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Implementation of International and Supra-national Law by Sub-national Units

(Work Sessions 3 and 15)

1. Introduction – international law in federal systems

The implementation of international law in a federal system is full of problems, and there are many ways of dealing with them. In both work sessions, the case acted as the starting point for a long debate involving participants from different countries giving examples from other federations. In some federations, constitutional law provides special rules, generally giving the federal government the power of (subsidiary) implementation. In some federations sub-national units have the power to conduct relations with foreign states and/or sub-national units, and to conclude international treaties in the area of their legislation. In addition, federations that are members of supra-national organisations have to make sure that supra-national law is implemented at the sub-national level. Special rules, at national as well as at supra-national level, ensure that the federated entities participate in the supra-national organisation's policy making and have access to the supra-national organisation's court.

2. Supremacy of International Law – the case of Canada

Canada can be regarded as a special case because Quebec, the only Canadian province with a French-speaking majority, is the biggest French-

speaking community outside France. Quebec is more active internationally than any other sub-national unit in the world and wants to have a “foreign policy” equal to that of the state. So the federal government has to consider the special wishes of Quebec, and has to act for two linguistic communities. Although the constitution of 1867 gave the provinces a high level of autonomy, the power of making international treaties still lies with the federal government.

The “Labour Conventions Judgement” (1937) confirmed the exclusive authority of the federal government to enter into international agreements, but the implementation of treaties is a joint task. Treaties in matters of provincial jurisdiction can only be implemented by the provinces; the federal government therefore has to use its treaty-making power with respect for provincial interests. Consultation and cooperation are very important, and the provinces are increasingly involved in the preparatory negotiations. That “multilevel governance”, as has been highlighted by a Canadian Chief Justice, works reasonably well most of the time, although it is not very formalised. The examples given by the case statement makers demonstrated the different problems caused by this system, as well as some that occur outside bilingual federations.

The framework created by the Canadian courts is much more intricate than that of other federations who follow the rule “externally we are one” (e.g. the United States). In Canada, as a Canadian lawyer mentioned, the courts play an interesting, but not the central role. However, the Baker case ruled by the Supreme Court of Canada in 1999 should be mentioned here. The Supreme Court held that a rule of international law, even though not fully incorporated

into Canada's domestic law, would be relevant in determining the legality of the exercise of statutory discretion.

Analysis of the cases and the statements by the participants reveals four different groups of problems.

2.1. The "inter-governmental deficit"

If there is no consensus between the provinces, the ratification of an international treaty can be delayed. The provinces should coordinate their policies more, and avoid competition with each other on an international level. A high-ranking representative of a Canadian province presented the delay in the ratification of the Kyoto protocol to reduce greenhouse gas emissions as an example: some provinces are for the ratification, some are against, some have no opinion to date.

There can also be differences between the federal government and some of the provinces, as an Austrian government official observed. Canada wanted to sign an agreement on social security with Austria. The latter was interested in homogenous provisions, but Quebec wanted a separate settlement. Finally, an arrangement was found, but the negotiations were complicated and prolonged. Another example, given by a Canadian politician, concerned economic development. Provinces trying to attract foreign businesses sometimes compete with each other. To avoid competition like this, "Team Canada" has been founded, which tries to coordinate the economic policies of the federation and the provinces. The prime minister, the minister for international trade, the provincial premiers and territorial government leaders, together with business representatives are organising missions to foreign

countries to increase trade and create jobs and growth in Canada. The promotion by Canada's leading politicians helps participants to come into contact with businessmen abroad and emphasises the wish of the federal and provincial governments to increase international trade.

2.2. The "democratic deficit"

Foreign policy is dominated by the executive powers. The legislative chambers are very often not involved in negotiations. But final parliamentary approval is insufficient. Once an international commitment is made, parliaments may have little choice but to implement the legislation. Often, secrecy and dispatch are important during negotiations, but that also means a lack of information to the parliaments (especially the opposition) and the interested public, especially Non-Governmental Organisations (NGOs).

2.3. The "federal deficit"

Because of its formal treaty-making power, the federal government can determine the priorities of the provinces, especially in the field of federal legislation. Local policies (for example pollution control or fishing) are discussed at an international level, but the sub-national units are not sufficiently involved by the federal government. Even when international treaties do not relate to provincial jurisdiction, they may still have consequences for the sub-national units.

2.4. The "national deficit"

Canada is a multinational federation, but Quebec often feels under-represented by the federal government. Because of its special "national

character", it wants to act freely on the international level to preserve its French identity.

Although in Canada, as in many federations, the sub-national units are prohibited from being parties to international treaties, Canadian provinces are almost sovereign in some fields; they cooperate with other federal units all over the world and increasingly engage in foreign policy. This can also be seen in other federations. For example, the Swiss cantons, and the German and Austrian Länder participate in foreign policy. Different examples show that explicit authorisation by law is less important than the political power of a state in the federation. Examples from other work session participants showed that there are also differences between the provinces of a federation. Some are more engaged in international affairs, some less; some are more interested in economic relations, some in cultural.

In some federations, like Canada, the United States or Brazil, the federal government cannot force states to implement international law. This can lead to international conflicts, especially where human rights are concerned. In some countries, the provinces are obliged to take all measures required for the implementation of international treaties. If they fail to do so, the federal authorities can take the measure by subsidiary legislation or force the sub-national unit to oblige.

3. Implementation within the Framework of Supra-national Organisations – the case of Austria

There is a difference between the implementation of international and supra-national law. Law of the European Union (EU) is not international, but

domestic law; its implementation requires special rules. The European law relates to both the spheres of competences of the federation and of the states. For this, federations belonging to supra-national organisations (in the EU: Austria, Belgium and Germany) have to make sure that the “supra-national law” will be implemented at the sub-national level. The problems, and how it is possible to deal with them, can be seen by examining the situation in Austria.

European law concerns federal as well as provincial jurisdiction. For this, it is possible that for the adaptation to directives, ten bills (one by the federal parliament, nine by the provincial parliaments) have to be passed. About one third of the provincial statutes (wholly or in part) are passed in order to implement European law. The Austrian constitution provides special orders for the implementation. The states are bound to take all necessary measures within their autonomous sphere of competence to implement juridical acts within the framework of European integration. If a state fails to do so, the European Court of Justice of First Instance has to declare the dilatoriness. Then, the competence for such measures, in particular the issuance of the necessary laws, passes to the federal authorities. A measure taken by the federation pursuant to this provision becomes invalid as soon as the state has taken the requisite action.

To date, there has been one judgment by the Court dealing with such a case, concerning a directive on the workers from risks related to exposure to biological agents at work (Judgement of the Court (Fourth Chamber), C-110/00; 11 October 2001). The directive was adopted at the federal level, but some of the states did not take the required measures. Since the directive was not completely implemented into Austrian law within the time limit, the

Commission of the EU brought the action to the Court, seeking a declaration that the Republic of Austria had failed to comply with its obligations. In its rejoinder, the Austrian government stated that the necessary measures had since been adopted at federal level, and that matters were at an advanced stage at the provincial level. The Court did not accept that argument, and declared that Austria had failed to fulfil its obligations. As a consequence of this judgment, the federal government issued an ordinance, substituting a provincial statute.

There are different methods of coordination between the states and the federal government (Art. 23d of the Austrian Federal Constitution – "B-VG").

- Distribution of documentation: it is important for the states to be informed of events in Brussels. The federal government must inform the states without delay regarding all projects within the framework of the EU, which affect their autonomous sphere of competence, or could otherwise be of interest to them.
- Consultation with the states: in the above-mentioned case, the Länder must be allowed to present their views to the federation (the Bund). If provincial legislation is involved, and the states present a uniform comment, the federal government is bound thereby in negotiations with and voting in the EU. It may deviate from that comment only with regard to compelling foreign and integration policy reasons. The states must be informed of these reasons without delay.
- Provincial participation in delegations: when a project within the framework of the EU also affects matters of provincial legislation, a

> member of a provincial government can represent Austria in the Council of the EU. While representatives of Belgian and German federal entities, who have the same right, use it, the Austrian states have not done so until now.

In addition, the states (and the local authorities) are represented in the Committee of the Regions. They maintain offices in Brussels to improve commercial and political connections at the European level and cooperate with other European sub-national units. But, the committee was described by one Austrian politician as a “toothless tiger”. It has no real power; the sub-national units cannot influence European policies in that way. More important would be the lobbying in the European Parliament. In Austria, as in some other countries, the candidates are nominated by the provincial sections of the political parties. Therefore many Austrian MPs feel obligations to their states.

In the Council of Europe, the sub-national units and the local communities are better represented than in the EU. The Congress of Local and Regional Authorities (whose president joined the work session) is the third body of the Council beside the Committee of Ministers and the Parliamentary Assembly. Beginning with the European Outline Convention on Trans-frontier Co-operation between Territorial Communities or Authorities (signed in Madrid in 1980), the Council of Europe is trying to improve and secure cooperation between sub-national units. Additional protocols, signed in 1995 and 1998 in Strasbourg, have been further steps in that direction. Although only soft law, these texts are an important tool for sub-national units, especially in rather centralised countries. Following the example of the European Charter of Local Self-Government (Strasbourg, 1985), the Council is currently discussing a

Convention on Regional Self-Government, which should serve as a standard for regional democracy and self-government, including external relations. In June 2002, there was a meeting in Helsinki to prepare the draft, but the decision on what form the text should take (that of a convention or a recommendation) was postponed.

As well as the rules concerning the implementation of supra-national European Community (EC) law in Austria, there exist special rules for the implementation of international law, which were presented in the work session by an Austrian lawyer. The states are bound to take measures that become necessary for the implementation of international treaties within their autonomous sphere of competence. If a Land fails, competence for such measures passes to the federation. A measure taken by the federation pursuant to this provision becomes invalid as soon as the state has taken the requisite action. In contrast with the implementation of European law, no decision by a court is required.

Since 1988, the states have had the power to conclude treaties with states bordering on Austria or with sub-national units of those states in matters falling within their own sphere of competence (Art. 16 B-VG). Before the initiation of negotiations about such a treaty, the federal government must be informed. Also, before such a treaty is concluded, the federal government's approval has to be obtained. Treaties concluded by a state shall be revoked upon request by the federal government. If the state does not duly comply with this obligation, competence in the matter passes to the federation. Because this is a rather complicated procedure, the states have not concluded such treaties to date.

The federal constitutions of Germany and Switzerland and Belgium have comparable rules concerning the treaty-making power of the federated entities. Art. 32 of the German Basic Law states that insofar as the states have power to legislate they may conclude treaties with foreign countries with the consent of the federal government. Art. 55 of the Swiss Constitution clearly stipulates how the cantons can participate in decisions of foreign policy. They shall be informed “timely and fully” and consulted; their position shall have particular weight when their powers are concerned. In such cases, they even can participate in international negotiations. Pursuant to Art. 56 the cantons may also conclude treaties with foreign countries within the scope of their powers, but the confederation must be informed before the conclusion and such treaties may not be contrary to the law of the confederation nor to the law of other cantons. They may only deal directly with sub-national units; relations with foreign states are conducted by the federal government acting on their behalf. Art. 167 Sect. 3 of the Belgian Constitution empowers the community and regional governments to conclude treaties regarding matters that are within the scope of the responsibilities of their councils.

The discussion following the presentation of the Austrian case was enriched by the question of the position of the local authorities (above all the large cities and metropolitan regions), NGOs, and civil society as a whole in international and EU affairs. For many participants, the role of the European Court as an independent authority in declaring the delay of the implementation of EC law was a good example of the protection of the states’ jurisdiction in this area.

4. Conclusion

International law is getting ever more important on the national as well as the sub-national level. The evolving international economic order requires adaptation of federal as well as provincial law. Implementation can take place in different ways. In “dualistic” systems, international and national law are totally separated. International treaties and conventions even once signed do not become part of domestic law until they are legislated into force. In “monistic” systems, further legislation is only required if the international rule is not applied directly.

Additionally, there is the problem of the internal division of competences. If the conclusion of an international treaty concerning sub-national matters by the federation implies its power to implement it by national legislation, it is a severe restriction of the powers of the federated entities. On the other hand, if the federation has no influence or control over the implementation by the sub-national units, the latter can prevent the performance of international obligations. Some constitutions allow the federal level to substitute the implementation. In cases of abuse, the ruling of a (supra-/international) court can be required. These questions are important especially for members of supra-national organisations, as the case of Austria has shown.

This leads to the question of the responsibility in case of breaches of such obligations under international law. Before international courts, the federation is also responsible for failure by the federated entities to meet such obligations. Some constitutions (for example Switzerland) provide for the recovery the financial costs of such breaches from the federated entities

concerned. In some countries, such as Canada, “indemnity agreements” exonerate the federation. Thus far, sub-national units are not directly responsible in international law, but their position may well change. Some rulings by international courts, such as the LaGrand case of the International Court of Justice in 1999, tend in that direction.

Although mentioned by one of the analysis statement makers, the recent United States practice of yielding to state’s rights in matters of criminal law was not further discussed. However, examples from other federations were added. There have been condemnations of Brazil by the Inter-American Court of Human Rights concerning violations of human rights by state officials. The federation was held responsible, although it cannot influence the state judiciary and officials. The incorporation of international human rights laws into domestic legislation, and the required constitutional reform, is one of the major tasks of the Brazilian federal government.

The same problem was mentioned by a Swiss lawyer: in many cases, the “Eidgenossenschaft” was condemned by the European Court of Human Rights concerning criminal procedures, although the Swiss cantons have the competence for criminal procedural law.

The implementation of human rights treaties leads to the transfer of “new values” to sub-national units. This is a very relevant topic, because it can lead to political, ethical and religious tensions. In such a case – if rules to force the implementation do not exist – the federation must inform, instruct, and convince the sub-national units that the implementation is good and important for them. Conflicts over the implementation of international treaties may

undermine the legitimacy of international law itself and result in a lack of support for international law by the sub-national units.

Participants from other federations pointed out that it can be very hard to implement international law, especially for smaller federated entities. More consultation and information should be made available by the federation, and more cooperation between the sub-national units themselves is important. In Switzerland, some cantons are working together by employing one expert/the same experts to prepare the implementation. Often, federal governments are not interested in consulting the states and including them in international affairs, but the influence of international law on the sub-national level is still growing.

Foreign policy making is no longer the prerogative of the federation. The sub-national units are becoming more and more internationally involved and the federal government has to share its powers with them. Some federal constitutions attribute international competences to the federated entities. As one of the analysis statement makers pointed out, there is a growing "polyarchy" at the international level.

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