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Certain legal aspects of the Draft Treaty embodying the Statute of the European Community, adopted by the Ad Hoc Assemby

Opinion
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Henri ROLIN, Belgium, Socialist Group

In accordance with Order No. 4 of the Assembly, the Committee on Legal and Administrative Questions met on 5th, 6th, 7th and 8th May, 1953, to consider certain legal aspects of the Draft Treaty embodying the Statute of the European Community.

At the meeting held on 8th May, 1953, the Committee on Legal and Administrative Questions unanimously agreed to the following opinion.

The Committee,

Having reviewed its opinion (Doc. 105) transmitted to the Ad Hoc Assembly by a decision of the Consultative Assembly of 17th January, 1953;

Whilst paying tribute to the efforts made by the Sub-Committee of the Constitutional Committee of the Ad Hoc Assembly to improve the draft Treaty on the basis of the observations formulated by the Committee on Legal and Administrative Questions,

Regrets t h a t both the Constitutional Committee and the Ad Hoc Assembly itself were unable to find sufficient time for detailed consideration of the articles of the draft Treaty relating to the Court;

Emphasises once again the considerable importance of these articles in securing the loyal implementation of the provisions of the Treaty and the smooth administration of the Community;

Draws the attention of the Foreign Ministers of the Member States of the European Coal and Steel Community to the following observations which, i t is hoped, will be given careful consideration in all subsequent examinations of the draft Treaty.

1. The establishment of a Court of the Community

The Committee has taken note with interest of the reasons given by the Rapporteur, M. von Merkatz, why it was not found possible to support Recommendation 36 (1952) of the Consultative Assembly on t h e establishment of a European Court which would be the judicial organ both of the Council of Europe and of such restricted Communities as might be constituted within its framework. It is also gratified to learn that the organisation of the Court of the Coal and Steel Community has not been merely incorporated in the draft Treaty of the new Community but has been used as a " starting-point " for the organisation of the Court of the European Community.

It is clear from Article 38 of the draft and from the comments of the Rapporteur t h a t the Court of the Coal and Steel Community will undergo modification in accordance with the terms of the new Treaty as soon as it enters into force, it being understood, however, that the seven judges of the Court of the Coal and Steel Community will, of course, continue as of right to sit in the new Court until their t e rm of office has expired (Article 39, clause 3).

2. The composition of the Court

The Committee notes t h a t the earlier proposals have been considerably improved in the draft Treaty with regard to the candidature, appointment and term of office of the judges and the qualifications required for appointment. It is still of the opinion, however, that there would be advantage in laying down an age-limit. The figure of fifteen provisionally adopted as the maximum number of judges will undoubtedly relieve most of t h e apprehensions expressed in the Opinion of the Committee on Legal and Administrative Questions. The Rapporteur of the Ad Hoc Assembly explains t h a t " in selecting t h e figure fifteen, the assumption was that this figure makes it possible, first, to form three Divisions with five judges each and, secondly, to appoint three judges each from the large nations and two each from the small nations ". If this plan is followed, each of the three Divisions will presumably comprise one judge from each of the three larger powers and two judges having the nationality of two of the three Benelux countries; this would eliminate, in the case of the larger Powers, and diminish, in the case of the Benelux countries, the danger of a case affecting the interests of one of them being heard in a Division comprising no judge of their nationality. However, even composed in this way, the Court of the Community will still have the disadvantage, as compared with the other international Courts, of not comprising any judge who is not a national of the States directly or indirectly concerned in the cases submitted to the Court.

The Committee would therefore welcome the appointment of at least a small percentage of the members of the Court, for example one-fifth, from among lawyers who should, as a compulsory condition, be nationals of non-Member States of the Community.

This may in any case be achieved in the future by the implementation of Article 92 of the draft Treaty. Under the terms of the last pai'agraph of that Article, " ...judges appointed by the associated State may sit in the judicial organs of the Community in accordance with the methods defined in the Treaty of association ". It is observed that such participation is, however, provided for only in the case of disputes between the Community and an associated State, or concerning nationals of an associated State. It would therefore appear to refer only to ad hoc judges appointed for a specific case. It is, however, possible t h a t associated States may be indirectly concerned in the settlement of disputes arising in connection with the interpretation or implementation of provisions contained in the Treaty or the validity of decisions by organs of the Community, even though they are not parties to the dispute.

For this reason, it appears reasonable t h a t they should be organically associated with the constitution of the Court, in the same way as certain non-Member States of the United Nations are associated with the constitution of the International Court of Justice. This solution would have the two-fold advantage of strengthening the Court by the inclusion of less directly interested elements and would also avoid the purely governmental appointment of ad hoc judges.

3. Independence of judges

The principle of the independence of judges is, of course, unchallengable; but the terms in which it is expressed in the last paragraph of Article 39 are not thought to be very satisfactory. The Protocol on the Statute of the Court of Justice of the European Coal and Steel Community contained various provisions in this respect which it would have been well to embody in the draft Treaty, even if only by reference.

4. The jurisdiction of the Court

The jurisdiction of the Court is laid down principally in Articles 41 to 44. In the Report by M. von Merkatz, it is pointed out t h a t these Articles mention " only such powers as do not already fall automatically to the Court by reason of its assumption of the competence of the Court of the European Coal and Steel Community or of the Defence Community. "

It thus becomes very difficult to gauge the exact scope of the proposed provisions :

a. What, for instance, is the meaning of the provision of Article 41, paragraph 2, according to which " The Court shall take cognisance, through the machinery provided for the hearing of appeals, of the judgements or decisions delivered by the judicial organs of the Community, all of which are subordinate to it "[1].There seems to be no doubt that this refers to the judgements of the Community and not to those of the States concerned. Such judgements would include those delivered by the local Claims Tribunals provided for in the Treaty establishing a European Defence Community (Articles 10 and 22 of the Jurisdictional Protocol appended to the E D C Treaty). But, even in such hypothetical cases, to which it was unnecessary to refer in vague and inadequate terms, the Court of the Community will act as a court of appeal and not as a court of cassation or a court of revision. This last term has, at least in French, Belgian, Luxembourg and Netherlands law, a precise meaning, which limits its application to the reconsideration of judgements delivered in respect of cases tried on repressive grounds. In German law, however, the word " revision " is used to describe the action of the Supreme Court in a case where, although competent t o quash the decision of a lower court on the grounds of violation of law, it does not refer such a case back to a lower court but revises the judgement whilst remaining bound by factual evidence established. It is quite clear t h a t the text of Article 41, paragraph 2, must in any case be rendered more intelligible.

b. Article 43 of the draft Treaty confers jurisdiction on the Court to pass judgement on appeals for annulment on grounds of lack of competence, substantial procedural violations, violation of the Statute or of any regulation concerning its application, or abuse of power, where such appeals are lodged by any interested party against tho decisions or recommendations of the European Executive Council or of the administrative authorities subordinate thereto. There is no doubt that this provision duplicates similar articles in the Treaties setting uj) the European Coal and Steel Community and the European Defence Community, and there is a clanger t h a t it will cause considerable uncertainty, particularly inasmuch as appeals may be lodged by any individual against any subordinate administrative authority emanating from the Executive Council but not against other organs of the Community (cf. Articles 33 and 38 of the Treaty setting up the European Coal and Steel Community, Articles 54, 57 and 58 of the Treaty setting up the European Defence Community and Article 11 of the Jurisdictional Protocol).

c. Article 44 would also appear to be somewhat ambiguous. Considered in relation to Article 106, which endows all decisions of the European Executive Council with executive force, provided only t h a t their authenticity be verified, and bearing in mind that even appeals lodged with the Court will have no suspensory effect (see Article 49 of the draft Treaty), this provision might be interpreted as a mere confirmation of the duty of national Courts to accept the validity of decisions by the European Executive Council which have not been annulled by the Court of the Community. But it is clear from the explanations of the Rapporteur that the purpose of this provision is to accord prejudicial force to any objection lodged in a national Court on the ground of the irregularity of a decision by the Executive Council, which appears to imply automatic reference by the national Court to the Court of the Community. If such is the intended scope of this provision, it should be stated in clearer terms.

5. Rules of law to be applied by the Court

Article 38 of the Statute of the International Court of Justice enumerates the sources of the law which the Court shall apply.

Although there is a tendency to consider this provision as purely declaratory and as applicable to all courts of an international character, there might be advantage in reproducing it in the section relating to the Court of the European Community. In this case, it might perhaps be advisable to indicate that the words " general principles of law " are given a wide interpretation, inasmuch as the principles of public and administrative law of the Member States will serve as a basis for the elaboration of the principles of federal law.

6. Provisions concerning the Convention for the Protection of Human Rights

The Committee on Legal and Administrative Questions cannot but welcome the desire expressed by the Ad Hoc Assembly to include the protection of human rights among the principal aims of the Community. This desire is clearly shown both in the Preamble and in Article 2 of the draft Treaty. But the provisions designed to ensure the protection of human rights appear not unlikely to lead to some serious complications.

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1. See the French text in tho adjoining column.

(a) In accordance with Article 3 of the draft Treaty, only the provisions of Section I of the Rome Convention and those of the 1952 Protocol signed at Paris are considered " an integral part of the Statute ". Section I of the Rome Convention, however, only contains a list of human rights and fundamental freedoms, whereas the undertaking by the States to secure to everyone within their jurisdiction these same rights and freedoms is contained in Article 1 of the Convention, which is not included in Section I. It is certainly within the spirit of the draft Treaty that all the Members of the Community should subscribe as of right to this undertaking; it would therefore be preferable if this were to be clearly expressed in the text.

Furthermore, in including only Section I, and not Sections II, III and IV of the Convention, the draft Treaty makes it impossible for the Commission of Human Rights to function vis-à-vis any States which have not individually ratified the Convention. This would make it necessary to set up within the Community supervisory organs completely independent of those for which provision is made in the Convention. Certainly, the Committee is not in favour of any such weakening of the Rome Convention, which might well gravely endanger its implementation.

The wording of Article 3 is undoubtedly due to t h e fact t h a t the draft Treaty setting up the Community provides for the admission of new Members who need not necessarily be Member States of the Council of Europe, whereas the Rome Convention is binding only upon Member States of the Council of Europe. Hence the impossibility of making the Convention applicable as a whole to the Member States of the Community.

I t is observed, however, that, presumably owing to an oversight, the Draft arrives at an opposite result in respect of the rights and freedoms included in the Paris Protocol, which is declared by Article 3 of the Draft to have the force of law, whereas, in accordance with that Protocol, all the provisions of t h e Convention are applicable to the rights and freedoms defined in the Protocol.

The Committee sees in the difficulties mentioned above another serious reason why the draft Treaty instituting the Community should be amended in the manner suggested in the second draft Recommendation, namely by limiting the admission of new Members to Member States of t h e Council of Europe.

(b) If there were support for the view expressed above, it would be desirable for all Members of the Community not to limit themselves to mere accession to the Convention for the Protection of Human Rights and to its Protocol. From the formal aspect, it would be appropriate that States should sign and ratify the Convention at the same time as they, ratify the draft Treaty instituting the Community, unless such ratification shall have taken place previously. This is the only way of acceding to the Convention for which provision is made in Article 66 of the Convention and Article 6 of the Protocol.

(c) As regards the substance of this Article, the Committee can only reiterate its hope that, if the Members of the restricted Community really wish to show their special concern for the protection of human rights and fundamental freedoms, the Treaty will make it compulsory for the Members of the Community to accept the right of individual petition to the Commission of Human Rights and the compulsory jurisdiction of the Court of Human Rights (Articles 25 and 46 of the Rome Convention).

(d) The object of Article 45 is to reduce the possibility of concurrence of jurisdiction between the Court of the Community and the organs for which provision is made in the Rome Convention. The provisions of this Article, however, can hardly be considered satisfactory :

> *Paragraph 1 reserves to the Court of the Community the right to hear disputes concerning an alleged violation of human rights by one of the institutions of the Community itself. The Committee sees no objection to the exclusive hearing of such complaints by the Court, since the Convention for the Protection of Human Rights also does not make it possible to hear any defendants other than States; but it is doubtful whether it is necessary or expedient to envisage such an unlikely and hypothetical case, already sufficiently covered by the provisions of Article 43 relating to appeals for annulment.*
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> *Paragraph 2 provides that an appeal to the Court of the Community lodged by States or their nationals, in the case of an alleged violation of human rights by one of the organs of the Community, shall be deemed to be a preliminary appeal, the possibility remaining of taking the case subsequently to the organs provided for under the Convention on Human Rights. This would be in accordance with the principle contained in Article 26 of t h e Rome Convention, which lays down that the plaintiffs must first exhaust all domestic remedies. The Committee believes it appropriate to point out that such a system is not capable of being made effective in practice, having regard to the provisions of the Convention on Human Rights which, as it has already been made clear, only relate in Articles 24, 25 and 50 to the hearing of complaints made against the High Contracting Parties.*

Paragraph 3 concerns the opposite and more usual case of an appeal in respect of an alleged violation on the part of a Member State of the Community. It appears to indicate by implication t h a t such an appeal shall be brought before the Court of the Community, even if only in the first instance, whilst compelling the Court to postpone consideration of any dispute involving a question of principle as to the interpretation or extent of the obligations resulting from the Convention until such question has been settled by the judicial organs set up by the Rome Convention. This procedure of reference to other judicial organs appears to be somewhat dilatory and complicated. In general, it would appear preferable, not only for the prestige of the Court, but in order to avoid its being overburdened with work and also in order to ensure unity of jurisprudence, to leave the enforcement of Human Rights entirely to the organs provided for under the Rome Convention.

7. Exclusion of all other jurisdictions

Article 46 of the draft Treaty embodying the Statute of the European Community contains an undertaking by the States not to avail themselves of any declarations or conventions existing among them to submit any difference arising out of the interpretation or application of the Treaty to a method of settlement other than those provided for therein. The Rapporteur states that this provision corresponds to similar provisions in the Treaty setting up t h e European Coal and Steel Community (Article 85) and the Treaty ?not yet ratified? setting up the European Defence Community (Article 122). This clause should be compared with t h a t contained in Article 62 of the Rome Convention whereby the High Contracting Parties agree t h a t , except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other t h a n those provided for in that Convention. At first sight, the clause of the draft Treaty appears to be more far-reaching and, indeed, to prevent two States from trying to settle a dispute by conciliation or by an agreement referring it to an arbitration tribunal or t h e International Court of Justice. On further examination, however, to come to an agreement with another State by means other t h a n those laid down in the draft Treaty does not appear to be considered as " availing oneself " of a treaty, convention or declaration. This, in fact, seems a reasonable solution. But i t should be clear t h a t such are the real intentions of t h e Contracting States, and this should be specifically provided for in the Treaty.

8. Enforcement of decisions of the Executive Council and of judgements of the Court

Article 106 of t h e draft Treaty confers executive force both on decisions of the Executive Council and on judgements of the Court in the territory of Member States, such enforcement to be subject only to verification of the authenticity of the decisions. This system would appear to be fully acceptable in respect of judgements of the Court, but it seems unreasonable to compel States to enforce decisions of the Executive Council which they consider to be ultra vires and against which they themselves have appealed for an annulment. Surely any such appeal on the part of a Government should necessarily imply the suspension of the enforcement of t h a t decision on its territory, subject to a time-limit being fixed for such suspension.

9. Amendment

Articles 110 and seq. provide for different methods of amendment according to the subject of the proposals. Where a proposal involves modifying the powers and competence of the Community, it should be submitted not only to t h e organs of t h e Community, but, according to Article 111, " to t h e Parliaments of t h e Member S t a t e s " . Such a clause might well give rise in certain States to further constitutional objections, since it would involve the conclusion of entirely new treaties amending the treaty of the Community, and this would call for the intervention of the Executive and Parliament.

10. Extra-territorialitij of the Seat of the Community

Article 100 states that the location or locations, selected shall be placed under the exclusive jurisdiction of the Community. The words "exclusive jurisdiction" would seem to imply t h a t the word " location " refers not only to the premises themselves, but to the town or territory in which the Seat is to be established.

In this case, it would seem advisable t h a t the population of t h e territory should be granted a considerable measure of autonomy enabling it to administer its own affairs; the words " exclusive jurisdiction " would seem to be too categorical; it would be more correct to provide that such territories should be placed under the authority of the Community, and no longer under that of the Member of the Community which had hitherto been responsible for its administration.

If, however, the purpose of Article 100 is merely to ensure that the premises shall not come under the authority of the officials of the State in whose territory they are situated, the word " immunities " covers the situation, and it would be preferable to use this word.

11. Area of application of the Statute of the Community

Article 101 of the draft Treaty settles this question as follows :

a. unless a declaration to the contrary is made before signature of the Treaty, the Statute shall apply to all the territories under the jurisdiction of each State;

b. subsequent protocols may, however, bring within the area of application of the Statute, or of part of the Statute, territories excluded from it by declaration;

c. laws, recommendations and decisions of the Community, together with the Treaties concluded by the Community, shall not be applicable to non-European territories except with such adaptations as may be laid down by the Member State under whose jurisdiction they fall.

This last provision ? t h e wording of which is not particularly satisfactory ? appears to give t h e governing State sovereign power to decide what adaptations are required in respect of non-European territories ? which considerably reduces the legal effects of the possible application of the Statute to those territories to the Statute. M. Benvenuti points out, it is true, in his Report, t h a t this view of the conditions of adaptation is not discretionary and that if any dispute arises in this connection it may be brought before the " ordinary bodies " of the Community. If t h a t is indeed the implication of this provision, its wording should be amended.

12. Basic principles of the European Civil Service

The Committee on Legal and Administrative Questions notes with satisfaction t h a t , in accordance with its opinion, the Ad Hoc Assembly has decided not to require the European Executive Council by itself to be responsible for drawing up regulations for its officials. According to Article 8 of the draft Treaty, the Community will be required to enact legislation defining the fundamental principles of such regulations in respect of its officials.

I t would appear preferable to include those fundamental principles in the Treaty itself, as was done in the case of Articles 100 and 105 of the United Nations Charter, whereas the regulations would be embodied in a law.

13. Assistance and intervention in order to safeguard the democratic order

The Committee gives its warm approval to the sentiments which have inspired Article 104 of the draft Treaty, but would wish the wording of the article to be reviewed.

As is observed in M. Benvenuti's Report, Article 104 provides for two possibilities :

a. The possibility of the Member States asking the European Executive Council for assistance in maintaining constitutional order and democratic institutions in their territories;

b. The possibility of the Community intervening on its own initiative for the same purpose.

As regards the first, it would appear preferable to substitute the notions of maintenance of public policy and of the unimpeded working of constitutional institutions for the terminology adopted in t h e text; it is, indeed, necessary to avoid giving the impression that assistance may be requested for the purpose of maintaining the status quo. If, by the normal processes of constitutional revision, democratic freedoms were imperilled, there would be cause to invoke the 1952 Protocol to t h e Convention for the Protection of Human Rights, signed at Paris.

As regards the second possibility, it would appear desirable to make it clear that the Executive Council shall be empowered to intervene on its own initiative only in the cases mentioned in the preceding paragraph.

14. Extension of the draft Treaty to a unified Germany

The Committee considers it necessary to emphasise the precarious nature of the legal implications of the provision contained in Article 103 of the draft Treaty, whereby an attempt has been made to ensure that the Treaty shall survive t h e eventual reunification of Germany. It would doubtless be incorrect to regard a unified Germany as the successor State to both Eastern and Western Germany, and there could be no question of requiring i t to be bound by the political undertakings subscribed to by the States of which it would be formed.

The opinion is widely held both inside and outside Germany t h a t the German Community, although it is not, for the time being, under one administration, continues to be a legal entity. It is agreed, moreover, at any rate in the Western world, that the Federal Republic alone can be considered as the free expression of the will of the German people. But some jurists maintain that the Bonn Government which was constituted as a result of the implementation of a Federal law having a provisional and regional character (cf. Article 146 of this law), has no authority t o commit the German people as a whole and or to bind the organs which a unified Germany may subsequently choose.

In these circumstances, it is doubtful whether Article 103 could achieve its purpose of legally binding a unified Germany. It may even be questioned whether it is therefore advisable to give the impression of seeking to impose this solution in advance on a unified Germany. It would be quite otherwise if a provision were included in the draft Treaty which would offer a unified Germany the option of confirming the Treaty ratified by the Federal Republic and providing in this event for the Peoples' Chamber to be modified in accordance with the procedure laid down in Article 112 or, preferably, in Article 111.