The Status and Rights of Sub-state Entities in the Constitutional Order of the European Union

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Hugh Trevor Roper: 'If I must die in the ditch, it will be for the civilisation of old Europe, with its sophistication, its contradictions, its complexities, its hierarchies, its rich and varied cuisine, its wines.'

Back label on a bottle of 'Anarkos' wine from Apulia: 'The Academy says No to the sacrifice of millions of vines planted ad alberello; capitalist colonisation in the third millennium of the lands of Apulia; exploitation of their vineyards and their wines; enforced transfer of the right of replanting to other regions in the north; the complicity and factiousness of EU agricultural legislation; cultural oppression in the pattern of wine consumption; destruction of typicity; [and] domination of the market. Anarkos is an opposition wine.'

'Mir welle bleive wat mir sinn.' ('We want to remain what we are.')

WRK HOPE IT is appropriate to begin an essay in honour of our friend Alan Dashwood, former Vice-Master of Sidney Sussex, oenophile and outstanding scholar and practitioner of EU law, with quotations from a former Master of Peterhouse, the back label on

2 L'Accademia dei Racemi Sinfarosa Zinfandel Primitivo di Maduria was founded in 1998 to maintain the heritage of Apulian wines. Plantation of vines ad alberello dates from Roman times. The vines are trained on chestnut stakes in the pattern of a quincunx, which makes it impossible to tend them by machinery. The original text reads: 'Il sacrificio di milioni di viti piantate ad alberello, la colonizzazione capitalistica del terzo millennio nelle Terre di Puglia, lo sfruttamento dei suoli vigneti e dei suoli vini, l'emigrazione forzata dei diritti di reimpianto pugliesi negli altri regioni del nord, la complicità e la fasiosità delle Leggi Comunitarie in Agricoltura, l'oppressione culturale nei modelli di consumo del vino, l'assottigliamento della tipicità, il dominio del mercato, L'Accademia dice No! Anarkos è un vino contro!'

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a bottle of Apulian wine and the inscription on a building in the old Fishmarket of Luxembourg. Each of them illustrates, in its own way, a problem that continues to defy the ingenuity (or perhaps the will) of those who seek to build a 'Constitution for Europe': how are constitutional clothes to be put on the contradictions and complexities, not only of 'old Europe' but of the new Europe that has emerged since 1989? The rather vacuous motto 'united in diversity' recognises the problem but does little to solve it.

We come from two countries—Scotland and the Basque Country—whose constitutional arrangements illustrate the contradictions and complexities. Each is part of a single Member State, one of which has a written constitution while the other does not. Scotland enjoys substantial legislative autonomy, notably in the fields of civil and criminal law and procedure, but extremely limited fiscal autonomy. The Basque Country, by contrast, enjoys substantial fiscal autonomy but limited legislative autonomy, not including civil and criminal law and procedure. Each has some constitutional characteristics that are not shared even by other 'sub-state entities' in the same Member State, far less in others. Those who like tidy symmetrical constitutions will not look here for inspiration.

Up to now, EU law has largely been able to ignore the contradictions and complexities upon the view that, as Alan Dashwood has put it, the Union is 'a constitutional order of states'. It is states that have undertaken the legal obligations under the Treaties, and it is to them that the Union must look to ensure compliance with those obligations by sub-state entities. The Union cannot accept refusal, delay or obstruction on the part of such entities as a justification for non-compliance by the state. The corollary is that—in theory—the Union does not prescribe, or interfere in, the internal constitutional order of the Member States.

But that is essentially the point of view of public international law. At an early stage, Advocate General Lagrange emphasised the constitutional nature of the ECSC Treaty and its internal consequences:

[O]ur Court is not an international court but the Court of a Community created by six States on a model which is more closely related to a federal than to an international organisation, and although the Treaty which the Court has the task of applying was concluded in the form of an international treaty and although it unquestionably is one, it is nevertheless, from a material point of view, the charter of the Community, since the rules of law which derive from it constitute the internal law of that Community.4

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3 See the Opinion of Advocate General Sharpston in Case C-212/06 Government of Communauté française and Gouvernement wallon v Gouvernement flamand [2008] ECR I-1683, para 101 and following, and cases there cited.
4 Case B/55 Fédération Charbonnière de Belgique v High Authority [1954-56] ECR 245, 277.
Similarly, the extensive interaction between the internal circumstances of the Member States and the political process of implementing the EEC Treaty was stressed by Advocate General Roemer:

There is a basic difference between the ECSC Treaty which brings about partial integration, and the EEC Treaty. As the objective of the latter is full integration of the whole of the economic life of the Member States, it must inevitably take into account the requirements of regional policy which are a component of the economic policy of each Member State. With regard to the Coal and Steel Community it was possible to disregard that aspect because it was feasible for the States to pursue a regional policy in the sector of the economy which was not integrated.\(^3\)

Nevertheless, the Treaties have, from the beginning, recognised the asymmetrical character and interests of the Member States—for example, in the special provisions for overseas departments, countries and territories,\(^6\) ‘regional unions’ such as those between Belgium, Luxembourg and the Netherlands\(^7\) and (initially) for the special relationship between the Federal Republic of Germany and what were tactfully referred to as ‘German territories to which the Basic Law does not apply’.\(^8\)

In a variety of contexts, the ECJ has stressed the obligations of national courts to look below the formalities of state organisation, and to set aside or override internal rules of national law (including constitutional principles)—consider, for example (amongst many others), \textit{Simmenthal}\(^9\) (the obligation to set aside incompatible rules of national law), \textit{Factortame (No 2)}\(^10\) (the obligation to set aside the rule of English constitutional law that the courts may not grant an injunction against the Crown), \textit{Marshall (No 1)}\(^11\), \textit{Johnston and Foster}\(^12\) (direct effect of directives vis-à-vis ‘emanations of the state’\(^13\)) and, perhaps most controversially, \textit{Köbler}\(^15\) and \textit{Traghetto del Mediterraneo}\(^16\) (state responsibility for the conduct of supreme courts).

\(^6\) Now Art 355 and Part Four of the Treaty on the Functioning of the European Union (TFEU).
\(^7\) Now Art 350 TFEU.
\(^8\) Protocol to the EEC Treaty on German internal trade and connected problems.
\(^10\) Case C-213/89 The Queen v Secretary of State for Transport, ex-parte Factortame Ltd and others [1990] ECR 1-2433; and the follow-up in the House of Lords [1991] 1 AC 603.
\(^11\) Case 352/84 Marshall v Southampton and South West Hampshire Area Health Authority (No 1) [1986] ECR 723.
\(^12\) Case 122/84 Johnston v Chief Constable of the RUC [1986] ECR 1651.
\(^13\) Case C-188/89 Foster v British Gas [1990] ECR 1-3353.
\(^14\) The expression ‘emanation of the state’ seems to have been used for the first time in the order of the Court of Appeal referring Marshall (No 1)
\(^15\) Case C-24/01 Gerhard Köbler v Republik Österreich [2003] ECR 1-10239.
\(^16\) Case C-175/03 Traghetto del Mediterraneo SpA v Repubblica Italiana [2006] ECR 1-5177.
Subject to the overriding requirement to give full force and effect to EU law, the institutions have been careful to stand aside from constitutional disputes within the Member States and likewise (as Marc Maresceau has described) from the dispute within the Council of Europe as to the internal constitutional order of Liechtenstein, a Member State of the EEA.

The legal position that states are the actors in EU affairs, and that the Union does not prescribe or interfere in their internal constitutional order, has in some ways provided a comfort zone for EU lawyers, enabling them to work on the construction of the Union's legal order without becoming too much embroiled in national disputes and differences. The peace of the comfort zone is now disturbed for a variety of reasons. These include:

- The resurgence of 'nationalism' in various forms;
- The accession to the Union of a growing number of smaller states and the prospect of more, particularly following the dissolution of the former Soviet bloc;
- Measures taken by the larger states of western Europe to allay separatist sentiment by the adoption of various forms of devolved government, including the creation of 'regional' parliaments;
- The provisions of the Lisbon Treaty—notably the new definition of subsidiarity in Article 5, the assertion of democratic principles in Articles 9 and 10 of the Treaty on European Union (TEU), and Protocols (No 2) on the role of National Parliaments and (No 2) on the application of the principles of subsidiarity and proportionality; and
- The judgment of the German Constitutional Court (Bundesverfassungsgericht) of 30 June 2009.¹⁸

Before we go further, we should make it clear that we are not here arguing a 'nationalist' case. In our respective countries, one of us might be described as a moderate unionist, the other as a moderate nationalist. Our aim is, rather, to revisit some of the issues that were urged (largely unsuccessfully) on the Constitutional Convention by another friend and colleague, Neil MacCormick.¹⁹ Some of his ideas did, directly or indirectly, find expression in the Constitutional Treaty, and now in the Lisbon Treaty. The question for us is whether the Treaties have really faced up to the issues he raised, or whether they conceal the seeds of continued dissatisfaction and dissent.

Nationalism has been seen as the scourge of Europe, the principal cause of successive conflicts and therefore, almost by definition, incompatible

¹⁷ Chapter 16 below.
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with the ideal of European integration. But it is idle to pretend that there are not lively and serious nationalist (or separatist) feelings within the EU and on its outer margins, or that these can safely be ignored as being irrelevant to its nature and future structure.

There is a warning in two of the eleven lessons drawn by Robert McNamara, the former US Secretary of Defense, from the Vietnam War:

3. We underestimated the power of nationalism to motivate a people to fight and die for their beliefs and values.

4. Our judgements of friend and foe, alike, reflected our profound ignorance of the history, culture, and politics of the people in the area, and the personalities and habits of their leaders.

Whether in south-east Asia or in Europe or elsewhere, ‘we want to remain what we are’ is a sentiment that strikes a chord with most of humanity. It is true that virulent forms of nationalism have led to internecine disputes and, all too often, to the persecution of minorities and massacre. But the reality surely is that the complexities and contradictions of ‘old Europe’, of which nationalist sentiment is one, cannot be ironed out or reasoned away. The problem for the European constitution-builder is how best to accommodate them.

In the countries of the former Soviet bloc, the solution has been to accept the dissolution of larger states into smaller states, each having all the prerogatives of statehood. Most notably, the former Yugoslavia, which many people thought would be the first Iron Curtain country to join the (then) European Community, has now broken into seven separate states (Slovenia, Croatia, Serbia, Bosnia, Montenegro, Kosovo and FYROM), one of which is already an EU Member State while the others are candidate countries at various stages of acceptance. The growing number of small states acceding to the Union raises the issue of ‘over-federalisation’ criticised by the German Constitutional Court in its judgment of 30 June 2009, which we discuss below.

In parallel, several of the countries of western Europe have, since accession to the Union, adopted different forms of federal or quasi-federal arrangements as a way of solving, or at least defusing, their internal tensions. At the beginning, only one of the original six (Germany) was a federal state. (The constitution of the Netherlands, initially a confederal republic, provides for a high degree of administrative and regulatory, but not legislative, decentralisation.) Of the nine states that acceded between 1973 and the enlargement of 2004, only Austria was a federal state at the time of accession. Since accession, Belgium has become a federation, while Italy, Spain and the UK have each adopted some form of federal, quasi-federal or devolved constitutional arrangement.

It is interesting, in this context, to compare what are thought to be essential competences of the state (the central state). In Spain the adminis-
tration of justice and substantive criminal law and procedure are national competences; in Germany they are shared competences; while in Scotland they are all devolved to the Scottish Parliament, subject to the overriding legislative competence of the national parliament. Taxation competences show comparable variations. This is unlikely to be the end of an evolving process of differentiation.

Against this developing patchwork of internal constitutional arrangements, we turn to consider the provisions of the Lisbon Treaty and the judgment of the German Constitutional Court.

The Treaty of Lisbon now formally affirms respect for ‘the equality ofMember States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’, and goes on to define the three basic principles of conferral, subsidiarity and proportionality.

The principle of subsidiarity has been a mantra of the treaty-makers since Maastricht and its formulation has been embroidered by successive Treaty amendments. However, as Derrick Wyatt observes, ‘Subsidiarity has so far failed to instil a culture of self-restraint on the part of the Member States and the law-making institutions’.

Immediately before Lisbon, the second paragraph of Article 5 of the EC Treaty read:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The Lisbon Treaty, as well as giving subsidiarity a more significant status in the Treaty on European Union, has introduced a small but significant amendment:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Thus, the Treaty now enjoins the Union legislator to consider the potential efficacy of action at regional or local level. This injunction is repeated,

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21 TEU, Art 5, following in essentials the Constitutional Treaty, Art 1-11.
22 EC Treaty as established at Maastricht, article 3b.
23 Chapter 2 above.
24 Treaty on European Union (TEU), as amended by the Treaty of Lisbon, Art 3(3), emphasis added.
for example, in Protocol (No 26) on Services of General Interest, which refers to ‘the essential role and wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of users’.

Again, following the Constitutional Treaty, the Lisbon Treaty asserts a number of democratic principles, including the following:

- In all its activities, the Union shall observe the equality of its citizens . . . .
- The functioning of the Union shall be founded on representative democracy.
- Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

Next, the Lisbon Treaty includes a number of new provisions for the participation of national parliaments which are enjoined to ‘contribute actively to the good functioning of the Union’, inter alia, ‘by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality [Protocol No 2]’. The Protocol provides that:

- Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged.
- Any national parliament or any chamber of a national parliament may . . . send . . . a reasoned opinion stating why it considers that [a draft legislative act] does not comply with the principle of subsidiarity. It will be for each national parliament or each chamber of a national parliament to consult, where appropriate, regional parliaments with legislative powers.

The separate rights of intervention granted to the chambers of national parliaments are particularly important where, as in Germany and Austria, one chamber is composed of representatives of the ‘regions’ (the Länder). Such a chamber may be expected often to find it ‘appropriate’ to consult the Land Parliaments as to whether the principle of subsidiarity has been respected. Time will tell whether this obligation will be taken seriously by

49 TEU, Art 9.
50 TEU, Art 10(1).
51 TEU, Art 10(3).
52 TEU, Art 12(b).
53 Protocol (No 2), Art 4, emphasis added.
54 Protocol (No 2), Art 6, emphasis added.
55 In Germany, the members of the Bundesrat are delegated by the Land governments; in Austria they are elected by the Land legislatures.
other national parliaments where neither chamber represents the regions.

Lastly (for present purposes), the Lisbon Treaty grants direct access to the Court of Justice to the Committee of the Regions "for the purpose of protecting [its] prerogatives" and, under the Subsidiarity Protocol, to bring ‘actions against legislative acts for the adoption of which the [TFEU] provides that it be consulted’. The Subsidiarity Protocol also contains a curious provision enabling Member States to ‘notify’ actions on grounds of infringement of the principle of subsidiarity ‘on behalf of their national parliament or a chamber thereof’. The ‘notification’ is to be made ‘in accordance with their legal order’. It therefore appears, though it is far from clear, that a situation may arise where a Member State is the nominal applicant in an action for annulment of a legislative act on behalf of its national parliament or a chamber thereof (perhaps reflecting the wish of its internal parliamentary assemblies), even if the government of that state has voted in Council in favour of that act and would wish to argue that it should not be annulled.

All in all, the Lisbon Treaty recognises, albeit in a rather hesitant and piecemeal way, what Neil MacCormick called ‘the manifest truth that European Democracy must operate at many levels, and that a concern for subsidiarity cannot be exhausted by reflection merely on relations between member states and union institutions’. In so doing, it moves us out of the comfort zone where only the states are the relevant actors. At least to some extent, it can no longer be said that the Union is a ‘constitutonal order of states’.

In more pompous terms, one might say that the two classical dynamics of European institutional integration—intergovernmental and supranational—are no longer sufficient to explain the new, more complex, Treaty structures. Now the inter-parliamentarian dimension needs to be added, reflecting both democratic representation and multi-level governance.

On the other hand, it can hardly be said of the Lisbon Treaty, as Neil would have wished, that ‘its structure is readily intelligible to its citizens and empowers them to have their full and proper say at all levels’. It persists in what he criticised as ‘the inappropriate use of the term “region” to refer to territorial entities within the Union, which their citizens regard as “nations”’ (German-speakers normally refer in English to the Länder as ‘states’, not ‘regions’.) And while the Treaty gives enhanced status to the Committee of the Regions, it does nothing to redress the extraordinary

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32 TFEU, Art 265, third paragraph.
33 Protocol (no 2), Art 8, second paragraph.
34 Protocol (No 2), Art 8, first paragraph.
35 See JHH Weiler, Il sistema comunitario europeo (Bologna, Il Mulino, 1985.)
36 'Democracy at Many Levels', above n 19, 2.
situation to which Neil drew attention, where Malta has ten members (full and alternate) and Catalonia three.

This is an aspect of what the German Constitutional Court called ‘over-federalisation’ (Überföderalisierung). The judgment of the Constitutional Court has attracted attention particularly because of its insistence on the principle of electoral equality (Wahlgleichheit), the continuing pre-eminence of the Member States as ‘masters of the Treaties’ (Herren der Verträge) and the consequential reassertion of the right of the Constitutional Court to verify whether legal acts of the European institutions and bodies remain within the limits of the sovereign powers conferred on them or if the Community courts interpret the Treaties expansively tantamount to an inadmissible autonomous treaty amendment.

For our part, we take leave to doubt whether absolute statistical equality of voting power in parliamentary elections is an indispensable condition of democracy. Nor do we find it easy to see how the EU can function if the judicial organs of 27 Member States (or perhaps only those that have a Constitutional Court?) are able to declare acts of the institutions inapplicable within their territorial jurisdiction. That said, we are more concerned here with what we might call hidden aspects of the argument.

In the official English translation on the Court’s website, paragraph 279 of the judgment reads: ‘The democratic basic rule of equal opportunities of success (“one man one vote”) only applies within a people’. The original German reads: *Die demokratische Grundregel der wahlrechtlichen Erfolgsschancegleichheit ... gilt nur innerhalb eines Volkes*. The word *Volk* (which carries negative connotations too) can certainly be translated ‘people’, but also—and we would suggest more accurately in this context—as ‘nation’. On this view, true democracy, or at least democracy in its fullest sense, can exist only within the context of a people or nation.

The Court introduces the idea of ‘over-federalisation’ after mentioning the ‘marked imbalance’ of representation in the European Parliament where

According to the draft decision, a Member of the European Parliament elected in France would represent approximately 857,000 citizens of the Union and thus as many as a Member elected in Germany, who represents approximately 857,000 as well. In contrast, a Member of the European Parliament elected in Luxembourg would, however, only represent approximately 83,000 Luxembourg citizens of the Union, i.e. a tenth of them, in the case of Malta, it would be

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37 'Stateless Nations', above n 19, 3.
38 §288.
39 §279 ff.
40 §334.
41 §338–39.
42 Available at https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve0000208en.html.
approximately 67,000, or only roughly a twelfth of them; as regards a medium-sized Member State such as Sweden, every elected Member of the European Parliament would represent approximately 455,000 citizens of the Union from that country in the European Parliament.\textsuperscript{43}

The Court notes, rather acidly, one might think, that ‘representation in the European Parliament is not linked to the equality of citizens of the Union (Article 9 Lisbon TEU) but to nationality, a criterion that is actually an absolutely prohibited distinction for the European Union’ and concludes that ‘this contradiction can only be explained by the character of the European Union as an association of sovereign states’.\textsuperscript{44} The judgment continues:

It is true that the democracy of the European Union is approximated to federalised state concepts; if measured against the principle of representative democracy, however, it would show an excessive degree of federalisation (\textit{Überföderalisierung}). With the personal composition of the European Council, of the Council, the Commission and the Court of Justice of the European Union, the principle of the equality of states remains linked to national rights of determination, rights which are, in principle, equal. Even for a European Parliament elected having due account to equality, this structure would constitute a considerable obstacle for the expression of the representative will of the parliamentary majority with regard to persons or subject-areas. For example, after the entry into force of the Treaty of Lisbon, the Court of Justice must still be composed according to the principle ‘one state, one judge’ and under the determining influence of the Member States regardless of their number of inhabitants.

Elsewhere in the judgment the Court asserts and seeks to protect (impliedly rather than expressly) the democratic interests of the \textit{Länder} and of local government, where it refers to the school and educational system, the media and the status of churches,\textsuperscript{45} the administration of justice,\textsuperscript{46} the delivery of health services and ‘the essential role and wide discretion of national, regional and local Governments in providing, commissioning and organising non-economic services of general interest’.\textsuperscript{47} National, regional and local choice in these matters must be protected from unauthorised intrusion by the EU and its institutions.

The thrust of these arguments is to support the view that the legitimacy of the EU and its institutions depends upon its being, and remaining, ‘a constitutional order of states’. The Member States are the source of legitimate authority and must be the ultimate judges of its limits. The discussion of democracy is concerned primarily with equality of voting

\textsuperscript{43} §285.
\textsuperscript{44} §287.
\textsuperscript{45} §360.
\textsuperscript{46} §365ff.
\textsuperscript{47} §397.
power, while the references to regional and local choice or discretion seem to be designed to convey the message ‘thus far and no further’ or even ‘keep your tanks off our lawn’.

In our opinion, this approach does not do justice to the complex problem with which the EU is faced. When it is said that the purpose of subsidiarity is to allow decisions to be taken as closely as possible to the citizen, the corollary must be that the decision makers, including legislative decision makers, who are closest to the citizen may legitimately make different choices in like circumstances. If the principle of equal treatment (or, put negatively, non-discrimination) means that all citizens must always be treated in the same way in the same circumstances, the range of choice that will be open to regional and local authorities is reduced to a level of banality. Anything in the nature of a ‘postcode lottery’ must be avoided, and uniformity of result must be imposed.

Thus, in our view, there is an underlying tension between the Treaty principles that, on the one hand, ‘in all its activities, the Union shall observe the equality of its citizens’ and, on the other, ‘the functioning of the Union shall be founded on representative democracy’ and ‘every citizen shall have the right to participate in the democratic life of the Union’. This tension has been illustrated in recent cases before the Court of Justice: the Azores and Basque Country tax cases,\(^\text{48}\) the Flemish/Walloon social security case,\(^\text{49}\) and Horvath.\(^\text{50}\) Each of these cases raised, in one form or another, the question whether differential arrangements adopted by ‘regional’ authorities within a single Member State were compatible with EU law.

In the Azores and Basque Country tax cases, the question at issue concerned the legitimacy of tax differentials as between, on the one hand, the Azores and the historic communities of the Basque Country and, on the other hand, other parts of Portugal and Spain respectively. The Court applied the threefold test of legitimate regional tax autonomy proposed by the Advocate General: institutional autonomy, procedural autonomy and economic autonomy.\(^\text{51}\) In the Azores case, the criterion of economic autonomy was held not to be satisfied in relation to the particular provision at issue, while in the Basque cases all three criteria were held to be satisfied.

In the Flemish/Walloon social security case, there was no question that

\(^{48}\) Case C-188/03 Portuguese Republic v Commission [2006] ECR I-7115; Joined Cases C-438/06 to C-434/06 Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others [2008] ECR I-6747.


\(^{50}\) Case 418607 The Queen, on the application of Mark Horvath v Secretary of State for Environment, Food and Rural Affairs [2009] ECR I-6935.

\(^{51}\) See the Opinion of Advocate General Geelhoed at para 54, and the judgment of the Court at para 67.
Flemish government was autonomous as regards the adoption of social security schemes. The question was whether the differential treatment resulting from the measures adopted was a 'purely internal situation' escaping the reach of EU law. It was held, for reasons explained by the Advocate General, that the situation was not purely internal. The Court did not, on the other hand, take up her invitation 'to reflect on the nature and rationale behind its doctrine in respect of purely internal situations'.

Horvath concerned a difference in implementation, as between England on the one hand and Scotland, Wales and Northern Ireland on the other, of a regulation concerning direct support schemes for farmers under the Common Agricultural Policy. The complaint of Mr Horvath was that, as a farmer in England, he was made subject to an onerous obligation in respect of the maintenance of public footpaths to which he would not have been subject had he been a farmer in Scotland, Wales or Northern Ireland. This was because the measures taken by the UK government to implement the relevant Council regulation in England imposed such an obligation, while the measures taken by the devolved administrations of Scotland, Wales and Northern Ireland did not.

The Court held that 'divergences between the measures provided for by the various administrations cannot, alone, constitute discrimination', provided that they are compatible with the obligations on the Member State. This conclusion has caused some perplexity amongst commentators. In the mid-1990s, albeit under different regulations, the Court had found it unacceptable that 'the competent authorities in the UK [had] tolerated differences in the application of the Milk Marketing Schemes' and found that the UK had failed in its obligations 'by allowing the Milk Marketing Boards to pursue divergent policies'. Horvath has been seen as striking out a new line, more tolerant of differential implementation.

For our part, we do not see Horvath as an earth-shattering departure from previous jurisprudence. If anything, we regard it as facing up to the reality that, if the devolution of legislative and regulatory power is to be meaningful, some degree of difference must be tolerated.

That does not, however, address the underlying issue whether sub-state entities with a democratic mandate and accountability must have a right to participate in the formulation of legislative and administrative measures for whose implementation they will have constitutional responsibility. It is through them, in this respect, that the citizen will, in the words of the Treaty, 'participate in the democratic life of the Union'.

In her Opinion in the Flemish social security case, the Advocate General recognised the force of the argument:

14 Opinion, para 121.
15 Horvath, above n 49, para 57.
105. Belgium is not the only Member State to have chosen a federal or otherwise
decentralised structure. Community law has not made it impossible for other
federal Member States, and/or their decentralised authorities, to exercise their
competences as defined by national law. However, a Member State cannot use
its decentralised structure as a cloak in order to justify a failure to comply
with its obligations under Community law.

106. It might be said that, if so, decentralised authorities of Member States
need some mechanism by which to participate in the elaboration of EU law,
especially when the Member State itself is not competent. (I add in passing that
analogous arguments arise in respect of locus standi in direct actions before
the Court under Article 230 EC.)

107. That is a fair point. Appropriate institutional arrangements can, however,
be set up to ensure such participation in the Community legislative process.
This can be achieved, for example, through the first paragraph of Article 203
EC, which implicitly allows regional ministers to represent their Member State
in the Council. I note that such arrangements have, indeed, been made within
the Belgian constitutional structure.

In the event, the Lisbon Treaty does not open a direct right of action
before the Court to sub-state entities, except through the channel of their
national parliament or one of its chambers, or through the Committee
of the Regions. Otherwise ‘regional parliaments with legislative powers’
may be consulted ‘where appropriate’. This formulation does not appear
to create an enforceable obligation to consult.

It is true that, as the Advocate General says, appropriate institutional
arrangements can be set up to ensure participation in the legislative proc-
ess through Article 203 EC, but this depends on the willingness of the
government of the Member State concerned to accord this possibility.
This is less likely to occur where, as often happens, the devolved admin-
istration is of a different political hue from the national administration.

What, then, is the solution? There appear to us to be two possible
solutions, but there may be more.

The first solution would be further institutional reform, including a
rethink of the role and composition of the Committee of the Regions.
That is for the Greek kalends, even if it were realistic to think that the
Member States would agree on a sensible structure.

The alternative is what might be called a ‘Community solution’, in the
sense of developing a practice of organised consultation which can later
become crystallised in law. After all, the European Council was in opera-
tion for some years before it was recognised as one of the EU institutions.

Neil MacCormick suggested that parliaments of self-governing entities

11 ‘Democracy at Many Levels’, above n 19, 5.
in Member States should be able to participate in COSAC.\textsuperscript{16} It is open to question whether the representatives of the parliaments of Member States who constitute COSAC would accept the extensive widening of its membership that this would involve. More promising as potential interlocutors are REGLEG and CALRE. REGLEG is the Conference of European Regions with Legislative Powers, representing the governments of 73 regions from eight Member States. CALRE is the Conference of Regional Legislative Assemblies, representing the Presidents (Speakers) of 74 assemblies from the same eight Member States.\textsuperscript{57}

The fact that there are two such bodies fits the new inter-parliamentary (or trans-parliamentary) dynamic that has begun to complement the inter-governmental and institutional structures of the EU, producing an increasingly complex constitutional structure of variable geometry. Within that structure there must surely be scope for the voice to be heard at Union level of those who are democratically accountable for giving legislative effect to Union action at a level closer to the citizen than national governments and parliaments.

A preparedness to give them a voice would be a pragmatic first step. But that requires the recognition, first, that there is a problem to be solved and, second, that symmetrical solutions do not always work for asymmetrical realities. We are not there yet.

\textsuperscript{16} Conférence des Organes Spécialisés dans les Affaires Communautaires. Available at http://www.cosac.eu.

\textsuperscript{57} See http://www.regleg.eu and http://www.calre.net.eu. The numerical difference is due to the composition of the Italian and Spanish delegations.