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DIMENSIONS OF THE CONCEPT OF INTEGRATION LAW: THE MODEL OF THE EUROPEAN ECONOMIC COMMUNITY

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In the last three decades, in a so to speak no man's land between the traditional spheres of municipal law on the one hand and international law on the other, a new area of known as *integration law* (or *law of integration*) has been emerging and progressively developing. Its genesis is due to the nature of economic, social and even political problems which states as the traditional entities of basic economic and legal orders have to face, control and manage in our times. These problems manifest, in many instances, not only a common regional basis and similarities beyond the limits of man-made national boundaries, such as in Western Europe, but also involve transnational interactions. In response to this challenge, a new approach has had to be developed, and for it the term integration has been adopted.[1] Integration stands for a new theoretical and conceptual framework. Initially anchored in the area of economics, it has inevitably found its way into the sphere of law and has led to the development of integration law as a distinct category.[2]

A lexical definition of integration is not difficult to formulate, but as a technical term for the purpose of economics and law it imposes a challenge. It stands namely both for a process and objective (aim) relating to the formation of a (new) whole by blending the relevant existing entities into a larger unit (which is to emerge *gradually*). It may have, in the above indicated international and transnational con-

[1] The concept of integration is not, however, a total innovation effected after 1945. In its rudimentary forms it goes well back into the 19th century; see for example the development of the German Customs Union (Zollverein) between 1819 and 1836. It is considered, by some historians at least, to be one of the main foundations on which the unification of Germany in 1871 rested.

[2] On integration from the angle of economics, see A.M. *El-Agraa*/A.J. *Jones*, Theory of Customs Unions (1981), pp. 1 ff; for ample literature on it from the angle of law and also in general, see K. *Kujath, Bibliography on European Integration* (1977), pp. 81 ff, also 97 ff; from the angle of law, P. Pescatore, *The Law of Integration* (1974).

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text, dominantly economic dimensions, but as such it also implies an inevitable impact on social, legal and political developments which may in turn affect the initial economic objetives and integration as a whole.[3]

Thus, for lawyers, integration involves, beyond its manifold economic technicalities and dynamics relating to its progressive implementation, the imperative question as to the dynamic normative contribution of the integration process and its objective as an emerging socio-economic (and legal) order. In this respect, integration law is involved in a process in a manner which has no parallels in the spheres of municipal or international law. These two categories of law, while evidently related to the continuous (and dynamic) adjustment of the law to the needs and development of socio-economic and other realities, are, compared with integration law, far less involved in a process in which progressive structural and institutional changes accompanied by shifts of competences are envisaged both as components of a process and as ultimate goals.[4] The present paper purports to examine some of the salient dimensions of the most advanced law of integration, that is, the law of the European Economic Community (EEC).[5] For this purpose, first reference will be made to the fundamental (constitutional) nature of the integration law of the EEC, to its multidisciplinarity; the nature of legal provisions relating to short-term and long-term integration objectives will be surveyed; and, before the conclusions, the essential function of judicial control in the integration process will be appraised.

3 In a municipal legal order, basic constitutional and institutional objectives are normally implemented within the initial phase of the legal order; the law of integration involves a long-term evolutive development entailing gradual shifts of competences from municipal to new (integration) institutions, and the gradual elimination of barriers separating the economies of the municipal systems. Such a process may be orientated towards the long-term and comprehensive objective of an economic union. As to international law, it is basically a law of inter-state or intergovernmental cooperation solidly anchored in the concept of sovereignty of states; international law does not *per se* provide, as integration law does, for structural and institutional changes aiming at the creation of a new entity beyond and above the entities involved in the integration process. For a limited, markedly economic approach to integration, see J.M. Van Brabant, *Socialist economic Integration. Aspects of contemporary economic Problems in Eastern Europe* (1980), p. 5.

4 See Pescatore (fn 2 above); for a comparison of the concepts of *integration* and *cooperation*, see M. Schweitzer/W. Hummer, *Europarecht* (1980), p. 30, see also p. 183.

5 Of the three European (Coal and Steel (ECSC), Economic (EEC), and Atomic Energy (EAEC or EURATOM)) Communities, the EEC is, in terms of integration, the most comprehensive and hence most ambitious. Unless otherwise indicated, reference in the present paper is to the text of the EEC Treaty (of Rome, March 25, 1957). For the text see *Sweet & Maxwell's European Community Treaties* (4th edn., 1980); see also *Basic Community Laws* (B. Rudden/D. Wyatt, eds.) (1980).

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That integration law is not a law of international cooperation is indicated by the term Community. It qualifies the entity which is to emerge as a fundamental goal of the integration process. The term Community carries a weightier legal quality than the designation association or organization; these as a rule apply to inter-gobernmental institutions of cooperation and coordination. Moreover, the law of the European Community is fundamental (constitutional) in nature because within itself it is integrated into a whole: it is not divisible; its individual provisions cannot be detached and singled out by acceding or already existing member states for the purpose of reservations which are a common and frequent practice in the law governing normal agreements and conventions in the sphere of international law. Furthermore, while new acceding member states may naturally negotiate the terms and technicalities of accession to the Community, they have to accept the corpus of economic and legal progress, that is, integration achieved by the Community. This corpus is best identified and qualified by the French term *acquis communautaire.* Also worth noting is the fact that, unlike normal international agreements, all three treaties of the European Community, relating respectively to the Coal and Steel Community (ECSC), the EEC and the European Atomic Energy Community (EAEC or EURATOM), do not provide for any unilateral withdrawal from membership or termination of the status of a member state as a contracting party. This arrangement stands in strong contrast to the practice of states as parties to inter-governmental bilateral or multilateral agreements.[6]

A further vital characteristic of Community integration law is that it provides for the shift of relevant competences from the sphere of sovereignty of member states to the sphere of supranational Community institutions. As a result, these institutions can adopt Community legislation which is directly, generally and uniformly applicable within the Community as a whole with its 10 member states, that is, without a margin of sovereign discretion by the latter to ratify or not ratify such legislation within their respective legal systems.[7] This constitutional and supranational dimension of Community law is enhanced by the function of judicial control which the European Court of Justice (ECJ) may exercise on behalf of the rule of law.[8] vital innovation of integration law is the inclusion of the three cate-

[6] See and compare, for example, EEC Articles 236 and 237, relating to the amendment and enlargement of the EEC, respectively.

[7] See EEC Art. 189.

[8] See Lord Mackenzie Stuart, *The European Communities and the Rule of Law* (1977).

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gories of member states, institutions and individuals within the scope of compulsory jurisdiction of the ECJ.[9]

In accordance with the multidimensional implications of economic integration, integration law is, within the European Community, multidimensional because it does not teleologically limit itself to economic objectives. It englobes also goals which extend, beyond objectives involving elements of social and economic justice, into an open ended destination with respect to which the integration process initiated in the 1950's shall lay "the foundations of an ever closer union among the peoples of Europe".[10] This shall be achieved "by common action to eliminate the barriers which divide Europe". On the way to this very distant aspiration, an "essential objective" involving considerations of economic and social justice is "the constant improvement of the living and working conditions" of the peoples of the European Community and the reduction of "the differences existing between the various regions (of the European Community) and the backwardness of the less favoured regions".[11] These more general aspirations, expressed on the level of the Preamble to the EEC Treaty, are translated into a definite legal commitment by their inclusion in the provisions of EEC Articles 2 and 3. The establishment of "a common market" as a short-term objective shall gradually lead to an ultimate objective involving "closer relations between the States" belonging to the EEC.[12] Evidently, such an open ended goal, with comprehensive and hence vaguely defined objectives as a characteristic of integration law in the European Community, has necessitated a special drafting technique applied to the EEC Treaty text. The short-term objectives of the EEC, namely, the four freedoms affecting the movement of goods, persons, services and capital, are relatively concrete in formulation and substance; the more distant objectives of integration are put in more comprehensive general terms and as such are inevitably vague as to specific details, and may be summarized under a general heading of coordination of (regional, industrial, energy, economic, etc.) policies. This implicitly refers to a major weakness to which integration law and the integration process may be exposed: the grey areas of integration law call for a continuous political unity on the part of the member states for the purpose of transforming the generally formulated provisions and goals of Community integration

9 See, for example, EEC Articles 164, 169 ff.

10 EEC Treaty, Preamble.

11 *Ibid.* For the socio-economic dimensions of EEC law, see Arts. 39 (1)(b), 119.

12 To refer to the EEC is a common market is, technically, a misnomer, for the common market is a component and not the totality of the integration objectives.

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law into solid legal flesh. This in turn implies the necessity of an adequate judicial power competent not only to settle legal disputes generated at various stages of the integration process, but also to establish the deep-rooted fundamental nature of integration law as a system to some extent capable to neutralize the negative effects of reluctance by member states to match and consolidate the integration process with parallel integration law.[13]

As to the multidisciplinary nature of EEC integration law, it consists in the composite nature of the foundations on which the EEC Treaty and its contents rest. The Treaty itself, as an inter-governmental instrument, belongs formally to the sphere of international law. Similarly, the international status and the external relations of the EEC are governed by international law.[14] The law of the "Foundations of the Community" (EEC Articles 9-84), governing the four freedoms affecting goods, persons, services and capital, pertain to the complex sphere of economic law and have links with the sphere of industrial and social law with respect to the free movement of workers (EEC Articles 48 ff). Provisions governing the structure and competences of the institutions are obviously linked to the broad category of institutional law, with comparable affinities, on the one hand, to municipal systems are of public law and other comparable affinities to the system of international organizations.[15] As to the discipline of comparative law, few areas of legal enquiry, beside private international law, offer such a fertile field of research as preparatory work necessary for drafting secondary Community law. This has been realistically recognized by the drafters of the EEC Treaty; EEC Articles 100-102 specifically provide for the approximation (harmonization) of the relevant municipal laws of the member states.[16] A further noteworthy dimension of EEC integration law is that it provides basic standards not only for fair competition between individuals,[17] but equally between the national economies of the member states.[18]

With the above sketched multidimensional and multidisciplinary

13 In such a context, the EEC Treaty can be rightly considered as being a treaty creating a general legal framework (French: traité-cadre; German: Rahmenvertrag). Cf. the respective Treaties of the ECSC and EAEC, which are much more limited in scope and objectives, and hence relatively more precise as to their text.

14 See and compare EEC Articles 210, 228, 131 ff, 238.

15 See EEC Articles 145 ff and 189, relating to the functions of the Council of Ministers, which consisting of the representatives of the member states, has dominant legislative powers.

16 See also EEC Article 215 par. 2 which refers to "the general principles common to the laws of the Member States", as a source of law governing the non-contractual liability of the Community.

17 See EEC Articles 85 and 86.

18 See EEC Articles 90, 92; see also Articles 36 and 37.

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background of EEC law, and with due regard to the innovative dimensions of Community law, for example, with the introduction of Community treatment as a basic rule of EEC Article 7 extended to all nationals of the member states,[19] the integration law of the EEC is definitely multidimensional as to its sources. As EEC Article 164 stipulates, "in the interpretation and application of (the EEC) Treaty", the Court of Justice (ECJ) shall ensure that "the *law* is observed". (Emphasis added.) Reference to "the text" of the Treaty would have been too restrictive and unproductive with respect to the genuine needs of the emerging integration law of the EEC, which is a law marked by the influence of sources of diverse origin. For example, EEC Article 86 on the abuse of dominant position in the competition system of the EEC betrays the influence of USA antitrust law, while EEC Article 85, governing restrictive agreements and practices between undertakings, reflects the impact of German (anti)cartel law. Similarly, the influence of the elaborate French administrative law can be clearly detected in certain elements of Community administrative law governing the legality of acts of the Community institutions.[20] General principles extracted from the legal orders of the member states are a further category of sources to which Community law may refer. The same applies to international conventions, such as the European Convention on Human Rights. In one other respect too the integration law of the EEC deserves mention: It is a new legal order in which provision is made for the (as yet rudimentary) representation of the peoples "brought together" in the Assembly (European Parliament) through the intermediary of (in 1979) directly elected representatives (Members of the European Parliament (MEP)). MEP's exercise "advisory and supervisory powers" which have proved to be and are capable of progressive extension or expansion as the experience with respect to budgetary powers and their development in the 1970's indicates.[21]

Concerning the vital function of judicial control entrusted to the ECJ, it too complements the nature of Community law. The ECJ has been instrumental in highlighting and defending the specific and dynamic aspects of integration law, and has defined the progressively emerging Community legal order as being *sui generis*, to which the member states have transferred the exercise of the relevant parts of their sovereignty. The ECJ has thus made clear that integration law

19 See EEC Articles 1-8, bearing the title "Principles" of the EEC.
20 See, for example, EEC Article 173.
21 See, for example, EEC Article 137.

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involves a dynamic process in which the Community institutions shall gradually assume legislative and administrative competences of supranational nature. It has been rightly pinted out that the ECJ exercises "a function which comes close to that inherent to a legislator" in view of the fundamental role which the ECJ has to fulfil when interpreting and thus concretising the generally formulated provisions of EEC law.[22] This function of the ECJ should be considered against a background of so to say chronological dimension relating to the pace and stages of the Community integration process. With great sensitivity for the interaction of integration law and integration politics, the ECJ has adjusted the extent or scope of its interpretation of a particular EEC Treaty provision to the needs and concrete realities of the given stage of integration. This involves a sense for delicate balance on the level of legal policy which the ECJ effectively and progressively deploys as the guardian and promoter of an ultimate principle which is very closely linked with integration: the principle of integration as the focal point of reference for the orientation of the slowly emerging Community. In other words, if the ECJ adopts in its judgments a too perfectionistic approach to the ultimate goals of the integration process, it risks to diminish its credibility and authority as an essential factor of progressive integration; if on the other hand it indulges in too conservative attitudes, it jeopardises its function as one of the pace makers of integration law. Given the political reluctance of member states to maintain the process of integration in accordance with the Treaty obligations they have assumed and in accordance with the dynamics of integrative developments, the ECJ has been the point of anchorage on which the Community legal order has rested. As such, the ECJ has succeeded in diminishing the negative influence of the centrifugal attitude of member states on the Community legal system. In blunt terms, it can be said that a marked tendency in the behaviour of member states towards Community law has been one of reducing it to a system of inter-governmental political cooperation. Such a system cannot be in agreement with the spirit and modus operandi of the EEC, and the ECJ has explicitly and implicitly rejected it.

On a less political but legally highly technical level, a further vital function of the ECJ deserves to be pointed out. The legal systems and traditions represented by the 10 member states cannot be com-

22 H.G. *Schermers, The Role of the European Court of Justice in the Harmonisation and Unification of European Law,* in *International Economic and Trade Law. Universal and Regional Integration* (C.M. *Schmitthoff*/K.R. *Simmonds,* eds.) (1976), pp. 3 ff, at 7.

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pared in terms of two categories only, distinguished as common law and civil law traditions with their respective characteristics. Community law with its novel dimensions, on the one hand, and the municipal laws of the member states, on the other, also constitute two contrasting categories, in the light of which the primacy, unity, uniformity and coherence of Community law have to be considered. The ECJ has established and upheld them by reasoning that in keeping with the nature of Community law, the Community legal order, integrated into the legal systems of the member states, has to have priority before municipal courts; consequently, member states may not retain measures which may compromise the effectiveness of Community law; the binding force of Community law has to be uniform throughout the Community and may not vary from member state to member state under the impact of municipal legal measures.[23]

Conclusions

The law of the European Economic Community, as the most advanced form of integration law, is multidimensional and mutidisciplinary as to its contents and roots. It is evolutive in that it involves a continuous and dynamic process on the way to relatively clearly defined short-term objectives and vaguely formulated long-term goals implying not only economic, but also social and political elements. Its institutional structure provides for the progressive deployment of supranational competences with the parallel shift of relevant sovereign powers from the sphere of member states to the sphere of Community institutions. Progress in this respect is dependent on the political willingness of the member states in implementing the treaty obligations they have accepted, and can be thwarted by the lack of such willingness. In such a framework of integration politics, the function of a judicial organ like the ECJ assumes paramount importance in asserting the legal foundations of the integration system and establishing the uniform applicability of the progressively emerging law of the EEC as a whole.

As the most advanced form of integration law, the model of EEC is at the same time a product of the particular historical and other factors which have shaped legal tradition in Western Europe. It cannot be recommended for adoption for integration processes in other parts of the international community, except possibly its basic tenets that

[23] See ECJ Case 14/68, *Wilhelm v. Bundeskartellamt* (1969), *Common Market Law Reports*, 8 (1969), 100, at 119.

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integration also means a shift of powers from member states to institutions of integration, and the progressive deployment of a uniform and coherent law makes the function of special judicial organ imperative for the proper functioning of the integration system.

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