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EDITORIAL COMMENTS

The rule of law as the backbone of the EU

This issue is dedicated to the memory of Henry (Hein) G. Schermers who died one year ago, in August 2006. Henry Schermers was editor-in-chief of this Review from 1979 to 1993, and a first generation scholar of European law. His first publication on EEC law was on "The grounds of appeal before the Court of Justice of the EEC".[1] His last full article in this Review was on "Legal education in Europe",[2] though he continued to contribute case notes and book reviews long after retiring from the Editorial Board. One area of European Community law which was most important to him was judicial protection, as demonstrated by his pioneering book on this topic, which has seen more than five editions.[3] Judicial protection and the rule of law go hand in hand: you can't have one without the other. It therefore seems appropriate in the Editorial of this issue to pay some attention to the current state of the rule of law in the EU.

It should be recalled that the original EEC Treaty did not contain any reference to such a fundamental principle. That Treaty did, of course, provide for some basic forms of legal protection, in particular the Articles 173 and 177 – now Articles 230 and 234 EC. In fact, the line of reasoning of the Court of Justice which led to the finding that Community law had direct effect was based on the role of Article 234.[4] From there on the Court proceeded in a more or less straight line, developing its case law on the principles common to the legal traditions of the Member States in order to come to the recognition of the general principles including the rule of law.

The Union's foundation on the "rule of law" is now enshrined in the preamble and Article 6 TEU, but the Court of Justice had already laid down this

1. Schermers, "De middelen waarmee een beroep voor het Hof van Justitie van de Europese Gemeenschappen kan worden ingesteld", *Europese Monografieën* No. 1.

2. 30 CML Rev., (1993), 9–15.

3. The latest edition under the original title was: *Judicial Protection in the European Communities* 5th ed. (Kluwer Law International, 1992) with Denis Waelbroeck; in 2000 a new edition with the title *Judicial Protection in the European Union* was published.

4. The Court reasoned that the task assigned to the ECJ under Art. 234 showed the Member States' acceptance that Community law could be invoked before national courts.

principle, and the requirements of judicial protection, in its 1986 *Les Verts* judgment, which remains as relevant today as it was twenty-one years ago:[5]

> "It must be first emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measure adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural and legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them, and in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling."

The contributions in the present issue of the Review are all related in some way to this theme. In the first article of this issue, Peers considers the effectiveness of judicial protection within the third pillar in the light of the case law of the Court of Justice on *Pupino* and *Segi*. Right from the signing of the Treaty of Maastricht, doubts were expressed on the compatibility of certain provisions of the second and third pillar of the EU, and those on the jurisdiction of the Court of Justice, with the basic principles of legal protection and the rule of law. Peers begins his analysis by examining the jurisdiction of the EU courts over third pillar matters; he then discusses the legal effect of third pillar matters in the national legal order. The final part of his article concerns the application of the general principles of law to the third pillar. Despite the Court's best efforts to date, there are according to Peers some fundamental defects in the legal structure of the third pillar that the Court cannot repair by itself. Review of legality of EU acts and their effective and uniform interpretation within national legal systems appears not to live up to the basic minimum standards established by the Community legal order.

5. Case 294/83, *Parti écologiste 'Les Verts'* v. *European Parliament,* [1986] ECR 1339, para. 23.

The second pillar also has its problematic aspects, as is demonstrated by Heliskoski's annotation of the CFI judgments in *Ayadi* and *Hassan.*[6] These judgments, following on from *Yusuf* and *Kadi,*[7] make it clear that for anyone targeted by Community economic and financial sanctions, based on a prior designation by the UN Security Council and its Sanctions Committee, the prospects of having those measures declared invalid before the Community courts remain bleak. In *Ayadi* and *Hassan* the Court of First Instance has elaborated on the standards of Community law to be taken into account by the national authorities while applying the exemptions and derogations set out in Council Regulation 881/2002 or when they conduct a judicial review of the national measures taken in the context of a particular designation. However, these standards concern only the conduct of national authorities when they implement measures adopted at Community level and have no bearing on the scope of the judicial review to be carried by Community courts in respect of the Community measures in question. The CFI has found that review before the Community courts is limited to whether *jus cogens* has been observed by the Security Council, as a result of which "the prospects of an individual to have the sanctions imposed upon him by the Community quashed are next to non-existent."

The problems in the legal protection of persons targeted by Community measures following instructions by the Security Council are also illustrated in Eckes' annotation of another CFI judgment, this time *Organisation des Modjahedines du people d'Iran (OMPI)*.[8] The sanctions challenged in *OMPI* were different from those at issue in *Yusuf, Kadi, Ayadi* and *Hassan,*[9] based as they were on a Union rather than a UN listing, and it would be wrong to conclude that the CFI has changed its position in principle that it has no authority to review the decisions of the Security Council. In *OMPI,* the CFI annulled, insofar as it concerned the applicant, Council Decision 2005/930/EC implementing Regulation 2580/2001 on specific restrictive measures di-

6. Case T-253/02, *Chafiq Ayadi* v. *Council*, judgment of the Court of First Instance of 12 July 2006, nyr; Case T-49/04, *Faraj Hassan* v. *Council and Commission*, judgment of the Court of First Instance of 12 July 2006, nyr

7. Case T-306/01, *Yusuf and Al Barakaat International Foundation* v. *Council and Commission*, [2005] ECR II-3533; Case T-315/01, *Kadi* v. *Council and Commission*, ECR [2005] II-3649.

8. Case T-228/02, *O.M.P.I.* v. *Council*, judgment of the Court of First Instance of 12 Dec. 2006, nyr.

9. While *Yusuf, Kadi, Ayadi* and *Hassan* were designated by name in the UN Security Council and the Sanctions Committee, *OMPI* was identified as a supporter of terrorism through the European identification procedure set up by the Community. See, Common Position 2001/930/CFSP on combating terrorism (O.J. 2001, L 344/90) and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (O.J. 2001, L 344/93).

rected against certain persons and entities with a view to combating terrorism, adopted pursuant to a Security Council Resolution. The annulment was based on the ground that the applicant's right to a fair hearing had not been observed, the decision did not contain a sufficient statement of reasons, and the applicant's right to effective legal protection was infringed. As far as the CFSP common position was concerned which also listed *OMPI*,[10] the CFI dismissed the action because it has no jurisdiction to review law adopted in the second pillar. The difference in standards of review between the pillars highlights the limits to possibilities of judicial protection which interfere with the EU's aspiration to be a Union based on the rule of law, and are considered by some to undermine the legitimacy of the CFSP.

In the Community Pillar judicial protection also comes up against certain limits, as appears from Varju's annotation of *Reynolds*, where the applicants failed to surmount the hurdle of showing that the act which they wished to have annulled was an act susceptible to review under Article 230 EC. Nevertheless, the annotation identifies in the judgment elements of a comprehensive approach to judicial review in the first pillar.

The development of the concepts of direct effect and supremacy has, of course, contributed essentially to the effective implementation of the rule of law in its European aspects in the legal orders of the Member States. Dougan elaborates two competing models of the relationship between these concepts. After testing the explanatory power of these models against the case law of the Court and analysing the vices and virtues of both visions, he judges that of the two his so-called "trigger" model has more descriptive power and is more intellectually sustainable, especially in the light of more recent cases such as *Pfeiffer*[11] and *Berlusconi.*[12] He concludes that there is no model to accommodate all the Court's jurisprudence on indirect effect of directives, and that even the "trigger" model offers only an incomplete alternative explanation. The question of horizontal direct effect remains the subject of a lively debate.

Becker in his article analyses the interplay of the principles of supremacy, effectiveness, equivalence and autonomy in the application of Community law by a Member State authority. Obviously, these principles have an important bearing on the rule of law in the Member States, because the first three principles have been gradually broadened without corresponding amendments in the EC Treaty. Becker argues that, as a result, the indirect application of

10. *OMPI* was also included in a European list annexed to a Common Foreign and Security Policy common position. Common Position 2002/340/CFSP (O.J. 2002, L 116/75).

11. Joined Cases C-397–403/01, *Pfeiffer*, [2004] ECR I-8835.

12. Joined Cases C-387, 391 & 403/02, *Berlusconi*, [2005] ECR I-3565.

Community rules displays a more systematic rather than just an ad hoc influence of Community law principles on national procedural law. The interplay of these principles when assessing the sustainability of an individual administrative decision violating Community law constitutes the thrust of his article.

The development of procedural rules in the area of State aid is yet another example of a steady path towards more legal protection. It should be remembered that in the early years of rebuilding and development of the economy, State aid went largely uncontrolled. Although the EEC Treaty Article 93(3) required the notification of State aid, it was mainly up to the Court of Justice to lay down the basic procedural rules. These rules were finally codified in the Council Regulation 659/1999 (the "procedural Regulation"), which aimed to make State aid control more transparent and more efficient, by integrating the fragmented procedural rules in one coherent and binding legal instrument. Now, eight years after its adoption Sinnaeve evaluates the first experiences with the procedural Regulation. The primary objective of the Regulation being to enhance legal certainty, overall, the instrument has fulfilled its aim and contributed to the consolidation of the rule of law in the State aid field as well.

The annotation by Roth of the *FENIN* judgment[13] reminds us of the gradual expansion of Community law into the area of State-controlled economic activities. The development of the Courts' jurisprudence on the concept of undertakings and the application of Article 86 to public undertakings, exclusive and special rights have brought this area into the ambit of the Community rule of law. It was perhaps more than a fortunate coincidence that this case law appeared around the time when the regimes in former Eastern Block countries changed.[14] As the case law on Article 86 and the norm of Article 3(1)(g), 10, 81 and 82 developed, concerns were also expressed about the need to keep services of general economic interest alive and well. This was addressed in Article 16 EC, following the Amsterdam revision of the Treaty. Ross' contribution explores the increasing importance of non-economic values and principles in the construction of a new model of EU competition law.

An essential strand of the judgments of the Court of Justice underpinning the rule of law consists of the case law on the legal basis. There can be no Community act without a proper legal basis and the Court will see to it that this principle is respected. As Ludwigs puts it in his annotation, the second Tobacco advertising judgment – like its predecessor – can be described as

13. Case C-205/03 P, *Federación Española de Empresas de Technología Sanitaria (FENIN)* v. *Commission*, judgment of the Grand Chamber of 11 July 2006, [2006] ECR I-6295.

14. This development was of course also influenced by the changing political climate of deregulation

a leading case on the vertical order of competences of the EC. On the same issue, the *PNR* judgment[15] addresses the external competence of the EC to conclude agreements on the transfer of passenger data to the US authorities. Here, the annotators, Gilmore and Rijpma, are disappointed that the Court did not also seize the opportunity to rule on questions of the fundamental right to privacy.

In a number of cases, accession to the EC, later the EU, has undoubtedly played a fundamental role in strengthening the rule of law and judicial protection around the continent. The accession of Greece, Spain and Portugal in the 1980s made an essential contribution not only to accepting the rule of law in areas governed by Community law, but also to the general acceptance of this principle in the legal order of countries emerging from a fascist regime. A similar development has taken place on a monumental scale with the accession of the former Communist countries and the reunification of Germany. In order to be able to start accession negotiations and eventually accede to the EU, these countries had first to meet the Copenhagen political criteria, which require "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities". The Copenhagen political conditionality is also given its Treaty basis in Article 49 TEU. Enlargement has shown its enduring value as one of the EU's most effective policies, successfully contributing to the proliferation of the rule of law, promoting democratic development and contributing to peace and stability both within the EU and in its relations with the neighbouring States.

The EU is certainly not the only body committed to spreading the rule of law in Europe: the Council of Europe should not be underestimated. In many ways, the Council of Europe is the oldest institutional watchdog of human rights principles, pluralistic democracy and the rule of law.[16] Membership of the Council of Europe became an implicit condition for become an EU candidate. In the post-1989 era, the Council of Europe and the European Commission launched important joint programmes to support the efforts of the numerous countries implementing these principles. As the accession process of the Central and Eastern European countries, and their transition to democracy, has been completed most of the remaining joint programmes aim at facilitating institutional reform and support for the development of the legal system of other members of the Council of Europe. These programmes tend

15. Joined cases C-317–318/04, *European Parliament v. Council and Commission,* judgment of the Grand Chamber of 30 May 2006, [2006] ECR I-4721.

16. From 1981–1996 Henry Schermers was member of the Commission for Human Rights in Strasbourg.

to be country-specific and cover a wide geographical area, stretching from Bosnia and Herzegovina to Azerbaijan.[17]

In the tussle of day-to-day politics in the EU, it is easy to forget how the founding of the European Economic Community and its development into the European Union have played a part in creating a climate in which the rule of law could flourish. No matter how heated the debate on the Treaty reform process is, no one would dare to challenge the necessity to uphold and expand the now well-established principle of the rule of law. This development was in no mean way stimulated by the European lawyers of the first generation.

17. Albania (since 1993), Ukraine (since 1995), the Russian Federation (since 1996), Moldova (since 1997), the three Caucasian Countries – Armenia, Azerbaijan & Georgia (since January 1999), Serbia and Montenegro (since 2001), Turkey (since 2001), Bosnia and Herzegovina (since 2003) and also The Former Yugoslav Republic of Macedonia. See ec.europa.eu/external_relations/coe/index.htm#back