THE PARTICIPATION OF THE ADMINISTRATION IN THE LAW-MAKING PROCESS OF THE OLD AND NEW EUROPEAN UNION

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I think the most useful contribution I can make to the first Congress of SIPE will be to suggest some questions for on-going debate amongst European public lawyers. I will speak first about the general topic assigned to me: the participation of the administration in the law-making process. Then I will speak about a specific aspect of 'administrative law-making' in the field of technical regulation.

The topic assigned to me immediately raises the question, "What do we mean by 'the administration' in this context?" In a broad sense, 'the administration' is the whole of the executive branch of government (as opposed to the legislative or the judicial branch). It therefore includes elected and politically accountable ministers. In a narrow sense, 'the administration' is the bureaucracy – the body of civil servants (*Beamter/ fonctionnaires*) and other executive agencies, whose function is to execute the work of the executive branch of government.

Many people in my country, and (I believe) in others, think that European laws are made by a hydra-headed bureaucracy in Brussels – by an unelected and unaccountable administration in the narrow sense. We know that that is not true. But it is not wholly untrue either.

The most powerful law-making body in the European Union is the Council of Ministers, composed of ministers representing the *governments* of the Member States – i.e. the executive branch. Most of its work is carried out by the civil servants of the Council Secretariat together with COREPER which is composed of, and supported by, national civil servants.

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The Commission consists, strictly speaking, of the College of Commissioners. It has the right – in general, the exclusive right – to initiate legislation. By withdrawing its proposal, it can prevent legislation being enacted or even amended. It may be empowered by the primary legislator (the Parliament and Council, or the Council alone) to enact secondary legislation. In practice, most of the Commission's legislative work is carried out by its civil servants and, when exercising its delegated law-making powers, it does so within the context of 'comitology' – a complex structure of committees composed almost exclusively of national civil servants.

The reality therefore is that a great part of the law-making of the European Union is carried out, in one way or another, by 'the administration'. This arrangement does not correspond to the conventional theory of the Separation of Powers. There is still separation between the judiciary, on the one hand, and the other branches or organs of government, on the other, but it is impossible to find a clear line of demarcation between the legislative and executive.

There are those who argue that this is unsatisfactory and that the European Parliament should become the sole legislator. While that may be arguable in political or academic debate, the lesson of repeated Treaty negotiations, and of the Convention on the Constitution, is that this will not happen – at least in the lifetime of most of us.

Moreover, the realist will recognise that, in the Member States themselves, the separation of powers in the law-making process is no longer as clear as theory would wish. Most modern legislation is highly technical. Its content is defined by civil servants and it is drafted by civil servants. Where it is necessary to amend it, the process of amendment, even if it is initiated by Parliamentarians, is largely controlled by civil servants. And, of course, it is civil servants who are responsible for executing and enforcing legislation. The law-making role of the individual Parliamentarian is, in practice, extremely limited in most, if not all, Member States.

I would therefore argue that public lawyers should no longer seek to analyse the law-making process of the EU in terms of the classical separa-

tion of powers. The analysis should rather be in terms of 'institutional balance' (the expression used by the Court of Justice in the *Chernobyl* case[1]) – that is to say, in terms of the balance between the powers of the institutions, rather than in terms of separation between them.

I would also argue that the 'constitution' of the EU, although it does not correspond to classical theory, is better adapted to the realities of modern life than a conventional constitution would be. The tripartite relationship between the Commission, the Council and the Parliament involves a system of checks and balances that takes account of the nature of the EU which is, after all, a political system unlike any other and is intended to be so.

Towards the end of his life, *Madison* wrote:

> "The more the political system of the United States is fairly examined, the more necessary it will be found to abandon the abstract and technical modes of expounding its character, and to view it as laid down in the charter which constitutes it as a system hitherto without a model; as neither a simple or a consolidated government, nor a government altogether confederate; and therefore not to be explained so as to make it either, but to be explained and designated according to the actual division and distribution of political power on the face of the instrument"[2].

The EU is a "system without a model" and there is no good reason why its constitution should be required to correspond, in theory or in practice, to the Constitution of the United States or to that of any of its constituent Member States.

Professor *Henry Schermers* has remarked – in my opinion, correctly – that the principal task of Parliaments has shifted from legislation to supervision.

> "Legislation is so complicated that for every subject matter experts are needed. ... Legislation is made by the experts of the administration, but it is supervised by the elected parliament. ...

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1. Case 70/88 *Parliament v Council* [1990] ECR 2041, point 21.
2. *Notes on Nullification*, 1835-36.

> Courts also have become supervisory organs. ... To a large extent their principal tasks run parallel: they both supervise the functioning of the other institutions, the one from a legal, the other from a political point of view. ... Both for parliaments and courts the task of controlling the government has become of the greatest importance and it has become increasingly difficult. The two institutions have become allies"[3].

On that view, the real question is not whether the European Parliament should become the legislator but whether it has sufficient powers to exercise effective political control of the acts, including the legislative acts, of the administration.

Turning to the 'new' European Union, I would draw attention to four characteristics of the Treaty on the Constitution.

The *first* is that the 'Constitution' is, and remains, a treaty. It may have some elements of constitutionalism but, ultimately, the Member States remain supreme. I do not say that that is necessarily a bad thing: I simply ask that it be recognised as a reality.

The *second* is that the Treaty introduces a further actor (or group of actors) into the system - the national Parliaments and, for some purposes, the Chambers of national Parliaments. The Protocol on Subsidiarity makes provision for the Chambers of national Parliaments to vote separately and therefore, potentially, in different ways. This would make it possible, in some Member States, to reflect the differing interest of the federal government and of the regions. So the system of checks and balances is strengthened, provided it does not become so complicated as to be unworkable.

Third, the Treaty would introduce greater transparency in the legislative process in the Council. Article I-23(5) provides that:

> "The Council shall meet in public when it deliberates and votes on a draft legislative act."

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3. H. SCHERMERS, The European Parliament and the European Court of Justice in HAND / MCBRIDE (eds.), *Droit sans Frontières*, 1991, pp. 243-48.

It is, of course, possible that the ministers would meet in secret before the formal meeting of the Council and resolve their differences beforehand, so that the public meetings become a pure formality. But the new provision would ensure that both the media and the national parliaments would be able, as they cannot do now, to discover how ministers voted and their declared reasons for doing so.

Fourth, the Treaty makes provision for delegation to the Commission of "power to adopt delegated European regulations to supplement or amend certain *non-essential elements* of the law or framework law" (Article I-35(1)). It remains to be seen what would be regarded as 'non-essential', but this is clear recognition that the Commission is a legislator. Even more significantly, the Treaty requires "mechanisms for *control by the Member States* of the Commission's exercise of implementing powers" (Article I-36(3)). This demonstrates, if demonstration were needed, that the Member States remain supreme and that this is essentially a treaty and not a constitution.

The second part of my contribution concerns judicial control of acts of the administration in the field of technical regulation. This has given rise to considerable academic debate in the context of the recent judgments of the Court of Justice in Case 50/00P *UPA*[4], and Case 263/02P *Jégo Quéré*[5].

The EU system provides for extensive judicial control of legislative acts at the instance of the institutions and of the Member States, particularly as regards the power to legislate (the legal basis of the act) and the procedure adopted (especially as regards institutional balance). In this context, the Court of Justice has distinguished between these legal aspects of law-making, on the one hand, and the aspects of law-making that involve a 'margin of appreciation' or legislative choice, on the other.

As regards actions brought by persons other than institutions and Member States, the Court has not been legalistic in insisting upon the distinction between 'decisions' and other acts. But the Court has been restrictive as regards the question whether the act concerns the applicant 'directly and individually'. The Court has been criticised for maintaining this restrictive approach in *UPA* and *Jégo Quéré*. How-

4. [2002] ECR I-6677.

5. Judgment of 1st April 2004.

ever. I believe that the facts of those two cases show that the problem is not as simple as some commentators suggest.

In both cases, the acts challenged were technical, regulatory acts. In *UPA*, the act concerned the regime for olive oil; in *Jégo Quéré* it concerned fishing net sizes in an area of the Eastern Atlantic. In both cases the applicants were 'directly' affected by the act in question. The question was whether they should be regarded as being affected 'individually'.

Both acts involved legislative choice. The olive oil regime had, in certain respects, become a notorious scandal. Action was necessary to reduce expenditure and an inevitable result of reducing expenditure was that some olive-oil producers would suffer. Similarly, any measure to preserve fish-stocks by limiting fishing net sizes would necessarily have adverse effects for some fishermen. In neither case was it possible to reach a solution without hurting someone. Consequently, whatever choice had been made, someone could claim to be directly and adversely affected.

The question is, "Should an individual or company be entitled to challenge such an act before the Court of Justice *at the stage when the act comes into effect* rather than at the stage when it is applied?" It is not sufficient to answer this question by drawing a distinction between 'legislative' and 'regulatory' acts and to say that because an act is 'regulatory', it must be open to challenge. As the two cases illustrate, some 'regulatory' acts are such that there will always be someone who can claim to challenge them and therefore involve 'legislative' choice.

The problem is particularly acute when it comes to setting technical standards that affect the interests of large multinational corporations. A corporation with a turnover many times greater than the Gross Domestic Product of some Member States is in exactly the same position, as regards the right of direct action before the Court of Justice, as the smallest individual fisherman or olive-grower. If access to the Court is extended in favour of the fisherman or olive-grower, then it is extended in favour of large corporations. They, more than the small individuals, would be likely to challenge 'regulatory' acts that affected their interests.

The problem of direct access to the Court of Justice is not just a legal question. It has significant political and economic implications for the future of the Union.

Schließlich sind Aspekte angesprochen worden, die mir als Wahlschweden aus der Seele sprechen. *Napoleon* ist bis an die Ostsee, aber nicht weiter gekommen. Da war am Ostseestrand Schluß, so ungefähr bei Hamburg, und über die dänische Grenze kam man nicht hinaus. Das ist ein wichtiger historischer Fakt für die Rechtsentwicklung für alles Mögliche. Schweden und Norwegen hängen mit Europa über eine Brücke, aber nicht mit Land zusammen. Die Landverbindung ist nach Asien. Das mag sich hier ein bißchen scherzhaft ausgedrückt anhören, hat aber doch einen tieferen Sinn. Wir nähern uns der Peripherie. Diese Peripherie haben wir auch in den Staaten des ehemaligen Ostblocks, das ist mir aus der Arbeit in der Venedigkommission geläufig. Wir müssen da mit ganz anderen Ausgangspunkten rechnen, als wir sie im deutschen Recht, im deutschen Raum, im deutschen Sprachraum, wenn ich Österreich und die Schweiz einbeziehen darf, und in Frankreich vor uns sehen. Ich glaube, wir nähern uns da einer sehr komplexen Situation, die ihren gebührenden Tribut erhalten muß.

Damit will ich schließen. Eine kleine Sache will ich bei dieser Gelegenheit aber doch noch sagen. Ich war früher einmal professioneller Dolmetscher. Ich habe zugehört, was die Dolmetscher hier übersetzen mußten. Dafür danke ich den Dolmetschern sehr herzlich. Das war wohl so eine der richtig schweren Tagungen, eine richtig schwere Aufgabe, so technische Dinge so flüssig zu übersetzen. Das ist gut gelungen: herzlichen Dank.

David Edward: Can I begin with the question why the EU is so intricate or complicated? I think the answer in part is political frivolity that you create. It is decided that every member state must have an organ and so you invent organs to distribute among the member states. There is a tendency to forget the prescription of an English philosopher *William of Ockham* in the 12th century who said: „Entia non sunt multiplicanda sine necessitate" – entities are not to be multiplied without necessity – and I think that might be a useful prescription for some operators in Brussels. But I also think the reason why the EU is complicated is because modern life is complicated. The difficulty is that theoretical analysis has not caught up with reality of modern life. For me the secret of the success of the European community as such is precisely it did address the realities of the economic life what Mr. *Koenig*

mentioned: cartels, substitutes and also the question of „service d'intérêt général". There was an attempt to address this question to provide some system of political and judicial control over the realities of modern life and I think that there is an danger with the discussion of the constitution where to a certain extent economic problems are pushed away into part III and we discussed the theories of democratic legitimacy and so on. There is a danger of forgetting that for the average person it is the achievement of economic stability and economic freedom of movement that is important.

Mr. *Huber* mentioned the fact that only 50% of European legislation is implemented in France. Of course one of the tasks of the court and one of the tasks of which I think the court has achieved satisfactorily is actually to address that which both, the community legislator and the member states, failed to address. If I can give an example of the community legislator: recently, just before I left, the court delivered a judgment on the question of the taxation of parent and subsidiary companies. This led to an article in the Financial Times by the commissioner which said the courts must not make the law on taxation of companies. That was a good headline but its message was simple: if you want to make the law on taxation companies, you, the member states, must legislate. If you do not legislate, the companies will come to the court to substitute for the legislator. So I think it is important to understand that the function of the court of justice has been in an important sense to address the economic problems which the member states and the community legislator has failed to address.

The question was raised: Should the citizens have a right of recourse to the courts and my answer is: there will always be a trade-off between efficiency and the rule of law. You can not assert either the one or the other, there is always a degree of balance to be achieved.

Finally, can I come back to the question of codification of administrative processes? And coming from a country which is not even joined by land or by bridge, but only by a tunnel, can I beg you not to codify anything more? Let me give you an example why: the court of justice started on the question of the procedural autonomy of the member states with, if I remember rightly, *San Giorgio* which said that the national procedure must not make it impossible to exercise a community

right. Well, that became unsatisfactory and it became necessary to introduce the idea of impossible or practically inefficiency. I think that maybe it is because I come from a country which has a roman law in heritage, although nevertheless we are influenced by the common law. In this field let us remember that the development of criteria for controlling the administration has to respond to the problems as they arise and if we try to codify now, the danger is, we will deprive the courts of the tools that are necessary to deal with the practical situations that arise in modern life.

I go back to the beginning. We have to recognize, that the world we live in is not the world of *Montesquieu*. It is the world of the 21st century which is extremely complicated and we need to devise a public law adequate to deal with it.

Thank you.

Vorsitzender/Chair/Président: We thank you, Prof. *Edward*, and we also thank Prof. *Vogel* and Prof. *Schwarze*. Damit ist unsere Sitzung am heutigen Vormittag beendet. Ich wünsche Ihnen eine angenehme Mittagspause.