

**THE COMMUNITY INSTITUTIONS' EXERCISE, AND POSSIBLE EXCESS, OF POWERS: IS THERE A LIMIT TO THE BINDING FORCE UPON THE MEMBER STATES?\***

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**A. PERSONAL REMARK**

My first remark is directed to the fact that Lithuania is about to become a full-fledged Member of the European Union as of 1st of May, forthcoming<sup>1</sup>. The great majority of people in Austria and in the other Member States are looking forward to this very important date that marks the final return home of quite a number of States which have been, against their will, separated from where they rightfully belong to, namely to the family of free and democratic European nations. Thus, I would like to bid you a very cordial welcome!

**B. INTRODUCTORY REMARKS**

My second remark concerns my lecture of today. Its somewhat lengthy title may still leave some of you in the dark about what I shall be really driving at in my lecture. I might therefore tell you in advance that it is the German Constitutional Court (the *Bundesverfassungsgericht*) and its Maastricht decision which forms the background of what I shall try to convey to you.

This Maastricht decision was handed down by the *Bundesverfassungsgericht* in 1994<sup>2</sup>, and concerned – primarily – the question of whether the German Constitution (the *Bonner Grundgesetz*) permitted Germany to ratify the Maastricht Treaty, setting up the European Union, without amending, beforehand, this very Constitution.

The *Bundesverfassungsgericht* ruled that nothing in the Maastricht Treaty was incompatible with the *Grundgesetz*. This is gratefully acknowledged; since otherwise the project of a European Union might have foundered right in the beginning. But the *Bundesverfassungsgericht* said also that it was for the *Bundesverfassungsgericht* itself to determine, in a given case, whether the Union, through one of its organs, had, or had not,

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<sup>1</sup> I.e. 1 May 2004.

<sup>2</sup> BVerfG, *Maastricht*, 2 BvR 2134/92, 2 BvR 2159/92, BVerfGE 89, 155; also in: EuGRZ 1993, 438 et seqs.

transgressed the powers conferred upon it by (or on the basis of) the *Grundgesetz*<sup>1</sup>. And this is not gratefully acknowledged, because it runs counter the very idea of primacy of Union and/or Community law, and contains the seed of disintegration<sup>2</sup>.

For this reason, I shall try to show that the position taken by the *Bundesverfassungsgericht* is wholly untenable, both from the point of view of international and Community law and of domestic law.

### C. THE QUESTION OF PRIMACY

The relationship between the Law of the European Union, and of the European Community, respectively, on the one hand, and the law of Member States on the other, is still an object of dispute. It is doubtful whether article 10 of the Draft Treaty establishing a Constitution for Europe, once adopted, according to which „[t]he Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States“<sup>3</sup>, will make a difference, since the Constitution is to be interpreted – in this as in other respects – on the background of the present *acquis communautaire*<sup>4</sup>. And it is the very problem of possible limits of precedence of Community law under the present *acquis* that constitutes the bone of contention.

#### 1. The EC Treaty as an international treaty

Primacy of Community law results from the fact that it is international treaties which form the basis of the Community<sup>5</sup>. Now it is axiomatic that today all States profess the primacy of international law<sup>6</sup>. Based on international treaties, as, in particular, the EC Treaty, and therefore on international law<sup>7</sup> (regardless of how special the Community's legal order

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<sup>1</sup> The *Bundesverfassungsgericht's* Maastricht decision has been widely discussed, especially in Germany, where it was expressly welcomed by the Euro sceptics and bluntly rejected, not only by the Europhiles but also, by the Euro realists. Cf. CHRISTIAN TOMUSCHAT, Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts, in: *EuGRZ* 1993, 489 et seqs.; also: Wer hat höhere Hoheitsgewalt? in: *Humboldt Forum Recht* 1997, no 8. The discussion was fuelled by the ECJ judgments on matters of Member State liability, especially *Francovich et al.*, cases C-6/90 and C-9/90, Coll. 1991, I-5357, and *Brasserie du Pêcheur and Factortame*, cases C-46/93 and C-48/93, Coll. 1996, I-1029. For a critical view of the discussion, which cannot be reviewed here, cf. again CHRISTIAN TOMUSCHAT, Das Francovich-Urteil des EuGH – ein Lehrstück zum Europarecht, in: OLE DUE/MARCUS LUTTER/JÜRGEN SCHWARZE (ed.), *Festschrift for ULRICH EVERLING*, II, Baden-Baden 1995, 1585 et seqs.

<sup>2</sup> Unfortunately, the *Bundesverfassungsgericht* has by no means remained the only high national court to take that approach. Cf., e.g., and *mutatis mutandis*, the recent decision by the Danish Supreme Court in Hanne Norup Carlsen and others v. Prime Minister Poul Nyrup Rasmussen, judgment of 6 April 1998, 3 *CMLR* (1999), 854 et seqs. Cf. also, critically approaching the same problem from a different angle, TAKIS TRIDIMAS, Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in te Preliminary Procedure, 40 *CMLR* (2003), 9 et seqs.

<sup>3</sup> The second part of article 10 of the Draft Treaty establishing a Constitution for Europe contains the so-called principle of loyalty according to which „[...] Member States shall take all appropriate measures, general or particular, to ensure fulfillment of the obligations flowing from the Constitution or resulting from the Union Institutions' acts“.

<sup>4</sup> Cf. article IV-3 paragraph 2 of the Draft Treaty establishing a Constitution for Europe: „The case law of the Court of Justice of the European Communities shall be maintained as a source of interpretation of Union law“.

<sup>5</sup> Community law is based on the EC-Treaty, as amended by several successive treaties up to the Accession Treaty that will enlarge the European Union as of 1st May of this year.

<sup>6</sup> There exists an understanding that the common good of mankind – peace, freedom, and social welfare for all men – cannot be achieved without each State conforming to the international community and its legal order.

<sup>7</sup> Cf. judgment of the ECJ, *van Gend & Loos*, Rs 26/62, collection 1963, 25: „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 independently of the legislation of Member States, community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty but also by reason of

created by the Treaty otherwise might be<sup>1</sup>), Community law necessarily partakes of the primacy of international law.

## 2. The relationship between international treaties and domestic law

### The general rule in article 27 Vienna Convention on the Law of Treaties

Consequently, the relationship between Community law and Member State law, and possible conflicts between them, are governed by the principle contained in article 27 of the Vienna Convention on the Law of Treaties of 1969, namely that „[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty [...]“.

### The exception of article 46 Vienna Convention on the Law of Treaties

There would exist only one way to question primacy of Community law and the resulting precedence of directly applicable and directly (or immediately) effective norms of Community law. The Member State doing so would have to show that the EC-Treaty has not been validly concluded. However, so far such an allegation has not been made by any Member State. And since the EC Treaty has been constantly applied by all Member States, all Member States would be stopped from invoking its invalidity today. Even if the treaty had originally been invalid for one reason or another – because, for example, the consent of one of the parties had been defective under article 46 of the Vienna Convention<sup>2</sup> –, this defect would have been healed long since by subsequent performance of the Treaty<sup>3</sup>.

Thus, no Member State of the European Community is in a position to deny the primacy of Community law and its precedence over Member State law on the ground that the EC Treaty is not a valid treaty.

### Reservations

#### (1) Express reservations

However, those who, at least in part, question precedence of Community law do anyway not invoke the invalidity of the EC Treaty; they only want to interpret it from the point of view of their particular Member State law. They do so by arguing that the Member States, or at least some of them, have reserved the right to deny precedence to Community law, albeit only under certain special circumstances<sup>4</sup>. However, none of the Member States has ever made an express reservation to this effect.

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obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the community”.

<sup>1</sup> For the notion of *sui iuris* character, judgment of the ECJ, *van Gend & Loos*, Rs 26/62, collection 1963, 1: „[...] The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the community, implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the treaty which refers not only to governments but to peoples [...]“; see also Judgment of the ECJ, *Costa v ENEL*, Rs 6/64, collection 1964, 1251, no 8: „[...] It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question [...]“.

<sup>2</sup> Cf. article 46, paragraph 1 of the Vienna Convention on the law of treaties: „A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance“.

<sup>3</sup> In this as in other contexts, international law recognizes a *sanatio* through practice.

<sup>4</sup> Discussions have always centered around decisions of the German *Bundesverfassungsgericht*. Cf. BVerfG, *Solange I*, 2 BvL 52/71, BVerfGE 37, 271; BVerfG, *Solange II*, 2 Bv 197/83, BVerfGE 73, 339; BVerfG, *Kloppenburger*, 2 BvR 687/85, BVerfGE 75, 223; BVerfG, *Maastricht*, 2 BvR 2134/92 and 2 BvR 2159/92, BVerfGE 89, 155, in: EuGRZ 1993, 429 et seqs; however a similar attitude is also to be found with the German *Bundesfinanzhof* and special courts of other Member States, in particular the French Conseil d'Etat and the Italian Corte Costituzionale; cf. BFH, *Kloppenburger II* – VR 123/84, EuR 1985, 191; *FG Rheinland-Pfalz*, EuZW 1995, 588; cf. *Cohn-Bendit* decision of the Conseil d'Etat, 22. December 1978, in: Revue trimestrielle du droit européen 15, 1979, 157 et seqs, or also in: EuGRZ 1979, 251 et seqs; see also PETER FISCHER/HERIBERT FRANZ KÖCK/MARGIT MARIA KAROLLUS, *Europarecht*, 4<sup>th</sup> edition, Vienna 2002, no 675 et seqs.

## **(2) Implied reservations**

Therefore, only an implied reservation could be invoked. Such implied reservation would have to be based on the assumption that no Member State, when ratifying, or acceding to the EC Treaty, could have given up sovereign rights which were to be regarded as unalienable from the point of view of his own legal system, or, more precisely, of his constitutional law.

Yet, international law does not know of implied reservations<sup>1</sup>; and even if it would do so, such reservations would have to be accepted by the other parties to a treaty in order to bring about the treaty's modification<sup>2</sup>. Therefore, it would not be sufficient for a State to allege an implied reservation on its part; a State doing so would also have to prove that the reservation was, again at least implicitly, accepted. Given the fact that such a network of implied reservations and their implied acceptance has never been invoked up to the present day, each Member State would again be stopped<sup>3</sup> from doing so now.

## **(3) Necessary reservation: the integration resistant core**

This brings the argument down to what we may call necessary reservations. They would be necessary in the sense that no State, even if joining a supranational organisation like the European Community, could give up certain basic principles.

It is also these principles that the discussion concerning a so-called integration-resistant constitutional core is all about<sup>4</sup>.

However, such an integration-resistant constitutional core can only have a very general character, because it has to be relevant for all Member States. In fact, there is only one source of reference for principles basic to all Member States, a set of principles proclaimed by the Member States themselves to constitute the fundament of the Union's, and of the Community's legal order as well as the fundament of their own legal orders. It is that set of principles that is contained in article 6, paragraph 1 EU, namely democracy, liberty, the rule of law, and the respect for human rights<sup>5</sup>. In contrast to these very general principles, mere particularities of this or that Member State's constitutional order could not be reckoned among the principles that would be comprised by (what we called) necessary reservations, because they would lack the general character necessary.

## **(4) Minimum conditions for implied reservations**

### **(a) In general**

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<sup>1</sup> Cf. article 23, paragraph 1 of the Vienna Convention on the Law of Treaties, according to which a reservation has to be made in written form: „A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty“.

<sup>2</sup> Cf. article 20, paragraph 1 of the Vienna Convention on the Law of Treaties: „A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides“. Cf. also paragraph 2: „When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties“. Cf. also article 48 Treaty on European Union (EU): „[...] The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements“.

<sup>3</sup> Cf. PETER FISCHER/HERIBERT FRANZ KÖCK/MARGIT MARIA KAROLLUS, *Europarecht*, 4<sup>th</sup> edition, Vienna 2002, no 676.

<sup>4</sup> For the question of integration-resistant constitutional core THEO ÖHLINGER, EU-BeitrittsBVG, in: KARL KORINEK/MICHAEL HOLOUBEK (edit.), *Österreichisches Bundesverfassungsrecht*, (1999), no 19 et seqs and 54; cf. also RUDOLF STREINZ, *Gemeinschaftsrecht bricht nationales Recht*, in: *Europas universale rechtsordnungspolitische Aufgabe im Recht des dritten Jahrtausends*, Festschrift for ALFRED SÖLLNER, Munich 2000, 1168 et seqs.

<sup>5</sup> Article 6, paragraph 1 Treaty on European Union (EU) provides: „[...] The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States [...] The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law [...] The Union shall respect the national identities of its Member States [...] The Union shall provide itself with the means necessary to attain its objectives and carry through its policies“.

A last word in connection with implied reservations. In addition to what I have already stated, such reservations, if not limited to the fundamental principles just mentioned, would have to be manifest or obvious. Since implied reservations form a special aspect only of the general problem to what extent national law must be taken into consideration in the course of treaty-making, and what effect the disregard for national law in this context could have on the integral applicability of a treaty, the criteria for such obviousness would be the very criteria laid down in article 46 of the Vienna Convention<sup>1</sup>. If a possible conflict between Community law and Member State law was not manifest at the time when the EC Treaty was concluded, an implied reservation, and even more its (albeit also only implied) acceptance is ruled out right from the beginning.

(b) As regards the EC Treaty

What has been said so far with regard to conflicts between Community laws and Member State law applies, *a fortiori*, to those conflicts between Community law and Member State law the (alleged) existence of which is discovered only later, whether by national doctrine or by national courts. Such new discoveries can never be the basis for exceptions to the applicability of Community law. Because to assume that each treaty contains an implicit reservation to the effect that the binding force of the treaty would cease, in whole or in part, and the treaty's integral applicability would come to an end if the national interpretation of domestic law should undergo a change, is incompatible with one of the most fundamental principles of international law, the principle *pacta sunt servanda*<sup>2</sup>.

### 3. Primacy of EC law established

Primacy of Community law, and its precedence over Member State law as foreseen by Community law itself, should, therefore, be regarded as axiomatic as the primacy of international law.

## D. AUTHORITATIVE INTERPRETATION OF COMMUNITY LAW

However, what if there arises a dispute, between the Community and a Member State, over the question of what is the applicable Community law? Such a difference of opinion may arise, and derive its importance, from the fact that the application of Community law, especially in relation to the so-called citizens of the single market (in German: *Marktbürger*), is left, to a great extent at least, to the organs of the Member States<sup>3</sup>.

### 1. The role of the European Court of Justice

Of course, for such pre-programmed conflicts, Community law itself offers a solution, namely the exclusive competence of the European Court of Justice (ECJ) to authoritatively interpret Community law, either in proceedings for a preliminary ruling under article 220 EC<sup>4</sup> or in proceedings under articles 226 through 228 EC instituted for violation of the Treaty<sup>5</sup>.

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<sup>1</sup> Cf. *supra*, note 53.

<sup>2</sup> Cf. article 26 of the Vienna Convention on the Law of Treaties: „Every treaty in force is binding upon the parties to it and must be performed by them in good faith“.

<sup>3</sup> Cf. PETER FISCHER/HERIBERT FRANZ KÖCK/MARGIT MARIA KAROLLUS, *Europarecht*, 4<sup>th</sup> edition, Vienna 2002, no 817 et seqs, 862 et seqs; see also THEO ÖHLINGER/MICHAEL POTACS, *Gemeinschaftsrecht und staatliches Recht - Die Anwendung des Europarechts im innerstaatlichen Bereich*, 2<sup>nd</sup> edition, Vienna 2001, 24 et seqs.

<sup>4</sup> Cf. article 220 Treaty establishing the European Community: „The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed [...]“.

<sup>5</sup> Cf. article 228, paragraph 1 Treaty establishing the European Community: „If the Court of Justice finds that a Member State has failed to fulfill an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice [...]“.

This system of conflict resolution applies not only in connection with primary Community law, in particular with the EC Treaty, but also in connection with secondary Community law, i.e. those norms that are created by the Community's legislative organs<sup>1</sup>. In this latter context, Community law itself takes into account the possibility that such a norm may suffer from so serious a defect as to cause its nullity<sup>2</sup>. Yet, Community law does not subject the question of nullity of one of its norms to the judgment of the Member States; rather, it reserves this judgment to a Community organ, namely again the ECJ<sup>3</sup>.

## 2. The applicable principles

### a) The principle of effectiveness

The approach taken by Community law for the resolution of conflicts with Member States over its own correct interpretation and application fulfils the requirement of effectiveness, a principle that exists not only with regard to the European Community and its law but has always formed part of traditional international law and, more specifically, the law of international organisations. (The recognition of *implied powers* of international organisation is the best expression of this principle<sup>4</sup>.) No international organisation could carry out its function if each Member State were entitled to ignore its obligations under the constituent treaty or under the decisions of the organisation's organs by asserting that the law of the organisation, if only interpreted correctly, would support its (the Member State's) view. And any obligation deriving from an international treaty would be worthless if each of the contracting parties were entitled to ignore it unilaterally by claiming that – under a correctly interpreted treaty – the obligation does actually not exist<sup>5</sup>.

### b) The principle of peaceful settlement of international disputes

In addition to this principle of effectiveness, it is the principle of peaceful settlement of international disputes<sup>6</sup> that has a bearing on our problem. Even for those international legal relations where dispute resolution has not yet risen to the elevated level of compulsory arbitration or adjudication, there still exists an obligation for the States concerned to settle an eventual dispute through those other means for the peaceful settlement of international disputes which are provided for by international law on a less highly organised level; means that are listed in article 33, paragraph 1 of the United Nations Charter<sup>7</sup>. Here, however, the

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<sup>1</sup> Cf. PETER FISCHER/HERIBERT FRANZ KÖCK/MARGIT MARIA KAROLLUS, *Europarecht*, 4<sup>th</sup> edition, Vienna 2002, no 815 et seqs, 852 et seqs; see also THEO ÖHLINGER/MICHAEL POTACS, *Gemeinschaftsrecht und staatliches Recht – Die Anwendung des Europarechts im innerstaatlichen Bereich*, 69 et seqs.

<sup>2</sup> Cf. article 230 Treaty establishing the European Community: „[...]It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers [...]“.

<sup>3</sup> Cf. article 230 Treaty establishing the European Community: „The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties [...]“; cf. also art 231 Treaty establishing the European Community: „If the action is well founded, the Court of Justice shall declare the act concerned to be void [...]“.

<sup>4</sup> For the notion and field of application of *implied powers*, cf. the Advisory Opinion by the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1948/49, 174 ff; see also PETER FISCHER/HERIBERT FRANZ KÖCK/MARGIT MARIA KAROLLUS, *Europarecht*, 4<sup>th</sup> edition, Vienna 2002, no 728.

<sup>5</sup> For this reason article 65, paragraph 1 of the Vienna Convention on the Law of Treaties provides that „[a] party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefore“.

<sup>6</sup> Cf. PETER FISCHER/HERIBERT FRANZ KÖCK, *Allgemeines Völkerrecht*, 6<sup>th</sup> edition, Vienna 2004, no 940 et seqs.

<sup>7</sup> „The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice“.

resolution of the dispute remains dependent on the good will of the parties. Where, however, the States concerned have agreed in advance to submit a certain dispute or category of disputes to arbitration or adjudication, the final outcome does not depend on their respective position anymore but rests solely with the court or arbitral tribunal.

### **c) The principle of comprehensive legal protection**

In the framework of Community law, Member States have opted for a comprehensive legal protection (*Rechtsschutz*) on the basis of a compulsory jurisdiction of the ECJ<sup>1</sup>. Such comprehensive legal protection is of course called for by the principle of the rule of law<sup>2</sup> as proclaimed in article 6, paragraph 1 of the EU-Treaty. Differences of opinion concerning the interpretation and application of primary Community law, and – as regards secondary Community law – also concerning its validity cannot ultimately be settled by the Member States but only by the European Court of Justice.

### **d) The model of article 36, paragraph 2 of the ICJ Statute**

Yet, the power of the ECJ to interpret primary and secondary Community law and, in the case of the latter, also to decide on its validity, does not constitute a complete novelty, something unheard of so far, something that is completely inappropriate for a court in relation to States. On the contrary, it is in international law already that such power is regarded as deriving from the very nature of an international court. Suffice it to refer to article 36, paragraph 2 Statute of the International Court of Justice (ICJ), which speaks of „all legal disputes concerning a) the interpretation of a treaty; b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; d) the nature and extent of the reparation to be made for the breach of an international obligation“. Not even the argument, the dispute were political rather than legal, is capable of excluding international adjudication; this has been made abundantly clear by the ICJ in its Advisory Opinion concerning *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*<sup>3</sup> where the Court rejected the idea political considerations that were allegedly involved could exclude the Court's competence for giving an Opinion since the matter concerned interpretation of article 4 paragraph 1 of the UN Charter, and the interpretation of a treaty was a regular judicial function<sup>4</sup>.

## **3. Power to define powers (Kompetenz-Kompetenz)**

### **a) In international arbitration and adjudication**

It is the same principle of effectiveness which demands that each international organ or institution is competent to define its own powers, unless the competence is expressly reserved to a particular organ within the same system<sup>5</sup>. Again, this has been clearly established by the International Court of Justice in its Advisory Opinion concerning *Certain Expenses of the United Nations*<sup>6</sup>, where the Court stated that each organ „[...] must

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<sup>1</sup> Cf. STEVE PEERS, Who's judging the Watchmen? The Judicial System of the „Area of Freedom, Security and Justice“, in: 18 *YEL* 1998, 337 et seqs; see also CATHERINE TURNER/RODOLPHE MUNOZ, Revising the Judicial Architecture of the European Union, in: 19 *YEL* 1999/2000, 1 et seqs.

<sup>2</sup> Cf. article 6, paragraph 1 Treaty on the European Union: „The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States“. See also ROBERT WALTER/HEINZ MAYER, *Grundriß des österreichischen Bundesverfassungsrechts*, 9<sup>th</sup> edition, Vienna 2000, no 165 et seqs.

<sup>3</sup> Cf. ICJ Reports 1947/48, 47 et seqs.

<sup>4</sup> „Nowhere is any provision to be found forbidding the Court, the principal judicial organ of the United Nations, to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.“ *Ibid*, 61.

<sup>5</sup> In contrast to the United Nations system, where the ICJ has not been given the power to define or describe the power of the organs of the United Nations, it is the ECJ that was vested with such a power with respect to all organs of the EC. This appears clearly from article 231 EC where acts emanating from an incompetent organ are null and void, this nullity to be established by the ECJ in any proceedings before it where the question of nullity arises. Cf. above all article 230 EC, 234 EC, 241 EC.

<sup>6</sup> ICJ Reports 1962, 151 et seqs.

determine its own jurisdiction [...]“<sup>1</sup>. This principle is of special importance for international courts and arbitral tribunals; otherwise, each party to an international dispute could repudiate the jurisdiction of any such court or tribunal to which it had previously submitted, by arguing in the case at hand that it was not among that category of cases for which the submission was intended<sup>1</sup>.

#### **b) In the European Community**

It is such in conformity with a generally recognized principle of international law that the European Court of Justice exercises the power of not only interpreting Community law with binding force but also of determining, in doing so, what is to be regarded interpretation of Community law (in contrast to its progressive development)<sup>2</sup>. Since Community law vests, in the ECJ, the central and supreme judiciary function, it is neither for another organ of the Community nor for any Member State to disregard the legal view adopted by the Court, irrespective of whether this view regards a comparatively minor question of detail or a principle of fundamental importance.

### **E. EXCESS OF POWERS**

#### **1. Divergent views**

##### **a) The view of the German *Bundesverfassungsgericht***

Of course, nothing I have said so far can exclude the possibility that international organs and institutions may, from time to time, transgress the limits of their powers. Such transgression need not necessarily consist only in exceeding the legal basis of their own actions; a too wide interpretation of powers by the judicial organ of an international organisation – be it the powers of the judicial organ itself or the powers of any other organ of the organisation – may also be regarded an excess of powers, if only in a broader meaning of the term.

It is this very broader meaning of excess of powers that is at the basis of the decision of the German Federal Constitutional Court (*Bundesverfassungsgericht*) in the case concerning the Maastricht Treaty<sup>3</sup>. There, the *Bundesverfassungsgericht* said – condensed in paraphrase<sup>4</sup> – that „[t]he European Union and its institutions, such as the Council, the Commission, the Parliament, and the Court of Justice, may exercise only those powers expressly transferred to them by the *Bundestag*. Otherwise they act *ultra vires*. Not the European Court of Justice but the German Federal Constitutional Court will ultimately decide which powers the *Bundestag* has transferred [...]“<sup>5</sup>.

##### **b) The position of international law as to international organs in general**

Now, the question of how to deal with an excess of power of an international organ, including international courts and tribunals, comes up also in international law in connection

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<sup>1</sup> This appears clearly from – *inter alia* – the judgment of the ICJ in the case concerning *Nicaragua v USA*, ICJ Reports 1984, 390 et seqs; cf. also the judgment of the ICJ in the case concerning the *Corfu Channel*, ICJ Reports 1949, 4 et seqs.

<sup>2</sup> Cf. in particular, the following cases: ECJ, *Germany, France, Netherlands, Denmark, Great Britain/Commission*, collection 1987, 3203, no 28; ECJ, *Francovich*, Rs C 6 und 9/90, collection 1991, I-5357; ECJ, *Brasserie du pêcheur*, Rs C-46/93 and C-48/93, collection 1996, I-1029; ECJ, *Köbler*, Rs C-224/01, collection 2003.

<sup>3</sup> See above, note 44, also above, note 83.

<sup>4</sup> Cf. JOACHIM WIELAND, *Germany in the European Union – The Maastricht Decision of the Bundesverfassungsgericht*, <http://www.ejil.org/journal/Vol5/No2/art6.html>, as of march 2004, 9.

<sup>5</sup> For the notion of *ultra vires* acts see MEINHARD SCHRÖDER, *Das Bundesverfassungsgericht als Hüter des Staates im Prozeß der europäischen Integration – Bemerkungen zum Maastricht-Urteil*, in: DVBl 1994, 316 et seqs.



with international organisations and institutions<sup>1</sup>. For an answer to this question, the case law of the International Court of Justice offers a number of clues.

The Advisory Opinion concerning *Reparations for Injuries Suffered in the Service of the United Nations*<sup>2</sup> can serve as a starting point. There, the ICJ has recognized that international organisations possess, apart from the powers expressly conferred upon them, also all those powers that are necessary for attaining their object and purpose. These *implied powers*<sup>3</sup> have the same weight as the express powers. And since international organs, as States, act through their organs, the powers of an organisation are at the same time also the powers of its organs.

We have already seen before that the principle of effectiveness gives, to any of the organs of an international organisation, the power of determining its own competence, unless this power is expressly reserved to a particular organ<sup>4</sup>. If an organ should exceed its powers, such excess is, according to the International Court of Justice, already calculated with by international law, such a calculation being required by the principle of effectiveness. The ICJ believes that this approach is not restricted to international law but is found in domestic law as well: „[...] Both national and international law contemplate cases in which the body corporate or politic may be bound [...] by an *ultra vires* act of an agent [...]“<sup>5</sup>. Member States are therefore bound by the decisions of an international organ even if the organ should have exceeded its powers.

### **c) The position of international law as to international courts and tribunals**

As regards, in particular, the decisions by international courts and tribunals, it appears from the case law of the International Court of Justice that in its opinion the problem of a possible excess of powers does not even arise here. It follows from the very nature of a court whose decisions are final in as much as there lies no appeal to another international body that the court possesses the power to give a final answer to the question of its own powers, including the power of determining the powers of other international organs<sup>6</sup>. This is only a specific aspect of the general principle that international courts and tribunals decide on their own competence<sup>7</sup>.

Thus, the power exercised by the ECJ to determine the powers of the European Community and its organs, including its own, a right repeatedly invoked by the Court<sup>8</sup>, is nothing exceptional or even outrageous. Rather, it fits into the general picture of international adjudication.

## **2. Excess of powers and the principle of effectiveness**

### **a) The general rule**

To sum up this point: The principle of effectiveness requires, in the field of international law and international organisations in general and in the field of Community law in particular,

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<sup>1</sup> According to the more exact English terminology, „international institutions“ is a notion which covers international organisations through which Member States carry out matters of common interest as well as international courts and tribunals and other conciliation commissions etc. that are charged with the peaceful settlement of international disputes on so far as the latter group, according to German terminology is sometimes called „international institutions“, we have to distinguish between the notion of „international institutions“ *stricto sensu* and *largo sensu*.

<sup>2</sup> ICJ Reports 1949, 174 et seqs.

<sup>3</sup> Cf. *supra* note 69.

<sup>4</sup> Cf. again the Advisory Opinion concerning *Certain Expenses of the United Nations*, *supra* note 78.

<sup>5</sup> Cf. *ibid.*, 168 et seqs.

<sup>6</sup> Cf. PETER FISCHER/HERIBERT FRANZ KÖCK/MARGIT MARIA KAROLLUS, *Europarecht*, 4<sup>th</sup> edition, Vienna 2002, no 730 et seqs, 1364 et seqs.

<sup>7</sup> Cf. again judgment of the ECJ, *Corfu Channel*, *supra* note 79.

<sup>8</sup> Cf. ECJ, *European Parliament v. Council*, Rs C-70/88, collection 1990, I-2041, no 16-27; ECJ, *Italy v. Council*, Rs 166/78, collection 1979, 2575 et seqs; ECJ, *Salamander AG v Council and European Parliament*, Rs T-172/98, T-175/98 until T-177/98, collection 2000, II-2487; ECJ, *Foto-Frost v Hauptzollamt Lübeck-Ost*, Rs 314/85, collection 1987, 4199.

acceptance of the fact that international organs and institutions, also and especially international courts and tribunals, may sometimes exceed their powers. If States want the international organisations and institutions set up by them to be effective, more particularly: if the Member States of the European Community want this Community to be effective – and such an intention must be imputed to them by necessity –, they cannot, at the same time, reserve to themselves the right to subject the decisions of these organs and institutions (including courts and tribunals) to their own individual judgment and to make the binding force of these decisions dependent on the outcome of this their judgment. In other words: The obligation to accept and implement these decisions (if there lies no appeal against them within the institutional system concerned) applies also to decisions which, in the eyes of one or the other Member State, seem to be in excess of the organ's, court's, or tribunal's powers<sup>1</sup>. A review of these decisions from without the system, by the Member States and their organs, courts, and tribunals is principally excluded.

### **b) The exception to the general rule**

Now there remains a very important question. Are there no limits whatsoever to the principle of effectiveness of international organisations in general and of the European Community in particular, with the consequence of an exclusively system-immanent review of the decisions of their organs and, more particularly, of the decisions of the European Court of Justice? And is there no competence left, in this regard, to the Member States and their (supreme) courts?

#### **(1) Effectiveness and legal certainty**

In order to answer this question it is useful to have recourse to the principle of legal certainty (*Rechtssicherheit*). In fact, the principle of effectiveness is closely related to the principle of legal certainty; for once the organ against the decisions of which there lies no appeal (an organ called in German legal terminology a *Grenzorgan*) has rendered its decision, what is the law is finally established.

Now, in his writings before the Second World War, the renowned German jurist *Gustav Radbruch* regarded legal certainty as the only but also the sufficient ground for the legitimacy of any legal order, independently from its (otherwise possibly low) quality, i.e. whether it worked justice or injustice<sup>2</sup>. However, *Radbruch's* experience with the national-socialist system and its deviations from certain basic notions of justice forced him, after the Second World War, to recognize that there may exist, in a positive legal order, norms which so blatantly violate fundamental human rights that the value of legal certainty is not sufficient to justify such outrages<sup>3</sup>. Such injustice disguised as law cannot claim binding force; in its regard resistance is permitted, even called for<sup>4</sup>.

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<sup>1</sup> This principle applies irrespective of the possibility that all Member States modify the EC Treaty and thereby create a new legal situation. Whether this might have an *ex tunc* effect for cases already finally decided by the ECJ appears to be doubtful; confer in this connection the advisory opinion of the ICJ on *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports 1954, 47 et seqs, according to which this might violate the general principle of law of *res iudicata*. For the present purpose however, this problem is not of interest.

<sup>2</sup> „[...] Rechtssicherheit geht vor Gerechtigkeit. Das Recht sei zwar Gemeinschaftsregelung im Dienste der Gerechtigkeit, da es zum entfernten Zweck die Gerechtigkeit habe. Der nähere und unmittelbare Zweck des Rechts sei aber die Rechtssicherheit [...]“, in: GUSTAV RADBRUCH, *Rechtsphilosophie*, 1956, 336; see also GUSTAV RADBRUCH, *Grundzüge der Rechtsphilosophie*, 1<sup>st</sup> edition, 1914, 39 et seqs; cf. also ALFRED VERDROSS, *Abendländische Rechtsphilosophie*, 2<sup>nd</sup> edition, Vienna 1963, 217.

<sup>3</sup> „[...] Wenn Gesetze den Willen zur Gerechtigkeit bewusst verleugnen, zum Beispiel Menschenrechte willkürlich gewähren oder versagen, dann fehlt diesen Gesetzen die Geltung...dann müssen auch Juristen den Mut finden, ihnen den Rechtscharakter abzusprechen[...]“, in: *ibid.*

<sup>4</sup> „[...] Es kann Gesetze mit einem solchen Maß von Ungerechtigkeit und Gemeinschaftlichkeit geben, dass ihnen die Geltung, ja der Rechtscharakter abgesprochen werden muss...es gibt also Rechtsgrundsätze, die stärker sind als jede rechtliche Satzung, so dass ein Gesetz, das ihnen widerspricht, der Geltung bar ist [...]“, in: *ibid.*

## (2) Legal certainty and justice

Considerations of this kind have not remained in theory only; they have also gained practical importance, especially in Germany where the awareness of the possibility that law may be perverted had been increased in the course of its recent history. In Germany it is positive law itself that entitles the citizen to resist against positive law that violates fundamental aspects of justice<sup>1</sup>. Moreover, not only does there exist a right of the citizen to invoke justice above the law; the taking into account of that justice is also a duty for the judge who is instructed, by article 20, paragraph 3 of the German Constitution (*Bonner Grundgesetz*) to decide „according to law and justice“<sup>2</sup>. It is widely recognized that justice is not meant to serve as a lock-step in the case of a *lacuna* in positive law only but that it may also be invoked for the purpose of disregarding the law where it clearly appears to work injustice<sup>3</sup>.

## (3) Effectiveness and justice

If these considerations are applied to the problem of an excess of power by an international organ or institution and more especially by the European Court of Justice, the limitations to the principle of effectiveness of international organisations in general, and the European Community in particular, take shape. The binding force of those of their decisions which have to be regarded an excess of power ends where these decisions have to be regarded as gravely unjust. Each Member State and its organs is justified – under (*mutatis mutandis*) the same conditions for which the German Constitution has enshrined a right to resistance – to disregard them.

Now, what about a standard that can guide us? In the framework of Community law, the applicable standard might be found in those principles which the European Union has proclaimed to constitute the basis of its own legal order as well as that of the Member States. These principles are, as mentioned, laid down in article 6, paragraph 1 of the EU Treaty and comprise democracy, freedom, the rule of law and the respect for human rights<sup>4</sup>. Each of these principles has to be interpreted on the line of a good European average, a standard that has also been accepted by the German *Bundesverfassungsgericht* in its decision known as *Solange II*<sup>5</sup> and in its follow-up case law to this decision<sup>6</sup>.

## F. EFFECTIVENESS, EXCESS OF POWERS, AND MEMBER STATES

Everything we have said so far does not remain on the Community law level only; it has also consequences for Member State law.

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<sup>1</sup> Cf. article 1, paragraph 1 Bonner Grundgesetz: „Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.“; cf. also article 1, paragraph 3 Bonner Grundgesetz: „Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht“. Furthermore, article 1, paragraph 2 Bonner Grundgesetz: „Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt“. See also HERIBERT FRANZ KÖCK, *Recht in der pluralistischen Gesellschaft, Grundkurs über zentrale Fragen zu Recht und Staat*, Vienna 1998, 68.

<sup>2</sup> Cf. article 20 paragraph 3 Bonner Grundgesetz: „Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden“. Cf. article 97 paragraph 1 Bonner Grundgesetz: „Die Richter sind unabhängig und nur dem Gesetze unterworfen“. See also HERIBERT FRANZ KÖCK, *Recht in der pluralistischen Gesellschaft, Grundkurs über zentrale Fragen zu Recht und Staat*, Vienna 1998, 172.

<sup>3</sup> Cf. THEODOR MAUNZ/REINHOLD ZIPPELIUS, *Deutsches Staatsrecht*, 26th edition, Munich 1985, 87 et seq, 324 et seqs; see also KLAUS STERN, *Das Staatsrecht der Bundesrepublik Deutschland, Band I, Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung*, Munich 1977, 628 et seqs.

<sup>4</sup> Cf. *ibid.*

<sup>5</sup> Cf. BVerfG, *Solange II*, 2 Bv 197/83, BVerfGE 73, 339 et seqs.

<sup>6</sup> Cf. BVerfG, *Kloppenburg*, 2 BvR 687/85, BVerfGE 75, 223 et seqs; BVerfG, *Maastricht*, 2 BvR 2134/92 und 2 BvR 2159/92, BVerfGE 89, 155; in: EuGRZ 1993, 429 et seqs.

## 1. The principle of community law-conform interpretation

As we know, Member State law is to be interpreted in conformity with international law<sup>1</sup> and Community law<sup>2</sup>. Therefore, we have to assume that Member State law itself recognizes, with regard to the relationship between itself and Community law, the principle of effectiveness of the European Community, with all the consequences deriving from this principle for Member State law, especially the binding force of decisions rendered by the European Court of Justice even if they may appear to be in excess of the Court's powers.

## 2. Community law-conform interpretation and excess of powers

Because of the principle of the Community-conform interpretation of Member State law, the conflicts between Member State law and Community law resulting from an alleged excess of power on the part of one of the Community's organs, and, especially, of the ECJ, have to be resolved, even from the point of view of Member State law, on the basis of Community law and the principle of effectiveness inherent in it.

## 3. Excess of powers and irreconcilable domestic law

Of course, the principle of Community-conform interpretation will not work in the face of an express provision to the contrary of Member State law. However, such an explicit exclusion of the principle of effectiveness is – quite understandably – not to be found in any of the Member States legal, and especially constitutional, legal orders.

### a) Obligation to revise domestic law

And even if it were, such exclusion would constitute a violation of the Member States obligations under Community law, especially under article 10 of the Treaty of the European Community which provides that „Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community [...]“<sup>3</sup> and would therefore have to be revoked by the Member State concerned, even before proceedings for violation of the treaty<sup>4</sup> were instituted against the Member State, as an *ultima ratio*.

It follows from what has been said so far that remarks like those made by the German *Bundesverfassungsgericht* in connection with a case law of the European Court of Justice which allegedly reflects, not an interpretation but, a progressive development of Community law<sup>5</sup>, remarks which contain the threat that the Court's point of view would be ignored if the *Bundesverfassungsgericht* considered the decision to be in excess of the Court's powers<sup>6</sup>, can have no foundation either in international and Community law or in Member State law (if correctly construed).

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<sup>1</sup> For the notion of interpretation in conformity with international law cf. PETER FISCHER/HERIBERT FRANZ KÖCK, *Völkerrecht*, 6<sup>th</sup> edition, Vienna 2004, no 243 et seqs; see also art 31 paragraph 3 lit c of the Vienna Convention on the Law of Treaties: „[...] any relevant rules of international law applicable in the relations between the parties [...]“.

<sup>2</sup> Cf. PETER FISCHER/HERIBERT FRANZ KÖCK/MARGIT MARIA KAROLLUS, *Europarecht*, 4<sup>th</sup> edition, Vienna 2002, no 884 et seqs, 1279 et seqs.

<sup>3</sup> For the notion of the so-called principle of loyalty cf. PETER FISCHER/HERIBERT FRANZ KÖCK/MARGIT MARIA KAROLLUS, *Europarecht*, 4<sup>th</sup> edition, Vienna 2002, no 776.

<sup>4</sup> Cf. art 10 Treaty establishing the European Community: „[...] They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty“.

<sup>5</sup> Cf. PETER PERNTHALER, Die Herrschaft der Richter im Recht ohne Staat, in: *JBl*, november 2000, no 11, 695; see also WALDEMAR HUMMER/WALTER OBWEXER, Vom „Gesetzesstaat zum Richterstaat“ und wieder retour? Reflexionen über das britische Memorandum über den EuGH vom 23.7.1996 zur Frage der „korrigierenden Kodifikation“ von Richterrecht des EuGH, in: *EuZW* 1997, no 10, 297.

<sup>6</sup> Cf. BVerfG, *Kloppenburg*, 2 BvR 687/85, BVerfGE 75, 223; cf. also BVerfG, *Maastricht*, 2 BvR 2134/92, 2 BvR 2159/92, BVerfGE 89, 155; in: EuGRZ 1993, 438 et seqs.

### **b) Limits to the obligation to revise domestic law**

The only justification for rejecting acts of Community organs in general, and judgments of the European Court of Justice, in particular, on the ground that they constitute an excess of powers would be a violation, by those acts or judgments, of the principles contained in article 6, paragraph 1 of the EU-Treaty<sup>1</sup>. In this, and only in this, respect, domestic law protecting these principles would prevail, and there would exist no obligation to revise it. Prevalence of Member State law would not, however, be grounded, even in such a case, on a principle or rule of Member State law; rather, it would derive from Community law itself which cannot be supposed to legitimise any Community act violating the European Union's most fundamental principles.

On the other hand, the principles contained in article 6, paragraph 1 EU constitute the only limit to the binding character of Community acts. No further limits could exist, not even from the point of view of domestic law, if only correctly construed on the basis of the principle of primacy of international and Community law. And, as we have seen earlier, acceptance of the primacy of international and, consequently, also of Community law, is axiomatic for any State that claims to be a member of good standing in the international and, particularly, in the European community.

## **G. POSSIBLE EXPLANATIONS FOR THE DESTRUCTIVE APPROACH BY CERTAIN MEMBER STATES SUPREME COURTS**

There remains only one question. What is it that causes supreme courts of Member States to make pronouncements like those of the German *Bundesverfassungsgericht*?

### **1. Lack of knowledge?**

Is it a lack of knowledge in the field of international law, as the famous Austrian jurist and former member of the International Law Commission *Alfred Verdross* once complained?<sup>2</sup> As regards Community law, such lack of knowledge cannot be assumed. And the principle of effectiveness of international organisations and its consequences in connection with decisions of international organs and institutions, and especially international courts and tribunals, as well as the principle of the interpretation of domestic law in conformity with international, and Community, law do not constitute novelties of a revolutionary character. In fact, it is evident to common sense even without any legal education that the position of the Community and its law would be precarious if both could obligate Member States only to that extent which is conceded by these Member State themselves (or by their supreme courts) in an actual case. Otherwise, the Community and its law would be at the mercy of Member States. It is unthinkable that the political will of the Member States, when concluding the EC Treaty, had been directed to such an „integration under reservation“ or „integration subject to recall“.

### **2. Misconception of historical facts?**

Indeed, any such allegation is fully contradicted by the historic facts. In order to understand this, it is sufficient to compare the complicated reasoning of the German *Bundesverfassungsgericht* in its *Maastricht* decision in 1994 with the explanation given by one of the leading German politicians at the time of the setting up of the European Communities in the 1950s.

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<sup>1</sup> Cf. *supra*, B.2.c)(3).

<sup>2</sup> Cf. ALFRED VERDROSS, „lura novit curia?“ in: *JB* 1964, 235 et seq.

Walter Hallstein, former German Secretary of State and closely involved in the matters of European integration, and afterwards the European Commission's first President, described the role intended for the ECJ as follows: „As we created the European Court we had an ambitious idea: to crown the constitutional structure of the Community with a supreme court that was to be a constitutional institution in the fullest meaning of the term, a court like the American [i.e., the US] Supreme Court in its splendid period under Chief Justice John Marshall, under whose guidance the constitution of the United States, hardly [i.e. only roughly] sketched in the constitutional instrument, received contents and stability through the Court's practice [i.e. case law]“<sup>1</sup>.

### 3. Psychological disposition

If supreme courts in the Member States do sometimes seem to be blind with regard to the relationship between Community law and Member State law, the reason for this is probably to be found in psychology. The fact that supreme courts, where Community law is involved, have ceased to be supreme courts seems to have not yet been fully digested. Perhaps we have, as regards supreme courts of the Member States, to wait for a new generation of judges, judges to whom European integration with its specific limitations on the sovereignty of Member States will have become something normal, and who will not have psychological problems with those principles which require comprehensive application of Community acts with all the ensuing consequences even for acts in excess of powers.

## H. OUTLOOK

Until this time will have come, it is the political branch of government in the various Member States which is called upon to see to it that European integration does not suffer damage from the psychological disposition presently existing in one or the other supreme court in one or the other Member State.



*Europos Bendrijos institucijų funkcijos ir galimas valdžios perteklius: ar yra privalomosios valdžios ribos šalims narėms?*

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*Lincio Johano Keplerio universitetas*

### SANTRAUKA

*Europos Bendrijos teisės ir valstybių narių teisės santykio klausimas, nepaisant bendros Europos Teisingumo Teismo jurisprudencijos, yra vis dar diskutuotinas. Ne tik kai kurioje literatūroje, bet ir valstybių narių aukščiausiųjų teismų praktikoje dažnai keliamas Bendrijos teisės viršenybės klausimas. Diskutuojama ne dėl principų – dažniausiai laikomasi nuostatos, kad tam tikri Konstitucijos straipsniai negali būti keičiami, todėl negali būti integruojami. Taip pat laikomasi pozicijos, kad Europos Bendrijos teisė privaloma tik tuo atveju, kai ji reglamentuoja valstybių narių Europos Bendrijos institucijoms perduodamą kompetenciją. Pagal Europos Bendrijos teisę Bendrijos institucijų kompetencijos viršijimas yra niekinis, todėl Europos Teisingumo Teismas privalo šiuos teisės aktus kore-*

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<sup>1</sup> WALTER HALLSTEIN, *Die Europäische Gemeinschaft*, Düsseldorf 1979, 110.

guoti arba panaikinti. Tačiau Bendrijos ir valstybių narių teisės konflikto neįmanoma išvengti tada, kai teismai, pavyzdžiui, Vokietijos Federalinis teismas, nesutikdami su Europos Teisingumo Teismo pateiktu Bendrijos institucijų kompetencijos išaiškinimu, reikalauja Europos Teisingumo Teismo sprendimus paskelbti ultra vires aktais.

Tokia valstybių narių teismų kompetencija yra nesuderinama su dabar jau aksioma tapusiu tarptautinės teisės primatu, kuris taip pat reglamentuoja Bendrijos ir valstybių narių teisės santykį. Juk Europos Bendrijos sutartis taip pat yra ir tarptautinė sutartis, todėl jai taikomos tarptautinės teisės nuostatos. Tarptautinės teisės normos draudžia valstybei remtis nacionaline teise, jei ji atsisako vykdyti sudarytos sutarties nuostatas. Jei Europos Bendrijos sutartyje būtų įtvirtintų nuostatų, kurios leistų peržengti Bendrijai suteiktą kompetenciją, jos jau seniai būtų pakeistos, nes sutartis taikoma daug metų. Sudarant Europos Bendrijos sutartį, reikėjo atsižvelgti į nacionalinių teisės sistemų ypatumus, todėl sutarties šalys privalėjo sutikti dėl šių ypatumų įtvirtinimo sutartyje. Negalima teigti, kad kiekviena sutartis galioja tol, kol nacionalinis teismas paskelbia sutartį arba jos dalį negaliojančia. Toks teigimas pažeistų pagrindinį tarptautinės teisės principą *pacta sunt servanda*.

Tarptautinių organizacijų teisėje taikomas funkcionalumo principas galioja taip pat ir valstybių ir Europos Bendrijos teisės santykiui. Remiantis šiuo principu, valstybės, kurios įsteigia tarptautinę organizaciją ir suteikia jai tam tikrą kompetenciją, sutinka, kad organizacijos padaliniai patys nustatytų savo kompetenciją. Būtina atsižvelgti į ultra vires aktų nuostatas, išskyrus tuos aktus, kurie pažeidžia pagrindinius principus, kaip tai yra įtvirtinta Europos Bendrijos sutarties 6 straipsnio 1 pastraipoje. Europos Sąjungos valstybės narės gali kreiptis į Europos Teisingumo Teismą dėl Europos Bendrijos teisės išaiškinimo. Tačiau tai yra teisingumo klausimas. Ginčo sprendimas pasitelkiant nepriklausomą instituciją reiškia tai, kad nė viena šalis, priimdama savo sprendimą, neturi teisės nepaisyti Teisingumo Teismo sprendimo nuostatų.



### ***Kompetenzausübung und mögliche Kompetenzüberschreitung von Gemeinschaftsorganen: gibt es Grenzen für ihre die Mitgliedstaaten bindende Wirkung?***

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#### **ZUSAMMENFASSUNG**

*Das Verhältnis von Gemeinschaftsrecht und mitgliedstaatlichem Recht ist ungeachtet der eindeutigen Judikatur des Europäischen Gerichtshofs noch immer umstritten. Insbesondere wird in einem Teil der Literatur, aber auch in der Rechtsprechung einzelner mitgliedstaatlicher Höchstgerichte der Vorrang des Gemeinschaftsrechts vor mitgliedstaatlichem Verfassungsrecht in Frage gestellt. Dies geschieht in der Regel aber nicht prinzipiell; vielmehr werden entweder nur bestimmte Teile der Verfassung für unveräußerlich und damit "integrationsfest" erklärt oder es wird das Gemeinschaftsrecht nur insofern als verbindlich angesehen, als es sich im Rahmen der vom Mitgliedstaat an die Gemeinschaft übertragenen Kompetenzen bewegt. Zwar sind Kompetenzüberschreitungen seitens der Gemeinschaftsorgane auch nach EG-recht nichtig und vom EuGH durch Aufhebung des betreffenden Akts zu korrigieren; ein Konflikt zwischen nationalem und Gemeinschaftsrecht ist aber dort unausweichlich, wo Gerichte wie das deutsche Bundesverfassungsgericht den Anspruch erheben, auch Urteile des EuGH zu ultra vires-Akten erklären zu können, wenn sie mit dessen Auslegung der Gemeinschaftskompetenzen nicht einverstanden sind.*

*Eine solche Kompetenz mitgliedstaatlicher Gerichte ist aber mit dem heute als axiomatisch anzusehenden Primat des Völkerrechts unvereinbar, der auch für das Verhältnis von Gemeinschaftsrecht und mitgliedstaatlichem Recht gelten muss, weil der EG-Vertrag unabhängig von der Quali-*

*kation der von ihm geschaffenen Rechtsordnung als supranational jedenfalls auch ein völkerrechtlicher Vertrag ist, für dessen Gültigkeit und Auslegung daher die Regeln des Völkerrechts heranzuziehen sind. Diese verbieten einem Staat, sich auf sein innerstaatliches Recht zu berufen, um einen geschlossenen Vertrag nicht zu erfüllen. Eine allfällige ursprüngliche Ungültigkeit des EG-Vertrags wegen Überschreitung nationaler Integrationsermächtigungen wäre durch seine jahrzehntelange Anwendung längst saniert. Vorbehalte zugunsten einzelner mitgliedstaatlicher (Verfassungs-) Rechtsordnungen hätten beim Vertragsabschluss angebracht und von den anderen Vertragsparteien akzeptiert werden müssen. Und anzunehmen, jedem Vertrag wäre die stillschweigende Klausel beigesetzt, er gelte nur solange, als er nicht von einem innerstaatlichen Gericht für (ganz oder teilweise) unanwendbar erklärt worden sei, wäre mit dem zentralen völkerrechtlichen Prinzip pacta sunt servanda gänzlich unvereinbar.*

*Im Übrigen muss auch für das Verhältnis von mitgliedstaatlichem Recht und Gemeinschaftsrecht der schon dem Recht der (einfachen) internationalen Organisationen bekannte Grundsatz der Funktionabilität gelten, nach welchem Staaten, die eine solche Organisation gründen und mit Kompetenzen ausstatten, akzeptieren, dass deren Organe ihre Kompetenzen selbst bestimmen, wobei auch ultra vires-Akte in Kauf genommen werden müssen, soweit dieselben nicht so grundlegende Prinzipien verletzen, wie sie sich die Europäische Union selbst in Art. 6 Abs. 1 EU vorgegeben hat. Wo die Staaten aber, wie in der Europäischen Gemeinschaft, ein Gericht, nämlich den EuGH, zur Auslegung des Gemeinschaftsrechts eingesetzt haben, widerspräche es überdies dem Wesen der Gerichtsbarkeit als Streitentscheidung durch eine unabhängige Instanz, wollte sich einer von ihnen anmaßen, das Urteil dieses Gerichts noch einmal seinem eigenen Urteil zu unterwerfen.*

