## BUREAU DE COORDINATION DES ÉTUDES
**Fiche d'identification de la mise à jour**

**COMMISSION :** Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté.

## ÉTUDE ORIGINALE

**Référence :** Volume 3, pages 361 à 372

**Auteur :** Hjalte Rasmussen

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

## MISE À JOUR

**Auteur :** Hjalte Rasmussen

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

2001-12-19

# EUROPEAN COMMUNITY SOVEREIGNTY ARRANGEMENTS

## A FRAMEWORK FOR A QUEBEC COMPARISON

### - A 2001-Update -

*General Introduction.*

In terms of Denmark's cohabitation with the European Union's sovereignty arrangements, it was a turbulent decade which passed since I presented my original report from 1991 to the **Government of Québec**. Many of the findings about that relationship which I presented in the 1991-report, must be modified. Some must be revised fundamentally. Indeed, not much of what happened during the intervening, roughly ten years corroborate the essential features of my conclusions.

In that report I "argued the case for an after all successful membership". 'Membership' was Denmark as a Member State of the *European Community*. No data available today suggest that the characterisation of the relationship as successful was inaccurate. By the time, however, the ink of my report had dried, Denmark was facing membership of the *European Union*. The recorded reactions of vast segments of the Danish electorate show that they perceived this new phase in European legal and political integration as an entirely different matter.

What happened? The turning point was the Union-treaty which metamorphosed the European Community into *European Union*. The Union-treaty's nickname is: the Maastricht-treaty; named, as it is, after the Southeastern Dutch city of Maastricht in which it was signed in December of 1991. This treaty's fundamental objective was to transform the existing Community of States into a Union of States. The essentials of the treaty's programme of innovation are portrayed below.

The Maastricht-treaty was signed by the Member States' Heads of State and Government acting in what, in European institutional jargon, is called *The European Council*. The draft Maastricht-treaty stipulated that it was to enter into force on the 1st of January of 1993, following its ratification, during the year of 1992, by the competent authorities of all the then twelve Member States.

Entry into force was delayed, however, following unforeseen events in two Member States. The unforeseen event in Germany was that complainants challenged the constitutionality of ratification in a case before the Constitutional Court[1)]. In Denmark a majority of the Danish voters - at a referendum held on June 2nd, 1992 - rejected the government's proposal according to which Denmark should ratify the Maastricht-treaty[2)]. The outcome of the referendum showed that the NO-majority was the narrowest imaginable. In a fundamentally democratic polity like the Danish the size of the NO had no bearing, however, and should not be permitted to have any bearing on the political impact of the negative outcome of the referendum.

---

[1]. These judicial procedings came to a close in October of 1993. Then, Germany could ratify the Treaty which entered into force by the end of the year 1993.

[2]. At a second referendum, held on 28 May, 1993, the Danish voters came out in favour of ratification wherefore Denmark could ratify the Maastricht-treaty shortly afterwards; this is retold below.

*Recapitulation of the Essential Findings of my 1992-report to the Government of Québec.*

In my 1991-report I wrote 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.[3)] Yet, he has so far learned to live with it."

The segment of the electorate meeting the elite-qualification is typically recruited from the nation's major political parties and their leaderships, from most employers' and trade unions, from the major written and electronic media, from academia, from the (central) civil services, etc., etc.. The 'members' of the elite - or, alternatively, the country's Political Class - share, according to referendum-analysts, certain characteristics such as being well-educated, and having good, prestigious and, most often, tenured jobs, mastering two or more foreign languages, featuring, for the most part, a societal high status combined with economic and financial confortability and, notably, non-dependency on governmental well-fare hand-outs, etc..

It has already appeared that Danish EC-membership began in 1972 as the elite's project. During the 1972-EC-entry campaign, the elite told the voters, on and on again, that the European Community and membership of it was solely about economic rationality. This was the codeword for legitimising membership and the necessary transfers of sovereignty which the voters accepted and overwhelmingly voted in favour of EC-entry on October 2, 1972.

The 1972-referendum was constitutionally required because EC-membership was conditioned by a transfer of Danish sovereignty. Transfers of sovereignty are, under certain conditions on which I shall elaborate below, warranted by Section 20 of Denmark's written constitution[4)]. A transfer of 'sovereignty' means that competences which the Constitution vests in the authorities of the Realm are henceforth to be vested in non-national authorities [5)].

During the period of time covered by my 1991-report, little if anything suggested that the voters were beginning to seriously challenge the legitimacy of membership. At the same time many voters, including an unknown number of those on the yes-side, may have remained suspicious about the real nature of the project. They knew that the Euro-sceptics of those days had issued an early warning according to which the politically toothless Community was simply a precursor of, or rather an essential building block for, the Jean Monnet'ian vision of an emerging United States of Europe (hereinafter the: spectre of federation). These warnings were neither in 1972 nor in subsequent years of great avail, though, counterweighed as they were by the massiveness of the resourceful and continuous yes-to-economic-common-sense campaigns.

There should, moreover, be no doubt that certain important aspects of the original EC-treaty and its lawmaking techniques were corroborating the arguments of the yes-side and were, consequently, helpful of its commitment not to permit the spectre of federation to come in the way of its transmittance of a rosy and peaceful picture of membership. There was (and I

---

[3]. 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.

[4]. The text of this Section is reproduced infra in fn. 14.

[5]. Transferring a piece of sovereignty via Section 20 means that it can take place without recourse to formal constitutional amendment. Such amendments, which must follow the procedures laid down in Section 88, are almost as difficult to operate successfully in Denmark as constitutional change is to accomplish in Canada.

cite from illustrations contained in the 1991-report) (1) the omission from the mid-1960's of the word *supranational* from the treaty-texts. (2) There was, moreover, the political *any-Member-State-can-veto-any-rule*-convention that was a brainchild of the so-called *Luxembourg Compromise* from 1966 and which twarthed the use for more than twenty years of majority voting for the purposes of EC-lawmaking. The Treaty-prescribed *unanimity*-requirements (3) cemented Member State control over Community lawmaking. The treaty's technique (3) consisting in authorizing the Member-State-dominated Council of Ministers to more or less sole in charge of making important political choices, including not least as regards initiatives aiming at intensifying legal harmonisation and economic integration. This, in combination with the veto-arrangements placed any Member State in a situation of quasi-absolute dominance over political developments. The treaty was, thus, a so-called *traité cadre*; not a *traité-loi* which itself lays down the rules to apply to the mutual relationship between the signatory states. Further, (5) the fundamental stipulation that all *languages rank as equally important* and that, therefore, Community law applying in, say, Denmark, should be drafted in Danish, is important. It brought about a situation placing most citizens at a safe distance and, often even, unawareness of the fact that most Community laws to apply in Denmark would have been conceived in another langauge, in short: the multilanguageness of the Community's lawmaking. (6) The predominance in practice of an *indirect lawmaking* procedure, based on the use of directives which are addressed to and bind the Member States which, in turn, issues the rules binding on the citizens and companies, was use ful also. Most often, only legal experts would be conscient about this chain of causation while the citizen would ignore this very real and important distinction between rules of EC-integration which become legislation (and other rules) in the Member States and genuine domestic lawmaking.

In other words and in conclusion: There was always a low degree of identifiability or visibility of EC/Union-memberships' severe and inherent repercussions on issues of high domestic sensibility such as language, legal system, social self-governance, democracy and parliamentarism, cultural self-expression and the rest.

*What triggered the NO in 1992?*

At the end of a period of twenty years of a basically 'successful membership' a majority of the Danish voters rejected none the less to go along with the proposed Maastricht-broadening and deepening of political and legal integration? Why did that happen?

When I drafted my 1991-report during the Fall Term of that year, the Danish Political Class was, as noted, well informed about the changes of the European Community's institutional and political structures that the Maastricht-negotiators were agreeing upon. At least, the skeleton of the purported Maastricht-changes was known.

On this backdrop, the general view prevailed that these changes were, in essence, both constitutionally and politically digestible. That is, digestible by Denmark as a Member State and the Danes or voters as the *pouvoir constituant*. It was at no point towards the closing of the Maastricht-negotiations in doubt that ratification would necessitate a further transfer of Danish sovereignty, and that this would require a public vote at a referendum - a referendum which would have to be won by the YES-side.

The Political Class did not, however, take seriously the possibility that it might loose the referendum, although a NO would threaten to cast in jeopardy the entire Union-project embedded in the Maastricht-treaty. Of far lesser importance would be that a NO was certain to delay the timely entry into force of the Union-treaty. Yet, during the referendum-campaign these options were brushed aside as speculative.

Some early concern was expressed, though, about the draft treaty's declaration that the incoming Union was gifted with a *federal vocation - une vocation fédérale*. These Danish concerns, at the roots of which lie a traditional uneasiness with the notion of federalism, were however shared by other, essentially, Northern Member States. Hence, it was a small matter to succeed in suppressing, during the last phases of the negotiation-process, those words from the draft treaty's text. There, they had figurated only, by the way, in the declaratory Preamble.

It came, therefore, as a great surprise when the Danish ratification-process was brought to a rather brutal halt on June the 2nd, 1992, when the NO had become a reality. The elite had failed to see what was coming up in the electorate.

The main question to be answered in the wake of the NO was, of course, which were the elements of the Maastricht-treaty's Union-project that prompted the voters to oppose the elite's success-version of Denmark's Community and Union membership. This question cannot be properly answered without the following brief recapitulation of the mains points of the Treaty on European Union. In what consisted, in other words, the Maastricht-*acquis* [6)]?

*The Essentials of the Maastricht-acquis.*

This is not the place to record the details about the Maastricht-*acquis*, even not those pertaining to its head-lines; but merely to highlight those very head-lines. For and foremost among these loom the new rules in the so-called Second and Third Pillar[7)]. Of these, the Second Pillar lays down provisions enabling the Union to conduct potentially powerful foreign and defense policies. The Third Pillar entrenches a vast spectrum of new Union powers in the fields of justice and home affairs.

By unionising very important aspects of foreign- and defencepolicymaking, the Maastricht-treaty interfered with and purported to denationalize some very powerful symbols of national (external) statehood. And by unionizing justice and home affairs, the treaty began to dethronise national self-governance in areas even closer to the hearts of many common men and women: Criminal justice, access to the territory, asylum, police-cooperation, etc..

Among the critical Maastricht-issues are also (1) that the Union's institutional structures became immensely complicated: The three-pillar structure, each pillar replete with its own multiple competencies, fields of application, decisional mechanisms and procedures etc., succeeded to the Community's single pillar or unified legal and decisional structure. (2) Inside the EC-pillar the Maastricht-treaty also brought about important changes, notably by adding new competencies to the EC's already rich and heterogene array of fields of lawmaking (new were, *inter alia*, education, culture and more) and by reinforcing the Union's powers in other fields (economic and social coherence, environmental policy, etc.). (3) The previously exception-free principle that Community law is the common law to all European states, companies and citizens was quashed; within narrow fields of application: (a) the United Kingdom was granted a right not to be bound by the new treaty-rules on social cohesion; and (b) the other Ten accepted that Denmark and the UK were free to decide (later) whether to join the euro-currencyzone or not, *i.e.* the final part of the third phase of the Economic and Monetary Union becoming a reality by the beginning of 2002. (3) Moreover, by allowing for rulemaking by qualified majority where requirements of unanimity had ruled before, the decisionmakers at Maastricht wanted to enhance the efficiency of Community law- and policy-making at the expense of the protection of the interests of Member States and their subjects. Qualified decisionmaking was introduced in respect of transport policy, consumer policy, certain elements of educational and environmental policymaking, development policy and transeuropean networks; while commitments were made to incorporate certain other policies (visa, asylum, etc.[8)]) into the ambit of qualified majority lawmaking after a lapse of time of five years. (4) A Union citizenship was also provided for and (5) a Union Ombudsman-institution

---

6. *Acquis* is European-institutional jargon meaning: The common set of rules which are binding on everybody.

7. The Pillar-terminology cannot be explained by reference to other, better known pillars. A 'pillar' depicts a set of substantive, organisational, procedural and other rules pertaining to a more or less well-defined policy-area which is organised separately from other fields of policy although belonging, together with the rules of different pillars, to a common organisational whole - in concreto the European Union. The Union consists of three pillars. Two of them are identified in the text over this footnote. The third consists of the old suprantional European (Economic) Community and its legal system.

8. This is explained in fn. 12 below.

was created. (6) Because some Member States were listening at home to more frequent and articulated criticisms pertaining to the far-away-ness and aloofness of EC-rulemaking, a subsidiarity-principle was enshrined in the Maastricht-treaty. Yet, it soon appeared that to some Member States this principle was meant to ensure a greater than hitherto scope for domestic lawmaking; to others it meant the opposite; and to most non-experts it was too opaquely frased to mean anything. Furthermore, (7) the formal powers of the European Parliament were reinforced in respect of a considerable number of policy-areas while the crucial issue was sidestepped. This is the one asking whether the scope and intensity of the European Parliament's powers is of relevance for a desirable enhancement of the qualities of European democratic government and, hence, lawmaking relevance and legitimacy. Moreover, (8) the fact that the organisation of public international law which in 1958 began its existence as the European Economic Community (EEC), then changed name to European Community (EC, 1986) only to become a European *Union* (EU), should be recorded in this list of important Maastricht-amendments. Concepts like union, as well as federalism and federation, do not go easy down with (European) Northeners. Finally, (9) the entire treaty-text was unreadable and uncommunicatable; not only for what it said clearly but also for its ambiguities and silences. The entire text has been called a 'legal Chernobyl'. It will be hard to find anyone to contest the validity of this last point.

*The Not-so-Successful Membership after 1992.*

Many and mostly non-elite Danes felt frightened and alienated when listening to accounts, like the just preceding, of the Union-treaty's multiple legal and political novelties. In stead of mere novelties, many considered them to be legal and political atrocities.

Indeed, the setting up of the illogical and intransparent Pillar-structure; and the new treaty's many encroachments on legal symbols of national sovereignty and statehood; together with its greatly expanded and intensified areas of Union empowerments, were eye-openers to may voters. They meant to see proven now what many of them had long suspected. Namely that EC/EU-membership was a slippery slope. Unintelligibly drafted as the treaty was, it was difficult for the protagonists of a Denmark whose place was in the heart of Europe (another description of the elite) to explain why the treaty was not what it looked like to many, namely the beginning of the end of Denmark's existence as an independent state.

It is probably fair to say that this sort of characterisation of the Maastricht-project had not, before it was too late, popped up in the minds of most members of the Political Class. So, with the wisdom of hindsight, self-criticism became the order of the day. Why did we not .....?

Specifically, the assumption that the suppression of the vicious *vocation-fédérale*-terminology could not do away with, or just conceal, the essence of the Maastricht-treaty's project of European Union occurred with hindsight as very naïve [9)]. This essence which was to bring about yet another calamitous sovereignty-absorbing and federalism-promoting broadening and deepening of integration, was - how could it be otherwise - entrenched in a variety of the very texts of the new treaty. It is as simple as this: With or without those words, the governments who masterminded the treaty wanted to accomplish a new and unprecedented move towards federal union.

*Damage-containment after the NO*

After the NO, the other eleven Member States declared that the ratification-problems created by the NO were, basically, none of their concern. It was Denmark's problem, they said. It was, hence, up to Denmark to devise means and ways to solve it [10)]. Accepting that help was

---

[9]. I do not say this with impunity in view of the fact that I was myself, in the views of some, a prominent exponent of the elite.

[10]. This characterization of the situation obviously did not represent but part of the legal picture. Danish failure to ratify would also be the others' problem because, without a Danish ratification, there would be no

apparently not on offer from the country's Community partners, the Danish Political Class embarked on a process of soul-searching[11]. The objective of this search was to identify the emblems of the euro-sceptical victory at the polls in order to be able to formulate a number of unitary *Danish Exceptions* to the Union-*acquis*

The point of the latter exercise was to circumscribe a number of policy-areas that the European Council would authorize Denmark as a Member State to opt out of, *i.e.* out of the *acquis*. The palatable justification for the granting of such an authorization would be that the country was not politically able to participate fully in Union decision- and policymaking.

Five such policy-areas where exceptions could be made to play were in the course of this sould-searching process singled out. These were (1) certain aspects of defence policy. (2) Legislation in respect of justice and home affairs, however only once this rulemaking, as foreseen would no longer be international but become supranational of nature [12]. (3) An immediate and definitive rejection of Denmark's participation in the third phase of the Economic and Monetary Union, *i.e.* the euro-currency. And, (4) union citizenship which, the Danish government feared, was destined not only to complement but to replace national citizenship [13]. A final 'exception' (5) took issue with the notion of 'union' from which the Danish government for ideological reasons wanted to distance itself.

At its meeting in the Scottish town of Edinburgh in December of 1992, the European Council enshrined the Danish government's list of Five Exceptions in a Decision of the Union.

On the face of things, this common action ended the *malaise* generated by the NO. Ratification on which focus had been, could happen. The following Subsection of this paper takes a closer look at subsequent developments in Danish domestic affairs in order to assess whether the Edinburgh-decision also brought an end to the Danish sociological Denmark/EU *malaise*. It is no secret that it did not.

*After the Edinburgh-decision - Does Form and Content Match?*

What follows does not submit or assume that the European Council's Decision on Denmark's opt outs was not generous and helpful. It was both. The Danes, by and large, understood this and that the Decision in reality accepted their quest for a status of separateness. Although the Danish Decision did not accept Danish cultural separateness in explicit terms, Danses understood the Decisions bearing to be just that; and appreciated that in real terms some sort of acceptance of separateness had happened in Edinburgh. One may also characterise the new situation as one opening for a Danish route to non-union.

A majority of the Danish voters acknowledged this and showed their gratitude by voting in favour of the ratification-package which consisted of the Maastricht-treaty plus the Five Exceptions. The favourable vote was expressed on May 28, 1993. That the majority once again was a narrow one is not material, cf. above.

The Danish electorate also voted YES to the next treaty to be submitted to a popular

---

Union-treaty which could enter into force. When this was written, almost ten years after the Danish NO, the Union is anew finding itself in a similar ratification-limbo following the NO to ratification of the Nice-treaty which the Irish voters pronounced at a referendum held in May of 2001

[11]. If my recollection is correct, a certain feeling of forsakenness pervaded many observers, lay as well as expert, when it became clear that the other Member States excluded completely from consideration the idea, first suggested by the Danish government, that the NO compelled a renogotiation of the Maastricht-treaty.

[12]. In Pillar-terminology cooperation in Pillar Three is international whereas it in Pillar One is supranational. As long as justice and home affair would remain subject-matters to be dealt with in the Third Pillar, this exception would not apply. Yet, the Maastricht-treaty laid down that justice and home affairs should perform a so-called Pillar-jump, after five years (this is already mentioned in the above). The Danish exeption on this point applied to all matters having 'jumped' from III to I.

[13]. To-day, the citizenship is dealt with by EC-treaty, Article 17. The formulation which one will find in that Article is a product of the Amsterdam-amendments of the Maastricht-treaty. The Amsterdam-treaty wrote the Danish exception on citizenship into the Treaty.

vote, the Amsterdam-treaty. Signed in 1997, this was a muddy and indecisive treaty on most of the points it dealt with. The Danish decisionmaking process as to wether or not it provided for a further transfer of sovereignty was muddy as well. It is more than debatable whether the treaty ought to have been submitted to a Section 20 referendum because the case for a non-transfer-of-sovereignty situation was a strong one. For this reason and because the new treaty did not tamper with the Danish Exceptions, the voters saluted with a YES, meaning: We, the guardians of the sanctitude of Danish sovereignty and further unabridged enjoyance of national independence see this treaty as a *non liquet*. So, OK for the time being, but we intend to continue to be on guard.

In line with this, the voters sent back a clear NO to the government when the latter asked them, at a referendum held on 28 September, 2000, to quash the Exception on the Euro. The NO was an unambiguous one in spite of the fact that the entire Political Class had, once again, campaigned ferociously in favour of a YES.

This event can be interpreted as meaning that the voters stuck to the *entente* which the elite had established with the non-elite at the occasion of the ratification of the Maastricht-treaty. In other words: We granted you the right to ratify the Maastricht-treaty on the condition of a Euro-NO; so there shall be no euro-currency.

The question whether the Edinburgh-decision influenced the domestic Danish sociological Union-*malaise*, can thus be answered in the affirmative and in the negative. Affirmatively, because the Danish euro-sceptics cherished the acknowledgement of a Danish separateness. The question whether it ended it must be vanswered in the negative, because the Five Exceptions since 1993 have come to set the agenda for Denmark's participation in EU-government: Hereto and no further.

The Five Exceptions have acquired a sort of constitutional, or perhaps rather a higher natural law status. The Political Class is widely considered to be bound by a sort of solemn pact between it and its euro-opponents. According to this pact it will require a favourable vote at a referendum to quash any one of the Five Exceptions which have come in the great public's perception to symbolise Europe's grant of a deerly wanted, separate status to Denmark.

Since, however, the chances are small that the elite will win such a referendum, any Danish prime minister must demonstrate an almost suicidal commitment to political risk-taking to call one. The Danish EU-situation is therefore stalled, it seems.

In conclusion of this, it can be said that a vast majority of Danes do not want to see Denmark leaving the European Community and its single market, even one featuring soft or non-economic supranational policies such as environmental protection, sex-equalisation policies, certain elements of cooperation in the field of education and more. Cooperation in most fields of foreign and defence matters plus all justice and home affairs is acceptable also but on the condition only that this cooperation remains to be governed by public international law arrangements. According to the Exception-regime, this is about where Danish membership stands at the present time.

There is, however, further evidence suggesting that the EU/Danish relationship is continuing to suffer from stress, *i.e.* after the adoption of the Danish Decision and the favourable referendum-outcome of May of 1993.

The first and major sign of the prevalence of continued deep-rooted *malaise* is that consecutive Danish governments and parliaments seem committed to treat insularly the nation's Union policymaking. Indeed, although Denmark is a representative-democratic polity featuring parliamentarism for more than a hundred years, political decisions about the major orientations of the country's EC/EU-policymaking have never been taken in Parliament. These decisions are taken at referendums, *i.e.* in the forms of direct democracy in which Danish voters are completely inexperienced. In spite of this lack of experience, Denmark has since EC-entry organised six such popular votes.

It is Danish representative democracy which pays the price for this experimentation. It is, thus, a quite noteworthy fact that less than ten per cent of the voters permit their views about a specific political party's EC/EU-policy manifesto to influence her or his choice of party to vote

for at general elections! Neither the major political parties nor large segmetns of the electorate show any great interest in stopping this deterioration of the Danish democratic personality. The political parties because they know that many of their rank and file voters would turn their back to them if voters were to take the parties' EU-manifestos into account at the polls. The voters because they feel that their say over Denmark's EU-policyformulations remains far more significant at a yes/no referendum than with EU-issues being one element only of a complex voting situation at general elections. It costs of this experimentation are not only born by Danish representative democracy. It is indeed difficult to imagine how the quality of Denmark's EU-policymaking could become a comprehensive and 'sound' whole as long as the country's major EU-policyorientations are decided at referendums.

Secondly, juridical events throughout the 1990s showed that the country's constitutional clock has also been brought out of balance by the general EU-*malaise*. That something was out of judicial order became obvious when the Supreme Court in 1996 admitted a class action about the constitutionality of the government's ratification of the Maastricht-treaty. The case was against all odds of being admitted brought by 12 EU-membership concerned Danish voters. None of them could prove that they had an individual interest in getting to know the Supreme Court's views about whether the 1993-ratification was *ultra vires* Section 20 of the Constitution [14)]. The plaintiffs did not fulfill a century-old condition of standing in constitutional cases. Indeed, for someone just faintly familiar with Denmark's constitutional history, the admission of the case was an unprecedented move. What, of interest for the problems which this report deals with, moved the Court?

Explaining its *volte-face* the Supreme Court itself stressed that

> "*adhesion to the Treaty on the European Union implies a transfer of legislative competence within a number of general and important fields of life and, accordingly, in itself is of radical significance for the Danish population in general*. In this way this case is different from usual cases relating to an examination of the compatibility by acts with the Constitution. Due to the general and vital significance of the Act on Adhesion the Appellants have a major interest in having their claims examined."[15)]

It is difficult to explain convincingly what legally distinguished the Act of Ratification of the Maastricht-treaty so profoundly from many other statutes and acts of ratification. The reasons for the Court's particular treatment of this Act might in these circumstances not have been 100 per cent legal but rather, more or less, be of a political nature. A possible interpretation of what happened may be that the general societal imbroglio about the EU-membership issue prompted the Court's radical turn-about. The radical and unanimous departure from precedent and tradition makes, to me at least, some sense if it is assumed that the judges felt that the country's judiciary could no longer remain totally aloof of the problem about identifying Denmark's place in Europe.

The origin of the EU-*malaise* was political, yet it was reasonable for the Supreme Court to assume that politics alone could not solve the problem. In this limbo it does not seem to me

---

[14]. Section 20 reads like this in the semi-official translation of it from Danish into English:

> § 20, (1) Powers vested in the authorities of the Realm under this Constitutional Act may, *to an extent specified by statute*, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation.
>
> (2) For the enactment of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing shall be required. If this majority is not obtained, whereas the majority for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in section 42.

[15]. UfR 1996. 1300 H (italics added by me); I have analysed this judgment in: Denmark's Maastricht-Ratification Case: Some Serious Questions About Constitutionality, European Integration, 1998, Vol. 21,pp. 1-35.

to be too farafeched to assume that the judges hypothesized that a judicial voice might depressurize because it would place the political strife in its constitutional framework.

The judges did not say it if this was the analysis which guided them to take action on the standing issue. If it were, however, the Court's 1998-judgment on the substance of the matter which it rendered on April 6, 1998, did not produce the presumed, intended effect.

Whether in fact a judicial pronouncement could in any circumstances have oiled the political processes, may be doubtful. Be this as it may, the 1998-judgment failed to influence them in any significant way. The 1996-rulings recklessness was gone when the Court quietly ruled that (a) the Prime Minister had not violated the Constitution when he ratified the Maastricht Treaty; that (b) Denmark's membership of the Community was constitutionally valid; and that (c) the text of Section 20 compels a distinction to be made between those of its elements which are legal and justiciable; and those which are of a political nature.

The Supreme Court thus ended its departure from precedent by leaving it to the political processes both to act as Section 20's *primus motor* and as the institution largely responsible for not acting *ultra vires* that provisions legislative warrant. These processes, the Court ruled, enjoy a fairly wide margin of discretion when deciding how much and how unprecisely delimitated sovereignty which can lawfully be transferred to the Union. The Court, in reality, instructed the political processes to find a lasting solution to the problem which the plaintiffs had asked the Court to solve in stead of those processes. Yet, these processes were in 1998 no better equipped to bring about a solution than they had been throughout the preceding five years.

The justiciable elements of Section 20 were, the Court emphasized that this provision cannot be used to transfer national sovereignty to such an extent that it can be said that Denmark has ended to exist as a '*selvstændig stat*', in English 'a self-governing (if not fully self-governing) state'.

'Self-governing' can be taken to imply that the Danish state must remain in possession of societally adequate quantities and qualities of non-transferred regulatory powers. Although the Supreme Court did say so expressly, it seems safe to assume that the following rationale was underlying this part of the judgment. The Court's view seems to have been that it will only be meaningful to organize, as the constitution requires, general elections, form governments and the like in order to govern municipal Danish affairs, on the condition that Parliament remains in possession of a substantive amount of non-transferred powers.

The major aim of the drafters of Section 20 had been, the Court added, to facilitate, not to render difficult, Danish participation in these new forms of international cooperation. Therefore, the drafters had not wanted to entrench in Section 20 itself a precise location of the limits to how much sovereignty Denmark can consent to give away [16)]. The plaintiffs must have felt deceived when they were informed about the Court's reasoning on this point because they had, in essence, asked the Court to draw some line around which the country's political EU-decisionmaking could revolve. The plaintiffs had highlighted the difference between the sitation in which the drafters had to act and the Court's far better informed basis for making constitutional choices, including about the existence of certain fields of non-transferrable policymaking. But, as was seen, to no avail. The Court sent the buck back to the political scene.

By taking the position that Section 20 substantively limits the amount of powers which can be transferred, the Supreme Court followed the submissions of the euro-sceptic plaintiffs. This legal victory was not of much avail to them and their cause, however. This conclusion follows because the Court at the same time found that even after the government's ratification of the Maastricht Treaty the totality of the transferred powers laid still on the safe side of Section 20's demarcation line. The Court in fact noted that in its interpretation of Section 20 it laid *clearly* on the safe side of the demarcation line.

---

[16]. This is the generally shared view of Danish constitutional scholarship, see for this my article cited in note 14 *in fine*.

Summing up, the Supreme Court simply signalled that it was intended on following interestedly political events in this field - but at a distance. A few additional, specifications of obligations flowing from Section 20 were given though.

The first was that the Community or Union cannot lay down rules which are in contradiction to the Danish Constitution. The Court thereby made it clear that it did not accept the European Court of Justice's jurisprudential dicta to the opposite effect. At several occasions has the latter court insisted on that it is a inherent quality of Community/Union law that it takes primacy over provisions of national constitutional law, procedural as well as substantive constitutional law.

The second had regard to situations in which a Community institution would propose to adopt a legal act for which there, according to Danish constitutional law, is no legal basis in the Treaty. In such a situation two obligations flow from Section 20. The first is that Danish ministers, other Danish officials and, perhaps, even commissioners, judges and Community staff with a Danish passport cannot lawfully participate in the adoption and/or implementation of such an act. The second is that the Supreme Court, under certain conditions will refuse to enforce the act on Danish territory because it will be invalid under Danish law. "Similar interpretations", the Supreme Court noted, "apply with regard to Community-law rules and legal principles which are based on the practice" of the European Court [17)18)].

In sum, the Court's most important pronouncement was the one about the necessity of safeguarding the continuance of Danish self-governance, about Denmark as a *selvstændig stat*. Legally, the implications of this pronouncement may be marginal because it must beread together whith the Court's other dicta, cf. above. At the psychological level the sentence may acquire some greater important simply because it addressed the same issue as the popular slippery-slope imagery, *i.e.* many people fearfulness that if one does not in time pull the breaks, and even brutally so, the EU-project will eventually transform Denmark's status to that of a subordinated region or province in an allmighty federal Europe. What impact on incoming EU-debates the Court's dictum will generate at that level, remains to be seen, although one should make sure to have one's expectations under control.

*Leaving the Union or Becoming a Full Member?*

The three-fifths-sort of membership which a majority of Danish voters seems to cherich most, is coming under increasing pressure. It is so from at least two fronts.

The first front originates in geunine domestically Danish circumstances. At its root stands that when the Danish political parties, both those in and out of government at any time, defined the scope of two of the Five Exceptions, namely those about certain military/operational aspects of defence policy and about the communitarisation of justice and home affairs, it was in practice cost-free to include these areas in the list of exceptions.

It was cost-free in the sense that there was a very slight and speculative probability only that the Union would ever, or at least in any foreseeable future, develop a military capacity and consider to make use of it; or that the letters of the treaty about justice and home affairs would mature into real policies. Within a lapse of time of a few years, however, the treaty's visions turned into realities. Moreover, the Union policies live up to the best ideals of Danish policy-priorities in these areas. These ideals are common ground to the members of the elites and non-elites. Yet, bound by its own exceptions Denmark has barred itself from exercising influence when these policies are being clad in flesh and blood. A cleavage thus exists between a widespread feeling of a necessity to stay loyal to the sacred exception-pact and of a

---

17. See for all this UfR 1998.800 H. These parts of the judgment are, of course, remindful of what the German Constitutional Court said in its Maastricht-Ratification ruling of October 12, 1993, Entscheidungen des Bundesverfassungsgerichts [1993] 89.

18. To the just-mentioned possibility of non-application of a Community legal enactment the following note of interest may be added. The first note is that the Supreme Court must have based its view on a theory according to which the Treaty is not ultimately an independent source of law. Instead, Community law derives in the last resort its validity from (*inter alia*) Danish constitutional law.

pressure to try to escape fromwhat increasingly appears to be a self-inflicted international policymaking irrelevance.

The second front stems from the fact that the Community and its market are today integrated into a Union. A union which nurtures a powerful ambition to become an ever more important, global political and economic actor.

In view of these pressuress, the big question is about what will come. The present situation is not tolerable in the long run, neither to Denmark nor to the concert of the other Member States. During the months preceding the 11th of September shock the view was more and more often expressed that the Danes would have one day to make a definitive choice. Either are we in, and then one hundred per cent, or, otherwise we must ask for permittance to quit and assume what is generally referred to a Norwegian conditions. As a closely associated Member States, Norway is bound by what the EC decides but not possessing any formal channels of influence on what will be decided.

However, if the necessity of making a definitive choice is widely accepted, there are - when this was written in October of 2001 - no clear indications of what the outcome of this definitive vote is likely to be. It is, more specifically, not clear at all in what way the 11th September shock will influence voters.

The Shock may induce a sufficiently large number of Danish voters to vote for full membership. I reckon this to be the more likely outcome of the crucial referendum.

This being so, I am certainly not convinced that the abovementioned fundamental quest for a continued status of accepted separateness will not, for that reason, continue to plague any Danish/EU sovereignty arrangement of the future.

Copenhagen, 29 October, 2001,

Professor Hjalte Rasmussen