The Maastricht Treaty in a Thirty-Year Perspective

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Abstract

The Maastricht Treaty represents a crossroad and turning point in the evolution of the European integration. The current paper explores the main characteristics of the period before and after this turning point including the relations between the Member States and the judicial power in the European cooperation. It also gives insights into the fault lines and tensions of the institutional structures following the conclusion of the Maastricht Treaty. The paper explores the cornerstones of a harmonious European cooperation: the principle of subsidiarity, the consensus-seeking and the preservation of cultural diversity.

Keywords: Maastricht Treaty, European Court of Justice, national constitutional and hight courts in the European cooperation, subsidiarity, diversity.

1. Introduction

At this conference we recollect the thirtieth anniversary of the Maastricht Treaty.[1] Maastricht is not simply a Dutch town. It has become a crossroad of the history of European integration and marked several significant milestones. First of all, it signalled the end of the Cold War: it was the first reform Treaty that was negotiated

1 European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002.

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and adopted after the collapse of the Soviet Union and the fall of the Iron Curtain. Second, it closed a successful chapter for those who took part in the first decades of European integration. Third, it marked a strong desire of the Western countries to fundamentally transform and broaden European cooperation.

Fundamental questions were raised: are the Member States exercising their sovereignty jointly or are their sovereignties emptied out by a supranational entity? Did Maastricht try to provide a framework for a common "European dream"? Or did it miss an opportunity to unify the continent based on its longstanding civilisation? Did it provide a vision, or did it create an illusion? To what extent can the European institutions replace those of the Member States? Thirty years after Maastricht, these are important and timely questions to answer for lawyers and non-lawyers alike. It is necessary to understand why we stand at the point where we are right now. Moreover, these questions are all the timelier and the more essential if we intend to unlock and understand the current European political and legal debates and if we wish to imagine an intellectually sound and prosperous future for Europe.

2. The period leading up to Maastricht

European cooperation began as a voluntary association among the Western European countries. However, this cooperation was formed in the shadow of the Iron Curtain that kept Europe apart for long decades. The cooperation of the initial period was economy- and market- focused. In contrast with previous divisions, their aim was to achieve a European unity through economic and market integration. Therefore, in the first three decades, European cooperation was largely devoid of ideological elements. Even though the solidification of the law of the European Union was not without judicial conflicts, there was a widespread and strong consensus among the Member States about the need to create an internal market along with the four freedoms: the free movement of goods, people, capital and to establish and provide services.

The innovative and evolutive Treaty interpretation of the Court of Justice of the European Union (hereinafter: European Court) soon emphasised the distinct, so-called *sui generis* nature of the European law. The 1963 van Gen den Loos decision[2] declared that European law 'is directly applicable so that individuals, whether they are corporations or natural persons, can rely directly on the European law and can enforce it before their national courts'. The 1964 Flaminio Costa v. E.N.E.L. judgement[3] declared that domestic law cannot enjoy priority over European law.

2 Case 26/62 Van Gend en Loos v Nederlandse Tariefcommissie [1963] E.C.R. 1.
3 Case 06/64 Costa vs. ENEL [1964] E.C.R. 585.

This was reinforced in the 1970 Internationale Handelsgesellschaft case[4] in terms of the constitutions of the Member States. These judgments of the European Court brough to life a European law that many times defines itself against the law of the Member States.

However, the common economic goal and vision and the strong consensus behind it provided the European institutions with strong legitimacy. The result of this focus-oriented strong consensus was referred to as *les trente glorieuses* or the thirty glorious years of European integration. This was the consensus of all the Member States. This success made this model of cooperation attractive that also led the Central-European countries, who were still kept behind the Iron Curtain, to dream about and aspire for membership in the European integration. The fall of the Iron Curtain seemingly brought the attainment of this objective much closer to them. As they were freed from the grip of soviet-communism, they wanted to be part of the success story of the European common market and the four freedoms.

3. The Maastricht turn

For various reasons, the early 1990s represented a decisive moment in World history as well as in the history of European integration. The failure of the planned economic model gave way to the spread of the market economy and neoliberal economic theory. With the end of the Cold War, European countries and Europe once again, at least to a certain extent, regained the ability to take their destiny into their own hands. This was the first time since the end of the Second World War that Europe got a chance to stand on its own feet. European cooperation was on the rise with many encouraging results. It seemed to have a bright future ahead.

The euphoric moment of neoliberalism and globalisation as well as general political optimism gave an impetus and led to the formulation of the Maastricht Treaty. Accordingly, one of the major watershed moments in the historical development of the European Union was the adoption of the Maastricht Treaty in 1992. In retrospect, the Maastricht Treaty represented an important crossroad. However, this treaty reform was not easy to pass. France and Denmark, among others, had their reservations. Therefore, Maastricht never enjoyed the same consensus as the Treaty of Rome.[5] Nevertheless, it was an opportunity for European cooperation to seize this historic moment and the many achievements of integration to become a driving force in the decades to come, or else this moment would be lost.

4 Case 11/70 Internationale Handelsgesellschaft vs. Einfuhr- und Vorratsstelle für Getriede und Futtermittel [1970] E.C.R. 1125.

5 European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.

With the adoption of the Maastricht Treaty, Member States decided to expand the scope of integration to include political fields of cooperation for political purposes. At the same time, an increasing number of areas began to be governed under the shared competence of the European Union and Member States. A more profound and political integration were given priority over the Eastward enlargement that would only take place more than a decade later in 2004 and 2007. As a consequence, the competence of the European Union expanded and now applies in a vast number of areas beyond the original, largely economic fields. The European Union has acquired its own fundamental rights document, namely the EU Charter on Fundamental Rights[6] which applies, inter alia, in situations where Member States have implemented EU law. This development has also reinforced the political aspects and the centralising force of European integration. To many thinkers, the notion of an *ever closer union* has become equal to an ideology that envisions a more centralised political union.

The Maastricht Treaty introduced the concept of Union citizenship that is originally built on and is complementary to national citizenship. However, this concept was later used as a means to create the concept of a European citizen and European demos, increasingly independent and isolated from national citizenship. Even though the competences of the European Parliament have been expanded, peoples of the Member States have less and less influence on the actual decision-making process or on the law formation of the European Union. Beyond centralisation, the Treaty of Maastricht unleashed a process of homogenisation. This homogenisation process included both economic and political aspects of European integration. With regard to the political dimension, for example, the intention is to differentiate between European and non-European political parties regarding the values they represent. In respect of the economic dimension, what we can see is a general discouragement of creativity and natural rivalry and competition between the Member States.

As a result of the process set off with the adoption of the Maastricht Treaty, integration has become less and less diverse, and the influence of the Member States has been continuously decreasing. In reality, it has become questionable whether the Member States would remain the Master of the Treaties. Even though the Maastricht Treaty introduced the principle of subsidiarity, it was underused and did not become a driving principle of European integration. This has been the case even though history has taught us that the strength and richness of European civilisation lies in its variety and diversity. In Europe, you can wake up in the land of Montaigne, walk ten minutes across a bridge and find yourself in the land of Goethe. This is the cultural diversity that European nations have been proud of. And this diversity has been the source of strong liberty, and has always bestowed a vision upon Europe. No single power has ever been strong enough to subjugate the entire continent for long. And this is the sort of variety that truly characterises the constitutions of European

6 European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

countries. They have different governmental arrangements and institutional settings. Each European country has its own governmental structure, established to exercise national sovereignty in a way that is appropriate to the national constitutional culture. They define the contours and boundaries of liberty and responsibilities in their own ways that are slightly different from each other. Consequently, the national constitutions are also reflections of the histories, cultural identities and struggles of the respective European nations. The separation of church and state has a different meaning in France and Denmark. And the list goes on. These features make each European constitution unique, albeit being part of the same European civilisation.

But this diversity is now weakened under the weight and dramatic expansion of the European institutions. The increasing efforts to centralise begin to devastate the inner cohesion of the integration.

By the time the Eastward enlargement transpired, European integration already headed in a direction different form the one that Central European countries once dreamed of and aspired for.

4. The failure of the Constitutional Treaty and the challenges of Lisbon

The Constitutional Treaty would have been the fulfilment of the process that started in Maastricht. In a symbolic sense, this would have been a step forward towards the establishment of a federation. However, this was rejected by the French and Dutch referenda.

The Lisbon Treaty[7] was adopted as a reform treaty to replace the failed Constitutional Treaty. However, the Lisbon Treaty has been "shaky" for a long time. The past decades revealed serious tensions and dividing lines within European cooperation. Is there a productive dialogue or a destructive confrontation between the national constitutions and the Treaties that enable the operation of European integration? Do we have an adequate framework that can settle the potential clashes or did we outgrow the established framework? Certain institutions of the European Union want to pull the Lisbon Treaty in the direction of Constitutional Treaty, while the Member States aim to defend their national identities and sovereign competences.

I was fortunate that I have had the chance to witness some of the interactions between the Hungarian constitution, the Fundamental Law, including the historical constitutional traditions, and the European Treaties. Moreover, I saw these unique interactions – at times dialogues and at times confrontations – from different angles. I was a Member of the Hungarian Constitutional Court when the Lisbon Treaty was

7 European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.

adopted in 2009 and the Court reviewed the document based on the constitution. We emphasised that the Lisbon Treaty did not create a super state. Instead, Member States shared their sovereignties within the framework of an international cooperation. Somewhat anticipating the constitutional confrontations of recent years, I attached a concurring opinion. This opinion points out that by signing the Lisbon Treaty, Member States have not renounced the essence of their statehood, their sovereignty and independence, the freedom to determine the foundations of their polity and statehood. Therefore, the Member States have retained their right to control the constitutional principles that are essential to maintain their statehood and constitutional identity.

As Hungary's Ambassador to Paris, I witnessed the European and international reactions to the then recently adopted Fundamental Law.[8] Many of these reactions were negative and malicious partly because of misunderstandings and partly because of intentional ideological attacks. My efforts were concentrated on explaining the background that led to the adoption of the Fundamental Law as well as its debated provisions and overall values.

As Minister of Justice of Hungary, I was confronted by similar challenges. I was entrusted with the task of guarding the constitutional identity of the country and defending it in its international relations. Every constitution has two faces. The first one is looking inward, regulates the institutional arrangements of the government and recognises the freedoms and responsibilities of its citizens. On the other hand, the second one is looking outward. A constitution enables a political community to secure their place on the world map. It empowers the country to express its sovereignty along with its actual or desired identity. Indicating its independence, it also signals that the country cannot be conquered or colonised. The '89 Hungarian constitution was a result of a recognised compromise between the old and new political elites and was designed to create the preconditions of and thus bring about the change of regime. However, its true purpose did not go beyond this. The adoption of the Fundamental Law brought us back to our historical roots and the constitutional development of the country by incorporating the achievements of the historic Constitution. It also expresses the objectives and commitments of the Hungarian nation as well as the virtues and values the nation aspires to pursue. This is of increasing importance in an expansionist and ambitious European integration, as it defines the constitutional boundaries of the European Union. As Minister of Justice, I experienced the increasing intensity of the pressures that European integration imposes on national constitutional identity.

It is not surprising though that there is an increasing number of cases in which the national constitution of one Member State – as interpreted by its constitutional or supreme court – may give a particular answer and the Treaty or EU law may not give the same answer. This is obviously an area which is ripe for tension. This is particularly true when one gets into more constitutionally sensitive topics such as

8 Hungary: Fundamental Law of Hungary, 25 April 2011.

asylum, national security, family or religion. Thus, one of the fundamental tensions of European cooperation stems from the conflict between the sovereignty of the Member States and the theory of the absolute or unconditional primacy of EU law along with the monopoly of the European Court to interpret EU law and the powers of the EU institutions. The European Court has not been able to relieve this tension. The European Court has barely applied the principles of subsidiarity and proportionality or the principle of conferral in its 70-year history. Furthermore, the European Court put increasing emphasis on the Charter of the Fundamental Law and on Article 2 of the Treaty that includes these values. The important question is whether the European Court can and is willing to take into account the cultural diversity of the Member States. In contrast, since the beginning, the European Court has continuously strengthened the instruments that ultimately foster centralisation. Thus, it cannot be considered as a fair and reliable arbiter between the EU and its Member States.

Furthermore, European institutions such as the European Parliament or the European Commission intend to propagate a more centralised integration and prepare a transition towards a European federal state. As a current Member of the European Parliament as well as of the AFCO Committee, I can now witness this side of the coin. The long proposed transnational list that considers the entire territory of the European Union as one constituency, as well as the establishment of a centralised European political party system, aim to introduce a top-down approach to European integration. I think that the Conference on the Future of Europe was also organised in a top-down approach.

The original idea behind the establishment of the European Commission was to have an independent, technocratic and non-biased guardian of the European legal order. However, as a reaction to the criticism, the institutions of the EU are suffering from democratic deficits, and the Commission has become more politicised. It has been shifting and becoming more politicised for the sake repairing the democratic deficit. At the same time, however, it would lose focus with regard to its traditional functions. The European Commission performs its political role at the expense of its traditional functions. The current "political Commission" has become much more concerned with the political concerns of the Member States, perhaps even more than with other political bodies of the European Union.

Through the idolised concept of the rule of law that is taken out of context, the European Commission and the European Parliament have been engaged in endless and pointless debates about Member States, especially about Hungary and Poland. These debates reveal a general narrow-mindedness and stifled atmosphere that unfortunately characterise current European politics. While the European Parliament, along with other institutions, makes a great effort to shape Europe's cooperation to fit its own image, it runs the risk of destroying its very foundations. Laying down the most important moral principles of our modern European culture, *Voltaire* once pointed out that 'I disapprove of what you say, but I will defend to the death your

right to say it.'[9] European cooperation shows just the opposite. How has the weight and current of European integration become so strong? What is the role played or to be played by the national constitutions in European cooperation?

Consequently, the right question is whether and how EU institutions should be checked and whom they should be accountable to. Neither the European Court nor the European Parliament seem to be able to exercise such control. The European Union is built upon European democracies. It aspires to be the democracy of democracies. Since the European Union will ultimately be democratically accountable to its founding Member States, the national parliaments would have to play a leading role in this process. They are and ought to be the primary guardians of national and constitutional identities as well as of the principle of subsidiarity. The so-called "yellow card procedure" already institutionalised the participation of national parliaments in the European decision-making process. However, it is poorly understood and underutilised.

In the absence of the participation of strong national parliaments and against the backdrop of the EU's desire for centralisation and absolute supremacy, we are witnessing the advent of an ultimate and emergency defence mechanism. The national institutions entrusted with constitutional review power serve as the final guardians of national constitutional arrangements and constitutional identity in cases where democratic accountability is not able to provide the constitutionality of the European decision-making process. Their important task includes defining the ultimate limits of EU law. Based on their respective constitutions as well as on the identity clause set out in Article 4 paragraph 2 of the Treaty, they identify the confines of the primacy of EU law. From German to Danish to Polish to French experiences, national courts declared that national constitutions remain the supreme norm over the national legal system even in the face European integration. On the one hand, it serves as the basis for the implementation of EU law. On the other hand, the constitutional identity may supersede and prevent this implementation. In its milestone decision of 2016, the Hungarian Constitutional Court declared that European legislation can be reviewed on the basis of the Fundamental Law: whether it oversteps its competence, whether it violates fundamental rights or Hungary's sovereignty or its identity based on the achievements of its historical constitution.

5. Challenges and conclusions

The stake of any future reform is nothing less than the harmonious cooperation between the European Court and the national high courts or constitutional courts in the European judicial system. The legal systems that form part of the European

9 Tallentyre, 1906, p. 199.

legal community, as well as the supreme or constitutional courts that serve as keystones, are on an equal footing. Thus, the relationship between the European Court and national constitutional courts should not be addressed in terms of hierarchy. They are better to be addressed in terms of competences. The more complex a legal or constitutional question becomes, the more the constitutional courts should be involved in the decision-making process. Resolving the conflicts between courts or facilitating the "judicial dialogue" assume a certain judicial mentality. Judges and courts need to be more open to institutionalised dialogue. Additionally, it would be useful for the national constitutional courts to be involved in the decision-making process of the European Court. It would resolve some of the tensions if national constitutional courts could present their positions before the European Court. Another reform avenue would be the introduction of a reverse preliminary ruling procedure. In cases that might concern constitutional identity, it would be reasonable if the European Court received guidance from national constitutional courts. Making the decisions of the European Court more inclusive would be a significant step forward.

It is my sincere hope that such a judicial and extra-judicial dialogue will not only help overcome challenges, but will also contribute to sustaining European unity in the diversity of nations. A European unity that is willing to understand and embrace the history and cultural legacies of the European nations. A European unity that thinks of itself neither as a market, nor as a neutral place or a narrow-minded ideology, but as a civilisation that gave birth to the world's most astounding cultural variety. A European unity that sees itself as a civilisational basis that binds European nations together in a community of destiny.

For various reasons, European integration remained without an alternative. Countries are increasingly interdependent due to the forces of economic globalisation and telecommunication. For individual European countries to be successful on the world market, the single European market has no alternative; only an institutionalised cooperation could achieve lasting peace on the continent. Do we need a new treaty or the amendment of the treaty? Undoubtedly, it would open an opportunity for everyone to rethink their positions.

Consequently, European integration needs to consider three factors: (1) It should be built on the principle of subsidiarity. Centralisation will be counterproductive and will lead to inefficient results. (2) The aspiration to forge a consensus is also a key element of European integration. Only European policies that enjoy the consensus of Member States can be successful in the long run. The lack of consensus will always result in division. Member States that disagree will sooner or later see themselves as the losers of integration. (3) The third factor is the importance of cultural diversity. Beyond the European policies, this should also be embraced by the case-law of the European Court, especially when the Court deals with cases beyond the four freedoms and the single market.

We are also being reminded of more philosophical and underlying questions. What is the ultimate purpose of European integration? How can European cooperation justify its own existence and raison d'être? Is it destined to replace or supersede

the Member States by forming a larger entity? Or is it created, as its motto says: to unite in diversity? In other words: is it the objective to make the Member States more competitive, strong and resilient in an age of globalisation and big powers? Nowhere in the Treaty do we find the idea that there should be one single European people or a single European nation. It would be a major deviation from the objective of the Founding States. European integration owes its existence to Member States and their constitutions. They have different governmental arrangements and institutional settings. Each European country has its own governmental structure. They define the contours and boundaries of liberty and responsibilities in their own way that slightly differ from each other. Therefore, the national constitutions are also reflections of the histories, cultural identities and struggles of the respective European nations. For example, we, Hungarians see and consider the five-pointed red star in a different way than Western-European countries, for historical reasons. The separation of church and state has a different meaning in France and Denmark. And the list goes on. These features make each European constitution unique, albeit part of the same European civilisation.

Ideally, a Treaty and their institutional setting would reflect the ultimate purpose of European integration: *in varietate concordia*.

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