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Michael Rötting, Das verfassungsrechtliche Beitrittsverfahren zur Europäischen Union

Summary

The Constitutional Accession Process to the European Union

and its Effects Exemplified by the Proceeding Evoked by the causa Gotovina in Croatia's Accession Process

The present study aims to show that the accession of a new Member State to the European Union is not merely a political process. It is governed by a legal procedure rooted in European Constitutional Law and meant to carry into effect the constitutional mandate of enlargement. To demonstrate the legal relevance of these findings, the study analyzes certain aspects connected to the postponement of the opening of accession negotiations with the Republic of Croatia in March 2005. This postponement was caused by the so-called *causa Gotovina*, as the members of the Council could not reach a consensus on Croatia's compliance with the accession criterion of respect for the rule of law because Croatia did not transfer the alledged war criminal and Croatian general Ante Gotovina to the International Court of Justice for the former Yugoslavia. The study concludes that by making the evaluation of Croatia's compliance with an accession criterion dependant on an assessment by the ICTY prosecutor and thus outsourcing it, the European Union violated Croatia's procedural rights in the accession process.

As European Union law originates in international law, the accession of a new Member State to the European Union takes place by means of a contract governed by international law concluded between the Member States of the Union and the applicant State. According to Art. 49 II TEU, "[t]he conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."

In general, the procedures leading to the conclusion of an international treaty leave plenty of negotiating room, ultimately deriving from the in-

ternational law principle of freedom of contract. This freedom may be exercised according to political priorities. Thus, it is a manifest hypothesis that the accession treaty between the Member States and an applicant State to the European Union is negotiated within the scope of a political process. Nevertheless, accession might also take place through the means of a *legal* process. The present study discusses the differences arising from the distinction between the two.

Therefore, it is crucial to clarify the notion of "process" the study is based on. The classical process doctrines refer to truth or true justice as the finality of a process. The allusion to an objective truth has always been the core problematic issue of the classical process doctrines. It is also the main reason why the classical process doctrines are not persuasive. Legal dogmatics try to construe a theory of process based on the terms of either action, legal situation, or relation. The corresponding theories of process, however, are partly incompatible with each other. Thus, they do not succeed in construing a satisfactory understanding of a process.

A system that has to guarantee that a definite decision is taken as the result of a process cannot at the same time guarantee that the taken decision is based on the objective truth.

Rooted in this understanding, Niklas Luhman developed the theory of "legitimacy through process". Luhmann proceeds from the function of truth in the classical theories of process and searches for a more abstract and more functional reference. This reference should include the mechanism of finding the truth, but go beyond the search for the objective truth. Luhmann comes across the exercise of power and its legitimacy. He interprets legitimacy as the generalised willingness to accept decisions of a content yet undetermined, within the scope of a certain tolerance.

System-theoretical understanding thus describes a process as a system that selects one concrete decision out of the body of all possible decisions by the means of a process that permits the persons or institutions concerned to take part in the creation of the decision. This allows them to live with the decision and to perceive the way of its creation as legitimate.

The system-theoretical approach proposes an understanding of processes as social systems that fulfil specific functions by elaborating a non-recurring, binding decision. The focus on a single case implies that processes are always of limited duration.

According to Luhmann, processes regulated by law belong to the most noticeable characteristics of the political systems of modern societies. The structure of the procedural system is predefined by general *legal* provisions applicable for a multitude of processes. These provisions reduce the number of possible actions and reactions in a process to such an extent that it becomes possible to launch certain processes as systems, without the further necessity to discuss the reasons for coming together, or to define and clarify the options to act and react of all parties involved. Processes regulated by law reduce the complexity of possible actions of the parties involved by permitting them to absorb the selections achieved by others. With a view towards European Union enlargement, the functioning of such a reduction of complexity might be illustrated: Before an accession takes place, certain criteria, as well as procedures are fixed. Because of their willingness to take part in the process, all parties involved take these selections as a point of orientation for their own proceedings.

Processes – as opposed to non-processes – require a framework that structures the process and defines the rules of conduct. The taking of a binding decision, however, remains the finality of all processes. This decision is *not* predetermined by the process. Corresponding to the complexity, the openness of the final decision constitutes a decisive motivation to participate in the process and perceive it as legitimate. The possibility to reach the desired output is thus a *conditio sine qua non* for the willingness to participate.

Based on the given definition of a process regulated by law, derived from system theory, it is not too difficult to subsume under this term even an accession process to the European Union where the Council takes a political decision based on its unrestricted discretion. Such a process would also be involved in the taking of a binding decision in a specific case. The legal momentum, however, would be reduced to appointing the institutional body bound to act, and to establishing the procedure for this body to decide – unanimous vote.

Nevertheless, in this study, the author conceptualizes the notion of a process regulated by law in a narrower sense. For a political process, it is characteristic that the decision taken is not subject to legal boundaries with regard to its preconditions and the procedure of its verification. It is characteristic that the decision is mainly made for political reasons. When verifying the decision in a reviewing process, one would not ask whether it was legally legitimate. Instead one would be interested in whether it was, from an ex post perspective, a politically wise decision.

The key elements in this process for the reduction of complexity would therefore be of a political nature, while the legal systeme merely appoints the institutional body competent for making this political decision.

In the notion this study is based upon, a process regulated by law distinguishes itself from the political process through its footing in the application of law. It presumes that an applicable legal regulation already exists[844]. With the exception of closing legal loopholes, a process regulated by law does *not* develop the applicable law. On the contrary, it is based on the application of existing legal provisions.

In this sense, the legal process is significantly different from the political process. Ideally, society's influence on legal processes is exercised exclusively by decisions leading to the creation of law, be it statutory or common. Thus, societal developments may influence the legal process uniquely through a single, concentrated and specified valve. This allows to control legal processes far more precisely than political processes.

The fixation on the law requires that all differences and inequalities must be presentable as the consequences of the application of legitimate, pre-existing procedural rules. From the perspective of the legal process, all those in a functionally equivalent role are equal. This principle of procedural equality is of fundamental importance for legal processes.

Legal processes compensate for the loss of the idea of a single decision based on objective truth – a loss which results from the margin of discretion given to the deciding body – with the guarantee of procedural rights. If it is not possible to reach mutual consent on the material contents of a necessary decision, mutual consent on the process in which this decision is taken can constitute the "corset" that helps to restore trust in the law if this trust is lost by a decision perceived as materially wrong or unfair. This is the reason why information may only become procedurally relevant after it has been filtered in accordance with the rules of the procedural system, and translated into terms immanent to this system. By taking part in the process, the parties, especially the applicant, are witnesses to the procedural steps, act within the system, and prepare for the decision to be taken. As a consequence, this decision

[844] This observation is even true for legal processes that have to be conducted without applicable statutory law. In this case, the legal process has to decide what shall be the law. However, these processes are also based on the assumption that the legal order they are based on preexists. See Luhmann, Legitimation durch Verfahren, p. 139.

does not come as a surprise. Being prepared helps all involved parties to accept the outcome even if it is not the desired one.

European Union accession negotiations depend largely on political factors. One therefore might argue that the resolution on the accession is a political decision and that the Member States could, if at all, only be bound politically when taking the final decision.

At first sight, this view is supported by Art. 48 TEU. Art. 48 TEU attributes the power to amend the treaties on which the Union is founded to the Member States, acting by common accord. Provided that such a common accord can be reached among the 27 Member States, they are indeed free to adapt the treaties to their transforming views of how the Union should be organized and which principles it is based upon.

Werner Meng concludes that there is no methodical way to prevent the Member States from completely redesigning the community structures. Therefore, the conditions of accession as well as the process leading to the accession of another Member State would not be subject to legal boundaries.

It is true that the accession conditions fixed by Art. 49 TEU are alterable via Art. 48 TEU, with regard to contents as well as with regard to procedural provisions. However, it should be kept in mind that such an alteration requires ratification in all 27 Member States.

It is also true that the wording of Art. 49 I 1 TEU only allows deduction of a right of European states to apply for membership in the Union, but not a right to membership as such. Juli Zeh has shown that no right to membership, be it enforceable or not, can be deducted from this provision or from other provisions of the treaties.

Nevertheless, the fact that there is no enforceable right to membership does not bar the hypothesis that the application process is a process regulated by law and applying law. A number of legal processes of national law do not lead to legally enforceable claims either.

It cannot be denied that the entirety of the legal provisions contained in the treaties on which the Union is founded is alterable via Art. 48 TEU. Unlike, for example, the German Basic Law in Art. 79 III GG, European Union law does not contain provisions protecting certain norms from being altered. The possibility to alter norms nevertheless does not disrobe them of their legal character. Neither does it constitute an argument in favor of denying all legal ties of the accession process. Furthermore, there is no indication that any alterations of the provisions of the EU and EC treaties would be easy. On the contrary, alteration of these norms requires ratification in accordance with the respective con-

stitutional requirements in all 27 Member States, including some that require or allow for referenda. As long as these requirements are not met, the Member States acting in the Council are bound by the existing legal framework. This also means that they cannot act freely without legal boundaries.

If we classify the relationship of the parties involved in an EU accession procedure as the relationship of EU Member States with a third State, the thought is not far-fetched that we might be talking about external relations of the Union. However, the sector of external relations is traditionally more closely connected to the political sector than to the legal sector. One could argue that Art. 49 TEU does not *explicitly* demand an accession procedure that comprehends the given criteria as binding legal criteria.

In the sensitive sector of external relations, it could be unwise to limit the political and factual scope of action of the Union institutions by binding them to a legal process, while the applicant State, not yet bound by the European Union legal order and thus acting in external relations, will most probably use all political instruments available.

However, this view does not take into account some decisive aspects. The accession of a new Member State to the Union, as it is foreseen by Art. 49 TEU, differs qualitatively from external relations with third States that the Union might have in the sectors of international treaties or trade relations or even in the sector of the so-called neighbourhood policy.

This is already illustrated by the systematic position of Art. 49 TEU in the final provisions of the EU Treaty. Agreements concluded by the European Community with third States are either based on Art. 133, 308 EC or are concluded in the form of legally non-binding trade and cooperation agreements on the basis of Art. 310 TEC. Neither does Art. 12 TEU, the provision that defines the forms of action by which the Union pursues the objectives of the common foreign and security policy, refer to the enlargement of the Union.

Already from its systematic position, it can be concluded that Art. 49 TEU does not constitute a provision governing external relations. It rather has to be seen in context with Art. 48 TEU. Both are fundamental provisions of the EU Treaty. Indeed, by creating the possibility of accession to the Union, Art. 49 TEU regulates one of the core elements of European integration, namely, enlargement.

The relevance of this element is shown in intriguing clarity by the considerations in the preambles to the EC and EU Treaties. The second

preambular consideration of the EC Treaty speaks of the contracting parties being "resolved to ... eliminate the barriers which divide Europe". In the eighth preambular consideration to the EC Treaty, they are then "calling upon the other peoples of Europe ... to join in their efforts". Moreover the Community is founded to "lay the foundations of an ever closer union among the peoples of Europe", as the first preambular consideration of the EC Treaty indicates.

While the element of an "ever closer union" constitutes the principle of European integration, the second element, "among the peoples of Europe", refers clearly to the entirety of the peoples of Europe, not only to some European peoples of a couple of European nations. It thus establishes the principle of enlargement. As early as in 1957, with only six founding Member States, the EC Treaty propagated the vision of a pan-European house and urged the European peoples of Central, Eastern and Southern Europe to overcome the dictatorships in their countries and join the Community!

The preamble of the 1992 EU Treaty emphasizes the same principles of integration and enlargement and adapts them to the different historical situation after the democratic transitions in Central and Eastern Europe. The twelfth consideration in the preamble of the EU Treaty continues to speak of the process of creating an "ever closer union among the peoples of Europe". It thus confirms the principle of enlargement as well as the pan-European dimension of European integration. Given that in 1992 the question of an accession of the Central and Eastern European reform democracies was highly controversial, particularly in the light of the economic differences between the regions of Europe, such a confirmation is amazing.

The second consideration of the EU Treaty's preamble, "recalling the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe", gives a direct guideline for the future development of the Union. Unlike the EC Treaty at the end of World War II, the preamble of the EU Treaty directly mentions the historic situation after the fall of the Iron Curtain. It then contains the affirmation that the EU Treaty has been designed to create a firm basis for the construction of the future Europe. For the Union, there only is a necessity to create this firm basis if the Union regards itself as the adequate institutional framework for the future Europe. This means that the EU Treaty has also been created to prepare the Union for the accession of the Central and Eastern European democracies. The commitment to the principle of enlargement could not have been more intense.

The principles laid down in the preambles illustrate the common basic concepts and convictions of the contracting parties. According to Manfred Zuleeg, the former German judge at the European Court of Justice, the principles and constitutional mandates fixed in the treaties, including the principles fixed in the treaties' preambles, constitute core elements of the development of the law by the ECJ's interpretation. Within the scope of application of Community and Union law, the Member States are required to respect and safeguard these principles. Even though the Council has a substantial margin of discretion when deciding on an accession application, important consequences arise from the question whether the accession process is a merely political one or a legal one, regulated by law and which applies the law.

This is at first true for the perception the European Union has of itself as a community of law. Enlargement brings economic and legal change not only to the Union and its Member States, but above all to the citizens, the subjects of the Union's legal order. As a matter of fact, European Union law constitutes the only transnational legal order that attributes individual rights and liberties directly to individuals and even creates a Union citizenship. As the Union's citizens are granted individual rights without having to use the detour via their home states, it is of a more than merely theoretical importance for the citizens whether actions affecting their economic and legal status are taken in a process regulated by law and applying the law. Moreover the creation of the applicable law can ultimately be retraced to the people – acting through their national representatives in the Council and through their representatives in the European Parliament. Denying the existence of a legal process would mean that the legal sphere of the citizens of the Union might thus become the object of an arbitrary use of power.

For the applying State, the question of whether accession negotiations are governed by a legal process is decisive when it comes to determining whether it is possible refer to procedural rights. These procedural rights go far beyond the right to obtain a final resolution on the accession application that does not arbitrarily misuse the margin of discretion. For example, a right of the applicant State to receive a rejecting resolution, when it becomes clear that it will definitely not be able to meet the accession criteria, can be deducted as a procedural right in a legal process. Vice versa, there could also be a procedural right to the continuation of the accession process when it becomes clear that the applicant state will be able to fulfil the accession criteria in the near future.

According to Thomas M. Franck, the perception of a legitimate process is even the decisive issue for the compliance of candidate states. More-

over, the understanding of the accession process as a legal process implies the applicability of all common procedural rights. This includes the right to be given the reasons in case of a rejection of the application. Such a requirement for giving reasons helps to oppose the influx of off-topic reasons that are not related to the accession criteria communicated to the applicant State. The principles that guided the exercise of discretion also have to be mentioned. Based on the same thoughts, one can deduce a right of the candidate State to be heard before each relevant decision taken in the accession process which would negatively affect this state. Such a right to be heard is a core element of the perception of a procedure as legitimate. The right to be heard enables candidate States to set forth their position before relevant procedural steps are taken.

These ideas are based on the assumption that the citizens of candidate States are meant to join the Union's legal order as Union citizens equal to all other Union citizens. Anneli Albi points out that from the point of view of the candidate States, accession to the European Union is quite problematic with regard to democratic legitimacy. During the accession process, the candidate state is not only required to fulfil the accession criteria, above all the Copenhagen criteria, but also it has to adopt the entire acquis communautaire. This includes a transformation of the legal order of a country, affecting between fifty and eighty percent of the body of norms. Obviously, such a transformation process is likely to tie down for years a substantial part of the executive and legislative capacities of the state in question.

From the point of view of democratic legitimacy, the core issue is that candidate States are required to adapt to a legal order although their peoples did not take part in the democratic process establishing this legal order. In many cases, the transformation will be irreversible, and with a view of the future functioning of the Union, a certain irreversibility of the transformation processes is perceived as a desirable side-effect of accession negotiations. The democratic rights of the peoples of the candidate States during the accession process, however, are reduced to either accepting or rejecting the accession treaty at the end of the process, at a point when many irreversible transformations have already taken place.

Even the most radical proponents of the thesis that accession to the union is a uniquely political process acknowledge that candidate States have to weigh up the democratic and economic risks of the accession application on the one hand, and the possible profits arising out of membership on the other hand. However, it is incomprehensible how the relevant political bodies in the applicant State are to be enabled to

perform such an appreciation of values if on the other hand the Union is free to alter the accession conditions at any time and apply them differently in every single case, even going beyond the written accession criteria.

Under such circumstances, it would be impossible to weigh up the costs of an application for membership. It is thus indispensable that the costs of the application, described by precise accession criteria, are known to the democratically elected policymakers and decision-making units of the applicant State before the decision on the application is made. We come to the conclusion that an accession process designed as a political process without legal fundament would correspond neither to the outstanding role of the principle of enlargement in the European Union legal order nor to its concretisation by the possibility of accession in Art. 49 TEU.

To sum up, we have observed that the accession process to the European Union creates a striking democratic deficit in the candidate countries. This deficit is remedied years later, within the scope of a successful integration of the candidate country, by the democratic participation in the common decision-making process in the Union. Only the assumption that the accession process takes place as a legal process, regulated by law, and applying the law, impedes the danger that candidate States might become hostages of arbitrary political decisions of the governements of the current European Union Member States represented in the Council. Thus, only a legal process can justify, with regard to democratic legitimacy, the democratic risks an application for European Union membership encompasses.

With regard to the accession process of the Republic of Croatia and the postponement of the opening of accession negotiations in March 2005, the legal question the Council had to find a consensus on in order to open the negotiations was whether Croatia was respecting the rule of law, by fully cooperating with the International Criminal Tribunal for the Former Yugoslavia. The obligation to cooperate with the ICTY can be deducted from several impressive sources of national and international law.

The present study shows that it was the Commission's task to provide the Council with all the necessary data to decide this question. This can be deduced from the role of the Commission as an institutional body within the framework of the Union's institutions. It also follows from the institutional balace of powers in the European Union. Among the Union's institutions, only the Commission is attributed with sufficient

resources to lead an ongoing, long-term evaluation of facts, as it is required in accession negotiations.

In the present case, however, the Council did not rely on material provided by the Commission to evaluate whether the Republic of Croatia was fully cooperating with the ICTY. It relied on an assessment by the ICTY's prosecutor, Carla Del Ponte. Ms. Del Ponte made her initial assessment on Croatia's cooperation dependent on whether the alledged war criminal Ante Gotovina had been transferred to the Court in The Hague. While the authorities of the Republic of Croatia consistently asserted that Gotovina had fled the country and that they could not get hold of him, the ICTY prosecutor's assessment claimed that Ante Gotovina could still be located in the "Croatian" sphere of influence. However, due to the purpose pursued by the Tribunal to resolve legal issues connected to the severe crimes committed during the conflicts leading to the dissolution of former Yugoslavia, which had been fought along ethnic lines, in the terminology of the work of the ICTY, "Croatian" refers to the Republic of Croatia as well as to the Croatian entity in Bosnia and Herzegovina. Thus, Ms. Del Ponte suspected Gotovina to hide either in Croatia or in parts of Bosnia and Herzegovina, and she did not provide any proof that the authorities of the Republic of Croatia had access to the general.

In the legal scope of the accession process to the European Union, "Croatia" nevertheless may only refer to the Republic of Croatia. When the Council relied on the prosecutor's assessment, while both institutions were using the term "Croatian", the understanding of the term in the Council's question was not congruent with the understanding of the term in the answer the prosecutor provided. This is why Union law accredits the task of providing the factual basis of the Council's decision to the Commission. It follows from an analogous application of the principles created by the European Court of Justice in *Meroni* that the Commission could not fully delegate this task to an organization outside of the legal framework of the Union. However, the ICTY is not part of the Union's legal framework. By outsourcing the evaluation of Croatia's cooperation with the ICTY to the prosecutor instead of only using the ICTY's expertise and cross-checking it with the procedural and factual requirements of Union law, the Commission had thus violated the procedural rights the Republic of Croatia had in the application process. In the terms of the system-theoretical understanding of legal process developed in this study, the information on Croatia's compliance with the accession criterion of respect for the rule of law had not been adequately filtered in accordance with the rules of the

procedural system, and translated into terms immanent to this system. It was thus an infringement of Croatia's procedural rights that this information became decisive for a procedural step to be taken.

The study then shows that the conflict was resolved by the creation of a "Task Force on Croatia", as an extraordinary body that nevertheless remained within the Union's legal framework, and a new assessment by the ICTY prosector addressed to the "Task Force" in October 2005. In this assessment, Ms. Del Ponte based her evaluation of Croatia's full cooperation with the ICTY on the fact that "[t]here is no evidence that Croatia is not doing everything it can to locate and arrest Ante Gotovina" – while Gotovina had still not been transferred to the Hague. It becomes clear that from March 2005 to October 2005, the burden of proof had shifted.

In a further step, the study then develops the core constitutional requirements that have to be met by an applicant State before Council can exercise its margin of appreciation on the application. These requirements are identical with the principles whose infringement by a Member State can lead to a suspension of membership rights based on Art. 7 I TEU. Art. 49 TEU and Art. 7 TEU are thus parallel legal processes, both targeted to safeguard a minimum of constitutional homogeneity in the European Union. Finally, a view on the accessions of Bulgaria and Romania shows advantages of the proposed understanding of Art. 49 TEU as a legal process rooted in the Union's Constitution.