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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

CONSTITUTIONAL LAW AND EUROPEAN INTEGRATION

Preliminary report
by
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I. Introduction

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

These developments were taken stage further by the Treaty of Amsterdam, currently in the process of being ratified. It states 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" and provides that, in the event of serious and persistent breach of these principles by a member state, the Council may decide to suspend certain of that state's rights, including voting rights, while its obligations continue to be binding.

The conditions for membership may be summed up as follows:

a. the candidate country must be a European state;

b. it must possess stable institutions that guarantee democracy, the primacy of the rule of law, human rights and fundamental freedoms and respect and protection for minorities;

c. it must be in a position to fulfil the obligations that it assumes, satisfying the requisite economic and political criteria;

d. it must have a proper market economy;

e. it must have the capacity to withstand the pressure of competition and market forces.

Apart from the requirements that members should be European and democratic, the criteria have been framed in the candidate countries' own interests because if the economy of a new member state were too fragile it would face a real danger of being engulfed through the exercise of 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, designed specifically for countries that aspire to membership, and, more recently, through the process of negotiation initiated on 30 and 31 March 1998.

Clearly, this is a result of the way that European integration has developed since it began almost half a century ago. Founded by six countries as an organisation of the coal and steel sector, the Community - later Communities - has developed steadily, gradually achieving its 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, it is also a unique form of organisation for regional integration because, as well as pursuing economic cohesion, it also has much more diverse and ambitious aims.

The European Union has a Parliament, directly elected by universal franchise, a Court of Justice of established authority whose decisions are binding, and an independent Community legal system regulating both 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.

Moreover, the European Union possesses its own resources, it 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 of the 15 countries concerned.

The exercise has undoubtedly been useful both to the member states and to countries that are in the process of accession or hope to become members. The former can draw instructive and worthwhile comparisons, while the latter have 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 initiative marks the end of 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 strongly 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 accompany them as they move towards membership of the major modern international organisations.

2. The replies received highlight 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 - points up the difficulty posed for dualistic countries, in particular, by the principle that regulations are directly applicable and certain provisions of directives take direct effect, and by the primacy of Community law in the event of a conflict between Community and national legislation, 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 previously necessitated by their dealings with public international law, to treat Community legislation differently from their traditional approach to 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 divide 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 all the more direct.

With regard to 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 initiated, to varying degrees, by 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 remaining - inter-governmental - Pillars, namely the Common Foreign and Security Policy (CFSP) and justice and home affairs co-operation.

By comparison with Community matters, inter-governmental activity entails a restricted right of initiative for the Commission, limited powers for the European Parliament and little

scope for the Court of Justice to intervene.

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 particular to each of the three Pillars.

2. In contrast to 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 the universal franchise of the citizens of the Community. 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, indeed, 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 institution's decision-making process.

The Council of Ministers is made up of the member states' representatives and is thus the inter-governmental organ of the Community. It was originally intended that each government should send one delegate to the Council. However, in recognition of the fact that some member states have federal structures, the Treaty on European Union now provides that "The Council shall consist of a representative of each member state at ministerial level, authorized to commit the government of that member state". The words "at ministerial level" do not stipulate that the representative must be a member of central government.

It is clear from these observations that the only forum provided in the institutional configuration of the Community for the national authorities of member states to take part 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 outline above.

3. That said, it should be pointed out, on the one hand, that while the Community legal system differs from the national systems of the member states it is not alien to them, and, on the other hand, that Community secondary legislation - the everyday legal instruments adopted by the Community institutions to implement the provisions of the treaties that embody the Community's primary legislation - is intended for application throughout the European Union and is 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, as to the result to be achieved, upon the member states to which they are addressed but leave to the national authorities the choice of form and methods

for achieving that result by the deadline stipulated. 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 in good time.

These specific features of Community law demand scrupulously detailed preparation and the establishment of 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 at the pace required.

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 attributed to central government and only a small proportion were assigned wholly or partially to infra-state entities. Moreover, it tends to be among the latter 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, rather than the rest.

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 preliminary national procedures, national constitutional provisions will obviously apply.

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

4. A consensus emerged from the replies received that, within the member states, European integration had had the practical effect of strengthening the central state 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, firstly 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 continuing vigilance of the European Commission has, of course, also played a role in this context.

2. Generally speaking, the replies received indicate that amendments to basic constitutional or legal provisions have not been necessary except in relation to access to certain public-service jobs, and 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 in as much 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 EEC, 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 a 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 preliminary report contains references to the Community treaties. It merely mentions 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 sentences - rich in substance and succinct - indicate the line that member states have taken, or should take, in relation to constitutional matters in order to fulfil the obligations entailed by European Union membership and ensure that they and their nationals enjoy the benefits that membership confers.