

UNIVERSITÄT DES SAARLANDES

Vorträge, Reden und Berichte aus dem Europa-Institut / Nr. 8

herausgegeben

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und Professor Dr. Michael R. WILL

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UNWRITTEN PRINCIPLES OF COMMUNITY LAW

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Vortrag vor dem Europa-Institut der Universität des Saarlandes

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Unwritten principles of Community law

Introduction

In this talk I propose to concentrate on three aspects of unwritten principles of Community law:

- (1) the reason for recourse to them;
- (2) how such principles are identified; lastly,
- (3) the problem of their interaction with legislation.

"Unwritten", in this context, means unexpressed in the Treaties. Clearly there are a number of principles which can be discovered in the Treaties, such as the principle of non-discrimination on the grounds of nationality, in Article 7 of the EEC Treaty, or the principle that men and women should receive equal pay for equal work, mentioned in Article 119. On the other hand, there are a large number of principles of Community law which are not to be found expressed or implied in the Treaties, such as the principle of proportionality, the right to a fair trial and the confidentiality of the lawyer client relationship. I do not think it profitable to list and comment on every one which the Court has so far found to exist.

1. Function of unwritten principles

It has been said that the European Court "has utilized general principles of law to cloak the nakedness of judicial law making" (1). This is, perhaps a slightly exaggerated assessment of one of the Court's functions. Like all the Community institutions, it acts within the limits of the powers conferred upon it by the Treaties (2). Those powers are to be found in the provisions giving it jurisdiction to declare an act of a Community institution void, to find that a Member State has failed to fulfill a Treaty obligation, to give preliminary rulings and so on. The role of the Court, in exercising its powers, is to "ensure that in the interpretation and application of (the Treaties) the law is observed" (3). Broadly speaking, the functions of the Court are, like any other judicial body,

(i) to apply rules of law to factual situations. But this necessarily requires it (ii) to identify the meaning and field of application of those rules. In the particular context of the Community, where the Treaties impose a basic legal framework and give power to the Community institutions to adopt secondary legislation, the Court must also (iii) determine the legality of the rules of law it is asked to apply. The discharge of this third function mirrors the two preceding it: in order to apply the appropriate rule of recognition, it is necessary to interpret it to know what it requires.

The ultimate responsibility for defining the rules of recognition to be applied by the Court lies with the Member States because they alone can make or amend the Treaties; and it is in the Treaties that is to be found the law that the Court is bound to apply. However, the Member States can only have done what it was within their capacity to do under international law. This opens up the possibility that they may have purported to do something which they could not lawfully do. It might then be said that, in such a situation, the Court cannot question the lawfulness of the Treaties because to do so would mean it had power to determine the ultimate criteria by which the validity of the instruments giving it jurisdiction must be tested; instead, its concern is only to apply the rules of recognition incorporated in the Treaties to the acts of the Community institutions in order to determine the legality of the latter. The paradox of a Court having power to determine the validity of provisions giving it jurisdiction vanishes, it has been said, "if we remember that though every rule may be doubtful at some points, it is indeed a necessary condition of a legal system existing, that not every rule is open to doubt on all points. The possibility of courts having authority at any given time to decide these limiting questions concerning the ultimate criteria

of validity, depends merely on the fact that, at that time, the application of those criteria to a vast area of law, including the rules which confer that authority, raises no doubts, though their precise scope and ambit do" (4). However that may be, the meaning and legal significance of the form of words embodied in the Treaties can only be determined by the Court in the light of rules which lie behind, as it were, the text giving it jurisdiction. In the final analysis, this boils down to what is meant by "the law" whose observance it is the Court's purpose to ensure.

For present purposes, "the law" can be said to comprise "rules of law", which specify what, in law, ensues when a given state of affairs exists, and "rules of recognition", which define the criteria identifying something as a rule of law. The former are, in relative terms, generally clear and it is not necessary to do more than interpret them, although that in itself can be a complicated business. The classic example of a rule of law which cannot simply be interpreted is that governing the non-contractual liability of the Community under the EEC Treaty. Article 215 provides: "in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties". Here the rule of law is not stated simply, as, "if the Community causes any (non-contractual) damage by its institutions or its servants, it shall make good that damage". As so expressed, the rule is one of strict liability without limitation. Instead, what the rule specifies as ensuing when (non-contractual) damage is caused is subjected to the condition that it is in accordance with the general principles common to the laws of the Member States.

In Case 43/75 Defrenne v. Sabena (5), the Court observed that, "in the language of the Treaty", the word "principle ...

is specifically used in order to indicate the fundamental nature of certain provisions ...". It was there referring to the use of the word "principle" in Article 119 of the EEC Treaty, the title to the first part and Article 113. It does not necessarily follow that the same meaning is to be applied in the different context of Article 215 but I think it can be taken to be the Court's view that, in that Article, the draftsman of the Treaty refers to the fundamentals of the laws of the Member States. In substance, the Member States have left a lacuna in the rule of law governing the Community's non-contractual liability, contenting themselves with an instruction to the Court (6) concerning the method to be adopted by it when filling the lacuna and completing the rule. That method, as interpreted by several Advocates General, involves a critical comparative study of national law with the object of isolating the solution which is most appropriate having regard to the objectives of the Treaty and the structure of the Community (7).

Even when a rule of law is complete and only requires interpretation, the Court has had recourse to a comparative study of national law. The locus classicus for this is the opinion of Advocate General Lagrange in Case 3/54 Assider v. High Authority (8). The same approach has been used where the rule of law appeared in a convention (9).

Turning to rules of recognition, some provisions of the Treaties are quite specific. Article 38 of the ECSC Treaty, for instance, says that the Court may declare an act of the Assembly or the Council to be void on the grounds of lack of competence or infringement of an essential procedural requirement. The rule of recognition, so far as these acts are concerned, is, therefore, that the author of the act has acted within its powers as defined by the Treaty and has not, in the adoption of the measure, failed to observe

certain essential aspects of the procedure laid down. Articles 33 of the ECSC Treaty and 173 of the EEC Treaty, on the other hand, while setting out several readily comprehensible criteria, also refer to "infringement of this Treaty or of any rule of law relating to its application". Ex hypothesi, the latter are not to be found in the Treaties, but neither Article specifies where they are to be found nor are the words "rule of law" expressly or impliedly limited to those rules which are written down. The position is even more vague when one comes to Article 41 of the ECSC Treaty and Article 177 of the EEC Treaty. Both provide that the Court may rule on the "validity" of acts of the Community institutions but neither specifies the criteria determining validity.

The Treaties do not, therefore, clearly and completely set out the rules of recognition to be applied by the Court. Yet it is manifest that, for reasons of legal certainty, a community supposedly based on the rule of law cannot go on unless it is possible to state positively whether a particular rule is a valid rule of law or not. No legal system can have lacunae in its rules of recognition. Even more so than in the case of Article 215 of the EEC Treaty, the silence or obscurity of the draftsman indicates a delegation to the Court of the necessary function of defining the rules of recognition of Community law. If delegation is perhaps too strong a word, it is enough to say that the identification of the rules of recognition is an exercise in the interpretation of the relevant Treaty provisions (10) which properly falls within the powers of the Court as the Community institution exercising judicial functions under the Treaties.

The primary effect of a rule of recognition is negative. It may cause a spurious rule of law to be declared void and of no effect but it cannot bring a rule of law into

existence, that is a matter for the legislator. Hence the elaboration of rules of recognition can be said to be more an exercise in law breaking than law making. On the other hand, they can be said to have a positive effect in that the legislator is, or ought to be, guided in the exercise of legislative powers by the criteria set out in the rules of recognition. For example, respect for fundamental human rights is one of the most important categories of rules of recognition identified by the Court. The legislator knows that a rule adopted by it which fails to respect fundamental human rights cannot, therefore, be properly designated a rule of law. As a result, the legislator is encouraged to exercise its function in a way that is compatible with fundamental human rights. In this role, the rule of recognition becomes what I shall describe as a "principle". It is not a rule, *stricto sensu*, which governs a particular case, because the case, the rule of law which the legislator intends to create, does not yet exist; the rule of recognition is simply a guideline, which is what I shall take a principle to be, for present purposes.

If a rule (of recognition) can at the same time be a principle, depending on the context in which it is applied, so may a principle be a rule of recognition. Recourse to principles is an essential element in judicial decision making because the judicial function in any legal system cannot, in practice, be reduced to the mechanical application of a rule of law to a specific factual situation. For example, where the rule of law in question has various interpretations, the judge must use his discretion in selecting the one that is, in his view, appropriate. He is not bound by any rule in the exercise of his discretion but he may be influenced by a principle which he may invoke to justify his decision, e.g. the principles that interpretations which are incompatible with a superior norm are to be avoided in order to preserve the legality of the measure in question, or that, in certain matters, the interpretation should favour the individual or the State.

These principles do not bind the judge when he reaches a conclusion, it lies within his discretion to adopt them or not. Similarly, principles may be used to determine the selection of the rule of law which applies to the case - it occasionally happens that the relevance of a rule of law is dependent on how the facts of the case are to be characterised - or to resolve the problems of antinomies or legal paradoxes (11). In some legal systems, principles are often used for the purpose of deducing rules of law applicable to a particular case when none were before expressly laid down. In short, the invocation of principles is a characteristic of judicial reasoning and a necessary part of the judicial function in a legal system.

2. How unwritten principles are identified

In a given legal system, the primary source of the principles invoked by judges lies in what the judges, as a group, perceive to be the ethos of the legal system they administer. Their perception is formed by their education as lawyers and judges; it is often rationalised or stated in formal terms. Nevertheless, in the final analysis, principles are used to express what the judiciary perceive to be the concept of justice on which the legal system is based.

So far as Community law is concerned, there is as yet no common ethic for a number of reasons. First of all, the Communities have been in existence for only a comparatively short period of time. In that period great advances have been made but the conditions, necessary in order to create a common perception of the concept of justice that informs the Community legal system, do not yet exist. In particular, the Members of the Court change frequently: in the last two years the Court has increased in size by two judges and one advocate general but there have been nine new Members. This has probably been an exceptional

period of change but it shows that the constitution of the Court is not unvarying. This factor would not, perhaps, be of much importance were it not that the background of the Members is so diverse. Quite obviously, the fact that they come from different Member States means that they do not all share the same outlook on life but, had all of them been appointed because they were practising lawyers or judges experienced in Community law, there would be a common basis of approach. This is not so. Very few Members of the Court were judges before they were appointed to it; some were civil servants, others academics or practising lawyers.

I do not say this to criticise the method or criteria of appointment but simply to draw attention to the fact that the Members of the Court are not drawn from a recognisable group of lawyers with a common grounding in Community law. I doubt whether such a group exists in the Community law. I doubt whether such a group exists in the Community, at least as a reservoir of potential appointees to the Court.

The consequence is that each Member of the Court thinks instinctively in the way he has been trained to think as a lawyer in one of the Member States, not as a Community lawyer. This explains, in part, the recourse by the Court to national law in order to discover the principles of Community law which will guide it in the discharge of its judicial functions. Other ways of expressing it are that the rule of law on which the Community is based, cannot, in the nature of things, be radically different from that of all the Member States composing the Community; or that, when filling the gaps left in the Treaties by the Member States, the Court must search for the spirit motivating the Member States when they formed the Community, and this is to be found in the general principles which can be distilled from national law. The way it was put in Case 155/79

A M & S v. Commission (12) was as follows: "Community law, which derives from not only the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the laws of those States ..."

Until the A M & S case, there was, perhaps wisely, no decision of the Court which explained precisely the criteria or the method of finding a principle of Community law on the basis of an analysis of national law. From the opinions of several advocates general, at least one extra-judicial pronouncement by a judge and a few judgments of the Court, two basic approaches can be discerned.

In Case 14/61 Hoogovens v. High Authority (13) Advocate General Lagrange said "the case law of the Court, in so far as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical 'common denominators' between the different national solutions but chooses from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to it to be the best or, if one may use the expression, the most progressive. That is the spirit, moreover" he went on to say, "which has guided the Court hitherto". Some fourteen years later a judge of the Court, Judge Kutscher, echoed the same view in these words: "There is complete agreement that when the Court interprets or supplements Community law on a comparative law basis, it is not obliged to take the minimum which the national solutions have in common, or their arithmetic mean or the solution produced by a majority of the legal systems as the basis of its decision. The Court has to weigh up and evaluate the particular problem and search for the 'best' and 'most appropriate' solution." He added that "the Court draws its inspiration from this principle in 1976 in exactly

the same way as it did in 1962, whenever it interprets Community law by using the comparative law method or - in a law-making capacity - supplements it" (14). This approach has attracted a considerable body of academic support (15). It will be observed, however, that the principle discovered by this method is properly to be described as a principle of Community law, not a general principle of law or a general principle of national law.

The second approach is that which appears to have been adopted in the fundamental rights cases (16). The formulation adopted by the Court is in these terms, I quote from the judgment in the Nold case: "... fundamental rights from an integral part of the general principles of law, the observance of which (the Court) ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law." (17)

One eminent authority (18) has construed this passage to mean that, in the field of fundamental rights, the Court relies on three sources of inspiration: (i) the general principles of law (or, as it was put in Case 29/69 Stauder v. Ulm (19) "the general principles of Community law"); (ii) the constitutional traditions common to the Member States and (iii) international agreements. However this may be, what the Court actually said can be interpreted in two ways: (1) protection of fundamental rights exists as a general principle of Community law but the application of this principle in a given case is inspired by constitutional traditions and international treaties; or (2) as a

general principle of Community law, the protection of fundamental rights derives its sources from the constitutional traditions of the Member States and from international treaties. Before considering these two hypotheses, it should be noted that international treaties, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms, appear to be relied on by the Court not so much as an independent source of inspiration, but as a manifestation of the constitutional traditions of the Member States. Thus in the Hauer case (20) the Court held: "the right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights."

Returning to the two possible interpretations of the formulation adopted in the Nold case, there seems little profit or practical use in drawing a distinction between the existence of a general principle and its application. In most cases, a general principle is too broadly expressed to be applied in a particular set of circumstances and must, therefore, be given a concrete form. In the Hauer case, for example, the principle was to be found in Article 1 of the first Protocol to the European Convention and was expressed as follows: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. None shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." The problem before the Court in that case concerned the lawfulness of a Council

Regulation. In order to apply the principle as a rule of recognition, it was necessary to elaborate the meaning to be given to the terms "necessary" and "general interest". The way the Court carried out the operation of finding the principle and defining it for this purpose, shows that, in reality, the source of the principle of the protection of fundamental rights, as a general principle of Community law determining the validity of secondary legislation, is nothing more than "the ideas common to the constitutions of the Member States".

The Court has, however, emphasised that the process of inspiration from this source is indirect in nature. This can be seen from the use in the judgments of words such as "inspiration", "guidelines", "constitutional traditions" and "indications". Another important factor of the process is that the guidelines indications or constitutional traditions are supposed to represent a view "common" to the Member States.

It is arguable that too much should not be made out of this. There are in fact no commonly recognised fundamental rights which are protected by the constitutions of all the Member States. For example, the United Kingdom has no written constitution with entrenched rights of a fundamental nature. At most there are, in its legal systems, certain principles which are entitled to considerable respect but which may be overridden by a suitably-worded Act of Parliament. The Court could only have accepted that fundamental rights are recognised in Community law if the degree of consensus which it envisaged were something less than the existence in all the Member States of a specific rule of law. This seems to be borne out by its reliance on the European Convention which, although it does not reflect rules of law enshrined in the national law of every Member State, represents views held in common by them.

Indeed, in his opinion in the Hauer case (21) Advocate General Capotorti said that Article 1 of the first Protocol to the Convention simply reflected the "dominant tendency" of the legal systems of the Member States. The importance of Article 1 and the Convention as a whole, therefore, lies in the fact that all the Member States have subscribed to it, not that it summarises precisely the position in the national laws or constitutions of each Member State.

One can, indeed, go further and say that, despite the fact that, in the Hauer case, the Court seems to have regarded the European Convention as a reflection of the constitutional traditions of the Member States, the true source of the principle of the protection of fundamental rights is neither the one nor the other. Both are invoked, not as sources per se, but as manifestations of the common will of the Member States. It is the fact that all the Member States respect the protection of fundamental rights that is the source of the principle in Community law.

The question arises whether the "common view" or "consensus" approach is compatible with the "best and most appropriate solution", approach which, according to Judge Kutscher, had been followed consistently by the Court, at least up to 1976. Their incompatibility seems evident, as can be seen by reference to two cases: Case 17/74 Trans-ocean Marine Paint Association (22), where the principle in question was accepted by all but two Member States, and Case 110/75 Mills v. Investment Bank (23), where the Court referred to "the general principles of the law of master and servant" although Advocate General Warner found, after a detailed study of national law, that no such general principle "common to the laws of the Member States" existed that was relevant to the case. In both cases, had the Court applied the test seemingly adopted in the fundamental rights cases, it could not have found, as it did, that there

was a general principle of Community law. Judge Kutscher explained the decision in Mills v. Investment Bank as being based on "the development which is evident in every Member State and (on) an evaluative comparative law approach in line with social progress" (24).

In his opinion in the A M & S case Advocate General Sir Gordon Slynn attempted to synthesise the two approaches. In his view, the first step in finding a general principle of Community law is to see if there is "wide acceptance" in national law of a "general principle even if broadly expressed". This "wide acceptance" need not amount to unanimity and, in practice, is hardly likely to. Once it is found, it is for the Court to declare "how that principle is worked out in the best and most appropriate way ... in the context of Community proceedings". However, the Court followed neither him nor Advocate General Warner. Its judgment places a great emphasis on the need for unanimity in the laws of the Member States in order to find and define a general principle of Community law: "Community law ... must take into account the principles and concepts common to the laws" of the Member States; the importance of the justification of confidentiality "is recognised in all the Member States"; "there are to be found in the national laws of the Member States common criteria" Regulation No. 17 must be interpreted as "incorporating such elements of that protection (s.c. confidentiality) as are common to the laws of the Member States"; the condition that confidentiality attaches only to communications made with an independent lawyer "reflects the legal traditions common to the Member States" (25). This appears to be the first occasion on which the requirement that a general principle of Community law be founded on or inspired by a common view or consensus between the laws of the Member States has been applied outside the area of fundamental rights.

In this context, it is interesting to compare how the advocates general and the Court, respectively, approached the problem of defining the general principle at issue in the A M & S case. Both, Advocate General Warner (26) and Sir Gordon Slynn (27), had stressed the need, when searching for a general principle, to "look for the reality behind the labels"; the general principle, in other words, emerges from the purpose which the various rules of national law serve. Following this approach, Sir Gordon Slynn first established the existence of a principle held in common by the Member States: "a client should be able to speak freely, frankly and fully to his lawyer". The different legal rules and concepts adopted in the legal systems of the Member States to give effect to this general principle reflected historical and social developments, the structure of the legal profession and the legal system in each Member State and so on. He then proceeded to consider how the principle should be "worked out" in the context of Community law in order to define "the way in which and the extent to which it applies in Community law".

The Court, in contrast, identified the principle as being the protection of "the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the clients' rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment". This principle, of Community law, as so defined, is based on the common criteria to be found in the laws of the Member States. It is said to serve "the requirement, the importance of which is recognised in all the Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it". This is, of course, the general principle of national law on which Sir Gordon Slynn founded his principle

of Community law. But, whereas he adopted that principle into Community law and then proceeded to define it, for the purposes of the case, as a rule to decide the issue between parties, in the light of what was the best and most appropriate solution for the Community, the Court defined the principle it found solely by reference to what it asserted were characteristics common to the laws of the Member States. In this respect it should be pointed out that, although the Court held that documents in the hands of the client are protected from disclosure by the principle of the confidentiality of the lawyer-client relationship, this is, on the basis of the information before the Court, by no means a common feature of the laws of the Member States. It is possible that the Court, in reality, adopted the traditional approach of searching for the best and most appropriate solution.

In any event, the judgment must be regarded as unsatisfactory. If the Court really did look for the best and most appropriate solution, its constant references to what is "common" to the laws of the Member States give rise to uncertainty concerning the proper test to apply when finding a general principle of Community law. On the other hand, if the proper test is what is "common" to the laws of the Member States that is itself an unsatisfactory one to apply outside the area of fundamental rights. There, the Court has the inestimable advantage of being able to refer to the European Convention on Human Rights as a statement of a common position adopted by the Member States. Even more important, the Convention represents, not the state of the law in the Member States, but the aspirations of the Member States, the standard of protection which they aim to ensure even though that standard may not be met with a present in national law. In contrast, the incorporation directly into Community law of what is found to be common in national law, in areas other than fundamental rights, leads inevitably to

acceptance of the lowest common factors and a decline in the level of legal protection in the Community.

A commonly held principle may be applied in different ways in the Member States through the interaction of a number of rules of law, defined by the political, historical, social and economic circumstances of Member State or the structure of its legal system. It does not follow that the features of its application, common to all of the Member States, are apt, in the context of Community law, not least because Community law must be applied throughout the Community and not simply in one Member State. In particular to select only the commonly accepted features is to make community law dependent on a haphazard selection of rules rather than a scientific analysis of the problem. This approach also results in the exclusion of special features necessitated by the existence of particular situations in one or more, but not all, Member States. Community law cannot, of course, be formed solely on the basis of the idiosyncracies of one Member State but the fact that it must be applied in all Member States without exception means that it cannot choose to ignore the existence in one part of the Community of a need for a particular solution. Logically, the common factor approach does not and can never lead to the legal interpenetration of which the Court spoke in the A M & S judgment.

3. Unwritten and written law

Not all general principles of Community law, including fundamental rights, are absolute in the sense that they cannot be overridden by secondary legislation. An example is the "fundamental" right to property which, as the Hauer case shows, may be cut down by legislation. An important limitation on the power of the legislator to override a general principle of Community law which is not absolute

is that other unwritten principle, the principle of proportionality.

As a general rule, the question whether an unwritten principle of Community law is absolute or not can be answered on the basis of the comparative study of national law which reveals its existence. One particular indication of its strength is whether it is applied in fields covered by legislation, or written law, in the absence of any specific authority. This is, for example, the case, as I understand it, with regard to investigations carried out by the Bundeskartellamt under Articles 46 and 51 et seq. of the Gesetz gegen Wettbewerbsbeschränkungen. Nonetheless, the fact that, in national law, a principle is applied, directly or by analogy, when written law is silent, does not indicate that the principle is absolute; it only shows that it is important enough that it can be overridden, if at all, only by express words.

Just as the Hauer case, the A M & S concerned a broad principle that could be moulded by the public interest but which contained a central core that was absolute. In such a situation, it is, of course for the legislator, here, the Community legislator, to decide how the principle is to be applied in practice in the light of the public interest. The legislator cannot ignore the principle entirely nor can it exercise legislative powers to abolish it. The legislator is bound to respect the principle but has a certain area of discretion concerning its application. The exercise of this discretion is subject to review by the Court in order to ensure that it has not been exceeded, i.e. to make sure that the restrictions imposed are truly in the interests of the Community, that they respect the principle of proportionality and that they do not seek to override the central core of the principle. Although the Court can, therefore, decide what restrictions on the principle can

be imposed, it is not its function to decide what restrictions should be imposed: the choice between various possible restrictions falls within the discretion of the Community legislator. This was the view taken in the A M & S by both Advocate General Warner and Sir Gordon Slynn. For this reason, the latter, in particular, defined the scope of the principle broadly, on the basis that it was untouched by any limitation imposed by the Community legislator. Like Advocate General Warner, he considered that the legislation which had been adopted by the Community legislator, Regulation No. 17, said nothing about the confidentiality of the lawyer-client relationship and this silence was to be construed as indicating that the legislator had not restricted the application of the principle.

Sir Gordon Slynn did not define the principle found by him in absolute terms but left it open to the legislator to impose those limitations it felt right to impose, in the light of the Community interest, subject to review by the Court. The Court, on the other hand, defined the principle in absolute terms, leaving it to the legislator to extend it, when necessary. The reason for this may lie in a difference of view concerning the interpretation of Regulation No. 17: the Court may well have thought that the silence of the Regulation did constitute an attempt to restrict or abolish the principle of confidentiality. On this basis, the Regulation would only be ineffective against the core of the principle. Had this approach been adopted, one would have expected to see a discussion along the lines of that in the judgment in the Hauer case, dealing with matters such as the public interest in competition investigations and the observance of the principle of proportionality. This is, in fact, absent. Two other factors weigh against the view that the Court limited its definition of the principle because of the wording of Regulation No. 17. The first is that in paragraph 18 of the judgment, the Court, when referring to the Regulation, said that it did "not exclude the

possibility of recognising, subject to certain conditions that certain business records are of a confidential nature". It seems, therefore, to have considered that the silence of the Regulation did not affect this possibility in any way. Secondly, it was, if anything, the method used by the Court to find the principle which led it to the narrow definition it adopted. In view of this factor, it cannot be said that the Court consciously imposed its own opinion of the Community interest and so trespassed on the area of discretion which properly belongs to the Community legislator.

Conclusions

Although the case law concerning unwritten principles of Community law is one of the most creative areas of the Court's activities, it cannot really be described with justice as naked law-making, if by this is meant that the Court has overstepped the role defined for it in the Treaties. The duty imposed on it to ensure that the law is observed, necessitates recourse to unwritten principles in order to identify what that law is. This is primarily an exercise in interpretation rather than law making. However, the fact that the draftsmen of the Treaties left significant lacunae in them and the elaborate nature of the methods used by the Court to fill these gaps both conspire to give the impression that the Court is "making" new law. In this context, it is important, once again, to distinguish between rules of law and rules of recognition. While it is theoretically possible, although highly undesirable, that a legal system should have lacunae in its rules of law, it is impossible for it to have gaps in its rules of recognition. In such an event, it is impossible to decide whether a given rule of law is valid or not. When this happens, the resulting lack of certainty concerning what is "the law" affects the very foundations of the legal system: can the legal system be, if one does not know, and cannot find out, what the law

is? What the Court does is to clarify the obscurities in the rules of recognition by interpreting the text of the Treaty and, in particular, such words as "validity" in Article 177 of the EEC Treaty. It does not, however, "invent" law.

Annotations

- (1) Hartley, *The Foundations of European Community Law*, 1981, at p. 119
- (2) cf. Article 4 (1) of the EEC Treaty
- (3) cf. Articles 31 of the ECSC Treaty, 164 of the EEC-Treaty and 136 of the Euratom Treaty
- (4) Hart, *The Concept of Law*, 1972, ed. pp. 148-149
- (5) (1976) ECR 455 at para. 28
- (6) which has jurisdiction of the matter pursuant to Article 178 of the EEC Treaty
- (7) see, for example, Advocate General Gand in Case 9/66 Sayag v. Leduc (1966) ECR 329 at p. 346 and Advocate General Roemer in Case 5/71 Zuckerfabrik Schöppenstedt v. Council (1971) ECR 975 at p. 988
- (8) (1954-1956) ECR 63
- (9) e.g. Case 28/76 L.T.U. v. Eurocontrol (1976) ECR 1541 and Case 814/79 Netherlands v. Rüffer (1980) ECR 3807
- (10) "Law", "Validity", "Rules of law relating to its application" in Articles 164, 177 and 173 of the EEC Treaty, and so on
- (11) cf. *Les Antinomies en Droit*, Ed. Perelman, at pp. 204 et seq.
- (12) 18 May 1982, at para. 18 of the judgment

- (13) (1962) ECR 253 at pp. 283-284
- (14) "Methods of interpenetration as seen by a Judge at the Court of Justice", Judicial and Academic Conference, 1976, at p. 29.
- (15) see, for example, Ganshof van der Meersch, *L'Ordre juridique des Communautés européennes*, 1975, p. 169; Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 114; Louis, *L'Ordre juridique communautaire*, 1979, p. 64; Reuter in *Mélanges, Rolin*, 1964 at p. 273; and Zweigert, *Les Nouvelles*, 1969, para. 1203
- (16) see, for example, Case 11/70 Internationale Handelsgesellschaft v. E.U.St. (1970) ECR 1125 at para. 4 of the judgment, Case 4/73 Nold v. Commission (1974) ECR 491 at para. 13 of the judgment, and Case 44/79 Hauer v. Rheinland-Pfalz (1979) ECR 3727, at para. 15 of the judgment
- (17) It should be noted that the English version is inaccurate in that it refers to Treaties of which the Member States are signatories, whereas the French version, which sets out the form of words agreed by the Judges, refers to Treaties to which the Member States have adhered
- (18) Pescatore, *Revue Internationale de Droit comparé*, 1980, p. 337 at p. 340
- (19) (1969) ECR 419 at para. 7 of the judgment
- (20) *supra* at para. 7
- (21) at p. 3760

(22) (1974) ECR 1063

(23) (1976) ECR 955

(24) op. cit. at p. 27

(25) see paras. 18, 21, 22 and 24 of the judgment

(26) see his opinion in A M & S and also Mills v. Investment Bank, supra at p. 979

(27) in the A M & S case