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DIVISION OF COMPETENCES IN FEDERATIONS AND EUROPEAN UNION

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Abstract:
The failure of the Constitutional Treaty, but also the recent developments in the European Parliament, through the formation of a group of countries following the nationalist current, demonstrate that the attribution of the title of superstate to the European Union does not reflect the political-legal reality of the European construction.
On the other hand, the consideration of some of the powers of the Union as superpowers is also inconsistent with the regulations of contemporary international law, generating confusion, both on a legal and political level.
This article aims to present the necessary arguments for clarifying the legal nature of the powers of the European Union and correlatively, the sui generis character of this international organization with an integrationist vocation.
Keywords*: competences, sovereign attributes, European Union, decentralization, federalism*

General remarks

The device of the Treaty of Nice did not bring all the necessary clarifications regarding the efficiency and transparency of the decision-making process. This thing it also emerges from the approach to annex to the Treaty a Declaration in which the initiation of a broad public debate on the revision of the treaties, in the form of a *European Convention on the Future of Europe*, was mentioned.

The Convention proposed the elaboration of a draft *Constitutional Treaty*, intended to simplify the European political and legislative framework. In this sense, the project proposed the merging of the three pillars, but with the continued maintenance of special procedures in the fields of *foreign policy, security and defense*.

Following the non-ratification of the Constitutional Treaty in France and the Netherlands (May 29 and June 1, 2005, respectively), it did not enter into force. There followed a period of reflection on the causes of the failure, after which, in the first part of 2007, the institutional process was resuscitated by Chancellor Angela Merkel, who presented a new version of the Treaty, which would replace the Constitutional Treaty.

The Intergovernmental Conference that followed allowed the adoption of the Reform Treaty on October 19 and its signing on December 13, 2007, in Lisbon.

Its ratification took place during 2008 and 2009, so that, starting from December 1, 2009, the treaty entered into force. The ratification process in the 27 member states was mostly achieved through parliamentary ratification, Ireland being the only country that had the constitutional obligation to organize a popular referendum. The option of a referendum was also discussed in countries such as Denmark, the Netherlands and Great Britain (at that time a member of the EU). [1]

First of all, we must emphasize the fact that the European Union, following its establishment by the Treaty of Lisbon, appears as an international organization, being constituted as an organization of states, based on an international multilateral treaty, endowed with its own bodies and will own, distinct from that of its founding states and also has international legal personality. [2]

The *sui generis* character does not come from the fact that it is a union of states in an international organization, but from the powers that are attributed to it by the states and that make this construction one with specific elements of a state[3] (governance, creation of the legislature, etc.). Also of a *sui generis* nature is the fact that this organization with obvious state-like powers cannot be generically fitted into the federative or confederate model.

Regarding the sovereignty of the member states, a first remark is related to the fact that, regardless of the nature of the international organization, the states must respect their domestic law,[4] but also the commitments they make in different forms of cooperation in which they have agreed to participate.

Finally, the actions of the international organization represent actions that the member states agree to respect and for the achievement of which they assume commitments. Consequently, any type of state cooperation, but especially those carried out in international organizations, inevitably implies the assumption of obligations that lead to the restriction of freedom of action in favor of the organization or its other members.

On the other hand, with all the current importance of international organizations, after their expansion creating a real structured network of entities, thus transforming the

international community, they do not replace states,[5] remaining, however, the primary element of the construction of international society, with whose existence they are interdependent.

The international organization's *own will does not lead to the imposition* of obligations towards the member states, due to the fact that they are the only ones who have the full capacity to establish them and therefore participate in the formation of their will. In this sense, the states are not subordinate to the international organization, but have commitments with them. All acts, regardless of their name, decision, resolution or any other document, are adopted by the states and do not become binding on them except in accordance with their constitutive rules (ratification, adoption, etc.).[6]

The European construction does not depart from the norms of international law.[7] What appears to be an act of direct governance of the European Union in relation to the member states, is in fact a *competence*, exclusive or shared, attributed by them to the European institutions, in order to regulate in certain areas, on their behalf and for them. The competence thus created is the direct and immediate result of the will of the states, the national authorities have agreed to delegate the exercise of some sovereign attributes to the institutions of the Union.

In this sense, the principles according to which the act of European governance is carried out, such as the assignment of competence, subsidiarity, proportionality,[8] which had in mind the precise harmonization of the fundamental principle of international law, sovereignty, with the decision-making process of the institutional structure built by the states themselves.

In this sense, from the beginning of the Treaty of Lisbon, it is mentioned that what remains under the jurisdiction of the member states and which is not contained in the EU portfolio with the title of community competences are those areas that define and compose the *national identity*.

This approach is necessary for the actual existence of the fundamental political and constitutional structures of the member states, which respect the essential functions of the states and, in particular, those aimed at ensuring *territorial integrity*, maintaining *public order* and *national security*.[9]

In support of what has been stated, arguments can be made that demonstrate the EU's abstention from the creation of a military block and, therefore, the fusion of the common defense function by maintaining the regulations in this field in the logic of intergovernmental cooperation.

The maintenance of the sovereignties of the states in the face of the European construction results from the fact that they continue to hold the status of subject of international law, exercising all their powers, except for those that, based on their freely expressed will, have been *delegated for exercise to the EU institutions*. The procedure itself of assigning powers to the EU institutions is proof of the expression of the sovereign will of the states, because otherwise this would be incompatible with their EU membership.

In conclusion, the European Union represents an association of states that remain sovereign, and which, together with the European institutions, are the basis of the entire community construction. The Union cannot exist without the member states, seeing that they represent the constituent element of the European Union, which has the member states as the foundation of its legal existence. The European Union itself is the result of the activity of the founding states that assign it powers to achieve common objectives, as can be seen in Article 1 of the Treaty[10].

In certain specialized works the expression transfer of sovereignty appears, creating confusion and inducing harmful currents for the existence and proper functioning of the community construction itself. According to what is mentioned in this study, from the use of this phrase we can deduce that sovereignty is neither exclusive nor inalienable, thus losing the material elements that constitute the concept of sovereignty and, with them, disappearing the cornerstone of the entire modern international order.

This approach does not reflect reality in the sphere of international relations either, due to the fact that such an interpretation would lead to the dissolution of statehood and, implicitly, to the erosion of one of the fundamental pillars of the community construction which is formed by sovereign member states. It would be most appropriate to use terms that reflect the fact that the reference is made to the lack of exercise of sovereign powers by the member states, as a result of the attribution of powers to the European Union, considering that it does not have sovereign attributes, but powers.[11]

This does not mean that, in the future, the states will not be able to decide to coagulate in a federal-type construction, with the newly constituted entity gaining sovereignty, in the current sense of the term, starting with the termination of the sovereignty of the member states, a phenomenon that would subscribe to the rules of order current international.

The division of competences in the European Union and of sovereign attributes in federations

The European Union has no equivalent in the history of federations and confederations, but the distribution of authority between the center and the member states can be compared to various federal models.

The political consensus necessary for the creation of the federation is shaped by a federal constitution that distributes powers. The evolution of federalism creates a diversity of authority resulting from the distribution of competences between the institutions of the central government and the member states.[12]

In federalism, authority is assigned through the primary and secondary vertical division of powers. The federal constitutions explicitly establish the competences at the central and local level, while the Treaty establishes exclusive competences of the Union and the member states, which cannot be violated, and the common (concurrent) authority exercised according to specific conditions at both levels of the multi- level.

In federal states, the primary distribution of authority is followed by a secondary differentiation in which the vertical dimension of the principle of *separation of powers* is specified. The powers outlined as a result of the secondary distribution of powers may be: implicit, inherent, reserved or denied to the central government and the subjects of the federation, either separately or jointly.

The history of federalism indicates that the maintenance of constitutional regulation for decades or hundreds of years has generated tensions due to the change of the social context. The constitutional framework of the vertical division of powers within the federation is shaped by the arbitration of the constitutional jurisdictions or by the constitutional revision by the judicial power.[13]

Compared to federalism models, based on federal constitutions, as an expression of their sovereignty, the European Union is a political-legal entity based on a multilateral treaty, not on a fundamental law, in which political integration is rather at the beginning of the road and , at the same time, contested by some member states, but in which there is strong economic cooperation complemented by the necessary legal regulations, which in turn creates the need to expand the powers of the Union.

The exclusive nature of some aspects of the community authority is not explicitly provided for in the founding Treaties and it was justified by the jurisprudence of the European Court of Justice.[14] A *presumption of competence* on the part of the member states involved in the decision-making process is applied to the community authority.

The Court does not use the terminology of distribution of powers, but established the term ”exclusive competence of the Communities”, as well as two types of community authority, *specific powers*, which refer to implicit authority, and *non-specific powers*, which are exercised when there is no a legal basis for the application of a certain authority.[15]

Subsidiarity[16] and *proportionality* are the fundamental principles that regulate the distribution of authority in the areas of common competence of the Community and the member states. The objective of the principle of subsidiarity is to guarantee an efficient division of authority and bringing decision-making closer to the citizens.

Subsidiarity is a dynamic concept, a feature that emerges from the protocol on subsidiarity and proportionality of the Treaty of Amsterdam, in Articles 94, 95 and 308 EU, the authority of the Communities can be extended to include issues related to the construction and operation of the common market and those regarding the achievement of other objectives of European integration, which are not regulated by the Treaties as spheres of competence of the European institutions.

The theme of the explicit division of powers between the European Union and the member states is a constant one in the European integration process, the division of powers reflecting the continuity of the principles established during the previous evolution of the European integration process and bringing functionalism and the community method closer to the federal method.

The fundamental principle of the *express delegation of powers* acts as a guarantee against the concentration of power within the EU institutions, and the principle of

subsidiarity and proportionality governs the exercise of Union powers. The Union acts in the context of the *authority delegated* by the member states, which retain their other sovereign attributes, the exercise of which is not expressly delegated to the EU institutions.

On the other hand, based on the principle of subsidiarity, the European Union can act beyond its express competences only if and to the extent that the objectives in question cannot be achieved by the member states and would be better achieved at the EU level. The principle of subsidiarity is subject to control by national Parliaments. At the same time, EU institutions should exercise authority in accordance with the principle of proportionality, which provides that the form and content of EU action should not exceed the level necessary to achieve the objectives established by the Treaty.

The sharing of authority follows a simultaneous implementation of functional and sectoral approaches. The *exclusive competence of the European Union* implies that only the Union can legislate and approve legal acts in a certain field, while the member states can act within the scope of this authority only when they are authorized by the European Union to implement these acts. The Union has the exclusive competence to establish the competition rules necessary for the functioning of the internal market and in the areas of monetary policy in the Euro Zone, common commercial policy, customs union, conservation of marine biological resources.

The European Union becomes a member of international treaties only to the extent that this is provided for in a legislative act of the European Union or when it is necessary for the exercise of its competences or is related to an internal act of the European Union. The EU's competence also includes the promotion and coordination of the economic and employment policies of the member states, as well as defining and implementing the Common Foreign and Security Policy and gradually defining the EU's defense policy.

The *concurrent (joint) authority* of the EU and the member states is achieved through their authority to legislate and adopt binding legal acts in the appropriate fields. Member States exercise their *sovereign attributes* where the European Union has not exercised any competence or where it has ceded its exercise.

The areas in which the legislative authority is shared between the sovereign attributes of the states and the competences of the EU institutions apply to the areas expressly provided for in the Treaty: the internal market, the area of freedom, justice,

agriculture and fishing, transport and trans-European networks, energy, social policy, economic, social and territorial unity (cohesion), environment, consumer protection, general public health safety issues.

In the field of research, technological development and space, development cooperation and humanitarian aid, the European Union is competent to approve and implement programs, without however preventing the member states from exercising their own sovereign attributes. The *implicit competences* of the European Union come from the powers expressly regulated as a necessary instrument for their implementation. The *exclusive competences* of the member states are all other competences that have not been delegated to the European Union by the Constitution.

Finally, it can be assumed that a more detailed definition of competences could face serious political resistance in the institutions of the European Union and the member states, due to the need to adopt amendments to the national Constitutions. The formula of the transfer of sovereignty will prove insufficient to formulate a clear distribution of power.

The abandonment of this line of constitutional development will in turn generate conflicts that the European Court of Justice or, in the case of the dissolution of national sovereignties and the simultaneous formation of the sovereignty of a European federal state, a possible future Constitutional Court of the EU, will be able to solves them effectively.

A brief study indicates that the ratification of an EU Constitution will bring clarity and understanding to legal and institutional structures, but as long as the European Union remains an international organization and does not legally transform into a federal state, it will not be possible to establish a unique hierarchy of methods, institutions and legal acts, such as the one in the national constitutions.[17]

Reverse hierarchy[18] of EU governance through intergovernmental and community methods will be preserved, although it will function in a more efficient manner by improving the interdependence between the EU and the member state institutions. The supremacy of EU Law reflects the legal supremacy within the framework of the *divided competences*, and the reverse hierarchies take precedence in the situation where different holders act in the sphere of the exclusive competences of the EU and the institutions of the member state.

References:

[1] The three founding treaties were the Treaty establishing the European Coal and Steel Community (ECSC), 1951, the Treaty establishing the European Community (EEC), 1957, and the Treaty establishing the European Atomic Energy Community, 1957. The fourth founding Treaty is the Treaty of at Maastricht or the Treaty on the European Union (1992/1993). The Merger Treaty - (1965), the Single European Act (1986/1987), the Treaty of Amsterdam (1997/1999), the Treaty of Nice (2001/1.02.2003) and Treaty of Lisbon (2007/2009) subsequently amended the founding treaties. The accession treaties signed with the new member states are examples of *new treaty amendments*.
[2] art. 47 of TUE.
[3] Draghici, Cristian (2021). *Some considerations on normative inflation and its effects on fundamental human rights and freedoms.* Journal of Law and Administrative Sciences No.15/2021, Petroleum and Gas University Publishing House of Ploieşti, p.59.
[4] respecting the rules established for the good development of meetings and organizational life as a whole.
[5] Geamănu, Grigore, *Drept Internațional Contemporan*, vol.2, Didactics and Pedagogy Publishing House, Bucharest, 1975, p.171.
[6] The Convention for encripting states rights, section 1, article. 2, letter.(j).
[7] Ciongaru, E. (2018). "The globalisation, law and justice - general considerations". *Journal of Law and Administrative Sciences* No.9/2018, Petroleum and Gas University Publishing House of Ploieşti, p.97.
[8] Maillet, Pierre, *Trois défies de Maastricht (convergence, cohésion, subsidiarité)*, Ed. L'Harmattan, 1993, p.105.
[9] Treaty of the European Union, article. 4, para. (2).
[10] Anghel, Ion M., "Uniunea Europeană și poziția (calitatea de subiect de drept internațional) a statelor membre",
in *Revista Română de Drept Comunitar*, 2009, nr. 6, p.97.
[11] Anghel, Ion M., "Uniunea Europeană și poziția (calitatea de subiect de drept internațional) a statelor membre",
in *Revista Română de Drept Comunitar*, 2009, nr. 6, p.92.
[12] The specialized literature outlines many models of federalism, which demonstrates the existing diversity in regulating the distribution of powers between the central government and the subjects of the federation. The distribution of competences constitutes the vertical dimension of the division of powers as outlined for the first time by J. Madison in the United States of America. For the American, German and Swiss model of distribution of authority in the federation, see W. Lehmann, "Attribution of Powers and Dispute Resolution in Selected Federal Systems", WP European Parliament, AFCO 103, Luxembourg, 2002.
[13] In fact, the intervention of the bodies in charge of constitutional control not only resolved disputes between bodies based on the constitution, but also ensured, through interpretation, the dynamics of the distribution of authority where the constituent power was inactive, although the constitutional text was maintained. The Constitutional Courts thus guaranteed the smooth functioning of the federal government by resolving disputes or created constitutional provisions regarding the distribution of authority that corresponded to the new realities and compensated for the inactivity of the constituent power.
[14] The Court usually applies "selective exclusivity" to issues that are within Community competence. Other issues are subject to common competence.
[15] Lenaerts, Koen, "Constitutionalism and the Many Faces of Federalism", 38 *The American Journal of Comparative Law* (1990), pp. 213-218.
[16] The principle of subsidiarity was introduced for the first time by the Single European Act (1987), but only in the field of environmental protection. Since its recognition as a general principle of community law by the Treaty on the European Union (1993), it has been applied in all areas of common competence.
[17] Ciongaru, Emilian (2022). "Some general conceptual developments of the constitutionality of social justice". *Journal of Law and Administrative Sciences* No.17/2022, Petroleum and Gas University Publishing House of Ploieşti, p. 19-22.
[18] Roeben, Volker, "Constitutionalism of Inverse Hierarchy: The Case of the European Union", *Jean Monnet Working Paper* No. 8/03, Jean Monnet Center, NYU School of Law, 2003.