

PROGRESS TOWARDS EUROPEAN UNION:**EC INSTITUTIONAL PERSPECTIVES ON THE INTER-GOVERNMENTAL CONFERENCES**

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One does not know what changes the future holds for the European Community but it is clear that changes are on the way and that these will have significant implications for the judicial structure of the Community. The full effects of Spain, Greece and Portugal joining the Community have not yet been felt. The Internal Market has not yet been established. But, already, the political leaders of Europe are discussing not only monetary but also political union. Moreover there is the question of the possible expansion of the Community. Already a large number of European States are queuing up to be admitted. Besides there is the problem of the "European Economic Space" and of a possible institutional relationship between the European Economic Community and the European Free Trade area.

Any such political changes must have significant effects on the work-load and the role of the Community Courts. Such changes may also affect the relationship between the European Court of Justice and the Court of First Instance. But it is difficult to discuss the legal implications of political changes which have not taken place and may never take place. It seems more useful therefore to stress the legal principles which appear to be important for the Community and which should guide any future political changes.

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The views expressed are personal views and not necessarily those of my colleagues.

The Rule of Law

The European Community is a Community governed by law. As the Court of Justice has pointed out a genuine rule of law, in the European context, implies binding rules which apply uniformly and which protect individual rights. But it is not sufficient for the Member States to pay lip-service to the rule of law. European Union, whatever form it takes, will lack any force if it is based upon rules that impose neither obligations nor sanctions on Member States in their relations with one another and with individuals. The clear implication is that there must be some method of imposing sanctions on (or withholding grants or subsidies from) Member States who refuse or neglect to obey the directives of the law-making authority in the Community or the judgments of the Court. Secondly, as again the Court has pointed out, the concept of the rule of law requires that rules should apply with the same force in all Member States. Thirdly, the Courts, and ultimately the Court of Justice, must be the final and ultimate interpreter of the fundamental rights of individuals in the Community. This may involve the right to review, and if necessary, to set aside the legislation of lawmaking authorities in the Community should these be found to offend human rights guaranteed by the Treaties or by the Constitution by which the Community is established.

Independence of the Judiciary

Another principle, which may turn out to be very important in the future, is the independence of the judiciary. The European Parliament is already demanding a say in the appointment of Judges to the European Courts and this demand may be a quite proper one for the Parliament to make. It is not unreasonable that the elected representatives of the citizens of the Community should wish to examine the credentials of prospective Judges. But one should also remember the importance of each Member State being entitled to nominate a Judge to the Court. This has been a significant factor in the evolution of Community Law and also in making Community Law more acceptable to the various Member States. Moreover a system of Parliamentary scrutiny might become invidious if it were combined with the present system of appointing Judges for comparatively short terms of office. If such a system were introduced Judges, once appointed, should be appointed for long terms or for life, subject of course, to the usual provisions concerning good behaviour.

Judicial Review of Specialist Tribunals

If the European Community is to continue to be a Community governed by law then the interpretation of Community Law must, in the final analysis rest with one Court competent to bind all institutions Member States and citizens of the Community. One should avoid a system where a group of independent specialist courts would deal with different aspects of European Law. There will, almost certainly, be a need for administrative or specialized tribunals dealing with various aspects of Community Law but an appeal must always lie from these tribunals to a court or hierarchy of courts concerned with the interpretation and application of Community Law.

Right to Appeal

Many lawyers would also maintain that a Community governed by law should give to every litigant not only a right to a full hearing of his case at law and on the merits, but also the right to appeal an adverse decision from the court which initially heard his case. How many appeals there should be and whether the appeal should be by way of review or rehearing are matters which are open to debate and which might vary with varying circumstances. But most lawyers would agree that the right to an appeal of some kind is a guarantee of fairness and of due process of law. It is surprising therefore that the Member States and the Institutions of the European Communities should have deprived themselves of the protection of a right to appeal by providing that in cases where they were plaintiffs the existing Court of Justice was to be a court of first instance from which there was no appeal. There may be cases (including some interlocutory cases) where the urgency of the matter may dictate that the parties should have immediate access to the Court of Justice and that its decision should be final. But these considerations would appear to apply only to a small minority of cases. It appears that the reason for the present anomaly is to be found in the historical fact that originally there was only one Court; that the creation of the Court of First Instance was a new experiment; and that maybe the Member States and the Institutions considered it more in accordance with their dignity to have their cases heard by the higher court. This, surely, is a matter which should be looked at again in a Europe moving towards political union.

An Ultimate Court of Appeal

I have stressed that an ultimate Court of Appeal which is the final interpreter of Community Law is vital to the success of the European Community. Even if the Community grows no larger and no closer political union takes place the Court of Justice will find itself as the ultimate court of appeal in a Community of more than 300 million people. But if one thinks of a larger Community or of a Community moving towards greater political union it is clear that the burden thrown upon the existing Court will be intolerable. Faced with this situation some people have suggested the creation of a special constitutional court such as exists in many of the Member States. I think it would be a pity if the Community went down that road.

So far as the Community is concerned the Treaties are the Constitution. The Court has in a series of great decisions, the full implications of which are not yet realized, spelt out the nature of the Community's legal order and shown how it was based on respect for human rights common to the Constitutions of the Member States and enshrined in the European Convention for the Protection of Human Rights. The case law developed by the Court for the protection of human rights received legislative endorsement in the preamble to the Single European Act where the Member States refer to their determination to work together to promote democracy on the basis of the fundamental rights recognized in the Constitutions and laws of the Member States and in the Convention for the Protection of Human Rights and Fundamental Freedoms. If therefore the political discussions at present in progress result in the introduction of a specific Community charter of human rights there seems to be no reason why the interpretation of such a charter should not be left to the existing Court.

It would be more helpful to relieve the Court of some of the routine work it has to attend to at present in order to allow it to concentrate on the great issues of Community Law and constitutional interpretation. It is absurd that a Court which is the final Court of Appeal in a Community of some 300 million people should have to apply itself to routine questions concerning the rate of VAT or Customs Duties which raise no issue of principle. Such routine

matters should be delegated to the Court of First Instance and there should be a system of filtration to ensure that only cases which raise some fundamental principle of Community Law reach the ultimate Court of Appeal.

The Court of First Instance

The Single European Act amended the Treaties to allow the Council, in certain circumstances, to establish a European Court of First Instance. The relevant amendment to the EEC Treaty appears at Article 168a. It empowers the Council, subject as aforesaid, to attach to the Court of Justice a court with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only and in accordance with the conditions laid down by Statute, "certain classes of action or proceeding brought by natural or legal persons". By decision dated 24 October 1988 the Council agreed to establish the Court of First Instance but that Court did not begin to exercise its jurisdiction until 31 October 1989.

The purpose of establishing the Court of First Instance was to relieve the burden on the Court of Justice. Nevertheless the jurisdiction actually conferred upon the Court of First Instance - though important - was comparatively narrow. It was confined to competition cases, cases concerned with the European Coal and Steel Community, cases brought by European civil servants and claims for damages in cases where the Court had jurisdiction. The Court inherited a large number of heavy competition cases from the Court of Justice but the Court hopes soon to have decided all these and should then have surplus capacity. The Court could then be called upon to exercise all the jurisdiction contemplated by Article 168a of the Treaty. This would include the European dimension of a wide field of commercial law and would cover competition law, mergers and takeovers, European trademarks and patents, the problems of European civil servants and actions for annulment, default or damages arising out of any of the matters in which the Court had jurisdiction.

Indeed one could go further and say that now that the Court of First Instance has been established that Article 168a of the Treaty has become largely of historical interest. Perhaps the time has now come when the fundamental jurisdiction of the two Courts should be defined by the Treaty itself. Some would say that the basic jurisdiction of the two Courts should appear in the

Treaty itself as this would be more in accordance with the independence of the judiciary. The fact that the basic jurisdiction of the Courts appeared in the Treaty need not preclude the legislative body in the Community from conferring extra jurisdiction in relation to specific matters on the Courts as occasion requires. This happens in many of the Member States.

Subsidiarity

If the politicians make any progress towards political union it seems to be a foregone conclusion that they are going to amend the existing Treaties to incorporate into them the principle of subsidiarity. The principle of subsidiarity prescribes that it is contrary to good political order that a higher organ on the political or administrative scale should take on any task which can be equally well performed by a lesser organ. The implication, in the context of the European Community, would appear to be that the Institutions of the Community should not undertake any task which can be equally well performed by the Member States. Not only is it intended, apparently, to incorporate the principle of subsidiarity into the Treaties but it is also intended to give to the Court the final right to say what the principle of subsidiarity implies in any particular case and also to give it power to annul Community measures which violate the principle.

Federalism

Some people see in the principle of subsidiarity the acceptable face of federalism. No doubt there is a sense in which this is true. But it would be wrong to assume that the principle of subsidiarity, applied to the Community legal order, necessarily implies the creation of a federal system of regional courts such as you have in the United States of America. To do so is to misunderstand the subtlety of the Community legal order and the significance of the relationship which the Court of Justice has created, through the Article 177 procedure, between the National Judge and Court in Luxembourg. In the Community legal order Community Law has primacy over National Law by virtue of the Treaties (as interpreted by the European Court) and by virtue of the amendments which were made to the Constitutions of the various Member States on joining the Community. By virtue of the same provisions the National Judge is a Community Judge and must give priority to

Community Law in his own Court even if this involves striking down National legislation enacted before, or after, the State entered the Community.

The Partnership between the Community and the National Courts

The partnership which exists between the European Court and the National Court in enforcing Community Law is one of the great achievements of the European Court. It has created this partnership through the use of the Article 177 procedure and it is understandable that the European Court should be so anxious to maintain this procedure intact. For one thing it is the chief method for ensuring that Community Law is interpreted the same way in all the Member States of the Community. But it is much more than that. A Common lawyer might be tempted to compare the reference for a Preliminary Ruling under Article 177 of the Treaty to a case stated in a Common Law jurisdiction. But he would not be correct in doing so. In the case of a case stated the lower court first finds the facts and then asks the superior court what, in the light of those facts, the law prescribes. Or alternatively the lower court may give its own interpretation of the law in the light of the facts which it has found and then ask the superior court if its interpretation of the law is correct. The superior court tells the lower court what the law is and, in effect, tells the lower court what, in the light of the facts and of the law, the lower court must do. The procedure in relation to a Preliminary Ruling under Article 177 is different. If in the course of a case the National Court is called upon to interpret any of the provisions of the Treaty or of Community legislation it can ask the European Court for guidance as to the correct interpretation. It may ask questions of the European Court but the European Court may reformulate the question if, on reading the file, it considers that the National Court has not asked the correct question. Its answers however will always be in general terms and advisory by nature. It leaves the National Judge to decide all questions of fact and to apply Community Law to the facts as found by him. There is no appeal from the decision of the National Judge to the Community Court. The National Judge, therefore, in his capacity as Community Judge becomes the upholder of Community Law in his own Member State. If the National Judge belongs to a State where the judicial review of legislation already exists the upholding of Community Law will pose no novel problem for him. If he belongs to a State where Parliament has traditionally been sovereign the problem may appear more

daunting. But the concept of a Community governed by law is naturally attractive to all Judges. In the partnership between the Community Judge and the National Judge the Community Court, which has very little power, retains a largely advisory role whereas the National Judge, who is nearer the levers of power, plays a major part in establishing the primacy of Community Law. For this reason it is doubtful if the Community needs a regional federal judicial structure such as you have in the United States of America. The National Judge guided by the European Court on difficult points of Community Law can preserve the Community legal order in each Member State. The Court of First Instance, subject to appeal to the European Court on difficult points of Community Law, can deal with those cases which can only be dealt with at a European level. It may also be argued that this system accords more closely with the principle of subsidiarity than the American system.

The Problem of Language

It also helps with another practical problem which the United States has not to face. This is the problem of languages. At present the European Courts have to cope with nine official languages and litigants may be entitled to use other languages - such as Irish - in certain circumstances. This means that the Court requires the permanent assistance of highly qualified teams of translators and interpreters. A judgment may be drafted in English translated into French, worked over and amended many times in French, and, when finally agreed, translated and delivered in Greek. Finally it will have to be made available in all the nine official languages of the Community. This problem is likely to get worse rather than better as new members join the Community. These problems tend to support the view that both Courts should stay in one place where these language services are available and also that they should, so far as practicable, confine their activities to such matters as have a European dimension and are of special importance for the Community's legal order.