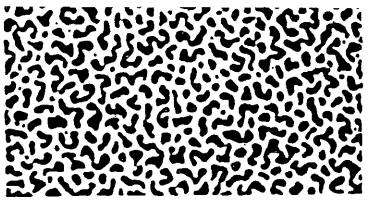

C O M M E N T A R I E S

The European Union — where political issues become legal issues

The issues which are taken up in this article stem from some reflections on alcohol policy in the light of European integration. However, the objective is of a more general nature. The aim is partly to elucidate how political issues can change character when they are dealt with within the framework of international co-operation — that is they become legal issues — and partly to put forward some suggestions as to how the national political/administrative system should relate to this process.

When I say that political issues become legal issues, I mean that they are transformed from being within the political arena to being within the legal arena. Such issues shall no longer be decided on by politicians, whether they sit in parliament or in government and administration, but by courts of justice and their judges and lawyers. The issue is no longer a theme within the political sphere, but for jurisprudence.

Within this context, by alcohol policy I am not referring so much to wider alcohol policy goals. The answers to such questions as whether or not alcohol is a social problem which deserves attention and if so to what degree, whether or not efforts should be directed to total consumption, or else concentrated on problem drinkers, the balance between the interests of alcohol policy versus the interests of industry, are unlikely to be found at the level of the European Union in the near future, and even less likely to be issues for legal regulation.

My concern is with alcohol policy measures and the way in which they are influenced by the co-operation which we are embarking upon.

Adherence to the European Union / the European Economic Area – from politics to law

All binding international agreements involve, in one sense, making legal issues of the issues which they regulate. This is simply what makes them binding. However, the extent to which this process occurs depends both on how broad an area the agreement covers, the content of the regulations and the mechanisms for enforcing the obligations of the agreement.

In principle, co-operation both within the European Union and the European Economic Area applies to limited areas. However, the extent is considerably broader than that which we have experienced with any other agreements. Another special feature of the agreements is that they are both very detailed and at the same time contain general regulations which in principle are applica-

ble (and enforceable, see below) in individual cases. There is very much more which is bound up in legal forms in such a way that the scope for the domestic political arena is limited.

However, there is an important difference in principle between the two forms of co-operation. The European Economic Area exhaustively lays down which regulations are covered by the agreement, whereas within the European Union, the bodies within the Union have the possibility for determining new regulations, as long as these regulations can be shown to have a legal basis in the constitutional treaties. Seen in this light, the European Economic Area is an agreement within the framework of ordinary international law, whereas the European Union contains a dynamic element.

Whether we shall have legal alcohol monopolies, how high duty on alcohol (and therefore prices) shall be, how much alcohol people should be allowed to take with them into other countries, are at present questions to which our parliaments can take an ongoing political standpoint. To a greater or lesser extent, these arrangements are controlled by legislation, but this is mainly a technical matter. It is not that much more difficult to change the law than it is to take other political decisions. If the law does not completely meet up to that which is politically desirable, it is a relatively simple process to make changes accordingly.

This does not of course mean that in the real world we have a free hand. Political realities limit the measures which we can use, in the same way as the composition of the alcohol market also does. But an ongoing political evaluation can still be made of the relationship between what is desirable and what is possible.

Our entrance into international co-operation such as EEA/EU changes this picture. Whether or not our sale of alcohol shall occur through a state monopoly is no longer just a question of whether there is political support for this as a useful measure, but also whether this is possible in a legal sense. Monopolies and the way in which they operate must be seen in the light of how Article 37 of the Treaty of Rome (which has been incorporated into Article 16 of the European Economic Area) is to be understood, not just whether they are appropriate instruments in terms of alcohol policy.

Unlike the usual agreements pertaining to international law, both the EEA and the EU create rights for the individual. This naturally strengthens their legal character. It is not just a case of obligations between states, but also between state and individual. Individuals can take their claims to the courts.

However, the mechanisms for enforcing the law in the EEA differ from those of the EU in that individuals cannot demand to have their case dealt with judicially by a supranational body. They must refer their case to the national courts. However, these courts are under obligation to use EEA/EU legislation as a basis. With this in mind, the national courts of justice can refer EEA matters to the EFTA Court. Even although these statements are not formally binding, the whole point of the system is that they shall be followed.

We must in any case bear in mind that EU legislation forms the basis of the European Economic Area, such as it has been developed. The fact that membership of the European Union, as opposed to the European Economic Area, also involves a greater degree of supranational enforcement of the law, simply provides an additional argument for the discussion which follows, and not a fundamental difference.

European Union law — from jurisprudence to politics

National legal systems are based on two essential features. Firstly, they reflect several centuries of political, cultural and economic experience. This particularly applies to that which could be called the core of the legal system: criminal law, procedural law, general contract law and general administrative law. Secondly they reflect ongoing political deliberations, which encompass different considerations.

European Union law has a completely different purpose. It is of course attached to various basic features of Western European development. But it does not, to the same degree, aim to encompass the whole of this development. One feature is that the co-operation is basically concerned with the economic sphere, which means that there is a tendency for considerations lying outside this sphere to be toned down. A more important issue

in our context is that co-operation builds upon the clear aim of creating closer connections between states within the Union (Article 2 of the Treaty of Rome), that is to say, greater integration.

Within that part of production of rules which corresponds to the national legislative process, the degree to which this aim for integration is taken care of varies somewhat. Different interests and political dealings are just as common in the Council of Ministers as in national parliaments, even though rules of procedure are built into the system to give the Commission (that is the body which has responsibility for ensuring that the Union functions and develops in line with its aim) a much stronger position with regard to production of laws than that which is assigned to governments in our national legislative processes.

However, the main difference lies in the system of enforcement and the production of rules which this represents. Through the Court of Justice of the European Communities, EU law can be laid down with binding effect, both for individuals and for the member states (including the national courts of justice). This means that even the most general regulations and principles are suddenly much more powerful in character than they would otherwise be in international agreements, where it could be said that they have more of the character of speeches.

As with national systems of justice, written EU law (EU legislation) does not, by a long way, provide the answers to all the legal questions which arise within the framework of the co-operation. This gives the Court of Justice quite a wide scope, perhaps more than for national courts of justice, because it is basically concerned with a system which has no tradition. The law-making element of the Court of Justice of the European Communities is therefore fairly prominent. This also applies to the question of what authority the Court of Justice has in the area of EU law, which to a large extent has been laid down by the Court of Justice itself. In terms of the consequences, the Court of Justice of the European Communities is undoubtedly a court of justice. Legal decisions are made, which are binding. But the way in which matters are reasoned differs so much from that which we, at least in the Nordic countries, are used to from the judiciary, that in my opinion it is almost misleading to use the term court of justice.

Courts of justice are by nature retrospective. They shall decide on what is "established law", that is to say, they shall in principle behave rationally in relation to given norms. This does not, of course, exclude law-making activity. It is often when the law is unclear, or else when we find ourselves in a "legal vacuum", that it is rational to turn to courts of justice. But decisions shall be made on the basis of accepted legal sources.

There is no universal agreement about which sources should be used, and their relative weight. There is room here for a great deal of dissent between scholars of law, and for significant differences between national traditions. But, as far as I can see, the Court of Justice of the European Communities goes a considerable step beyond this by its extremely strong orientation to its overall purpose.

In Nordic tradition, the "purpose of the Act" is one of several sources for resolving judicial issues. Some legal scholars have wanted to make this into the dominating factor of interpretation. But this applies to relatively concrete aims associated with specific acts (in interpretation of specific regulations which regulate sale of alcohol, how much weight should one place on the fact that the purpose of the Act is to limit consumption of alcohol?). There are few who would be of the opinion that the "Purpose of the nation" should be a relevant issue in the interpretation of individual acts.

However, the Court of Justice of the European Communities goes considerably further. A fairly dominant factor in interpretation is consideration of the overall purpose of the co-operation, particularly integration between member states. Even assessment of whether one or another interpretation is most suited to promoting this aim is not in itself satisfactory. Just the theoretical possibility that an interpretation could act as a barrier to integration can be sufficient for it to be rejected. "Zweckrationalität" rather than "Wertrationalität" appears to form the basis for the body's decisions.

Behind this style lies a stated emphasis on the dynamic character of EU law and the desire of the Court of Justice to play a role in this development. It is not so much a question of how the legal rules are to be understood, but whether a phenomenon contributes to increased integration within the Union. To a large extent it is the Court of Justice which has taken upon itself the role of driving

force in the direction of achieving the political aim of the Union. This is an issue which, if it had been moved to the national level, would obviously have been referred to the political arena.

The boundary between law and politics is not clear cut. Courts of justice are sometimes forced to make decisions in cases where there is political controversy. It is relevant to give at least some consideration to political aspects when rulings are made. The transition from a legal to a political process occurs along a continuum. Whether a body should be called a court of justice or a political body is, perhaps, a matter of taste. In our context, it is sufficient to state that the political element in the Court of Justice of the European Communities is considerably more pronounced than that which we are familiar with from our own country.

This phenomenon which we are confronted with can, in my opinion, be described in the following way: In the European Union political decisions become legal issues. But at the same time, decisions which in form appear to be legal take on a strong political aspect. The balance between the political and legal spheres which we are familiar with at home is not necessarily applicable in analysis of the system which we are embarking on.

The political/administrative strategy — politics or legalism

By joining EEA or EU, we take a stand to accept the framework and principles which these agreements are based on, including (to a variable degree) the principle of increased integration. However, what this involves, and how much weight should be given to this principle in relation to other principles, has not been determined once and for all. This is most apparent in relation to the dynamic process which the EU goes through when decisions are made in the Commission and in the Council of Ministers, and especially with any changes to the Treaty. This is clearly a matter of political decisions about the direction and extent of integration, taking other considerations and interest into account.

One of my main points in the section on EU law (page 56) was that political development takes place not only in the political arena, but just as much in the law enforcement system. This system has now become quite different within the EEA compared with in the EU. However, an incorporated condition is that EEA law shall not develop differently from EU law. Even though in practice the strain on national political decisions will probably become less, in principle we are in the same situation, within the areas which the EEA covers, as we would be if we were a member of the EU. In relation to our considerations about how we should relate strategically to the arena of the courts of justice, this suggests that it should be possible, at least to a reasonable extent, for such considerations to be common for the two alternatives.

The first question which arises is whether we ought to adapt, whatever the cost and as soon as possible, or else whether we ought to wait and reconsider the matter.

The point of departure must be that we have made an agreement on the assumption that we intend to fulfil it. On a good many points it is fairly obvious what we have committed ourselves to. For example, there is little doubt that the Norwegian Act on the Purity of Beer (that beer can only be made of water, malt, hops and yeast) was contrary to the agreement, since a completely equivalent act in Germany was overruled by the Court of Justice of the European Communities. Similarly, it is absolutely clear that duty on alcohol falls outside the EEA agreement.

In my opinion, with regard to such points which must be considered to be clear-cut, it is in our interest to adapt as soon as possible, even though certain national interests (for example jobs in the Norwegian brewing industry) can provide an argument for doing the opposite.

However, other issues are much more open for reasonable doubt. For example, it has been claimed that the Nordic monopolies on import and wholesale of wine and spirits are contrary to Article 37 of the Treaty of Rome. This claim is based on, i.a., the judgement about the Italian monopoly on tobacco. But the opposite view can also be argued for, by referring to the sociopolitical basis for the monopolies and their non-discriminatory practice.

Perhaps we ought to strengthen the sociopolitical and non-discriminatory aspects of the monopolies. But I see no reason to abandon import and

wholesale monopolies, simply because doubt can be raised about whether they are in accordance with the agreement.

Firstly, the issue is not clear-cut, and we have good reasons for maintaining the arrangement. It has been said about Norway that we were the cleverest pupil in the NATO class: we fulfilled the Americans' expectations long before they even knew that they had such expectations. Similar tendencies can be detected in the Nordic debate on the relationship to the EU. We shall adapt to the EU long before the demands have been made and well before it has been made clear whether there really is an obligation. I do not think that this is an appropriate attitude where important national interests are concerned. Our alcohol monopolies are such a central part of our alcohol policy that they should not be abandoned simply because doubt can be raised about whether they are legally tenable.

Secondly, court cases take time. It is difficult to see what pleasure we can obtain by taking our possible sorrows in advance. This is, of course, not at all a typical Nordic attitude. Denmark, which we normally regard as the most sanguine of us, is clearly the EU country which has incorporated the largest part of the EU directives into its national law.

Thirdly, after loosing one process, new possibilities present themselves. Mechanisms for enforcement in the EEA/EU have at least one aspect in common with a normal process in a court of justice, that is that the courts only consider issues which are presented to them: whether an arrangement is consistent or inconsistent with the legal regulations. They do not consider the legality of alternative arrangements. One lost case on import monopoly does not mean that anyone can start up their own import business the following day.

The Nordic societies are, to a large extent, very legalistic. Laws and regulations shall be abided by. This applies equally for the Government itself. It is important not to abandon this value, even if we become more closely connected to countries where this value is not such a central issue.

An important aspect of our legalism is the strongly democratic element. First and foremost this is connected to the development of our judicial system through political decisions. In this aspect we differ substantially from the Anglo Saxon tradition, where, to a great extent, courts of justice have precedence over democratic institutions.

It is important to acknowledge that our legalism shall now function within other terms of reference. The balance between law and politics is about to be changed. To a greater extent we must learn to distinguish between form and content. Just because several issues appear to be judicial in form, this does not mean that the political element disappears. I believe that many of us, particularly at the political/administrative level, now face a considerable problem of mental readjustment.

The legalistic sphere contains several legitimate roles. Judges, who in the final analysis decide on legal issues with binding effect, have been readily placed at the centre. Administrative bodies also generally look to the role of judges for their patterns of reasoning.

There are two aspects which indicate that this is not always an appropriate attitude when decisions are moved to the supranational level. The first aspect is the increased element of consideration of political objectives, which the Court of Justice of the European Communities represents. We cannot extract much help in managing this from the traditional role of Nordic judges. The second aspect is that the balance between the judiciary and democratic institutions at the same level is displaced. If, according to Parliament, a High Court decision cannot be lived with, legislation can be changed. Decisions in the High Court are, to a certain extent, under democratic control. Seen from the point of view of individual states, this possibility has been removed in relation to the Court of Justice of the European Communities. In practice it is also rather limited at the EU level.

In my opinion, the political/administrative level should at least take on another legitimate legalistic role, that is the role of advocate. We must first decide what we want. We can then fight for our standpoint with the means that are available to us. Our job is to plead our case, not to guess what the Court of Justice of the European Communities will arrive at. We must at least expect that other parties will realize that decisions will no longer be taken (exclusively) at the parish pump, but in

other arenas and with other actors. It is certainly not our task to feed the opposition with arguments.

And if we should loose a case, we have several alternative courses of action open to us. It can be more appropriate in this case to look to good business lawyers rather than to traditional judges, when choosing roles.

The approach to the problem is actually not unknown at the national level either. When the Government first becomes involved in a court case, our lawyers are fairly concerned that administration accepts that it is no longer the highest authority, but is actually a party to the case in line with the private opposition. But the dimension for the need for this displacement of roles becomes completely different at the supranational level into which we now move.

Knut Brofoss
(Translation: Linda Grytten)

Finnish social alcohol research and alcohol policy

Research and decision making can be linked to one another in various ways. First, difficulties in choosing between different alternatives may result in the launch of a research project with the hope that the study will reveal the best alternative or even identify a new, superior solution to the initial decision-making problem. Secondly, research findings can be used as grounds for decisions made already before the study was actually carried out or decision makers can just initiate a study in order to gain time, because they are unwilling or unable to make the necessary but unpopular decisions. Thirdly, research initiated on its own can bring about more-or-less detailed recommendations for action, which will either be accepted or rejected by decision makers. And finally, research can analyze social problems, changes in them and general social trends, which yields specific information or additional general knowledge. This in turn can influence problem definition and public discussion, thus changing the external conditions of decision making and, in this way, affect the political decision making process (Mäkelä 1970; Mäkelä 1985; Lampinen 1992).

A researcher is often seen as an individual who independently and in isolation produces results which then either make it possible for the decision-makers to act, or force them to act, in a certain way. However, a researcher — and why not also a decision maker — may function in different roles at different phases of a decision-making process: as a researcher, as a member of a political party or pressure group, as an expert in the state bureaucracy or even as a Member of Parliament or a Ministry. Sometimes intermediary groups exist between the research activity and the decision-making process, which influence how research will be conducted and interpret the results for policy makers. And finally, one has to bear in mind that the relationship between research and decision making never takes place in a vacuum; both are closely related to the general ideological and political currents that prevail at a given time.

This paper will discuss the Finnish social alcohol research. The focus will be on the extent to which the problems related to alcohol policy have been covered in research and also on more specific questions such as how problems, actually met in alcohol policy making, have been reflected in research and to what extent the changes in alco-