

**Hjalte Rasmussen**

**European Community Sovereignty Arrangements :  
a Framework for a Quebec Comparison**

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Politically, one of the most contentious items on the agenda of the European Council's 1991-Maastricht meeting was whether or not to write into the preamble of the new Union treaty that the Community/European Union was to have a **federal vocation**. In the next-to-final draft of the Maastricht Treaty the two words were included, still. They were meant to supplant a more than forty years old telos-description calling for an **ever closer union** among the peoples of Europe (the Rome Treaties from 1958).

Debate broke out **pro** and **con** the proposed amendment. The reason herefore was that for some (in particular the British and, to a certain extent, the Danes) federalism connotes **centralism**. For others, it implies **decentralisation** (Germany, Italy, Spain, etc.). The debate was about the Union's sovereignty arrangements.

High-level political discussions about the Community's sovereignty issue have erupted at rare intervals (thus, e.g. in the mid-1970's (the Tindemans-rounds)); in the early 1980's (the so-called Genscher & Colombo-initiative which became the Solemn Stuttgart Declaration (1982)); at the occasion of the negotiations which led to the adoption of the Single European Act (1986); and at other occasions). European integration being a process involving sovereign states in numerous lower-level Community crises (which on their face values were about something entirely different) the real agenda was labeled: **sovereignty arrangements**.

The EC was prone to grapple with the sovereignty problem as it went along because the problem, and this is not subject to disaccord, was **not solved** by those who negotiated the founding **treaties**.

### ***1. Bridging over the Problem***

Underway from 1958 until today various techniques, mostly purely political, have been employed in order to bridge over the sovereignty issue in practice:

- The omission from the mid-1960's of the word **supranational** from the treaty texts; the political **veto-convention** (the so-called Luxembourg Compromise (1966)) according to which Council decisions of **any** importance were always taken by unanimity (i.e. despite the availability of (qualified) majority voting rules);
- Treaty-prescribed **unanimity** requirements (instead of decision-making by qualified or simple majorities);
- Arrangements on transfers of vaguely circumscribed **legislative competences** to be translated into law by subsequent political compromise (instead of laying down from the outset operational common market rules and regulations);

Arrangements for controlling Member States infringements against their Community obligations that do not call for automatic prosecution by the European Commission; etc., etc.

## 2. *My Text's Loosely Circumscribed Concept of Sovereignty*

The crucial sovereignty issue, in all its ramifications, had from the inception of the Community to be left aside because the central actors were in fundamental disagreement about how to define or settle the relationship between sovereignty-jealous old nation states and a potentially sovereignty/autonomy-hungry, emerging central government. The ramifications include questions about **language, legal systems, social self-government, democratic, and parliamentary** traditions and all other branches of **cultural self-expression** that characterize perhaps all the Member States and their peoples. It is in this loosely defined manner that it was used above, and I shall use the concept of sovereignty in what follows.

## 3. *Additional Bridging Techniques*

- ✓ Never settled, the sovereignty issue inevitably surfaced from time to time creating political and legal problems, often unexpectedly. During the discussions leading to Maastricht it did, as said, pop up anew, necessitating the invention of a new bridging technique: The so-called principle of **subsidiarity**. It was agreed upon by all participating governments, in essence because all were able to read their own understandings into it. Ingeniously thought out, it is, however, hardly an operational formula. It sounds out that the Community in policy sectors where it does not hold **exclusive competence** (which by far is not the rule) shall take

*action 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 and effects of proposed action, be better achieved by the Community (Article 3 c).*

- ✓ Needless to dwell at length over the question as to whether this wording will be of much **help** to those who will actually have to decide whether the Community should or should not take action in a given situation, on a given subject matter. It will not.

**Disputes** arising out of some future (alleged) EC-legislative encroachments on Member States' spheres of reserved vires jurisdiction, will then have to be brought before the European Court which has not, however, earned a reputation of acting as a **neutral** arbiter over the sovereignty conflict between the Member States' and the Community's interests; between centralization and decentralization.

#### 4. *Irreversible Transfer or Deposited Sovereignty?*

European academics have continued to be divided over the issue about whether the constituent states have made an **irreversible** transfer of sovereignty or whether they have **deposited** some of their sovereignty in the Community; i.e. for the time being as long as it will be in their interest to do so.

**Politically**, as noted, this question has long been if not dormant then by tacit agreement not brought expressly to the fore. The abovementioned **veto** convention which was not broken against the protest of an out-veto'ed Member State before well into the 1980's prevented in practice the problem from surfacing.

The **irreversibility/deposit** of sovereignty discussion reemerged in the shape of a proposal aiming at introducing a **withdrawal**-clause into the Community constitution, however, quite recently in the **Danish** political debate over ratification of the new treaties. The inclusion of such a clause was to take place when the Treaties will be amended anew. Amendment is foreseen to take place before the end of the century. I submit that it is quite unlikely, however, that such a clause will ever be inserted into the treaties. Unlikely for a number of reasons, one important of which being that it would by necessity have to be proceeded by a principled sovereignty discussion. The EC Member States do not seem to be prepared, as yet, to take that discussion if only because they would not probably be able to agree on anything operational, a conclusion not without disquieting undertones.

More practically, but in political terms, the withdrawal issue moved close to the top of the agenda during the Maastricht meeting when it became clear that the **British** Prime Minister was determined not to compromise on certain crucial policy issues, in particular on questions relating to the co-called **social dimension** of the EC. Whence, resort had to be to find some rather unusual bridging-formula. This time, it was given the shape of a protocol in which the Twelve declare that the UK accept that the Eleven use the Community law-making machinery (Commission, Council, etc.) in order to create the legal social charter provisions amongst themselves, i.e. without binding effects on the UK or on UK citizens and/or companies.

In Maastricht, moreover, neither the UK nor Denmark were constitutionally and politically able to commit themselves to actually follow the Ten onto the final, third stage of the Economic and Monetary Union (EMU). Denmark obtained in this respect the others' green light for organizing later (1996) a national referendum which will be decisive for that Member State's definitive yes or no to EMU and by implication, presumably, to full participation in the political union (notwithstanding ratification in 1992 of the new union treaties).

Again, the art of the lawyer-negotiators consisted in interring the sovereignty/withdrawal conflict. Their efforts might anew be crowned with success; at least for the time being. Indeed, to those sorts of problems, only political and intermediate solutions may be found. Once a

consensus on the long-term sovereignty problems will be found, the outcome may be embedded in law.

### ***5. Judicial or Political Conflict Resolutions?***

However, once embedded in law and legal language it is my submission that it will not be recommendable to entrust to Community judges to act as constitutional umpires. Such conflict-resolution resides in safer hands if to some substantial extent left to the political processes themselves. This submission expresses my personal view, indeed, and it is in contrast to a long-standing EC-tradition of legalizing and eventually judicializing political conflict-resolution, including conflicts over the range and the nature of the transfer of sovereignty from the incipient states to the emerging central government.

Most European constitutionalists favour also reliance on courts and judges. The main argument against leaving the responsibility for solving the relevant conflicts with the political processes sounds out, in essence, that we are informed by the history of federalisms that the role of arbitor between central and local claims of powers in a federal-type of constitutional set-up should be with a central/federal judicial institution (in case with the European Court). According to this view, it should not be left with the political processes which are feared to be dominated by parochial forces or interests. If in these processes the potential threat of parochialism gaining the upper hand were to materialize, the (embryonic) federal sovereignty-construction would be ruined or disintegrate, the argument typically goes.

That may, admittedly, represent a unpleasant scenario. But so may an uncontrolled and perpetual sucking-up by the center of residues of competences, values and interests, believed to have been locally anchored by the constituent accord. Viewed in this context, the subsidiarity principle might simply become yet another vehicle to legitimize centralism.

**Summing-up**, these introductory observations have briefly presented the most fundamental Community policy issue: The one pertaining to the division of sovereignties which has - visibly or not, been on the top of the Community's political agenda ever since the inception of the European Economic Community in 1958.

### ***6. My Themes and Approach Below***

Some caveats are necessary. The first is that what follows are only my very personal, critical comments about the Community's institutions, its law- and policymaking processes and its special brand of constitutionalism. I drafted this text following the invitation to appear as a witness before Quebec's Assemblée Nationale's committee on the study of questions afférentes à l'accession du Québec à la souveraineté. I have tried to describe the European sovereignty arrangements knowing that the text was not meant to be studied by European experts on

Community matters. I should also add here that I actually very much welcomed the invitation which gave me an opportunity to permit thoughts and perceptions having matured in my mind as a close observer of Community affairs over 20 odd years to be brought onto paper. One may say, indeed, that I have written from the perspective of the sovereignty-sensibilities of a smaller Member State, featuring cultural, linguistic, legal-cultural, democratic and legislative particularities, in this case the more than one thousand years old Kingdom of Denmark.

### ***7. A Small, Culturally Particular Member State***

Denmark became, as it will be recalled, a member of the EC in 1973 under rather traumatic circumstances. Indeed, having negotiated the country's entry, the government of the day had to submit to the voters in the form of a referendum the question whether the implied transfers of national sovereignty were constitutionally mandated and politically acceptable. In many ways did the debates preceding the referendum and the vote itself split the nation in two halves. Mutual hatreds, suspicions and misunderstandings between pro- and antimarketeers continued for more than a decade to bar any enlightened discussions about the nature and the limits to the transfer of sovereignty and about the economic, social and political usefulness and effects of EC membership.

By the mid-80's, this frozen situation by a sudden began to thaw. The first signal of change was linked to the succesful outcome of the second national referendum on EC membership which formally was posed as a question of yes or no to ratification to the European Single Act of 1985 which did not raise constitutional but only political problems. This followed because the ESA, while expanding somewhat the scope of Community competences, did not really entail new transfers of national Danish sovereignty. The yes/no-question was therefore explained to the electorate by leading politicians and perceived by the voters as a quite arrow one in sovereignty-terms. The national situation had not, however, developed or matured to the point where the implications for our national sovereignty, in the broad sense outlined above, of important but incremental sovereignty-transfers having taken place both by EC-judicial and by autonomous EC-political decision inbetween 1958 and 1985 could be envisaged and discussed in an unbiased political atmosphere.

Secondly, certain unfreezing landmark-developments, linked to the Community's external as well as internal political successes of the late 1980's, took place: (1) The Community concluded important compromises relative to its budget; (2) it managed a powerful take-off towards realizing the promised Internal Market; (3) the Group of Seven entrusted on it to be in charge of international aid-programmes vis-à-vis Eastern and Central European countries; and (4) a call for an intergovernmental conference responsible for amending the existing treaties and for drafting new accords on Political Union and on Economic and Monetary Union was issued.

Thirdly, German reunification made a tremendous impact on the Danish political leadership's EC-thinking, pushing towards final acceptance of the inevitability and beneficial nature of the

country's membership. Reunification may constitute the point of no return for a foreseeable future. Fifthly, the political and psychological impacts generated by the developments in Eastern and Central Europe and the fact that other Nordic countries either have filed (Sweden) or consider to file (Norway and Finland) applications soon for membership, have contributed in their own rights to cementing Danish pro EC-positions. The premises of political leadership for reaching more or less across-the-board pro-Community conclusions undoubtedly vary considerably depending on political points of departure. But so does the nature of the points on the just-preceding list of major events which brought about change.

**Summing-up**, a national development taking place within a span of less than 20 years only, and ranging from a quite traumatic entry situation to high-level political near-consensus about taking the rather big leap forward towards more integration in depth as well in width which was decided in Maastricht, cannot but trigger curiosity and many questions. It does so even on the part of those best informed about the EC/Danish sovereignty relationships.

## ***8. My Outline for the Remainder of This Paper***

For the purposes of presentation I have decided to form what follows as a series of tentative (unexhaustive) identifications of those factors which might explain how, within that relatively short span of time an old, sovereignty-jealous, nation state with a language, culture, parliamentary tradition, etc. of its own, all squarely at the periphery of Community main streams, may - sort of paradoxically - metamorphose from a perception of the EC as an essentially economic and, in any event, alien socio-political construction to accepting its radical politicisation and (inevitably ensuing) federalisation at the expense, it goes without saying, of national sovereignty and self-determination.

It is my **basic submission** that if the Danish people had not by and large found/detected that its national politico-constitutional life under Community tutorship was not essentially acceptable and tolerable, the macro-economic and political events of the late 1980's, to which I referred above, the country's old internal cleavages would have, still, prevented the metamorphosis from happening.

In what follows, I shall from that perspective proceed by highlighting on the pros and cons of the nation's life under Community tutorship. I shall in due course deal with particularities of the EC's constitutional build-up, hereby touching upon questions pertaining to the various divisions of powers between center and constituent parts; to the processes and powers of implementation and enforcements of the EC's legal decrees; to democracy arrangements at EC level; to the adequacy of the EC's political processes; to the role of the Court, to the Community as an essentially elitist social organisation; to problems pertaining to transparency of governmental processes; to language arrangements in theory and in practice; etc., etc.



## 9. *Arguing the Case of an After All Successful Membership*

I submit that the Community's success cannot fully be appreciated if it is not understood that the whole affair began as an experience involving **elites** only - and that it has continued that way until the present day. Even in a Member State like Denmark where the electorate at large is probably better informed about what the Community stands for than it is the case in most other, if not all, other Member States, ignorance still prevails when it comes to the crux of the matter. The ordinary citizen can read about the Community and he has heard a lot about it. Yet, he does not understand its nature, its decision-making, its middle- and long-term implications for his national politico-constitutional set-up, etc. Even the better-informed regularly refers to «down there» in the EC - as if the Community was not pervasively implanted in his own country, administration, parliament, government, economic life, etc. The expression translates an understandable feeling of alienation. He has so far learned to live with it because most opinion-makers have tended to explain the realities of membership in positive terms. ✓

Secondly, the central government, i.e. that in the Community, as a rule does not directly **regulate** the lives of citizens of a Member State. Indeed, most Community rules are laid down in so-called Directives. Directives are legal decrees binding on the Member States only. These are, however, committed to promulgate national provisions implementing the Directives, i.e. issuing national rules that transpose those of the Directives. Hence, from the citizens point of view, he has as a rule to abide by legal decrees authored by his own government. He will often not be aware of the Community origin of the rules imposed on him.

The Community origin of the numerous laws in force at any time might, nonetheless, have been experienced as an **alienating** factor if it had not been for the following circumstance. Indeed, of the greatest importance for affording Community law and regulation with a familiar face has been its legislative processes' great reliance on **comparative lawmaking**. For its legislative purposes, the central government has shown considerable willingness and ability to incorporate and absorb a great variety of the national legal systems' legal methods, techniques and fundamental and otherwise principles; as well as the truly countless amounts of more concrete, legal materials. Comparative lawmaking has been in operation in all/most policy sectors, including, e.g. laws on market organisations, on companies, on insurance, on environmental protection, etc., etc. Self-evidently, the reliance on genuine comparative legal work has largely contributed to making the subjects to the law feel less estranged in that capacity than otherwise would probably have been the case.

Thirdly, the crucial **language** problem is almost imperceptible by the ordinary citizen. The **legal decrees** binding on him emerge in his own language, either because they have been issued in Danish by his own government (cf about the Directives just above) or, in those rare cases where the rule in question emanates directly from the central government (which will be the case with the so-called Regulations), huge translation-services ensure on a daily basis that any Regulation exists in the Danish language. Translation is, indeed, conditioning validity at Community level.

Moreover, since elites only are involved in the **administration** of government business in Brussels (e.g. Council and Commission), in Luxemburg (e.g. Court) and in Strasbourg (Parliament or EP), the ordinary citizen is never confronted with the immesurable language-problems that characterize the operation of government at Community level.

Note also, that whatever the art and nature of the EC legal decrees in question, **enforcement** of Community law is almost exclusively a national matter. In those rare cases where EC powers of enforcement do exist, adequate requirements of cooperation with national civil servants ensure that most advert implications of the language problem are avoided.

The sense of **legal-cultural closeness** which emerged in the wake of the legislative processes' reliance on comparative work, in turn contributed to enhancing conditions of unenforced compliance with the laws of the Community whether immediately applicable (Regulations) or transposed (Directives). Indeed, given the absence of real powers of enforcement of its own, the Community government depends still, as a rule, on the **persuasiveness** and acceptability of its legal decrees.

Fourthly, while an occupation of the Realm by alien-looking laws was avoided, so was a pervasive **economic conquest** by non-Danish companies of the country's businesses. Both these absences are in turn linked to that the EEC-Treaty's Common Market-project was not, and by far not, translated into legal reality by the Community processes. These showed a remarkable inertia from the mid-60's until about 20 years later. This inertia may be traced back to a political convention which dominated the EC's central lawmaking institution (the Council) and which consisted in making decisions by unanimity (the so-called **veto-practice**) only, even despite the availability of treaty-provisions authorizing qualified majority voting. As noted above, this convention constituted an important instrument by which to bridge over the unresolved, fundamental sovereignty conflict deviding the participating States.

Yet, noteworthy powers of regulation of important economic sectors had been transferred to Community level by those states which, like Denmark, decided to enter the Community. This meant that powers of regulation of the activities of Danish citizens, in limited though vast economic sectors, no longer were vested in Danish authorities. Constitutionally, the transfer was feasible but it did dig holes in the powers both of the Folketing (the nation's parliament), the administration and the courts. Because of the transfer of regulatory powers, the country witnessed, throughout the 1970's and early 1980's, the outbreak of endless (domestic) cleavages between **alternative majorities** (i.e. alternative to that supporting the governments of the day). The latter is alone directly involved in the administration of the transferred powers at Community level. Community politics at national Danish level became very contentious, indeed.

However, even at national level, Community politics was more or less an exclusive play-ground for members of various **elite-groups**. The ordinary **citizen** hardly understood much, if really anything, of the importance attached by the competing elites to the issues which divided them. The voters as a rule divided amongst themselves along the same lines of division as did their

MP's. During that period, pollsters did, however, regularly register majorities of being against Danish membership. It is revealing of the confusion of the electorate over the real Community-issues though that every time it has been asked at elections or referenda to vote for or against the EC, a pro-Community majority has always resulted. At these occasions the electorate has not unconditionally followed the consigns of political leadership. This was in particular the case in 1986 when the Social Democratic party, in opposition, recommended its voters to vote against the ratification of the Treaty on the **Single European Act**, a recommendation that was not followed in general by the party's rank and file. The SD party has been the country's largest for most of the present century and been leading several governments, alone or in coalition with other parties. It has been in opposition now during the last ten years.

Secondly, but linked to the just preceding problem, concern spread in many circles over the heavily **intergovernmental** nature of Community policymaking. This implied an almost total lack of **transparency** of what was going on in the process as well as a corresponding **democratic deficit** that was registered as problematic considering the obvious decline in the powers of the national parliament. As long as the loyalty of the typical national voter resided with his national institutions, including the national parliament, and as long as this transmitted the impression of **remaining** (more or less) **in charge** of making the country's fundamental political choices, few cared about, however, the democratic deficit at Community level.

And for many years of Danish membership, important fractions of the Folketing were successful in transmitting precisely that impression. They did so i.a. by frequently circumscribing narrowly the government's leeway of action in the Council, by imposing on it to veto numerous Community proposals for action, by adding footnotes and reservations to most major Community policy statements, and by blocking all and any moves initiated by other Member States towards amendments, however desirable, of the basic charter.

**In sum**, the prevailing intergovernmentalism, the inexistent transparency of the lawmaking processes, and the deplorable democratic deficit at EC level might have become nationally contentious issues, capable of generating longer-lasting and deeper antagonism in the electorate at large towards the Community. However, Danish MP's have handled these issues in such a way as to minimize their real importance for themselves (losses of regulatory powers) and for the voters (loss of self-government). Since in the wake of the declining powers of parliament, important powers reverted back to civil servants and to their masters, the ministers, one should not be surprised to learn that much criticism of the Community has hardly ever emanated from these quarters.

Thirdly, the hitherto single truly supranational institution of the Community, the **European Court**, has been able to perform an amazing pro-integrationist courtroom government without much attention being paid to it. Reasons rally to explain how that might be: First of all, the Court's business has more than anything remained an **elite** matter. Secondly, problems pertaining to law and legal procedures are not the preferred manuevs of politicians. Indeed, judicial law is first and foremost, in the minds of most people, matters of law and therefore better to be left

to **legal experts** to be dealt with. Thirdly, it is part of a rather strong Western European tradition that judges are believed to **stay out of politics**, if only for the reason that they have no political mandate and that they have not been trained to deal with political problems.

Wrong when it comes to the role of the European Court which, indeed, decided to enter the scene of pro-Community policymaking in the same rhythm as the enertia became the hallmark of the EC's political processes. This means that since the mid-1960's they have been deeply involved in ensuring a growth in both the scope of pro-Community law- and policymaking and in an in-depth development of the strengths of the EC's legal and political orders. While a political vacuum dominated at the level of the Community's elected politics, the judges took actively part in a process of high density centralizing and federalizing politics at judicial levels. This took place at the expense of many important bits and pieces of reserved Member States' sovereignty and, if necessary, of the citizens' expectations about legal certainty and security.

This is only the place to state that, however potentially conflict-laden, the Court's pro-Community activism passed essentially without generating much criticism. Yet, whether the absence of critical voices is due to sheer ignorance about what was going on in the courtrooms or is attributable to complacency by those who were actually well informed, the Court succeeded in transforming the Community's legal system from being some strange variant of an international organisation to something featuring strong resemblances with a maturing federal legal system.

In other words: When elected politicians by the mid-80's began actively to make pro-Community policies and embed them into Directives and Regulations, the Court had fundamentally changed the Community's legal/constitutional conditions of survivability against footdragging compliances, defiances, attacks, etc. The legal system had in the meantime been tuned and trimmed to support effectively the ambitions of a strong central government and federal-type of political developments.