THE EUROPEAN UNION'S CONSTITUTIONAL DEVELOPMENT: TOWARDS THE SOLIDARY INTEGRATION MODEL

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Joseph Weiler wrote that every polity has memorable 'constitutional moments' in the minds of its citizens.[2] These moments bring about change in the constitutional system, either directly, as in the abolition of the monarchy in Italy, or indirectly and symbolically, such as with the fall of the Berlin wall. Weiler goes on to analyse which moments can be said to be the 'constitutional moments' of the EU. Above all, he mentions the signing of the Maastricht Treaty which coincided with a revival in EU integration spirit.

This author contends that this approach is somewhat flawed as it portrays a double caricature – the focus on singular moments of change on the one hand and the history of EU integration as a struggle between intergovernmentalism and supranationalism on the other hand, while ignoring the day-to-day politics which bring about the gradual accretion of competence resulting from EU policy making.[3]

The classical debate on European integration centred upon the notions of federalism, neofunctionalism and intergovernmentalism. Federalism, as Spinelli wrote in 1972, was based on the idea that nation states had to be replaced as they could not guarantee the political and economic safety of their citizens.[4] Federalism describes a constitutional settlement whereby authority is dispersed into two or more levels of government.[5] It contradictorily

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[2] J.H.H. Weiler, *The Constitution of Europe: 'Do the new clothes have an emperor?' and other essays on European Integration* (Cambridge University Press, Cambridge 1999).

[3] Ben Rosamond, *Theories of European Integration* (The European Union Series, Palgrave MacMillan, Hampshire 2000) 106.

[4] Europedia, 'A Synopsis of Prominent Integration Theories' <http://europedia.moussis.eu/books/Book_2/2/1/1/01/?all=1> accessed 1 May 2010, citing Altiero Spinelli, 'The Growth of the European Movement since the Second World War', in M. Hodges (ed), *European Integration* (Penguin, Harmondsworth 1972).

[5] *Rosamond* (n 3), 24.

promotes the creation of larger continent-wide states to replace smaller nation-states which failed to promote peace. The logic fails as these larger states can lead to larger problems. Andrew Moravcsik argues that while the EU is hardly a nation-state, the Treaty of Rome is in itself a *de facto* federal constitution defining the separation of power between Brussels and the member states.[6]

Neofunctionalism as propounded by Ersnt Haas, is based on the idea that integration in regulatory, low politics areas will lead to further integration in related economic areas and more importantly, to a shift in citizen loyalty.[7] Although this approach has been integral to the study of European unity, it still proposes the introduction of mechanisms which would bypass national governments, since it operates on the presumption that an international society of states can adopt the internal procedural features of a nation-state.[8]

All of these theories nevertheless foresee the elimination of the sovereignty of member states,which EU citizens would be reluctant to accept.[9]

A. Verhoeven describes EU constitutionalisation as 'a court-led attempt to shift sovereignty, to cut the umbilical cord that links the EC treaties with international law' and thus move away from intergovernmentalism. This approach of the European Court of Justice (hereafter ECJ) clearly surfaced in the *Van Gend en Loos* judgment,[10] which case highlighted the ECJ's teleological approach:

The European Economic Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals.

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[6] Andrew Moravcsik, 'Despotism in Brussels: Misreading the European Union' [2001] Foreign Affairs May/June <http://www.foreignaffairs.com/articles/57040/andrew-moravcsik/despotism-in-brussels-misreading-the-european-union?page=2> accessed 8 May 2010.

[7] Anthony P. Giorgianni, 'Assessing the European Union's Prospects for Cohesion' (Master's Thesis, Naval Postgraduate School Monterrey California, 1995) <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA302833> accessed 7 May 2010.

[8] *Rosamond* (n 3), 50.

[9] *Giorgianni* (n 7).

[10] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 00001.

The court interpreted the preamble of the Treaty and established that its provisions could actually confer rights directly onto individuals. This has been described by Judge Pescatore and J. Steiner as 'a highly political ideal, drawn from the ECJ's perception of the nature and constitution of the Community as a Community of peoples as well as States'[11]. A similar expression of such political ideas was made in *Costa v. E.N.E.L.*[12].

In *Les Verts* [13], delivered in 1983, the ECJ ruled that the EEC is based on the rule of law inasmuch as none of its members may escape the courts' review jurisdiction for 'conformity with the basic constitutional charter, the Treaty.' The Court underlined how the Treaty has functions apposite to those of a constitution – defining powers between institutions horizontally and between the Union and the Members States vertically. The Court based its view on an interpretation of Articles 2 and 3 of the old EEC Treaty which set the objective of an economic Union, which Union requires the establishment of an autonomous legal order.

The *Les Verts* judgment refers to the existence of a community governed by the rule of law but not a political community, described by former Justice Koopmans as 'law without a state',[14] a view that was reiterated in Opinion 1/91 ECR 1991.[15] The Court blocked the creation of a European Economic Area judicial system in conditions which could not ensure the uniform application of EU law in the European Union. The court had acted similarly even before the *Les Verts* judgment in Opinion 1/76[16]. The ECJ's desire to safeguard this conception of the constitutional rule of law, even in the absence of a specific Treaty provision, may be seen in other cases including

[11] Pescatore P, 'The Doctrine of Direct Effect: An Infant Disease of Community Law' [1983] 8 ELRev 155, 158; see also Josephine Steiner, *Enforcing EC Law* (Blackstone Publishers, London 1995).

[12] Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 00585.

[13] Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 01339.

[14] Lindahl and van Roermund, 'Law Without a State? On Representing the Common Market' in Bankowski and Scott (eds), *The European Union and its Order: The Legal Theory of European Integration* (Blackwell Publishers, Oxford 2000).

[15] Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area of 14 December 1991 ECR I-06079.

[16] Opinion 1/76, Draft Agreement establishing a European laying-up fund for inland waterway vessels, of 26 April 1977, ECR 00741.

Zwartveld.[17]

The ECJ's approach has not gone unchallenged. On the contrary, it was radically challenged by the German Federal Constitutional Court in the *Maastricht Judgment*[18]. The German court stated that the EU is not a political order and that, furthermore, a constitutional limitation of power implies that the Union's powers represent a single sovereign entity: the sovereign people. Constitutionalism – limited government operating under the rule of law – presupposes the existence of a political community, which the EU is not. Secondly, the German Court noted that the extent of the powers of the EC depended on their conferment by national parliaments which do represent a sovereign people.

Doubts on the extent of constitutionalisation of the EU were also expressed by AG Lagrange in *Da Costa v. Shaake*. He stated that the Treaties may only prudently and in part be considered as constitutions, and that such analogies must not be overstretched. On a Community level, the Treaties may be considered as constitutional; however, internally each member state deals with the treaties in the same way it does other international agreements.[19] This opinion highlights the thought process which leads to the conclusion that European Constitutionalism is horizontal and not vertical. AG Lagrange seems to suggest that EU treaties function as international law, domestic law and constitutional law simultaneously. The nature of EU law will naturally indicate the extent of constitutionalism as it directly relates to the sovereignty of the member states.

The supremacy of EU law is an important question. Some measures are directly effective and override national law when there is a conflict. Such supremacy, however, is granted by domestic law and may be withdrawn. The ECJ has emphasised how directly effective community law prevails over internal law, a view which is not entirely accepted by the member states.

Another issue relates to whether EU law is a sub-category

[17] Michael Longo, 'The European Union's Search for a Constitutional Future' (2001) CERC Working Papers Series No. 3/2001 <http://www.cerc.unimelb.edu.au/publications/CERCWP032001.pdf> accessed 4 May 2010 citing C-2/88 *IMM zwartweld* [1990] ECR I-3365.

[18] *The Maastricht Judgment* (1993) 89 BVerfGE 155.

[19] Amaryllis Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International, The Hague 2002) citing C28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration* [1963] ECR 00031.

of, or is to be considered separate from International Law. Community law, it may be argued, is a sub-system of international law as it owes its continuing existence and validity to international treaties. Careful analysis of the wording of the EC treaty reveals that it is international in nature (being a treaty between states) unlike the United States Constitution which begins with the words 'We the people of the United States'. The European Parliament and the ECJ derive their powers from the treaties in the same way as national institutions derive their powers from the national constitution. Moreover, it is argued that the fact that a legal system is created by another legal system does not mean that it is not separate. This is in fact how some federations are formed.

Hartley states that three features distinguish Union law from international law: that all member states are bound to accept the jurisdiction of the ECJ; the jurisdiction of the ECJ to give rulings on community law upon references from national courts; and the fact that the Community may adopt directly effective legislation. The latter is a particular feature of the Council which may enact such legislation by Qualified Majority Voting. This means that the law is still enacted by an institution representing the states but the method does not require consensus as other international law instruments do.

In light of these features and the abovementioned ECJ judgments, it is difficult to deny that Community law is separate from international law.

In *Costa v. E.N.E.L.*, the court stated that by creating a community of unlimited duration, having its own institutions and legal personality 'stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields.'[20] However, this judgment highlights the confusion surrounding the concept of primacy of EU law. The judgment clearly declares the primacy of EU law, but is such primacy a matter of supremacy or a matter of recognition and loyalty?

Verhoeven argues that the court intended to ensure that the goals of the community could be achieved through uniform application of EU law reminding states of their commitment and loyalty to the system they themselves

[20] Ibid.

created.[21] This is in line with international law. Moreover, national law which conflicts with EU law is merely inoperative but not invalid. Invalidity may only be declared by national courts. Thus it is not a matter of the ECJ exercising authority over national courts, but the loyalty which the member states themselves have vowed.

In *Van Gend en Loos* the ECJ declared that treaty provisions could be directly effective. However, direct effect is not reserved to vertically integrated systems and may be found in international law. In fact, the conditions for direct effect are almost identical to those applied by a national court in determining whether international law is self-executing in states in which constitutions accept such effect.[22]

"Provisions in treaties and other international agreements are given effect as law in domestic courts of the United States only if they are 'self-executing' or if they have been implemented by an act having the effect of federal law…a self-executing treaty would prevail in a domestic court over a prior, inconsistent act of Congress." [23]

There has been a compromise of sovereignty in the sense that a member state may not act freely and national parliaments are restricted in their actions. Such restrictions are however brought about by their own actions. Although there is a legal union which is separate from that of the Member states, political sovereignty remains with national parliaments. This emerges clearly from the procedures for amending the Treaty. A member state will only be bound by a Treaty or a Treaty amendment if it ratifies it.[24] This confirms the existence of a separate legal system which is not independent and therefore not sovereign. National statutes give primacy to Community law over all national law and this rule holds until the national parliament expressly repeals such law.[25]

[21] Ibid.

[22] Ibid.

[23] Fredric L. Kirgis, 'Federal Agreements and US Law' (1997) American Society of International Law <http://www.asil.org/insigh10.cfm> accessed 5 May 2010.

[24] Trevor C. Hartley, *Constitutional Problems of the European Union* (Hart Publishing, Oxford 1999).

[25] Trevor C. Hartley, *The Foundations of European Community Law* (6th edn, Oxford University Press, Oxford 2007) citing Case C-213/89 *R* v *Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] ECR I-2433.

This is further illustrated by what the German *Bundesverfassungsgericht* stated in the *Maastricht* case regarding the concept of *kompetenz-kompetenz*[26]. A principal argument brought before the German Court was that Germany's ratification of the Treaty was contrary to the Basic Law principle of democracy, since competences of the German Parliament were passed on to the EU and thus were outside the control of the electorate. The Court disagreed, stating that the Community legal system had such competence because of the existence of German laws ratifying it. Any amendment would require the approval of the German Parliament. Thus, unlike national parliaments, the EU by itself could not grant itself further competence.[27]

A similar decision was the *Danish Maastricht Case*. The Danish constitution permits the conferral of power to an international organisation,however such conferral must be specified by statute. The EC cannot grant itself powers beyond this scope and, were it to attempt this, the Danish constitution would oblige the government to veto such a proposal.[28]

The primacy of EU law over national constitutions remains controversial since these constitutions themselves lay the foundations for EU legislation. Some national constitutional courts have retained that they have review jurisdiction.[29] Other courts however have accepted the primacy of EU law, as evidenced, for instance, in the Belgian judgment of *Fromagerie Franco-Suisse 'Le Ski'*, in which the Court stated that incorporation by statute was only required as a formality because a Treaty was effective as a Treaty and not as a statute[30]. This is similar to the French Courts' position as propounded in the leading case of *Société Vabre & Société Weigel*.[31]

[26] *Kompetenz-kompetenz* is the jurisdiction of a court to determine its own jurisdiction. This competence requires that a decision by such a court on its own jurisdiction followed by a decision on the substantive matter could not be challenged on grounds of jurisdiction.

[27] *Hartley* (n 23).

[28] *Hartley* (n 23).

[29] Elena Papageorgiou, 'The European Court Of Justice And The Supremacy Of EC Law"<http://www.law.gov.cy/Law/lawoffice.nsf/all/1C8623121CB2B3D2C2257442003257C5/$file/THE%20EUROPEAN%20COURT%20OF%20JUSTICE%20AND%20THE%20SUPREMACY%20OF%20EC%20LAW.doc> accessed 8 May 2010.

[30] 'The treaties which have created Community Law have instituted a new legal system in whose favour the Member States have restricted the exercise of their sovereign powers in the areas determined by those treaties.'

[31] *Hartley* (n 23).

In avoiding conflicts, the ECJ has incorporated national constitutional principles into EU law as in *Internationale Handelsgesellschaft*.[32] Secondly, it has allowed variations in the mode of application of EU law, such as in the *ERT* case[33]. It has however insisted that conflicting constitutional norms are no excuse for not adhering to Treaty obligations.[34]

This author propounds that it is thus sensible to conclude that there is no vertically integrated hierarchy - there is horizontal co-ordination to the extent that the well-defined forceful mechanisms ensuring the binding force of EU law may give the semblance of a vertical system. There is a voluntarily compromised sovereignty, which compromise may be withdrawn if there is no longer recognition of the EU legal system.

The logic that constitutionalism relies on a sovereign order providing a final arbiter for all issues in a vertical hierarchical manner, in this author's opinion, fails to portray the EU truthfully as it only gives a binary picture whereby either the EU or the member states are sovereign.

In order to understand this horizontal conceptualisation of EU constitutionalism, it would be pertinent to consider Hart's perspective of recognition as the source of law.[35] Hart argues that the validity of law relies on its recognition by its subjects. Hart's idea is that primary rules of obligation, which are rules accepted by all, must be supplemented by secondary rules in a modern civilised society in order to cater for the uncertainty which primary rules of obligation by themselves create. The secondary rules are not concerned with human behaviour themselves, but with the primary rules. The rule of recognition is a secondary rule which identifies the primary rules of obligation. Moreover, this rule unifies all the rules which are recognised by a society into a single identifiable set of rules.[36]

[32] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 01125.

[33] Case 260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-02925.

[34] *The Maastricht Judgement* (n 18).

[35] *The Maastricht Judgement* (n 18).

[36] Richard Tur (Senior Law Tutor at Oriel College, Oxford), Lecture Notes <http://users.ox.ac.uk/~lawf0013/Hart%20Lecture%205%202001.htm> accessed 10 May 2010.

Only in this way can one begin to understand how national law and EU law can be viewed as a unitary system. Both systems are unified by the recognition of their subjects. EU law and national law apply in the same territory and on the same subjects, which subjects recognise their validity. This system allows us to view the two systems in a horizontal relationship in which no constitutional system takes precedence over another, although some verticality remains necessary for the proper functioning of EU law.[37]

This provides for a pluralist view of the European Constitutional area as opposed to a monist or dualist view. The traditional monist and dualist theories portrayed a conflict of primacy between EU and national law. There is no supreme area, but the two legal systems are intertwined into a single network of rules, with division of competence depending on the area being regulated. The problem with such a multilevel constitutional system is that there is no final arbiter. Dworkin argues that an overarching set of guiding principles is necessary to properly integrate the two systems based on common traditions and thus common recognition.[38] Such a common set of principles cannot be imposed by the EU onto the member states (or vice-versa), but must develop through an agreement – by means of ongoing cooperation.

Perhaps this shift in theory towards pluralism explains the survival of neo-functionalism which views politics as being pluralist, consisting of a network of varying interests and groups.[39] However, it is not only functionalism which has survived. Some still see the possibility of a federal formation and view the Lisbon Treaty as a step in this direction. There is really no logical objection to the idea of a treaty establishing a 'social contract' forming a federation. There is, after all, a fusion of supranational and intergovernmental areas leading to a perceived loss of state sovereignty as well as the recognition of the Union's legal personality and the strengthening of the concept of EU citizenship.[40] Moreover, a federal state can take various forms and may be largely decentralised.[41] However,

[37] *The Maastricht Judgment* (n 17).

[38] Ibid.

[39] *Europedia* (n 4), 55.

[40] Paul P. Craig and Grainne De Burca, *EU Law: Text, Cases and Materials* (4th edn, Oxford University Press, New York 2008).

[41] Stanford Encyclopaedia of Philosophy – Federalism,

Verhoeven argues that there is no empirical basis for such a view in light of the resistance shown by citizens and national institutions alike to the building of a federal state; nor is there any backing for this view in the constitutional *acquis* of the Union or the case law of the ECJ.

It must be noted that although it would be counterproductive to overemphasise the importance of particular events, the rejection of the Constitutional Treaty definitely reflects the fears of European citizens who will not have their sovereignty compromised. The Lisbon Treaty has been ratified mainly because of the watering down of the primacy clause in the Constitutional Treaty.[42] The effect of such clause has been retained; however, the original wording did not do good to the horizontal and pluralist nature of EU constitutionalism. Conversely, the Lisbon Treaty offers a horizontal perspective, while providing the necessary mechanisms for the guiding principles recommended by Dworkin, by laying out clear procedures for the adoption of rules within appropriate competence areas.

As established above, the EU is better looked at as a horizontal and unitary system. Accordingly, it would be apt for EU constitutionalisation to follow a solidary model which promotes the Union moving forward as one, by means of active assistance to those states which are not in a position to accept a certain level of integration as they are unable to implement certain measures. The Union should be structured in such a manner as to allow for active participation of citizens, thus providing for clear levels of authority on the EU, national and regional levels. This, together with respect for national identities and promotion of cohesion, will go a long way towards achieving the deepening of consensus, thus minimising recourse to the 'national interest' defence and the blocking of integration and EU constitutionalisation.[43] Consequently, the development of the Union would no longer be seen as an upward devolution of power away from the sovereign citizen body but would elevate the citizenry in such a way that it would no longer need to counteract constitutionalisation in order to preserve its individual liberties and national identity, but would participate in the

<http://plato.stanford.edu/entries/federalism/> accessed 1 May 2010.

[42] 'The Constitution and law adopted by the institutions of the Union in exercising competences on it shall have primacy over the law of the Member States.'

[43] Peter G. Xuereb, 'Solidarity and Constitutionalism: Towards a Solidarity Model', [2002] 6 European Law 643-662.

integration process itself in a horizontal and deliberative manner.

The Lisbon Treaty has, in a way, moved the Union in this direction by giving more strength to the European Parliament (hereinafter 'EP'), which represents the citizens rather than the states. There is now a balance of power between the EP and the Council which reflects the balance between supranationalism and intergovernmentalism. Citizens are brought closer to decision-making by the increased role of national parliaments, the possibility of citizens proposing EU law, and public deliberations of the Council.

Nevertheless, there still remains the possibility of enhanced cooperation which, together with the derogations to the Treaty provisions by states such as Denmark, has resulted in a two-speed Europe – an *à la carte* menu of integration levels[44] which runs counter to the idea of a solidary union.

Such solidary integration could satisfy the German Basic Law qualification to further integration as propounded in the German *Lisbon Judgement*[45], which is relevant to all states. The principle of democracy requires that national parliaments retain their authority, as only they are truly representative of the citizens (since the EP is not proportionate to population size).[46]

Sovereignty can no longer be fused with the organisational order of the state but must be remanded to its rightful owners.[47] Sovereignty lies not with the EU, nor with the state, but belongs to the community – *Gemeinschaft* (people held together by common loyalties) and not *Gesellschaft*.[48]

[44] Walter Gerven, *The European Union: A Polity of States and Peoples* (Stanford University Press, Stanford 2005).

[45] *The Lisbon Judgment* (2009) BVerfG, 2 BvE 2/08.

[46] Michael Bothe, 'The Judgment of the German Federal Constitutional Court Regarding the Constitutionality of the Lisbon Treaty' (Istituto Affari Internazionali,0920) <http://www.iai.it/pdf/DocIAI/IAI0920.pdf> accessed 6 May 2010.

[47] *The Maastricht Judgment* (n 18).

[48] *Rosamond* (n 3), 43.