THE OBJECTIVES OF THE E.E.C. AS STANDARDS OF THE EUROPEAN COMMUNITY LAW

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LES OBJECTIFS DE LA C.E.E. COMME STANDARDS DU DROIT COMMUNAUTAIRE

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I

Legal rules in terms of their objective dimension as standards of evaluation of conduct (1) are actually the safest methodological basis. However, legal standards do not cover the field of standards of appraisal fully (2). The indeterminacy due to unsettled law, in particular to standards in the narrower sense mentioned below, necessitates having recourse not only to the more stable parts of the system, but also to additional extra-legal standards. By virtue of this, the general social goals of the system can be considered as standards by which to evaluate the claim of rights (3). Equally we cannot disregard the interpretative value of the social aims of the given institution or set of rules or particular rule. Principles, on the other hand, differ from policies in that they are general standards. Moreover, even the above mentioned sorts of standards are not exhaustive of the totality of second order standards. So Dworkin speaks about other standards at the end of his own enumeration (4). Indeed, in the context of legal reasoning are also included other criteria known as guiding standards (5). Generally speaking, traditional standards in the broad sense are divided into first order standards and various implicit elements. It is a matter of more general interest if these elements are still another source of law (6).

The varied interpretative weight of the various subordinate standards must briefly be discussed for the purposes of this lecture. To begin with, the consequence of a concret social situation or relation is governed by a principle and thus a new norm in its entirety as condition and consequence comes into being. Accordingly and in view of the fact that principles are anyway accepted as part of positive law, the technique of transformating principles into complete norms is the same, whether the norm be a legal rule or original judge-made law. The principle of the judgment in the case Riggs v. Palmer (115 N.Y. 506, 22 NE 188, 1889), relying on the general principle that no one can profit by his own fraud (7), is practically equivalent to

(1) The term is used by Raz in analyzing the structure of rules (J. Raz, The concept of a legal system, 1980, pp. 22 ff.).
(2) Evaluation relates to conduct, appraisal to judicial decisions ; See H.L.A. Hart, Essays in Jurisprudence and Philosophy, 1983, pp. 105, 109.
(3) H. Bredemeier, Law as an intergrative mechanism, in W. Evan (Ed.) Law and Sociology, 1962, at 74.
(4) See R. Dworkin, The model of rules, 35, U. Ch. L. Rev. 14 (1967).
(5) Cf. M. Freeman, Standards of Adjudication (1973), C.L.P. (Current Law Problems) 166, T. Eckhoff, Guiding standards in legal reasoning (1976) C.L.P. 205.
(6) See generally H. Gross, Standards as law (1968-1969) A.S.A.L. (Annual Survey of American Law) 575.
(7) Dworkin, op. cit.

the art 1860 par. I of Greek Civil Code concerning unworthiness to inherit. Secondly, the same is not true of policies because political and social aims of law have no legal validity of their own. Yet, by contrast with principles, policies, if embodied in legislative acts, would acquire binding force though not to the degree to be equalized to complete norms. In the hypothetical case we are examining, social goals would become established standards tending to develop into law and operating differently than principles whereas from the latter do not evolve new social situations. That means also that conversely in view of the model we spoke of at the beginning, established objectives would be imagined to be the initial position while legal rules compensate their insufficiency.

The preceding somewhat long introduction was necessary. This is because the objectives of the more general and comprehensive among the three European Communities are perhaps the only standards occupying the middle area of rules manqués of the above described type. More specifically, the objectives of the E.E.C. are those laid down in the Preamble and in Art. 1-8 of the E.E.C. Treaty and supplemented by the rules of the same Treaty setting out the common policies. It can be said that the policies of the Community are just detailed objectives. This is notably apparent with regard to the objectives of the Common Agricultural Policy (8). All the same only partly fall the principle Art. 100 and 235 of the Treaty under this category. Lastly, the statements and declarations included in the European Unique Act of February 1987 simply emphasize the already expressed ideological foundations of the Community.

Below we will examine the influence the objectives of the E.E.C. exercise upon the construction of complete rules and the contribution of these objectives to the formation of judicial precedents. At the end some concluding comments will follow.

II

The role of the main aims of the E.E.C. as basis of interpretation is only ancillary and complementary. Principally are these goals the substratum of legal rules. True, the content of legislative material cannot be accurately predicted with the aid of mere generalisations that do not surpass the stage of potential law. On the contrary, implementation of Directives by the harmonisation of national law is predictable to a greater degree.

(8) On the description and origin of the objectives of the C.A.P. see A. Ries, L'ABC du Marché Commun Agricole, 1978, p. 81, F. Snyder, Law of Common Agricultural Policy, 1985, pp. 15 ff.

Explicit objectives of the law and law itself are, however, more intimately associated than the nature of things and the corresponding norms though they are more loosely associated than original and derived European legislation. Contiguously it is to be noticed that deduction of rules from legalized objectives is independent of degrees of formal validity.

From the standpoint of perfect and selfsufficient Community law, either primary or secondary, is significant the distinction between the foundations of the Community which constitute the so-called four liberties, (the interdiction of certain discriminations and restrictions), and the positive legislative practices promoting the policies of the Community. The distinction is of importance to the problem of indefinite legal concepts since the rules of the former kind are those mainly containing such concepts. But some explanatory notes concerning indeterminate legal concepts in general must be interpolated to facilitate the approach to the specific issue of ambiguous concepts of Community Law.

It is impossible to prophesy of each right outcome in its particularity. Hence the relevant rule is sometimes restricted to marking out an average type of conduct, parts of which are indefinite concepts (9). One of the reasons for defining laws of this kind as vague or open-ended standards is the fact that the focus shifts towards the indefinite concept (10). The rule as a whole gives in turn meaning to the confused concept (11). In conclusion, the descriptive part of the rule and the indeterminate concept are imseparable. Accordingly, it is justified to make use of the terms legal standards, general clauses and indefinite commands of law indiscriminately to denote the same thing (12). This interpretative basis offered by the more solid parts of the rule is, to be sure, missing 1) in rule-like standards, namely in respect of conceptions that refer to conduct rather autonomously, as in the case of the concept of due care or diligence, and 2) in discretionary standards. So much for standards in the strict sense on grounds of general aspect. Of course, standards in the strict sense are fundamentally met in open legal systems and this is especially true in the case of E.E.C. Law (13).

(9) The conception of standards in the strict sense as defined in the text converges by and large with the definitions given with slight differences by J. Farrar - A. Dugdyle, Introduction to Legal Method, 1984, pp. 8-9 (with reference to R. Pound), and by St. Rials in his work titled "Le juge administratif français et la technique du standard", Paris, 1980.
(10) J. Bell, Policy arguments injudicial decisions, 1983, pp. 38, 132, 219.
(11) Note the interesting remarks of S. Rials, Les standards-notions critiques du Droit, in "Notions à contenu variable en Droit", Bruxelles, 1984, pp. 39 ff.
(12) E. Castberg, Problems of Legal Philosophy, 1957, at. 85.
(13) See further H. Bauer-Bernet, Notions indéterminées en Droit Communautaire, "Notions à contenu variable etc...", op. cit., at 269.

Typical examples of standards in the context of Community law are the Art. 85 and 86 of the E.E.C. Treaty about competition and the rulings of Dir. 75/1975 setting out the criteria of permitted indirect sex discrimination in labour relations. But, as already implied, of crucial importance are the exceptions to the four liberties. To be more exact, the application of a basic freedom is specially excluded on the ground that 1) the relative activity is connected with the exercise of public autority or 2) public order or public health should be protected. In fact, only the first exception is totally independent of specific circumstances of the interested country. And further a distinct category of reservation clauses constitute the safeguard clauses classified to discretionary standards. We must conclude, therefore, that with regard to degree of certainty the clauses mentioned above under n° 2 stand between the first class of clauses and safeguard clauses.

Finally it has to be noticed that in so far as European Community legislation, original or derived, clear or open-ended, is dominated by the objectives of the Community, it is sometimes thought to be necessary a case enumeration of types of Companies according to the law of each member-state or of classes of lawyers etcetera in a special annex in order to reduce the impact of divergence of domestic legislations.

III

The way the objectives of the E.E.C. affect judicial decision-making is now to be dealt with in respect of viewpoints a) common to every legal system b) specific for international law and c) relating exclusively to the E.E.C. law.

1) A legal standard can qualify another legal standard of higher legal validity. This is the case of Reg. 17/62 in the field of competition and of Reg. 1612/68 that is more detailed as regards the freedom of establishment. Quite another matter is the shaping of judicial standards (standards jurisprudentiels as Rials calls them), although they represent a particular form of standards in the strict sense. On the other hand, judicial rule creation is either original of intermediate. In both cases judicial standards conduce to consistency of adjudication by limiting judicial discretion (14). Examples of such rules of reason give the decisions of the Court of Justice in the cases 43/74 (van Dynn), 48/74 (Charmasson), 120/78 (REWE), 52/79 (Coditel). The

(14) Rials, Le juge administratif, p. 207.

remaining uncertainty margin has to be covered with the aid of guiding standards. As has been seen above, the final phase in the process of individualisation is a matter of judicial law making in terms of reasonableness in the perspective that every standard is by definition ideal standard.

2) It may be said that in addition to the vertical or internal dimension of selfdetermination of law, private international law possesses also an horizontal or external dimension of development to the direction of uniformity of elements common to differing legal orders. In furtherance of this view it has been suggested that indefinite concepts of international law ought to be uniformly interpreted by an international court (15). This suggestion has been materialised in the realm of legal order of the Community whereby elements of international law have been preserved. Apart from the concepts already mentioned, the principle of uniform interpretation applies also to the rest of abstract concepts of European law such as the concept of undertakings. Only on rare occasions is the interpretative difficulty a complex of terminology differences met in a multilingual text and difference between systems. In that event, if the problem has not authoritatively found its solution, the only way out is the remedial intervention of the Court. For instance, the Court of Justice of the E.E.C. held in case 30/77 (Bouchereau) that the terms dispositions, measures and Vorschriften are notionally identical and further that all of them comprise expulsion. It is noteworthy that unification in terms of case law is also expressed by the assumption that general principles of law are source of European law to the extent that they are common to the legal orders of all Member - States. That applies, for example, to the principle of proportionality in taking administrative measures.

3) The substantive side of the particular subject we are considering here is the more approximate to the specific content of the objectives of the Community. The action of these objectives is both direct and indirect.

First, the objectives of the E.E.C. are by virtue of their own nature constitutional standards conducting directly the interpretation of rules determined exactly by these objectives. As it has been pointed out by an eminent writer, the principles of equality, non-discrimination, liberty, solidarity and unity are interpretative principles as well (16). This is the reason why the

(15) Ch. Perelman, Le raisonnable et le déraisonnable en Droit, 1984, at 156.
(16) P. Pescatore, Les objectives de la C.E.E. comme principes d'interprétation dans la jurisprudence de la Cour de Justice, Mélanges Ganshof van der Meersch, 1972,

objectives of the E.E.C. perform an additional action similar to the constitutional interpretation of law. This thesis has been verified by recent judicial data (17). In principal, priority is given to outcomes most converging to the objectives of the E.E.C. mainly with the expansive interpretation of rules confirming fundamental principles, the restrictive interpretation of rules providing exceptions and the creation of according complementary standards. At first sight the view is justified that the interpretative power of the objectives of the Community is due to preference for teleological methods. Yet inversely the truth of the matter appears to be that the teleological interpretation is imposed by the moderately binding force of institutionalized objectives. On the whole only apparent is the cyclic character of the relation between the two functions we referred to previously.

Secondly, indirect action consists in framing new interpretative canons. For the proper treatment of this theme we take probatively for granted that the specific features of the supranationality of E.E.C. Law, just as they are known *post facto* to be recognized, have been enshrined in the Treaty. Now, if that were true, those characteristics would be effortlessly regognized as forming integral part of the Constitution of the Community. From all this it will be clear that the real question is whether the existing legal status is virtually equivalent to the respective principles. But because of the very content of the expressed ends of the E.E.C. the answer is in the affirmative. The only thing needed to fill in the gap owing to the fact that the initial presupposition is imaginary, is the process of deriving the new standards from those adopted by the legislature. The results of this interpretative work are at first stage the two well known devices, i.e. the *effet utile* and the *effet necessaire*, and at second stage the elaborate grounds of judgments giving effect to the principle of supremacy of E.E.C. Law (Case Costa V. Enel a.o.), or to the theory of direct effect (Case Simenthal), or to the principle of the exclusive competence of the Community (Case AETR, Case Kramer) (18).

325. Of course, it is essential to distinguish between general principles which emerge from the E.E.C. - Treaty and general principles of law.
(17) For a number of leading cases relative to the principles mentioned in the text, see J.V. Louis, The Community Legal Order, 1980, pp. 30 ff.
(18) Ultimately the Court of Justice has greatly contributed to European integration : see A. Vernardos, The elaboration of Community Law in terms of case law, "Legal Tribune", 1979, pp. 365 ff.

VI

The strategy of Community legal order is the adequate point of departure to set forth a new paradigm. To summarize the general idea, the legally accepted objectives of a potential legal system occupy a middle place between unwritten social targets and perfect rules. And to complement this conclusion, these *sui generis* dynamic standards are the foundation of the legal order corresponding to the predesigned framework and moreover a guide to its interpretation.