Legal issues of European integration

Special issue dedicated to Professor Henry G. Schermers

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LAW REVIEW OF THE EUROPA INSTITUUT, UNIVERSITY OF AMSTERDAM

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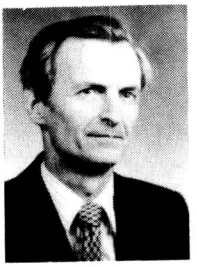

PREFACE

On the 30th June, 1978, Henry G. Schermers ended his work as the director of the Europa Institute of the University of Amsterdam to accept the functions of Professor in the Law of International Organisations and director of the Europa Institute, at the University of Leyden. During the fifteen years that he was attached to the University of Amsterdam he achieved considerable results. Apart from his many publications, I mention in particular the establishment of the International Course in European Integration and this Review, 'Legal Issues of European Integration', which next year will complete its first decade.

The Europa Institute of the University of Amsterdam wishes to express its deep appreciation for these accomplishments by the publication of the present volume, which consists of articles by Henry Schermers' friends and colleagues. It is a great pleasure that so many of them were prepared to contribute to this volume. It is at the same time a demonstration of the extent to which Henry Schermers' work and person are valued.

As the central theme we selected one of Henry Schermers' favourite subjects, namely the problem of legal protection. However, as Schermers himself did in his book 'Judicial Protection in the European Communities', we interpreted it broadly, also including general aspects of the Community's legal order such as, for instance, the relationship between Community Law and the national law of the Member States, and the direct effectivity of Community Law.

I hope that my predecessor will read the volume with pleasure. As well as expressing my gratitude to the contributors I would like to thank Miss Annelies Kramers for her editorial work and Mrs. Laura Schiesswald-Corduwener for her secretarial assistance.

RICHARD H. LAUWAARS
Europa Institute
Director

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LAURENS JAN BRINKHORST*

WORKING TOGETHER WITH HENRY G. SCHERMERS – SOME PERSONAL MEMORIES

Throughout the Sixties the study of the European integration process, in particular in its legal aspects was pursued actively at a number of Dutch universities. Both the size of the country, the interest in the Netherlands as a founding member state of the European Community in European affairs, and the more coincidental fact that nearly all those active in this field knew each other from previous experiences were contributing factors.

By 1961 the centre of European activities was located in the Europa Instituut of Leyden University, under the directorship of Professor Ivo Samkalden, former Minister of Justice, and later Mayor of Amsterdam. Apart from the pursuit of academic studies and teaching, it was felt that the broadening of the knowledge of European law could best be stimulated by extra-mural activities, such as lectures and evening discussions for interested professional circles: barristers and solicitors, judges, business lawyers and government officials.

Henry Schermers, then assistant legal advisor at the Dutch Foreign Office, was an active participant. Although his doctoral dissertation dealt mainly with the institutional aspects of the Specialised Agencies of the United Nations, he had already expressed his interest in European regional integration through publications on Benelux (with which he was concerned professionally) and the European Convention on Human Rights. His concentration on the institutional aspects of the European Communities followed logically. It was therefore natural that he should be offered to teach in the first post-graduate course of European law, in which the judicial remedies of the European Communities were analysed. It was a subject-matter which fascinated both him and me, and one which formed the nucleus of our close collaboration for the next ten years, both in writing and in teaching.

When Schermers was nominated a senior lecturer in the Law of International Organisations at the University of Amsterdam, he became at the same time a joint director of the Europa Instituut at that University. Here his considerable talents as an academic manager became quickly known.

* Head of Delegation of the Commission of the European Communities in Japan.

He made full use of the inter-disciplinary character of his Institute – economics, law and political science – and together with the NUFFIC soon started the post-graduate English language International Course in European Integration, which is now in its 18th year. It was subsequently supplemented by a still flourishing Summer Course, this time limited to the Legal Aspects of European Integration. Many practitioners of European Community Affairs, in government, industry or academic work have received their first training in European law and economics in Amsterdam. I vividly recall the many board meetings convened to hammer out the programme, to balance the budget and to select the teachers, in which Henry Schermers played a key role. Also at these meetings we selected some qualified participants, who now occupy prominent places in various positions in Europe. He mostly convinced by persuasion and not by confrontation and thus succeeded in getting his way in many instances throughout the complicated inter-faculty and sometimes even inter-university struggles. It was the time of democratisation, of interest in more participation on the part of students, but he had an easy passage throughout all these meetings. Another asset which served him well was his ability to delegate and his capacity to inspire a sense of responsibility in others, which led to better performances than would have been the case otherwise. In turn, he invited trust and for his part never failed to fulfil his promises.

But my best recollections concern the periods during which we worked together. Our joint teaching of the Course Judicial Remedies in the ICEI during which we experimented with the case-law approach well-known in the Anglo-Saxon world soon led to the idea to prepare a book of leading cases, which could serve a wider audience. As both of us had numerous obligations in our respective university towns of Amsterdam and Groningen throughout the academic year, this task was performed during summer sessions of one week or more. The first of these sessions took place in the summer of 1967, when my family had just moved to the northern University of Groningen, which had appointed me to its newly established chair of European law. Since Henry is a talented carpenter, he offered to build a book-case of superb quality and finish in my study, after our regular hours of solid work in European law. All this facilitated considerably our moving and getting installed in our new house, as Henry was also a handy man in reparing electrical equipment or fitting new lightbulbs.

We started this project in our respective homesteads, but soon decided that the best place of inspiration and uninterrupted work would be Henry's small summer cottage at 't Harde; a beautiful spot in the wooded countryside of Gelderland, near the IJsselmeer (the Netherlands' inland sea).

Even though the case-law of the Course in 1967 comprised less than one third of the number of volumes which have appeared until now, transporting our respective libraries to 't Harde was quite a complicated affair. One of us usually came by car, fetching the other at the small local station, some three miles from Henry's cottage. I vividly recall one arrival from Groningen with two suitcases filled to the brim with books and they were heavy indeed.

Schermers and I have very complementary characters, which meant in our case a close harmony cooperation. Also our working-rhythms reflected our different life-styles. Whereas Henry likes to retire very early, in order to start close to sunrise (which in the summer can be very early indeed) my daily cycle never brings me to bed before midnight. This proved to be a very practical arrangement, since this way we could use the hours spent separately, reviewing each others writing and reflecting on the work to be done next day. Also in this way we were not hampered by the need to use the same books. After work we made long walks in the woods and certainly did not only discuss the serious affairs of European Community Law which kept us busy throughout the day.

Somewhat to our surprise – unexperienced case-law teachers as we were at the time – the publication of *Judicial Remedies in the European Communities* also proved a commercial success, which prompted us to bring out a supplement and subsequently a second edition. Of course by now the book has become very much the intellectual property of Henry, since my involvement ended about ten years ago, when I left the legal field for politics.

The ties created during the period of this partnership have remained strong. And our contacts have expanded to other fields: joint mountain hikes in Austria, a winter sport vacation in Switzerland, membership of the Managing Board of the Dutch Association of European Law and building another book-case, after I moved again, this time from Groningen back to The Hague.

Even though our respective careers have grown in different directions, for both of us European affairs still is an important source of inspiration and daily activities.

JOHAN K. DE VREE*

THE RULE OF LAW: ORDER AND DISORDER IN POLITICAL SYSTEMS

I. INTRODUCTION

Large parts of human conduct and social life are, or seem to be, governed by all sorts of rules, norms, and standards; by customs and mores; laws and legal procedures, rights and duties; and by ethical or moral imperatives and injunctions. They constitute the fabric of civilized society, and the foundation of order, peace and security in human affairs. In their absence as, for instance, to a large degree in international life, society degenerates into a nasty and brutish state of nature.

In this article we will briefly go into the problem from whence such rules, laws, etc., derive. In what sorts of conditions or circumstances may we expect them effectively to govern the behaviour of individuals and of groups or organisations such as states? And, in particular, why is it that, while so much of social life within nations is indeed effectively governed by law (though to varying degrees, to be sure), a similar accomplishment has eluded us so far in the international sphere?

It is rather obvious that, in a brief article like the present one, justice cannot be done to the full richness and complexity of this subject. For a more complete and balanced treatment, the reader is referred to De Vree, 1979, a, b; 1982, Ch. 11; and to Rood, 1982 and 1983. It is, perhaps, not amiss to emphasise that, although our subject involves rules and norms, it is not itself of a normative nature. That is, we propose to discuss the emergence and effectiveness of rules or norms in an entirely factual way, just like any other empirical phenomenon. We observe that rules do apparently exist, and that individuals, whether singly or grouped in human systems do, sometimes, act in accordance with them. Our problem is to enquire into why this should be so, quite irrespective of whether we like it or not, and whether we find the rules involved beneficial or obnoxious, just or unjust.

* Professor of international relations at the University of Utrecht, senior lecturer at the Europa Instituut of the University of Amsterdam.

II. RULES, REGULATION, INSTITUTIONALISATION, AND INFORMATION

At the risk of being accused of stating the obvious: rules (which we shall henceforth take to comprise all sorts of rules, legal and non-legal or not-yet-legal) do not describe how people behave *in fact,* but set *standards* for judging such behaviour. To the extent, probably never perfect, that actual behaviour conforms to what the rule prescribes or proscribes we shall say that it is *effective.* And to the degree that social interaction, or social, political, and economic processes such as government or collective decision-making are enacted in accordance with rules, we shall call them (more or less effectively) *regulated.* When an entire system is thus regulated, such as a national state, a business organisation, or a bureaucracy, we shall speak of its (more or less effective) *institutionalisation.*

It is not difficult to see that the primary role of rules (as well as of regulation and of institutionalisation) is to provide *information.* Using that term in the general sense of modern information theory, the essence of information is to diminish uncertainty, or to increase the degree of order. Rules aim to do so especially with respect to man's social environment, that is, the behaviour of his fellows which constitutes perhaps the greatest and most important source of uncertainty in the life of every individual. Rules reduce such (social or behavioural) uncertainty by telling the individual what sorts of actions he may expect on the part of others; which claims upon others are allowed or legitimate, and will therefore be supported, and which not; and, conversely, against which claims from the side of others he may expect to be defended.

Man is an eminently social animal. That is, the success of most of his actions and enterprises, indeed his very survival, depends greatly upon what his fellows do or do not do – a degree of dependence which has increased ever more during recent centuries, and which obtains between mere individuals as well as between the nations of the modern world. As a result, for every individual or nation, the behaviour of other individuals or nations assumes an ever-increasing importance. But so does information about those others, about their actions, as well as about their interests, claims, and positions.

Basically this is so for two reasons. In the first place, life and behaviour involve continual choice and decision. To the degree that the social environment is uncertain or unpredictable, such choices and decisions are naturally more difficult. Risks, costs, benefits, and consequences, cannot be determined with any degree of accuracy and as a consequence, the attractiveness or unattractiveness of alternatives cannot be distinguished. Longer-term plans, investments, and enterprises become more difficult if not impossible, and so do trade and peaceful cooperation, all of which require a reasonable degree of certainty and predictability, *i.e.*, of order.

In the second place, interaction and social or political processes generally become more difficult and dangerous. For any more or less stable and peace-

ful interaction must needs be based upon a relatively clear and accurate knowledge on the part of those involved as regards their mutual relationships, their relative positions and power, what they have to accept from each other, and how far they can safely go in respect of one another. In the absence of such relatively accurate information, social life and politics, *i.e.*, the continual processes of mutual adaptation, of give-and-take, and of implicit or explicit bargaining which they involve, may all too easily escalate and degenerate into violence, frequently extremely harmful to all concerned.

Accordingly, information, and therefore the rules which provide it, is indeed essential to all forms of relatively stable and peaceful social life, to trade, peaceful cooperation, the individual pursuit of happiness, and civilized life generally. It will be the more so when mutual dependences between people or nations are strong – as they are in conditions of modern life, domestic as well as international. Probably the main source of the *legitimacy* of rules (that is, the extent to which they are found to be valuable by people), and hence of the willingness of those involved to abide by them, is precisely their role in rendering the social environment more predictable and orderly.

However, while the above explains the need for, and value or legitimacy of rules in conditions of considerable interdependence, it should be observed that it applies only to rules which are indeed effective, *i.e.*, to rules which are already obeyed by people (or nations, for that matter). For only such rules actually provide the information that people need so much. Rules, laws, norms, and moral injunctions are of very little use when they merely exist in the law books, or in the imagination of the lawyer, nobody paying much attention to them except in the form of occasional lip-service. Such rules do not order the social environment and cannot acquire much value or legitimacy. They will accordingly not become effective.

Here we hit upon one of the relations of 'feedback' that are so exceedingly common in nature and in social life. If the rule is not effective to begin with it cannot become so, or only with great difficulty, precisely for that reason. It goes far to explain why legal development in international life, as well as in the early stages of the formation of national societies, is such a slow process.

What, then, renders rules effective, or makes people conform to them?

III. THE EFFECTIVENESS OF RULES

One often meets with the idea that rules can carry human behaviour into an altogether different sphere, not governed any more by the 'natural' forces, interests and mechanisms that govern behaviour outside the sphere of rules. That is, the existence of rules is often taken to imply that behaviour is governed by the rules *instead of* by interests, values, and insights or expectations. It is important to recognise, though, that as *standards* of conduct or,

rather, of judgment, rules do not tell us anything at all about what people actually do and why they do it. When people do follow a rule or obey a law this cannot be explained from that rule or law but from the fact that, apparently, their interests and insights agree with what the rule or law prescribes or proscribes.

Now it has already been shown that effective rules *per se,* that is, irrespective of their substantive nature, do represent a high value to people. Accordingly, the information which rules provide represent one of the basic sources of its effectiveness. In a way, as almost anything is worse than disorder, people will be most willing to obey any kind of rule or law. Naturally, they will be more so to the degree that the rule agrees with their own interests, allows them to perform their favourite or profitable actions, defends them against the claims of others, and legitimises and protects their positions, enterprises and property. That a rule will more easily acquire legitimacy when it agrees better with the interests of those concerned almost goes without saying.

Finally, obedience to a rule can never be taken entirely for granted, how ever legitimate and how ever much it may generally agree with the interests of those concerned. There will always be occasions when people will be tempted not to obey the rules. In such cases the third factor ensuring the rule's effectiveness comes into play: 'sanctions'. By 'sanctions' here is meant every action involving (the threat of) more or less severe sacrifices aimed at deterring actual or would-be transgressors of the rule and thus ensuring obedience to it. Sanctions need not have a legal status. Etiquette involves sanctions just as much as the penal law, though no modern government would be prepared to mete them out. Likewise, the regulation of international life and the sanctions through which it is made effective (for instance, with respect to the delimitation and maintenance of spheres of influence or territorial boundaries) do not involve government and law in the proper sense of that word or hardly so.

Just as there is an intimate relationship between a rule's legitimacy and the interests of the subjects, so there is such a relationship between it and the probability and severity, hence effectiveness, of sanctions. Roughly the more legitimate a rule is, and the more it agrees with the interests of the subjects, the less often sanctions will be needed. Accordingly, the less weighty they will be and, as the number of transgressors is small, the more successful. As a result, they will also be more probable and therefore contribute more to the effectiveness of a rule. Conversely, when the rule is not very legitimate to, and does not square with, the interests of sufficiently powerful subjects (nations or people), sanctions will be costly, risky, and unsuccessful, therefore improbable. Thus, as is illustrated by the League of Nations' experience, in the conditions of international life a system of 'collective security' is doomed to be effective only in quite exceptional cases, characterised by Great-Power consensus and very weak transgressors.

These considerations already suggest quite clearly some of the more import- and social or 'power-political' parameters involved in the working of rules. To these we now turn.

IV. SOCIAL OR POLITICAL CONDITIONS

It is rather obvious that one cannot expect rules to emerge and develop when there is no need for them, *i.e.*, for the information which they provide. Accordingly, we should expect them to occur only in conditions of relatively high interdependence among people, groups, or nations. This in itself already largely explains why, so far, rules and (political or social) regulation and institutionalisation are to be found *within*, rather than *among* nations. During most of human history relations of interdependence have been of a rather limited scope, and largely restricted to members of the same group or nation. This situation still prevails today, although it must be recognised that, during the last two centuries, nations, too, have become more interdependent, largely as a result of technological and industrial evolution. Hence also the increased need for international law and organisation which is so characteristic of the present century.

However, as can be observed readily enough, the *need* for such regulation and institutionalisation, even though felt by all the members of the international cast, is not in itself sufficient to ensure their actual development and effectiveness. For, broadly speaking, these also require certain 'power-political' conditions to be satisfied. It follows from the argument of the previous sections that if rules, institutions or organisations are to function effectively, they should agree rather closely with the interests of a sufficiently strong or powerful group, coalition, or set of nations. If not, no sanctions will be forthcoming to ensure obedience to the rules involved in those cases, sure to occur, when such obedience is irksome. Naturally this will occur the more readily when the rule is *not* in agreement with the interests of those concerned. And when these are relatively powerful, they have the capacity to disobey the rules with impunity. Hence, they are also sure to do so. These considerations are the more compelling as, during the early stages of rule development, regulation and institutionalisation, the rules involved cannot as yet have much independent legitimacy, due basically to their rendering the social environment more predictable, and precisely because they are as yet not effective.

This situation is rather characteristic of the international scene, the more so as those whose agreement with, or obedience to, the rules, *viz.*, the Great Powers, are also those who are inevitably strongly opposed to each other. Accordingly, it is extremely difficult to find or construct one dominant coalition or power that could agree to one and the same set of rules, to the extent that *its* members would not be inclined to disobey them, and that they would be able and willing to deter others from such disobedience. This will be all the more so if the rules concerned touch their vital interests, for instance, their capacity and freedom to wage war and to arm for it. It should be recognised, though it is often forgotten by our contemporaries, that this situation was equally characteristic of *national* legal development or institutionalisation in the more or less distant past. In fact, the process of national integration or state formation consisted and still consists largely of the growth

of a dominant power, *viz.* the government, as the prime condition for order and effective legal development.

It is important to see that the conditions just discussed, *i.e.*, a high degree of interdependence and the emergence of a highly homogeneous dominant group, should not merely be satisfied occasionally. As rules are made to function for many, often unforeseen events or cases, these conditions should be satisfied in a regular, stable and predictable manner. Instability and unpredictability in relations among the members of a system, especially when they are powerful, prevents the emergence of those stable expectations that are a prerequisite for any 'decisions' to obey, support, or value a rule or institution. They render it impossible to judge whether or not the rule is in one's interest, whether sanctions will be forthcoming in the future, and whether others will obey it in the future so that it may pay to obey the rule even when it is to one's own disadvantage.

This is again a matter of information so that we arrive at the conclusion that if rules are to emerge and effectively provide information, such information must already be there – another example of a dynamic feed back relationship. It means in particular that rules can emerge and function effectively only in such cases when those involved already have sufficiently accurate and dependable information as to each other's relative power, interests, intentions, opportunities and limitations. Such information is possible only in conditions of relative stability, in the absence of frequent and great disruptions or intensive social and political change, in particular as regards dominant relations that may exist in the system.

It will again be clear that while these conditions are to some extent satisfied in established, integrated national societies as a result of long processes of historical evolution and power-political struggle, they are hardly characteristic of contemporary international life. It is an additional barrier to legal evolution and institutionalisation in that sphere. It is also rather ominous, as the need for such evolution and institutionalisation, especially in the sphere where they are most difficult, *viz.*, that of warfare and armament, has become so very great.

V. CONCLUDING REMARKS

The previous argument leads inevitably to the conclusion that legal evolution, the creation of institutions and of order, especially in the international sphere, are slow processes that are intimately related to, and in fact dependent upon, the evolution of suitable political conditions – a difficult and dangerous process in itself. This also means, contrary to what many people seem to believe, that law and institutions which effectively govern human behaviour and politics cannot simply be *made* by man. It is, rather, a matter of continuous growth or development in which people, particularly politicians and lawyers, do not so much *make* or *invent* the law, as *find* it, *i.e.*, seek to form-