

It is a great pleasure for me to welcome you to today's conference on behalf of the 'Rule of Law Program South East Europe of the Konrad Adenauer Foundation. Let me express my profound thanks to Mr Razvan Horatiu Radu for taking the initiative to organize this event and for inviting us to be a partner. We gladly cooperate with the Ministry of European Affairs which has an important role in this country.

Let me give you some information on the Konrad Adenauer Foundation in general and the Rule of Law Program in particular (...).

Today we have invited two experts to talk about "the interaction of the National and the European Legal Order – the role of the European Court of Justice" and the liability of Member States for the infringement of EU law", so I should refrain from talking about these topics, too.

But I would like to make a few points about the legal way in which Germany transferred national sovereign power to the EU thus also enabling EU to pass European legislation and also about a few problems that went hand in hand with it.

When the European Communities were established in the 1950s, the then Member States already created a separate self-sufficient body of law which would bind them, all future member states, their citizens and their courts. The Federal Republic of Germany simply applied Article 24 of the Basic Law: "The Federation may, by a law, transfer sovereign powers to an international organization". And the European Coal and Steel Community, the European Atomic Energy Community and the European Economic Community were exactly that.

Since then much progress has been achieved on the road to further European integration. A milestone was the Maastricht Treaty which came into force on 1st of November 1993, with which the European Union was founded comprising the renamed European Economic Community and the inter-governmental policy areas of foreign policy, military, criminal justice, and judicial cooperation. It also meant the third stage of the European Economic and Monetary Union with the objective to adopt the EURO as a currency.

Two things were clear in Germany at that time. Firstly, that such a union could hardly be considered just an international

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organization and thus that Article 24 of the Basic Law was no longer a suitable instrument to transfer power to such a legal entity and secondly, that the next historic task after German reunification would be further European integration.

So Article 23 of the German Basic Law which had opened the door to German unity was modified and now reads as follows: "With a view of establishing a united Europe the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of solidarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this basic law. To this end the Federation may transfer sovereign powers by law (...)".

Almost at the same time the Treaty of Maastricht was ratified by the German Bundestag, both decisions were challenged before the German Constitutional Court arguing it would mean both – I am exaggerating a bit- the end of democracy and the authority of the German Bundestag. The Constitutional Court rejected the claim but emphasized and I quote from one of the head notes: "The important factor is that the democratic foundations upon which the Union is based are extended concurrent with integration, and that a living democracy is maintained in the Member States while integrated proceeds" and that "The German Federal Parliament must retain functions and powers of substantial import." And it stressed that it was not willing to transfer too much of its own power to the European Court of Justice: "The German Federal Constitutional Court must examine the question whether or not legal instruments of European institutions and governmental entities may be considered

to remain within the limits of the sovereign rights accorded to them, or whether they may be considered to exceed those limits." And from another head note: "However, the Federal Constitutional Court exercises its jurisdiction regarding the applicability of derivative Community law in Germany in a "co-operative relationship" with the European Court of Justice."

The next milestone was the Treaty of Lisbon which entered into force on 1st December 2009 and which provides the Union with the legal framework and tools necessary to meet future challenges and to respond to citizens' demands, its core objectives being a more democratic and transparent Europe, a more efficient Europe, a Europe of rights and values, freedom, solidarity and security, and a Europe as an actor on the global stage.

It cannot be a surprise that the decision of the German Bundestag to ratify the treaty was once again challenged before the Constitutional Court. Once again the Constitutional Court rejected the claim but it also disappointed those who want further European integration. I quote from one of the head notes: "Article 23 of the Basic Law grants powers to take part in and develop a European Union designed as an association of sovereign states" and "European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that no sufficient space is left to the member states for the political formation of economic, cultural and living conditions."

And the Constitutional Court stresses its own competences also under the provisions of the Treaty of Lisbon: "The Federal Constitutional Court examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers

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accorded to them by way of conferral” and “furthermore the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected.”

However, in 2010, the German Constitutional Court has gone back one step in its “cat and mouse” game with the European Court of Justice. The European Court of Justice had declared some provisions of the German Law on Part-Time Working and Fixed-Term Contracts incompatible with the EU Anti-Discrimination Directive and thus void. The case was taken to the German Constitutional Court which sustained the decision of the European Court of Justice. In the reasoning of the Mangold decision you find some surprising sentences such as: “When reviewing acts of the European bodies and institutions, the Federal Constitutional Court must in principle adhere to the rulings of the European Court of Justice as providing a binding interpretation of Union law” or “The possibilities for Member States’ courts to grant protection of legitimate expectations are however pre-defined and limited by union law.”

This decision only affirms that the European Union has become a sovereign system of power. The constitutional legal nature of the European Union is still controversially debated, some argue “The Union is sui generis” others “The Union oscillates between a federation and a federative union” to give just two examples but hardly anyone will still call it an international organization.

Thank you very much for allowing me to make these few points. I now look forward to the following contributions.