CHAPTER SIX

The European Union and the National Assembly

Alan Dashwood

1 Introduction

The issues raised by the topic I have been invited to address are quite different from those which the previous speaker dealt with so ably and amusingly. Up to now, the European Convention for the Protection of Human Rights and Fundamental Freedoms has been the preserve of specialist practitioners before the Strasbourg institutions, who would take over at the point where remedies pursued in the domestic courts had failed to produce an outcome satisfactory to the claimant. Now the Convention is effectively to become part of our law, though it will apply in a sophisticated way, cleverly designed to preserve the theoretical sovereignty of Parliament. Not only the text of the Convention and its Protocols but also the Strasbourg jurisprudence will have to be incorporated into the stock-in-trade of barristers and solicitors, and of course of judges, too.

The impact on the private practice of law in this country will certainly vary from one specialism to another, but overall it is likely to be profound. No such change is impending, so far as concerns the law of the European Union.[1] We already knew when the United Kingdom acceded to the European Communities, as they then were, that much of the law derived from the Treaties would have to be applied directly by our Courts. Ten years before our accession, in its famous *Van Gend en Loos* judgement,[2] the European Court of Justice had said that Community law "not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage".[3] That was perfectly understood by the draftsman of the European Communities Act 1972, the machinery of which has ensured the almost trouble-free integration of our two UK jurisdictions into the wider constitutional order of the Union.[4]

So it is nothing new that the law of the European Union may have direct effects in Wales. The entry into force of the Government of Wales Act 1998 will not entail for legal

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1 The European Union (EU) is a composite entity created by the Treaty on European Union (TEU), otherwise known as "the Maastricht Treaty", which came into force on 1 November 1993. The EU comprises: the European Community (EC); the European Coal and Steel Community (ECSC); the European Atomic Energy Community (Euratom); and two new areas of competence created by the TEU, as amended by the Treaty of Amsterdam, namely the Common Foreign and Security Polity and Police and Judicial Cooperation in Criminal Matters. There is a single set of EU institutions that manage activity in those five areas. The scope of their powers, and the procedures to be followed in exercising those powers, are determined by the Treaty text governing the area of activity in question. The EC is the area in which the powers of the institutions are most extensive.

2 Case 26/62, [1963] E.C.R. 1

3 *Ibid* at p.12.

4 See, in particular sections 2 and 3 of the Act.

practitioners any significant change in the advice they should be giving their clients about the rights and duties that may result for them from the European Treaties, or from legislation made by the Union institutions. That is certainly not to suggest that the establishment of the National Assembly has no legal implications for the European Union. However, the issues to be considered are ones of a public law, indeed constitutional, rather than of a private law character.

In the pages that follow I first consider some general points about the place of sub-State entities in the constitutional order of the Union. I go on to discuss more particularly the ways in which the National Assembly may be able to contribute to the EU's legislative process. Finally I consider the future role of the National Assembly in the implementation of, and in ensuring compliance with, EU law.

2 Sub-Member State Entities in the EU

A first point that needs to be made is that Member States and their institutions are at the very heart of the EU process. The point is blindingly obvious but it has been obscured by Eurosceptic rhetoric about dictation from "Brussels".[5]

Through their representatives at meetings of the Council of the EU, Member States participate directly in the process of making Community law. No legislation can be adopted without obtaining the Council's positive approval. In deciding most things, the Council acts by a qualified majority system of weighted voting, the larger Member States like the United Kingdom having 10 votes each. Any Member State is, therefore, in danger of being outvoted, if it adopts an intrinsigent position. However, Council negotiations are all about ensuring that proposals for legislation take the problems and the aspirations of the different national delegations fully into account. The aim is to reach a compromise which commands the widest possible acceptance.

In addition, it is the Member States that have the chief responsibility for implementing EU law on the ground. The Commission is sometimes referred to as the EU's "executive", but that is a misconception. What in a national system we should recognise as executive or governmental powers are, in the EU, shared between the Council, the Commission and the national authorities. Executive decisions with a high political content, such as on retaliatory measures against an international trading partner, fall to the Council. The role of the Commission is mainly at the intermediate stage of preparing and adopting detailed texts for the implementation of primary legislation, though it does have direct coercive powers in the field of competition. For the most part, though, it is officials wearing national hats (customs and excise officers, health and safety inspectors and so on) who apply the rules made in Brussels to individuals and businesses. This is one of the strengths of the system, because it means that those at the sharp end of government in the Union are answerable through the familiar political and judicial processes of the Member States.

There is, however, no formally defined relationship between the EU and "sub-Member State entities". I use that rather ungainly phrase as a neutral way of designating the whole range of territories within different Member States that enjoy a special constitutional status, including the German Länder, Catalonia, Sicily, and now Wales and Scotland. Such entities, whatever

5 See A. Dashwood, "States in the European Union." (1998) 23 *European Law Review* 201.

the scope of their powers under the respective national constitutions, have no guaranteed place in the institutional framework of the Union. Thus votes on the Council, seats in the European Parliament and even seats in the Committee of the Regions are allocated on a Member State basis.

Moreover, the national authorities that exercise devolved powers under the system created by the European Treaties all have the same status in EU law, as part of the Member States' government apparatus. The United Kingdom is no less responsible in law for infringements of EU rules committed by, or under the authority of, the National Assembly of Wales (or the Scottish Parliament) than it is for infringements directly attributable to Ministers, or to civil servants in Whitehall. By the same token, a regional authority like the National Assembly would not have the standing of a "privileged applicant", able to challenge the validity of Community measures without demonstrating that it is "directly and individually concerned" by them.[6]

All of that is perfectly understandable because of the paradoxical nature of the EU as a "constitutional order of States".[7] I have coined that expression to bring out the specificity of the relationship between the Union and its Member States. On the one hand, the Members have accepted the discipline of acting in common, over a whole range of matters of central political and economic importance, through the institutions of the Union: this gives the Union the character of an advanced constitutional order. On the other hand, membership does not entail any change of status in public international law: the Member States remain subjects of the international legal order in the fullest sense. Moreover, for their citizens, they remain the principal focus of collective loyalty and the main forum for democratic political activity. That delicately balanced relationship would be put in jeopardy if there were direct constitutional links between sub-Member State entities and the Union's institutions.

At the same time, the existence of sub-Member State entities is a familiar political phenomenon in the EU and one that can, in practice, be comfortably accommodated. Indeed, the description of the TEU, in its Article 1,[8] as marking "a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen" may be read as an endorsement, in principle, of subsidiarity as an organising principle within the Member States, as much as in the relationship between the Member States and the Union.[9]

There are Member States which are fully-fledged federal orders, like Germany and Belgium. In other Member States, such as Italy and Spain, examples can be found of asymmetrical federal arrangements, where the degree to which powers have been devolved from the centre

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6 See the recent order of the Court of First Instance in Case 7-238/97, *Comunidad Autónoma de Cantabria* v *Council* [1998] ECR II-2271. The relevant provision of the EC Treaty is Art. 230 (ex Art. 173). The privileged applicants under Art. 230, second para., are the Member States, the Council and the Commission.

7 See A. Dashwood, "The Limits of European Community Powers." (1996) 21 *European Law Review* 113.

8 Ex Art. A of the TEU.

9 *Cf* Art 5 EC (ex Art.3b), where the subsidiarity principle is applied only to the latter relationship.

varies from one region to another. The United Kingdom will fit, for the time being at least, into this second category.

Practical arrangements can be made, both at the level of the EU institutions and at internal Member State level, to ensure that authorities enjoying devolved governmental powers like the National Assembly are able to contribute effectively to the decision-making process of the Union and to play their due part in implementing, and ensuring compliance with, Community law.

3 The National Assembly and the EU's law-making process

Just as we have seen that the EU has no identifiable executive, so there is no particular institution that can be singled out as its legislature. There is, rather, a legislative process in which different institutions play the parts allotted to them under the Treaties. The Council remains predominant, though recent Treaty amendments have enhanced the role of the European Parliament. With good organisation, the National Assembly should be able to contribute effectively to the Union's legislative process in a variety of ways.

A first objective should be to ensure that the particular interests of Wales are taken into account at the stage when legislative proposals are being prepared. The task of preparation falls to the Commission in the system of the EC Treaty, under which most Union legislation is enacted. The Permanent Representation of the United Kingdom to the European Union (or "UKREP") carefully monitors policy formation within the Commission, seeking to influence this in the interests of the country as a whole, including Wales. Nevertheless, the National Assembly may well feel that it needs to be independently represented in Brussels, to ensure the direct flow of information focused on its particular concerns, and to put its own spin on the lobbying of the Commission. If it establishes a Brussels office, it will be following precedents set by other regional authorities.

Participation in the Committee of the Regions will provide another route by which the National Assembly may assert some influence on the legislative process of the Union independently of the UK Government. The Committee, which came into being with the entry into force of the Treaty on European Union in November 1993, is a purely consultative body. The degree to which it is listened to by the Council depends, in the end, on whether the representatives of powerful regional interests are willing to combine their political forces in exerting pressure on Ministers: there has been little evidence of this to date, but it is early days. The members of the Committee are appointed by the Council for a term of four years, which is renewable; the Council is required to act by unanimity "on proposals from the respective Member States". The White Paper had said that provision would be made in the Bill for the seats on the Committee which are allocated to Wales to be held by Members of the Assembly, but there was nothing to that effect in the Act: it seems the matter is to be one of those regulated by a non-statutory "concordat".

At home, the National Assembly will need to make arrangements for the scrutiny of Commission documents and proposals for legislation. This is far from easy to do effectively, as the experience of the House of Commons has shown. The main problem is one of timing, more particularly in the case of draft Union legislation. The exercise will be futile unless the views of the Assembly can be formulated early enough to be fed into the negotiating position of the United Kingdom.

With that in view, the Protocol on the role of national parliaments, which has been annexed to the Treaty on European Union[10] and to the three Community Treaties by the Treaty of Amsterdam, will clearly be of no less interest to the National Assembly than it is to Westminster. The Protocol requires, among other things, that Commission proposals "be made available in good time so that the government of each Member State may ensure that its own national parliament receives them as appropriate". It also requires that a six-week period elapse between a proposal's being made available to the European Parliament and the Council in all the official languages of the Union, and the date when the proposal is placed on the Council's agenda for decision. In practical reality, negotiations within the Council are likely to go on much longer than six weeks; however, it is useful that the principle of informing national parliaments of a Commission proposal in good time before its adoption should have been formally recognised.

It is not only the initial proposal put forward by the Commission that should concern the National Assembly. In practice, the text of draft Union legislation (except when it is very simple or very urgent) presents a moving target. Substantial changes are usually made during the process of negotiations within the Council, in order to reach a compromise that will attract a qualified majority or unanimity (depending on the prescribed voting rule). Member State parliaments, and regional bodies like the Assembly, may find that the text they have so earnestly scrutinised bears only a passing resemblance to the measure that is finally enacted. To ensure real democratic control of decision-making within the Council, national parliamentary bodies should ideally be given sight of the final compromise text which is to be put before the Ministers, and have an opportunity of expressing their views on it.

We have seen that sub-State entities as such are not formally given a place in European Union institutions and bodies. However, the provision common to all three European Community Treaties, which defines the composition of the Council, was amended by the Treaty on European Union so as to make it possible for a Member State to be represented at a given Council meeting, or for certain agenda items, by a minister from a regional government, rather than from the central government.[11] The original text provided:

> "The Council shall consist of representatives of the Member States. Each Government shall delegate to it one of its members."

Now the text reads:

> "The Council shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member State."

The change to the phrase "a representative ... at ministerial level" was designed to accommodate the situation of federal Member States when matters are being discussed by the Council which, under the national constitution, fall within the exclusive competence of regional governments. It may be felt more appropriate that the spokesman on such matters be a minister with direct political responsibility for them, if only in part of the Member State

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10 Listed in the Final Act as Protocol No. 13.

11 See Art. 203, first para. EC (ex Art. 146).

concerned, provided that he or she has been duly authorised to engage the responsibility of the State as a whole.

The option of representation by a minister not a member of the central government is less obviously eligible for a Member State like the United Kingdom, with a system of devolution that is asymmetrical. However, from time to time there will be matters before the Council which are of such overwhelming importance to Wales that it seems right constitutionally for the United Kingdom's seat to be occupied by the Assembly's First Secretary. Would this be compatible with the requirement that Member States be represented "at ministerial level"? There is no case law on the point, because it has always been assumed in the practice of the Council that it is for national constitutional law to determine which offices are within the scope of that description. Should the question ever be raised, it would not follow, in my opinion, that the First Secretary could not be "at ministerial level" in the sense of EU law, merely because the Assembly has derived powers of legislation: a more significant test is surely that he or she holds office at the pleasure of a body elected by the people of Wales. In this connection, it is worth recalling that none of the other delegations queries the German practice of sending, as representatives on the Council, State Secretaries who are not even holders of elective office, but high officials.

In the absence of any legal impediment, it will be a matter of political choice if and when the Assembly First Secretary should represent the UK for certain items on a Council agenda. The White Paper gave the impression that the representative on such occasions would be the Secretary of State for Wales rather than the First Secretary, but it is understood that political thinking on this issue has changed. The matter of participation in Council meetings, and more generally of the contribution the National Assembly may wish to make to the UK policy line as it evolves in the course of negotiations is, it seems, to be the subject of concordats.

Last but not least, it would be advisable for the National Assembly to develop its relations with the European Parliament, in view of the role that institution has been given in the so-called "co-decision procedure", which was first introduced by the Treaty on European Union and has been strengthened by the Treaty of Amsterdam.[12] Under that procedure, which is on the way to becoming the normal one for adopting general European Community legislation, the Parliament is formally an equal co-legislator with the Council, even if its political influence remains secondary. The National Assembly should take steps (presumably through the Welsh MEPs, as well as through any representation it may establish in Brussels) to ensure that, on matters of particular interest to Wales, the relevant Parliamentary Committee is apprised of its point of view.

4 Implementation of, and compliance with, EU law

Section 29 of the Act provides:

> "(1) The power to designate a Minister of the Crown or government department under section 2(2) of the European Communities Act 1972 may be exercised to designate the Assembly.
> (2) Accordingly, the Assembly may exercise the power to make regulations conferred by section 2(2) of the European Communities Act 1972 in

12 See Art. 247 EC (ex. Art. 189 b).

relation to any matter, or for any purpose, if the Assembly has been designated in relation to that matter or for that purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council designating the Assembly....."

A designated Minister or department is empowered by section 2(2) of the European Communities Act 1998 to make regulations "for the purpose of implementing any Community obligation of the United Kingdom...". No such designation is made by the National Assembly for Wales (Transfer of Functions) Order 1999, presumably because the Order relates to enactments already in force, under which, accordingly, any necessary implementing action should already have been taken.

The power conferred on the National Assembly pursuant to section 29 of the Act extends to the implementation of EC directives. It will be remembered that, according to Article 249 of the EC Treaty,[13] "[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". In theory, at least, there may, as a consequence of section 29(2), be differences in the drafting of the texts giving effect to directives in Wales, as compared to those applicable in England or in Scotland; though doubtless, in practice, strenuous efforts at co-ordination will be made by the government lawyers concerned. Nor can the possibility be ruled out that differences may be found in the substance of the implementing measures which are adopted. If, as may be the case in the future, the National Assembly were to have a different political complexion from the Government at Westminster, a more or less friendly attitude to the policy behind a given directive could lead to a maximalist interpretation by the one implementing body, and a minimalist interpretation by the other.

If the National Assembly were to fail in its duty of implementing an EC directive within the prescribed time limit, or if the measure adopted did not fully achieve the objective set for the Member States, that would expose the United Kingdom to proceedings in the European Court of Justice brought by the Commission under Article 226 of the EC Treaty. There would also be the possibility for individuals, who suffered harm in consequence of the Assembly's breach of its duty under the Act, to seek damages under the doctrine of State liability which has been developed by the Court.[14]

Another relevant provision of the Act is section 106, which imposes on the National Asembly both a duty and a disability:

"(1) A Community obligation of the United Kingdom is also an obligation of the Assembly if, and to the extent that, the obligation could be implemented (or enabled to be implemented) or complied with by the exercise by the Assembly of any of its functions...

(7) The Assembly has no power -

(a) to make, confirm or approve any subordinate legislation, or

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13 Ex Art. 189.

14 The leading cases on State liability are: Joined Cases C-6 and 9/90, *Francovich* [1991] E.C.R. I-5327; Joined Cases C-46 and 48/93, *Brasserie du Pêcheur* and *Factortame* [1996] E.C.R. I-1029; Joined Cases 178, 179 and 188/94, *Dillenkofer* [1996] E.C.R. I-4845.

(b) to do any other act, so far as the subordinate legislation or act is incompatible with Community law...".

There is a quality of belt and braces about that provision. Subsection (1) is, in effect, declaratory since in Community law all elements that constitute the State, including national and regional legislatures and even the Courts, are bound by the duty of loyal cooperation imposed by Article 10 of the Treaty.[15] Subsection (7) does, however, usefully make clear that acts adopted by the Assembly would be void *ab initio* and not merely voidable.

It is worth recalling that the duty of compliance would extend to the general principles of law which have been recognised by the European Court of Justice as forming part of the legal order established pursuant to the EC Treaty. These include the principles of non-discrimination (not just on grounds of nationality or sex), of the protection of legitimate expectations and of proportionality. The Court has ruled that the general principles of law must be respected by national authorities when they are acting within the scope of application of the Treaty.[16]

There is a further, intriguing compliance point that arises because, according to paragraph 1(1)(c) of Schedule 8 to the Act, a "devolution issue" means, among other things, "a question of whether the Assembly has failed to comply with a duty imposed on it (including a question whether the Assembly has failed to comply with any obligation which is an obligation of the Assembly by virtue of section 106(1)...": it follows that paragraph 30 (1) of the Schedule would apply, so that the relevant law officer or the Assembly itself, if they were party to proceedings in which it was contended that the Assembly had acted in breach of a Community obligation of the UK, could require the court to refer that issue to the Judicial Committee. That power would be widely available because, pursuant to paragraph 5 of Schedule 8, the Attorney General and the Assembly must be given notice when any devolution issue arises in proceedings before a court or tribunal, and they may then choose to become a party, so far as the proceedings relate to such an issue.

I cannot help wondering whether that apparently sensible provision is compatible with the principle of the primacy of Community law as it was stated by the European Court of Justice in the leading case of *Simmenthal.* It is worth quoting *in extenso* from the judgement:

"21. ...every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.

22. Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from

15 Ex Art. 5.

16 See Case 5/88, *Wachauf* [1989] E.C.R. 2609; Case 260/89, *ERT* [1991] E.C.R. I-2925.

having full force and effect are incompatible with those requirements which are the very essence of Community law.

23. This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary...."[17]

The *Simmenthal* ruling was given in a context where the disputed national legislation had been struck down by the Italian Constitutional Court. The Court of Justice went out of its way to stress that issues of compatibility with Community law must not be shunted off to a tribunal with special jurisdiction. Such issues fall to be resolved by the court deciding the merits of the case, since otherwise there would be an impediment, if only a temporary one, to the effective enforcement of rights derived from the EC Treaty.

My concern is that a referral to the Judicial Committee under paragraph 30 (1), of a question as to the compatibility of an Assembly measure with Community law, might perhaps be seen as an instance where "the solution of the conflict [would] be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law...". If so, then the court or tribunal seised of the proceedings would be under a duty to decline to make the referral. There would be a similar duty for lower courts to refrain, in respect of devolution issues of this particular kind, from exercising their option of referral to a higher court in the cases provided for by paragraphs 6 and 7 of Schedule 8.

A counter-argument would be that paragraph 30 (1) merely provides a fast-track procedure enabling the Law Officers or the Assembly to take a case straight to the Judicial Committee, in order to obtain a decision at the highest level as soon as possible, when the issue raised is considered to be of public importance. In resolving such issues, the Judicial Committee would, under the Act, be "the Court called upon to apply Community Law". The procedural device in paragraph 30 (1) would represent no impediment to such application: on the contrary, it would offer the possibility of expediting a matter which might otherwise reach the Privy Council by the slower route of successive appeals.

I am indebted to the Lord Chancellor's Department for an exchange of views that has partially reassured me. If concern remains, it is because I have always read the *Simmenthal* judgment as meaning that issues of compatibility with Community law must not be singled out as having a special legal character which justifies referring them to a tribunal other than the one that would ordinarily have jurisdiction to determine the merits in given proceedings. The real problem may lie, not so much in paragraph 30 (1) of the Schedule as in the inclusion, pursuant to paragraph 1(1)(c), of issues of the Assembly's compliance with Community obligations among the matters classified as "devolution issues", thereby giving them a quasi-constitutional character and bringing them within the jurisdiction of the Judicial Committee.

17 Case 106/77, [1978] E.C.R. 629, at p. 644.

5 Conclusion

By way of conclusion, may I make three brief points.

First: the devolution of powers from central government to regional authorities is happening all over Europe: indeed, the development has come relatively late in the UK. It is a political phenomenon with which the EU is having to come to terms, through practical arrangements rather than the creation of formal constitutional links. Whether the shift of power downwards to the regions and upwards to Brussels signifies the withering away of the State, only time will tell. For my part, I see few signs of an erosion of national identity in the Member States where this has been strong.

Secondly: the National Assembly will have real opportunities of influencing the legislative process of the EU. There are bound to be frustrations, owing to the lack of transparency of Council negotiations, which in my view is irreducible beyond a certain point. The wise course will be to use all available means of ensuring a free flow of information from Brussels to Cardiff (through good relations with UKREP, with the Commission and with the European Parliament), so as to identify matters that are of prime importance to Wales, and to focus political effort on those matters.

Thirdly: there is no bilking the fact that implementation and compliance represent a formidable challenge for the National Assembly. That is true, in particular, of the implementation of EC directives. If there is to be a genuine "choice of form and methods"[18] which the Assembly deems appropriate for Wales (as distinct from simply copying Whitehall's texts), a significant strengthening of the legal forces previously available to the Welsh Office will surely be necessary.

18 See Art. 249 / (ex Art. 189)