EUROPEAN LEGAL HISTORY

Sources and Institutions

Third edition

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Butterworths
London, Edinburgh, Dublin
2000

contemporary and long-established western legal systems. It is in the translation of this preoccupation into concrete legal rules that the differences are most easily seen.

18.4.4 Ownership will serve as an example. In the classic traditions of western legal systems, private ownership is fundamental. An identifiable legal person – the owner – is accorded legal sovereignty over the object of his ownership. So far as the law permits, he may use and exploit that object as he pleases, and it is he, to the exclusion of all others, who takes the economic benefits accruing to it. The emphasis is on the rights of the individual, regardless of his economic standing vis-à-vis other citizens. Further, few restrictions are placed on the nature of the property which may be owned. In Socialist law, the principal distinction in the law of property is that between the means of production and goods for consumption. The primary concern is not to identify legal sovereignty but to determine by whom the property is or ought to be exploited. Socialist law knows differing regimes of ownership. Personal ownership is restricted to such goods as the individual may require for his own use; it does not permit exploitation of goods for profit. Ownership of the means of production, agricultural and industrial, is vested in a socially responsible body, a co-operative, or the state.

18.4.5 Socialist law and legal thinking have had a profound influence on those countries which have found themselves members of the Soviet bloc. Since 1989, however, we have seen the disintegration of this bloc and the liberation of states hitherto subject to it and thus to Socialist-inspired legal systems. To what extent Socialist law will survive is an open question. In Germany, unification has meant the abrogation of the East German Code, the *Zivilgesetzbuch* (ZGB), brought into force in 1976, and the application of West German law to the whole reunited Germany. Elsewhere the change has been less dramatic but it is clear that liberation has often been accompanied by a desire for appropriate legal reforms, and that the West has been looked to as a source of inspiration. In this context, the new Dutch Civil Code (see para 18.2.2) has proved attractive.

B. European integration

18.5 THE BACKGROUND

18.5.1 The aftermath of the Great War of 1914–1918 saw the creation of the League of Nations, the brain-child of the American president, Woodrow Wilson. Following the Second World War, the League gave place to the United Nations, whose forum is the International Court of Justice at The Hague. Despite these efforts at community on a global scale, which nowadays include the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), the countries of western Europe wished for ties of a closer kind among themselves. This aspiration found expression in several ventures. Among the organizations which have endured have been the original European Communities of the 1950s which, since the 1992 Treaty on European

Union, form the nucleus of the European Union. This legal development is at the heart of this chapter for two reasons. The first is because the European Community has had a profound effect on the legal systems of its member states. The second reason is more general. The import of this book has been to show how the disintegration of law and legal culture, which accompanied the disintegration of the Roman Empire in the West, found its corrective in the mediaeval revival of legal studies and the creation of the *ius commune*, that supranational body of law that could be – and was – drawn on to the profit of almost all Europe. The paradoxical result was renewed fragmentation; nation states emerged and fashioned their own distinct legal systems, even if the common origins were apparent. Now, with the advent of the European Community, the pendulum is starting to swing the other way again and, within its (ever-growing) sphere, the law of the European Community is overriding, binding on its member states and taking precedence over domestic law.

18.5.2 In the aftermath of the Second World War, at a conference held at The Hague in 1948, a call was made for economic and political union in western Europe. This was at least partially prompted by the fear of the military power of the Soviet Union and the perceived threat it posed to a disunited and weakened West. The post-war years saw the establishment of communist regimes in several east European states and it was not at all clear what the limits of Soviet ambition would prove to be. Western Europe reacted to this situation in various ways. First, as was perhaps to be expected, it looked beyond its immediate frontiers to its relatively unscathed allies across the Atlantic. The post-war settlement had seen the establishment of the Marshall Plan, by which the USA undertook to provide financial assistance towards the post-war reconstruction of Europe, and the Organization for European Economic Co-operation. In 1949, these trans-Atlantic ties were strengthened by the creation of the North Atlantic Treaty Organization (NATO), a military alliance of a primarily defensive nature between the USA, Canada and western Europe.

18.5.3 Within Europe itself, the establishment of the Council of Europe in 1949 must be accounted a success. The aim of the Council is the promotion of closer co-operation in economic, social and cultural matters among its member states. But the Council has no powers of legislation and if its resolutions are to be binding, further action is necessary. Yet the Council has made its mark, most notably, as we have seen, in the 1951 European Convention for the Protection of Human Rights and Fundamental Freedoms.

18.5.4 Two further initiatives of the early 1950s, for a European Defence Community and a European Political Community, failed, but the hopes survived to prompt further negotiations.

18.6 THE FOUNDATION OF THE EUROPEAN COMMUNITIES

18.6.1 The Communities have had from their very foundation the express aim of European integration, as can be illustrated by reference to art 2[8] of the Treaty of Rome which founded the European Economic Community. There we read:

'The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote . . . a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living, and closer relations between the States belonging to it.'

8 A problem with the EC Treaty is that the Treaty of Amsterdam has renumbered most of the articles of the Treaty of Rome with effect from May 1999; the convention now seems to be to cite them as, eg, 'art 249 (ex art 189)', as in para 18.9.2.

18.6.2 The history of the European Communities begins in 1950 when the French foreign minister, Robert Schuman, proposed the merger of the coal and steel industries of France and Germany. There were two reasons. It was hoped that such a pooling of resources under the control of a supranational authority would both make impossible future conflict between France and Germany, and would also provide a firm basis for integrated economic growth between the two countries – and any others which cared to join them. Schuman's suggestions were enthusiastically received, not only by France and Germany, but also in Italy and the Benelux countries – the Netherlands, Belgium and Luxembourg. The result was the coming into being, in July 1952, of the European Coal and Steel Community (ECSC), consisting of these six countries. There was clearly a political agenda behind the economic objectives, and the UK declined to participate, on grounds of both national sovereignty and current economic policy.

18.6.3 In 1955, the foreign ministers of the ECSC member states met in the Sicilian town of Messina. Their deliberations made it clear that, as with Schuman before them, their principal aspiration was political integration, even if in the immediate future the way towards the achievement of this goal lay in the field of economic approximation. The following year, 1956, saw the publication of the Spaak Report, the work of the Belgian foreign minister, Paul-Henri Spaak, recommending further integration of the economies of the ECSC member states as the best way forward. The result was the creation, in 1957, by two treaties signed at Rome (the Treaties of Rome) of two further Communities – the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). Both treaties came into force on the first day of January 1958; each of the new Communities so created consisted of the six states which had originally joined together to form the ECSC. Again, the UK declined to participate.

18.6.4 Of the three Communities which existed by 1958, two – the ECSC and Euratom – were subject-specific. The EEC, on the other hand, was not; its remit was broad enough to cover any economic activity not included in that of the other two. The result is that the EEC became by far the most important of the three Communities. Article 2 of the EEC treaty (quoted above) stated that the EEC should achieve its goals by means of the establishment of a common market among its member states. The remainder of the treaty furnishes the detail necessary to make this aspiration a reality, and so informs us of what its framers understood by the term, 'common market'. To this end, the treaty established four fundamental freedoms, which together represent

the foundations of its economic order; their purpose is the removal of artificial restraints on trade, and the promotion of a common policy in such areas as competition law and the vital field of agriculture. First, the treaty provides that goods moving from member state to member state are not to be subject to customs duties or other restraints. Second, workers are given the right to move without restriction within the Community. Third, there is provision for the free movement of capital, and fourth, for the providers of services to be free to do so wherever in the Community they wish.

18.6.5 The ECSC had from the start an institutional structure consisting of four principal organs, which discharged legislative, executive, judicial and consultative functions. When the EEC and Euratom were founded, it was intended that they should each have a similar framework. However, it was realized that, although each Community was theoretically independent of the others, their identity of membership, coupled with the economic remit of each, would make superfluous the provision of completely separate sets of institutions. Accordingly, at the same time as the Treaties of Rome were signed, a Convention – the Convention on Certain Institutions Common to the European Communities – was also agreed. The Convention provided for a single consultative Assembly and a single Court of Justice for the three Communities. It did not touch the legislative and executive arms of the three Communities; for these there remained separate provision until a treaty, commonly referred to as the Merger Treaty, came into force in July 1967, providing for a single legislative arm, the Council of Ministers, and a single executive, the Brussels-based Commission; thus institutional unity has been achieved.

18.7 EXPANSION

18.7.1 At first the UK was too committed to her imperial past to believe that her future lay with the EEC. When the government changed its mind, the UK met with rebuffs in 1961 and 1967, but finally became a member of the Communities on 1 January 1973. This membership was confirmed in 1975 when a domestic referendum overwhelmingly endorsed British membership as renegotiated by the Labour government of the day. Ireland and Denmark became members on the same day as the UK. Greece joined in 1981, while 1986 saw the accession of Spain and Portugal. The six had become the twelve.

18.7.2 In 1960, seven European states – Portugal, the UK, Denmark, Norway, Sweden, Austria and Switzerland – which were not at that stage prepared to surrender national autonomy to the extent required for membership of the Communities, had joined together to form the European Free Trade Association (EFTA). The motivation was economic, not political. When the UK and Denmark became members of the Communities in 1973, the remaining EFTA states, augmented by the accession of Iceland and Liechtenstein, individually negotiated free trade arrangements with the EEC. Then, in 1992, the European Economic Area (EEA) was instituted. By the agreement creating it, all remaining barriers to trade between the Community and the EFTA states are removed. The four basic freedoms (see para 18.6.4) of the EEC Treaty (and Community law relating to them) are extended to embrace these states, as are

Community competition law and participation in a variety of other policy areas. The EFTA states were not, however, to be party to Community decision-making processes. The agreement came into effect on 1 January 1994 – a year later than originally planned because the Swiss, following rejection of the agreement in a national referendum, were unable to ratify it. However, for most of the EFTA states membership of the EEA really only made sense if it represented a stepping stone to full membership of the European Community. In January 1995, Austria, Finland and Sweden acceded to the European Community . They were originally to have been joined by Norway, but there too a national referendum produced a negative result, as had happened following a bid for membership in the early 1970s.

18.7.3 Enlargement still features prominently on the agenda. The success of the Community, particularly since the passing of the Single European Act of 1986 (see para 18.8.2) emphasized the attractions of membership, and underlined the dangers of less than full participation in the European club. Of particular significance, too, has been the break-up of the Communist world of Russia and Eastern Europe. Interest in membership amongst the emerging eastern democracies is high as they seek to orientate themselves towards the West and her economic ways. Commitment in principle to enlargement was given at the European Council held in Copenhagen 1993, which set out the criteria that applicant states would have to satisfy before membership was granted: these were both political (basically, a commitment to western-style democracy) and economic (the demonstration of a degree of economic health). The publication of the Agenda 2000 programme in July 1997 enabled the beginning of movement towards full membership for the states which were deemed most nearly to meet these criteria. Accordingly, in the following year negotiations with the first group of applicants began – Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia. Another seven applications are under active review as the process of enlargement gains momentum. All applicant states already have a history of relations with the European Union, in the form of Association Agreements.

18.7.4 Enlargement is not without its problems. An institutional structure which was originally designed for a membership of six will not necessarily suit an enlarged Europe which could conceivably have a membership in the high twenties. Already, divergences are apparent and remedial action is pressingly urgent; this point is covered in the discussion of the Treaty of Amsterdam (see para 18.8.8). Although applicant states have to satisfy minimum economic requirements before full membership is offered, some new states, certainly those of the eastern bloc, will, in the short term at least, need to be net recipients of European funding. This may well cause tensions with their longer established partners, who are themselves not always agreed on such matters as the common agricultural policy.

18.8 RECENT DEVELOPMENTS

18.8.1 The preamble to the EEC treaty makes it clear that it was designed to 'lay the foundations of an ever closer union among the peoples of Europe'

and that it contemplated further action designed to promote closer integration among the member states. This aspiration has been given concrete expression, but progress in the face of national self-interest has often been slow.

18.8.2 During the 1970s and early 1980s, the quest for closer integration led to no practical result. Then in 1984 there appeared a draft treaty on European union, designed to replace the Treaty of Rome. The draft was far-reaching, envisaging a marked increase in the power of Community institutions at the expense of member states. It provided that a number of areas, for example economic and monetary policy, which are at present the preserve of national governments, should be brought within the competence of the Treaty. Not surprisingly the draft proved too radical for the governments of most member states. The outcome of an inter-governmental conference, called to consider the matter in December 1985, was therefore not approval of the proposed Treaty on European Union, but the Single European Act, which was signed in 1986 and came into force the following year. This, unlike the original draft, merely amends rather than replaces the founding Treaty of Rome. Nonetheless, the Single European Act is not anodyne. In the first place, it committed its signatories to the completion of the single market by the end of 1992; by and large this commitment has been honoured. Second, the Act brought new policy areas within the competence of the Treaty; among these were the environment and economic and social cohesion. Provision was also made for increased co-operation among member states in the field of foreign policy. Further, the Act gave formal recognition – for the practice was already well established – to the European Council, that is, to the regular meetings of the heads of state or government of member states, who, since 1975, have come together to deliberate on matters of Community policy and, generally, to provide the Community with the necessary impetus for its development.

18.8.3 The Act also enhanced the standing of the European Parliament, which had started out as the Assembly of the Communities. Official recognition of the title by which it is now known only came with the Single European Act itself, even if, unofficially, the usage had been current for some time. The original assembly was a nominated rather than an elected body, whose function was purely advisory. However, as required by the Treaty of Rome, nomination of delegates by member governments was replaced by direct election; the first such elections were held in July 1979. From that date, the European Parliament could – and did – claim democratically to represent the peoples of Europe, and it sought to increase its powers accordingly. These claims were acknowledged in the Single Act, when it permitted the European Parliament a more active and interventionist role in the legislative process.

18.8.4 In December 1990, the twelve member states of the Communities embarked on the ratification and implementation of a new Treaty on European Union, which, in the UK at least, has become known as the Maastricht Treaty. The first obstacle to be overcome was the stance of the UK government, which refused to agree to the finalization of the text of a treaty containing social provisions which went a good deal further than those in the Treaty of Rome, and which also reflected the European Social Charter of 1989 (from which the UK had also stood aloof). A compromise was reached, and in February

1992 the Treaty of European Union was signed at the Dutch town of Maastricht by all twelve member states; the Treaty incorporated an 'opt out' provision, freeing the UK from any obligation in respect of the disputed social provisions. Despite this concession, ratification of the Treaty still raised problems, especially in Denmark and the UK, while it was also challenged on constitutional grounds in the courts of four other member states. However, it was finally ratified by all the member states and came into force on 1 November 1993.

18.8.5 The European Union created by the Treaty of Maastricht is not the easiest of concepts to explain. But (to borrow the much-used but still useful analogy) it may be likened to a roof supported by three pillars. The most substantial of these pillars consisted of the existing three European Communities. The over-arching role of the EEC was, however, recognised: henceforth, it was to be known simply as the European Community (EC). As with the Single European Act, amendments were necessarily made to the founding treaties. Many of these broke new ground. For example, each national of each member state is accorded citizenship of the Union, a citizenship which, among other things, entitles him or her to vote and to stand for office in local and European elections wherever within the Union he or she may be resident. While this is new, it is hardly startling; Irish citizens in the UK have always been able to vote in local elections. Nonetheless, the concept of European citizenship did cause some unease concerning its relation to national identity: was the latter to be subsumed in the former? The answer was 'no' – but the ambiguities of the situation do help to explain the cool reception the Treaty met with during the process of its ratification by national governments.

18.8.6 More significantly, the role in the legislative process of the democratically elected European Parliament was once again strengthened. Furthermore, provision was made for an Ombudsman, to whom citizens of the Union could bring allegations of maladministration by Community institutions. The principle of subsidiarity was endorsed, a principle which allows action at the most local level of government able to achieve the desired result. This principle, drawn from modern Church law, does indeed fit with a concept of federalism, but it can also be called on by those who fear that the treaty marks a further inroad on national sovereignty. The difficulty lies in determining precisely when action at local or national, rather than Community, level will be more effective. The Treaty also underlined the importance of economic and monetary union for the European future; a common European currency (the ecu) is now in the course of introduction.

18.8.7 The second pillar upon which the Union was to rest was a common foreign and defence policy; the third a common approach to justice and home affairs. These were sensitive areas, raising – again – questions concerning the erosion of national sovereignty. Accordingly, and unlike decision-making in the context of the first Community pillar (where the emphasis has been increasingly on the will of the majority), unanimity was required for measures to be taken under these heads. Moreover, (and again unlike the first pillar) no real power was given to the Court of Justice to review action taken.

18.8.8 The late 1990s saw further developments which came to fruition in the Treaty of Amsterdam, effective as from May 1999. The treaty was not as

comprehensive as many had hoped. It seems generally agreed that it ducked the question of institutional reform – a question made all the more pressing by the prospect of the imminent enlargement of membership of the Union. This matter has been put off until another day. Nonetheless, the Treaty has made its contribution. The role of the European Parliament in European affairs was again strengthened, while the use of majority voting (as opposed to unanimity) was extended in the legislative procedures of the Council, thus making swifter progress possible. The Treaty also registered a commitment within the Union – how practicable remains to be seen – to the elimination of discrimination on the grounds of sex, sexual orientation, race, age, disability or religion. It also revised the tripartite structure established by the previous Treaty on European Union. Certain aspects of matters relating to justice and home affairs have now been brought within the remit of the central, the Community, pillar of the Union: they are thus subject to the regime of majority (rather than unanimous) approval, and also amenable to review by the European Court of Justice. The commitment to a 'frontier free' Europe – a Europe characterized by the abolition of all frontier controls between its Member States – was given effect by the incorporation of the Schengen Agreement into the Treaty. The Agreement had, in fact, been in existence since 1990, but only as an agreement between some (not all) of the EU member states. It now acquired the status of European law proper, but not before 'opt-outs' had been agreed for the UK and Ireland, neither of which were prepared to accept the lack of frontier control involved. Finally, the Treaty made provision for what may be termed a 'two-speed' Europe. This means that, provided certain conditions are satisfied, it is possible within the regime of the Treaty for some, but not all, member states to proceed with initiatives. The rationale is, of course, the very different levels of economic, social and cultural development as between established and soon-to-be member states. It remains to be seen how these provisions will work, and with what success.

18.9 THE SOURCES OF COMMUNITY LAW

18.9.1 The principal sources of European Community law are the Community treaties, the secondary legislation of the Community, and the jurisprudence of the European Court of Justice. The first of these sources, Community treaties, consists of the treaties founding the three Communities, and subsequent amendments of them, as represented, for example, by the Single European Act and the Treaty on European Union. The Community legal order was created by, and takes its being from, these treaties. In terms of a hierarchy of sources they are therefore supreme; nothing can be done unless it is sanctioned by them. On the other hand, in the style of the classic continental code rather than the British statute, the treaties are, and were intended to be, no more than skeleton treaties. It was envisaged from the beginning that their provisions would require to be fleshed out; hence the importance of the other sources of Community law.

18.9.2 Article 249 (ex art 189) of the EEC Treaty (the Treaty of Rome) makes provision for secondary legislation. Under its terms, in order to carry out the tasks assigned to them by the Treaty, the Council and Commission are