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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

CONSTITUTIONAL LAW AND EUROPEAN INTEGRATION

by

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I. Introduction

The requirements for membership of the European Union have changed over the years, reflecting the development of a European identity, achievement of the aims of the founding treaties and the contribution of the new treaties, as well as a greater awareness of the need to protect human rights and fundamental freedoms and, with it, greater insistence on democratic values.

Admittedly, there was never any doubt about the democratic nature of the founding states of the three European Communities, which had irreproachable constitutions and had emphasised their commitment to freedom and to its protection in the preambles to the founding treaties, not to mention the very specific human-rights provisions in the actual body of the treaties on matters such as non-discrimination and equality between men and women. But that was as far as it went.

Initial developments in this area were the work of the Court of Justice of the European Communities, which developed Community law as a distinctive system, establishing that nationals of member states were no less the subjects of that law than the member states themselves and as such had rights (including human rights) and duties which the Court had to uphold (1).

For their part, the Heads of State and Government declared in 1972 that democracy constituted the very basis of the Communities (2), going on to outline a European identity consisting of representative democracy, the rule of law, social justice and respect for human rights (3) and to publish a joint declaration of the European Parliament, the Council and the Commission (4), which laid due emphasis on respect for the fundamental rights contained in the member states' constitutions and in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The declaration on democracy issued by the Copenhagen European Council (5) affirmed that respect for, and protection of, representative democracy and human rights in every member state were ***essential elements*** of Community membership; this was to be reiterated and expanded in the preamble to the Single European Act of February 1986, and subsequently in the Treaty on European Union of 7 February 1992 (6).

All of this was taken one stage further by the Treaty of Amsterdam of 2 October 1997 (7), currently in the process of being ratified, which - having solemnly affirmed these principles - provides that, in the event of a serious and persistent breach by a member state of liberty, democracy, respect for human rights and fundamental freedoms or the rule of law, the Council may decide to suspend certain rights of that state, including voting rights, whereas its obligations continue to be binding.

With regard to enlargement of the Community, initially the treaties simply provided (8) that any European state could apply for Community membership and that admission conditions had to be agreed between the member states and the applicant state. No explicit reference was made to the democratic nature of applicant states, but after the military takeover in 1967 the association agreement between the Community and Greece was frozen and stayed so until 1974, and this, together with the March 1981 declaration issued by the Maastricht European Council concerning the incident the previous week in which Colonel Tejero had entered the Spanish Cortes with a gun, was a clear signal that any state aspiring to membership must be <u>European and democratic</u>.

In the light of these developments, membership criteria were drawn up for the countries of central and eastern Europe by the Copenhagen European Council in June 1993. They may be summed up as follows:

a. the candidate country must be European;

b. it must possess stable institutions that guarantee respect for democratic principles, the rule of law, human rights and protection of minorities;

c. it must have a proper market economy;

d. it must be able to withstand the pressures of Union competition and Union market forces;

e. it must be able to fulfil the obligations that it accepts and satisfy the economic and political requirements laid down;

In addition to these explicit requirements, there is the ***implicit requirement*** of membership of the Council of Europe and of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to quote the European Commission message to the Council and the European Parliament in 1995 (9).

Apart from the requirements that members should be European and democratic, the admission criteria have been framed in applicant countries' own interests because if the economy of a new member state were fragile it could easily be swamped by the "four freedoms" (free movement of persons, goods, capital and services), the free play of competition with tight control on state aid, and the application of the whole gamut of Community rules and regulations.

That is why - with the European Union's help - candidate countries must bring their systems into line with those of the Union, as they are already doing by applying the so-called Europe Agreements, which are agreements of association with the Community designed specifically for countries aspiring to membership and include the establishment of free trade areas based on asymmetrical concessions in the candidate country's favour. The negotiations initiated on 30 and 31 March 1998 with the first group of central and east European countries applying for membership are expected to result in more comprehensive assistance.

Clearly all this is a result of the way that European integration has developed since it began almost half a century ago. The ECSC, founded by six countries as an organisation of the coal and steel sector, and then the three Communities, have developed steadily, gradually achieving their aims, assuming new responsibilities, expanding in four stages to a membership of 15 countries and becoming the European Union, which is currently preparing for consolidation and further enlargement.

While the European Union is obviously an international organisation, the Community legal system introduced by the European treaties cannot be considered merely as a system of treaty-based international law. In its current stage of development, the European Union is a unique organisation for regional integration which, as well as pursuing economic and monetary cohesion, has other political and general aims.

The European Union has a Parliament, directly elected by universal suffrage, a Court of Justice of established authority whose decisions are binding, and an independent Community legal system applying both to the member states and their nationals. In addition to their various nationalities, the latter also enjoy European citizenship - a new status that confers advantages both within and beyond the borders of the Community.

In addition, the European Union possesses its own resources, levies taxes and has just taken the final decisions on the adoption and introduction of a single currency**, the euro**.

II. The questionnaire and replies

1. The questionnaire on "Constitutional Law and European Integration" - which set out to identify changes made in the legal systems of European Union member states in order to bring them into line with the new realities of membership - attracted replies from 13 countries.

The exercise is undoubtedly useful both to the member states and to countries that have applied for membership or hope to do so. The former can make instructive and worthwhile comparisons, while the latter gain a valuable source of information for the process of constitutional review in which they must engage in order to establish a firm and problem-free basis for building a relationship between their various national legal systems and that of the Community.

The questionnaire brings to an end the first phase of the Venice Commission's work, during which it has provided advice and guidance to central and eastern European countries in the process of marking their new-found freedom by adopting constitutions more imbued with democratic principles. It also signals the start of a new phase in which the Commission, at the request of some of those countries, will assist them as they move towards membership of the major modern international organisations.

2. The replies throw light on two divisions among European Union member states, the first between the monistic and dualistic schools of thought and the second between unitary and federal systems.

The monism/dualism split - with two-thirds of the member states in the first camp and the remainder in the second - highlights the difficulty for the dualistic countries of fitting into a Community characterised by the monist solution adopted by the European Court of Justice. This difficulty arises daily since Community regulations are directly applicable, some provisions of directives have direct effect, and Community law takes precedence in the event of a conflict between Community and national law, especially where the national law pre-dates the Community provision. This explains why countries in the dualist camp have been obliged to make revisions not necessitated by their dealings hitherto with public international law, to treat Community legislation differently from all their previous international agreements, or else to fudge the issue by declaring that they espouse dualism in principle but monism in practice.

The few member states with long-standing or newly-introduced federal systems have (unlike the unitary states) to involve both state and infra-state bodies, to varying degrees, in the Community process. For the countries concerned, this means taking steps to ensure that Community procedures are implemented smoothly and without delay, while giving both federal and federate bodies their proper role.

This second division distinguishes federal from unitary states, but the picture varies considerably depending, on the one hand, on the particular constitutions of the federal countries and, on the other, on the degree to which the unitary states are centralised.

III. Constitutional revision

Section I of the questionnaire, on constitutional revision(s), requires some introductory comment to facilitate an overall assessment of the replies received. The first European treaty, establishing the European Coal and Steel Community (ECSC), did not entail constitutional revision in the six founding member states. It was only when the treaty began to be implemented, and particularly when it was followed by other treaties, that the advisability, or in some cases the

necessity, of constitutional revision was made apparent by the unique nature of the new Community and the extent of its impact in practice. A number of the founding member states - for which the Treaty on European Union may be seen as the turning point - embarked on the task, some more quickly than others, while those more recent members that did not make the necessary changes when they joined have been following the trend.

The first enlargement, in 1973, had obvious constitutional repercussions, notably for Denmark and Ireland. The second, in 1981, did not affect the Greek Constitution. The third enlargement coincided with the Single European Act (SEA) of 1986 with the result that Spain and Portugal, which had been involved in the SEA negotiations, were prepared in advance. The fourth enlargement, in 1995, brought Austria, Finland and Sweden into a Community that had by now become the European Union, and the constitutional impact was therefore more direct.

In the case of the Treaty of Amsterdam, national ratification procedures are taking their course and it would be premature to discuss constitutional revisions the nature of which is not yet officially known.

IV. European integration and the different powers

1. Section II of the questionnaire concerns state authorities required to participate in the Union's law-making and decision-making processes – processes involving, to varying degrees, the European Parliament, the Council of Ministers and the European Commission.

It should be noted at the outset that, since the Treaty on European Union, these bodies have all operated under the umbrella of the European Union, exercising powers that vary depending on whether they relate to the First - specifically Community - Pillar or to the two other - intergovernmental - Pillars, namely the Common Foreign and Security Policy (CFSP) and justice and home affairs co-operation.

In intergovernmental as opposed to Community matters, the Commission has only a restricted right of initiative, the European Parliament's powers are limited and the Court of Justice has very narrow jurisdiction.

Thus the same institutions are developing within the common framework of the European Union but the powers that they exercise there and the procedures that they follow are specific to each of the three Pillars.

2. In contrast with the original system, under which the European Parliamentary Assembly comprised delegates of the national parliaments, the European Parliament has, since 1979, been directly elected by universal suffrage of the citizens of the Community (10). It therefore comprises "representatives of the peoples of the states brought together in the Community", a formula that serves to emphasise its autonomy, where appropriate, while allowing scope for contact with national parliaments and meetings between members of the national parliaments and MEPs, some of whom are in fact MPs in their own countries.

The European Commission, on the other hand, is composed of members "whose independence is beyond doubt" and who "shall neither seek nor take instructions from any government or from any other body". This rules out participation by national authorities in the Commission's decision-making process.

The Council of Ministers is made up of the member states' representatives and is thus the Community's intergovernmental organ. It was originally intended that each government should send one representative to the Council. However, in recognition of the fact that some member states

have federal structures, Article 146 of the Treaty on European Union now provides that "The Council shall consist of a representative of each member state at ministerial level, authorised to commit the government of that member state". The words "at ministerial level" do not mean that the representative must be a member of central government.

It is clear from these observations that in the institutional configuration of the Community the only forum for national participation in European Union decision-making and law-making is the Council of Ministers. Consequently, only representatives of member states' executive bodies participate, at different levels, in decision-making and preparing legislation within the Council.

Virtually all the replies to this part of the questionnaire reflected a strengthening of the role of executive, as opposed to legislative, bodies - and this would seem logical in the scenario outlined above.

3. That said, it should be pointed out on the one hand that while the Community legal system is independent, it is not alien to the national legal systems of the member states, and on the other hand that primary Community legislation and, to an even greater extent, subordinate Community legislation - the everyday legal instruments adopted by the Community institutions to implement the provisions of the treaties that embody the Community's primary legislation - are intended for application throughout the European Union and are directed at both the member states and their nationals.

Without considering all these instruments in detail, it is essential to note that *regulations* have general application, are binding in their entirety and directly applicable in all the member states, while *directives* are binding on the member states as to the result to be achieved but leave it to national authorities to decide by what formal and other means the result is to be achieved within the time limit. Consequently, as soon as Community regulations come into force, they are part of the positive law of the Community as a whole, while directives - or, strictly speaking, certain provisions of directives - may be given direct effect by a decision of the Court of Justice of the Communities even if they have not been transposed into national legal systems within the set time.

These specific features of Community law demand scrupulously detailed preparation and an ongoing, structured dialogue between the European Commission and the member states - both at official level and with organisations, specialists and independent experts - as soon as the Commission starts drafting proposals. Once proposals have been submitted to the Council and Parliament, the dialogue takes place in committees and Council working groups as well as in hearings organised by the Commission.

For the same reasons, dialogue must also take place within the member states so that legislative and executive authorities can exchange views and, under the terms of each country's constitution, prepare the position that it will adopt in the Council of Ministers.

Ultimately this twin-track activity produces legislative instruments that reflect the economic and social realities of the whole Community. It goes without saying that flexible and efficient mechanisms are needed to ensure that the process moves with the required speed.

V. European integration and the different levels of state structure

1. Section III of the questionnaire refers to powers transferred to the European Union by its member states and to the respective roles of the central state and infra-state entities in the Union's law-making and decision-making processes.

With regard to the first part of the question, it seems clear that, irrespective of the constitutional structures of the states concerned, virtually all the powers transferred to the Community were previously assigned to central government and only a small proportion were assigned wholly or partially to infra-state entities. Moreover, it tends to be among the second that we find parallel, rather than exclusively Community, powers.

2. The second part of the question would appear to be addressed only to the federal states and highly decentralised unitary states.

As explained above, it is the federal or central governments that participate in decision-making and law-making within the European institutions. In the case of a federal government, and where the matter concerned is the responsibility of a federate entity, a ministerial-level representative of that entity may take part in the process, but will do so as a representative of the member state.

3. In all aspects of preliminary national procedure, national constitutional provisions will obviously apply.

As for the implementation of Community law in each member state, this will be the task - the state having overall responsibility - of those bodies that apply national legislation in the relevant field.

4. A consensus emerged from the replies that, within the member states, European integration had had the practical effect of strengthening central government vis-à-vis the infra-state entities.

VI. European integration and fundamental rights

1. For the sake of simplicity, the questions in Section IV may be summed up as relating to the smooth application of Community rules throughout the European Union and the fundamental principle of non-discrimination between nationals and citizens of other member states on grounds of nationality - the rule being that the latter must be accorded the same treatment as the former.

Community rules on the equality of the sexes have undoubtedly had an impact on national legal systems, first through the recognition by the Court of Justice that Article 119 of the Treaty Establishing the European Community had direct effect, and subsequently through the transposition of directives adopted in this area. The European Commission’s continuing vigilance has, of course, also played a part here.

2. Generally speaking, the replies indicate that amendments to basic constitutional or legal provisions have not been necessary except in relation to access to certain public-service jobs and to the right to vote and stand in European Parliament and municipal elections.

3. In the area of fundamental rights and general principles of law, the line pursued by the Court of Justice of the Communities is - as the Court has repeatedly affirmed - entirely compatible with that of the member states’ higher national courts.

The Treaty of Amsterdam represented a step forward inasmuch as paragraph 1 of Article 6 (ex Article F) decrees that: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states.”

VII. Relationship between Community law and domestic law

1. Except in the cases of some new member states, the replies to Section V of the questionnaire may be deemed generally positive with regard to recognition of the primacy of Community law and its direct enforceability by the courts.

This receptive attitude surely owes something to the preliminary ruling procedure under Article 177 of the EEC Treaty, which allows - or in some cases requires - national courts to seek a preliminary ruling by the Court of Justice on the interpretation of Community law and its validity if a Community legislative provision is at issue in a case before the national court.

Over the years, this procedure has generated and promoted particularly fruitful dialogue between the Community court and the national courts - which, by virtue of the fact that they ultimately have to rule on the matters at issue and apply Community law, are also Community courts.

2. With regard to the relationship between Community law and national law, most of the replies received indicate that, with reference to the relationship between classical international treaty law and domestic law, Community law is accorded a special position.

It is explained in the questionnaire that Community law means the legal apparatus of the Community, including its primary and secondary law as well as international treaties that it has concluded and instruments adopted by the joint bodies established under such treaties.

VIII. Conclusion

The present report contains references to the Community treaties and to the case law of the Court of Justice whose major contribution to European integration is universally recognised. An extract from Point 21 of Opinion 1/91 of 14 December 1991 serves to illustrate its role:

"The EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the states have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only member states but also their nationals […]. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the member states and the direct effect of a whole series of provisions which are applicable to their nationals and to the member states themselves."

These few pithy sentences indicate the line that member states have taken, or should take, on constitutional matters in order to fulfil the obligations entailed by European Union membership and ensure that they and their nationals derive full benefit from the European integration that is being developed - as Mr La Pergola has put it - between sovereign legal systems evolving in a context of transnational enjoyment of constitutionally guaranteed rights and freedoms.

NOTES

(1) In particular, see the judgments VAN GEND and LOOS no. 26/62, COSTA/ENEL no. 6/64, STAUDER no. 29/69, INTERNATIONALE HANDELSGESELSCHAFT no. 11/70, NOLD no. 4/73, RUTILI no. 36/75 and MAIZENA GmbH no. 139/79.

(2) Paris Summit of 1972.

(3) Copenhagen Summit of 1973.

(4) Joint declaration by the three institutions of 5 April 1977.

(5) 8 April 1978.

(6) See the preamble, Article F § 2 and Article 8.

(7) See Articles F and F1.

(8) See Articles 98 ECSC, 237 EEC and 205 EEAC.

(9) Message from the Commission to the Council and the European Parliament on "The European Union and the External Dimension of Human Rights Policy", doc. COM (95) 567 of 22.11.1995, § 23.

(10) The next European Parliament election by direct universal suffrage is scheduled for June 1999. This will be the fifth direct election.