

Foreword: Europe & Co-Sovereignty

This book contains the edited versions of the conference held at Oxford University, European Studies Centre, St. Antony's College 2003/04 within the Basque Visiting Fellowship research on "Sub-State entities and co-sovereignty within the EU". Both the publication, the seminar within the Basque Fellowship and the Fellowship itself were possible thanks to the efforts of the Basque Studies Society through the agreement on Basque Studies which is supported by Basque institutions and St. Antony's College (Oxford University).

But this subject is also a key one within the European debate either at the State or Sub-state levels. Therefore, reports and scopes are diverse but even so of considerable interest in current times. As M. Keating says, there are still many issues pending with regard to the European integration process. One of such issues is the current situation of Sub-State entities within the Union and the possibilities involved in the whole system designed to follow a path towards a concept of sovereignty that is already shared at the supra-national level, but not so within the respective domestic constitutional levels. This is particularly important in building, developing and enforcing EU Law. In that sense, this book contains contributions from various authors and countries, and especially noteworthy are the Flemish case by L. Bas, the Welsh case with more than one international implication by M. Quinn, or the Basque approach from different fields as reflected by J. Bengoetxea and X. Ezeizabarrena.

Sub-State entities like Wales or Scotland in the UK; Wallonia and Flanders in Belgium; Bavaria and the other German Länder; the Austrian Länder; or the Basque Country, Catalonia, Galicia and some others in Spain, do have, among many others in the whole of Europe, a key role therefore and are facing difficult legal and institutional challenges before the EU, due to their current difficulties as experienced in attempting to actively participate within all EU levels. The problems in reaching a peaceful institutional agreement on all the aforementioned fields are even greater when we talk about the EU as the result of an international treaty, and therefore, using a conception that avoids Sub-State entities taking part directly within EU decision making processes. In certain sense, we can talk of the EU as a real product of an international treaty. However, it does have a clear will for political integration and this also implies dealing with Sub-State participation in different terms at all levels. This means that in an international organisation looking for integration, the Sub-State approach recognised at

domestic levels needs to become a part of the EU framework. Far from previous legal approaches, the Bavarian case is presented within the book within a much more sociological outlook by J. Karl.

But the whole view is also present in different provisions of treaties, for instance, Article 6.3 of the EU Treaty regarding respect for national identities of the Member States (article 5 of the former Project of European Constitution). And this provision does not only demand protecting domestic particularities of every State within the EU, but also the recognition of the national particularities within various Member States. One of the drafters of the Spanish Constitution, like M. Herrero de Miñón also confronts this particular concept within the idea of historical titles (rights) and the search for the various identities of European minorities.

In order to focus on this problem and assume its real dimension we can take the institution of Human Rights as a valid example. They are an inherent requisite to belong to the EU system and they are characteristic of every single one of the Member States. Article 6.1 of the EU Treaty is clear therefore (article 2 in the former Project of Constitution). This is essential because the EU assumes "*ab initio*" that the nuclear part of its legal regime is to be controlled not directly by itself, but through the common constitutional traditions of the Member States. This is indeed a matter that is directly linked with sovereignty and the rights of individuals that are entitled to claim for the protection of such rights before any administrative or jurisdictional body. The expansion of the EU towards the East is also present within this debate thanks to the role played by former Oriol College Fellow, E. Jurado.

So, the real existence of a sum of constitutional agreements seems to be a suitable procedure to recognise such Human Rights at the EU level, even though the EU itself lacks the tools to protect them directly. Therefore, there is a principle of mutual trust for the protection of Human Rights in each domestic level. If this is so in such a basic matter in our legal systems, why do we not institute a similar principle of mutual trust in order to recognise and assume the participation of Sub-State entities within the whole process? Even the financial and economic issues have an interesting comparative contribution in the papers submitted by M. Watson and J. Loughlin.

To conclude, there is at present a growing mutual impact with regard to the efficient compliance with Law mainly through the enforcement of the general principles of Law and the jurisprudence of the European Court of Human Rights (ECHR). Thus, Human Rights continue to be a relevant part of the EU tradition as a nuclear point, with at least three sources of recognition and assumption:

- a) The EU Law with the mentioned limits.
- b) International Law, especially through the ECHR.
- c) The domestic Law of each Member State.

It was actually the existence of a common constitutional tradition that substantially contributed to the developments in Human Rights. And this may also

serve to implement similar approaches in those cases in which Sub-State entities may be lacking protection even though they do have direct constitutional recognition in several cases. Indeed, the absence of a real positive charter of Human Rights at the EU level, despite the recognition on article 6 of the EU Treaty, has not been an obstacle for the EU to assume such rights, even though the jurisprudence of the Court of Justice of the European Community (CJEC) is also inspired, *inter alia*, by those common general principles of Law of the Member States.

So, therefore, if in such matters as Human Rights, the importance of the domestic regime is extremely clear for attaining a real protection at European level, EU bodies, Member States and, eventually, the CJEC should also take up the challenge to define the protection of the constitutional rights of Sub-State entities before the EU. That is, in a nutshell, the nuclear common message for most of the contributors to this book.

The lack of the principle of subsidiarity at Sub-State and local levels is another problem in this context, and this shows signs of a lack of political will within certain Member States in order to comply with article 5 of the European Community (EC) Treaty. This means that EU actions do also have certain limits within the objectives provided by the EC Treaty. Therefore, and once provided that the rights or powers of Sub-State entities do not affect those objectives, they may have a presumption of legality at the EU level as well as in the domestic sphere, depending on their constitutional recognition.

Finally, the implementation at the European level of the constitutional reality within every social, territorial and legal scope demands for a distinction of the existence of these Sub-State complexities that are not easily defined under the general concept of "Regions". Domestic realities with a constitutional statute within Member States may require peculiar treatment in order to implement such a constitutional scope and singular approach. That is obvious, in particular, for those entities with legislative powers.

The failed process in search for a European Constitution is still indeed a unique opportunity to approach the situation of the Sub-State entities within the EU. The path already followed by Germany, Belgium or Austria offers clear examples of real participation, integration and co-sovereignty exercised in terms of national solidarity. Suddenly, there has been some real debating on the very concept of sovereignty greatly, as has been pointed out over the last few years by Scottish professor N. MacCormick in his magnificent book, "Questioning Sovereignty".

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