Court of Justice of the European Communities

Judicial and Academic Conference
27–28 September 1976

Reports

LUXEMBOURG

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Note

The original text of the Report (I) by Judge H. Kutscher, President of Chamber, was drawn up in German

The original text of the Report (II) by Professor C. Hamson, Q.C., was drawn up in English

The original text of the Report (III) by Mr F. Dumon, First Advocate-General at the Belgian Cour de Cassation, was drawn up in French

The original text of the Report (V) by Mr Advocate-General J.-P. Warner was drawn up in English

The original text of the Report (VI) by Judge P. Pescatore was drawn up in French

In view of the very short period of time within which the manuscripts had to be translated and printed, it was not possible for the authors to arrange for the translations of their texts to be revised.

Preface

At the end of a period of activity of almost 25 years the Court of Justice of the European Communities took the initiative in inviting a new type of reflection upon its methods of interpretation.

The time appeared to be particularly ripe in that, following the rise in the number of requests for preliminary rulings submitted under the Treaty of Rome, the European Court of Justice is receiving an ever-increasing number of questions concerning the interpretation of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

It was therefore of the greatest interest to the Court to bring together senior members of the judiciaries of the Member States and qualified representatives of the national Bars and famous universities in order to submit to their critical assessment the whole of its case-law. Such was the first aim of the Judicial and Academic Conference held in Luxembourg on 27 and 28 September 1976 in which more than 150 people took part.

The Conference was also an exceptional opportunity to give the nine Ministers responsible for the administration of justice the chance to meet — for the first time — lawyers from all the Member States and to obtain an overall picture of the comparative vitality of Community law in each of those States.

Three papers were to introduce the discussion on the methods of interpretation employed by the Court. So that the area of criticism should be as wide as possible three 'rapporteurs' from different environments were asked to present papers. Mr Kutscher, then President of Chamber at the Court, was to bring to the Conference his wide experience of an enterprise in which he has been intimately involved within the Court, whilst two other 'rapporteurs' from outside the institution were also invited to submit their own critical observations. A prominent lawyer — Mr Dumon, First Advocate-General at the Cour de Cassation of Belgium — and an eminent professor from a British

university — Mr Hamson, former Professor of Law at Cambridge — were in fact particularly well qualified to present the views of lawyers from both civil and common law countries on the theory and practice of the Court.

The lively, deep and varied discussions which followed under the chairmanship of, first, Mr Alberto Trabucchi, Advocate-General, and, secondly, Mr Aindrias O'Keeffe, President of Chamber, were based on those three significant documents.

The themes were very varied. Approval alternated with criticism, often from the same contributors. At the risk of over-simplifying the discussion, let me refer, among the problems most frequently touched on, to those raised by Professor Hamson in relation to the direct effect of the Treaties as it results from the judgment in *Van Gend and Loos* and those referred to by Mr Dumon, First Advocate-General, in relation to the principle of equal pay for men and women acknowledged in the *Defrenne* judgment. The time available was, of course, insufficient to exhaust the debate. However, the number, the authority and the diverse national origins of the contributors[1] gave great weight to the critical examination undertaken in a remarkable community of spirit.

The instructional part of the meeting, to which the second day was devoted, enabled the same audience, which then included the Ministers responsible for the administration of justice of the various Member States,[2] to appreciate the vitality of Community law in all its various forms.

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[1] Despite the crowded timetable the following participants were able to contribute:
Mr Olmi, Director-General of the Legal Department of the Commission of the European Communities, Sir Derek Walker-Smith, Chairmen of the Legal Affairs Committee of the European Parliament, Viscount Ganshof van der Meersch, Emeritus Public Prosecutor at the Cour de Cassation of Belgium, Professor Van Gerven from Louvain, Professor Lando from Copenhagen, Professor Boerner from Cologne, Mr Deringer from Cologne, Mr Monguilan, First President of the Cour de Cassation of France, Mr Touffait, Public Prosecutor at the Cour de Cassation of France, Mr Bellet, President of Chamber at the Cour de Cassation of France, Professor Vedel from Paris, Professor Teitgen from Paris, Mr Catalano from Rome, Professor Monaco from Rome, Senator Bosco from Rome, Professor Ubertazzi from Milan, Councillor Liesch from Luxembourg, Professor Verloren van Themaat from Utrecht, Professor Schermers from Amsterdam, Lord Denning, Master of the Rolls, from London, Professor Lipstein from Cambridge, Professor Graveson from London, Professor Lawton from Belfast.

[2] Mr van Agt for the Netherlands, Lord Elwyn-Jones and Lord King Murray for Great Britain, Mr Møller for Denmark, Mr Erkel for the Federal Republic of Germany, Mr Guichard for France, Mr Cooney for Ireland, Mr Bonifacio for Italy and Mr Krieps for Luxembourg.

It was first necessary to define for the Ministers the various trends which had emerged from the previous day's discussion on the methods of interpretation employed by the Court. That task fell to Mr J. Mertens de Wilmars, Judge.

Mr J.-P. Warner, Advocate-General, then traced the evolution of the work of the Court from its earliest days and Mr Gundelach, Member of the Commission, described the difficulties of interpretation which that body has also encountered.

The final stage was to be a survey of the ways in which the Treaties and Regulations are applied in the Member States. This task was entrusted to Mr P. Pescatore, Judge, who spoke, in comparative terms, of the evolution of the case-law of the national courts, the progress made and the difficulties which persist here and there.

In a well-documented and penetrating address Mr van Agt, President of the Council of Ministers for Justice of the Community, then sought to describe the development of integration through the case-law of the Court of Justice and of the national courts and to express the confidence of the Member States in those bodies.

What conclusions are to be drawn from such a conference?

First of all, this novel formula may be applied again in future. It appears to be useful to submit a body of case-law to the constructive criticism of such an assembly, as it may bring about a closer alignment of theory and practice and a closer cooperation between the Court of Justice and national courts. Certain of the latter are even proposing to try the same formula at their own level.

Moreover, this high-level conference brought out the essential features of Community law. The frequent emphasis on the need for a uniform body of case-law showed the importance which the audience attached to the basic principles of a single system of law which is common to all the Member States and whose uniform interpretation and application binds their nationals more closely together.

It also became apparent that close cooperation between the national courts and the Court of Justice is a decisive factor in the success of Community law. It is, in fact, as a result of several thousand questions submitted by several hundred courts and tribunals that the case-law has developed step by step in an atmosphere of mutual trust and confidence. It is the national court which,

by taking the initiative, has been the driving force of that development. Thus the case-law of the Community is both progressive and collective in nature.

The results of the Conference to which I have just referred highlight possible future progress towards new developments. Experience has shown that the repercussions of any Community provision, however unimportant it may, be hasten judicial integration — the experience of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is the most recent illustration of this; it must therefore be recognized that here is a discreet but effective practical method of bringing about gradual integration whilst other, more ambitious, projects are marking time.

In this regard, it would be very easy, with a little imagination, to draw up an impressive list of subjects in which substantial progress might be achieved towards the adoption of a uniform attitude by the national courts. A methodical examination of commercial law and, on a more general level, of private law, might lead in particular to the discovery of numerous international conventions, for example, on negotiable instruments or commercial sales, of which various Member States are signatories. This list could lead to the extension of those conventions in the Community context, either in the search for identical common solutions or in an attempt by the contracting Member States to elaborate uniform interpretative procedures.

If, as this Conference has confirmed, the foundations of legal Europe have been laid, is it not time for the Member States to start building on them?

Robert LECOURT

Programme

Monday 27 September 1976

Discussion on methods of interpretation of Community law by the Court of Justice and national courts

9.15 a.m. Welcome to the participants in the conference by the President of the Court

Under the chairmanship of Mr Advocate-General A. TRABUCCHI:

— Brief statements by the authors of the reports on the salient points of their reports which will have been distributed to the participants in advance (10 minutes for each statement)

Authors of the reports:

(1) Judge H. KUTSCHER, President of Chamber at the Court of Justice: 'Methods of interpretation as seen by a judge at the Court of Justice';

(2) Professor C. J. HAMSON, Q.C., of the University of Cambridge: 'Methods of interpretation. A critical assessment of the results';

(3) Mr F. DUMON, First Advocate-General at the Belgian Cour de Cassation Professor V.U.B. (Free University of Brussels): 'The case-law of the Com munity. A critical examination of the methods of interpretation'.

10.00 a.m. Coffee interval

10.15 a.m. Discussion. Those wishing to speak are asked to make their intention known by filling in the slips which will be available. (In view of the size of the gathering the number able to speak will depend on the brevity of the speeches)

1.00 p.m. Lunch given by the Court (4th Floor)

3.15 p.m. Under the chairmanship of Judge A. O'KEEFFE, President of Chamber:
A brief re-opening of the discussion by Judge A. M. DONNER (10 minutes) and further discussion

4.30 p.m. Coffee interval

4.45 p.m. Continuation of the discussion

6.45 p.m. End of discussion followed by a buffet reception in the Great Hall.

Tuesday 28 September 1976

In the presence of the judges and of the professors presentation to the Ministers of Justice of the nine Member States of a review of twenty years of Community judicial activity

9.45 a.m. Welcome to the Ministers by the President of the Court

Address by Judge J. MERTENS DE WILMARS on the previous day's discussions;

Address by Mr Advocate-General J.-P. WARNER on the evolution of the work of the Court of Justice;

Address by Judge P. PESCATORE on the application of the Community law in each of the Member States;

Address by the Minister-President of the Council

Closure of the proceedings by the President of the Court

1.00 p.m. Closing lunch with the Ministers at the Municipal Theatre.

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Methods of interpretation as seen by a judge at the Court of Justice

by

H. KUTSCHER

President of Chamber at the Court of Justice

LUXEMBOURG
1976

ARRANGEMENT

The commentary is limited as a rule to references to the provisions of the EEC Treaty. Differences between these provisions and those in the ECSC and the Euratom Treaties have been disregarded.

I – The methods of interpretation common to the national legal orders and Community law

1. Principles of interpretation of written law

In his comprehensive study of Political Integration by Jurisprudence A. W. Green states that almost every judgment of the Court of Justice of the European Communities refers to principles which enable it to interpret Community law and decide the particular case.[1]

This finding made in 1968 could still apply today. It reflects the fact that every court, whether national or European, has to determine or ascertain 'the law', in so far as it is not apparent, whenever it applies it to a legal issue and decides this issue. Only rarely is 'the law' apparent when the issue is brought before the court. It is the determination of issues by interpreting the law which is the proper function and basic task of every court.

Jurisprudence has endeavoured for centuries to explain what the Court actually does and how it proceeds when it interprets the law. It has analysed and arranged the case-law from this point of view, established and itself proposed methods of interpretation. The number of the principles and methods which the court has at its disposal when interpreting the law is almost incalculable. It extends from comprehensive systems to well-established technical rules, of which reasoning by analogy or the *argumentum e contrario* are suggested by way of example.

However European Jurisprudence has not so far developed any doctrine of legal interpretation which could be described as conforming to an *opinio communis*. Nevertheless there is a common body of scarcely disputed concepts of the methods of interpreting written law.

You have to start with the wording of a provision, with its ordinary or special meaning.

The Court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted.

The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect.

Its purpose, either considered separately or within the system of rules of which it is part, may be taken into consideration.

Considerations based on comparative law are admissible or necessary.

In new fields of law the Court must feel its way from case to case: continental legal thought is fully conversant with reasoning from case to case.

Unquestionably the emphasis given to each of these methods of interpretation varies in the nine Member States. More significant differences are found between the countries belonging to the continental legal system and the common law countries. Common law principles and methods also have an effect on the interpretation of statute law. The combined European legal resources available for the interpretation of written law is however intact. The Member States of the Community share it with the other countries of Western Europe in spite of all the differences of detail.

There is not doubt, and for this no proof is required, that the said methods of interpretation are also applied by the Court of Justice of the Communities. Its methods of interpretation are thus basically the same as those of the national courts of the Member States.

In this respect also the case-law of the Court of Justice does not present any special features in comparison with that of all the national courts when the said methods are applied side by side. This phenomenon is well known to national courts. Finally the Court of Justice of the Communities shares with the national courts a reluctance to give in its judgments general rulings on the problems of interpretation. It explains the rule and also indicates which methods it is using in the process but does not express an opinion on the basic questions of the methods of interpretation. The Court, just like the national courts, leaves this rather to jurisprudence which has also concerned itself with these questions. The legal writings on the methods of interpretation of the Court of Justice of the Communities are unusually comprehensive.

In this respect the Court keeps within generally recognized principles of interpretation when it takes account of the special features of the particular legal matter. It is obvious that in international law for example methods have to be applied, which are different from those used in national law, and that even in national law modifications and gradations are necessary which depend upon the legal matter to which the rule to be interpreted belongs. The rules for the interpretation of criminal law are not the same as those applied in the interpretation of economic and administrative law and again other methods of interpretation are called for in the case of revenue law. Each legal matter makes specific demands on interpretation. Although the Court of Justice of the

Communities has applied all the traditional and recognized methods of interpretation, it is nevertheless obvious that in its case-law only minor importance is attached to some methods, whereas others – and in particular the interpretation of the rules of Community law according to their place in the system of the Treaties and in the light of the aims and objectives of the Communities, that is schematic and teleological interpretation – are very much in evidence. Is this emphasis which emerges from the case-law of the Court of Justice justified? This will have to be considered. At this point it is sufficient to state that specific methods of interpretation which derogate from the general principles of interpretation are appropriate for each legal matter and this applies also to Community law.

2. Interpretation in a wider sense

If 'interpretation' is understood in a narrow sense, then words, phrases, sentences or paragraphs of written texts are its subject matter. It is, however, almost self-evident that the interpretation of the law is not limited to this.

(a) Determination of the applicable law; interpretation and legal sources

The Court has to determine, to ascertain the law, whenever it applies it to a specific case. This law does not only consist of written texts. The interpretation of law is thus closely and indissolubly linked with the inquiry into the sources of law. The determination of the applicable law is also 'interpretation' in this wider sense.

The legal order of the Community covers not only the network of treaties, their annexes and the mass of derived Community law which the institutions of the Communities have enacted.

In order to enable the Court of Justice to carry out the tasks entrusted to the Community the Treaties expressly place it on the same footing as the other common institutions (Article 4 EEC Treaty). It has to ensure that in the interpretation and application of the Treaties 'the law' is observed (Article 164 EEC Treaty). It reviews the legality of acts of the Council and the Commission, the actions of which may be null and void because of infringement of the Treaties or of any 'rule of law' relating to their application (Article 173 EEC Treaty, Article 146 Euratom Treaty). It decides whether the Community in the case of non-contractual liability has to make good any damage 'in accordance with the general principles common to the laws of the Member States' (Articles 178, 215 EEC Treaty; Articles 151, 188 Euratom Treaty).

These provisions of the Treaty make it clear that unwritten legal principles are also part of the legal order of the Community. Their applicability in Community law depends in the last resort on common consent. The law of the Community is founded on the national legal orders, the basic principles and structures of which permeate Community law. The principles of the *ius commune europaeum* are also at the root of and leave their mark on the Community legal order. Article 215 of the EEC Treaty confirms that Community law and national legal orders are interwoven. A system which is in part legal and limited basically to the regulation of economic and social matters cannot be interpreted and applied without recourse to general legal principles.

The Court has in its decided cases laid down and applied a not inconsiderable number of such 'general principles'. They include, to mention only *one* example, fundamental rights, in protecting which the Court is bound to draw inspiration from the constitutional traditions common to the Member States (Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1134; Case 4/73 *Nold* [1974] ECR 507).

Unwritten rules, which would be classified as customary law, have not, as far as I can see, been found so far in Community law, if relations between the institutions are disregarded.

The Court decides the law which it must apply whenever it has to determine the significance and scope of international agreements for the Community legal order. This also comes under interpretation, giving this word a wide meaning.

Thus the Court has held that the provisions of the Association Agreement with Greece form 'an integral part of Community law' (Case 181/73 *Haegemann* [1974] 460). According to the judgment of 12 December 1972 in Joined Cases 21 to 24/72 *International Fruit* [1972] 1219 the European Economic Community is to a certain extent bound by the provisions of GATT. According to the judgment already mentioned in the *Nold* case international treaties for the protection of human rights can supply guidelines for the protection of fundamental rights which should be followed within the framework of Community law. Finally the Court has ruled that certain limitations in Community law on the powers of Member States in respect of the supervision of aliens are a specific manifestation of the more general principle enshrined in the provisions of the Convention for the Protection of Human Rights (Case 36/75 *Rutili* [1975] ECR 1232). These examples of international agreements which were considered, may suffice.

(b) Rules and legal concepts which have not been precisely defined

It has often been pointed out that the Treaties contain numerous rules and use a great many legal concepts which are not precisely defined. To mention only two examples: Article 30 of the EEC Treaty prohibits in principle all measures having

an effect equivalent to quantitative restrictions on imports; according to Article 36 ' and Article 48 *et seq.* certain restrictions on free movement of goods and freedom of movement for persons are permissible if justified 'on grounds of public policy, public security or public health'. The prohibition against 'concerted practices' (Article 85 EEC Treaty) and 'abuse . . . of a dominant position' (Article 86 EEC Treaty) are also not precisely defined. There are likewise a great number of vague rules and concepts in derived Community law.

As far back as 1963 at the Europäischen Arbeitstagung in Cologne Von Simson stressed that vague rules and concepts were part of the technique of the Treaties, had to last for a long time and that the intention was that they should be developed.[2] The vagueness of many of the concepts of the Treaty is intended to ensure that the institutions of the Community have a certain freedom of action. There can be many kinds of reasons why a set of rules is vague: for example the inability to foresee the economic trend or lack of the common consent of the parties to the Treaty or they can be found within the legislative body. If the legislature or, so far as the Treaties are concerned, the States which are parties to the Treaty, are content, no matter what their reasons may be, when dealing with a matter, to use vague or imprecisely defined provisions and concepts, the Court has the task of putting right what the legislature neglected to do by defining the rule or concept. This situation has often been confirmed and its implications for the relationship between the legislature and the Court have also been described in detail: the Court, especially *vis-à-vis* the administration, exercises legislative functions.

To sum up it may be stated that the definition by way of interpretation of vague rules and concepts is also one of the Court's tasks. As an example the defining of the expression 'quantitative restrictions on imports and all measures having equivalent effect' (Article 30 EEC Treaty) may be mentioned. The Court defined this expression more precisely by stating that all trading rules enacted by Member States 'which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' are to be considered as such measures (Case 8/74 *Dassonville* [1974] ECR 852).

A special problem arises whenever vague legal concepts are used to limit the Commission's powers to take action, especially powers to adopt general regulations in the field of organizations of the market for agricultural products. The Court has constantly in its case-law interpreted such powers as giving the Commission extensive freedom both to assess the economic situation and to decide as to the means to be adopted to meet it. When the Court considers whether such freedom has been lawfully exercised, it cannot substitute its own evaluation for that of the competent authority, but must restrict itself to ascertaining whether the evaluation of the competent authority contains a patent error or constitutes a misuse of power.

This applies, to mention only one of many possible examples, to the concept 'where the balance of the market in cereals is likely to be disturbed' (cf. the judgments of 18 March and 25 June 1975 on denaturing premiums for common wheat, Case 78/74 *Deuka I* [1975] ECR 432 and Case 5/75 *Deuka II* [1975] 770).

The Court is thus reticent when the issue to be determined is whether measures to deal with economic matters in the context of an organization of the market are appropriate or necessary. It has not endeavoured to put itself in the position of the administration.

(c) Filling in lacunae

The power vested in the Court to ensure that in the interpretation and application of Community law the law is observed certainly includes the power to fill in so-called lacunae in the law and here it should be noted that the concept 'lacuna' presupposes that there is an integral and perfected legal order which in principle has dealt with all conceivable cases and situations. Community law must be understood in this sense as an integral and perfected legal order in respect of the matters which it covers.

As an example of a 'lacuna' Article 228 (2) of the EEC Treaty may be mentioned, which provides that international agreements concluded by the Community are binding on Community institutions and on Member States, although is does not state what effects the provisions of such agreements have within the Community. In its judgment of 5 February 1976 (Case 87/75 *Bresciani* which has not yet been published) the Court decided that the provisions of such agreements (in this case it was the Yaoundé Agreement of 1963) could create rights for the benefit of individuals which the national courts had to protect (cf. the abovementioned judgment of 12 December 1972 in the case of *International Fruit).* The Court thus filled in a lacuna.

In this connexion it should however be mentioned that the Court has refused to fix, on its own volition, limitation periods for infringements of Articles 85 and 86 of the EEC Treaty. In order to fulfil their function of ensuring legal certainty limitation periods must be fixed in advance. It is for the Community legislature to fix their duration and the detailed rules for their application (Case 45/69 *Böhringer* [1970] ECR 795).

The Court repeated this view in a later judgment but nevertheless added that although, in the absence of any express provisions on the matter, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its power to impose

fines, its conduct in that case could not be regarded as constituting a bar to the exercise of that power (Judgment of 14 July 1972 in Case 48/69 *ICI* [1972] Rec. 650). The limitation period has in the meantime been dealt with by a regulation of the Council.

(d) Development of the law

The question whether the Court is competent to develop the law is the subject of discussion in all Member States even if not everywhere with the same intensity. The question arises not only in the field of statute law but also in the case of law which has been developed and laid down by the superior courts. It is especially important when long-standing statutory rules and regulations are no longer suited to quickly changing economic and social circumstances. May the Court take account of such a situation by developing the law?[3] This question touches on the relationship between case-law and legislation and the principle of the separation of powers. The question, however, loses some of its importance when the laws have *not* been adopted by a directly and democratically elected parliament and where the legislative bodies, especially the Council and the Commission, are not subject to any effective control by a representative parliament, but the legality of their legislative activity has nevertheless to be reviewed by the Court by virtue of an express provision to that effect (Article 173 EEC Treaty). The examination of the Court's power to develop the law must be looked at with due regard to its relationship to the structure of the Community institutions, that is to say in a constitutional context. The constitutional structure of the Community diminishes the importance of this question. It is therefore also less important for the Court than for certain national legal orders, because the texts which have to be interpreted are not held in such high respect on account of their age as some national codes.

On the whole it must, however, be recognized that the task entrusted to the Court to ensure that the law is observed includes the power to develop the law by interpretation.

The power of the Court to interpret in the wider sense, that is in particular to determine the applicable law, to fill in lacunae and to develop the law can be based on Article 164 of the EEC Treaty, which gives it the task of ensuring that the law is observed even if this provision is thought to be only declaratory.

The significance and scope that the Court itself attributes to this provision becomes clear from its judgment of 8 April 1976 in Case 43/75 *Defrenne* v *Sabena,* which has not yet been published. The Court stresses that the effect of Article 119 of the EEC Treaty (men and women should receive equal pay for equal work)

cannot be nullified by the fact that certain Member States had not fulfilled their obligations arising from the Treaty and that the reaction of the Community institutions to this failure to act was inadequate. To approve the contrary view, the Court adds, would entail the risk of elevating a legal infringement to the level of a rule of interpretation, a view which the Court could not accept without acting in contravention of the task entrusted to it by Article 164 EEC Treaty.

II – Special features of the interpretation of Community law

1. Interpretation and application. The reference for a preliminary ruling under Article 177 of the EEC Treaty as a link between the national and Community court.

The interpretation of Community law by the Court is done very largely in the context of the reference for a preliminary ruling under Article 177 of the EEC Treaty. The interpretation of the law in the context of *this* procedure presents special features.

The national court interprets the law while applying it to a specific case. Article 177 of the EEC Treaty however proceeds on the basis that there is a clear separation of functions: it does not empower the Court to apply Community law and to decide the case in question; on the contrary these two functions lie in the province of the national court. Article 177 of the EEC Treaty proceeds on the basis of a hierarchical jurisdiction and cooperation between the national court and the Community Court (cf. Case 6/64 *Costa* v *ENEL* [1964] ECR 585). Community law is by no means applied only by the Community Court but on the contrary mainly by the national courts which to this extent likewise function as 'Community courts'. The main characteristic of judicial interpretation is as a rule that it is undertaken in the course of applying the law to a specific case and therefore in relation to that case and its special features. In proceedings under Article 177 of the EEC Treaty the Court is, however, bound to interpret a provision in a general and abstract way which does not *only* apply to the particular case. This procedure thus compels the Court to give a ruling on the content and scope of a rule, which, due to its general nature, may itself assume the nature of a general rule. In this connexion it must not be overlooked that such rulings, which are generalizations extracted from particular cases, help to make Community law uniformly applicable.

It is true that under Article 177 of the EEC Treaty the Court can answer questions of interpretation in a more or less general way. From the wording of the questions and on the basis of the facts referred for a preliminary ruling the Court can, and must if necessary, extract the questions falling within its jurisdiction and which pertain to the interpretation of Community law (cf. Case 78/70 *Deutsche Grammophon*, [1971] ECR 498). The Court has never disregarded the fact that its answer must enable the national court to decide the case without further difficulties of interpretation.[4] Therefore the Community Court cannot completely lose sight of the case in question. The Court is in particular fully aware of the danger of general rulings which could affect groups of cases which have not been discussed and examined. The Court must therefore in its answers steer a middle course between the general applicability required by Article 177 of the EEC Treaty

and the necessarily close connexion with the specific case to be decided by the national court.[5] This can prove to be difficult.

In the field of interpretation Article 177 of the EEC Treaty does not grant the Court a monopoly but a prerogative: in the final analysis only the Court gives an authoritative interpretation of Community law. This arises from the duty of the courts of last instance to make references for a preliminary ruling. This prerogative is indispensable for maintaining the uniformity of Community law which can only apply in all Member States uniformly; that is, if it is subject to the same rules of interpretation. Otherwise it would cease to be Community law. The interpretation of the Court binds only the judge and the parties to the main action as emerges from the case-law according to which a reference is admissible for the purpose of a ruling if the Court adheres to an interpretation given in an earlier case. The President, Mr Lecourt, has correctly pointed out that the spectre of government by judges would be revived if the interpretive judgments of the Court were held to apply *erga omnes* and its interpretation was treated as being quasi-legislative.[6] It is however obvious that the authority of interpretive judgments extends beyond the particular case. Once a rule has been construed its interpretations is usually accepted by the national courts, although it is not legally binding on them. As the Court's decided cases show, it assumes that *this* is the effect of its interpretive judgments, for the courts of last instance are not obliged to make a reference for a preliminary ruling under Article 177 of the EEC Treaty if the Court has already settled a question of interpretation in an earlier reference.

Article 177 of the EEC Treaty has created a procedure under which the national courts and the Community court work closely and directly together. The doubts which the national court has with regard to the correct interpretation of Community law as well as the questions, which it consequently refers, reflect the methods of interpretation with which it is familiar. In its answer the Court interprets Community law according to its own methods. The methods of interpretation of the national and Community Court meet and intermingle in this procedure. To this extent this procedure also contributes to the 'integration' of the law of the Member States and the Community and also their legal systems.

The effect of the special features of the procedure under Article 177 of the EEC Treaty is that the interpretation of Community law by the Court is more effective and has wider application. The Court is aware of this fact.

2. Choice of methods of interpretation

In the first part of this talk an attempt was made to give an outline of the combined European legal resources available for determining methods of interpretation of written law. It is difficult to group these methods together. Any such attempt is to a

certain extent arbitrary due to the differences between national legal systems and in particular their concepts and terminology. Itt is also quite clear that legal traditions, which have influenced whomever as lawyer and judge attempts such a grouping, form part of these resources.

Subject to these reservations it is possible to distinguish: the literal or exegetic, the historical, the comparative law, and the schematic and teleological methods.

The question arises whether these groups of methods of schological interpretation stand in such a hierarchical relationship to each other that the Court has to consider first one and then, if this does not produce the answer, another and possibly a third or fourth method. All that can probably be said of this procedure is that the interpretation must proceed on the basis of ascertaining the ordinary or the special meaning arising out of the context of a word, phrase, sentence or paragraph. If the literal interpretation gives a clear, unambiguous meaning and it stands up to an examination in the light of other methods of interpretation, should that be necessary, then the question of interpretation is answered. Such cases are, however, rare: it can be assumed that there will as a rule be no application to the Court for an interpretation if the meaning of the text is 'clear' in this sense. If the literal interpretation is unsuccessful then the Court must resort to other methods. It is hardly possible to establish any order of priority or succession between them. It is not unusual for one method to be chosen while one or more other methods are adopted to confirm the result. Or several methods of interpretation are used at the same time. Case 6/72 *Continental Can* [1973] ECR at p. 243 states: 'in order to answer this question (whether Article 86 of the EEC Treaty applies to changes in the structure of an undertaking), one has to go back to the spirit, general scheme and wording of Article 86, as well as to the system and objectives of the Treaty.' The Court thus interprets Article 86 of the EEC Treaty on the basis of its wording and at the same time schematically and teleologically, that is to say it construes Article 86 separately, and also in the light of the system and objectives of the Treaty.

Obviously in the choice of one or the other or several methods the judge's intuition or what is commonly called his 'Judiz' plays a not insignificant part. This 'Judiz' applies not only to the determination of the issue but also to the way which leads to its determination. The field which the parties have chosen for their arguments is also capable of influencing the Judge. The judge's intuition formed and strengthened by the large number of cases and difficult situations with which he has been confronted, his experience and his 'Judiz' should lead to the choice of methods of interpretation, which meet the requirements of the special problems raised by the particular case, that is, which are suitable having regard to the 'nature of the case', no less than the specific demands for interpretation made by the legal issues in the context of which the case has to be decided.

The Court will exercise caution in the choice of a particular method of interpretation if it is faced with new material, questions and problems for which it does not have any continuous or established case-law to help it, that is in fields where 'reasoning from case to case' is particularly called for. With regard to the case-law of the Court reference may be made in this respect, by way of example, to the case-law on non-contractual liability of the Community (Article 215 of the EEC Treaty).[7] In the case of Article 86 of the EEC Treaty Mr Advocate-General Mayras rightly stressed that the concept of abuse of a dominant position is not defined by this Article, which goes only so far as to give some examples and it must therefore be determined 'according to the individual case'. (Opinion of 12 February 1974 in Case 127/73 *BRT* v *SABAM* [1974] ECR at p. 324). Proceeding in this way the Court in its judgment of 27 March 1974 (ibid p. 316 *et seq.)* laid down a number of criteria for the abuse of a dominant position by 'imposing unfair trading conditions' (Article 86 (a)) which took account of the particular case, which was concerned with a company exploiting copyrights, and, in answer to the question put by the national court, limited itself to the finding that there *could* be an abuse if an undertaking entrusted with the exploitation of copyrights and occupying a dominant position imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright.

Although therefor in particular, on the one hand, an order of priority or succession of methods of interpretation cannot be established, it is, on the other hand, nevertheless quite clear that the Court uses some methods of interpretation only rarely and attaches only limited importance to them, but clearly prefers other methods. The literal and historical methods of interpretation recede into the background. Schematic and teleological interpretation including the application of the principle of *effet utile* is of primary importance. Interpretation drawing on comparative law has a certain significance.

What follows is not intended to be even an approximately exhaustive explanation of when and in what circumstances the Court uses this or that method. It is limited rather to some propositions and examples.

The propositions imply that the methods of interpretation preferred by the Court are not only justified but forced on it by the special features of the Communities and Community law.

If proof of the correctness of these propositions is accepted, this means that two objections which have from time to time been made against the case-law of the Court must be rejected. These objections are to this effect:

1. In certain fields of Community law the Court, by an interpretation which is far too dynamic and evolutionary, focuses too much on the objectives laid down in

the Treaties and favours integration, has pressed forward too quickly with the development of Community law and, moreover, in a manner which it has no right to adopt. For this reason a gap has developed between the position on European integration taken up by the case-law of the Court and the real situation in Europe, which can only be improved by the political institutions of the Community adopting a policy of progressive integration. In other words: although from the point of view of integration policy the case-law of the Court is to be welcomed it is nevertheless not legally convincing. The Court has not, or at least not always, kept within the limits placed on all judicial activities.

2. Further misgivings are sometimes voiced, because the interpretation of Community law by the Court focused on the 'system' of the Treaties and their objectives has been accepted in the six 'old' Member States, and runs the risk, particularly in the two new common law Member States, of not being accepted in the same way without difficulties. Although a judge experienced in common law is familiar with schematic and teleological interpretation, he is nevertheless inclined to keep more closely to the wording of a law and to adopt the inductive method, whereas the Court, using methods of interpretation which take account of the system of the Treaties and stress the objectives of integration, adopts primarily in its arguments the deductive method.

Before these questions are discussed a few observations are nevertheless called for on literal, historical and comparative interpretation.

3. Literal interpretation

It is obvious that every interpretation of a rule has to start with its wording and the 'ordinary meaning' of a word, phrase or sentence, and its meaning determined by 'common usage'.[8] Where appropriate this meaning must be ascertained by a grammatical exegesis. This applies both to the national and Community court. I shall not go further into the questions which can arise from this grammatical interpretation.

In this respect Community law is, however, in a special position since the texts to be interpreted, apart from the ECSC Treaty,[9] are in several languages. The texts of the EEC Treaty and the Euratom Treaty are equally authentic in seven languages (Danish, German, English, French, Italian, Irish and Dutch), while the whole of derived Community law is equally authentic in six languages (the seven mentioned above apart from Irish).[10]

The obligation to consider all the relevant linguistic versions in interpreting Community law applies to the Community Court in the same way as to the national court. It can, however, be stated that national courts, just as they do when

interpreting international treaties in several languages, are also inclined when applying and interpreting Community law to adhere exclusively to the version of the text in their own language.[11] The immediate danger of such a practice is that problems of interpretation may be overlooked. By accepting the apparently clear wording of one version as authentic the Court disregards the fact that consideration of the versions in the other languages may perhaps cast doubt on the correctness of the result of the interpretation. Indeed the special feature of the interpretation of texts in several languages lies *inter alia* in the very fact that questions of interpretation arise only if the meaning and significance of the wording in the various languages appear to differ from each other, that is, if the ascertainment of the meaning of a provision cannot just be based on one version or equally on the versions in all the languages.

An example of the dangers which can arise from considering only the text in one's own language is the order of the second Senate of the German Bundesverfassungsgericht (Federal Constitutional Court) of 29 May 1974 (the order in *Solange* BVerfGE 37, 271). The order distinguishes between the *validity* and the *applicability* of a provision of Community law. The Bundesverfassungsgericht can never decide as to the validity of such a provision; it may, however, come to the conclusion that such a provision may not be applied in the Federal Republic of Germany to the extent to which it conflicts with a fundamental right contained in a provision of the Basic Law (ibid. p. 281 *et seq.)*. The question may be asked whether the majority of the Second Senate of the Bundesverfassungsgericht would have drawn this distinction between the validity and applicability of a rule of derived Community law with the same impartiality, if they had taken note of the other versions of Article 189 of the EEC Treaty. Whereas the German version states that the Community regulation '*gilt* unmittelbar in jedem Mitgliedstaat', the versions in English, French and Italian use the words 'directly applicable', 'Directement applicable' and 'direttamente applicabile'. Upon a proper construction the EEC Treaty recognizes no distinction between 'validity' and 'applicability' of a Community regulation. An examination of the versions in the other languages, which had to be carried out, would at least have made the fact that the distinction between the validity and applicability of a Community regulation is not compatible with Community law stand out more clearly.

There are, however, cases where a national court is aware of the difficulties of interpretation arising from the fact that the texts exist in more than one language and therefore makes a reference under Article 177 to the Court of Justice of the Communities for the interpretation of Community law.

Thus, for example, the Sozialgericht (Social Court) Gelsenkirchen gave as the grounds for its order of reference for a preliminary ruling dated 11 May 1976 in Case 40/76 *Kermaschek* on the interpretation of provisions of Regulation No

1408/71 *inter alia* that it was not in a position to ascertain whether particular considerations had been decisive and were adequately expressed on the adoption of a provision, and in particular that it, the Sozialgericht, did not have any opportunity of making a critical analysis of the wording of the regulation in the official languages of the European Communities which govern its interpretation.

The risk that problems of interpretation arising from the existence of texts in more than one language might be overlooked by the Court of Justice of the Communities is small. For each judge reads the texts which are relevant to the decision in his mother tongue as well and will point out difficulties which might arise if the interpretation were based on only one or some of the versions in the various languages.

The Court has often stressed, although this is actually self-evident, that the need for a uniform interpretation and application of Community law in all Member States precludes the examination of a provision in one of its versions in isolation and that this requirement makes it necessary to interpret it in the light of the other versions if there is any doubt as to its meaning.[12] This rules out any preferential treatment of the language of the case which is relevant to the particular court proceedings.

The result of such an interpretation which pays due regard to all the language versions is certain in so far as they can all only have the same content, meaning and scope; otherwise the uniformity of Community law in all Member States and in all language versions, which is absolutely necessary, would no longer be guaranteed. How is this result achieved? Certainly not by giving 'equal' consideration to all the versions: indeed it is just when the meaning of the various language versions appears to differ that interpretation becomes necessary. It will be however just as difficult to achieve by searching for the minimum common to all versions.

The situation will often arise that a greater number of versions appear to have the same meaning whereas a smaller number on the other hand – whether agreeing or not *inter se* – suggest a different construction or one which is not clear. In such cases the 'majority' have in practice the greater chances of prevailing. However, the Court then determines the correct meaning of the provision by adopting other methods of interpretation. As an example let me mention first the judgment of 12 November 1969 (Case 29/69 Stauder [1969] ECR 419).

This case was concerned with a decision of the Commission addressed to all the Member States on the sale of butter at reduced prices to persons in receipt of welfare benefits. The German and Dutch versions provided that those persons entitled to benefit could receive butter only in exchange for a 'coupon indicating their names'. One such person regarded this obligation to reveal his

name as an infringement of fundamental rights. The Court found that the French and Italian versions stated only that a 'coupon referring to the person concerned' must be shown, thus making it possible to employ other methods of checking and preferred this more liberal wording.

In the grounds of this judgment it is stated that the most liberal interpretation must prevail, provided that it is sufficient to achieve the objectives pursued by the decision in question. It cannot, moreover, be accepted that the authors of the decision intended to impose stricter obligations in some Member States than in others.

In the Court's judgment of 13 March 1973 in Case 61/72 *Mij PPW Internationaal N.V.* [1973] ECR 301 the issue was *inter alia* whether certificates for the advance fixing of export refunds are 'issued', which in the relevant Dutch version is translated sometimes by 'afgeven' and sometimes by 'overhandigd'. The Court stated that no argument can be drawn either from any linguistic divergencies between the various language versions, or from the multiplicity of the verbs used in one or other of those versions, as the meaning of the provisions in question must be determined with respect to their objective.

In its judgment of 23 October 1975 in Case 35/75 *Matisa* [1975] ECR at p. 1212 which was concerned with the interpretation of tariff headings of the Common Customs Tariff, the Court preferred the more liberal meaning of the wording of the other language versions to the narrow German wording but it based its decision in the end on the fact that the various versions of the tariff headings requiring interpretation were no obstacle to the Explanatory Notes to the Brussels Nomenclature relating thereto being accepted as an authoritative source for the purpose of interpretation which made it possible to classify the imported goods with absolute certainty under a particular tariff heading.

In a further decision on the interpretation of the Common Customs Tariff the Court found that although the German wording of the tariff heading in question 'does not perhaps bring out this difference clearly', the French, English and Italian versions 'leave no doubt in this matter' (judgment of 18 February 1976 Joined Cases 98–99/75 *Cartens Keramik* at paragraph 12 of the grounds, not yet published). Here too the determining factor was not that the versions accepted were those of the majority but that they were much clearer.

As a result it can be stated that the difficulties of interpretation arising from the multilingual nature of Community law are frequently resolved not through a grammatical interpretation but by resorting to an examination of the object of the provision and its place in the system of the Treaty. It is true that this finding does

not alter the fact that in the first place all relevant versions are considered but it shows that the Court accords only limited significance to literal interpretation: 'the Court cannot . . . be content with a literal interpretation' (Case 6/60 *Humblet* Rec. 1960 p. 1125).

4. Historical interpretation

Historical interpretation can mean two things: Reference back to the actual intention of the legislature, that is a subjective historical method, or reference back to the 'objective' intention of the legislature, and in particular to the function of a rule at the time it was adopted (an objective historical method).[13] Furthermore the historical method can also include a form of interpretation which traces the history of individual legal concepts or institutions (such as the 'institutions of Roman law') and draws conclusions from it. However the observations which follow do not take this aspect of interpretation into account.

First, so far as the *Treaties* are concerned, it would be better in this connexion to speak of the common intention of the parties to the Treaty. This 'common intention' has been referred to in earlier cases, albeit only occasionally, by the Court as a possible source of information. In its judgment of 16 December 1960 in Case 6/60 *Humblet,* Rec. 1960, p. 1125 the Court nevertheless was constrained to hold forthwith that it was impossible to establish any such consensus on the part of the Member States which could serve as a guideline for the interpretation of Article 11 (b) of the Protocol on the Privileges and Immunities of the ECSC. The Court cannot rely on preparatory work which provides a history of how the Treaties came into being. In so far as any such preparatory work exists at all – essential questions were obviously only discussed and decided within working groups – it has in any case not been published. Documents which are not generally accessible must, however, be ruled out as aids to interpretation for constitutional reasons.

On the other hand official opinions and explanatory memoranda relating to the Treaties laid by the governments of the Member States before their parliaments as well as parliamentary debates have been published. The Court has previously had occasion to consider such opinions and memoranda,[14] but has at best made use of them as a means of providing suggestions and pointers or confirmation of an interpretation already arrived at. It is useless to look at such pointers in the more recent judgments. This applies also to the three countries which acceded in 1973.

As far as I can see there is no trace in the case-law of the Court of the method of objective historical interpretation which focuses primarily on the object of the particular rule of the Treaty at the time the Treaty was concluded. This is understandable. The aims of the Communities are an increase in integration, an

ever closer union among the peoples of Europe (preamble to the EEC Treaty) and economic and social progress, that is a change in economic and social conditions. Interpretations based on the original situation would in no way be in keeping with a Community law orientated towards the future.

No greater significance can therefore be given to an historical interpretation of the provisions of the Treaty. This conclusion was reached at the Cologne conference as far back as 1963 and convincingly substantiated by our colleague Judge Pescatore.[15] It does not, of course, apply if historical interpretation – giving it in my opinion, with reference to what has already been said, too wide a meaning – is deemed to include reference back to the objectives of the Communities as laid down in particular in the preambles of the Treaty and the opening provisions which set out their principles. The clearly expressed intention of the Member States in the Treaties to create a 'Community which will become progressively integrated' (these are the words used by the German Bundesverfassungsgericht in its order dated 18 October 1967, BVerfGE 22, 296) with all the consequences flowing from this is of very great importance for the interpretation of Community law.

Unlike the position under the Treaties preparatory work *(travaux préparatoires)* for *derived Community law* is to a certain extent generally accessible. Article 190 of the EEC Treaty provides that regulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to the Treaty. The proposals, for example of the Commission, and the opinions, for example of Parliament, are published in the Official Journal of the Communities. The recitals which throw into relief the aims, that is the 'intention' of the Council or Commission on the adoption of provisions, directives and decisions, are frequently examined by the Court for the purpose of interpreting these provisions. As an example the judgment in Case 29/69 *Stauder* [1969] ECR at p. 424 may be mentioned which states that the decision of the Commission has to be interpreted in accordance with 'the real intention of its author'. The opinions of the Advocates-General also contain references to this preparatory work.[16] However at the same time opinions relating to and recitals of derived Community law nevertheless help the Court, if only to a limited extent, to clarify the purpose and meaning of a provision. The judgment in the *Stauder* case for example not only concentrates on the 'real intention' of the author but also on the aim which the decision sought to achieve.

Viewed as a whole historical interpretation plays only a subordinate part in Community law; it fulfils at most a subsidiary function. This is a great advantage: the Community judge faces up to his law unencumbered by this preparatory work.

5. Comparative law interpretation

At the beginning of this section I should like to emphasize again that my remarks should not be understood as being an even approximately exhaustive statement of the Court's methods of interpretation. The questions of comparative law interpretation have many aspects. They have been discussed frequently and in detail. My remarks are limited to stressing some aspects of this method of interpretation which may have featured in the Court's decided cases.

I have first of all a preliminary observation: interpreting the provisions of one treaty by reference to the provisions of the other treaties has sometimes been called comparative law interpretation. There is no justification for this. Although Community law is based on several Treaties, which however provide for single institutions, it must be regarded as a single entity, as the law *of the* European Community. The principle of the uniformity of Community law, which requires that there must be no contradictions within this uniformity, means that a harmonizing interpretation of these Treaties is imperative.[17]

A (a) Article 218 of the EEC Treaty (Article 188 of the EAEC Treaty) provides that the Community in the field of non-contractual liability shall make good any damage, caused by its institutions or by its servants in the performance of their duties, 'in accordance with the general principles common to the laws of the Member States'.

The provision is regarded as justification for the view that in the case of written law the main principles of the *ius commune europaeum,* which the Court has to determine and consider, also form part of the legal sources of Community law (see I 2 (a) above). It must moreover be borne in mind that Article 215 of the EEC Treaty does not refer to such fundamental legal provisions but, with much more modesty, merely to the basic principles of the laws of the Member States relating to liability for breach of official duty. In this connexion it is clear that as regards non-contractural liability there is imposed on the Community only a uniform system in compensating for damage (Case 9/69, *Sayag* v *Leduc* [1969] ECR at p. 335). But do such general principles exist?

The most comprehensive and thorough examination to my knowledge by an international colloquium (Heidelberg 1964) of this question of the liability of the 'State for the unlawful conduct of its institutions' produced only relatively modest results.[18] The same applies to a further opinion in 1975, which in particular carried out an examination from the point of view of comparative law of the question of fault or blame as a condition precedent to liability and also of liability for illegal legislation.[19]

The Court apparently shared early on the doubts expressed in particular by its Advocates-General Lagrange and Gand as to the scope and effect of the reference to 'general principles' in Article 215 so far as the six original Member States were concerned. Mr Advocate-General Langrange observed that the only truly common legal principle is that which nowadays disapproves in all Member States of the doctrine of the non-liability of the State and that in other respects the systems are sometimes fundamentally different. He considered Article 188 of the EAEC Treaty (cf. Article 215 of the EEC Treaty) to be merely a diplomatic formula often to be found in international treaties which is significant only to the extent to which it refers to certain principles of equity which are normally found in a State governed by the rule of law.[20]

The Court in its judgment of 10 July 1969 in *Sayag* v *Leduc* refrained from making any reference to comparative law and determined the question in issue (the meaning of 'performance of duties' under Article 188 of the EEC Treaty if a servant of the Community uses his car in the performance of his duties and causes an accident) by interpreting the text of Article 188 of the EEC Treaty without relying on the 'general principles'.

In another case concerning the Community's liability for its legislative (as opposed to its executive) activities, the Court was required to undertake more intensive comparative law examination. The Court in its judgment of 2 December 1971 in Case 5/71, *Zuckerfabrik Schöppenstedt,* ([1971] ECR at p. 984 *et seq.)* held that applications, based on Article 215 of the EEC Treaty, claiming compensation for legislative acts of the Community were admissible. The Court describes the circumstances in which the Community is liable in such cases and which have been constantly repeated in the Court's case-law, as follows: 'Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequences of that action, by virtue of the provisions contained in Article 215, second paragraph, of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred'. (see, for example, judgment of 14 May 1975 in Case 74/74, *CNTA* v Commission [1975] ECR at p. 546).

In the first case of this kind after the accession of the three new Member States, Professor Ipsen, who assisted the defendants (the Council and the Commission) submitted again and emphatically that there was no general legal principle that under Article 215 of the EEC Treaty the Community was also liable for legislative acts, and in particular having regard to the legal systems of the new Member States.[21] There is no trace of these objections in the grounds of the judgment of 13 November 1973 in Joined Cases 63 to 69/72, *Wernhahn and others* v *Council and Commission,* ([1973] ECR 1229).[22] On the contrary the Court repeats without further reasoning the words already used in earlier judgments ([1973] ECR at p.

1248). It proceeds – and correctly – on the basis that the general legal principles within the meaning of Article 215 of the EEC Treaty after the accession of the three States must from now on be inferred from the legal systems of the nine Member States, that in consequence no alteration of the case-law is however necessary.

The opinion of Mr Advocate-General Roemer in this case is instructive ([1973] ECR 1255). He draws attention – I limit myself to the key expressions – to the need for evaluative comparative law ('wertende Rechtsvergleichung'), emphasizes a certain tendency to further development in some Member States, mentions a further narrowing of the gap between 'the legal systems, which on the point of interest in the present case are largely negative' and the, if you like, 'more progressive legal systems', refers to the structure of Community law with Parliament only playing a small part in the legislative process and finally lays special stress on the concept of the strengthening by the Court of legal protection within the Community.

It is impossible to ascertain which of these views of its Advocate-General the Court considered important. The fact remains that it has not altered its case-law according to which legislative acts can also fall within the Community's non-contractual liability.

(b) If Community law uses concepts which have clearly been borrowed from one or more of the legal systems of individual Member States, the first question which arises is whether this is to be regarded as a reference by Community law to national law – that is that the concept has the specific meaning which it has under national law – or whether it is a concept of Community law the meaning of which – as defined by Community law – can differ from that by which it is understood under one or several national legal systems.

Reference to national law excluding a comparative law interpretation is rare (for example the expression 'companies or firms' in Article 58 of the EEC Treaty). In general the concepts taken from the laws of individual Member States have within the framework of Community law specific meanings different from their meaning under the national legal systems, which spring from the system of Community law and the objectives of the Treaty. This applies – to mention only a few examples – to the concept 'worker' (Articles 48 to 51 of the EEC Treaty, judgment of 19 March 1964 in Case 75/63, *Unger,* [1964] ECR 177) and also 'offer' in the organization of the market in cereals. In this organization of the market the intervention agencies are bound in certain circumstances to buy in cereals which are 'offered' to them. The Court held that intervention agencies cannot derogate from the Community concept of an offer and gave as its reason, *inter alia,* that terms used in Community law must be uniformly interpreted and applied throughout the Community except where an express or implied reference is made to national law (judgment of 1 February 1972, Case 49/71, *Hagen,* [1972] ECR 35).

In cases where there appears to be a *prima facie* reference to national law the Court has also modified the meaning of the concept for the purposes of Community law, it has done so in the case of the concept 'nationals of the State in whose territory . . . they [the officials] are employed' (Article 4 of Annex VII to the Staff Regulations, which deals with the expatriation allowance). The concept of 'nationals' contained in this article must be interpreted in such a way as to avoid any unwarranted difference as between male and female officials who are, in fact, placed in comparable situations. It is therefore necessary to exclude nationality imposed by law on a female official upon her marriage with a national of another State and which she was unable to renounce (judgment of the Court (Second Chamber), of 20 February 1975, Case 21/74, *Airola* [1975] ECR 221).

If there is no reference to national law and Community law uses specific concepts with which the national legal systems are familiar, then an interpretation of the concept in Community law has much to recommend it, which traces its meaning in the laws of the individual Member States on a comparative law basis. However, such an interpretation based on a comparison of the relevant legal systems, which is intended to define the concept and make outlines more clear-cut, is only rarely found in the judgments of the Court although more frequently in the opinions of its Advocates-General. For an example reference should be made to the detailed and exhaustive examination by Mr Advocate-General Lagrange in the case of *Assider* v *High Authority,* (Case 3/54, 1954/55 Rec. p. 157 *et seq.)* 'misuse of powers' ('Ermessensmißbrauch', 'détournement de pouvoir', 'sviamento di potere') which is found in Article 33 of the ECSC Treaty and Article 173 of the EEC Treaty.

(c) Interpretation or supplementation on a comparative law basis is also called for if Community law is silent on particular questions, with which the legal systems of individual Member States have for a long time been familiar and which they have answered. In its judgment of 12 July 1957 in Cases 7/56 and 3 to 7/57, *Algera and others,* [1957] Rec. p. 115) the Court, on the question whether the revocation of measures creating subjective rights was admissible, gave its judgment 'with due regard to the legal rules acknowledged by the laws, legal writings and case-law of the Member States'. An 'examination based on comparative law' of just under two pages follows. It has been correctly stated that a comparative examination in such detail has never since then been carried out in any of the Court's decided cases.[24]

Later judgments confine themselves to recording the result of the comparison of the various legal systems. Attention is drawn by way of example to the judgment of 4 July 1963 in Case 32/62, *Alvis,* ([1963] ECR 55) which held that according to a generally accepted principle of administrative law in force in the Member States, the administrations of these States had to give their servants the opportunity of replying to allegations before any disciplinary decision is taken concerning them.[25]

In *Kampffmeyer and others* v *the Council and the Commission* (judgment of 2 June 1976, Joined Cases 56 to 60/74, not yet published) the issue was whether, under Articles 178 and 215 of the EEC Treaty, the Court could be asked to determine the non-contractual liability of the Community for imminent damage foreseeable with sufficient certainty. The Court affirmed that an application for such a declaration was admissible and substantiated its view with reference to the legal systems of the Member States: most, if not all, of these legal systems recognize an action for declaration of liability based on future damage, which is sufficiently certain. The judgment does not indicate what degree of certainty is required.

In its interlocutory judgment of 15 June 1976 *(Mills* v *European Investment Bank,* Case 110/75, not yet published) the Court proceeded on the basis that the legal relations between the Bank and its servants are of a contractual nature. The next point to be clarified was whether, in the event of a possibly wrongful dismissal, the Court can only award the dismissed servant compensation for the material and non-material damage which he suffered as a result of the wrongful dismissal, or whether the Court can make a declaration to the effect that the dismissal is void. The Court emphasizes that, although the continuation of a contract depends upon the mutual consent of the parties, the law of contract as well as the general principles of the law governing labour, to which the Staff Regulations of the Bank refer, place limits on the intention of the parties, and that consequently in the event of a wrongful dismissal of a serious nature, the Court can declare that such a dismissal is void. An application for a declaration that the dismissal is void is therefore admissible – and the interlocutory judgment had to decide only whether such an application was admissible.

The reference in the judgment to 'the general principles of the law of master and servant' which are not further specified, is all the more remarkable because Mr Advocate-General Warner in his opinion of 6 May 1976 examined the legal situation in the Member States with reference to this question in greater detail and came to the conclusion that there was no general principle common to the laws of the Member States that a court may declare a dismissal to be void.

The Court's decision must be understood as meaning that, having regard to the development which is evident in every Member State and from an evaluative comparative law approach in line with social progress, it came to the conclusion that in serious cases it can declare that the dismissal has no legal effect. Some Member States have already expressly made provision to this effect, while in others the courts, on the strength of more recent legal provisions, can in any case recommend reinstatement of the wrongfully dismissed employee with its corresponding financial consequences if the recommendation is not followed.

(d) Those general legal principles, not being the legal principles for the narrower sphere of particular legal areas (for example administrative law, labour law or

procedural law) but on the contrary embracing the whole sphere of Community law, form part of Community law. Above all they comprise fundamental rights (see I 2 (a) above) which moreover – at all events in the view of some Member States – include the prohibition *ne bis in idem*, the right to be heard in legal proceedings and the principles of proportionality and protection of legitimate expectations.

The judgments of the Court which find that these general legal principles are an integral part of Community law do not contain a more detailed exposition based on comparative law. The Court has merely stated that they are inspired by the constitutional traditions common to the Member States and that no measure can be regarded as lawful which is incompatible with the principles recognized and guaranteed by the constitutions of these States. Furthermore the judgments in the *Nold* and *Rutili* cases (see I 2 (a) above) show that the protection of fundamental rights by the European Convention for the Protection of Human Rights, to the extent to which it *ratione materiae* applies to Community law, also sets the minimum standard for the protection of fundamental rights for Community law – but it is only to be regarded as a minimum standard, which must not be lowered and which the Court can indeed, and is obliged on occasion, to raise.

In this field the Court has so far only had to decide cases where infringement of a fundamental right was not a serious issue, so that it was unnecessary with reference to a specific problem to consider on a comparative law basis what is or is not compatible with the constitutional traditions common to the Member States. At all events there has so far been no known case where the Court has held that a provision or measure was valid which the constitution of any Member State regarded as incompatible with fundamental rights.

B (a) The Court's abstention from references to comparative law in the grounds of its judgments should not obscure the fact that within the Court a considerable amount of time and energy is devoted to comparative law, although it is not specifically reflected in the judgments. The pleadings of the parties, particularly those of the Commission, often contain a discussion of the relevant problems from the point of view of comparative law and the Court frequently supplements this through its Research Department. From time to time the Commission is requested to state how certain questions are dealt with in the Member States (for example the question what time-limits apply for challenging notices imposing charges and how the reimbursement of charges which have been imposed illegally is arranged: the *Rewe* case 33/76, letter of 15 July 1976). The Advocates-General frequently set out in their opinions expertly compiled and evaluated comparative statements of the laws of the Member States. It can be assumed that in a court composed of judges from all the Member States, important strands of all the national legal systems are woven into its judgments, even if the judges may prefer – particularly having regard to the generality of the general principles – to limit themselves in this

connexion to oral discussion during the deliberation and to forego more detailed comparisons of the law of Member States in the grounds of judgment. This may explain the terse findings which are frequently found in the grounds of judgment.[26]

(b) 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. The best possible solution is the one which meets the specific objectives and basic principles of the Community – of which the protection of fundamental rights of citizens is an integral part – in the most satisfactory way.[27] This is the meaning which must be attached to the Court's finding that the protection of fundamental rights must be ensured within the framework of the structure and objectives of the Community (judgment in the *Internationale Handelsgesellschaft* Case, see I a (a)).

Mr Advocate-General Lagrange has already stated in his opinion of 4 June 1962 in *Nederlandsche Hoogovens,* Case 14/61 ([1962] ECR at p. 283) that a considered and evaluative comparison of the relevant laws is necessary. The Court has to choose those solutions which, having regard to the objectives of the Treaty, appear to it to be the best or, if this expression may be used, the most progressive. The Court has up till now been guided by this principle. It must be 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.

What has been said explains the meaning of and the limits to interpreting and supplementing Community law on a comparative law basis. A comparison of national provisions of law makes the outlines of the problem which has to be solved stand out more clearly, contributes to mastering the essential issues in a case with more certainty and makes it easier to select the best, most appropriate and fairest of several possible solutions.

Member States should have the same objective in mind when they undertake the approximation of laws (Article 100 of the EEC Treaty).

6. On schematic and teleological interpretation

The foregoing exposition has confirmed that the methods of interpretation employed by the Community judge are not fundamentally different from those which the national judge applies in interpreting his law. This is true of the literal and historical interpretation of a provision, although in this respect the emphasis

varies both in the national legal systems and in Community law. The same applies to interpretation by comparison of laws, which, however, in the nature of things is of greater importance in Community law than in the national legal systems.

The interpretation of rules in their schematic relationship with other rules and with the regulation of a matter as a whole (including consideration of the 'place' of the provision to be interpreted and of the 'structure' of the regulation of a matter) as well as their interpretation according to their purpose and design, that is to say, their teleological interpretation, are also familiar to the judges of all the Member States. But both of these methods are so prominent in the interpretation by the Court of Justice of Community law as to suggest in this respect a conversion of quantity into quality. The importance which the Court of Justice attributes to them can only be understood if one has in mind the special nature of the Community and its legal system as well as the special functions of the Court of Justice.

a. The special nature of the Community and its legal system; the special functions of the Court of Justice

(1) **What is the 'special nature' of the Community?**

The Court of Justice was not slow to distinguish it, principally in its judgments of 5 February 1963 (*Van Gend & Loos,* Case 26/62, [1963] ECR 1) and of 15 July 1964 (*Costa* v *ENEL,* Case 6/64, [1964] ECR 585). The Community Treaties are to be distinguished from 'ordinary international treaties'. The Treaty establishing the European Economic Community was concluded for an unlimited duration and created a Community with legal capacity and capacity of representation on the international plane and having its own legislative, executive and judicial organs. The Community has been granted its own sovereign rights which stem from a definitive limitation of the authority of the Member States or from the transfer to the Community of sovereign powers. Only by virtue of an express provision of the Treaty can the tasks assigned to the Community be removed from it and restored to the exclusive jurisdiction of the Member States (judgment of 14 December 1971, *Commission* v *France,* Case 7/71, [1971] ECR 1018).

Thus it was that the founding Treaties were intended by the parties thereto to create an independent Community; this came about through the establishment of its institutions. The sovereign power assigned to it is different from and independent of the sovereign power of the Member States; it may only be exercised for the purposes of the aims of the Treaties and the interests of the Community.

The Treaties were ratified without any substantial reservation by all the Member States. Every national authority was aware of the scope and the irrevocability of the decision which was taken in ratifying the Treaties. Every national authority

was likewise aware that in the future the national legal systems could no longer be set up against the obligations which were solemnly undertaken with the establishment of the Community (cf. Order of 22 June 1965, *San Michele,* Case 9/65, [1967] ECR 27).

The nature of the Community Treaties is in this respect twofold, in that on the one hand they create international obligations between the Member States but on the other contain a constitution common to these States in respect of part of their sovereign functions. By virtue of the special nature of the Treaties the Community cannot be regarded as an association of States to be judged primarily according to public international law. The constitutional nature of the Treaties is the predominant factor.

Digression: The principles of interpretation under public international law cannot as a general rule be employed for the purposes of Community law.

On the negative side it follows from the special nature of the Community that the principles of interpretation peculiar to and governing public international law treaties cannot as a general rule be enlisted for the purposes of interpreting the Community Treaties. It may suffice to give two examples in support of this, although it must not be forgotten that the rules of interpretation of the Vienna Convention of 1969 on the Law of Treaties (Articles 31 to 33) may lead to a standardization and also, to a certain degree, to a modification of the rules of interpretation hitherto applied in public international law.

So far as the Community Treaties are concerned the principle that limitations on the sovereignty of the contracting States are in case of doubt to be interpreted narrowly ('in dubio mitius') does not apply. In this respect, the rules applying in the case of the law on coordination in public international law cannot apply for the purposes of interpreting the law on integration under Community law.[29] Unlike treaties governed by public international law, therefore, the Community Treaties, as the constitution of the Community, are to be interpreted broadly rather than restrictively, according to the methods of interpretation applicable to constitutional jurisdictions, and thus like national constitutional law. On the other hand the maxim 'in dubio pro communitate', which indicates the opposite tendency and is occasionally advocated, is equally unacceptable.

In addition the rule of interpretation according to which it is within certain limits permissible and appropriate to call in aid the subsequent concurrent conduct of the parties to a Treaty for the purposes of interpreting it finds no application in Community law, whether in order to reach a conclusion from this subsequent

conduct on the original intention of the parties or in order to find the existence of a modification of the content of the Treaty based on concurrence.[30]

In another part of this paper (II 4) it has already been stressed that on the one hand it is impossible to call in aid the subjective intention of the parties to the Treaty for the purposes of interpreting individual Treaty provisions but that on the other hand the intention of the contracting States – and this applies to the 'old' as well as the 'new' Member States – to create a Community designed for progressive integration was unquestionably embodied in the Treaties.

According to the Treaty the Commission shall, in order to ensure the proper functioning and development of the Common Market, ensure that the Treaties are applied (Article 155, EEC Treaty). It can take action against Member States which in its opinion have failed to fulfil obligations under the Treaty (Article 169, EEC Treaty). The Member States can bring before the Court of Justice an infringement of the Treaty by another Member State (Article 170, EEC Treaty). The Court of Justice can within the limits of its jurisdiction declare that there has been an infringement of the Treaty by the Member States as well as by the Council or Commission (Article 169, 170, 173, 175, EEC Treaty). In addition the Parliament, too, has supervisory powers (Article 137, EEC Treaty). Through these provisions of the Treaty the institutions of the Community – especially the Commission and the Court of Justice – are given the task of ensuring the observance of the Treaties. This of necessity includes the power to take decisions on their content and scope. Thus the Treaties themselves have entrusted their interpretation to the institutions of the Community; this, too, is expressive of their constitutional nature. This fact rules out of the question recourse to the subsequent conduct of the Member States for the purpose of determining the content of the Treaties.

The Court of Justice takes this view as its point of departure. In its judgment of 8 April 1976 (*Defrenne,* Case 43/75, not yet published) it declared that a resolution by the six Member States of 30 December 1961 which proposed the elimination by 31 December 1964 of all discrimination in the field covered by Article 119 of the EEC Treaty (equal pay for men and women for equal work) in no way altered the fact that the application of Article 119 was to be fully secured as from 1 January 1962 (paragraph 2 of the ruling, and grounds 47, 48, 56, 57, 58, 65 and 66 of the judgment). An amendment of the Treaty could only be made by means of the procedure prescribed for that purpose under Article 236 of the EEC Treaty.

(2) What is the 'special nature' of the legal system of the Community?

(aa) In its judgments delivered in 1963 and 1964 in the *Van Gend & Loos* case and in the case of *Costa* v *ENEL* the Court of Justice made it plain that with the founding of the Community a new, separate legal order, a 'legal body' was created,

which is binding on the Community, its institutions, the Member States and their citizens. This legal order, to which the Treaties and subordinate Community law belong, is independent; Community law stems from an autonomous source of law. This independence of the Community legal system is the foundation on which the twin pillars which bear it rest: the direct validity and applicability of its rules and its precedence over national law.

The case-law of the Court of Justice on the direct applicability of provisions of Community law is familiar. It has drawn the inescapable consequences from the fact that the Community legal system is not only binding as regards the institutions of the Community and the Member States in general but is directly binding also as regards the administrative authorities and courts of those States, and, above all, their citizens. The case-law of the Court of Justice, according to which even those provisions of the Treaty which from their wording appear to be addressed to the Member States may, under certain conditions, be directly applicable in this sense (thus, to use the terminology of public international law, self-executing), has been firmly established since the judgment in *Van Gend & Loos* and belongs to the 'acquis communautaire' which can no longer be seriously called in question. In this connexion it must be borne in mind that the vigilance of individuals concerned to protect their rights (see the judgment in *Van Gend & Loos)* has proved to be – particularly through the procedure under Article 177 of the EEC Treaty – an exceptionally effective supplement to the supervision which the Commission exercises in order to ensure that the Treaties are observed.

The same has been true, as regards the precedence of Community law over national law, since the judgment in *Costa* v *ENEL*. It cannot be seriously denied that the realization of the aims of the Treaty would be seriously jeopardized and that discrimination within the Community would result if Community law were to vary in validity and to be variously applied from one Member State to another according to the respective national legal systems. Community law stands and falls by its uniform validity and application in all the Member States.

(bb) The legal system of the Community of the Member States is further characterized by the fact that it employs a large number of undefined rules and concepts and contains only a relatively small number of precise, substantive rules of law and that, above all, it prescribes objectives, indicates directions and establishes principles. Essentially the Treaties establish a great plan and programme together with the procedure for their realization. The mass of subordinate Community law on the other hand only contains, as a general rule, implementing provisions of a technical nature.

The plan and the objectives the realization of which the Treaties are intended to serve were defined with great clarity, particularly in the Preamble to and in the introductory provisions of the EEC Treaty: an ever closer union among the peoples

of Europe, ensuring economic and social progress by common action and by the elimination of the barriers dividing Europe; the unity and harmonious development of their economies; the progressive abolition of restrictions on international trade (Preamble to the EEC Treaty).

The first objective is the realization of a common market founded on a customs union (Articles 2, 3 (b) and 9 of the EEC Treaty). The free movement of goods within the Community is to be ensured by the elimination, as between Member States, of all customs duties and charges having equivalent effect as well as of all quantitative restrictions and measures having equivalent effect (Articles 3 (a), 12 *et seq.* and 30 *et seq.*) The four freedoms stipulated by the Treaty are directed towards an economic union: freedom of movement for workers (including the measures necessary to this end in the field of social security), freedom of establishment and to provide services, and the free movement of capital (Articles 3 (3), 48 *et seq.*, 52 *et seq.*, 59 *et seq.* and 67 *et seq.*). Finally the Treaty provides for the realization of a common agricultural, transport and commercial policy (Articles 3 (b), (d) and (e), 38 *et seq.*, 74 *et seq.* and 110 *et seq.*) and for a competition policy in respect of which the principle of free competition within the entire Common Market applies (Article 85 *et seq.*, including the prohibition of State aids which distort competition – Article 92 *et seq.* and tax provisions – Article 95 *et seq.*). The economic policy of the Member States is to be coordinated (Articles 3 (g), 103 *et seq.*). In addition there are provisions on the aims of social policy of the Treaty (Article 117 *et seq.*). Subject to certain exceptions the end of the transitional period prescribed in the Treaty (31 December 1969) constitutes the latest date by which all the rules laid down must enter into force and all the measurres required for establishing the Common Market must be implemented (Article 8 (7)). The prohibition of discrimination on grounds of nationality in principle applies to all fields (Article 7).

The fact that the legal system of the Community contains a large number of undefined rules and concepts and confines itself, in respect of wide areas, to stating aims and principles and that therefore it needs in a large measure to be given precision and concrete detail by judicial decision, presents the Community judge with tasks of a special and difficult nature when it comes to interpreting and applying Community law in the individual case.

(cc) These difficulties are made the more acute by reason of the well-known difficulties, which will not be recounted in detail here, which encumber the legislative procedure of the Communities. It has often been remarked that – to give but one example – numerous questions, e.g. freedom of movement, competition law, State aids, tax law, the adjustment of State monopolies of a commercial character, the relationship of the principle of the free movement of goods to industrial property rights, are still waiting for closer regulation by the Council, whether by means of regulations or directives. The number of the Commission's proposals which has not been dealt with by the Council is considerable. But the

problems will not wait for a legislative solution. If they arise in an action, the judge must solve them. It is a well-known fact that the inactivity of the legislature compels the courts to decide questions and to solve problems the settlement of which properly belongs to the province of the legislature. A certain shifting of the burden from the legislature to judicial decision is then inevitable (see *supra* I 2 b). The 'legislative short-fall' which results from the inactivity of the legislature is one of the reasons which so often compel the Court of Justice to have recourse to the aims of the Community and to general principles of law when interpreting Community law. In this connexion it should not be forgotten that this case-law, which fills 'gaps' in a sense other than the usual, is subject always to a later legislative solution which at most must keep within the bounds assigned by the Treaties. Joseph H. Kaiser's statement that the area of the judge's jurisdiction is co-determined by the state of the law to be applied[31] applies also to this 'gap-filling' case-law of the Court of Justice.

In the judgments of the Court of Justice there are indications which point to the unsatisfactory state of Community law in this respect. Thus in the judgment of 18 February 1971 (*Sirena*, Case 40/70, [1971] ECR) it is observed that the national rules concerning the protection of industrial and commercial property have not yet been unified within the framework of the Community. In the judgment of 22 June 1976 (*Terrapin*, Case 119/75, not yet published) and also in other judgments a more cautious reference is made to the 'present state of Community law'.

(dd) Closely bound up with the difficulties under which the Community legislature labours and with the 'legislative short-fall' of Community law is the constant danger to the Community and to the realization of its aims constituted by centrifugal forces emanating from the Member States. The national judge gives judgment within the framework of a State apparatus the existence of which is not called into question. The Community judge, on the other hand, on occasion finds himself compelled to consider the interpretation of Community law from the standpoint of the existential necessities of the Communities and the maintenance of their capacity to function. To give but one example: the uniform validity and application of Community law in all the Member States, thus the question of its precedence, concerns one of the bases of the Community.

(3) What are the special functions of the Court of Justice?

Reference may be made, as regards this matter, to earlier remarks (*supra* I 2 a and II 6 a (1) Digression). In the constitutional structure of the Community the Court is given a position of equal rank with that of the other institutions. Owing allegiance only to the Treaties, it rules with binding effect upon the interpretation of Community law, the validity of subordinate law and on whether the conduct of the

Council, the Commission and the Member States is in conformity with the Treaty. It is not an international court of justice; it exercises functions which combine those of a constitutional court, an administrative court and a civil court. In this respect its position differs from that of most national courts.

If one adds together the special features of the Community, its legal system and the special functions of the Court of Justice one is left with the necessity of according precedence to the schematic and above all to the teleological interpretation of Community law.

b. Remarks on schematic interpretation

It would be superfluous to point out once more what importance schematic interpretation has in the case-law of the Court of Justice. Its application corresponds to the special features which characterize the legal system of the Community. If this legal system takes the form of a broadly conceived plan and if it confines itself essentially to setting aims and directions as well as to establishing principles and programmes for individual sectors, and if in addition there is no legislature which fills in the framework drawn up by the Treaties within a reasonable time (see *supra* II 6 a (2)), the judge is compelled to supplement the law on his own and to find the detailed rules without which he is unable to decide the cases brought before him. The judge can succeed in this task only by having recourse to the scheme, the guide-lines and the principles which can be seen to underlie the broad plan and the programme for individual sectors. Without recourse to these guide-lines and principles it is not even possible to give precise definition to the significance and scope of the general rules and concepts of which the Treaties make such abundant use (see *supra* I 2 b). It is plain that such a schematic interpretation which sees the rules of Community law in their relationship with each other and with the scheme and the principles of the plan, cannot escape a certain systematization and therefore on occasion demands that the solution of a problem be inferred by deduction from general principles of law.

It is neither possible nor appropriate in the context of this paper to give a detailed account of the schematic interpretation of Community law by the Court of Justice. I will therefore limit myself to a few observations on two aspects of this method of interpretation.

(1) As an example of *recourse to general principles of Community law* reference may be made to the interpretation of Article 37 (1) of the EEC Treaty (adjustment of State monopolies of a commerciel character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States) in three judgments which were delivered in February 1976. They concern

the Italian tobacco monopoly and the German spirits monopoly. In these judgments it is stated: Article 37 (1) must be interpreted in its context in relation to the other provisions of the article and taking account of its 'place' in the general scheme of the Treaty. The duty laid down in this provision is intended to ensure compliance with the fundamental rule of the free movement of goods throughout the Common Market (judgments of 3 February 1976, *Manghera,* Case 59/75, [1976] ECR 91, and of 17 February 1976, *Miritz,* Case 91/75, [1976] ECR 217). The prohibition of any discrimination regarding the conditions under which goods manufactured or sold by nationals of the Member States are procured and marketed is a fundamental principle in the application of the Treaty which by virtue of its legal nature concerns the economic and legal position of the nationals of the Member States. Provisions of the Treaty requiring Member States to abolish all discrimination within a specific period become directly applicable even when the duty has not been discharged before the expiry of that period (judgment of 17 February 1976, *Rewe,* Case 45/75, [1976] ECR 181). The interpretation of Article 37 (1) of the EEC Treaty was therefore essentially determined by the basic rules of the free movement of goods and of the prohibition on discrimination.

A further example is afforded by the judgment of 21 July 1974 (*Reyners,* Case 2/74, [1974] ECR 649) which for the purpose of interpreting the provisions on freedom of establishment calls in aid the 'general programme' laid down in Article 54 of the EEC Treaty, declares in this connexion that the rule on equal treatment with nationals is 'one of the fundamental legal provisions of the Community', and in support of the direct applicability of Article 52 of the EEC Treaty refers *inter alia* to Article 8 (7) of the Treaty. The Court of Justice employed analogous reasoning in interpreting the provisions on freedom to provide services (Article 59 *et seq.* of the EEC Treaty) (judgment of 3 December 1974, *Van Binsbergen,* Case 33/74, [1974] ECR 1299).

The exception which the Treaty makes to the basic rules of equality of treatment, freedom of movement and freedom to provide services have been consistently given a narrow interpretation by the Court (see, e.g. judgment of 4 December 1974, *Van Duyn,* Case 41/74, [1974] ECR 1350; judgment of 28 October 1975, *Rutili,* Case 36/75, [1975] ECR 1231). This case-law which defines the powers of the Member States operates at the same time 'pro communitate' and 'pro libertate' (for further examples of schematic interpretation, see under II 6 c (1)).

(2) The interpretation of a provision in its relationship with others governing the same or related matters, that is to say, its schematic interpretation, calls for it to be interpreted in such a way as not to stand in contradiction to other rules of the Community legal system which – just like national legal systems – is to be regarded as a unity (cf. *supra* II 5, beginning).

The so-called interpretation of *subordinate Community law in terms of its conformity with the Treaties* may be regarded as an exception to a harmonizing

interpretation of this kind. Whilst as a general rule the same methods of interpretation are to be applied for the interpretation of the Treaties and subordinate law this principle only finds application to measures adopted by the institutions of the Community. Under this principle the measure taken by the institution is to be interpreted – if at all possible – so that it is compatible with the superior law of the Treaties and the general principles of law which, too, are attributed a status superior to that of subordinate law. Other interpretations which would lead to incompatibility with the superior law, and thus to the inapplicability or to the invalidity of the measure adopted by the institution, are to be disregarded. The superior rule of law, then, is not a criterion of examination but serves to determine the context of the subordinate rule.

The Court of Justice has frequently proceeded according to this principle, without expressly mentioning it.

Regulation No 3 on social security for migrant workers which was made pursuant to Article 51 of the EEC Treaty (measures in the field of social security as are necessary to provide freedom of movement for workers) must be interpreted 'in the context and within the bounds of this article and having regard to the fundamental principles which it lays down' (judgment of 7 May 1969, *Torrekens,* Case 28/68, [1969] ECR 125).

Article 28 (2) of Regulation No 4 (providing implementing procedures and supplementary provisions in respect of Regulation No 3) can pursue its objective of simplifying administration only within the context and limits imposed by Article 51 of the EEC Treaty and cannot be allowed to affect adversely the rights stemming from that article in favour of individuals (judgments of 1 December 1970, *Mutualités Socialistes,* Case 32/70, [1970] ECR 987).

The concept of 'nationals' must be restrictively interpreted so that a provision of the Staff Regulations on the grant of expatriation allowances remains compatible with the principle of equality of treatment of female and male officials (judgment of the Second Chamber of 20 February 1975, *Jeanne Airola,* Case 21/74, [1975] ECR 229, see *supra* II 5 A b).

Rules governing the denaturing premium for common wheat (Regulation No 849/70) had to be applied, 'for the sake of legal certainty', in such a way that quantities of goods which satisfied certain requirements might still benefit from those rules. 'Interpreted in this way, Regulation No 849/70 contains no provision the validity of which could be doubted' (judgment of 8 March 1975, *Deuka* I, Case 78/74, [1975] ECR at 433 and 434; followed in the subsequent case, judgment of 25 June 1975, *Deuka* II, Case 5/75, [1975] ECR at 711.

It must not be forgotten that the interpretation of secondary Community law in terms of its conformity with the Treaties displays certain features which are to be found also in the interpretation of statutes in terms of their conformity with the constitution, as practised by the Supreme Court of the United States of America and – following that court – by some continental constitutional courts. As in the case of interpretation according to conformity with the constitution, the relationship of the judge in particular to the legislative institutions of the Community plays a part in the case of interpretation according to conformity with the Treaties. The general requirement of judicial restraint which applies to this relationship demands that measures adopted by the other Community institutions shall only be regarded as invalid or inapplicable where it is impossible to arrive at an interpretation in which they remain compatible with superior law and therefore valid.

c. Observations on teleological interpretation

The special nature of the Community, which must be regarded, not as an association of States subject to international law, but as a community *sui generis* is orientated to the future and designed with a view to the alteration of economic and social relationships and progressive integration, rules out a static and requires a dynamic and evolutionary interpretation of Community law. The Community judge must never forget that the Treaties establishing the European Communities have laid the foundations of an ever closer union among the peoples of Europe and that the High Contracting Parties were anxious to strengthen the unity of their economies and to ensure their harmonious development (Preamble to the EEC Treaty). The principle of the progressive integration of the Member States in order to attain the objectives of the Treaty does not only comprise a political requirement; it amounts rather to a Community legal principle, which the Court of Justice has to bear in mind when interpreting Community law, if it is to discharge in a proper manner its allotted task of upholding the law when it interprets and applies the Treaties. How else should the Court of Justice carry out this function which it has been assigned except by an interpretation of Community law geared to the aims of the Treaty, that is to say, one which is dynamic and teleological.

To what extent and with what effect the Court has referred to the general and specific objectives of the Treaty – which have been summarized above, see II b a (2) – when specific provisions of Community law have to be interpreted has often been described and demonstrated in detail. There is no need to demonstrate this all over again. In this connexion reference can be made in particular to the articles of the President of our Court and of Pierre Pescatore.[32] I will therefore confine myself to observations on some aspects of this teleological method of interpretation. They deal with the close connexion between schematic and teleological interpretation, the principle of *effet utile* (effectiveness) and of the principle that the Community's capacity to function must be safeguarded.

(1) The *schematic and teleological interpretation* of rule *are closely interlocked* in the case-law of the Court and frequently can only be separated with difficulty. It may suffice to give three examples of this.

The Court in its judgment of 5 February 1963 in *Van Gend & Loos* (Case 26/62 [1963] ECR 12 and 13) stated that in order to decide whether the provisions of the Treaty have direct effect in national law their spirit (*esprit*), general scheme (*économie*) and wording (*termes*) must be considered. The Court then described the objectives of the Treaty and also the special features of the legal order which the Treaty creates. This is followed by observations on the general scheme of the Treaty as it relates to customs duties and charges having an equivalent effect (on Articles 9 and 12 and their place in that part of the Treaty which deals with the foundations of the Community).

In *Continental Can* the Court, in order to answer the question whether the expression 'abuse' of a dominant position refers to changes in the structure of an undertaking (by merging with other undertakings), had recourse to the spirit, structure and wording of Article 86 of the EEC Treaty as well as the system and objectives of the Treaty (judgment of 21 February 1973, Case 6/72, [1973] ECR 243). The interpretation of Article 86 of the EEC Treaty which followed combines considerations which refer to the relationship of Article 86 to Article 85 of the EEC Treaty and arguments inferred from the objectives of the Treaty set out in Article 3 (f) and Article 2 of the EEC Treaty.

In the judgment of 8 April 1976 (*Defrenne*, Case 43/75 not yet published) it is stated that in order to answer the question whether Article 119 of the EEC Treaty was directly applicable, one must look to the nature (*la nature*) of the principle that men and women should receive equal pay for equal work, the objective (*l'objectif*) of this provision and on its place in the Treaty. The dual purpose – economic and social – of Article 119 of the EEC Treaty as well as its relationship to other provisions (Article 117: the need to promote improved working conditions and an improved standard of living for workers) is set out.

Although a detailed analysis would perhaps make it possible to find that the deliberations of the Court were centred on the 'general scheme' of the 'objectives' and 'purposes' of the Treaty or on rules governing a sector, it is however obvious that the various arguments were intertwined. This is understandable. Article 86 of the EEC Treaty for example must unquestionably be considered and construed having regard to its connexion with the other rules on competition of the Treaty (Articles 85 to 94). But the 'general scheme' of these rules on competition can in turn only be understood if the objectives of the Treaty, to the attainment of which these rules are intended to contribute, are considered at the same time. The same applies for example to the provisions on the elimination of quantitative restrictions in trade between Member States (Articles 30 to 37 of the EEC Treaty), on the

elimination of customs duties and charges having equivalent effect (Articles 12 to 17) or to the tax provisions (Articles 95 to 99). The 'general scheme', which plays an important part in interpretation and which underlies the rules adopted for specific fields (competition, the customs union, free movement of goods, free movement of persons and services, common policies), must be understood within the framework of the objectives which it is the intention of the Treaty to attain. Schematic and teleological interpretation are therefore necessarily interwoven.

(2) *The rule of effectiveness (règle de l'effet utile)* has been borrowed from international law. It does not only mean that a rule has to be interpreted in such a way that it has a meaning; that goes without saying. What it states is that the provisions of the Treaty are to be so interpreted that their purpose is, if possible, achieved, that they have a 'practical value' and that their 'effectiveness' can be developed. It can therefore be understood as meaning that preference should be given to the construction which gives the rule its fullest effect and maximum practical value.

The Court has frequently enlisted this principle of interpretation, for example in the judgment of 29 November 1956 (Case 8/55, *Fédéchar,* Rec. 1955/56, p. 312) and later on in two judgments of 15 July 1960 (Case 20/59), *The Italian Government* v *High Authority;* Case 25/59, *Netherlands Government* v *High Authority,* Rec. 1960, at pp. 708 and 781). The essential point made in these judgments is that legal theory and case-law are agreed that the provisions of a Treaty (the three cases were all concerned with the ECSC Treaty) included those legal principles without which they could not be applied in a sensible and reasonable way. In all three cases the question was whether the High Authority had certain powers which had not been expressly conferred upon them by the Treaty. The Court acknowledged that such 'implied powers' existed.[33]

In its judgment of 15 July 1963 (Case 34/62, *Germany* v *Commission,* [1963] ECR 144) the Court held that a particular interpretation of Article 29 of the EEC Treaty would deprive the Common Customs Tariff of all effectiveness (*tout effet utile*). The Court has moreover decided that the abolition or alteration of aids to be decided by the Commission under Article 93(2) of the EEC Treaty, if it is to be 'effective' may also include the obligation to require repayment of aid granted in breach of the Treaty (judgment of the Court of 13 July 1973, Case 70/72, *Commission* v *Germany* [1973] ECR 829).

The conclusion to be drawn from these cases can be summarized as follows. The Court, in accordance with the principle of *effet utile* gives preference to the construction which produces the maximum effectiveness and enables its effect to be developed to the greatest possible extent. But what are the criteria by which the effectiveness of a rule is to be judged? The only possible answer to this question is

that these criteria must be gathered from the objectives of the Treaty. According to the principle of *effet utile* preference is to be given to the interpretation which is best able to further attainment of the objectives of the Treaty. The principle comes under teleological interpretation.

In its judgment of 31 March 1971 (Case 22/70, *Commission* v *Council,* [1971] ECR p. 273 *et seq.*), which is frequently quoted, the Court relied for the purpose of interpreting the Treaty and finding that the Community has powers in the field of external relations, not on the 'effectiveness' (*effet utile*) but on the 'necessary' effect (*effet nécessaire*) of an internal set of Community rules.[34] This judgment is a very good example of an interpretation of the Treaty which simultaneously proceeds on the basis of the schematic, teleological, deductive and evolutionary methods towards attainment of the objectives of the Treaty. By limitating the powers of Member States it furthered the activity of the Community and its functional integration in the field of the common commercial policy.

(3) In European legal articles the principle of *effet utile* has often been equated with *the principle that the capacity of the Community to function must be safeguarded.*[35] The Court has also turned to this principle in order to determine the scope of certain provisions of the Treaty. For an example reference should be made to its opinion of 11 November 1975 (Opinion 1/75, conditions for the grant of export credits [1975] ECR 1355) which stated that the common commercial policy (Article 113 of the EEC Treaty) was designed to promote the functioning of the common market and to protect the interests of the Community as a whole. The retention by Member States, in reliance on parallel powers, of a certain freedom of action is incompatible with this concept. The Community has sole power to enter into an international agreement concerning the conditions for the grant of export credits.

The principle that the capacity of the Community to function must be safeguarded was consequently decisive for the purpose of interpreting Article 113 of the EEC Treaty. This principle, too, belongs to the rules of interpretation to which the Court is entitled to turn. It plays a particularly important part if centrifugal tendencies originating in the Member States are a serious threat to the attainment of the objectives of the Treaty. The common commercial policy is a very important objective of the Treaty.

7. Filling in a gap in Community law: effect of judgments 'in time' (the *Defrenne* judgment)

Closely connected with the schematic and teleological interpretation of Article 119 of the EEC Treaty in the *Defrenne* judgment (the partial direct effect of the provision from 1 January 1962, for the new Member States from 1 January 1973)

is the Court's decision on the question from what date female workers can benefit from the direct effect of Article 119 of the EEC Treaty. This connexion may justify discussing only at this point and following on from the observations on schematic and teleological interpretation the problem of the effect of judgments 'in time'.

The Court held that the direct effect of Article 119 *cannot* be relied on in order to support claims concerning pay periods prior to the date of the judgment (8 April 1976), except as regards those workers who have already brought legal proceedings or made an equivalent claim. After mentioning special circumstances which mainly concern the conduct of some of the Member States and of the Commission the Court gave as the main reason for its decision that important considerations of legal certainty make it impossible in principle to re-open the question of pay as regards the past.

Professor Jean-Victor Louis (Brussels)[36] rightly stated in one of the first analyses of the judgment that this decision represents a compromise between 'the demands of justice and of legal certainty'. Is it not unjust to refuse women workers, who have failed to make a claim before 8 April 1976, the benefits of the consequences of the direct effect of Article 119 of the Treaty? Does this not mean that those women workers who took the struggle for their rights as far as the courts obtain an unduly high bonus, and one which discriminates against their less tenacious colleagues? Professor Louis' comment that by its decision the Court has proved that it is a 'genuine constitutional court' indicates how this question should be answered.

It is true that constitutional courts usually attach no importance to the question whether a rule has direct effect and to the further question from what date this effect runs. However they attach much more importance to the question from what date a rule, which is acknowledged to be incompatible with the constitution, has ceased or ceases to have effect. *Ex tunc* or *ex nunc* or merely with effect from a date to be determined by the Court which is after the date when it delivered judgment? The effects 'in time' of a decision of a court in which it is held that a rule has direct effect and those of a judgment which holds that the rule is to be regarded as unconstitutional and therefore void are perfectly comparable. In both cases the decision of the court can have grave consequences for the past which can scarcely be disregarded. This applies in particular when such a decision is only made when a relatively long period has elapsed (in the *Defrenne* case: partial direct effect of Article 119 of the EEC Treaty for the six Member States from 1 January 1962, judgment of 8 April 1976). If I correctly understand the position constitutional courts recognize two different solutions of the problems which arise in such cases. Both solutions depend in the final analysis upon weighing the justice demanded by the particular case against the undesirability of excessive litigation and legal certainty. The one solution provides that unconstitutional laws are annulled with effect *ex nunc;* when making such a decision the Court can still postpone the date from which a law is to cease to be valid.[37] This principle (rendering the rule

infringing the constitution invalid *ex nunc*) is however modified in the case of proceedings which are pending or are about to be brought before administrative authorities or courts. The other solution is based on the assumption that unconstitutional laws are invalid *ex tunc*,[38] but modifies this principle by leaving undisturbed by the declaration of invalidity decisions based on the rule declared to be void and which can no longer be contested.[39] So far as the effects of the annulment of rules following an action for annulment are concerned (Article 173 of the EEC Treaty) Community law has decided in favour of the second of the two solutions which I have described: measures which are declared to be void are void *ex tunc*; they are to be 'deemed non-existent' (first paragraph of Article 174; judgment of 31 March 1971, *Commission* v *Council*, AETR, Case 22/70 [1971] ECR. In the case of a regulation the Court can however under the second paragraph of Article 174 state which of its effects shall be considered as definitive. The Court has given this provision a wide interpretation (judgment of 5 June 1973, *Commission* v Council, Case 81/72, [1973]ECR 586). This provision offers the Court an opportunity of mitigating the possibly serious consequences of a provision's being held to be void *ex tunc*, in particular with the object of protecting legitimate expectations and in the interest of legal certainty. Further, for the purpose of protecting legal certainty the Court (Second Chamber) has dismissed applications by women officials for payment of the expatriation allowance based on the judgment of 7 June 1972 (*Sabbatini*, Case 20/71, Rec. 1972, p. 350) in which the Court (Second Chamber) did not apply a provision of the law relating to officials (Article 184 of the EEC Treaty), because it was incompatible with the principle that male and female officials must receive the same treatment. The applicants had failed to make use at the appropriate time of opportunities open to them to take proceedings: consequently they were unable to rely on the judgment in the *Sabbatini* case (judgment of 21 February 1974, *Kortner-Schots and others* v *Council, Commission and Parliament*, Joined Cases 15 to 33 [1974] ECR 191). In other words: measures, which can no longer be challenged are unaffected by the fact that a rule has under Article 184 of the Treaty been declared to be inapplicable with effect *inter partes*.

In cases where a rule is inapplicable (Article 184 of the EEC Treaty) Community law has decided in favour of legal certainty and against doing justice in every single case. In the event of a rule being declared to be void (Articles 174 and 176 of the EEC Treaty) Community law grants the Court the opportunity of giving the principle of legal certainty priority over doing justice in a particular case (the second paragraph of Article 174 of the EEC Treaty). There are however in Community law no corresponding provisions which cover the case where the Court – even though belatedly, but here the principle of no action, no judge applies – has to declare that a rule of Community law has direct effect as from a date well before the date of the judgment. Has the Court overstepped the limits imposed upon every court and assumed in an impermissible way legislative functions by giving priority in principle to legal certainty in a situation such as the one with

which it was confronted in the *Defrenne* case on the basis that to those who had dared to fight for their rights fell the fruits of victory? Or should the Court, in view of the grave consequences of a judgment with no temporal limitation of its effect, have capitulated and – contrary to its convictions – ruled against the partial direct applicability of Article 119? On this point the Court was surely right in stressing in the *Defrenne* case that although the practical effects of every judicial decision must be carefully considered, this must not be allowed to go so far that the objectivity of the law is distorted and its application suppressed, only because the judgment of a court may have certain repercussions as regards the past. To sum up, it may be stated that in the *Defrenne* case the Court found an appropriate solution of a difficult problem for which Community law makes no express provision. This solution follows provisions which Community law contains for a parallel problem (nullity of a legal rule). When the Court made its decision as to the effect 'in time' of the *Defrenne* judgment it did not act as a legislator: on the contrary it confined itself to filling in the particular gap in Community law in accordance with the general scheme of the Treaty.

III – Final observations

It is recognized that when a judge states the law, gives it concrete form and precision, fills gaps in and develops it, he is participating in the law-making process, and thus that legislative bodies cannot be said to have a monopoly over the procreation of the law, but that the courts and the legislature share this task. This also applies to the Community judge and to the legislative bodies of the Community.

It is true that the case-law of the Court has furthered the economic and social integration of the States associated together in the Community and their peoples. The Court's methods of interpretation and its decided cases can be described as leaning in favour of integration. However the Court has not achieved this result by overstepping the limits assigned to every judicial function and assuming the functions of a legislative body. These effects are due rather to the fact that the Court has to give priority to a schematic and above all to a teleological and dynamic interpretation geared to the objectives of the Treaty. It is only these methods of interpretation which match the special features and requirements of the Community and its legal system. The inevitable result of the schematic interpretation of Community law is that at times the arguments and the interpretation in the Court's judgments are deductive in nature, although reasoning from case to case has its place. It may be added that a schematic and teleological interpretation is particularly well suited to the legal system of a Community which has set as its objective the integration of modern States with very advanced economic and social structures which present and demand a high degree of rationality.

The court has developed 'weapons for limited warfare' against situations which offend against the concept of the Community.[40] Interpretation of derived Community law in terms of its conformity with the Treaty as well as the limitation 'in time' of the effect of judgments are to be counted among these weapons. They also include 'admonitions' to the legislative institutions of the Community which are sometimes found, carefully formulated, in the Court's judgments (see for example the judgment of 13 November 1973, *Werhahn and others* v *Council of the European Communities,* Joined Cases 63–69/73, [1973] ECR 1229 and 1252). In acting in this way the Court has not exceeded the functions assigned to it by the Treaties. It is in keeping with the constitutional nature of the Treaties that the Court has to exercise the particular functions of a constitutional court. The methods and 'techniques' which I have mentioned form part of the specific means available to a constitutional court.

The case-law of supreme courts can in the final analysis only produce effects if it is 'accepted' by those affected by it because of a far-reaching consensus. This applies

in particular to constitutional courts whose judgments cannot really be enforced. The effect of its judgments is to an unusual degree dependent upon a consensus which recognizes that they are binding and must of necessity be followed. Public opinion plays a not unimportant part in this connexion.

It cannot be said that in this respect the case-law of the Court has encountered difficulties. Its judgments have been 'accepted' and followed by those affected, the citizens and institutions of the Community as well as the Member States. At most there has been on occasion a certain delay before acceptance. There is no foundation for the view that the Court's decisions which lean in favour of integration have gone much too far ahead of European realities.

All things considered the Court has so far, in my opinion, fulfilled the task assigned to it by the Treaties of ensuring that in the interpretation and application of the Treaties the law is observed and in so doing has not overstepped the limits placed on every court.

My commentary has its origin in many respects in ideas which my colleague, Pierre Pescatore, has expressed in numerous articles, lectures and talks. With his agreement I have decided not to make any detailed references to them but I would like nevertheless to stress that certain essential lines of reasoning in my commentary are to be attributed to Pierre Pescatore.

Notes

1 A. W. Green, Political Integration by Jurisprudence – The Work of the Court of Justice of the European Communities in European Political Integration –, Leiden 1969, p. 416.

2 Cf. Simson, Reinecke und Mathijsen, Der Gerichtshof und die unbestimmten Rechtsbegriffe, in: 10 Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften, Europäische Arbeitstagung Köln, April 1963, Kölner Schriften zum Europarecht (KSE) Vol 1, p. 396 *et seq.*

3 Cf. Robert Fischer, Die Weiterbildung des Rechts durch die Rechtsprechung, 1971 with notes.

4 Cf. on this point and generally on 'interpretation and application': A. M. Donner, Uitlegging en Toepassing, Miscellanea Ganshot van der Mersche, 1972, Vol. 2, p. 103.

5 In the view of Tomuschat, Cahiers de Droit Européen, 12 (1976) p. 58 *et seq.*, the Court succeeded in doing so in Case 36/75 *Rutili* [1975] ECR 1219. See also on this point the opinion of Mr Advocate-General Mayras in Case 127/73 *BRT* v *SABAM* [1974] ECR 320 and Daig, Aktuelle Fragen der Vorabentscheidungen nach Art. 177 EWG-V, EuR 1968, p. 259 and Handbuch für Europäische Wirtschaft, Kommentar zu Art. 177 EWG-V.

6 R. Lecourt, Le juge devant le marché commun, 1970, p. 57.

7 Cf. Lord Mackenzie Stuart, The Non-Contractual Liability of the European Economic Community, Maccabaean Lecture in Jurisprudence 1975, Proceedings of the British Academy, Volume LXI (1975), especially pp. 13 and 23. (Common Market Law Review, Vol. 12 (1975), p. 493).

8 Judgment of 21 December 1954 in Case 1/54, *France* v *High Authority*, Rec. 1954, p. 7; Judgment of 23 December 1961 in Case 30/59, *Steenkolemijnen*, Rec. 1961, p. 1.

9 Only the French version is authentic, Article 100 ECSC Treaty; exceptions, however, to this emerge from, for example, Article 8 of the convention on certain Institutions common to the European Communities of 1957 and Article 39 of the Merger Treaty of 1965.

10 Cf. Article 248 EEC Treaty, Article 225 Euratom Treaty, Articles 160 and 155 of the Act of Accession.

11 Cf. Hilf, Die Auslegung mehrsprachiger Verträge, 1973, passim.

12 Cf. judgment of 5 December 1967 in Case 19/67 *Sociaale Verzekeringsbank* [1967] ECR 345;
Case 29/69 *Stauder* [1969] ECR 419.

13 Cf. Zuleeg, Die Auslegung des Europäischen Gemeinschaftsrechts, EuR 4 (1969), p. 97; reference is also made elsewhere to the observations of Zuleeg.

[14] For instance the Luxembourg opinion on the Euratom Treaty, judgment in Case 6/60 *Humblet,* Rec. 1960, p. 1125 at p. 1155;
Debates on the ECSC Treaty in the Netherlands Parliament, Joined Cases 2 and 3/60 *Niederrheinsche Bergwerks-AG* Rec. 1961, p. 261 at p. 290.

[15] Kölner Schriften zum Europarecht, Vol. 1 (Note 2) p. 177 *et seq.*, in particular p. 201 *et seq.*, p. 209 *et seq.*

[16] Cf. for example the opinion of Mr Advocate-General Reischl of 6 April 1976 in Case 111/75 *Mazzalai:* reference to an opinion of the Economic and Social Committee which, however, was not followed in the judgment of 20 May 1976, which has not yet been published.
Cf. also Bernhardt, Die Auslegung völkerrechtlicher Verträge, 1963, p. 116.

[17] Cf. Wolf, Kölner Schrifterizum Europamarkt Vol. 1 (Note 2) p. 199, Zuleeg (Note 13), p. 102 *et seq;*
Examples of such a harmonizing interpretation:
judgment of 13 June 1958 in Case 9/56, *Meroni,* Rec. 1958, p. 27; judgment of 16 December 1960 in Case 6/60, *Humblet,* Rec. 1960, p. 1196;
judgment of 12 May 1964 in Case 101/63, *Wagner* [1964] ECR 195;
judgment of 21 January 1965 in Case 108/65, *Officine Elettromeccaniche* [1965] ECR 1.

[18] Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Beiträge Vol. 44, 1967. The colloquium had before it *inter alia* reports from all the present Member States with the exception of Denmark and Ireland as well as a report on the law relating to the liability of the Community. The object of the colloquium was to ascertain the 'general principles' within the meaning of Article 215 of the EEC Treaty, see in particular Jaenicke *loc cit.* pp. 859–877.

[19] Zur Reform des Staatshaftungsrechts, Rechtsvergleichendes Gutachten des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht, 1975, published in the digest 'Recht' and issued by the Federal Ministry of Justice, Bonn.

[20] Opinion of Mr Advocate-General Gand in the said case *Sayag* v *Leduc loc. cit.* p. 340; Lord Mackenzie Stuart (Note 7) p. 7 *et seq.;* cf. also Ress, Die Bedeutung der Rechtsvergleichung für das Recht internationaler Organisationen, Zeitschrift für auslänidsches öffentliches Recht und Völkerrecht, Vol. 36 (1976) p. 227 (259 *et seq.*).

[21] Ipsen, Zur Haftung für normatives Unrecht nach Europäischem Gemeinschaftsrecht, Festschrift für Hermann Jahrreiss, 1974, p. 85.

[22] Lord Mackenzie Stuart (Note 7) p. 14 *et seq.*

[23] Further examples:
The concept *'force majeure'* (judgment of 11 July 1968, in Case 4/68, *Schwarzwaldmilch,* [1968] ECR 377;
The concept 'public service' within the meaning of Article 48 (4) of the EEC Treaty (judgment of 12 February 1974 in Case 152/73, *Sotgiu,* [1974]ECR at p. 162 *et seq.*).

[24] Meessen, Zur Theorie allgemeiner Rechtsgrundsätze des internationalen Rechts – Der Nachweis allgemeiner Rechtsgrundsätze des europäischen Gemeinschaftsrechts, Jahrbuch für internationales Recht, Vol. 17 (1975), pp. 283 and 300.

[25] Further examples:
judgment of 10 December 1957 in Case 8/56, *ALMA*, Rec. 1957, p. 179;
judgment of 25 February 1969 in Case 23/68, *Klomp*, [1969] ECR at p. 50;
judgment of 16 March 1971 in Case 67/69, *Simet*, [1971] ECR 197.

[26] Cf. Bothe, Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Vol. 36 (1976), p. 280 *et seq.*

[27] Fuss, Der Grundrechtsschutz in den Europäischen Gemeinschaften aus deutscher Sicht, Heule (Belgium), 1975, p. 71 *et seq.*; Meessen (Note 24), p. 301 *et seq.*; Bothe (Note 26); all have further references; Zweigert, KSE Vol. 1 (Note 2), p. 203 *et seq.*

[28] On this principle see Bernhardt (Note 16) p. 143 *et seq.*

[29] This formula is found – in a different context – in Petersen's Auswärtige Gewalt und Völkerrechtspraxis der EWG (ZaöRV, Vol. 35 (1975) p. 273).

[30] Cf. for example Bernardt (Note 16) p. 166 *et seq.*; Degan, Procédés d'interprétation tirés de la jurisprudence de la Cour de Justice des Communautés Européennes, RTDE 1966 pp. 189, 217 and 218; Art. 31 (3) of the Vienna Convention on the Law of Treaties.

[31] Archiv des öffentlichen Rechts., Vol. 101 (1976), p. 91.

[32] Robert Lecourt, L'Europe des Juges, 1976, in particular p. 241 *et seq.*;
Pierre Pescatore, Les objectifs de la Communauté Européenne comme principes d'interprétation de la jurisprudence de la Cour de Justice,
Miscellanea W. J. Ganshof van der Meersch, Vol. 2 (1972), p. 325 *et seq.*

[33] On the judgment in the *Fédécher* case and generally on the principle of *effet utile*, see Boulouis and Chevallier, Grands arrêts de la Cour de Justice des Communautés Européennes, Vol. 1 (1974), No 21 – p. 101 – for further references.

[34] On this judgment see Boulouis and Chevallier (Note 33) at No 22 – p. 104 – and also Chevallier in: France and The European Communities, 1975, p. 459 (464 and 465).

[35] Hans Peter Ipsen, Europäische Gemeinschaftsrecht, 1972, p. 280.

[36] Europäische Grundrechte-Zeitschrift, Strassburg/Kehl, 1976, p. 178.

[37] This applies for instance in the case of the jurisdiction of the Austrian and Italian constitutional courts.

[38] This applies for example in the case of the jurisdiction of the constitutional courts of the Federal Republic of Germany.

[39] The rules described which have been in part developed by case-law are more varied than they are represented to be in this article. They modify the particular principle even more for example in the case of convictions, the enforcement of decisions, claims based on unjust enrichment etc. For further 'techniques' which judges of constitutional courts adopt in order to mitigate the effects of their findings that particular laws are unconstitutional, see the instructive articles on 'Admonitory Functions of Constitutional Courts' (West Germany, Italy, USA) by von Rupp-v. Brünneck, Vigoriti and Linde in: American Journal of Comparative Law, Vol. 20 (1972) p. 387 *et seq.* Linde refers *inter alia* to the 'technique' of prospective overruling (limiting the new rule to prospective applications) 'practised' by the Supreme Court.

[40] This formulation is attributable to Cappelletti, Judicial Review in the Contemporary World, New York, 1971. I am indebted for it to the review of this book by Hans G. Rupp, Rabels Zeitschrift für ausländisches und internationales Privatrecht, Vol. 40 (1976), p. 157.

Corrections

In the course of transcribing the manuscript into type and print, certain errors have crept in which are now corrected as below:

1. Page 18

The last three sentences of the first indented paragraph should read as follows:

> 'Whereas the German version states that the Community regulation "*gilt* unmittelbar in jedem Mitgliedstaat", the versions in English, French, Italian and Dutch use expressions which in German would be rendered as "unmittelbar anwendbar" ("directly applicable", "directement applicable", "direttamente applicabile", "rechtsstreeks toepasselijk"); only the Danish version ("gælder unmiddelbart") corresponds to the German, whilst the Irish ("infheidhme go díreach"), apparently is to be understood in the sense of "shall have immediate force", Whatever significance may be attributed to the fact that other provisions of the Treaty, and not only in the German version, make a distinction between "validity" ("Gültigkeit", "validité" etc.) and 'applicability' ("Anwendbarkeit", "applicabilité" etc.) — see Article 177 on the one hand and Article 184 on the other — the suggested consideration of the non-German versions would in any event, without there being any need to go beyond a literal interpretation, have brought home with greater clarity the fact it is not compatible with Community law to distinguish between "validity" and "applicability" in relation to the effect of a Community regulation in the Member States, including its binding effect upon the national courts.'

2. Note 2.

Note 2. — reference to papers given at the Europäischen Arbeitstagung in Cologne, April 1963 — should be supplemented by the following paragraph.

> 'At this conference the methods of interpretation employed by the Court of Justice were thoroughly discussed; see in particular the main paper given by Monaco, the supporting papers given by Wijckerheld Bisdom and Wolf, and the contributions to the discussion by Ophüls, Pescatore, Zweigert, Constantinesco, Bülow, Waelbroeck and Lagrange and others p. 177 *et seq.* Reference may be made to these papers and contributions on which the following observations are in various ways based.'

Court of Justice
of the
European Communities

Judicial and Academic Conference
27–28 September 1976

Methods of interpretation — A critical assessment of the results

by

C. J. HAMSON, Q. C.

Professor of the University of Cambridge

LUXEMBOURG
1976

When, under President Lecourt's most stimulating guidance, we first met to discuss the three papers to be prepared for this part of the conference, it was decided that Mr Dumon would concern himself principally with the general principles of interpretation, Judge Kutscher would give an account of how the Court actually applied them, and I would attempt an appraisal of some aspects of the Court's activities. My undertaking is in any event temerarious, particularly at this conference where the level of knowledge, intelligence and distinction of the participants is unusually high; but I am at least excused from reviewing the corpus of the Court's case law. My contribution should be regarded as a prolix appendix or addendum to Judge Kutscher's and Mr Dumon's excellent paper.

President Lecourt also exhorted us that we should each seek to define our own 'line of approach'. I found this suggestion most helpful, and it seems to me to provide my best starting point. The comment which I propose to offer is that of an *academic* lawyer interested in *comparative* law; and I wish to try to specify that standpoint both negatively and positively.

First, negatively, this is not a paper by a representative of the United Kingdom. It is no doubt not entirely accidental that the author of one paper is a German, of the other a Belgian and of the third a British subject. But nationality 'must be and is' (to use Lord Atkin's famous conjunction) irrelevant to the matter in hand. In any event there is no British approach to Community Law. It is not necessary to remind this audience of the extreme variety which exists in the British Isles: there is not even a British legal system. It is well-known that the British judge on the European court — an expression which is strictly meaningless (Article 167 does not reproduce the nationality requirements applicable to the Commission now contained in Article 10 of the Merger Treaty) — practised in the Scots Law, the legal system operating north of the Border, and not in the Common Law of England (which is the legal system normally associated with the British Isles in the continental mind). The fact is that if there is a British judge, there is no English judge upon the European Court.

Secondly, and again negatively, this paper is not the paper of a representative of the common law. Though I cannot wholly divest myself of the bias or prejudice which springs from my connection with that law and from my great admiration of it at least in its classical form, I have been too long in commerce with foreign law, and notably with French law, to be able fully to trust my instinct as to the common law. And instinct, in the sense of an informed and

settled habit of mind, is a great deal more important than learning and reasoning in these matters however much the latter may have contributed to the former and however important it may be to return to check with consecutive reason the instinctive conclusion. There would obviously be a great many exponents of a common law approach more appropriate than myself.

I may be permitted here to call attention to an inherent ambiguity in the term 'common law'. It is often, and in my opinion properly, used, especially upon the continent of Europe, to denote the legal system of that part of the British Isles which is confused with the whole. As such it is a synonym of the English legal system. But it is also used in a larger and more historical sense to denote the matrix out of which the present English legal system itself sprang. In that sense the common law has a very numerous progeny. The present English legal system is one only of a considerable family, though in my opinion still probably the most authentic member of it. Within that family there is great diversity — as great as, perhaps greater than, the diversity between European continental systems. As the mother of that progeny the common law can be compared not with any existing continental legal system but with the Roman law itself — I mean with the classical and authentic Roman Law of the Republic and the Principate when Roman law was a making, not with the Roman law which had degenerated into the Digest of Justinian and still less with the rediscovered Roman law of the glossators. In this acceptation of the term, the federal law of the United States of America, and the law of many of those states, is a sort or kind of common law, even if aberrant. And what has occurred there is a specimen only of what has occurred elsewhere, and probably not the most interesting or instructive. More instructive, I believe, is the reception of the Common law in the sub-continent of India and its fortunes there.

Who would venture to represent the common law in that acceptation of the term? The method of interpretation adopted by the Supreme Court of the United States in relation to the constitution is special and peculiar. It constitutes in my opinion a most notable, a remarkable, achievement. It is not matched by anything done in recent time at least by the English courts, which fortunately have not been called upon to deal with similar fundamental problems. Is it in that method of interpretation — if method it can be called — that the spirit and genius of the Common law is to be found? I doubt it. And I am even more doubtful that it should be offered to the European court as a model or pattern to be followed, or even as a source of inspiration. What it does exemplify is the manner in which a common law court — I think that the United States Supreme Court may fairly be called that — could and did react to a novel and unprecedented situation; but the situation which faces the European court, as I see it, is not the situation which faces or faced the United States court.

Thirdly and positively, it is the business of the comparative lawyer, being a person seeking to acquaint himself with a system by hypothesis foreign, to use his utmost endeavours to divest himself of those axioms or concepts or preconceptions which are natural to him because highly appropriate to his own legal system — to reduce himself to a state of at least relative innocence in order to be able to perceive and actually to observe that which is new and novel, the foreign system. There are few things so silly or so presumptuous as the offer to transpose into the categories of one's own system a system which is different precisely because it is not only ignorant of those categories but refractory to them. The intellectual exercise involved in this attempted denudation is difficult and seldom wholly successful. But it is an effort which a comparative lawyer should endeavour to make; and indeed he must go further. In order to be able to appreciate the foreign system for what it is, and not for what he might fancy it ought to be, he requires to have for it and with it a high degree of sympathy. Sympathy has little to do with judgment of good and bad, or better and worse. The model is Fabre with his insects — he took a profound delight in the animal he observed, marvelled at its beauty and skill, at the ingenuity it displayed in coping with its environment, at its extraordinary tenacity and determination, and above all he rejoiced with it in its success, whether or not on another level of values it was a beneficent or a most noxious specimen. This direction of the attention to success, and the ability to appreciate success, is I believe a critical matter for the comparative lawyer, both because a foreign legal system really has in some measure actually attained success in the very fact of being in existence and operative as a legal system, and because we are likely to know a thing better (as indeed we do a person) if we attend to what it does, and is capable of doing, well rather than to its failures. For what we judge to be its failure may be no more than a disinclination to want to do what we think it ought to do.

Accordingly as a comparative lawyer I approach the European court in as pure a state of innocence as I can manage, concerned to observe it for what it is, not desiring to classify it by constraining it upon the Procrustean bed of categories already known to me in order to fit my pre-existing fancies, but on the contrary animated by the highest degree of benevolence and predisposed most sympathetically to appreciate and to admire the triumphs and successes which I confidently expect it to have achieved. Nevertheless I remain an academic lawyer — a person, as I see it, who is detached from the event, who should consider it as he would if it had occurred a century ago, and who should judge it with a similar impartiality and severity. This is a less agreeable trait and is apt to irritate the practitioner whether at the Bar or upon the Bench. From his remote and privileged position the academic lawyer is inclined to conclude — and there is obviously warrant for the conclusion — that the practitioner, whatever his good intentions, is almost certainly in error, that his action, even if excusable because of the pressure of circum-

stances, is insufficiently considered and insufficiently informed and insufficiently aware of the nature of the conjuncture in which he acts. In this detached judgment there is a considerable measure of condescension. That is a misfortune; but I do not see how it can be avoided however great may be the sympathy of the academic lawyer with the predicament of the practitioner.

If we are to appraise the operation of the European Court of Justice the first question to ask is evidently, what has it achieved? It will universally be agreed, at least as a first approximation, that in the areas subject to its authority, the Court has constructed and is constructing a supranational legal system which not only maintains the integrity of the Treaty and its pre-eminence within the national systems but imposes upon each state positive legal duties directly enforceable against the state in the state's own courts. The system is logically coherent, technically brilliant and, as it seems to me aesthetically satisfying. In the construction of this system the Court has shown great energy and a high degree of boldness, and the system so constructed displays a striking continuity in its development and an equally striking internal consistency. And moreover this remarkable result has been achieved in a very short space of time and in circumstances of considerable difficulty.

The natural reaction of the comparative lawyer is to shout hurray; and in this signification of approval he will be joined by many, including I would suppose Lord Denning, to judge from the opinion he expressed in *Bulmer Ltd* v *Bollinger S.A.* (1974) Ch. 401, 415. The methods which the Court has used in its work have been admirably analysed for us in the important contributions of Judge Kutscher and Mr Dumon; and no purpose can be served by any attempted rehearsal by myself of what has been much more adequately stated by them.

The Court regarding itself as having been appointed by Article 164 to be the custodian of the law of the Treaty has assumed the duty to secure that the principles defined by the Treaty are observed and its objectives attained. I think it fair to say that the Court's purpose is that, so far as that may be possible by the exercise of any powers vested in itself, the Community as envisaged by the founders and as delineated by the terms and the objectives formulated in the Treaty be effectively realized as an existing and functioning entity. I believe that the steadfastness of its purpose is best manifested in the cases where there has been a default in the performance by a person of a duty cast upon him by the Treaty. The Court appears to me to show considerable zeal in attempting to deal with the resulting situation as if the default had not occurred and to seek to remedy the damage done to the Treaty, if at all possible, rather than simply to exact performance by the person in default.

It is submitted that the nature of the Court's operation is well or even best, exemplified by its action in situations of default, and I propose to examine two cases in that area — both of them well known — in order to discover the actual mode of the Court's operation and to try to assess its advantages and disadvantages. The first is *Van Gend en Loos* v *Nederlandse administratie der belastingen,* 26/62 of 5 February 1963 [1963] ECR 1. which may be regarded as the first in the series; the second is *Defrenne* v *Sabena S.A.* 43/75 in which judgment was given on 8 April 1976 which is for the time being the culmination of the series.

As is well known in Van Gend en Loos a statute in the Netherlands brought into force modifications of the Benelux tariff resulting from the acceptance by the Benelux countries of the Brussels customs nomenclature. The required reclassification resulted in increased custom duties payable on certain aminoplastic products imported into the Netherlands from Germany by Van Gend en Loos. Article 12 of the Treaty expressly provides 'Member States shall refrain from ... increasing (the customs duties) which they already apply in their trade with each other'. There are of course numerous statements in the Treaty that the basis and a fundamental objective of the Treaty is a customs union involving the prohibition of customs duties between Member States. The importer in the Netherlands objected to payment of the higher duty demanded by the Netherland customs on the grounds that the Treaty precluded any increase thereof.

The Tariefcommissie, the administrative agency of last resort in fiscal matters in the Netherlands, referred to the Community court under Article 177 two questions. The questions were not aptly framed for they appear to raise queries as to the effect in the Netherlands legal system of obligations resulting from the Treaty, whereas the Court's jurisdiction is limited to the interpretation of the Treaty. Indeed two of the Member States who appeared as they are entitled to do, in order to oppose the importer's claim and the reference under Article 177, founded themselves precisely upon that ground — namely that the Court was being asked not so much to interpret the Treaty as to consider its application within the framework of the Constitutional law of the Netherlands. That question of application was within the exclusive jurisdiction of the national court. It raised some difficult questions — for example the effect of the competition *inter se* within the Dutch legal system of obligations arising from the Benelux Treaty and those arising from the EEC Treaty, whereas the interpretation of the EEC Treaty was in the circumstances self-evident — if the customs duties had been increased the Netherlands government was in default. In the case of default by a Member State in fulfilling its obligations under the Treaty, Articles 169 and 170 make express provision for the process to be followed to secure the remedying of that default — as to which it is sufficient here to say that considerable regard is paid to national susceptibilities and the opinion of the Commission must be sought before

the matter is brought before the Court. That process is, to say the least, in strong contrast with the direct and immediate confrontation between the individual and his own government which would arise if the default of the Member State was justiciable under Article 177. Additionally, the Belgian government objected to the Court's jurisdiction under Article 177 on the ground that the question asked by the Tariefcommissie was not relevant to the determination by the Tariefcommissie of the issue before it.

The manner in which the Court dealt with these preliminary objections is hightly instructive, particularly in a case such as this which arose early in its judicial history. First the Court showed great willingness to disentangle the possible ambiguities of the questions submitted to it: it was at pains to discover what it could regard as the basic point, being a matter within its competence, which the referring judge could be taken as having submitted for its opinion. Even if the question as framed might include matter outside its competence, it would — *ut res magis valeat quam pereat* — neglect the irrelevant material and direct its answer to what it had defined as relevant. So in our case it treats the Tariefcommissie's reference as raising a question only of the interpretation of the Treaty and not of the application of the Treaty according to the principles of Dutch internal law; and it proceeded to answer only the point so formulated, or reformulated, by itself. Secondly it stated with great punctiliousness that the question how the Treaty, as interpreted by itself, was to be applied to the issue before the Dutch courts according to the principles of Dutch internal law was a matter falling within the exclusive jurisdiction of that court. This recognition of the separation of functions has become a ritual formula of the European court; and indeed the concept of the co-existence of the Community legal system with the national legal systems is basic to the Court's legal philosophy whatever may be the complexities of their inter-relation or inter-action. Thirdly because of this separation of functions it was no part of the business of the European court to enquire why the national court had raised a question touching the interpretation of the Treaty, nor whether the question was relevant or not to the issue before that court; it was sufficient if such as question had in the view of the European court been asked by the national court and effectively remained to be answered. Fourthly the Court treated as wholly distinct from each other a reference to itself under Article 177 and any possible proceedings under Articles 169 and 170.

A hesitant or timorous court could I think have legitimately declined jurisdiction upon the ground of any of the preliminary objections proposed to it. Not only did it not do so but it showed an unusual degree of vigour and energy in striking down such objections and manifested a very firm determination to use the process of reference established by Article 177 in order to vindicate and enforce the provisions of the Treaty to the utmost of its powers.

The Court's decision on the substance of the reference was not less significant. Article 12 in terms creates immediate obligation upon Member States — it is they who are directed to refrain from increasing customs duties. The German government jointed the Belgian and the Netherlands governments in urging it upon the Court that Article 12 created only this obligation incumbent upon Member States, with the corollary that the only method of implementing the Treaty, and of enforcing the law which Article 164 enjoined the Court to observe, was to require the Netherlands government to conform its action to the Treaty's provisions if indeed it had departed from them. This contention of the three governments was moreover adopted by the Court's own Advocate-General, Roemer, in his opinion. It has not I think been sufficiently noted that the Court's decision was upon the 'conclusions contraires' of its advocate-general, that is to say of the person to whom it turns for impartial and considered advice upon the law which it is its duty to apply. The force of the contention which faced the Court was considerable: three of the six signatory governments were agreed upon what they had done and intended in the Treaty (and I have no doubt that one at least of the other governments also would have concurred if it had at that time been taking an interest in what was happening in the Community's institutions) and this view appeared to the advocate general to be the reasonable and appropriate view, though it was opposed by the EEC Commission which also appeared.

Again what is striking is not merely the fact that the Court rejected this contention but the energy with which it rejected it and the far-reaching reasons upon which it founded its rejection. The relative importance of these reasons is no doubt a matter of subjective appraisal: what seems to me basic is the Court's sense that if it did not recognize and directly enforce rights arising in an individual Community law it would risk becoming idle and ineffective. 'A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals... The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States'. In the view of the Court 'the objective of the EEC Treaty .... implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States.' This implication is held to be confirmed by various considerations rehearsed by the Court and not least by the very existence of Article 177 which indicates that the States have obligations capable of being invoked by their nationals before the national courts. The Court therefore concludes 'that the Community constitutes a new legal order ... the subjects of which comprise not only Member States but also their nationals.' This legal order can and does confer rights upon individuals not only when an explicit grant is made by the Treaty but when obligations are imposed, in a clearly defined manner upon

others. In particular Article 12 is 'ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.' It sets out a clear and unconditional prohibition, which is not a duty to act but a duty not to act. 'The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.' Accordingly the Court rendered its decision in the terms 'Article 12 of the Treaty establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect.'

This is not the place to analyse the manner in which the Court has in subsequent cases developed the principles set out in the Van Gend en Loos judgment, though I may be permitted to say that this development shows a high degree of consistency and logical coherence. With an ever-increasing emphasis the Court establishes Community law as an autonomous and distinct supranational legal system organically linked with the national legal systems and respecting their independence but nevertheless exercising a jurisdiction which is paramount to theirs. No comparative lawyer can fail to admire the ability and devotion shown by the Court in creating this legal system and, not less, the solidity of the system they have created. This admirable construction is in large part immediately founded upon Van Gend en Loos. Nevertheless I propose to criticize this decision — at least the manner in which the Court reached its conclusion and formulated its reasons. A mere commentator is well advised to show prudence in criticizing a judgment which forms the basis of the Court's case-law; and I am not willing to suggest that the Court was *fundamentally* in error in its actual decision; it might well have stultified itself had it decided the contrary of what it did decide. But with Van Gend en Loos the Court embarked upon a course which has had, and will continue to have, consequences which are as confusing as they are dangerous.

My criticism of the terms and method of the decision is not, I believe, due to hindsight — though in any event that is a prerogative of the academic lawyer, but before embarking upon that criticism and in lieu of any analysis of the numerous and very important cases which developed the principles of Van Gend en Loos, I propose arbitrarily to select a recent case — 43/75 Defrenne v Sabena in which judgment was rendered on 8 April 1976 — as exemplifying the end result attained in this critical area of Community law.

The Defrenne case — which I shall identify as Defrenne No 2 since Mlle. Defrenne had already appeared before the Court (80/70) on a connected issue in 1971 — is again a reference to the Court under Article 177, on this occasion by the Labour Appeal Court (Cour du Travail) of Brussels. The reference raised the question of the interpretation of Article 119 of the EEC Treaty, and of

its direct applicability in the Belgian legal system. The text of Article 119, first paragraph is as follows:

> Each Member State shall during the first stage ensure, and subsequently maintain, the application of the principle that men and women should receive equal pay for equal work.

Mlle. Defrenne had been employed under various contracts by the Belgian Airways Company, Sabena, as an air hostess from 10 December 1951 until 15 February 1968 when she attained her fortieth year, the retiring age for female air-borne staff. It was admitted that the work of an air hostess is identical to that of a male steward; but up to 1 February 1966, when Sabena introduced a new pay code, the air hostess's pay was inferior to that of a steward of equal standing. After the termination of her contract, on 13 March 1968, Mlle. Defrenne sued Sabena in the Tribunal de Travail of Brussels claiming the difference between the wages she had received and those which a male steward would have received between 15 February 1963 — the *terminus a quo* fixed by the Belgian Statute of Limitations — and 1 February 1966. The sum involved was 12 716 Belgian francs, that is to say about £ 100 at that date. She also claimed that she should have received a larger 'severance payment' and that her pension should have been calculated at a higher rate.

The court of first instance rejected all three claims. The Labour Court of Appeal affirmed the decision as to the severance payment and pension rate, but decided to seek the European Court's ruling on the claim for wage arrears, and under Article 177 raised two questions. The first is straightforward — did Article 119 directly confer upon a worker, without the intervention of national legislation, a right of action in the national court to enforce the principle of equal pay, and if yes, from what date. The second question asked, apparently alternatively, whether Article 119 became enforceable in the national court by reason of subsequent acts of the Community authorities, (and if yes, which and from what dates) or whether its enforceability should be regarded as depending exclusively from the competence of the national legislature. This question is to some extent redundant or repetitive but the confusion reflects the confusion and ambiguities of the conduct of the Community itself.

The passage from the first to the second stage of the Community's transitional period was conditional upon a finding that the objectives specifically laid down in the Treaty for the first stage had in fact been attained in substance. It was quite clear that the first stage objective enunciated in Article 119 had not been attained when a conference of the Member States was called in 1961 to consider the situation. Nevertheless on 30 December 1961 — as always, at the last moment — the conference decided that the second stage should start on 1 January 1962, the due date. So far as Article 119 was concerned,

they passed a resolution which added some details to its provisions touching equal pay but which went on to accord a grace period of a further three years — to 31 December 1964 — for the complete elimination of pay discriminations based on sex. The purpose of the resolution was no doubt to suspend the effect of passage to stage two on the provisions of Article 119. In Defrenne No 2 the Court held that the resolution was wholly ineffective to suspend those provisions: the Treaty could be amended only in accordance with Article 236, which required *inter alia* that amendments be formally ratified by all Member States.

In spite of this purported extension of time during the grace period little was done by the States in default to remedy their default. The Commission acting under Article 155 called various conferences for the purpose of expediting action and submitted a number of reports of which the last dated 18 July 1973 gave notice that it proposed to begin enforcement proceedings under Article 169 against Member States still in default; but no such proceedings were in fact started. However, on 10 February 1975 the Council issued a directive (No 75/117) to Member States requiring them to conform their legislation to Article 119 and to further details set out in the directive but giving them a further delay of one year to attain that result. Again in *Defrenne No 2* the Court held categorically that whatever additional obligations may have been created by Directive 75/117 that directive could not affect the obligations immediately resulting from Article 119 or the time of their coming into operation. Accordingly these obligations became effective, in the case of the original members of the Community, from the beginning of the second stage (that is to say from 1 January 1962) and in the case of the new members from the date of the coming into force of the Treaty of Accession (that is to say from 1 January 1973).

Article 119 was thus cleared from its entanglement with resolutions and directives, and the naked question remained as to its meaning and effect. Answering that question the Court rendered a judgment which is more extensive than usual and which considered as an intellectual exercise is, if I may say so arresting. It manifests a fixed determination to promote the objectives of the Treaty by giving direct legal efficacity within the national system to Community provisions, and to do so to the utmost limits of the possible — which indeed are stretched with considerable ingenuity.

The stages of the exposition or argument — omitting some specific answers to specific objections made by the parties — may perhaps be recapitulated as follows. First the Court emphasised that Article 119 touched the very foundations of the Treaty because the purpose of the Article was to achieve conditions of fair competition between Member States by denying to any of

them the unfair advantage of employing female labour at depressed rates of pay, and because its further purpose was 'to promote improved working conditions and an improved standard of living for workers' which, as stated in Article 117 and in the preamble, was another dominant objective of the Treaty. (It must suffice here to note that the Court was anxious to place the Article in this kind of context, perhaps to justify the urgency it felt to give to the Article its fullest legal effect.)

Next the Court is concerned to establish that the text of the Article gives indications which of themselves are precise enough to define enforceable legal obligations. Accordingly it states (1) that the context of the Article makes it clear that equality of pay can be secured only by raising the lower level to the higher and (2) that a distinction must be made between direct and overt discriminations based on sex and those which are indirect and covert. It goes on to admit that the abolition of all such discriminations, covert as well as overt, might well require further community and national legislation establishing appropriate criteria. Overall abolition is no doubt the objective of convention No 100 of the International Labour Office of 1951 which speaks of equal remuneration for work of 'equal value', whereas Article 119 is concerned to secure equal pay for the *same* work (the French text has 'pour un même travail' where the English reads 'for equal work'). The limited direct overt discrimination struck at by Article 119 can without difficulty be identified by a court, especially if that discrimination results from legislative or administrative provisions or from collective bargaining agreements or where in one of the same undertaking (whether a public service or a private enterprise) a female worker is, for the same job, paid less than a male worker. (At this point the argument must be taken as assuming that if the terms of Article 119 *can* be made sufficiently precise the Article *should* be construed as directly creating legal obligation between individual in the national counts.)

The Court goes on to say that objection to this conclusion cannot be raised from the terms of Article 119, and in particular not from the use of the word 'principle', since that word as used in the Treaty means that the provision in question is fundamental: to treat it as providing merely 'une indication vague' would be to upset the very basis of the Treaty. (The logic of the argument again falters here: the only alternative to giving Article 119 direct internal effect is not to treat it as 'une indication vague' — the real alternative is to construe it, as the text would seem to require, as improving an immediately binding positive obligation upon the Member States).

It had further long ago been established by the Court's decisions that the fact that an injunction is formally addressed to the Member States does not prevent the injunction from creating enforceable rights in individuals. More-

over Article 119 categorically imposes an absolute duty upon the States to attain a specified result by a determined date: the binding character of this obligation is affected neither by the non-performance of the states nor by the default of the Community's organs in enforcing performance. To hold otherwise would be to permit lawlessness to become the measure of the legal duties created by the Treaty, a course not open to a court which had regard to the function attributed to it by Article 164.

Accordingly the Court concludes as follows:

> 'The reply to the first question must therefore be that the principle of equal pay contained in Article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.'

That might have been taken to be the end of the matter. It was not. In the course of argument the representative of Ireland and the representative of the United Kingdom both of whom had appeared in order to sustain the view that Article 119 did not have direct internal effect, had submitted *inter alia* that the giving of such an effect to the Article would produce economic chaos. The United Kingdom representative submitted that the burden of arrears of wages from 1 January 1973 though falling unequally on various sectors of the economy, depending upon the proportion of women employed and the disparity existing between male and female wage scales, would hit with great severity a number of enterprises which he listed, and especially the clothing industry. The cost, which might be estimated at about 3.5 % of the total national wage and salary bill, would inevitably exacerbate the rate of inflation and lead to innumerable bankruptcies in series. The Irish representative estimated that the cost of the additional payment to those women only whom the Irish State employed in the public sector would exceed the total allocation to be made to Ireland by the Community's Regional Fund for the entire period 1975—1977.

The Court, evidently impressed by these submissions, held that though consideration of the hardships which a judgment might produce in situations already brought into existence could not be permitted to influence the objectivity of the Court's decision upon what the law required to be done as to the future, nevertheless the Court was under duty to weigh carefully the practical consequences of its decisions. In the exceptional circumstances of the present

case it would be appropriate to take into account the fact that the persons who would be affected by the ruling had been misled by the conduct of Member States and by the re-iterated opinion of the Commission as well as by its default in bringing enforcement proceedings, and they had been induced to believe that it was proper to continue practices which though not prohibited by the rules of the national systems were contrary to Article 119. In these circumstances it was desirable, in order to maintain the stability of legal relations, in principle not to permit completed transactions to be re-opened, and in consequence except where action or its equivalent had already been started Article 119 could not be invoked to sustain a claim for wages relating to a period anterior to the date of the present judgment.

Well there it is. The Court has travelled a long way from the simplicities of Van Gend en Loos. Though no doubt Mlle. Defrenne No 2 is an extension of the principles established in Van Gend en Loos, its result was I think inherent in those principles as formulated unless great care was shown. And it is an odd result. The interpretation which the Court has put upon the Treaty is such that in order to avoid mere chaos the Court is compelled to claim and to exercise a dispensing power which is I believe not known to any modern court of any of the Member States. The Supreme Court of the United States of America and the courts of some of its constituent states have indeed, under the doctrine of 'prospective over ruling' claimed, and exercised a power to declare for the future a rule which is not to be applied to the past and two members of the House of Lords have indicated, *obiter*, that the doctrine may deserve consideration in the United Kingdom. But the power to suspend as to the past (where it is admitted at all, for there is a considerable bias against retroactive legislation) and the power to declare law *de novo* as to the future (i.e. to make it effective as from a given date) is inherently the mark of the legislative function and there is an obstinate belief upon the continent of Europe that a court does not have a legislative function. Such a function does not appear to have been allocated to the Court of Justice by Article 164, to which the Court has very frequently referred as constituting its charter. Moreover when acting under Article 177 the Court had previously with a special punctiliousness re-iterated that it was concerned only with the interpretation of the law, and not with the application of it which it left to the national courts. The distinction between interpretation and application is evidently fine and difficult; but surely the consideration of the practical consequences of a judgment pertains upon any view to the sphere of the application of the law. The end product of Van Gend en Loos is certainly very questionable, and it is evidently necessary to examine more carefully the premises from which the Court starts, the principles which it adopts and the method which it employs in reaching its conclusions.

The decision in Van Gend en Loos deals with the question of the direct application of provisions of the Treaty within the national legal system of a Member State. That is the only aspect of the extensive case law of the Court of Justice which is the subject of this enquiry. The first question is whether *any* provisions of the Treaty (or of any Treaty) should have direct application. It is well-known that within the English legal system treaties do not have such application. Within that system the orthodox view today (I venture no opinion as to what the orthodox view might be in fifty years' time) undoubtedly is that the EEC Treaty is directly applicable because the European Communities Act 1972 enacts that it shall be. However, it is equally well known that on the continent of Europe many if not all of the legal systems do directly receive international treaties into their internal law upon ratification, though some — as for example the French — hedge such reception with precautions, requiring that there be reciprocity or that the Executive be consulted. It cannot therefore be a matter of surprise that in 1963 a continental European Court of Justice held that the EEC Treaty should be and was directly applicable in the sense that it was immediately received within the national legal systems; and it very properly reinforced its conclusion with considerations drawn from the aims and objects of the Treaty and from its nature and structure and not least from Article 177 which evidently envisaged that questions concerning the meaning of the Treaty or of the acts of its organs would directly arise before national courts.

Nevertheless so far as the express terms of the Treaty go, it is only to Regulations within the meaning of Article 189 that direct applicability is attributed. And that appears to be eminently reasonable, at least in one sense of direct applicability. Even if the Treaty becomes immediately part of the national legal system becomes immediately part of the national legal system and in that sense is directly applicable it is a question whether a directly applicable provision is apt to engender in an individual a particular kind of right enforceable by action. It is clearly the scheme of the Treaty that the very wide obligations undertaken by the parties to the Treaty should be given precision and concrete detail by concerted legislative or administrative action on the part of the Member States or by regulations issued by the Council of the Commission or by both modes of implementation. The draftsman may have meant what he said and may indeed have intended to give to this Subordinate Community legislation, and to it only, direct applicability in the sense of engendering in an individual a right enforceable by action within the national legal system in the very terms in which the right had been defined. Such a view does not necessarily require us to classify the EEC Treaty as a constitutional instrument — though that seems to me a possible opinion. It is reasonable, and quite normal, in the case of ordinary legislation dealing with complex matters — let alone matters as complex as those of the EEC Treaty — to make provision for its implementation by, and only by, subordinate legislation. Of its nature this subordinate

legislation is more apt to establish that detailed framework within which the orderly implementation of the principles declared in the principal instrument can be secured and enforced. Nor is Article 177 deprived of its efficacy on this view: the subordinate legislation will indeed come before the national courts and the courts may have to submit to the European court questions touching the interpretation not only of the subordinate legislation but of the Treaty also when under Article 184 the validity of the subordinate legislation is in issue.

Accordingly it suggested, *in limine*, that there is a good deal of weight in the contention of the three governments and of the Advocate-General in Van Gend en Loos itself that Article 12 did not have direct applicability in the sense that it did not immediately engender in an individual an enforceable right of the kind which the plaintiff claimed. A supplementary question arises and requires to be answered — not whether the national court is empowered to recognize and to give effect to a provision of the Treaty but whether that provision is apt immediately and of its own force to create in the plaintiff a right of the kind which he claims. This supplementary question has been identified as the question whether the particular provision has 'direct effect'. That expression is convenient and is here adopted to connote this supplementary question.

When we consider the provisions of the Treaty we find that exceptionally some are not merely imperative — I believe most of the provisions to be imperative — but categorical in that they prescribe a particular consequence. A good example, perhaps the best, of such a categorical provision is Article 85 (2) which provides that 'any agreements or decisions prohibited pursuant to this Article shall be automatically void.' If any kind of provision was intended to have 'direct effect' surely this provision should be so regarded: it may reasonably be suggested that a national court empowered to give effect to the Treaty must if an agreement of the defined class is brought before it declare it to be void. Yet even in the case of Article 85 (2) there is a considerable doubt whether this was the intention of the draftsman; for he goes on to provide in Article 87 that 'the Council shall ... adopt any appropriate regulations or directives to *give effect* to the *principles* set out in Articles 85 and 86' (italics added). It looks as if here also the draftsman is following his favoured scheme of relying upon subordinate legislation to bring into operation and make effective the principles of a policy which the Treaty declares, however definitely the policy may have enunciated.

Where a Treaty provision is not merely imperative but categorical also, it may not be too great a strain upon the Treaty to regard the provision as having 'direct effect', even though the draftsman may have intended the contrary; but even here such action may further complicate the application of the Treaty which is complicated enough. But some at least of the provisions of the Treaty to which the Court has attributed 'direct effect' are not categorical

in the sense indicated. Both Articles in question — Article 12 and Article 119 — expressly issue directions to third parties — Member States in these instances — to act or not to act in a manner which is specified. The directions are of course imperative and may be precise and even very precise; but if the directions are not observed the provisions themselves do not and cannot produce in the real world the result which would have been then produced if the directions had been observed. If the Commission has been directed to issue a Regulation of a specified kind and the Commission fails to do so, then quite simply the Regulation does not exist. In this type of case, if the Court proposes to give 'direct effect' to the provision the Court must take a further step and in my view a critical step. It must decide that it will deal with the situation *as if* the direction had been observed. This does not mean that the Court is suffering from a hallucination: it means that the Court has decided to sever the legal world — the world in which it operates — from the world of what are called real or actual events.

There is nothing particularly shocking in such a severance — it happens frequently enough and it may even be necessary for the full flowering of a legal system. But it does entail certain dangers, particularly in an enterprise as novel and as complicated as the setting up of a European common market, and in any event the Court ought manifesty to give the appearance of appreciating the dangers and the limits of the course upon which it is embarking. The justification of Van Gend en Loos is that the separation proposed — the *ecart* — between the legal and the real world is or appears to be really rather small. Article 12, as the judgment itself notes, is strictly negative and imposes a negative duty — the Member States shall refrain from increasing the customs duties already applicable. This state has increased this duty. Instead of reprimanding the state — which in any event was not open to the Court in the process before it — all that needs be done is to direct the national court to deal with the matter *as if* the increase had not been made. The resulting dislocation in the real world appears to be tiny — the substitution in the tariff list of a previous figure instead of an existing figure. (Actually the whole transition from the Benelux to the Brussels tariff could have been imperilled). At so small a cost the Court will exemplify its power and authority; it will vindicate and enforce the law of the Community; it will enlist to promote that law the energies of individuals in claiming their rights; and it will notably encourage those who are labouring to establish the Community in spite of the recalcitrance and backslidings of some of its component parts. What looks like heroism has evidently a powerful attraction for some types of judicial temperament; and there may be some excuse for a Court's desire to strike a spectacular attitude, especially if the cost appears to be small. As a commentator and spectator I am not willing to conclude that the Court took a wrong turn precisely here, but I do say that there was something seriously wrong in the form of its judgment and the manner in which it has grown into a precedent.

A common law critic of the form of the Court's judgments labours under the serious handicap of having a natural bias in favour of a different form. On a personal level perhaps my handicap is less than it might be as I have great admiration for some types of continental judgments and notably for those of the French Conseil d'Etat. They are no doubt of a highly esoteric character; they are succinct and have, or had, the precision and all the interest which the old writs had. And they are of course Collegiate: they record the conclusions of the Conseil d'Etat 'statuant au contentieux'. They differ *toto caelo* from the repetitions and prolixities and approximations of modern English appellate judgments but I find them attractive and I believe them to be effective.

It is not therefore the collegiate character of the European Court's judgment which is as such the cause of my reserve. That collegiate character cannot at present be avoided: the court itself appears to be quite convinced that it is essential to maintain for its members the self-protection which corporate action and 'le secret du délibéré' provide. I would not venture to differ from that view, though it may be a pity that it is so. However, it is a consequence that the European Court confronts, or attempts to confront its audience with what I may call a finished article: whatever the influence of the 'juge rapporteur' the judgment consists of a text upon which there has been joint deliberation and which has been agreed as a text by at least the majority. The Court is careful to recite the arguments of the parties, especially if it proposes to dissent from them; but it necessarily recites them as it understands them and normally as constituting objections to the course which it has decided to adopt. There is not the same necessity in justice or in self-justification to rehearse the points made by the party whose views the Court is accepting.

Having set out the objections made, the Court then states its opinion. The manner and form of this statement reminds me most powerfully of the 'Respondeo dicendum' in an 'articulus' of the great mediaeval 'Summa Theologica' of St. Thomas Aquinas. It is in principle a rounded and complete answer, and it may be compelling; but it is one which does not admit of any doubt or hesitation in the mind of the person answering. If there have been doubts or hesitations they have been ironed out *before* the answer is formulated: now it is 'sic et non sic'.

Whatever may be the case in theology, in a legal decision of any difficulty the judicial mind ought to have, and normally has, considerable hesitation, however firmly it may eventually conclude on the one side or the other. In a difficult case there are powerful reasons on either side and it is a small matter, or a special slant, which may decide the issue. It is highly desirable that the actual impact of the argument, and the reaction to it of the judicial mind,

should manifestly appear. The advantage of the English process, whatever its other deficiencies, is that it does permit or even require the actual impact to be made manifest — not merely at the hearing (where, even in an appellate court, the spectator is effectively assisting at the 'délibéré' itself in that he is present at the occasion at which the individual judge is forming his opinion and can watch the process) but also in the form of the English judgments in which the judge expresses his own personal view of the facts and the law It is not, I think, sufficiently appreciated that the English system puts upon the judge a very considerable strain. No doubt he is enured to it by his previous life as counsel, and he is fortified by the panoply of the law and by the long tradition of his office. Nevertheless it is no small credit to him that he is able and willing to endure that strain and that in the discharge of the duties of his onerous office he normally attains a high level of performance.

I have heard it expressed as a criticism of the European Court that it does not respond to the argument addressed to it. This is not correct: the argument is recorded and the answer given to it clearly appears from the conclusion reached by the Court. But the criticism is justified in so far as the form of the trial and the formal agreed text of the judgment preclude us from observing the process whereby the Court has reached its conclusion. We have the agreed conclusion but in lieu of any account of how that conclusion was in fact reached, of what influence which argument or which view may have had, we have a recital *ex post facto* of the reasons which in the opinion of the Court justify the conclusion which has been reached.

The European Court accordingly delivers a judgment which is armoured and dogmatic if I may so describe it. Such a form of judgment has many advantages. It is, I think, quite clearly what was expected of the Court. The Court after all was instituted by our continental colleagues 'pour dire droit', and this is precisely what it does. The law which it declares is categorical, but is it not appropriately categorical? It may read as if it were the section of a statute; but I doubt if the Community in the confused process of formation could afford the luxury of an English type of judgment which issues in no agreed precise formulation of the law to be applied, and only in the fortunate case allows an inference to be made of the limits within which subsequent decisions are likely to fall. Moreover in the field with which we are dealing the Court under Article 177 is asked to determine a question of law and has made it clear that it is not concerned with its application. Such a question encourages and perhaps requires an answer which is abstract and absolute.

Judgments of this kind are not conducive to that development of the law which is associated with the doctrine of precedent as understood in common law countries. They indicate a different preferred mode of progress — that of the tram rather than of the bus. The critical decision lays down a line to be followed

and the rule is formulated in a manner which prescinds from the contingencies of the instant case. Thus in Van Gend en Loos the decision is that Article 12 of the EEC Treaty has 'direct effect' within the territory of a Member State and enures to the benefit of citizens whose individual rights the internal courts should protect. Article 12 is specifically directed to Member States and imposes upon them a general duty. What has been decided is that from a general duty so imposed upon third parties an individual enforceable right can arise. In fact the duty imposed by Article 12 was also a negative duty and in further addition it appeared to be relatively a simple matter to determine what the situation would have been had the third party acted as the Treaty required; but these 'circumstantial contingencies' are no more incorporated into the decision than are any hesitations or doubts which the members of the Court may then have had.

The Court starts its consideration of the next case upon interpretation to come before it with the naked principle or premise that general duties can and do create individual rights, together with the conviction that it is the business of the Court to give legal efficacity to the terms of the Treaty if it possibly can. Thus, in the Defrenne No 2 case though the Article 119 then in question imposes a positive duty upon the States and one moreover the performance of which requires, as is admitted by the Court, (see paragraph 19 of the judgment), the intervention of a whole mass of Community and national legislation, these 'circumstantial contingencies' are treated as equally irrelevant to the application of what is regarded as the established principle (see paragraph 31 of the judgment), that rights in individuals are created by obligations cast upon States. Accordingly, as it would be evidently impossible to impose upon the national courts the duty of dealing with cases brought before them as if the required mass of rules and regulations with unspecified particulars had actually been enacted, the Court, if it is set upon creating a directly enforceable right in an individual, must somehow spell out of the generalities of Articles 117 and 119 a specific obligation independent of the non-existing regulations and capable of being directly enforced.

This the Court proceeds to do by calling in aid a really very ingenious distinction between what it names overt and covert discrimination. There is overt discrimination if by regulation (for example in the civil service) or by the terms of a collective wages agreement a difference in remuneration is established on the basis of sex or if in one and the same enterprise or undertaking, public or private, a man and a woman earn different rates of pay for the same work.

Such overt discrimination is capable of being identified by the national courts 'Solely by reference to the criteria laid down by Article 119 . . . on the basis of a purely legal analysis of the situation' (see paragraph 21 of the

judgment). In those situations Article 199 is *capable* of direct application and *can* therefore create in individuals rights which the national courts must protect. (Paragraph 24 of judgment). It is apparently taken as axiomatic that because on such an interpretation Article 119 can create individual rights it must be held that it does create them.

Even if the application of the decision is limited to the future the resulting complication is formidable. In each national jurisdiction non-discrimination rights, if I may so describe them, will stem from three separate sources — the national legislation which the Article requires, Community regulations which the Court envisages, and the direct operation of the Article itself which the Court establishes. Whereas it seems tolerably clear that in the draftsman non-discrimination rights should in each country depend from the legislative provisions of that country subject to the power of the Commission to require each country to attain the appropriate level of protection, by amendment if necessary of those provisions. The scheme proposed by the draftsman may be judged to be a good deal more sensible than the result attained by the Court's decision, especially in an area as complex and difficult as non-discrimination.

By way of further comment on the mode of the Court's operation as illustrated by these two cases, this may be added:

(i) the decision in Defrenne No 2 is not carried by the decision in Van Gend en Loos. There are profound differences between the two instances and no consideration is given to the question whether these differences should be critical;

(ii) there appears to be an over-riding determination in the Court to treat general provisions in the Treaty, if it possibly can, as capable of creating, and creating, directly individual rights enforceable in the national jurisdictions;

(iii) to achieve that result it is willing to treat somewhat cavalierly the expressed intentions of the draftsman of the Treaty and to use a considerable degree of technical ingenuity in its interpretation;

(iv) it is not deterred by consideration of the legal and practical difficulties resulting from its decisions but is willing, in order to deal with some of them, to call in aid a power of suspending the law which is commonly believed to be a legislative power.

What seems to have happened is that, whatever have been the successes of the communal undertaking, there has been in some degree and in some instances

a breakdown or failure in the arrangements made for bringing the Community into that fullness of existence which the founders envisaged with perhaps an excessive optimism. To achieve their purpose they required the cooperation, or the joint operation of a variety of organs or entities and specified and distributed to each a variety of tasks. Of the work entailed the principal burden lies, and necessarily I think must lie, upon the Member States: whatever may be individual falterings in individual instances, the Community was unlikely to get under way — or indeed long to continue to function — without the willing and active cooperation of the Member States. This the draftsman evidently recognizes by the great number of obligations which the Treaty specifies as incumbent on the Member States. The Treaty of course created some organs of its own, of which the principals are the Council, the Commission and the ofourt; for the Assembly in the original state of things appears to have a peri-Cheral function. These organs, as indeed the Community itself also, have of pourse an existence separate and independent from the Member States; and chey are of critical importance in the construction of the Community, particutarly in so far as they (and the Commission especially) can aid and promote and incite and direct and secure the performance by the Member States of the tasks allotted to them. But however important may be any of the participants in the joint operation, none I think can supply the place of the other. Indeed any attempted usurpation is calculated to destroy the equilibrium upon which the Treaty rests.

The scheme envisaged by the draftsman in allocating functions and duties is tolerably clear and seems in principle sensible. Having distributed duties as appeared to him right — with a preponderance of them cast upon Member States — he institutes a Court of Justice to see that the provisions of the Treaty are carried out — or, to use his own words, to ensure that in the interpretation and application of the Treaty the law is observed (Article 164). When he defines its jurisdiction he gives pride of place, as seems right, to its jurisdiction over Member States which are alleged to be in default of their Treaty obligations, but is careful to limit the right of initiating such a process to the Commission and to fellow Member States only and subject in each case to preliminary proceedings by the Commission. (Articles 169 and 170). He then proceeds in Articles 173 and 175 to give jurisdiction to the Court over the Council and the Commission, again limiting the right to initiate process.

Article 173 is of special interest. The draftsman is evidently proposing to give to the Court the jurisdiction exercised over the administrative field in France by the Conseil d'Etat, which, as is well known, is classified under four 'cas d'ouverture' — 'incompeténce', 'vice de forme', 'détournement de pouvoir' and 'violation de la loî ou des principes généraux du droit'. The intention and the difficulties of the draftsman appear most clearly in the French text. He can transpose direclty into the Treaty the first three 'cas d'ouverture' and he

does so. But he cannot directly transpose the fourth 'cas', and he accordingly paraphrases it as 'violation du présent traité ou de toute règle de droit relative à son application.' And the parallel with the 'Conseil d'Etats' jurisdiction is further exemplified by the grant by Article 184 to parties generally the 'exception d'illégalité' developed by the Conseil d'Etat. It would I think be clear to a continental lawyer that upon any delimitation of separate jurisdictions a court having the jurisdiction specified would also have jurisdiction 'à titre préjudiciel' — which might I think be translated as a prerogative right — over the field over which the jurisdiction extends. Accordingly by Article 177 the Court is given a pre-eminent authority in questions concerning the interpretation of the Treaty of the validity and interpretation of acts of the institutions of the Community; so that should any such question arise in a national jurisdiction, any court may and the court of final instance, must, refer that question to the European Court to enable that Court to give what the English text describes as a preliminary ruling.

In the area of the law with which we are concerned — namely where the Court is asked to rule upon a situation resulting from the failure of a Member State to perform an obligation cast upon it by the Treaty — the real question is not the technical question whether a particular provision can be construed as immediately creating a directly enforceable right, for that is merely a device to secure a consequence to which *aliunde* preference has been given. The real question is a much more difficult and over-riding question — what should the Court regard as its duty when faced with a breakdown in the treaty scheme of things?

In respect of defaulting States the draftsman has given to the Court only a carefully limited jurisdiction, and he has been careful to make directly applicable in Member States only regulations issuing from the Council or the Commission which he no doubt envisaged as containing detailed provisions of a kind impossible in a treaty. In the circumstances of the Van Gend en Loos case it must have been an extreme temptation to the Court to do something more effective than piously abstaining. The State no doubt was in default but it was largely an accidental default. There did not appear to have been any deliberate intention to increase customs duties; the increase seemed to be an unconsidered side effect of the laudable performance of the State's obligations under the Benelux treaty. It must have seemed a very simple thing in such a case for the Court to remedy the default directly — to require the national court to disregard the increase, if increase there had been. The contention of the three governments — that the Court should abstain, that the increase should be cancelled by the State's internal mechanisms or that the default be dealt with by the Commission with possible process under Article 169 — has an air of extreme unreality. It is a delaying tactic and is requiring that a steam hammer be used to crack a nut. After all everybody is

agreed that if there has been an increase in the duty, the increase is improper; and there is no difficulty in ascertaining what the duty should have been if it had not been increased.

The temptation to the Court to act in Van Gend en Loos was very great. And there were all manner of other considerations. In 1963 the Community was not developing as rapidly and as happily as the founders had expected. It would be a considerable encouragement if it were made manifestly to appear that at least one organ of the Community was in business and meant to do business. The Court by its action would demonstrate that the Community was in effective operation, and that in the most striking way — by giving a direct remedy to the individual in front of the courts with which he was familiar, and vindicating that remedy in the name of the Community. By such action not only would the Community be made real but the individual would in promotion of his own interests be incited to become the protagonist in the development and enforcement of Community rules. There is moreover a diversity in judicial temperament; and for some what is described as a realistic boldness has considerable attraction. *Boni judicis est ampliare jurisdictionem:* it is his paramount duty to develop and extend the law he administers and to give it efficacity. The European Court, I think, regards itself as the trustee of the hopes and aspirations, the purposes and the objectives of the founders of the Community and is anxious not to fail in the performance of this trust.

The decision in Van Gend en Loos is accordingly justifiable and may be justified by the fillip it gave to the development of the Community. But it is of no less importance that the Court should not become more royalist than the King. It is to be regretted that the form of judgment of the Court did not permit it to make clear that it appreciated the danger of the course upon which it might appear to have been embarking. It proposed to short-circuit the scheme elaborated in the Treaty. Even if the immediate result attained in the Van Gend en Loos case is satisfactory, the consequences as exemplified in Defrenne No 2 are unacceptable and grave. That the Court should be disturbed by the manifest failure of the contracting parties to perform the obligations they have undertaken is understandable and appropriate; and it must be commended for its firm determination to provide a remedy for the failure. But the remedy provided may produce evils greater than those which it is sought to cure, particularly if, as seems to be the case here, the economy of the Treaty is disturbed. Even in the short run it would have been more reasonable to require the Member States to perform the obligations they had undertaken in the Treaty, and to perform them in the manner prescribed by the Treaty. In lieu of that, the Court declares that the rights which would have been established if those obligations had been performed had in fact been established 'de plein droit' within the founding members since January 1963, to the extent of securing to men and women workers equal pay for the same work.

The declaration will sound odd in the ears of women workers who have received inferior pay for the same work and who are told that they have no remedy for the injury which they have sustained. If such a declaration is accounted a vindication of Community law, it is a vindication in a wholly unreal world.

The Court, it is submitted, should be at pains to keep its world in closer contact with the actual world which includes defaulting Member States and an insufficiently active Commission. The Court's impatience may be justifiable; but it should not permit that impatience to induce it to trespass outside its province and to attempt to establish by its own fiat what the Treaty directs to be established by a very different process. Whatever may be the advantages of zeal or impatience, the Community will, I suspect, be more solidly and durably established if account is taken of its hesitations and failings and if it is encouraged to proceed with 'all deliberate speed' which in a human undertaking of less complexity has required a period of time longer than expected.

It should be remembered that we are looking at Community law in its infancy. It is a lusty infant. We are extremely beholden to the Court for having maintained it in so vigorous a condition. It promises well, it has plenty of life, but it has still to attain maturity. When it is established and secure I believe that it will experience less need to justify its existence or to vindicate itself by spectacular gesture; and will, because accepted, accept to discharge its own function in a more tranquil manner and in a lower key. And I venture to express the hope, now that the Community has been extended, the consideration be given to the manner and form in which judgment is delivered, and in particular as to whether it would be possible, while maintaining if it be necessary 'le secret du délibéré', to give a more adequate response to argument and to link a decision more firmly to the circumstances and conditions from which it arises.

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The Case-law of the Court of Justice — A critical examination of the methods of interpretation

by

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Introduction

The Treaty of Paris and even more so the Treaties of Rome have caught the imagination in many different spheres of activity. In general they were warmly welcomed for it was felt that a deep-seated yearning for co-operation, collaboration, economic, social and cultural progress, understanding between the peoples of the old Europe and brotherhood could be satisfied through these daring and novel designs for Europe.

The institutions, the working, and the objectives of the European Communities and their problems were and still are complex.

Despite the efforts expended, few indeed are those who, even in the so-called educated and well-informed circles, have anything like a clear conception of what those Communities are, what they can or ought to do and what they have accomplished.

Their setbacks are more widely-known than their successes and achievements. Furthermore it is primarily those setbacks which attract the attentions of certain political circles and above all of the press. The achievements, the work done, are passed over in silence, no doubt because they lie in somewhat technical fields with which it is not easy to make an acquaintance.

Let us be optimistic and think that this is perhaps because public opinion wants to see the Communities develop to the full and that it is disappointed; disappointed, if somewhat uninformed, not because of what the Treaties have set out to do and what they have allowed or have required to be done, but because the Member States do not take those fresh decisions which are necessary to perfect the European institutions and fail to exercise the political options necessary to extend the powers of the Communities in order to create a truly cooperative organization in the essential fields which constitute the necessary complement of decisions already taken.

As Mr Tindemans rightly wrote:

> 'If we wish to conserve the heritage of the Treaties and to embark upon new endeavours the Member States must agree on fresh objectives'. [1]

[1] Letter addressed by Mr Tindemans to his colleagues of the European Council on 29 December 1975.

The tasks and responsibilities of the Court of Justice of the Communities will no doubt be further increased if such options are exercised; nevertheless those which it has already taken on are considerable, although the public at large is little aware of them and its work escapes their notice.

Nevertheless with each year that passes the Court of Justice is more and more asserting the European concept and the European imperative, at an ever increasing tempo in wider and wider and ever more numerous spheres; it enforces the observance of the countless rules of European law – I repeat 'countless' — cementing the diverse elements of the Communities.

In the nine Member States all courts, from the lowest up to the highest, are applying European law regularly, not to say daily. European law, like law deriving from national sources, has become part of their positive law. The Court of Justice is called upon to coordinate this Community legal system constructed within the various Member States.

For thousands of judges, lawyers and citizens Europe and the European Communities have become a living and tangible reality, as they have for governments and national administrations, which are required to appear or ensure that they are represented before the Court of Justice, and for many industrialists, businessmen and workers who are subject to European rules in the sphere of customs, competition, transport, argricultural and social organization . . .

Even without the fresh 'options' exercised by the politicians the work of the Court of Justice is ever expanding because, as the provisions of the Treaties and of the ever more numerous regulations and directives filter into the life and activities of institutions, groupings and individuals of the nine Member States, problems arise and must be submitted to the Court of Justice.

Indeed the purpose of this account is certainly not to describe the importance of the role, work and mission of the Court but, in the course of setting out the interpretation of the rules of law and of the methods employed to this end, its fundamental importance will necessarily emerge.

CHAPTER I

The concept of 'interpretation'—interpretation and application—the grounds of judgment of the decisions of the Court of Justice of the European Communities

Section 1 Interpretation — Concept

1. The meaning and scope of interpretation

We who have been asked to prepare this paper cannot aspire to provide a satisfactory definition of this concept, which has been discussed and indeed elaborated on by so many eminent writers in all countries, or one which could meet with universal approval.

Nevertheless in our review we shall endeavour to furnish some information and guide-lines on this concept and above all on the considerable work achieved over a period of more than twenty years by the Court of Justice, which we hope will be considered sufficient and perhaps useful.

In its widest and most general sense 'interpretation' consists of giving a clear meaning to something which is obscure. [1]

The interpretation by a court of a law or of any other rule of positive law is strictly speaking ascertaining the meaning of the provision as it applies to a specific case. [2]

Interpretation is no doubt abstract in that it seeks to discover the substance of the legislative act without any reference whatever to given facts or situations and to define a rule of conduct for the future.

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[1] Robert, *Dictionnaire de la Langue Française — vide* 'Interpretation'.

[2] J. M. Polak, *Theorie en Practijk der Rechtsvinding,* Zwolle, 1953, p. 13; *Pandectes Belges,* Brussels 1896, *vide* 'Interprétation des Lois', No 4.

Nevertheless a court making such an interpretation with a view to its application to a specific case cannot ignore such a reference if only because it is difficult and often impossible for it to separate interpretation and application.

The interpretation given by a court can never be divorced from a specific case. It is a link in a series of mental processes leading up to a practical application, to the fulfilment of its duty to pass judgment. An interpretation can only relate to a written provision — words or phrases, indeed the context, — but often, or even generally, it is a much wider process even in the case of an international court required to interpret and apply a convention. It is frequently asserted that a convention is complete and that consequently it cannot be related to general international law. Nevertheless, on the basis of the general principle of interpretation that 'no provision of written law can be considered *in vacuo*', the Permanent Court, in a case relating to certain German interests in Upper Silesia (C.P.J.I., Série A, No 7, p. 42) rejected the argument based on the principle of isolation and declared that the principle of respect for established rights 'forms part of general international law which on this point *inter alia* forms the basis of the Geneva Convention'. [1]

It cannot be disputed that the concept of 'interpretation' has a strict or narrow meaning and a wide meaning.

In the former sense, as Professor Renard [2] writes, interpretation 'means the analysis carried out on a specific rule, that is to say in most cases on a legal provision. In this sense to interpret a law is to clarify its meaning, determine its scope and to establish its bounds and its effects. In the wide sense interpretation means all the mental processes to be completed in order to arrive at the solution required in a particular situation. In other words interpretation encompasses all the procedures necessary to render objective law applicable. Specifically . . . it is the total of the processes which should be gone through before the law is applied'. All judges, academic lawyers and legal practitioners realize the simplistic and unrealistic nature of the assertions of Montesquieu and of Robespierre to the effect that 'The judges are the mouthpiece which utters the words of the law; inanimate beings which can temper neither its severity' [3] . . . 'In a State which has a constitution and legislation, the case-law of the courts is synonymous with the law [4].

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[1] Ch. de Visscher, *'Problèmes d'Interprétation Judiciaire en Droit International Public'*, Paris 1963, pp. 108 and 109.

[2] *'Cours de "Sources du Droit" et Méthodologie Juridique'* — Presses Universitaires de Liège, 1969.

[3] *'De l'Esprit des Lois'*, VI, 3.

[4] Assemblée Nationale, Sitting of 18 November 1970.

Even the adherents of the exegetical school cannot but perceive the error in this.

These views can be explained and justified in so far as it was necessary to emphasize the separation of the duties and responsibilities of the legislature on the one hand and the judiciary on the other: the former apply to the legislators or to the Nation (spontaneously shaping custom and, in part, the general or other principles of law), the latter apply to the courts and tribunals.

But how great are the duties and responsibilities of the courts and tribunals!

They must discover the rule or rules applicable — custom, 'laws' [1] general principles [2] determining their meaning and scope, and as to the latter, determine the powers and duties of the authorities, coordinating and harmonizing those various formal sources of law, without losing sight of the fact that the concept of 'law' has a wide meaning both in national law [3] and in international law [4] or regional law ... and extracting the rules and principles which are contained in one or more laws or customs and which follow from such rules or from the very nature of institutions, and so forth.

Interpretation also involves determining the order of precedence of the rules if a problem of this nature arises [5].

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[1] & [2] Even if it is particularly the interpretation of the *law* which is under consideration it must be said that the scope of the investigation must extend beyond written law: 'The objective of the law, the general principles of law, previous legislation and the preparatory work are some of the means of establishing precisely that intention if it appears doubtful' (*Répertoire Pratique de Droit Belge, vide* Pourvoi en Cassation en Matière Civile, No 492).

[3] & [4] 'Laws comprise the provisions of a constitution, of decisions of the legislature, provisions contained in royal decrees or in orders, provisions issued by territorial authorities, sometimes indeed by officials, by institutions of public law or by social and/or economic groups ...'

'Law' in the substantive sense, that is to say a general and impersonal provision issued by an authority, comprises foreign law to which the rules of private international law apply, the rules of general international law deriving from treaties and the rules of European law deriving from treaties, regulations, directives etc.

[5] Normally there is no difficulty in establishing the precedence of rules contained in constitutions, laws of the legislature and the rules of the executive or of agencies thereof (decrees and orders ...). On the other hand problems can and do arise *inter alia* in connexion with the order of precedence of rules issued by authorities of territories and those issued by institutions of public law or economic or social organization, joint or otherwise.

There is no difficulty with regard to the order of precedence amongst the provisions of the Treaties, especially the European Treaties, and the regulations or directives issued by the Council or the Commission.

'Interpretation' also consists on the one hand in settling questions of precedence if a conflict arises between a rule of internal law and a rule of international or European law or again if a conflict occurs between a rule of international law and a rule of European law, and on the other hand in filling in lacunae in laws, custom and general or other principles (for the problem of lacunae *vide infra* Chapter V).

Law evolves. Whilst it is as a rule the task of the legislator to amend the provisions of written law in relation to social changes and developments it is nevertheless impossible to ignore the role of the courts in this sphere. In all systems of positive law the courts are frequently called upon to define extremely wide concepts (such as those of public policy, morality etc.) and to adapt them to new developments.

Conditions in the life of society change as does the abundance of scientific and technical information and as do social and economic conditions. The older provisions of the law must be adapted to this situation and the courts very often take the view that if the legislature could have foreseen this change it would of necessity have taken it into account. This also constitutes interpretation.

I shall later [1] consider whether this interpretation, which may be described as 'evolutive', has now been inherited by the Court of Justice and if so, whether special problems arise in this connexion.

Interpretation clearly concerns both the facts and the law and the Court of Justice is frequently called upon to interpret both [2].

Since a rule is general and abstract and thus capable of an indefinite number of applications, the interpretation thereof produces a general effect which the interpretation of the facts, infinitely variable and distinct, cannot have.

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[1] Chapter IV, Section 2.

[2] I shall content myself with referring by way of example to the judgment of the Court of Justice of 4 February 1975 in Case 169/73 ([1975] ECR 117). In its judgment the Court acknowledged that in law the Community was liable for the inexact information supplied to commercial operators by the departments of the Communities and held that the existence of a chain of causation between the conduct of the administration and the alleged damage presupposes that this conduct is such as to cause an error in the mind of a prudent person.
The extent of the liability involves an abstract decision which thus settles a point of interpretation in law: whether in fact such a commercial operator was or was not misled through an error committed by a 'prudent person'... is a problem of interpreting the facts. The 'causal connexion' is sometimes a question of law and sometimes a question of fact.

This does not preclude the existence in addition of a body of case-law, based on facts, developed by courts whose task it is to ascertain and interpret the facts: however that is not relevant to our problem which is already extensive enough.

Certain authors, especially outside France and Belgium are by no means satisfied with the word 'interpretation' which seems too narrow: alongside it they rely on the concepts of *rechtsvinding* (discovery of law) [1], *rechtsverfijning* (refining of the law) and *rechtsvorming* (the creation of law) [2].

Amongst German writers and to a certain extent in German case-law the distinction between '*Auslegung*' (interpretation) and '*Rechtsfortbildung*' (development of the law) is observed. This distinction is drawn in particular by von Savigny. If the solution is going to be compatible with the wording of the provision (of the written law) this constitutes '*Auslegung*'; if it goes beyond the interpretation of the words it constitutes '*Rechtsfortbildung*' [3].

The concept 'refining of the law' (*'rechtsverfijning'*) may cover a wide, restrictive or evolutive interpretation as well as harmonization and coordination.

The concept 'discovery of the law' (*'rechtsvinding'* or *'Rechtsfortbildung'*) certainly relates to the operation whereby the courts must ascertain which rules are relevant to the matter before them. However this concept also concerns the operation whereby the courts seek out and discover unwritten rules which also constitute positive law in the matter (that is to say they seek out the rules which are relevant and must be applied): custom, general and other principles, rules 'implied' in one or more provisions or indeed in one or more principles and which emerge from the nature of things and of institutions . . .

2. Provisions of the European Treaties and interpretation

Under Article 31 of the ECSC Treaty, Article 164 of the EEC Treaty and Article 136 of the EAEC Treaty the Court of Justice is expressly required 'to ensure that in the interpretation and application' of the Treaties and of the rules laid down for the implementation thereof 'the law is observed'.

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[1] Cf. J. M. Polak, *op. cit. passim;* G. J. Wiarda *'Drie Typen van Rechtsvinding,* Zwolle 1972.

[2] W. Van Gerven *'Het Beleid van de Rechter',* (Antwerp 1973), p. 10.

[3] Larenz, *'Methodenlehre der Rechtswissenschaft',* 1960, p. 290. In case-law the expression 'interpretation' is sometimes employed (cf. Entscheidungen des Bundesverfassungsgerichts 8, 210 and 220).

Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty entrust it with the special task of interpreting the Treaties together with the acts of the institutions of the two Communities. The Court of Justice thus the law common to the Member States and is indeed the supreme court for all the courts of the Member States with regard to the interpretation of Community law.

Regard must also be had to Article 41 of the ECSC Treaty, Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty in that they require the Court to settle the 'validity' of the 'measures' adopted by and of the 'acts' of the institutions of the Communities. In deciding the 'validity' the Court of Justice must define the powers and jurisdiction of the Council and of the Commission, and if neccessary those of other bodies or authorities as well — that is define 'the meaning and the scope' of the provisions of Community law — it must determine the relation between written and unwritten Community law and the national systems of law, between international law or regional law and Community law and at the same time extract the general or other principles which constitute this law.

The concept of interpretation having the very wide scope which I have endeavoured to develop above by applying to it certain elements borrowed from the writers or case-law of certain Member States is that which may be discerned both in the extremely important body of case law of the Court of Justice and in the work which it has accomplished under Article 31 of the ECSC Treaty, Article 164 of the EEC Treaty and Article 137 of the EAEC Treaty and in the task with which it is entrusted by Article 41 of the ECSC Treaty, Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty.

It seems quite unnecessary at this point to define what is understood by the 'scope' of one or more rules. We will limit ourselves to the following points:

(a) Article 85 of the EEC Treaty as it is worded does not state expressly whether the agreements between undertakings ... and practices which may affect competition within the Common Market include agreements or concerted practices between foreign undertakings, that is to say, those whose principal place of business is outside the territory of the Common Market, or between such undertakings and other undertakings established on the territory of the Common Market; an answer to this question is imperative. It will be said that there is a lacuna. Indeed this is so if it is considered that there is a lacuna whenever a clear and precise solution does not emerge from the wording, that is to say a solution on the basis of the wording for *every problem* which arises *(vide* Chapter V, Section 5).

In this connexion we may remind ourselves that in the judgment of 14 July 1972 in Cases 48, 49 and 51 to 57/69, [1] it was necessary to clarify the scope of this concept in Article 85. In defining further the scope of Article 85 the Court had to decide whether purely national agreements, that is to say those restricted to the territory of a Member State and which do not envisage imports and exports, fall within or without the scope of the said article. The Court's answer was that agreements which hinder economic interpenetration are caught by Article 85 (judgment of 17 October 1972). [2]

Does 'agreements between undertakings' in Article 65 of the ECSC Treaty also refer to agreements between a number of associations of undertakings?

Does abuse of a dominant position, which is prohibited by Article 86 of the EEC Treaty, arise solely from 'practices' for example, of one undertaking or also from its merger with others? Here is a problem on the scope of the concept 'abuse of a dominant position'. Does this constitute a lacuna? Undoubtedly, if one expects the legislative provisions to cover every situation.

Whatever the outcome may be regarding the problem of lacunae to which we shall thus return it is important to clarify the scope of the concept referred by Article 86 of the EEC Treaty.

(b) Determining whether or not a provision of a treaty, of a regulation or of a directive is self-executing constitutes interpretation in that it defines the scope of a rule. Indeed in international law it has been held that this constitutes 'interpreting' a treaty. Even before the entry into force of the European Treaties national courts in several countries had decided by way of interpretation whether a provision in an international convention was or was not applicable by them and whether it might be relied upon by the citizen to support a claim, a defence or an objection.

(c) Settling the question whether or not a rule is of itself capable of application to a specific case (judgment of 11 March 1965 in Case 31/64 [3] and the judgment of the same date in Case 33/64 [4] or deciding whether a Community regulation is complete in itself and creates a right or whether national provisions can or cannot impose additional conditions for the recognition of this right (judgment of 6 June 1972) [5] again constitutes interpretation.

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[1] 14 July 1972, *I. C. I. and Others* ([1972] ECR 619 et seq. — not yet published; [1972] C.M.L.R. 557).

[2] *Vereeniging Cementhandelaren,* Case 8/72 ([1972] ECR 977 — not yet published; [1973] C.M.L.R. 7).

[3] Case 31/64, *Bertholet* ([1965] ECR 81).

[4] Case 33/64, *Koster (née Van Dijk)* ([1965] ECR 97).

[5] Case 94/71, *Schlüter und Maack* [1972] ECR 307 — not yet published; [1973] C.M.L.R. 113).

(d) Interpretation and definition of the scope of one or more rules or legislative provisions are always involved in:

(I) investigating and settling the application *ratione personae* of a Community provision (judgment cited *supra);*

(II) determining from what date a Community provision takes effect and fixing its application in point of time (judgment of 11 March 1965 in Case 33/64 cited *supra* [1];

(III) determining when and on what conditions a Community provision imposes obligations on the Member States in particular with regard to their legislation or national rules (judgment of 4 February 1965, Case 20/64 [1965] ECR 29); [2]

(IV) determining whether the provisions of the European Treaties or of other sources of Community law take precedence over previous or subsequent provisions or measures of internal law and whether over all measures and provisions or only over certain of them. Determining the scope necessarily involves prescribing the area within which the legislative act or measure is mandatory if these are operative within the national legal system: also determining whether a Community provision must take precedence over an international agreement, for example the European Interim Agreement on Social Security Schemes relating to Old-Age signed in Paris on 11 December 1953 (judgment of 28 May 1974) [3].

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[1] *Vide* also judgments of the Court of Justice of 24 November 1971, Case 30/71 [1971] ECR 919 — not yet published — [1972] C.M.L.R. 121; 4 July 1973, Case 1/73, *Westzucker* [1973] ECR 723; 14 December 1971, Case 43/71, *Politi* [1971] ECR 1039 — not yet published — [1973] C.M.L.R. 60; 7 March 1972, Case 84/71, *Marimex* [1972] ECR 89 — not yet published — [1973] C.M.L.R. 907; 25 June 1975, Case 5/75, Deuka [1975] ECR 759.

[2] It is fundamental that provisions apply everywhere, that is to say, throughout the entire Community, in principle at least, at the same time. Cf. the opinion delivered before the judgment of the Belgian Cour de Cassation of 16 June 1975, Revue de Droit Pénal et de Criminologie 1975 — 1976, p. 67 et seq.
I may cite in this context the judgement of the Court of Justice of 15 December 1971 in Case 35/71 ([1971] ECR 1085 — not yet published — [1972] C.M.L.R. 806) which, in interpreting Regulation No 120/67 of the Council on the common organization of the market in cereals which provides that the levy to be charged shall be that applicable on the day of importation, held 'that the concept "day of importation" wicht is conclusive for the purposes of the application of the levy scheme, *must have the same meaning in all the Member States,* since otherwise there is a danger that different rates of levy would be applied to goods which are in the same situation economically *at the same date* and the introduction of which into the territory of the Member States has comparable effects on the market in agricultural products . . .'.

[3] Case 187/73, *Callemeyn* ([1974] ECR 553).

Determining whether a Community provision must or must not be in accordance with the provisions of an international treaty in international law which bind the Community (judgment of 12 December 1972 in Joined Cases 21 to 24/72) [1].

Determining the provisions applicable and discovering the different sources which exist in conjunction with the sources of written Community law also involves interpretation in the wide sense *(rechtsvinding)* and the Court of Justice has of necessity been led to do so frequently. I shall treat this task of 'discovery' of the formal sources of the law at another point in my review (*vide* Chapter III).

Deciding whether a right or a legislative act takes precedence over a right or legislative act deriving from another source — especially the problem of relations between Community law and national law — involves ascertaining the scope of those rights and legislative acts and thus 'interpretation' as I have already indicated. This particularly involves deducing the nature and the effect of Community law, taking account of its *raison d'être,* of its aim, of its common institutions and of international institutions and of the nature of the European 'construction'.

It may perhaps be said that this constitutes 'constructing' on the foundation of law as a whole; this again is a different facet of the concept of interpretation but it clearly comes within this sphere.

This is what was done in the basic decisions of the Court of Justice: in this connexion reference may be made to the celebrated judgments, of which further details are superfluous, of 15 July 1964 *(Costa v ENEL),* 13 February 1969 *(Walt Wilhelm),* 17 December 1970 *(Internationale Handelsgesellschaft)* and the order of 22 June 1965 relating to a rather unusual procedural issue raised in the *San Michele,* case.

(v) At this point, in order to illustrate the concept of 'construction by the court' — which also constitutes an interpretation — (this expression is always capable of causing confusion for those who have failed to consider it sufficiently and who think that they can

[1] Cf. the opinion of Mr Advocate-General Mayras delivered before the said judgment of 12 December 1972 and the commentary by Mr Rideau in Cahiers de Droit Européen 1975, No 4, p. 461 et seq.

discern the court as an actual legislator) mention should also be made of the case-law of the Court of Justice which furthermore is in accordance with the case-law of certain national courts which have been called upon to give a ruling in this connexion on the revocation of administrative measures which give rise to individual rights, especially those appointing officials: lawful revocation if the measure was illegal, unlawful revocation if it was legal.[1] 'Construction' it no doubt is, but based on reasoning, deduction, perfection and co-ordination of various legal rules or principles (*vide* Chapter V, Section 4).

The law and the rules of law in general cannot foresee and provide a definite solution for every problem and set out clearly all its effects. They confer on certain public authorities the power of appointing, dismissing and assigning to non-active status . . . ; they also confer rights and duties on the officials appointed.

It is for the courts to specify the nature and the limits of such powers, duties and rights: a veritable task of 'interpretation', or more precisely harmonization and coordination.

It is pointless to resort to the convenient concept of 'lacuna' which creates confusion and appears to confer upon the courts powers which they do not possess.

Section 2 Interpretation—Problems peculiar to international courts, to national courts and to the Court of Justice

1. Problems peculiar to international courts

The nature of international courts and of their particular task gives rise to certain special problems which are alien to or different from those pertaining to national courts; the same is true of the Court of Justice by reason of its nature and tasks and of the nature of Community law.

Nevertheless differences existing between the 'methods' of interpretation must not be exaggerated as I shall have occasion to point out in my consideration of such 'methods'.

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[1] Judgments of 12 July 1957 in Joined Cases 7/56 and 3 to 7/57 (Rec. 1957, p. 85).

Ch. de Visscher [1] writes: 'In the overwhelming majority of cases the interpretation of law flowing from a treaty only affects a right peculiar to the contracting parties (except for so-called "treaties establishing laws"). The interpretation of custom, which represents a common or general international law, presents very different aspects. This is why certain judgments of the International Court of Justice have in certain circles aroused feelings of surprise and indeed of disappointment. In this context reference may be made to the judgments in the *Anglo-Norwegian Fisheries* case and in the *Nottebohm* case. The fact is certainly to be explained by the vagueness of certain customs. Because interpretation of a custom by the courts affects the significance of common or general international law it throws a light on its subject matter radiating far beyond the relationship between the parties to the dispute. Is the application before the courts of the interpretation of customary international law jeopardized today by criticisms disputing the authority of the cases on which it is based, a point of view for which the representatives of new States have appointed themselves the interpreters, especially in the General Assembly of the United Nations and in the Security Council?' The author continues: certain interpretations may be capable of giving rise to active or passive effects in favour or to the detriment of third States; 'this is particularly the case with treaties concluded by the dominant powers at the time the subject-matter of which is restricted in territorial scope, for example those treaties intended to settle certain consequences of the transmission of the rights and the obligations of a State which has disappeared (succession with regard to States) and the advantages which certain agreements on international communications confer on third States'. [2]

With regard to methods Mr de Visscher emphasizes a point which all courts must heed. He writes, 'A treaty does not exist *in isolation;* it is conceived and can be understood only in the context of the international legal order and in connexion with the subject-matter to which it relates. From this follows the important consequence that even when the interpretation of a provision of a treaty is recognized as derogating from general international law it can be understood only within the strict limits determined by its provisions'. [3]

2. The national courts and the Court of Justice

With regard to the problems peculiar to the Court of Justice as compared with those of national courts I shall merely emphasize the following points:

(a) Whilst the national courts are required daily to interpret Community law (interpretation in the broad sense which I have adopted above) they

[1] *Op. cit.*, p. 47 et seq.
[2] *Op. cit.*, p. 72.
[3] *Op. cit.*, p. 37.

cannot, without making a reference to the Court of Justice of the European Communities (Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty), either perceive in every case whether a problem exists or provide a solution to any problem which may exist as can the Court of Justice. They do not know the opinions of writers and case-law in the various countries as does the Court of Justice, in particular by reason of its specialization and of the information with which it is daily supplied by the representatives of the Member States and of the Commission.

(b) Although they can give rulings, as does the Commission and in turn the Court of Justice, on the application of Articles 85 and 86 of the EEC Treaty they are not competent — and this is particularly true of courts which do not specialize in this sphere — to give rulings as to the effects of agreements, associations and concerted practices within the Common Market, as can the Court of Justice which is required to deliver a ruling on decisions of the Commission which possesses information on the situation in the Common Market as a whole whilst a national court cannot normally have such information at its command.

(c) Normally a national court will be more 'timid' than the Court of Justice in the face of problems occasioned by the direct effect of the provisions of treaties regulations and directives.

(d) The members of the Court of Justice are of nine different nationalities. Clearly their training is by no means identical. The constitutional principles peculiar to their countries of origin and indeed the institutions, customs and traditions with which they have lived may provoke reactions and methods of reasoning which do not arise at all in the institutions of lawyers of the same nationality. [1]

(e) The European Treaties may be compared to a constitution. In the Member States the courts also interpret the constitution but the authority responsible for the constitution may, theoretically at least, subject them to review since by reviewing the constitution the legislature may confer upon a rule or provision of the constitution a meaning and scope at variance with that settled by the courts. Accordingly the representatives of the nation retain the last word.

It is indeed true that the European Treaties may be amended or supplemented or clarified but unanimity is necessary for this. It will be said that because of this the judges of the Court of Justice must display additional prudence.

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[1] I shall endeavour to clarify this finding in the part of the review on the limits assigned to the task of the courts (*vide* Chapter II).

It seems to me that this is merely theoretical; the Court delivers its rulings with the same care and prudence whether or not review is possible.

Besides, it must not be forgotten that the case-law of the Court may undergo modifications as a result *inter alia* of what may be called a 'rebellion' by the national courts who may adopt another interpretation than that established by the Court of Justice. In the face of such a rebellion or even of reactions amongst writers or in political circles the Court may be brought to reconsider the problems which it has already settled although it does not indeed 'yield' by reason of rebellion, expediency or political influence. This shows how necessary a flexible case-law is and how hazardous, to say the least, is the desire to give effect *erga omnes* to the decisions of the Court in particular to those which are delivered under Articles 177 of the EEC Treaty and 150 of the EAEC Treaty.

3. Certain problems peculiar to Community law

Let us finally consider certain problems peculiar to Community law.

The last considerations set out above no doubt relate to such problems.

(a) By reason of the absence of procedure for the revision of the European Treaties or more precisely because of the need to revise them by unanimous decision can the Court of Justice be regarded as having much greater freedom than that normally enjoyed by national courts? Can the Court of Justice replace the political authorities of the Member States which are answerable to the people and their representatives whilst the Court is not so or only very little? This seems indeed audacious and scarcely compatible with the principles of a true or even a rudimentary democracy.

How can one justify the possession of such a 'power' by the Court of Justice when, except in Great Britain, owing to the special nature of its public law the legislature is denied the right to amend or supplement the constitution without recourse to the procedure for revision which conserves the right of the citizens to intervene directly and the rights of the opposition?

Nevertheless it is clear that the Court of Justice must interpret the provisions of the Treaties as the national courts do in respect of the provisions of their constitutions.

(b) When the Court of Justice must ascertain the general or other principles of Community law it must consider not only the basis and the spirit of Community law but in addition the laws of the Member States as a whole

whilst the national courts normally discern those principles with exclusive reference to their national legal systems and the *mores* of *their* particular politics. With regard to Community law comparative law plays an important part. I shall endeavour to provide further explanations on this point *(vide* Chapter IV, Section 3).

The Treaties, regulations and directives employ words and concepts which are familiar in the various Member States and which have a meaning and scope which often appear obvious to every national authority and in particular to the courts and those assisting them. [1] However those Treaties, regulations and directives constitute *a law common to the* various Member States; they must have the same meaning and the same scope within the territory of each of those States. A Community meaning and scope must be established by the Court of Justice. Many judgments and opinions have emphasised this problem which is encountered by all courts which have to interpret and apply Community law and in particular to the Court of Justice. [2]

The fact should also be borne in mind that the three Treaties refer to 'vague' concepts *(Unbestimmte Rechtsbegriffe).* Furthermore the Treaties are based on concepts peculiar or common to the Member States or indeed which are simply expressed in the same manner.

Finally one must not lose sight of the fact that the Treaties contain a restricted number of provisions of substantive law although provisions of this nature are frequent in regulations and directives. [3]

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[1] J. Boulouis and R. M. Chevallier, *'Grands Arrêts de la Cour de Justice des Communautés Européennes'*, Paris 1974, p. 94.

[2] See in this respect the very interesting opinion of Mr Advocate-General Mayras in Case 152/73 [1974] ECR 167. The proceedings related to defining the concept of 'public service' within the meaning of Article 48 (4) [of the Treaty] to which the principles of the freedom of movement for workers and protection against discrimination do not apply. The Advocate-General states that whilst in international law the meaning and scope of this concept may be established in terms of the law of each of the States concerned (as it is in accordance with Article 13 of the European Convention on Establishment of 13 December 1955) this does not hold good with regard to Community law. Such an interpretation, based on the pre-eminence of the sovereignty of States could not be upheld in view of the objectives and spirit of the European Economic Community. Mr Mayras asks, 'what in fact would freedom of movement amount to if it depended upon one State or to set in operation, as it were automatically, the exception contained in paragraph (4) by entrusing to a public service, within the meaning of domestic law, responsibility for some activity or other which appeared to it to constitute a task of general importance?'

[3] Cf. P. Pescatore, *'Les Objectifs de la Communauté Européenne comme Principes d'Interprétation dans la Jurisprudence de la Cour de Justice'* in Miscellanea W. J. Ganshof van der Meersch, Brussels 1972, p 328.

Section 3 Interpretation and application

1. General considerations

In a report drawn up in the name of the Legal Affairs Committee of the European Parliament it was stated: '... The distinction between interpretation and application is certainly amongst the most complex problems of those raised by Article 177. As a general proposition it may be stated that interpretation must be of a particularly abstract nature whilst application is concrete, that is to say it refers to a specific case. In other words whilst interpretation defines and clarifies the meaning of the provision, application settles a dispute turning on the provision so interpreted. The former operation necessarily precedes the second'. [1]

This problem has been considered by a very large number of writers in the various Member States. Let me mention Mr Ch. de Visscher who writes: 'All application of a rule of law is intimately bound up with its interpretation although the two operations are distinct. Very often a term or rule of customary law is applied without the doubt being raised which gives rise to interpretation. On the other hand all interpretation, whether by governments or by the courts, is done in respect of an actual or potential case'. [2]

2. Procedure under Article 177

The former President, Judge Donner has recently published a penetrating study of the distinction in particular with regard to the application by the national courts and the Court of Justice of Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty. I shall return to this point.

Normally the courts must both interpret and apply the law. In exceptional circumstances the two procedures are separated and entrusted in the same case to different courts: such 'division' is familiar in national legal systems. In France in particular there is the jurisdiction reserved to the 'administrative' courts or to the Government to interpret certain rules and in the Federal Republic of Germany and in Italy the power reserved to the constitutional court to give a ruling on the compatibility of a provision with the constitution.

It is frequently and properly suggested in other States that the constitutionality of laws should by no means be decided by all courts within the legal system but exclusively by the supreme court and also by the Council of State,

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[1] European Parliament, Working Documents, 1969–1970, Document 94, p. 9: 15 September 1969.

[2] *Op. cit.*, p. 27.

when one or other body delivers a 'preliminary' ruling on the reference by one of the other courts before which the question has been raised.

The Court of Justice is clearly required itself to apply the provisions of which it has provided a preliminary interpretation, in particular in exercise of its jurisdiction with regard to applications for annulment, on the grounds of civil liability and the failure of the Member States to fulfil their obligations under the Treaty and to actions brought by officials.

In its task of cooperating with the courts of the Member States in the administration of justice the Court of Justice is required to interpret Community law whilst the former are entrusted with the task of applying it.

In this respect, then, interpretation and application are separate just as the interpretation of Community law on the one hand, and of national law on the other, are separate. [1]

Although the distinctions are no doubt finely drawn and have occasioned difficulties they are not insurmountable and the extreme flexibility displayed by the Court of Justice has been of great assistance in this matter.

The Court of Justice has frequently recalled the distinction between application and interpretation. In its judgment in the *Capolongo* case of 19 June 1973 [2] the Court considered that: ... 'in exercise of the powers conferred by Article 177 ..., the Court, having to limit itself to giving an interpretation of the provisions of Community law in question, cannot consider legal acts and provisions of national law, the risk being that the reply will correspond only imperfectly to the circumstances of the case'.

The Court further repeated this view in particular on 30 September 1975: '... The Court ... has no jurisdiction to apply the Community rule to a specific case ...' (case 32/75).

Certain of the questions submitted to the Court relate rather to application. One such question formed the subject-matter of the judgment of 6 April 1962 [3]: 'The request from the Court of Appeal of the Hague is concerned with

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[1] The Court of Justice is entrusted with the interpretation of Community law and not — within the framework of Articles 177 and 150 cited above — with national law. Nevertheless this distinction cannot always be maintained with regard to the tasks entrusted to the Court by Articles 88 of the ECSC Treaty and 169 to 171 of the EEC Treaty and 141 to 143 of the EAEC Treaty.

[2] Case 77/72, *Capolongo* [1973] ECR 622.

[3] Case 13/61 [1962] ECR 45.

the question whether the restriction on export imposed by the plaintiff, Robert Bosch GmbH ... on and accepted by its customers, falls under Article 85 (1) of the Treaty. This question cannot be considered as a pure question of interpretation of the Treaty, since the document on which this summarily, described restriction on export appears has not been laid before this Court. This Court can accordingly make no decision without a preliminary investigation of the facts, and the Court has no jurisdiction to conduct such an investigation ...'.

As the former President, Judge Donner [1] states the Court may decide that Article 85 of the EEC Treaty prohibits an agreement which has a particular effect but not that an agreement does or does not have such an effect. Likewise he explains, the Court cannot rule that a specific provision of national law is contrary to the Treaty, but merely that under the Treaty a specific thing, course of action or decision is or is not permissible ...

Nevertheless, since interpretation and application are linked, the former being required for the latter, the questions submitted and the replies given are frequently and necessarily 'bound up' with the facts of the case.

Thus in its judgment of 12 July 1973 [2] the Court was required to decide whether a business representative was covered by Article 12 of Regulation No 3 concerning migrant workers or by Article 13 ... The Court considered that the position of a representative differs basically from that of the workers referred to in Article 13 and that consequently this latter provision is not applicable. On the other hand since the Court was requested to clarify the meaning and scope of the concept 'residence' as this word is employed in the first subparagraph of Article 13 (c) of Regulation No 3 as amended by Regulation No 24/64 (it should be noted how close we are to the facts) it replied: 'In the case of a business representative pursuing the kind of activities described in the order of reference for a preliminary ruling, the place in which that worker has established the permanent centre of his interests and to which he returns in the intervals between his tours' is the 'permanent residence' in the sense of that provision of the regulation. This judgment of the Court nevertheless remains within the sphere of interpretation although no great problems as to its application remain for the national court since the judgment may be applied to an indefinite number of other cases (business representatives).

Another example. In its judgment of 26 April 1972 [3] the Court held: 'The provisions of subheading 20.06 B II (a) 6 (bb) of the Common Customs Tariff read together with Additional Note No 2 to Chapter 20 must be interpreted

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[1] A. M. Donner, *'Uitlegging en Toepassing'* in 'Miscellanea W. J. Ganshoff van der Meersch', Vol. II, p. 103 et seq.
[2] Case 13/73 [1973] ECR 935.
[3] Case 92/71 [1972] ECR 231.

to mean that fruit, other than pineapples and grapes, referred to under heading 20.06 of the tariff, having a sugar content determined in accordance with Additional Note No 1 to Chapter 20 which exceeds 9% by weight . . .'.

Summarizing the already extensive case-law and experience of the Court of Justice, Mr Advocate-General Mayras [1] explained that if there is both a purely abstract interpretation and an interpretation which is really useful in the settlement of the dispute 'the case-law of the Court has followed the second course'.

Judge Donner also writes: 'De ontwikkeling van de jurisprudentie gaat dus duidelijk in de richting van een uitlegging voor het concrete geval. Worden de vragen in algemene en abstracte termen gesteld, dan schroomt het Hof niet om het dossier te raadplegen en aldus de algemene gestelde vraag in haar concrete tekst te zetten alvorens de passende uitlegging te geven' ('The development of case-law clearly takes the form of interpreting specific instances. If the manner in which the questions are submitted is too general and abstract the Court will not hesitate to consult the file and to replace the question in its actual context before delivering the interpretation requested').

Indeed the Court frequently recalls the necessary distinction [2] but it states that it can and should, if the question is badly phrased, 'provide the national court with the factors of interpretation depending on Community law which might be useful to it in evaluating the effects of a provision of national law'.

The Court thus provides an interpretation in terms of the application which the national court will make of it in future; this is normal and does not constitute the application of Community law by the Court of Justice *(vide infra)*. The Court is thus led to restate the questions submitted to it, which is furthermore natural and extremely useful.

Nevertheless this course is not without its hazards: thus in its judgment of 6 May 1971 [3] the Court did not hesitate, although the national court had *not* submitted the question, to formulate questions and cases which no doubt exceeded the submissions made by the parties to the dispute.

With regard to the questions which are so frequently submitted within the framework of the procedure under Article 177 of the EEC Treaty, let us say of the 'relation' between Community law and national law, the Court is

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[1] Opinion in Case 127/73, *SABAM* [1974] ECR 313.
[2] Judgment of 30 September 1975 in Case 32/75.
[3] Case 1/71, *Cadillon,* [1971] ECR 355.

clearly right in reiterating that it is not its task to interpret national law but rather to decide whether a national law comes within the ambit of a Community provision. In its judgment of 15 May 1974 (Case 184/73) the Court held: 'A provision of national law intended to prevent the simultaneous receipt of sickness benefit and benefit on account of incapacity to work constitutes a provision for suspension or reduction *within the meaning of* Article 11 (2) of Regulation No 3'.

Certainly it is not the task of the Court to interpret national law but ... in order to reply to the questions submitted it is very often obliged to find that a particular national law decides a specific point — which constitutes an interpretation; this occurs particularly if a certain Community provision refers to a specific situation or advantage which is conferred by national laws or secondary legislation. [1]

Frequently the national court asks whether a condition imposed by a national law is contrary to a specific provision of Community law. [2] Nevertheless the reply given by the Court is more abstract than the question and does not expressly refer to the national law.

3. Findings and reflections

(a) Any court which is usually required to settle a dispute or give a ruling on a situation or a problem which is submitted to it must successively:

(i) consider and establish the facts, the subject-matter of the dispute, situation or problem (this former task is clearly not incumbent upon supreme courts — such as cours de cassation — which 'take no cognizance whatsoever of the facts' and can only proceed on the basis of those facts which have been definitively established by the lower courts);

(ii) consider and 'interpret' the rule or rules relating to the case submitted to it;

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[1] Judgment of 30 September 1975, Case 32/75. In the opinion which Mr Advocate-General Mayras delivered in Cases 190/73 and 1/72 or in 76/72, he was obliged to resort to extensive considerations of the meaning and scope of national legislation. See also the typical judgments of 27 October 1971, Case 23/71, *Janssen* [1971] ECR 853 and that of 22 June 1972, Case 1/72, *Frilli* ([1972] ECR 464.

[2] *Vide* the judgment of 26 November 1975 in Case 39/75, which deals with the compatibility of a provision of Netherlands law, relating to residence in the Netherlands, and a provision of Community law.

(iii) draw its conclusions from the facts thus established and from the rules thus ascertained and interpreted, that is to say *judge,* that is apply the law and rules to the particular case ... and give those rules a definite effect in accordance with the circumstances of the case.

(b) The former President Judge Donner is correct in stating that it is possible to distinguish interpretation and application but not to separate them. [1]

This is a necessary finding with regard to the task entrusted to the courts but it is clearly insufficient with regard to legal theory.

Whether the courts interpret a rule or rules or whether they have to entrust the interpretation to another court (for example through Article 177 of the EEC Treaty) they apply an interpreted rule to a specific case.

Although a court may have interpreted a rule correctly or scrupulously adopted (as it must) the interpretation supplied by the Court of Justice, it may none the less have applied them to facts which have not been properly established or to badly-drawn claims and defences. This results in a good interpretation ... but a bad application; the distinction reappears.

A wrong interpretation of a rule may also remain without effect on the legality of the operative part of the judgment, and thus on the decision of the court. Thus a cour de cassation will decide that a misinterpretation of a rule is irrelevant and will consequently dismiss the appeal if, despite this error, the operative part of the judgment in dispute is justified in law by a finding of fact by the lower court or on another ground in law which the cour de cassation substitutes for the ground of the judgment which was delivered. Thus the distinction appears again between interpretation and decision — more precisely the operative part of the judgment — which relates to the *application of rules of law.*

In legal theory rules are interpreted without regard to a specific case although 'practical cases' are often invoked as illustrations or in order to clarify a point.

(c) The courts are not required to give a general interpretation but one for a specific case although it is clear that they must consider that the interpretation they adopt is that which they must adopt for all subsequent identical cases.

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[1] *Op. cit.,* p. 116.

Thus, when it is necessary for courts to refer a matter to another court for the latter to interpret the matter in its stead as for example under Article 177 of the EEC Treaty, the latter court must necessarily be permitted to take the place of the former: thus it must be fully informed, it must be acquainted with the facts and the exact and actual problem in connexion with which the question for interpretation arises.

Does this invite other courts — such as the Court of Justice — to apply a rule? This question must be answered in the negative.

Application constitutes the deduction from the interpretation of the rule and from the finding and appaisal of the facts of an exact consequence which will form the operative part of the judgment to be delivered. The Court of Justice is never required under Article 177 of the EEC Treaty to find and to appraise facts and to draw a conclusion from them or even from the interpretation which it places upon the rule.

It appears to me that the Court of Justice which is called upon to supply the national court with an answer which is helpful to it, and thus an answer which gives proper heed to the particular case and to the facts before that court is not required itself to ascertain from the file what constitutes the facts. This is not its task ... and, as all judges are aware, it is extremely difficult exactly to determine the facts from a mere perusal of the file without having heard the parties and, if necessary, the witnesses.

The courts must thus themselves state clearly what the facts are with regard to which the question for interpretation arises.

Nor should the judges of the Court of Justice be required to interpret national law ... that is not their under Article 177 of the EEC Treaty or under Article 150 of the EAEC Treaty. Certain questions submitted by national courts can nevertheless force them to do so. [1]

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[1] Reference should be made in this respect in particular to the judgment of 16 November 1972 in Cases 14, 15 and 16/72 [1972] ECR 1105 et seq.; the judgment of 30 September 1975 in Case 32 /75; the judgment of 30 October 1974 in Case 190/73 [1974] ECR 1123. Reference should also be made to the opinion of Mr Advocate-General Mayras in Case 44/72 (judgment of 13 December 1972) and in the above-mentioned Case 1/72 and in Case 76/72 (judgment of 11 April 1973) [1973] ECR 457 as also the opinion of Mr Advocate-General Reischl in Case 187/73 (judgment of 28 May 1974) [1974] ECR 553.
In its judgment of 17 February 1976 in Case 45/75 the Court had to reply to the question of whether the levying of the part of the monopoly equalization duty (Monopolaufgleich) called the Monopolaufgleichspitze (monopoly equalization margin) on imports of Italian Vermouth — this levy was imposed under the German Spirits Monopoly Law (Gesetz über das Branntweinmonopol) of 8 April 1922 — violates the principles of the first paragraph of Article 95 of the EEC Treaty. The Court held: 'Although, in the

The national court making a reference to the Court of Justice must thus supply the latter with the interpretation of the national law or provision thereof which is necessary for the Court of Justice to interpret a Community rule.

Section 4 The grounds of the judgments of the Court of Justice

(1) Are these judgments too long, too short, sufficiently clear?

Opinions sometimes vary in this respect. It is often considered that the judgments are not explicit. Sometimes it is even held that they are ambiguous and sibylline.

The methods of a supreme court are not those of another court. The judgments of the one are succinct whilst those of the other are less so and even prolix.

Their respective styles differ.

In my view those who have scrutinized the judgments of the Court of Justice must arrive at the honest finding that they are of the length or extent dictated by the exigencies of replying to the submissions made and of providing a coherent, comprehensive and sufficient statement of reasons.

There is a belief in certain quarters that the Court of Justice is obliged to reply to any questions and submissions whatsoever even if such a reply cannot provide a basis for the judgment or the reply which it gives in particular to a question of interpretation or of validity.

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context of proceedings under Article 177 of the EEC Treaty it is not for the Court to rule on the compatibility of provisions of a national law with the Treaty, it does, on the other hand, have jurisdiction to provide the national court with all the criteria of interpretation relating to Community law which may enable it to judge such compatibility . . . '.

When the Court is requested to give such a ruling on compatibility it does so in terms which respect the division of jurisdictions. *Vide* for example the judgment of 26 February 1976, *Tasca,* Case 65/75.

This judgment draws finer distinctions than the judgment of 23 January 1975 in *Galli,* Case 31/74 [1975] ECR 47 and in particular entrusts the national court with the task of appraising whether a national provisions dealing with prices jeopardizes 'the aims or functioning of the common organization of the market'.

Vide with regard to the *Galli* judgment: M. Waelbroek, *'Les Réglementations Nationales de Prix et le Droit communautaire,* Brussels 1975; and G. Motzo, *'Politiche Nazionale dei Prezzi e Politica di Congiuntura della CEE',* Rapport au Colloque de Grottaferrata 1976.

The many persons who reproach the Court of Justice with its failure to reply to all these pointless questions are usually unacquainted either with the technique of the courts or their duties, tasks or obligations.

As Judge Donner pertinently and rightly said during the course which he gave as visiting professor at the Académie de Droit Internationale [1] 'This would oblige the European Court to follow a particularly onerous procedure before giving a judgment which would be of no assistance in the particular case. No doubt it is always helpful for the Court of Justice to interpret a provision of European law... but its task is to deliver rulings which are of assistance in settling a case. It is not a body to be consulted on abstract questions. The Court of Justice has warded off the danger of becoming a kind of oracle obliged to give a ruling on anything asked it.'

Reproaches of this nature are frequently levied, particularly by certain academic lawyers or commentators who are insufficiently acquainted with the practice of the courts and in particular with the rights, duties, obligations and reponsibilities of the courts. Numerous examples could be quoted with regard to the criticisms which are particularly directed in Belgium against the judgments of the Cour de Cassation. It should further be added that pleasure is to be derived from demolishing decisions, preferably if they emanate from high places and enjoy prestige and authority. How many times has it been said or written that the Cour de Cassation has 'ducked' problems! Such critics do not perceive that the court could not or should not have considered these problems.

With regard to the complaints of ambiguity and of insufficient clarity in the judgments delivered by the Court of Justice: it is true certain of these judgments — but in my view they constitute the exception — require particular scrutiny and sometimes even repeated perusal before it is possible precisely to discern the decision and above all the grounds of judgment of the Court of Justice. It is clear that no complaint will lie if the judgment is difficult to understand for the simple reason that the subject-matter with which it deals is itself difficult to grasp. Likewise it is certainly impossible seriously to entertain such complaints when, as is often the case, they are the outcome of a failure to make a sufficient endeavour to understand the reasoning of the Court of Justice in the contexts, often of extreme complexity, which the Court of Justice must daily consider.

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[1] *'Les Rapports entre la Compétence de la Cour de Justice des Communautés Européennes et les Tribunaux Internes'* — extract from the Recueils de Cours, Volume XI, 1965, p. 33.

It cannot be pretended that certain judgments are not less clear than others or indeed sometimes extremely difficult to grasp: but is there a national court, even a supreme court, or an eminent university professor or commentator against whom such complaints might on occasion be levied?

(2) Could it be proper that the personality of different judges may appear more clearly in the judgments of the Court of Justice?

Thus we come to the question of the dissenting opinion.

The International Court of Justice, the Bundesverfassungsgericht, the European Court of Human Rights, the courts of the Common Law countries and also certain South American States are acquainted with and employ this procedure.

Lawyers and national courts usually have a liking for the systems adopted by their national institutions: dissenting opinions or a general supposition of unanimity or, let us say, an anonymous majority. However in certain countries, where the dissenting opinion is alien to the legal framework, some lawyers, who tend not to be judges or members of administrative tribunals, would like it to be introduced there.

It is unnecessary to consider this question in this review. Let me limit myself to the three following considerations:

(i) The provisions of the European Treaties provide no place for the opinion or opinions of a minority of the Members of the Court of Justice or even for communicating the fine distinctions which individual members of the majority might have wished to make known.

The institution of the dissenting opinion would require the amendment of the Protocol on the Statute of the Court of Justice, adopted unanimously, and this appears quite out of question.

(ii) The dissenting opinion appears to me incompatible, or compatible only with difficulty, with the conditions upon which the judges are appointed; their tenure of office is for a limited period although it may be renewed as a result either of a special decision of the political authority of the Member States of the Communities, or even through a choice made by a political assembly or directly by the Nation.

(iii) There is no doubt that the dissenting opinion, or in general the individual views of the members of courts required to deliver judgments, would constitute a considerable asset to legal writers, professors and lecturers in universities and even to advocates. Academic lawyers would reap from the dissenting opinion and the subtle distinctions expressed by the judges of the majority a harvest of information and of data which would be used in the 'practicals' or the foot-notes of judgments. Lawyers would be tempted to advise their clients to base an action on a view of the law of which a supreme court had previously disapproved, since they would know that the judge or judges constituting the majority which delivered the judgment in question had been replaced by others.

However... this would guarantee neither legal certainty nor even the authority of court decisions. Such at least is *my* opinion.

CHAPTER II

Limits of the task of the court - of the task of the Court of Justice

Section 1 Introduction

Interpretation, to enable the court itself or another court to reach a decision (Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty) involves the performance of an enormous task, as I have endeavoured to point out in another part of the review (Chapter I, Sections 1 and 2).

Nevertheless no matter how enormous this concept and task it clearly has limits implied by the very nature of the judicial offices, and in particular of the nature of the task entrusted to the Court of Justice of the European Communities.

These limits are imposed in particular:

(1) by the separation of powers on the one hand between the political or administrative authority and on the other hand the judiciary,

(2) by the necessary separation, which is generally acknowledged in the positive law of the Member States, between the responsibilities and tasks of the 'legislature' and those of the courts. [1]

It is tempting to think and even to maintain that the Court of Justice enjoys wide powers of appraisal and freedom which the national courts, and, in particular the supreme courts of the Member States, by no means possess.

It is difficult to draw comparisons and indeed they are often precluded.

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[1] As J. C. Gray has stated, in *'The Nature and Sources of the Law'*, Boston 1963, p. 93: 'The judges are the discoverers, not the makers of the law'.

Certain supreme courts, such as cours de cassation, can only take cognizance of law and not of the diversity and variety of the facts. The task of the Court of Justice is wider and the Court is very often acquainted with the facts.

The national courts have progressively adapted to the complexity of present-day society and its multifarious rules of law, written and unwritten. The Court of Justice was from the outset entrusted with its task in the context of a multinational and supranational society whose cohesion had still to be emphasized; it was a new society in which the rules of written law were few whilst the principles of unwritten law had progressively to be discovered and asserted.

Like a federal constitutional court the Court of Justice must uphold the 'policy' of the separation of powers and of jurisdictions within the Communties on the one hand and the Member States on the other (Article 88 of the ECSC Treaty, Articles 169 to 171 of the EEC Treaty and Articles 141-143 of the EAEC Treaty). [1]

In exercising its jurisdiction in this sensitive field does the Court of Justice display 'independence' and does it indulge in 'politics'? Are the judgments of the Court or the grounds therefor based on expediency?

This has sometimes been claimed.

A 'political decision' should not be confused with a decision which entails 'political consequences'.

There are limits to what courts do and should do: it appears that this is acknowledged in all legal systems, or at any rate in those of the Member States. It is clear that differences and subtle distinctions may be perceived both in the practice of national or international courts and in the views of legal writers considering this matter from the point of view of *de lege lata* or *de lege feranda.*

Those who consider the problem from the point of view of *de lege lata* take account, (or sometimes most unfortunately fail to take account — which makes it impossible for their view to convince informed opinion and deprives

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[1] The Federal Republic of Germany and Italy (the latter in connexion with its regions) have acquired experience of this.
In connexion with the exclusiveness of the rule of the Court of Justice in delivering rulings with regard to the failure of the Member States to fulfil their obligations: — *vide* J. Mertens de Wilmars and I. Verougstreate, *'The Failure of Member States to fulfil their Obligation'*, Common Market Law Review 1971.

it of a major part of its validity and scientific authority) of rules of law, especially those of systems of public law which determine which authorities are required to establish or modify, ususally in accordance with democratic procedures, rules of conduct setting up institutions and determine their jurisdictions and duties.

It is clear that this problem cannot be considered here.

I shall nevertheless consider two aspects of this problem because the Court of Justice in its case-law could not avoid considering it and has moreover expressly stated its view on this matter.

These two aspects are:

(a) the separation of powers and of jurisdictions between the political authorities and the administration, on the one hand, and the courts on the other, and

(b) the law-making task of the 'legislature' and the judicial offices.

This consideration will also allow discussion of what is sometimes termed 'interpretation by the courts' and the confusion to which this expression may give rise and which we have already indicated in Chapter I.

Section 2 Powers of the political authority and of the administration and the task of the courts in the sphere of economics

1. Law and economics, economic law

Law must be contrasted with politics since politics relates essentially to choices and options and has regard for expediency whilst this is by no means the task of the courts. Law undoubtedly arises from prior political choices but once it is created it has its own objectives and subject-matter just as politics has its.

Law and economics are not in conflict. Law comes into being or is developed in terms of social, financial, budgetary and economic circumstances. Phenomena, situations, activities, economic, social and tax problems ... are the substantive sources of rules of law, that is to say they occasion their coming into being and amendment. Rules of law are based on those phenomena and activities, and organize and discipline them. Private

relationships, family relationships, relationships with other social groups, relationships arising from chattels, realty, commercial operations, the needs and tasks of the public which require agencies and resources ... these constitute the source and the subject-matter of rules of law, that is to say of rules which constitute rules of conduct and establish the increasingly more numerous regulations, tasks and powers of the public services.

Law can no more be expressed as the opposite of economics than can law and society, law and social relationships, labour relationships, relationships within undertakings, relationships pertaining to wealth and money.

It is tempting to contrast economic law [1] with civil law or criminal law because these latter categories of positive law often of necessity constitute the subject-matter of laws arranged in codes whilst this is not always so in the case of the category of positive law known as economic law. [2] The variety of the formal sources of law relating to various categories of positive law does not affect the nature of those categories.

Inspired by a desire to contrast economic phenomena and economic law with other social phenomena and other categories of positive law evolution, emphasis is given to the evolution and to the rapid modifications which economic situations and problems undergo. Nevertheless the problems and phenomena pertaining to the relationships of classes or social groups, even those concerning family relationships which were governed by old established codes also undergo constant change calling for amendments to or the development of rules of law.

The 'uncertainties' of economic law are also emphasized. [3] It cannot be doubted that uncertainties exist but they are inherent in new institutions, concepts and situations. 'Uncertainties' are also frequently encountered in social law, European law and international law ...

2. Separation of powers — judgments of the Court of Justice

A. General considerations

It is clear that the powers of the political authority and of the administration on the one hand and of the tasks of the courts on the other must each remain in their respective spheres.

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[1] In connexion with this concept, *vide* G. Farjat, *'Droit Economique'* (P.U.F. 1971), p. 17.

[2] Nevertheless it is quite possible to cadify economic law as is illustrated by the Czechoslovakian Economic Code.

[3] Although economics is not, in the words of Mr Advocate-General Lagrange in (1963) ECR 184 an exact science, economic law does not necessarily share this inaccuracy.

But is it likewise clear that the Court of Justice has understood this, particularly in the economic sphere?

With regard to actions for annulment Article 33 of the ECSC Treaty emphasizes that 'the Court may not, however, examine the evaluation of the situation, resulting from economic facts or circumstances in the light of which the High Authority took its decisions or made its recommendations, save where the High Authority is alleged . . .'. This is an obvious rule which it was moreover considered unnecessary to repeat in the Treaties of Rome. Furthermore the Court of Justice applies this obvious rule when it is required to give a ruling withing the framework of the Treaty establishing the European Economic Community. Thus in its judgment of 18 March 1975 [1] the Court held: 'when examining the lawfulness of the exercise of such freedom, the courts cannot substitute their own evaluation of the matter for that of the competent authority but must restrict themselves to examining whether the evaluation of the competent authority contains a patent error or constitutes a misuse of power'.

In his opinion delivered in Case 6/54 [2] Mr Advocate-General Roemer commented on this 'separation' of powers and of jurisdictions. He quotes the statement of reasons which the German Government put forward in support of the draft law authorizing the ratification of the Treaty and which states: 'the principle of the separation of powers which prevails with regard to the institutions required that the review of the Court of Justice should not mean substituting the Court for that of the High Authority as the supreme agency of the will of the Community in economic matters'. He also quoted the report of the French delegation which runs thus: 'accordingly it was possible to effect the necessary reconciliation between the requirement of containing the operations of the High Authority within the limits of the law and the no less imperative requirement that these operations should not be hampered in a field in which economic, political or social considerations require a constant appraisal of factual circumstances or appropriateness *which normally falls outside the jurisdiction of the court*'. The Advocate-General concluded that 'with regard to the *ratio legis* it may be deduced that in connexion with the ground of manifest failure to observe the provisions of the Treaty the Court must be in a position to make a finding without substituting its own appraisal of economic policy for that of the High Authority ... The Treaty consequently makes arrangements for the

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[1] 18 March 1975, Case 78/74, *'Denaturing premiums for common wheat'* [1975] ECR 421.

[2] 21 March 1955, Case 6/54, *Government of the Kingdom of the Netherlands* v *High Authority*, Rec 1954–55, p. 201.

review of the economic policy followed by the High Authority: under Article 24 the High Authority is obliged annually to submit to the assembly a general report on its operations. [1]

The courts do not administer or govern as does the administration and the legislature and the government is not normally called upon to act as judge.

Nevertheless fine distinctions are possible when a court must sit in judgment on the facts which the administration should have known. In such matters the training of the lawyers making up the court, the constitutional principles and the institutions of their countries influence them or are capable of doing so. Such training and principles differ in particular with regard to France, Italy, Luxembourg, the Netherlands and Belgium on the one hand and the United Kingdom on the other. [2]

Thus Lord Mackenzie Stuart states in the record of a conference held on 9 January 1974: [3] 'in the absence of express legislation British administrative law scarcely ever permits and indeed absolutely excludes review of the facts on the basis of which the administration exercises its power of appraisal'. The distinguished British Member of the Court of Justice then cites a number of decisions of the courts of his country in support of this view.

Lord Mackenzie Stuart later states: 'Even in the United Kingdom the power of the administration is not unlimited. Any decision of the courts annulling, for example, a measure issued by a local authority on the ground that it was adopted *ultra vires,* produces a certain effect on the course of the operations of the administration but despite that it has never been suggested that the courts do not have jurisdiction to entertain such an application. What is more, it is no doubt possible to call in question the correctness of the proposition as a whole. Does passing judgment on the administration necessarily involve administering?' This would be the case if the Court of Justice had to substitute its power of appraisal for that of the administration

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[1] Mr Advocate-General Roemer further stated: 'the rule as to the limiation of review by the Court applies particularly to the question of whether an economic measure is necessary or appropriate ... Owing to their very nature economic decisions such as those which are contested and which are issued for a restricted period, must be justified not only in the circumstances of the period when they were adopted but even more within the context of the economic developments following their implementation and the objectives of the Treaty'

[2] Would German, Danish and Irish lawyers please excuse failure to make specific mention of their legal systems: this is a simple confession of ignorance!!

[3] Société de Législation Comparée : *Revue Internationale de Droit Comparé* — janvier-mars 1974, p. 61 et seq.

and itself order implementing measures. Nevertheless it is undoubtedly a task of the courts and not of the administration to annul an implementing measure which lacks a valid basis in law or in fact.

Mr Advocate-General Lagrange stated in his opinion in Case 13/63: [1] 'In French law, such a defect (failure to state reasons or a statement of contradictory reasons) is considered as falling under 'infringement of the law'. But this is of little importance: the essential thing is to see clearly that we are here in the sphere of review of the legality of the grounds and not in that of a mere defect of procedure. The applicant also disputes on several points the *material accuracy* of the grounds: here too review must be made by the Court which has the task, when a question of material inaccuracy is raised, whether, in spite of this inaccuracy, the decision remains any the less legally justified. Such are the principles which hitherto seem to have inspired the Court in its exercise of judicial review of the grounds of a decision taken under a discretionary power'.[2]

B. Economic choices and the task of the courts/Court of Justice — certain judgments

(a) It is sometimes asserted that the Court holds certain 'economic views' and that they manifest themselves in its judgments ... and that it has made certain politico-economic choices.

I am afraid that this is the result of confusion. The Treaties and the implementing regulations are founded on certain economic concepts. The decisions of the Commission and of the Council of Ministers may constitute the application of a doctrine or of an economic choice. The Court of Justice must determine whether such choices or economic policies, which come

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[1] [1963] ECR 184.

[2] See also the judgment of the Court of 22 January 1976 in Case 55/75 with regard to the limits of the powers of the Court of Justice and review by it. The Court held that: 'As the evaluation of a complex economic situation is involved, the Commission and the Management Committee enjoy, in this respect, a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of powers or whether the authority did not clearly exceed the bounds of its discretion'. The Court held that Regulation No 974/71, as amended, 'provides that the grant or the imposition of compensatory amounts shall apply only where application of the monetary measures referred to ... would lead to disturbances in trade in agricultural products. Under Article 6 of this regulation the Commission, deciding in accordance with the established procedure of management committees, shall rule as to *the existence of a risk of disturbance*' The Court, then, considers the framework, that is to say the bounds of the discretion of the Court.

within the exclusive jurisdiction of the non-judicial authorities of the Community and which *do not concern the Court,* infringe a rule of law deriving in particular from the Treaty or from the implementing regulations or whether they are compatible with such rules of law.

The authors of both the Treaty of Paris and of the Treaties of Rome certainly had a certain concept of economic policy and this is necessarily reflected in the provisions of the three Treaties. In cases brought before it the Court of Justice is clearly required to settle the questions submitted to it on the basis of the rules and principles arising from the Treaties and thus from the economic theories adopted by the authors of the Treaties. However it is clear that it is by no means the duty of the Court — and it appears to me that the Court of Justice has observed this rule — to approve or reject certain economic theories and thus possibly make political choices for it would be putting itself in the place either of the authors of the Treaties or of the Council of Ministers or for the Commission which were entrusted with tasks other than those of the Court of Justice.

It is clear that certain economic concepts and theories influenced the authors of the Treaties. It is also clear that one or other theory or concept or application of economics engenders the agreement or otherwise of certain economic or political groups especially in the Member States. However matters of economic choice do not come within the jurisdiction of courts.

In a noteworthy study which appeared in the 'Mélanges en l'honneur de M. Ganshof van der Meersch' [1] Judge Mertens de Wilmars referred to the economic concepts which inspired or may have inspired the authors of the European Treaties or which are favourably regarded or otherwise by the political powers in the Member States. He writes in particular that:

the economic concept forming the basis of the European Treaties is the theory of the market economy;

the Treaties, and particularly the Treaty of Paris, were conceived at a time when it was considered almost unanimously that it was necessary to react against state planning in times of crises and war;

the provisions of the Treaty of Paris are not characteristic of a planned economy and on the contrary they favour competition conceived as an instrument serving to coordinate the market economy.

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[1] *'De Economische Opvattingen in de Rechtspraak van het Hof van Justitie'*, Volume II, p. 285 et seq.

In the Member States economic concepts, trends and tendencies have appeared: the State planning necessary to create a Welfare State, bring about a better distribution of wealth, improve the social climate, or to authorize public investment or to allow public authorities to acquire shares in private undertakings.

Judge Mertens de Wilmars further emphasizes that it is possible to entertain a number of concepts of competition within an economic system and he cites certain particular views with skill and authority.

Nevertheless ... the political and administrative authorities — the latter being moreover dependent on the former — have the task of and responsibility for determining economic policy and what means are to be employed in implementing it. The task and responsibility of the courts is to consider, without interfering in the powers of the said authorities, whether the decisions which they have taken conflict with rules of law.

Let us consider certain judgments and certain appraisals and comments relating to this question.

(a) It might be thought that in its judgment of 18 May 1962 in Case 13/60 the Court, in order to be able to establish the role of competition in an economic oligopoly, has itself drawn a distinction between 'the power to fix prices' on the one hand and 'the power to determine prices'. In fact the applicant itself drew this distinction and the Court considered whether the ECSC Treaty and the EEC Treaty distinguished between these two powers and what was the difference between them *according to the Treaties.* The Court of Justice interpreted the Treaties (which is a judicial function) and ruled:

'For the undertaking which is in a position to exercise it the power to fix prices is an objective fact arising out of an easily perceptible organizational structure. The power to determine prices, however, resides in a power, given to an undertaking in a position to exercise it, to establish prices at a level appreciably different from that which would be established by the effect of competition alone.'

It appears to me clear that the Court of Justice has restricted itself to a judicial role.

In what did the proceedings consist? The High Authority had refused to authorize the applicants to sell their products through a single selling agency. On the basis of the provisions of Article 65 (2) of the ECSC Treaty the High

Authority considered that such an agency was capable 'of placing in the hands of the undertakings concerned the power to determine prices, control or limit production or the outlets for a substantial part of the relevant product'. The Court met the objection put forward by the applicant to the effect that the single selling agency could not 'determine the prices' because they resulted from supply and demand and replied by considering the factual situation which existed on the market and more precisely within the Coal and Steel Community, and held: 'to see the coal or energy markets as perfectly competitive atomistic markets would be to ignore realities. They are not made up by innumerable small producers, unable to affect market conditions by the weight of their individual supplies, but are made up rather of a limited number of undertakings, whose production is almost always substantial. It is the nature of things which makes the energy market a market in which large units confront one another'.

The Court had previously stated that the applicants' conception 'inevitably recalls the atomistic markets described by liberal economics, where each participant was confronted by a market price which he could in no way affect by his own policies . . .'.

Thus the Court does not give a ruling as to whether a system of oligopoly or of perfect competition is necessary; it simply describes the state of affairs which it had to find as a fact.

The Court subsequently states that: 'such a market is characteristic of a state of oligopoly, which is also one of imperfect competition'. The judgment does indeed refer to the 'theory of imperfect competition' and the authority 'of a well-known author who defines this oligopolistic market' but, it appears to me, this is merely to deduce from them that 'these descriptions' of the theory apply exactly to the market in coal and even to that in energy as it has been described by the applicants themselves. In further stating that 'the Treaty establishing the European Coal and Steel Community takes into account the technical and commercial evolution which constantly augments the size of economic units, increasingly giving the coal and steel markets the character of an oligopoly' it appears to me that the Court merely clarifies the basis of the EEC Treaty taking account of reality.

Continuing, then, to fulfil a 'judicial' role the Court states in its judgment that 'the provisions of Article 65 (2) and Article 66 (2) evidence *the intention of the authors of the Treaty* not to restrict this evolution, provided that it serves the objectives of the Treaty and particularly that it enables the necessary measure of competition between the large units to exist in order to safeguard the basic requirement of Article 2 . . . This insistence upon the

safeguarding of a certain measure of competition within a system of imperfect competition... has clearly inspired one of the conditions imposed by Article 65 (2) upon joint selling agreements...'.

In considering the decision of the High Authority, based on Article 65 (2) (c) of the ECSC Treaty, not to authorize the creation of a single sales agency, the Court of Justice concluded that it 'saw no reason for accepting that... the High Authority has failed to observe the letter and the spirit of the Treaty and particularly the obligations imposed upon it by Articles 2, 3 4 and 5'.

The Court of Justice was not led to decide whether a state of imperfect competition was politically or economically more advantageous than unlimited competition but instead defined the factors which inspired the Treaty of Paris and on the basis of that Treaty on the one hand, it found that it allowed the existence in the coal and steel market of imperfect competition deriving from an oligopolistic situation and that it intended a certain measure of competition to continue and on the other hand, it held that in this case the High Authority had observed the provisions of the Treaty when it refused the authorization requested.

(b) Whilst the Court of Justice, like any court, must often harmonize and coordinate *rules of law* (I shall give particulars of this [1]) the political or administrative authority must often reconcile and coordinate certain objectives, either because it is empowered to do so or because therein lies the essence of government or administration.

In its judgment of 13 June 1958 in Case 9/56 [2] the Court emphasizes 'that the High Authority must effect the permanent reconciliation which may be implied by any contradictions existing between the objectives considered separately and, when such considerations are established, accord to one or more of the objectives of Article 3 the precedence *which may appear to it to be required in view of the economic facts and circumstances in the light of which* it adopts its decisions'. The Court of Justice itself clearly does not harmonize and coordinate but it decides that harmonization is required by virtue of the nature and of the very wording of the Treaty and that it is for the High Authority and the Commission to exercise, within the framework of the Treaty, the options necessary to accomplish their task.

This is indeed *a judicial decision.*

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[1] *Vide* Chapter V, Section 4.
[2] *Meroni*, Rec. 1958, p. 11.

In its judgment of 15 July 1963 in Case 34/62 [1] the Court held that: 'These criteria [set out in Article 29 of the EEC treaty] relate to different objectives which may conflict with each other or not be applicable at the same time, so that the complaint that the Commission has not considered all of them is only valid if they were all relevant to this case. When applying Article 25 (3) of the EEC Treaty, account must in the first instance be taken of Article 39, although it is not so important as Article 29 because the objectives which it sets out must be taken into consideration and the danger of impeding the attainment of these objectives must be a factor in assessing, as the Commission is required to do under the said paragraph, the expediency of granting an authorization'.

The same conclusion may be drawn with regard to the judgment of 13 June 1958.

(c) In its judgment in Case 8/57 of 29 June 1958 [2] (a so-called scrap case) the Court of Justice held in particular: 'In the sphere of production the "indirect means of action" ... are to be distinguished from the "direct influence" referred to in Article 5 not by the aims pursued but by the methods appropriate to carry them out... The two procedures, indirect or direct, modify the structures which individual action would otherwise create; they thus constitute in addition economic intervention procedures but the former creates the appropriate conditions for engendering in producers the will voluntarily to adopt the behaviour which the common interest, referred to in Article 3, requires of them whilst the latter require, in view of this common interest, different measures from them than the factual circumstances induce them to undertake willingly... Although they are identical in their effects and in the power of intervention which they confer the indirect means of action allow the freedom of decision of all the persons concerned in the market to be respected whilst the direct influence requires this freedom to be restricted if not abolished'.

Thus the Court of Justice in no way expresses *its views* as to the effectiveness, the opportuneness or the necessity of one or other means of economic action on the part of the authority. It states what the Treaty prescribes or allows.

C. *Competition, protective measures, non-contractual liability; judgments of the Court of Justice*

There are still certain observations to be made relating, in particular, to judgments concerning the rules of competition within the European Economic

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[1] Case 34/62 [1963] ECR 131.

[2] *Hauts Fourneaux et Aciéries Belges,* Recueil 1958, p. 223.

Community (Articles 85 and 86), protective measures and non-contractual liability.

(i) In interpreting the meaning and scope of the provisions of Article 85 and in particular on the basis of the wording thereof, the judgment of the Court of Justice of 13 July 1966 in Case 32/65 [1] emphasized that the limitations imposed on competition are appraised in the light of the general principle that trade between Member States must not be hampered or paralysed. Article 85 furthermore provides that 'all agreements which may affect trade between Member States ... are incompatible with the Common Market ...'. The Court stressed that in Community law the essential objective of this provision is to prevent the partitioning of national markets. In its judgment of 13 February 1969 [2] the Court stated, rightly in my view, that agreements between undertakings must be appraised differently in accordance with the provisions of Community law and with those of national law so that an agreement between undertakings may give rise to two parallel procedures before the Community authorities and the national authorities. The Court thus determines the separation of jurisdictions.

In the judgment of 13 July 1966 [3] the Court held that although sole distributorship agreements may be regarded as lawful under national systems of law they may fall under the prohibitions of Article 85 if they have as their object or effect the division of the markets.

In the same judgment, providing a ruling on the application by the Commission of Article 85 (3) of the EEC Treaty the Court held 'the exercise of the powers of the Commission necessarily involves complex economic evaluations ... Judicial review of those evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom ... This review must in the first place be carried out in respect of the reasons given for the decisions which must set out, the facts and considerations on which the said evaluations are based'.

In all those judgments the Court of Justice has clarified the economic system of the Treaties, the powers and tasks of the Commission and of the Council of Ministers; it has interpreted Community law.

It has not created an 'economic policy' or substituted itself for or 'placed itself over' the political and administrative authorities. It has carried out its 'judicial' role.

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[1] [1966] ECR 389.
[2] Case 14/68, Walt Wilhelm [1969] ECR 1.
[3] Cases 56 and 58/64 [1966] ECR 299.

It is indeed understandable that certain persons have deplored and criticized certain judgments — I shall, moreover, return to this aspect [1] — but that is another question.

Let me mention at present the *Portelange,* [2] *Bilger* [3] and *Haecht* [4] judgments relating to the concept of the 'provisional validity' of agreements... covered by Article 85 of the EEC Treaty. Some have been criticized or approved the first judgments whilst others have done the same in respect of the last judgment. A complete change of judicial attitude has certainly occurred. Is this to be explained by political or in particular by economic choices? Is its origin to be traced to the economic consequences of the first judgments or again to the reactions of the national courts and of legal writers?

I consider that this change, like the way in which it was done and in particular its causes, constitute an entirely normal phenomenon in the exercise of purely judicial office.

In carrying out its task the Court of Justice had at the same time to 'interpret' a number of concepts, harmonize and coordinate several provisions relating to competition within the EEC and in particular to clarify the concept of 'nullity' (Article 85 (2)) the concept of the exceptions from such cases of nullity (Article 85 (3)) and the legal system flowing from Regulation No 17 adopted in implementation of Article 87 of the EEC Treaty. Such interpretation, harmonization and coordination produced, with every legal justification, the concept of provisional validity. But what was the precise nature, extent and duration of such provisional validity? New questions of interpretation. The views of the national courts and of writers were divided in this matter *(Vide* in particular the opinions in connexion with the judgment of 8 June 1967 of the Cour de Cassation of Belgium (Journal des Tribunaux, 9 September 1967 and the Revue Trimestrielle de Droit Européen, 1967, p. 924). The Court of Justice provided an interpretation of these in its judgments in the *Portelange* and *Bilger* cases. This decision gave rise to criticism and upset 'judicial and doctrinal circles' particularly because of its repercussions in business life, for it was thought that the 'rules of law' did not justify or scarcely justified the said decision. On the first occasion the Court of Justice took account of those criticisms and reactions and reconsidered the problem . . . as any national supreme court would have done.

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[1] *Vide* Chapter VI.
[2] Judgment of 9 July 1969, Case 10/69 [1969] ECR 319.
[3] Judgment of 18 March 1970, Case 43/69 [1970] ECR 127.
[4] Judgment of 6 February 1973, Case 48/72 [1973] ECR 77.

Sometimes the Cour de Cassation of Belgium, taking the view that it may have erred in a previous judgment, reconsiders the question, due to the external contributions from writers and the lower courts, and adopting fresh lines of argument or legal considerations whose relevance had escaped it, and possibly amends its decision. The change of attitude on the part of the Court in the *Brasserie de Haecht* judgment [1] is to be explained and justified in this way.

(ii) Let me mention some further characteristic judgments in which these respective powers and jurisdictions are clarified and respected and in which the Court of Justice provides useful guides as to the nature, the extent and the limits of its own jurisdiction.

Elsewhere in this review I have already cited and briefly commented on the judgment of 22 January 1976 in Case 55/75 on the granting or the levying of a compensatory amount when the application of certain monetary measures involves disturbances in the trade in agricultural products. [2]

Helpful guidelines may also be derived from the opinion of Mr Advocate-General Dutheillet de Lamothe in Case 37/70, *Rewe Zentrale* v *Hautpzollamt Emmerich*. [3] A Member State was authorized by the Commission under Article 226 of the EEC Treaty to levy a countervailing charge in respect of certain imports. An importer had asserted before the Court of Justice that in order to deal with the situation which, according to the Member State, existed it would have been possible to adopt other measures less radical than a countervailing charge in respect of imports and which would have entailed less disturbance. The Advocate-General maintained that: '... the Court

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[1] Case 48/72, *Brasserie de Haecht* [1973] ECR 77.

[2] *Vide* to the same effect the judgment of 25 June 1975 in Case 5/75 [1975] ECR 759. The Court is ruling on the validity and the scope of Community provisions. It first of all recalls that in reviewing the legality of the exercise of a power by the Community authorities the Court cannot substitute its appraisal for that of the competent authority. Its task is merely one of review. It thus finds on the one hand with regard to the granting and abolition of the denaturing primes for cereals that the Commission enjoys both with regard to taking into consideration any factors relating to disturbance and the choice of methods intended to counter them a wide discretion which it must exercise in the light of the objectives of economic policy within the framework of the common agricultural policy ... In particular the Commission has the power entirely to suspend payment of the denaturing prime if the economic circumstances require. The Court also finds that account must be taken of legal certainty and in particular of the legitimate expectations of the persons concerned — review by the Court — and in particular that, since adjustments of the denaturing system during the marketing year are of an exceptional nature, then can be made only where the balance of the market is likely to be disturbed. Thus Denaturing undertakings may therefore legitimately arrange their projects for the entire cereal marketing year.

[3] [1971] ECR 43.

acknowledges that although in this sphere the Commission does not have a discretion it possesses a power of appraisal subject to review by the Court and I would personally add that this is a wide power of appraisal ... In fact I consider that in so difficult a matter, regarding the application of what may really be called "emergency measures" introduced by the Treaty, solely for the transitional period, as a kind of safety valve intended to prevent, at the cost of certain Community sacrifices, general explosions harmful to everyone, these two concepts, material error and clear error must form the basis of the Court's review if it is to avoid the risk of allowing the review of *legality* to degenerate into a review of *expediency*'.

This opinion is at one with the view taken in the Order of 5 October 1969 [1] in which it was held: ... '... suspension of the operation of a decision of refusal [of an application submitted by a Member State for authority to adopt certain protective measures] cannot be equivalent to the grant of the authorization refused by the Commission. The Court has no authority to substitute itself for the Commission in order to take within the framework of Article 226 [of the EEC Treaty] decisions instead and in place of the executive'.

(iii) The judgment of 14 May 1975 in Case 74/74, relating to noncontractual liability, recalls previous case-law in accordance with which: 'since the disputed measure is of a legislative nature and constitutes a measure taken in the *sphere of economic policy,* the Community cannot be liable for any damage suffered by individuals as a consequence of that measure under the provisions of the second paragraph of Article 215 of the Treaty, unless a sufficiently flagrant violation of a *superior rule of law* for the protection of the individual has occurred'. By Regulation No 189/72 the Commission had abolished compensatory amounts. It was alleged in particular that by withdrawing these amounts with retroactive effect the Commission had violated the principle of legal certainty, and had failed to respect the trust which the persons concerned might legitimately have in the maintenance of the compensatory amounts for current transactions. The Court did not find that the complaint as to the retroactive effect was well founded. It held nevertheless that: 'in the absence of an overriding matter of public interest, the Commission has violated a superior rule of law, thus rendering the Community liable, by failing to include in Regulation No 189/72 transitional measures for the protection of the confidence which a trader might legitimately have had in the Community rules'.

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[1] Case 50/69 R [1969] ECR 449.

In the national legal systems and especially in the Belgian system similar principles obtain. It has recently been written [1] that it is certainly not for the courts to consider what measures the executive must take in order to govern and administer but that it is the constitutional and legal duty of the courts to settle whether the decisions of the executive power are 'legal' and in particular if the executive power may properly abstain from adopting certain measures or decisions . . . and whether a decision or failure to take a decision can constitute a wrongful act. The administration is unfettered in its choice in so far as it does not infringe a rule of law, in particular a rule which requires or prohibits the adoption of a specific measure. The administration certainly makes this decision without the supervision of the courts but if that decision infringes a rule of law the courts must act.

Professor Dabin wrote [2] that: 'the legislature no more administers when it legislates for the administration than the courts administer when they deliver a judgment on the administration. This is why, although the administrative courts do not formally constitute part of the judiciary, they do not lose their judicial nature when they settle disputes to which the administration is a party: the courts judge and do not administer. Since the tasks of the courts and of the administration remain distinct the essence and validity of the separation of powers is preserved'.

Section 3 Powers of the 'political authority' and of the administration and the task of the Court of Justice in other spheres

Disputes involving officials

It is superfluous to recall the very numerous judgments and opinions which have been delivered in this connexion. The administration has its powers and responsibilities . . . and the Court of Justice has its. The Court of Justice may not substitute itself for the administration whilst the administration may not infringe the law.

Let me mention in particular the judgment of 7 June 1972: [3] the Court found that the wording of the Staff Regulations of Officials showed clearly that the authors of the Staff Regulations intended to leave to the administration a

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[1] Rechtkundig Weekblad 1971, Column 1820 (translation *supra*).
[2] Revue Critique de Jurisprudence Belge 1963, p. 122.
[3] Case 46/71 [1972] ECR 373.

certain discretion equitably to appraise the facts and circumstances put forward in each case in support of an application for a person to be treated as a dependent child. This discretion, which is necessary to take account of the many unforesseable circumstances characterizing every case, is not incompatible with the general principle of equal treatment for officials. [1]

In his opinion in Case 29/70 *(Marcato* v *Commission)* [2] Mr Advocate-General Dutheillet de Lamothe said: 'you refuse to review the administration's assessment of the occupational aptitude of the official. You review only: the regularity of the procedure which has led to the assessment of the merits of the official; the material accuracy of the facts on which the administration has based this assessment and the compatibility between facts and assessment'.

Section 4 The task of the 'Community legislature' — as expressed in the Treaties and the amendments thereto and in Community regulations and directives — and the task of the courts (especially the Court of Justice)

1. Introduction

Do the judges of the Court of Justice of the Communities manifest themselves as too European, too integrationist and too 'creative' of integration and of a true European Community? Certain people take this view and complain of such an attitude on the part of the Court of Justice. On the other hand others welcome it and consider the Court is entitled to adopt such an attitude.

A compromise is necessary. In so far as the Court of Justice ensures integration through the judgments which it delivers on the basis of the Treaties and the spirit of the Treaties it does not seem to me possible to complain that it exceeds the task with which it was entrusted.

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[1] Cf. also the judgment of 12 December 1956 in Case 10/56 (Recueil 1956, p. 371): 'it is for the administrative authority at its discretion to appraise the ability of condidates to carry out specific duties and for the Court to review, if necessary, the ways and means whereby this appraisal was arrived at. An unfavourable appraisal of the ability of a candidate to fill a post of translator cannot reasonably be made on the judgment of 8 July 1965 in Cases 19and 65/63 [1965] ECR 533 et seq.; and the judgment of 4 February 1970 in Case 13/69, *Van Eick* [1970] ECR 3.

[2] Case 29/70, *Marcato* [1971] ECR 259.

On the other hand such a complaint would obviously carry weight if the Court of Justice were to read into the wording and spirit of the Treaties or if it were to go beyond the intentions of the authors of the Treaty, especially of the nine Member States which are bound by the European Treaties, and if it were to establish European integration by 'stretching' the wording, principles and spirit, without being able to base this on a definite development arising in particular from new Treaties. To deliver a judgment on this matter it is not necessary to substitute a personal view on integration for that arising from the Treaties. It is not necessary to be for or against integration to assess the remarkable work of the Court of Justice. The only necessity is objectively to appraise whether its judgments have exceeded the rules, provisions and principles which are included or which follow from the Treaties, regulations and directives.

Certain persons, including indeed responsible authors, consider and write thus that the Court of Justice has a duty and a power to 'push' European integration. This is the opinion of A. W. Green in particular. [1]

It appears to me self-evident that this is not the task of Court of Justice and that in any event it does not possess such powers. The Court of Justice must interpret the rules and provisions of European law, accepting as its basis what those rules and provisions have settled with regard to the powers of the Communities and of the Member States; the extent of integration must be deduced by the Court from Community law as it emerges in particular from the Treaties establishing the European Communities or modifying or supplementing the three original Treaties. The Court cannot itself bring about greater integration. A development in relation to this integration may be conceived, a development which has been outlined since the Treaty of Paris and the Treaties of Rome. This development is to be traced not to the wishes of the Court of Justice but to what has perhaps been decided by the competent political authority in particular in the Treaties subsequent to the Treaties of Paris and of Rome. Can the Court of Justice, on the basis of the regulations of the Council of Ministers move towards further integration than that which is to be discerned in the Treaties? It cannot be overlooked that another problem arises in this case: that of appraising the conformity and validity of such regulations with the provisions of the Treaties on which they are or necessarily should be founded.

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[1] *'Political Intergration by Jurisprudence — The Work of the Court of Justice of the European Communities in European Political Integration'* — W. A. Sythoff Leyden 1969; see also: Schlochauer, *'Der Gerichtshof der Europäischen Gemeinschaften als Integrationsfaktor'*, Festschrift Halstein 1966, p. 431 et seq.

At times the Court of Justice shows itself to be liberal, at others less liberal or not liberal at all. In this connexion it has been written that the Court of Justice shows itself to be liberal when it is required to interpret Article 33 of the ECSC Treaty, especially with regard to the extent of undertakings' right to bring an action for annulment whilst in connexion with applications under the second paragraph of Article 173 the Court proves iself to be extremely rigid and strict. This view obviously calls for clarification. When the Court has been required to interpret the second paragraph of Article 33 it has declared the actions brought by undertakings to be admissible on every occasion on which the letter and the spirit of the article allowed it to do so, bearing in mind the general principle of the state of law which may be discerned in the ECSC Treaty. When the Court of Justice has been required to interpret the second paragraph of Article 173 it has been confronted with wording differing from that of Article 33 and this was plainly intended by the authors of the Treaty of Rome to restrict the persons referred to in the second paragraph who could bring actions for annulment. The Court could only bow before the will of the legislature.

2. Judgements of the Court of Justice with regard to this important question

I shall limit myself to citing two judgments.

In its ruling with regard to the Common Customs Tariff and the common organization of the agricultural markets the Court held in its judgment of 26 April 1972: [1] 'no matter how unsatisfactory it is in practice, the diversity of criteria which may result from those two legal systems in determining separately the basis for imposing the levy and for imposing customs duties, it is not for the Court to remedy the situation, by modifying, by way of interpretation, the content of the provision applicable to one or other case since such modification pertains exclusively to the competence of the Community legislature'.

On 14 July 1972 the Court found that no bar by lapse of time existed in relation to competition (Articles 85 and 86 of the EEC Treaty) and that it was not the duty of the Court to fix a time-limit. [2] Nevertheless the Court could hold that on the basis of the principle of law relating to legal certainty

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[1] Case 92/71 [1972] ECR 251.

[2] The Council of Ministers subsequently (by a Regulation of 26 November 1974) fixed a time-limit for bringing proceedings.

proceedings brought within time-limits which are no longer reasonable must be declared inadmissible, as the Court indeed held in another case on 6 July 1971. [1]

3. Government by the Court

Judge Pescatore recently wrote: [2] 'The Court has been careful not to exceed its role as judge... There has never been any question of setting up any form of a government by the courts, to use a perennial expression'.

Judge Mertens de Wilmars also wrote: [3] 'There can thus be no question of government by the courts, as has been contemplated in certain quarters'.

As we know the concept 'government by the courts' originates in the case-law of the Supreme Court of the United States of America. [4] The expression attained wide currency... but on many occasions it was and still is wrongly employed and invoked.

'Government by the courts' indeed obtains if the courts exceed their proper task: if they ignore, infringe or brush aside the rules of law which it is their duty to respect and apply... if they base their judgments on their own social and economic views or on those of the parties to which they belong... if their judgments stem from 'choices' and from 'policies' which have not been decided by the political authorities or those with power to amend the constitution or to legislate — and which do not emerge from positive law, that is to say from the legal system as a whole, its spirit and development and general or other principles.

Nevertheless the courts 'do not govern' when, after the political authority has made a choice, taken a decision and formalized it in a law or regulation, they hold that this decision, that is to say this choice, could not in accordance

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[1] Judgment of 6 July 1971 in Case 59/70, *Aids to the Iron and Steel Industry* [1971] ECR 654.

[2] *'Les Objectifs de la Communauté Européenne comme Principes d'Interprétation dans la Jurisprudence de la Cour de Justice'* in Miscellanea W. J. Ganshof van der Meersch, Volume II, p. 325.

[3] *'Economische Opvattingen in de Rechtspraak van het Hof van Justitie van de Europese Gemeenschappen'* — In Miscellanea W. J. Ganshof van der Meersch, p. 285.

[4] The expression originates in particular — without it being necessary to list the classic works in this field — in particular in an article by L. B. Bondin, *'Government by Judiciary'* in the Political Science Quarterly 1911, and in the work, *'Gouvernement des juges dans les Communautés Européennes'* by J. P. Colin, Paris 1966.

with the rules or law be adopted in the manner in which it was or by the authority which issued it in a law or regulation, in particular because this decision falls within the jurisdiction of another authority or the decision was prohibited by a rule which the law or regulation has thus infringed.

A court and especially the Court of Justice, clearly does not 'govern' if, as has been wisely advocated, it were required to deliver a ruling on the conformity with the European Treaties of the 'laws' which the European Parliament might be led to adopt following a revision of the European Treaties which strengthened its powers and entrusted it with the tasks which, on a democratic view, are desirable.

It would, moreover, be rather difficult to understand why such 'laws', which would take the place of the numerous regulations which the Council of Ministers is required to adopt within the present European organization and which are subject to review by the Court of Justice, should not be covered by the present guarantee of conformity with the Treaties.

Clearly it is highly desirable that the granting of wider powers to the European Parliament, as a result of revision of the Treaties, should be coupled with the establishment of a procedure for revising the Treaties similar to that existing in Member States with regard to the revision of constitutions.

It has sometimes been said or written that the Court of Justice either has taken political decisions — that is to say decisions based on political expediency or political choices rather than on rules of law — or quite simply that it has substituted itself for the Community 'legislature'.

I am convinced that this view is mistaken.

Nevertheless at the end of this review I shall consider certain judgments, bearing this opinion in mind. [1]

Before concluding this part of the review there is a final observation.

It has been said, and also written, on a large number of occasions that owing to the complexity and large number of the rules of law the Court of Justice in reality *chooses the rule which it will apply* and that consequently it allows itself to be influenced in this choice by philosophical, political and social views and thus by choices which it makes in this matter.

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[1] *Vide* Chapter VI, in particular Section 2.

I am convinced that the Court of Justice does not make such a choice in arriving at its judgment. Confronted with a complex, difficult and variegated body of law the Court of Justice on many occasions indeed perceives a number of possible outcomes, and this or that principle, rule or line of argument, which may be taken into consideration, but it is the duty of the Court to scrutinize, weigh up and ponder divorced from any preference or preferences, in order to arrive at the cogent judgment as it sees it.

The conclusions drawn by one judge will not perhaps appear convincing to another. This is why, when members of courts discuss the judgment to be delivered, opposing views are so often encountered. Certainly, alterations in judicial attitudes and in case-law also occur. It is further true that the same question can be settled differently by different supreme courts.

The reason for these divergencies and alterations in attitude emerges, however, both from the diversity and complexity of the work of the courts. Methods of reasoning and the way in which problems are grasped and perceived are not the same for all judges. Furthermore it must not be forgotten that judges are human and that their capacities and natures differ.

Clearly reasoning and logical thought play an essential part but ... the reasoning of the courts is not that of formal logic and of the logic of pure mathematics, although the strict reasoning of mathematics is often imperative.

In international courts, or more precisely in courts which are made up of lawyers who have had a different legal training or who have simply lived among no doubt comparable but none the less different institutions, solutions put forward by one judge may, owing to those differences, fail to coincide with those proposed by other judges. I have already had occasion to emphasize this factor.

Thus in certain countries it is either rare, or exceptional, or even out of question that the provisions of international treaties should be regarded as directly applicable by the authorities, the citizens and the courts. In other countries, even before the entry into force of the Treaties of Paris and of Rome, the courts frequently applied provisions of international treaties in the same way that they applied their laws, orders or decrees.

Consequently it is natural that lawyers who, although forming part of the same international or regional court, have lived in countries where differing attitudes prevail with regard to the problem of directly applicable provisions should likewise react differently when they are faced with the question of whether a provision of a European treaty, of a regulation or of a directive is directly applicable.

Nevertheless it appears to me clear that when the authors of the Treaties established the European Communities they included in these Treaties an important number of provisions with which we are familiar relating to the rights and duties of private individuals with the intention that the rules inserted therein should constitute rules of conduct for all citizens, that they should be applied in a like manner in all the Member States and that consequently these provisions should be directly applicable. If this were not the intention of the authors of the Treaties it would be difficult to understand why they adopted provisions such as those in Article 177 of the EEC Treaty entrusting to a common court the common interpretation on a reference from national courts — *and consequently the courts necessarily required to apply these provisions* — the uniform and coordinated interpretation of the provisions of the Treaties, regulations and directives.

CHAPTER III

The formal sources of Community law

Section 1 Introduction

It is clear that national systems of positive law by no means have only 'statutory law' as their sole formal source — even understood in the wide sense which was explained above. International law also has sources other than treaties. National law and international law also comprise custom, general or other principles and rules inferred from one or more provisions of 'satutory laws' or of treaties or even of principles considered separately or in conjunction with other sources.

Likewise European law, that is to say the law of the European Communities, is not established solely by the treaties, regulations and directives ... there are also other formal sources. [1]

Not only general principles or merely 'principles' but also and in particular rules of international law constitute rules of European law or form part of the law which the Court of Justice must apply.

It is for the Court of Justice of the Communities to 'discover' those 'factors' of positive European law: this constitutes 'interpretation' in accordance with the concept which I have endeavoured to develop above.

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[1] The concept 'formal sources' is understood in the sense of the 'forms' in which the rules of law manifest themselves: custom, laws and general principles ... By 'material' sources is meant the factors, circumstances and phenomena which give rise to rules of law and, clearly, at the same time to their substance: factors relating to biology, climate, *mores,* political and social ideas, economic factors and economic or social requirements or necessities ... Certain persons also distinguish 'actual sources' and 'material sources'. The former constitute 'the underlying elements' which explains why a particular rule comes into being ... philosophic views ... the geographical structure ... and economic necessity. The agencies of the State which are required to bring the rule into being constitute the 'material' sources: for example the legislature ... and the executive', (*Vide* Cl. Renard, *'Sources du Droit et Méthodologie Juridique'*, Les Presses Universitaires de Liège, p. 40).

In the following sections I shall devote a brief review to those principles and rules of international law; the concept, investigation and discovery through the case-law of the Court of Justice and often by the Court's application of those 'rules' and principles.

Section 2 The 'general principles' or 'principles' of Community law

Subsection 1 — General factors

'Principles . . .' also constitute elements of national positive law. Obviously I do not intend to try to reproduce here, even summarily, the definitions which have been put forward and the opinions which have been formulated with regard to those 'principles . . .' in the works of eminent writers in a number of States or in noteworthy judgments of the courts.

Let me limit myself to the following observations. Unwritten rules constitute principles which form the moral and institutional framework upon which society is based. Such rules bind the authorities empowered to issue secondary legislation, the administration, the courts . . . sometimes even the legislature when the rules have a constitutional status. They are often imposed by our civilization and are frequently reproduced in laws or regulations. As Gény wrote: [1] 'these general principles represent an ideal of reason and of justice which accords with the permanent basis of human nature and are presumed to form the basis of the law. It is held that they must always have been borne in mind by the legislature'. In fact the legislature frequently constructs written rules taking account consciously or otherwise of the existence of these principles and supposing that they will be applied in particular when the laws are interpreted.

Principles of law also arise as a result of the uniform arrangements which the laws have thus applied to certain problems or to problems having a similar nature.

General or other principles further give effect to common sense and logic and it is not always necessary expressly to include them in written laws. [2]

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[1] *'Méthodes d'Interprétation et Sources en Droit Privé Positif'*, Vol. I, p. 33 et seq.

[2] This is the case in particular with, the maxims *'nemo plus juris transmittere potest quam ipse habet'* or *'res inter alios acta nemini nec nocet nec prodest'*. This latter maxim is reproduced by written rules of law, in particular in civil codes.

I should also like to emphasize that rules which are simply to be inferred from the nature of things and in particular from institutions are often classified as 'principles'. The obligation on a court to provide a statement of reasons for its judgments — a principle established in numerous provisions — follows 'from the very nature of the courts'. [1] The same holds good even with regard to 'the general principle of law relating to the rights of the defence. They follow necessarily and logically from the nature of the court's task; the court cannot properly carry out its task if the parties do not provide it with true information. A similar conclusion may be reached with regard first to the rule or the principle of the continuity of public services which necessarily follows from the very nature of those services and of their task [2] and secondly with regard to the maxim *'patere legem quam ipse fecisti'*. When reference is made to an unwritten rule which does not constitute custom it is generally or very often classified as a 'general' principle. Undoubtedly it may often be said that a 'general' principle is a concept which is required by civilization whose law, custom or case-law have applied it on one or more occasions and which is thus still capable of being applied on further occasions. In this sense the principle is obviously 'general'. It has recently been written: 'The difference between a rule of law and a general principle must be considered in terms of its generality which is, as has been seen, one of the factors in a rule of law; but it is not sufficient to state that a principle has a more general scope than a rule. A rule of law is adopted with a view to a specific legal situation whilst a principle of law is general in that there is inherent in it a series of infinite applications in law. It may also be stated that a number of distinct series of solutions expressed in rules of law come under the general principle of law'. [3]

In my view, however, it is possible to maintain that there are a certain number, not to say a large number, of unwritten rules of law which constitute 'principles' but which do not have this characteristic of generality.

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[1] Opinion of Procureur Général Hayoit de Termicourt in connexion with the judgment of the Cour de Cassation of Belgium of 9 October 1959 (Bulletin et Pasicrisie 1960, I.170)

[2] D. Loschak, *'Le Rôle Politique du Juge Administratif Français'*, Paris 1972, p. 86. 'The court ... sometimes employs principles which cannot be tracted, even remotely, in any basic provision. The courts accordingly infer these principels *from the nature of things* either as the internal logic the institutions require or if they appear to be inherently necessary to society. *The principle of the continuity of the public service* may be included in this category'.

[3] W. J. Ganshof van der Meersch, *'Propos sur le Texte de la Loi et les Principes Généraux du Droit'*, speech delivered at the solemn session of the reopening of the Cour de Cassation of Belgium on 1 September 1970.

Why should it be asserted that the principle that punishment is restricted to the wrongdoer or of the principle that all parties tendering for a public works contract shall be placed on an equal footing [1] or of the principle of *a persona ad personam non fit interruptio* [2] or again that the principle of the 'continuity of public services' are necessarily general?

The same question could be posed with regard to several 'principles' which have been relied on before the Court of Justice or which judgments of the Court of Justice and opinions of Advocates-General have applied and to which I shall refer in Subsection 2 of Section 2 of Chapter III.

The word 'principle' is certainly in current usage but it may be wondered whether in certain cases it is adequate. Is it necessary to classify as a 'principle'. a rule which follows logically and necessarily, let us say even as an imperative, from one or more provisions of laws or even from a general or other principle? For example, and I apologize for quoting Belgian law yet again, Article 9 of the Constitution provides that only a law of the legislature can establish what constitutes a crime and prescribe penalties. [3] From this provision follows the rule that the courts cannot provide an interpretation by analogy with laws which 'render persons criminally liable' as in this case the courts themselves would decide what act or omissions must result in a penalty. Must this rule, which necessarily follows from Article 9, of necessity be classified as a 'principle'?

Indeed a number of national courts have adopted the same attitude with regard to the problem of the 'lawfulness' of the annulment of adminstrative measures conferring individual rights. However have the courts really applied a principle in this sense? Have they not merely deduced the solution from the meaning which must be conferred upon a number of rules, written or otherwise? [4]

In his opinion in Cases 7/56 and 3 to 7/57 [5] Mr Advocate-General Lagrange considered: 'It is in fact *a principle* that when individual decisions are in accordance with the law they cannot be annulled . . .'.

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[1] *Vide* judgment of the Cour de Cassation of Belgium, 19 November 1970 (Bulletin et Pasicrisie 1971.I.242).

[2] Judgment of the Cour de Cassation of Belgium of 22 June 1972 (Bulletin et Pasicrisie 1972.I.985) the principle — *a persona ad personam non fit interruptio* — is deduced from Articles 2246 to 2250 of the Code Civil.

[3] Likewise Article 103 (2) Grundgesetz.

[4] *Vide infra* Chapter V, Section 4: The Harmonization or coordination of rules.

[5] Recueil 1957, p. 285.

'Principles' or 'general principles' which form part of Community law arise from the law of the Member States or even, perhaps, from international law as well. Further general or other principles arise from the provisions of the European Treaties themselves or of necessity constitute the basis of these provisions.

Sometimes rules which are expressly set out in the provisions of the Treaty are, owing to their importance or their fundamental nature, classified as a 'principle' or a 'general principle'. This clearly involves employing the concept of 'principle' or of 'general principle' in another sense.

Article 3 (b) of the ECSC Treaty provides that the institutions of the Community shall, within the limits of their respective powers, in the common interest ... ensure that all comparably placed consumers in the Common Market have equal access to the sources of production. From this provision can, and normally is deduced what the judgment of 21 June 1958 [1] terms 'the principle that consumers shall be placed upon an equal footing with regard to economic rules'. However it appears that in this instance the word 'principle' is understood in the sense of a 'fundamental' rule.

In the same judgment the Court of Justice stated that Articles 2 to 5 of the ECSC Treaty must always be complied with because they establish the fundamental objectives of the Community ... and that they must always be read together in order to apply them adequately; the Court then stated that: 'it will be necessary to reconcile to a certain extent the different objectives of Article 3 as it is manifestly impossible to attain each and every one completely since the objectives constitute *general principles* towards the attainment of which every possible endeavour must be directed'. This no doubt constitutes the same meaning of 'general principle' as that stated above.

In a remarkable study Judge Pescatore has set out and brilliantly commented upon the 'propositions' or 'principles' of equality or non-discrimination, liberty, solidarity and the (economic and legal) unity of Community law. A number of these 'principles' are expressly set out in the provisions of the Treaties whilst others arise from or simply constitute the foundation of the Treaties [2].

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[1] Case 8/57, Recueil 1958, p. 223.

[2] *'Les Objectifs de la Communauté Européenne comme Principes d'Interprétation dans la Jurisprudence de la Cour de Justice'* in Miscellanea, W. J. Ganshof van der Meersch, Volume 2, p. 325 et seq.

With regard to the non-contractual liability of the Communities, the second paragraph of Article 215 of the EEC Treaty (like the second paragraph of Article 188 of the EAEC Treaty) invokes the concept of 'the general principles common to the laws of the Member States'. So far as I am aware at least this concept has not been clarified in the case-law of the Court of Justice. Nevertheless Mr Advocate-General Gand, in his opinion in Case 9/69 [1] tried to clarify its substance.

As we shall see later this does not make it impossible to consider several 'principles' arising from the laws of the Member States in particular as forming part of Community law.

A principle of law, even one relating to fundamental rights, and forming part of one or more national laws must be discarded if it conflicts with the written or unwritten rules of Community law [2]. 'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. . . . therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional structure' [3].

A principle of law arising from national laws may however affect the validity of a Community measure if this principle may be considered as also forming part of Community law.

The Court also rightly held that a rule of *international law,* in particular an unwritten rule of international law, must be ignored if it conflicts with written or unwritten provisions of Community Law [4].

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[1] *Sayag* [1969] ECR 339.

[2] Case 11/70, Internationale Handelsgesellschaft [1970] ECR 1125.

[3] Cf. judgment of 15 July 1960 in Cases 36, 37, 38 and 40/59, Recueil 1960, p. 589.

[4] Joined Cases 90 and 91/63 [1964] ECR 625.
Two Member States objected before the Court that an application was inadmissible, relying upon the rule of international law to the effect that the party injured by another party's failure to execute his obligations is relieved from carrying out his own. The Court replied: this rule cannot be recognized under Community law. 'The Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order ... therefore, except where otherwise expressly provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands'.

Whilst a court must often take into consideration a number of written rules of law in order to be able to settle the case before it, it must also on many occasions have regard at the same time to written or unwritten rules or to a number of unwritten rules or 'principles'. The court must then coordinate and harmonize and in particular clarify the scope both of the written rules and of the umwritten rules. Thus in the matter settled by the judgment of 13 December 1967 [1] the Court of Justice had to take into consideration on the one hand the rule of written law that the authors of a Community regulation fix the date of its entry into force and on the other hand the 'principle' relating to legal certainty [2].

Subsection 2 The 'general principles' of law and European law — judgments of the Court of Justice and opinions of the Advocates-General

A. General considerations

Such principles form part of European law and constitute formal sources of the law of the European Communities.

In its judgment of 21 January 1965 [3] the Court declared: 'The fact that a rule invoked by a party does not form part of written law is not sufficient proof that it does not exist. Such a submission cannot therefore be dismissed from the outset as inadmissible'.

In his opinion in Case 11/70 ([1970] ECR 1125) Mr Advocate-General Dutheillet de Lamothe said that the fundamental principles of national legal systems 'contribute to forming that philosophical, political and legal substratum common to the Member States from which through the caselaw an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual. In that sense, the fundamental principles of the national legal systems contribute to enabling Community law to find in itself the resources necessary

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[1] [1967] ECR 441.

[2] The Court held: 'an institution cannot, without having an adverse effect on a legitimate regard for legal certainty, resort without reason to the procedure of an immediate entry into force. Although the preamble to the regulation is silent in this respect the Court nevertheless finds in the provisions which it enacts serious reasons for holding that any interval between the publication and the entry into force of the regulation might in this case have been prejudicial to the Community. Such a delay would in fact have run the risk of causing a hasty and concentrated flow of transactions which would have interfered with the very implementation of Article 6 . . .'.

[3] Case 108/63, *Merlini* [1965] ECR 1.

for ensuring, where needed, respect for the fundamental rights which form the common heritage of the Member States'.

Mr Advocate-General Mayras, in his opinion in Joined Cases 21 to 24/72 *(International Fruit Company),* recalled that the Court which, under Article 164 of the EEC Treaty, must ensure that in the interpretation and application of the Treaty the law is observed, 'could not limit itself merely to checking that the measures adopted by the institutions strictly conform with the provisions of the Treaty as duly interpreted by the Court . . . The Court also applies the general principles common to the laws of the Member States, which are also general principles of public international law which . . .'.

B. *Certain 'principles . . .' invoked before the Court of Justice and which the Court of Justice may apply*

Fundamental human rights

The Verwaltungsgericht Stuttgart asked the Court of Justice, under Article 177 of the EEC Treaty, whether a decision of the Commission was compatible with 'the general principles of Community law in force' and, in its judgment of 12 November 1969 [1], the Court of Justice held: 'Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court'.

In its judgment of 14 May 1974 [2] in the *Nold* case the Court held that:

(a) fundamental rights form an integral part of the general principles of law, the observance of which it [the Court] ensures;

(b) 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.

(c) with particular regard to the right of ownership and the freedom to engage in a trade or profession those rights do not constitute unfettered prerogatives and must be viewed in the light of the social function of property and activities protected thereunder.

(d) within the Community legal order it is likewise legitimate that these rights should be subject to certain limits justified by the overall objectives

[1] Case 29/69, Stauder [1969] ECR 419.
[2] Case 4/73, *Nold* [1974] ECR 491.

pursued by the Community, on condition that the substance of these rights is left untouched.

The decisions of the Court of Justice to the effect that the general principles relating to fundamental human rights constitute principles of Community law have received general approval. Nevertheless certain lawyers consider that the Court of Justice has in so doing taken liberties with the law which it is responsible for applying. Such a view is natural amongst persons who have regard principally if not exclusively to the written rules of law.

In my view, such fundamental rights, by their character and quite naturally, constitute principles common to the Member States and of which the Court of Justice must take account. Let us recall that a 'general' principle is often an unwritten rule which legislators, and this includes those who draw up international conventions, have naturally adopted as their basis and they are deemed to have done so or to have referred to it. It appears to me clear that when the authors of the European Treaties drew up and signed the Treaties which were subsequently submitted for ratification by their States they necessarily assumed that they were not creating exceptions to the fundamental principles of their constitutions and, in particular, to those relating to individual rights [1]. Accordingly those principles, quite naturally and of necessity, constitute 'general' or other principles of Community law.

Is it necessary to emphasize that the decisions taken by the Court of Justice with regard to fundamental human rights reduce the likelihood of claims that the provisions of the European Treaties and of the regulations and directives implementing them, on the one hand, are not compatible with the provisions of the national constitutions on the other?

The provisions of the Treaties, regulations and directives can or should be interpreted on the basis of those fundamental rights and the validity of the regulations, directives or decisions is appraised on the basis of those principles of 'European law'. Nevertheless it is self-evident that the Court of Justice must display prudence and caution in defining the limits of the concept of fundamental rights in Community law [2].

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[1] *Vide* in particular judgment No 183 of 18 December 1973 of the Italian Corte Costituzionale.

[2] *Vide* Professor Colliard (in his report to the *VII Congrès of the* FIDE *la protection des droits fondamentaux par le pouvoir judiciaire,* Brussels 1975), doubts whether the Nold judgment is compatible with Article 222 of the EEC Treaty. He emphasizes that there is little likelihood of a conflict between the provisions of the Treaty or of secondary law and human rights properly so-called (p. 26 and 27). The same cannot be said with regard to property rights or freedom to trade which indeed may conflict with Community law.

We wish to recall that, in his report on European union, Mr Prime Minister Tindemans suggests that individuals should be allowed to appeal direct to the Court of Justice against a measure, adopted by one of the institutions of the union, which infringes their fundamental rights.

2. The objection of illegality

As we know, the Treaties of Rome expressly provide that, notwithstanding the expiry of the period prescribed for applications for annulment, any party may, in a dispute in which a regulation of the Council or of the Commission is called in question, avail himself of the procedures laid down . . . to invoke the *inapplicability* of such regulation before the Court of Justice.

A provision of this nature is not included in the Treaty of Paris (the ECSC Treaty) but provision is made for the objection of illegality with regard to the particular case referred to by the third paragraph of Article 36 thereof.

In its judgments of 13 June 1958 [1] the Court of Justice considered that the said third paragraph of Article 36 merely constitutes 'the application of a more general principle which Article 36 provides shall apply to the specific case of an appeal in which the Court has unlimited jurisdiction' [2].

3. The principle of employing appropriate means to achieve the end in view

Another European court, the European Court of Human Rights, also applies this principle [3].

In considering the scope of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights considered in particular in its judgment of the Belgian Language case that 'a difference of treatment in the exercise of a right enshrined in the Convention must not only pursue a legitimate aim: if the means employed are not reasonably appropriate to the aim pursued this also constitutes a clear infringement of Article 14'.

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[1] Cases 9/56 and 10/56, Recueil 1958, p. 13 and p. 115.

[2] In his opinion in Joined Cases 20 to 32/71 Mr Advocate-General Roemer emphasized that the decision must also apply in the case of the law relating to the Staff Regulations of the Communities.

[3] *Vide*, in particular, the language case of 23 July 1968 (Publications de la Cour, Série A, No 6, p. 33 to 35, paragraphs 9 and 10), also the case regarding the National Trade Union of the Belgian Police: judgment of 27 October 1975 (Med. Série A, No 19, p. 19 to 20, paragraphs 44 to 47) and the judgment of 19 January 1975 in the proceedings relating to the SwedishTrade Union of Engine Drivers . . .

This principle is acknowledged above all in German law [1]. In its judgment of 29 May 1974 the Bundesverfassungsgericht (the Federal German Constitutional Court) held that 'this interpretation corresponds to the prevailing view in German law (and contained in the constitutional principle that the means employed must be appropriate to the end in view) that the obligee may be relieved of the obligation in the abovementioned cases if 'the burden exceeds the importance of the obligation', *a fortiori* since the Court of Justice of the European Communities adds that 'the diligence which the exporter had to display' and 'the extent of the sacrifices which he had to accept' are flexible concepts . . . [2].

With regard to the principle that the means should be appropriate to achieve the end in view in conjunction with the principle of legal certainty in European law, reference should be made to the opinion of Mr Advocate-General Mayras before the judgment of 4 July 1973 in Case 59/72 [3].

4. The application as to time of rules of law

The judgment of 5 December 1973 [4] states that under 'a generally recognized principle, the laws amending a legislative provision apply, unless otherwise provided, to future consequences of situations which arose under the former law' [5].

5. The 'non bis in idem' principle

With regard to this principle, and in particular to the imposition of a fine by a court of a Member State in addition to a fine payable to the Community under Article 85 of the EEC Treaty, reference should be made to the substantial exposition devoted to comparative law by Mr Advocate-General Mayras before the judgment of 14 December 1972 in Case 7/72 [6].

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[1] It is not unknown in French law. See, for example, Conseil d'Etat Français of 28 May 1971, Gazette du Palais of 22 February 1972.

[2] Cf. the French version of this important judgment of the Bundesverfassungsgericht in Cahiers de Droit Européen 1975, p. 149 et seq., especially p. 161.

[3] The judgment of the Court of Justice of 17 December 1970 in Case 11/70 ([1970] ECR 1125) is also quoted on occasions as showing that this principle has been applied. In a substantial note appearing in the Sociaal Economische Wetgeving of February 1975, Judge Mertens de Wilmars states that the Court of Justice applied the principle in the judgment of 13 March 1968 in Case 5/67 and in Case 11/70 cited above. Cf. also the judgment of 12 November 1969 in Case 29/69 *Stauder* [1969] ECR 419.

[4] Case 143/73, *Sopad* [1973] ECR 1433.

[5] See also the judgment of 14 April 1970 in Case 68/69 [1970] ECR 171.

[6] [1972] ECR 1281. Vide also the judgment of 13 February 1969, *Walt Wilhelm,* Case 14/68 [1969] ECR 1.

6. Respect for established rights

In its judgment of 15 July 1960 [1] the Court of Justice held that 'Community law, as it flows from the ECSC Treaty, contains no principle of written law or general unwritten principle that acquired rights must be protected'. Mr Advocate-General Lagrange had put forward a slightly different view (Recueil 1960 p. 940).

7. The 'audi alteram partem' principle

In his opinion in Case 17/74 *(Transocean Marine Paint Association* v *Commission)* Mr Advocate-General Warner, after an extremely searching study of comparative law, came to the conclusion that this is a principle of Community law within the meaning of Article 164 [2].

8. The principles of legal certainty and that persons are on an equal footing with regard to public charges (see also 9)

In its judgments of 13 July 1961 in Cases 14, 16, 17, 20, 26, 27/60 and 1/61 [3] the Court had to decide whether the High Authority was guilty of a wrongful act or omission. The Court held: 'The undertakings subject to the financial arrangements are in competition in so far as the High Authority is bound to ensure with particular care that the principle that all persons shall be on an equal footing with regard to official charges is always most scrupulously observed; in those circumstances the complaint cannot be made that the High Authority accorded precedence, albeit at the cost of numerous amendments, to the principle that justice shall be done in individual cases rather than to the principle of legal security'.

It is possible that two principles, the principle that justice shall be done in individual cases and that of legal security, contradict each other. In reality, it seems that, in this case, the principle that justice shall be done in individual cases was confused with the principle that persons shall be placed upon an equal footing with regard to official charges.

It is no doubt true that the Court of Justice once again had regard for the principle of legal certainty when it considered whether the Community was out of time when it recoverd a sum wrongfully paid to an official (judgment of 18 March 1975) [4].

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[1] Cases 36, 37, 38 and 40/59 [1960] Recueil 1960 p. 885.
[2] *Vide* also the judgments of 14 July 1972 (Case 48/69 [1972] ECR 619).
[3] Meroni [1961] Recueil 1961, p. 345.
[4] Joined Cases 44, 46 and 49/74, *Acton and Others* [1975] ECR 383.

In its judgment of 14 May 1975 [1] the Court considered (a) whether the behaviour of the Commission violated the principle of legal certainty because one of its decisions had retroactive effect, or (b) whether the Commission had ignored the legitimate expectations of persons concerned (that the compensatory amounts prescribed by a regulation of the Commission would be maintained for current transactions) [2].

9. The principle that persons are on an equal footing with regard to public charges.

The Court of Justice appears to have applied this principle in its judgments of 13 July 1961 cited above at (8).

10. The principle of the protection of legitimate confidence

This principle is closely bound up with the principle of legal certainty, as is, moreover, clear from the judgment of 4 July 1973 in Case 1/73 [2] and also from the cited judgment of 14 May 1975 in Case 74/74.

In its celebrated judgment of 5 June 1973 [3] to which I shall return in considering the Court's task of harmonization and of coordination, the Court based its judgment on the principle of legitimate confidence. It held: 'Taking account of the particular employer-staff relationship which forms the background to the implementation of Article 65 of the Staff Regulations, and the aspects of consultation which its application involved, the rule of protection of the confidence that the staff could have that the authorities would respect undertakings of this nature, implies that the Decision of 21 March 1972 binds the Council in its future action. Whilst this rule is primarily applicable to individual decisions, the possibility cannot by any means be excluded that it should relate, when appropriate, to the exercise of more general powers'.

The judgment of 4 February 1975 [4] also appears to be based on this principle although this is not expressly stated. It is based on legitimate confidence,

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[1] Case 74/74, *CNTA* [1975] ECR 533.

[2] In its judgment of 4 July 1973 in Case 1/73 the Court also appraised the validity of a measure of Community institutions in relation both to the principle of legal certainty and that of the protection of legitimate confidence. (Cf. Alexandre Oser, '*Réglementation communautaire de la concurrence et sécurité juridique*', Revue du Marché Commun No 192, January, p. 28 et seq.

[3] Case 81/72 [1973] ECR 575.

[4] Case 169/73 [1975] ECR 117.

'legal certainty' or even the principle known in Netherlands law as 'behoorlijk bestuur' (proper administration) [1].

According to this judgment when, in a resolution passed to inform and guide commercial operators on the subject of the contents of a future regulation, the Council omits to make reservations on the possible application of a provision of the Treaties, knowledge of which is important for action by those concerned, it distorts the task of informing which it has assumed and makes or may make itself liable. In his opinion Mr Advocate-General Trabucchi expressly invoked this principle of legitimate confidence and, in particular, stated: 'It is a principle recognized in the Community legal system that assurances relied upon in good faith should be honoured'. Further, the Court of Justice has recently had occasion to take a decision on this point in its judgment delivered on 4 July 1973 in Case 1/73 [2] [3].

In its judgment of 14 May 1975 in Case 74/74 the Court of Justice considered whether by its behaviour the Commission had *inter alia* ignored the legitimate expectation of persons concerned that the compensatory amounts prescribed by a regulation of the Commission would be maintained for current transactions.

In his opinion in Case 81/72 [4] (judgment of 5 June 1973) Mr Advocate-General Warner stated: 'It is true that in the law of certain Member States ... a promise given by a public authority as to the manner in which it will exercise a discretionary power vested in it can to some extent and in certain circumstances have a binding effect. But I apprehend that the application of that doctrine is confined to promises given in individual cases and that it cannot be invoked to fetter a legislative power'.

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[1] The concept in Dutch law of 'in het algemeen rechtsbewustzijn levend beginsel van behoorlijk bestuur' (the proper principle of administration as it emerges from the general conception of justice) has been very well summarized by President Wiarda, Tijdschrift voor Bestuurwetenschappen en publiek recht 1970, Jubileum Nummer, p. 369. He explains that this concept covers natural justice, ('Zorgvuldigheid' or provision of a adequate statement of reasons), good faith, equality, proportion (evenwichtigheid) and legal certainty.

[2] Case 1/73 [1973] ECR 723.

[3] With regard to liability arising from incorrect information, cf. the judgment of 13 July 1972 in Case 79/71 ([1972] ECR 579) and the judgments of 28 May and 9 July 1970 ([1970] ECR 325 and 347); cf. also Conseil d'Etat of France of 20 March 1974, Recueil des Décisions du Conseil d'Etat 1974, p. 197 and of the Cour de Cassation of Belgium of 4 January 1973 (Bulletin et Pasicrisie 1973 I.434). Other judgments of supreme courts of the Member States could be cited.

[4] [1973] ECR 575.

In its judgment of 17 March 1976 in Joined Cases 67 to 85/75 the Court of Justice further conferred upon this principle the status of a rule of Community law [1].

11. The principle that ignorance of the law is no excuse.

In his opinion in Case 163/73 [2] (judgment of 4 February 1975) Mr Advocate-General Trabucchi said *inter alia:* 'A decision contrary to the applicant's contention, therefore, is not simply a matter of invoking the basic rule that ignorance of the law is no excuse . . .'.

12. The principle of the continuity of the legal system

A dispute arose between the Netherlands tax administration and an official of the ECSC at a time when Article 16 of the Protocol on the Privileges and Immunities of the ECSC was still in force, which provision conferred upon the Court of Justice a special jurisdiction with regard to interpretation. At the time when the Netherlands court brought the matter before the Court of Justice and the latter had to give a ruling this protocol had been repealed.

In its judgment of 25 February 1969 [3] the Court held: 'The procedure provided for by Article 16 . . . and the provisions on preliminary rulings for interpretation of the Treaties establishing the EEC and the EAEC have an identical objective, namely, to ensure a uniform interpretation and application of the provisions of the Protocol in the six Member States. In accordance with a principle common to the legal systems of the Member States, the origins of which may be traced back to Roman law, when legislation is amended, unless the legislature expresses a contrary intention, continuity of the legal system must be ensured'.

13. The principle that consumers shall be placed upon an equal footing with regard to economic arrangements [4]

In its judgments of 21 June 1958 [5] the Court of Justice both acknowledged the existence of this principle and explained what is to be understood by an

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[1] This judgment runs thus: 'They [the applicants] have alleged further that, having regard to the system of subsidies as laid down by that regulation, the sudden abolition of the monetary compensatory amounts constitutes ... an infringement of the principle of the protection of legitimate expectation. Since the introduction of those amounts was motivated, in accordance with Community rules, by concern to prevent disturbances in trade and not by concern to ensure for producers unchanged remuneration, this complaint cannot be sustained'.

[2] [1975] ECR 117.

[3] [1969] ECR 43.

[4] Cf. Subsection 1: the considerations relating to this principle may be deduced from Article 3 (b) of the ECSC Treaty.

[5] Case 8/57, Recueil 1958, p. 225.

'equal footing'. It held that 'By virtue of a principle generally acknowledged in the law of the Member States the equal footing of the persons concerned with regard to economic arrangements does not prevent the establishment of prices which vary according to the particular circumstances of consumers or of categories of consumers provided that differentiation in treatment corresponds to a difference in the circumstances of the consumers. In the absence of an objectively established basis, differentiations in treatment are of an arbitrary and discriminatory nature and are illegal. It cannot be complained that the economic system is unfair on the pretext that it entails different consequences or unequal sacrifices for the persons concerned when this situation proves to be the result of the different conditions in which undertakings conduct their business.'

Another principle of equality: the *equal treatment of officials.*

In its judgment of 21 November 1974 [1] the Court held that 'thus interpreted Article 1 (4) of the implementing provision, affecting all persons falling within its area of application on the basis of objective and justified criteria, is not incompatible with the general principle of equal treatment of officials or with other general principles of law'.

14. The principle of the unity of Community law

It is clear from the very nature of the European Communities and especially from the provisions of Articles 177 of the EEC Treaty and 150 of the EAEC Treaty, which made provision for special arrangements to ensure the unified interpretation of Community law, that the latter must receive a uniform application and interpretation [2].

It is futile to create common rules and a common legal system if such rules and system can be interpreted and applied differently.

Considering this 'unity' with skill and acumen, Mr Pescatore in his study, quoted above, states: 'First of all a series of judgments which perceive the problem at what continues to be a technical level: this is the problem of the uniform interpretation of legal concepts which, whilst they must be inserted in the law applicable within the Member States, none the less retain a Community significance . . .'. He continues: 'Although the judgments previously cited still remain to some extent at the level of legal technique, they none the less constitute a series of decisions whose importance is all

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[1] [1974] ECR 1287.

[2] *Vide* R. Lecourt, 'Le Juge devant le marché commun', Geneva 1970, p. 42 et seq.

the more fundamental since they concern the relationship between Community law and national law'. He refers in particular to the following section of the *Costa* v *Enel* judgment: recourse to rules or concepts of national law in order to appraise the validity of measures adopted by the institutions of the Community would jeopardize the unity and effectiveness of Community law. The validity of such measures can be appraised only in terms of Community law . . . [1].

Certain legal situations may be classified in accordance with a national legal system and accordingly the question of the application of the rules of such a system arises. In its judgment of 14 June 1967 [2] the Court of Justice gave a ruling on the common financial arrangements relating to the equalization of ferrous scrap. An undertaking was rendered liable to pay 'a scrap equalization charge'. It had pointed out that, 'it has itself produced the ferrous scrap in question at its own premises and . . . according to *Netherlands law,* the ferrous scrap belonged to it from the moment when it was produced and that it gave no consideration for this scrap under the contractual relationships referred to by the High Authority'.

The Court held: 'It is impossible strictly to relate this concept to the concepts of national law governing the relationships in civil law between undertakings consuming ferrous scrap. Any differences existing between the national laws of the Member States might in fact make impossible the uniform application of Community provisions throughout the Common Market as a whole. In order to avoid such a danger, the application of the equalization scheme, to which common legal concepts apply . . . is essentially based on the acquisition of ferrous scrap for a consideration' [3].

On 1 February 1972 [4] the Court delivered a ruling concerning regulations empowering the national authorities to adopt measures laying down conditions or procedures for their 'implementation'. The Court held that 'although intervention agencies are empowered under . . . to adopt additional

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[1] P. Pescatore, *Op. cit.*, p. 354 et seq.

[2] Case 26/66 [1967] ECR 115.

[3] Comparable problems exist in the national laws. It is generally maintained that civil law is the basis of national positive law . . . In fact both criminal law or tax law or social law . . . are based on concepts which are qualified and whose legal consequences are established by civil law: for example sale, ownership etc. . . . This does not prevent a specialized field of law, such as criminal law, or social or tax law . . . from derogating from those concepts of what we may term general law. It is obviously necessary that this should follow clearly from the letter and/or the spirit of the 'specialized' legislation. In this respect reference is made, rightly or wrongly, to the 'autonomy' of criminal, social or tax law.

[4] Case 49/71 [1972] ECR 23.

procedures and conditions for taking over, they cannot however derogate from the Community concept of an offer as contained in particular in Regulations . . .'.

In its judgment of 15 December 1971 [1] the Court held: 'The concept "day of importation", which is conclusive for the purposes of the application of the levy scheme, must have the same meaning in all the Member States since otherwise there is a danger that different rates of levy would be applied to goods which are in the same situtation economically at the same date and the introduction of which into the territory of the Member States has comparable effects on the market in agricultural products. This meaning is to be inferred from the purpose of the levy system . . . [2]'

It may be wondered whether 'the unity of Community law' is really a general or other principle in the sense that it constitutes a rule, or a rule of law.

Certainly it may be said that, by reason of its importance, this concept 'of unity' has the force of a 'principle': but then the meaning is different (*Vide supra* Chapter III, Section 2, Subsection 1).

In reality, the unity of Community law, as it has been expounded in the cases above-mentioned, is no more than an essential concept which springs from the very nature and spirit of the European Communities.

15. 'Community preference'

In its judgment of 13 March 1968 [3] the Court emphasized that 'in balancing these interests, the Council must take into account, where necessary, in favour of farmers the *principle* known as "Community preference", which is one of the principles of the Treaty and which in agricultural matters is laid down in Article 44 (2)'.

It will be recalled that this article provides *inter alia:* 'Minimum prices . . . shall not be applied so as to form an obstacle to the development of a natural preference between Member States'.

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[1] Case 35/71 [1971] ECR 1083.

[2] This judgment relates to Article 15 (1) of the regulation of the Council on the common organization of the market in cereals providing that the levy to be charged, in particular, that on barley coming from third countries, shall be that applicable on the day of importation.

[3] Case 5/67 [1968] ECR 83.

In the above-mentioned study Judge Pescatore properly invokes this concept of 'Community preference' in relation to the judgment of 4 July 1963 *(Federal Republic of Germany* v *Commission)* [1]. He emphasizes that, in this judgment, the Court stated that the need to intensify economic relations within the Community takes precedence over the interest which Member States may have in maintaining their economic links with third States.

Once again one must wonder whether this 'preference' really constitutes a 'principle' constituting a rule or a rule of law or whether, in accordance indeed with Mr Pescatore's definition, it is a 'concept' which furthermore follows naturally from the letter, the spirit and the nature of the Treaties but always within the limits of the latter [2].

16. Community 'public policy'

In a case pending before the Court of Justice the applicant requested as an interim measure that judgment should be suspended until a decision was given by the Italian Constitutional Court as to whether various provisions of the Treaty establishing the European Coal and Steel Community were compatible with the constitution. In its Order of 22 June 1965 [3] the Court held that 'such a claim is ... inadmissible in that ... any decision to suspend judgment would be tantamount to reducing the Community to a cipher ... therefore, there must be dismissed as contrary to *Community policy* any application the purpose of which is to establish discrimination of this nature which no law of ratification could introduce into a treaty prohibiting such discrimination'.

In the national legal systems the concept of 'public policy' is, theoretically at least, a functional concept. The effect of public policy is to refuse to take certain conventions into consideration or to have them declared null. The concept makes it possible or mandatory to dispense with a foreign law, which would normally have had to be applied. It extends the powers of the courts ...

In the above-mentioned order of the Court of Justice 'Community policy' was employed to dismiss as unfounded an objection submitted by a litigant.

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[1] Op. cit., p. 348.

[2] With regard to this concept and its limits see: judgment of 27 October 1971 in Case 6/71, *Rheinmühlen* [1971] ECR 838; Rapport Spaak, p. 14 to 15 and J. Mertens de Wilmars in *Miscellanea Ganshof van der Meersch, op. cit.*, p. 302 to 304.

[3] [1967] ECR 27 et seq.

The Court thus explained that it was prohibited from acceding to the application for suspension submitted by one of the parties because this would be liable to violate the basic 'principles' on which the Communities are founded.

Does this constitute a 'principle' or a rule? It appears possible to take into consideration the same views which have been set out above, in particular with regard to 'the unity of Community law'.

17. Other additional principles

In its judgment of 18 March 1975 [1] the Court ruled that, according to a principle recognized in the labour law of the Member States, wages and other benefits pertaining to days on strike were not due to persons who have taken part in that strike and that this principle is applicable to relations between the institutions of the Communities and their officials, as the Commission has already found on several occasions and, in particular, in its decision of 16 December 1970.

Section 3 Rules of international law and Community law Judgments of the Court of Justice and opinions of the Advocates-General

'The Court of Justice is empowered to make a finding with the force of law whether an agreement binding the Community or the Member States as a whole is or is not directly applicable within the territory of the Community and, if so, whether a measure of a Community institution is *compatible with this external agreement*. The term "validity" within the meaning of Article 177 ... extends not only to the validity of acts of the institutions of the Communities, considered in the light of the Treaty or of secondary Community law, but also to the validity of such acts considered in the light of an international law other than Community law, on condition both that the provision of international law which has been invoked is binding upon the Community and that it is directly applicable within the Community legal system' [2].

On 12 December 1972 the Court of Justice delivered a ruling to the same effect [3] [4].

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[1] Joined Cases 44, 46 and 49/71, Acton [1975] ECR 383.

[2] Opinion of Mr Advocate-General Mayras in Joined Cases 21 and 24/72 *International Fruit Co.* [1972] ECR 1219.

[3] Idem.

[4] Cf. the judgment of the Corte di Cassazione of Italy of 8 June 1972 No 1773 which considers the self-executing nature of the provisions of GATT. Cf. also the commentary on this judgment in the Journal du droit international, Janvier-mars 1976, p. 153 et seq.

In its judgment of 28 October 1975 in Case 36/75 the Court of Justice held as follows: 'Taken as a whole, these limitations placed on the powers of the Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed ... ratified by all the Member States, and in Article 2 of Protocol No 4 to the same Convention ... which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on rights secured by the above-quoted articles other than such as are necessary for the protection of those interests "in a democratic society" '.

In its judgment of 4 December 1974 [1] the Court of Justice stated that 'it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence [2].

It appears certain that the international conventions concluded by the Communities themselves form part of the law of the Member States and of Community law [3].

Section 4 Special sources with regard to customs matters — the Common External Tariff

Agreements concluded within the framework of GATT, conventions on nomenclature, explanatory notes and classification opinions...

The Protocols to the General Agreement on Tariffs and Trade, in particular, the Protocol recording the outcome of the Tariff Conference of 1960 to 1961, are sometimes incorporated or referred to in Community regulations.

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[1] Case 41/74, *van Duyn* [1974] ECR 1337.

[2] It is stated in the Juris-Classeur, under V *'L'Organisation judiciaire internationale'*, Section 230 No. 81 et seq., *'Les sources du droit des juridictions administratives internationales'*, that 'international administrative courts do not as a rule apply international law'. The author of this study quotes an example which does not appear to me convincing when he writes: 'This was the case, for example, with regard to the Administrative Tribunal of the International Labour Organization: although the tribunal was requested by the applicant to do so, it did not consider whether a decision of the Director General regarding the nationality of an official was consistent with the concept of effective nationality developed by the International Court of Justice'. A concept developed by the International Court of Justice does not necessarily constitute a binding rule of international law.

[3] Cf. R. Kovar, *'Les Accords liant les Communautés européennes et l'ordre juridique communautaire'*, Revue du Marché Commun 1974, p. 345 et seq.

Accordingly, in interpreting Community regulations, it is necessary to interpret the provisions of GATT. This was so in the judgment of 15 October 1969 [1]. Rules of Community law are thus to be found in those protocols.

In its judgment of 26 April 1972 [2] the Court declared: 'Since agreements regarding the Common Customs Tariff were reached between the Community and its partners in GATT the principles underlying those agreements may be of assistance in interpreting the rules of classification applicable to it. Consequently account should be taken of the content of agreements concluded in the course of the Tariff Conference of 1960 to 1961 . . .'

'It is accepted that the Common Customs Tariff annexed to Regulation (EEC) No 950/68 is based on the *Brussels Nomenclature,* which was established by the Convention on Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 to which the Member States were parties . . . [Articles III and IV of the Convention] provide that a Nomenclature Committee under the authority of the Customs Cooperation Council is to issue explanatory notes and classification opinions. These explanatory notes and opinions are a means of interpretation for the original and present meaning and scope of the individual tariff headings. In the absence of relevant provisions issued by the Community, therefore, their authority [of these notes and opinions] as regards the interpretation of the Nomenclature cannot be ignored by the institutions called upon to apply the Community provisions incorporating the Brussels Nomenclature . . . the observance of these explanatory notes and opinions is a *useful* means of ensuring that the common external tariff is uniformly interpreted and applied at all frontiers of the Common Market . . . (judgment of the Court of 8 December 1970 in Case 14/70 ([1970] ECR 1001)' [1].

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[1] Case 14/69 [1969] ECR 349.

[2] Case 92/71 [1972] ECR 231: [1973] CMLR 562.

[3] The explanatory notes and the classification opinions for which provision is made by the Convention on Nomenclature for the Classification of Goods in Customs Tariffs have the status of 'an *authoritative* source for the purposes of the interpretation of the headings in the Common Customs Tariff'. Cf. also the judgments of 14 July 1971 in Cases 13 and 14/71 [1971] ECR 767 and 779.

CHAPTER IV

Methods of interpretation

Section 1 General considerations

Numerous 'methods of interpretation' are cited in treatises on law, law books and university teaching.

The descriptions conferred upon such methods do not always coincide; indeed they vary infinitely.

Although a particular method may be described by different authors in the same manner they may regard its subject-matter or characteristics as widely different, thereby giving rise to confusion.

As an introduction I shall merely cite certain methods:

(1) The exegetical method

This method adopts as its principal basis the meaning of words and phrases and attributes fundamental importance to the context and punctuation . . . Certainly it is impossible to ignore the importance of the text, the words employed and the context in determining the meaning and scope of a written rule. Certain exegetical schools have ruled out any reference to other formal sources of law on the postulate that laws, and above all codes, are complete and indeed perfect. According to the views attributed to certain exegetical schools or their followers recourse might not be had to preparatory works in order to clarify the meaning and scope of a rule or concept. There is often much exaggeration and partiality in assessing this method, and indeed in assessing the entire exegetical school [1].

[1] A number, and indeed a large number, of writers who are classified under the exegetical school resort to preparatory works, the history of law, reasoning, common sense and the aims and objectives of legal provisions . . .

Certain writers draw fine and more objective distinctions in their review of the methods of this school, differentiating between the grammatical and psychological variants of the method.

It is clear that — like the Belgian courts — the British courts also attach great importance to the wording of laws. But they too are cautious [1] — they apply successively the literal interpretation, the golden rule and the mischief rule [2].

(2) The logical or rational method

It is usually held that this method is characterized by its reference to analogy, to *eiusdem generis,* corollary and *'de eo quod plerumque fit'* reasoning . . .

It is clear that the scope of the rational method as a means of inquiry and action is very much wider. I shall return to this point in a special section of this review. (*Vide* Chapter V, Section 3).

(3) The method or methods of investigating the spirit, the aim and the objectives of the 'law' and at the same time the circumstances of its genesis

It is also possible, at least to a certain extent, to describe this as a functional method.

It is clear that one must consider resorting to preparatory works in order to discern such aims, spirit and objectives.

In another part of this review I shall endeavour to consider in greater depth this recourse to preparatory works, and also the very concept of these 'works'. (Vide Section 3 of this chapter).

Let me point out that recourse to preparatory works is often described as the historical method. In fact, in may view it constitutes rather a means of

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[1] Walter Van Gerven, *'Beginselen van Belgisch Privaat Recht'*, Algemeen deel, p. 53.

[2] Professor Carbonnier is correct when he writes: 'the written law must not resemble a scroll which is deciphered by an oriental scholar; a literal and grammatical interpretation would not reveal its nature': '(the law) is a declaration and demonstration of intention. The law speaks. What does it endeavour to tell us? ... Behind the wording lies the intention of the legislature which the interpreter must seek ...' — *Civil law* — Themis, Presses Universitaires de France, pp. 122 et seq.

discovering the spirit of the law, its aims, its objectives and the circumstances in which it came into being... It is not really a 'method' of interpretation but a means of assistance in the use of a method.

(4) The so-called historical method

I have just indicated that this description is used when resort is had to preparatory works. Nevertheless, a different meaning and scope is frequently conferred upon this method.

In his opinion in Case 34/74 ([1974] ECR 1237) Mr Advocate-General Trabucchi relies upon the 'historical-systematic' method. This expression seems to mean the interpretation of a term or of a concept in the light of the aim pursued by the provision in question, of the circumstances of its genesis and of its position in the provision as a whole. It cannot be concealed that the characteristics of such a method coincide with those summarized above at (3).

The historical method sometimes relates to the history of law and at other times to the history of the law... and it is clear that the latter may in large part be discerned by consulting the preparatory works [1].

A fresh distinction is however necessary: the history of law is considered in some quarters to be a method of interpretation, the purpose of which is to investigate the economic, social and technical situations in which the rule was intended to produce its effects...; others take the view that the purpose of this method is to investigate, by reference to history, the meaning and scope of a rule or of a concept which a modern legislature has felt it unnecessary to clarify when including it in legislation [2].

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[1] Paul Scholten, *'Algemeen deel der Handleiding tot de Beoefening van het Nederlands Burgelijk Recht'*, Assers Tweede druk; Stäger, *'De Rechthistorische Interpretatie en de Westhistorische Interpretatie'*.

[2] In Section 3 of this chapter certain examples of the historical method are provided. Let me cite another example: the concept of the liability of *singuli in solidum*. François Chabas, *'Remarques sur l'Obligation in Solidum'* in the Revue Trimestrielle de Droit Civil 1967, pp. 310 et seq. writes: The liability of *singuli in solidum* is very old. Even in the 14th century traces can be found in our law of the liability of all the joint authors of torts. The wording of the formula 'the liability of *singuli in solidum* et pro toto' receives no explanation from writers, which is an indication of a long tradition.

(5) The so-called useful effect, implied powers or principle of effectiveness method... further described as the 'ut res magis valeat quam pereat' rule

I shall devote a special survey to this method which is now very frequently relied upon and which has been applied for so long by the courts that it has never been necessary to define it.

(6) The so-called sociological method or the sociological school [1]

It forms a counterpart to the exegetical or grammatical method. The phrase of François Geny, 'by the Civil Code, beyond the Civil Code' is often quoted to describe it. According to the followers of this 'school' a law is merely the expression for the time being of the legal system at a specific point; consequently, as soon as such a provision is published it is completely divorced from the will of the legislator.

Experience has shown the dangers of such a method, in particular in connexion with legal certainty and the equality of private persons before the law. It is superfluous to recall in this context the extremes of President Magnaud, President of the Tribunal of Château-Thierry.

(7) The objective method — the subjective method

It seems that the first method is to be treated as equivalent, at least to a certain extent, to the sociological method. Using the objective method a law is interpreted in isolation: using the subjective method it is interpreted by endeavouring to discover the will of the legislation [1].

(8) The teleological method

This method has also been relied upon on numerous occasions in recent years especially with regard to the case-law of the Court of Justice of the European Communities. Nevertheless it is not always accorded the same meaning and scope. I shall devote a number of additional remarks to this point in Section 3 of the present chapter.

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[1] P. Scholten, *Op. cit.* states, p. 104, *'De wet is tegelijk wilsverklaring van de wetgever en zij is een waarde voor zichzelf'.*

(9) The evolutive method of interpretation

This method also calls for special treatment.

(10) The so-called scientific method

It balances the excesses of the so-called grammatical (or exegetical) method and the so-called sociological method; it also fills the lacunae. This method acknowledges, as it should, that the law does not consist solely of written provisions and that the meaning of such provisions and above all the wide concepts upon which they are based, develop ... that new situations arise which the legislature was unable to envisage or provide for ... that on many occasions regard must also be had to what the legislator would have decided or envisaged if he had known of the new situations or problems to be dealt with ... that the law must nevertheless be observed and that it is not for the courts to put themselves in the place of the legislature who is responsible to the Nation [1].

(11) Free choice of method?

Some lawyers indeed consider it necessary to resort to preparatory works; others, on the contrary, deny this. It is a question of choice of method.

Some lawyers, influenced by the nature of their institutions, respect the separation of powers between the legislature on the one hand and the judiciary on the other. Others take an independent attitude. This is also a question of choice. However, apart from this, it is self-evident that the courts cannot choose, when called upon to interpret one or more rules and to apply them to the facts, to have recourse *inter alia* to the grammatical or exegetical method and to ignore reasoning or a consideration of the aim and objective of the rules and the manifest evolution or otherwise of certain concepts: whether or not a specific method is appropriate depends on the problems involved. Certainly the views of lawyers, and especially of judges, may vary in this respect, but each of them applies a specific method on the basis of reasons or considerations which appear imperative to him. Furthermore a

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[1] Clearly, there are numerous 'schools' of interpretation of a law or of the law as a whole. Each of them has its own characteristics, emphases or compromises ... Thus Professor Zonderland (*'Méthode van het Privaat Recht'*, Elsevier 1974, Brussels and Amsterdam) cites the following schools: German idealism, the historical school, evolutionary, utilitarian, analytical, pure *(de zuivere rechtsleer)*, sociological, American realist, Scandinavian, existentialist or relativist schools, the new natural law school, Neo-Kantism ...

number of methods must often be applied simultaneously. Thus in its judgment of 21 February 1973 [1] the Court quite naturally held: 'the spirit, general scheme and wording of Article 86 as well as the system and objectives of the Treaty must all be taken into account'.

In the same judgment the Court of Justice rejected the line of argument, either *a contrario* or by analogy, on which the parties relied and, in order to settle the question whether a grouping of undertakings constituted an abuse of a dominant position [2], considered all the provisions of Articles 85 and 86 of the EEC Treaty in the context of the 'general principles' laid down in its Article 3.

In my view it is incorrect to deduce from certain sentences appearing in judgments of the Court of Justice that it applies these methods in a particular hierarchical order.

In its judgment of 29 November 1956 [3] the Court stated that it was necessary to seek 'an adequate interpretation or one which is compatible with the *wording,* the *context* or the *objectives*' of the Treaty.

Since 1963 the Court appears to have used the reverse order and to have relied upon interpretation according 'to the *spirit,* the *general scheme* and the *wording*' of the Treaty [4]?

The importance of this inversion appears very slight.

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[1] Case 2/67 [1973] ECR 215.

[2] With regard to the various methods which are stated to be open to the 'choice of the court' the Report of the International Law Commission concerning the draft treaty on the Law of Treaties (United Nations, January 1966, Monaco, General Assembly, Official Documents, 21st Session, Supplement No 9, p. 52) states with great care and realism: 'most of the time the principles of logic and common sense (which must be taken into account) are only of value in determining the meaning which the parties may have intended to confer on the terms employed by them in a document. The applicability of those principles to a specific case depends on a whole series of factors which must first of all be appraised by the interpreter of the document: the particular arrangement of words and sentences, their relation to each other and to the other parts of the document, the general nature and subject-matter of the document, the circumstances under which it was drawn up ... Nevertheless, where it appears proper to have recourse to one of those principles or maxims they cannot be automatically applied, because the interpreter must first be persuaded that it is appropriate to employ them in the particular circumstances of the case ...'.

[3] Case 8/55 [1955–1956] Recueil, 291.

[4] Cf. judgment of 5 February 1963 in Case 26/62 [1963] ECR 1.

Section 2 Considerations relating to certain 'methods of interpretation' — the teleological, useful effect and evolutive methods

(1) The teleological method

Teleology is the study of final causes and of ultimate objectives. It is a philosophical doctrine based on the concept of the ultimate objective. It has been written that knowledge of an entity, whereby the whole is understood by reference to the parts, is teleological knowledge.

The purpose of the *legal* teleological method is to interpret a rule taking particular account of the purpose, the aim and the objective which it pursues. Certain persons proceed further and consider that the purpose of the teleological method is to confer on a rule the interpretation which is most appropriate to satisfy the requirements of society.

It cannot be concealed that in this latter sense the teleological method of interpretation is — at any rate very largely — the same as the so-called sociological and 'objective' methods.

In his survey, to which I have already referred on several occasions, Mr Judge Pescatore writes: 'It is the teleological method which stands out with ever increasing clarity in the judgments of the Court of Justice. To this method we owe the both dynamic and ordered development of a body of case-law directed by the guide-line of a coherent concept. Furthermore, none of the dangers pointed out by proponents of caution has materialized. The Court has taken care not to exceed its judicial role; despite this it has succeeded in showing that law, appropriately interpreted, is also a powerful lever towards European integration. The Treaties establishing the Communities have been completely moulded by teleology ... the Treaties establishing the European Communities are based upon the concept of objectives to be attained ... In this context the teleological method is not simply one method of interpretation amongst others: far from it. It constitutes a method which is particularly suited to the special characteristics of the Treaties establishing the Communities [1].

The author is clearly correct: a court must found on the aim and objectives of the rules. This clearly does not lead it to exceed the role which the institutions confer on it. Such a method indeed constitutes 'a powerful lever

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[1] P. Pescatore, 'Les objectifs de la Communauté Européenne comme principes de l'interprétation dans la jurisprudence de la Cour de Justice', Miscellanea W. J. Ganshof van der Meersch, Volume II, *vide* in particular pp. 326 to 328.

towards European integration' which, brought about in this way, is the consequence of the aim and objectives of the provisions of the Treaties as the Member States intended them when creating real Communities amongst themselves.

The concept of teleological interpretation is often associated with evolutive interpretation or the need to fill lacunae in the legal system or in a particular law.

Nevertheless, I think that these concepts are different and indeed that they belong to different categories.

Any law, any corpus of laws and indeed any body of positive law inevitably contains lacunae for the good reason that neither particular laws nor legal principles have been able to provide exactly for the infinite variety of social phenomena and the problems to which they give rise. The teleological method is certainly not the only one which renders it possible for a rule to be given its full scope and efficacity.

'Evolutive' methods are applied where, after a written or unwritten rule has come into being, society changes and broad concepts included in written or unwritten rules have 'evolved', or where scientific and technical progress has altered, amongst other things, the nature of social relationships . . .

Not only may the teleological method be useful when rules 'evolve' . . . but it is clear that it is also applicable when there has been no evolution at all.

The Court of Justice has wisely and consistently adopted as its basis the 'principles' [1] which constitute the very objectives of the Communities: equality, liberty, solidarity, unity . . ., the objectives on which the Treaties are founded. Does this necessarily imply an evolutive interpretation? Is it not rather that the Court merely gives full effect to these fertile concepts and vital and effective principles?

(2) The 'useful effect' or 'implied powers' method, often described by the maxim 'ut res magis valeat quam pereat' [2]

This method may be given two meanings.

First sense: to confer on a rule or rules the meaning and scope which emerge from the provisions of the law and from their spirit, as well as from the

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[1] *Vide* the concecpt of 'principles' in Chapter III, Section 2.

[2] The maxim is from Ulpian (Dig. XLV, Title I): *Actus est interpretandus potius ut valeat quam ut pereat.* As regards the concept of the actual effect in Community law, cf. R. Ormand, *'La Notion de l'Effect Utile'* (thesis), Paris 1975.

aims and objectives which they pursue, in such a way as to give them the effect which they must necessarily have. It may be wondered, in that case, whether it is necessary for the intellectual process of a judge to be given a scientific definition which may be regarded as modern. I shall return to this problem in Chapter V, Section 3, in which I consider the rational and the deductive methods.

Second meaning or scope: to give a rule or rules the effect which the judge personally considers to be the most useful. Consideration of the aim or objectives of rules them becomes an exercise in abstract logic on the basis of an intention or personal conception which the judge sometimes endeavours to bestow on the nation or the people. A method which results in a more or less subjective view of the aims pursued by the legislature is clearly dangerous.

Both national and international courts interpret rules according to their 'useful effect' as defined in the first sense.

Ch. de Visscher [1] cites the following ground from a judgment of the Tribunal for the Settlement of Applications in the Kyugas Indians Case between Great Britain and the United States: 'No rule of interpretation is more firmly established than that which requires a meaning to be given to a clause rather than for it to be deprived of all meaning. The choice before us here is not between two possible interpretations. We are asked to reject the clear meaning of a clause and to rule that it has no meaning. It is certainly impossible for us to do so'.

At this point I wish to refer again to a judgment of the Cour de Cassation of Belgium, which I consider to embody a principle of pure common sense which has clearly been proclaimed by many other national courts: 'it is sometimes necessary to establish what the legislature wished to say rather than what it actually said; it is in principle preferable to assume that the legislature employed an expression which communicated its thought imperfectly rather than to attribute a thought to it arbitrarily' [2].

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[1] Ch. de Visscher, *'Problèmes d'Interprétation Judiciaire en Droit International Public'* (Paris 1963), p. 84.

[2] Cour de Cassation of 9 February 1925; Pasicrisie 1925, I, 129, in particular at p. 142. The courts interpreting English law are also acquainted with a fairly similar concept: if a passage may be interpreted in two ways the court will chose that which does not produce an absurd result (the Golden rule) (see for example *Young v Clarey* [1948] Ch. 191). As was stated in R. v Oakes [1959] 2QB 350 (CCA): 'a court is entitled to choose a possible meaning which seems reasonable rather than one which produces an inconsistency or an absurdity or inconvenience'.

The International Law Commission of the United Nations Organization also considered that it was unnecessary to describe such a means of interpretation as a method. Its report states: 'The Commission ... considered that in so far as the maxim *"ut res magis valeat quam pereat"* constitutes a general rule of interpretation it is incorporated in the first paragraph of Article 27 (Article 27 of the draft became Article 31 of the Convention of 1969) which stipulates that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms used in their context and in the light of the object and aim of the treaty'. [1]

The Court of Justice has referred in a number of judgments to the 'useful effect' or 'useful application' but in doing so it has merely emphasized that legal rules must be interpreted reasonably, so as not to fail in their aim or objective.

Thus, in its judgments of 15 July 1960 in Cases 20/59 [2] and 25/59 [3] on the question whether or not the High Authority had a power to adopt decisions or make regulations concerning the publication of rates and conditions for the carriage of coal and steel, the Court held: 'it is ... necessary to consider whether a power to make regulations vests in the High Authority by implication from other provisions of the Treaty or from its general structure and background ... Legal writers and case-law agree that the terms of a treaty imply certain rules without which such terms cannot be usefully or reasonably applied'. On the basis of this line of argument the Court recognized the implied powers of the Community administration.

When called upon to interpret Article 55 of the EEC Treaty, which excepts from the application of the Community provisions concerning the right of establishment activities which in a State are connected, even occasionally, with the exercise of official authority, the Court found that the profession of 'avocat' and the practice thereof remain governed by the law of the various Member States and that the possible application of the restrictions

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[1] Report of the International Law Commission on the Law of Treaties, January 1966, General Assembly, Official Documents, 21st Session, Supplement No 9. This report states: 'In its Advisory Opinion on the Interpretation of Peace Treaties (International Court of Justice, Rec. 1950, p. 229) the Court declared: 'The principle of interpretation expressed in the maxim *ut res magis valeat quam pereat* and frequently termed the useful effect principle, could not authorize the Court to extend the clause regarding settlement of disputes written into peace treaties in a sense which ... would contradict the letter and spirit of that clause'. N. B. The spirit makes it possible to discover what the treaty intends and consequently what effect it must have, that is, its useful effect.

[2] Recueil 1960, at p. 688.

[3] Recueil 1960, p. 723.

on freedom of establishment must therefore be considered separately in connexion with each Member State having regard to the relevant national provisions. It then emphasized that: 'This consideration must however take into account the Community character of the limits imposed by Article 55 on the exceptions permitted to the principle of freedom of establishment in order to avoid the *effectiveness* of the Treaty being defeated by unilateral provisions of Member States' [1].

The same meaning is given to the expression 'useful effect' in the judgment of the Court of 3 December 1974: 'In particular, a requirement that the person providing the service must be habitually resident within the territory of the State where the service is to be provided may, according to the circumstances, have the result of depriving Article 59 of *all useful effect,* in view of the fact that the precise object of that Article is to abolish restrictions on freedom to provide services imposed on persons who are not established in the State where the service is to be provided' [2].

The judgment of the Court given on 31 March 1971 [3] may be regarded as marking a development in the scope of the concept of 'useful effect'.

The Court made the bold deduction from the implementation of Regulation No 543/69 of the Council on the harmonization of certain social legislation relating to road transport that the bringing into force of the regulation 'necessarily vested in the Community power to enter into any agreements with third countries relating to the subject-matter governed by that regulation'.

An argument based on the text, which could have been important in the reasoning of the Court of Justice, (the regulation provides that the Community shall undertake such negotiations with third countries as prove necessary) is merely referred to as an extra detail.

Certain authors [4] have described this as the 'necessary effects' or 'consequence' method ('effet nécessaire ou effet-conséquence'). The method remains the same but the extent of the consequences deduced from comparing a rule with the objectives of the treaties (in particular in Case 22/70 referred to above) may evoke suprise in certain quarters.

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[1] Judgment of 21 June 1974 in Case 2/74, *Reyners* [1974] ECR 631.

[2] Case 33/74, *van Binsbergen* v *Bestuur van Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299. Cf. also Case 56/65 [1966] ECR 235: Case 75/63 [1964] ECR 177: Case 26/62 [1963] ECR 1.

[3] Case 22/70 [1971] ECR 263.

[4] R. M. Chevaliier, *'Le Contentieux des Communautés et le Droit Administratif Français'* in *'La France et les Communautés Européennes'* (Paris 1975), p. 459.

(3) The evolutive method

Clearly, the need for such an interpretation only arises if there is evolution. The term 'evolution' means that since a specific period of time a change has taken place in social conditions, requirements or possibilities, methods and techniques, economic, social, philosophical and moral concepts . . .

Generally speaking, the wording of a recent law or treaty does not require any evolutive interpretation.

The wording of old laws may indisputably require an evolutive interpretation by the courts where the separation of powers and authority between, on the one hand, the legislator or the nation (which creates customs and sometimes principles of law) and, on the other, the courts so permits.

Furthermore, before it can be conceded that there has been an evolution which must be taken into consideration such evolution must be certain. This is not because certain social groups demand with force, even employing coercion and violence, 'changes' and 'reforms' which the courts of necessity must and indeed may take account [1].

Evolution may evidently play a very important role where the courts are required to apply concepts which are neither defined nor clarified and which are commonly or at least frequently referred to as 'vast or complex' or even as 'vague'.

It is clear that the meaning given today to concepts such as '*boni mores*', 'acts outraging public decency', 'public policy' or 'the authority of parents' could not be the same as in 1804 or 1940 or even 1950 or 1960 . . .

National courts often make an evolutive interpretation of old texts, conferring upon them the meaning and scope which the legislator would have given them if he had been able to take into consideration the new facts, circumstances or *mores*.

To make such an interpretation the courts may also have regard to the substance and spirit of the laws subsequently adopted by the legislature.

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[1] According to Roscoe Pound (*Justice according to Law*, New York 1963, p. 278) 'The judges may not in reason be asked to lead in the present transition. They must go with the main body, not with the advance guard and with the main body only when it has attained reasonably *fixed* and *settled* conceptions'.

The European Treaties are not mere laws enacted by a legislature which can be modified easily and thus interpreted, when they are old, on the basis of an evolution which emerges clearly from more recent laws. The Treaties must be regarded as equivalent to constitutions ... and as I have already emphasized no provision has been made for a true revision even on the basis of a qualified majority.

Nevertheless it is clearly impossible to rule out an evolutive interpretation based on new European Treaties or on other treaties signed by the Member States or even by the Community. However, an evolutive interpretation on the basis of regulations of the Council of Ministers or *a fortiori* of regulations of the Commission would clearly pose delicate problems regarding the institutions and their jurisdiction.

In a noteworthy report submitted at the IVth International Seminar on the European Convention for the Protection of Human Rights [1] Judge Sørensen stated that: 'without prejudging the final outcome it can at this point be stated that the Commission (in its reports on the proceedings regarding the Syndicat national de la police belge and the Swedish Union of Engine-Drivers) referred to certain of the conventions of the International Labour Organization in order to determine the meaning and scope of the concept of freedom of association and the right to form trade unions recognized by Article 11. It recalled that these conventions have been ratified by a very large number of States, including practically all those who were parties to the European Convention on Human Rights, and that those conventions embody rules commonly acknowledged in the field of labour law. Consequently they can only be ignored in the interpretation of Article 11 at the risk of the European Convention being overtaken by the evolution of labour law at international level'.

Mr Sørenzen is correct in stating that in many cases it is necessary, in accordance with the intentions of the contracting parties, to regard the object and aim of a treaty as preventing the rigid establishment of legal rules in order to allow evolution to take place and that 'this is particularly true with regard to treaties whose provisions, like those of our convention, abound in general, undefined concepts which frequently refer to non-legal rules or standards such as "inhuman treatment", "reasonable periods of time" and "necessary in a democratic society" ' ... He further states that the

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[1] Rome, 5–8 November 1975, Council of Europe, Strasbourg 1975: *'Les droits inscrits en 1950 dans la Convention Européenne des Droits de l'Homme ont-ils la même signification en 1975?'*

evolutive interpretation of such wide and vague concepts has also been advocated by the International Court of Justice [1] and is practised under certain constitutions.

Section 3 Means of assistance in applying a particular method of interpretation—Preparatory works — Comparative law — Reference to a provision of inferior status or to a subsequent attitude

(1) Introduction

In the foregoing I have endeavoured to give some details regarding the various 'methods' of interpretation.

Reference to the 'preparatory works' of 'laws' is generally also considered as constituting a method of interpretation.

However, I consider that reference to such works constitutes rather a 'means' or 'tool' which enables certain methods of interpretation to be applied. By consulting such preparatory works it is in fact possible to discover the meaning and scope of a rule, in particular its *raison d'être,* spirit and objectives.

The same applies as regards recourse to comparative law; this is clearly more of a 'means' than a method of interpretation.

At this point I must define the term 'comparative law'. At present this aspect of law plays an important role in legal science and holds a favoured place in university curricula.

It is clear that in order to compare laws it is first necessary to discover the relevant legislation. It is this first aspect of 'comparative law' which is relevant to the problems forming the subject-matter of our review. Furthermore, as I shall explain later, comparative law, which usually concerns the law of the Member States, plays a double role in Community law.

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[1] Opinion on the Legal Status of the Territory of Namibia, International Court of Justice Recueil 1971, p. 31.

(2) The so-called 'historical' method — reference to preparatory works and parliamentary proceedings — background documents to international treaties, conventions and protocols

A — General considerations

We talk of the 'historical' method but this description is likely to cause confusion. First of all, it is necessary to clarify whether it is in relation to 'the law' itself or to the rule or the concept that the method is 'historical'. If it is in relation to the law, the aim of the so-called historical 'method' is to determine when, how and why the 'law' came into being, to investigate the circumstances or facts which led to the proposal for legislation, to consider the reasons, explanations and objections made or expressed in the course of the 'parliamentary' proceedings or to consult the 'justifications' — preambles, explanatory memoranda, reports to the sovereign or to the president of the Republic — provided by the executive in the exercise of a power to make regulations or a quasi-legislative power held under an enabling act or as a result of a delegation of legislative powers.

Not only laws and regulations but treaties, conventions and international protocols are preceded by preparatory work. It is also impossible to ignore in this context the work of international institutions such as the International Committee for Maritime Law or the International Law Association in preparation for diplomatic conferences at which the work of those institutions is adopted for subsequent incorporation into international conventions or treaties. The courts are often requested by their national legislatures to interpret such conventions in the light of the work of those institutions. [1]

As I have just explained, the scope of the so-called 'historical' method, or more precisely of this 'means' or technique as described above, is relatively restricted, that is, it covers the law, the provisions of international treaties or perhaps secondary legislation.

A true historical survey may have a different purpose and be much wider in scope: it may be to seek through history — for example, by reference to the

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[1] Thus, for example, the explanatory memorandum concerning the draft which became the Belgian Law of 28 November 1928 and the report of the Commission de la Chambre, state that the studies and discussions which had preceded the drafting of the Hague Rules (relating to bills of lading in particular) must be read together with the rules of the Belgian law in interpreting the latter (Cf. Pasinomie 1928, pp. 477 and 478). Cf. in particular the judgment of the Cour de Cassation of Belgium of 8 July 1955 which was based on those works (Bulletin et Pasicrisie 1955, p. 1220 and note).

history and evolution of the institutions and law of the Roman Republic and Empire, or of the institutions and the law which have grown up in particular in Great Britain — the meaning and scope of concepts which have been adopted without explanation or justification in provisions of enacted law or even in principles of law. This holds good as regards the meaning and scope of the concept, recognized in particular in French and Belgian law, of the 'enactment of the law' [1], and the principle that with regard to chattels possession amounts to ownership (Article 2279 of the Civil Code). [2]

I have placed the word 'method' in inverted commas because I consider that it is not so much a 'method' as a means of determining — in particular by using parliamentary proceedings or preparatory documents of other institutions — the meaning, scope, objective and aim of provisions laid down by law or regulation or of concepts adopted by such provisions.

It cannot be denied that this method or means has its limits: the documents constituting the 'preparatory work' must be available for consultation by the courts and by the persons concerned; they cannot lead the courts to ignore the actual wording of the law or of the regulation and it is clear that they can only be taken into consideration in so far as they provide a definite explanation of the meaning which was conferred on the words by the parliamentary majority, where the 'law' in question is the result of the deliberations and the decisions of legislative assemblies. Scrutiny of the said works makes it possible, on the one hand, to ignore documents containing declarations or considerations which have no effect on the determination of the meaning and scope of the provision to be interpreted and, on the other, to discover and at the same time to take account of documents revealing information, declarations or considerations from which the meaning, scope, intention and objective may be interpreted or established.

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[1] Lafferrière, *'De l'authenticité du texte des lois publiées au Journal Officiel'*, Revue du Droit Public et de la Science Politique 1949, pp. 117 et seq.; J. B. Herzog et G. Vlachos, *'La promulgation, la signature et la publication des textes législatifs en droit comparé'* (Travaux et recherches de l'Institut de droit comparé de l'Université de Paris); Opinions relating to the judgment of the Cour de Cassation of Belgium of 14 January 1976, Rechtskundig Weekblad, 1975/76, Columns 1745 et seq.

[2] Planiol and Ripert write in this respect *(Traité Elémentaire du Droit Civil, Volume I, 12th Edition, No 2459):* 'It is probable that in our laws there is no provision which provides a better explanation of the need for historical studies in order to understand modern law'. With regard to the provision in Article 20 (5) and (6) of the Belgian Law of 26 December 1851 on secured debts and mortgages (a provision repeating French legislation), cf. also Planiol and Ripert, *Op. cit.*, No 1543 et seq.

Authors in a number of countries have dwelt on the problem of the authority of 'preparatory work', some are in favour of consulting them, whilst others reject them unreservedly. [1]

Nevertheless, recourse to preparatory work appears to me to be not merely useful but on many occasions indispensable. I consider that those who oppose consulting it quite fail to take account of the innumerable present-day laws which are of a very technical nature and, inevitably, by no means easy to understand. I am thinking in particular of economic legislation and even more of tax legislation. In order to understand the provisions submitted to members of legislative assemblies it is very often necessary to provide explanations, cite examples and explain and illustrate them. All this is done in explanatory memoranda, in the reports of commissions, orally in the course of public discussions or through additional explanations furnished by the minister who submits the proposed legislation. It is on the basis of those examples and explanations etc. that the members of legislative assemblies vote and thus give their approval to the provision submitted.

Despite this, some people wish to deny access to the preparatory work which allowed the legislative assemblies to come to their decision, although the courts are, after these assemblies, the institutions which are obliged to clarify the meaning and the scope of the complex laws which have been passed! This really seems to me to be scarcely defensible.

Preparatory work — Reference to such works by international and national courts

Before I analyse the attitude of the Court of Justice to 'preparatory work' let us consider the attitude of international and national courts both with regard to international treaties, conventions and protocols and laws and regulations etc.

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[1] Cf. in this respect in particular (a) F. Frankfurter, *'The Reading of Statutes'* in Essays on Jurisprudence from the Columbia Law Review, New York 1963, pp. 59 and 60: 'Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined *to* the language, they are still confined *by* it. Violence must not be done to the words chosen by the legislature. Unless indeed no doubt can be left that the legislature has in fact used a private code, so that what appears violence to the language is merely respect to special usage. In the end, language and external aids, each accorded the authority deserved in the circumstances must be weighed in the balance of judicial judgment': (b) H. Lauterpacht, *Les Travaux Préparatoires et l'Interprétation des Traités,* Recueil des Cours, Annuaire de Droit International 1934, p. 713: (c) S. Neri, *Sull'Interpretazione dei Trattati,* pp. 184–197.

(i) International courts

I wish first of all to consider the Vienna Convention on the Law of Treaties of 23 May 1969. Article 31 thereof provides:

'1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

A special meaning shall be given to a term if it is established that the parties so intended.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an istrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.'

Article 32 of the same treaty further refers in particular to preparatory work. It provides:

'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.'

Charles de Visscher [1] states first of all that the Permanent Court of International Justice and then the International Court of Justice will or will

[1] *'Problèmes d'Interprétation Judiciaire en Droit International Public', Op. cit.*, p. 116.

not have recourse to preparatory work, depending on the nature of the wording, and writes that: 'although preparatory work must always be employed with caution it does not involve a question of principle: this depends on the individual case and on common sense. As always in interpretation it is necessary to avoid dogmatic attitudes and to be guided by the requirements of judicial logic which, as we have seen, are those of a flexible mind. The latter automatically has recourse to the origin of an obscure passage and uses the discussions which led to its drafting . . .'. He states: 'a report drawn up by a committee at a diplomatic conference and approved by it usually carries considerable weight. Such a report may even be decisive if the conference confers upon it the status of an authentic interpretation'.

Lord McNair [1] states: 'A document forming part of the preparatory work may be cited only in so far as it can be shown that the contracting parties jointly agreed on this passage either by a resolution to be written into the minutes or in another way . . .'.

Guggenheim also considers that: 'the minutes of negotiations often contain declarations which, due to their clarity, are of prime importance in interpreting a treaty'. [2]

V.D. Degan wrote: 'In the case-law of the International Court of Justice this process of interpretation is in general adopted although it is subject to many important limitations'. [3] In his opinion in Case 8/55 Mr Advocate-General Lagrange declared: 'It is indeed true that the statement of grounds for a law, like the other documents which are usually classified under the heading of "preparatory work", has no binding force with regard to the interpretation of the wording and in particular can never be cited against the wording itself if the latter is clear and unambiguous. However it is universally acknowledged that the courts may have recourse to it for information and to derive from it factors which can, if necessary, throw light on the legislature's thinking. The courts certainly enjoy a complete discretion in this matter. No doubt, if a treaty is concerned, national documents relating to the ratification procedure can show only the thinking or the intention of one of the signatory governments. Nevertheless it must not be presumed that when a government submits the Treaty to its parliament for ratification it would express a view which it knew was not shared by the parliaments of other signatory States . . .'.

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[1] P. Guggenheim, *'Traité de Droit International Public'*, Vol. 1, 2nd Edition, p. 258, Note 6.
[2] Cf. Guggenheim cited *supra* at p. 260.
[3] Revue Trimestrielle de Droit Européen 1966, p. 189 et seq.

In his opinion in Case 2/74 [1974] ECR at p. 666 Mr Advocate-General Mayras also excluded recourse to the preparatory work of treaties. He stated: 'The States, signatories to the Treaty of Rome, have themselves excluded all recourse to the preparatory work and it is very doubtful whether the reservations and declarations, inconsistent as they are . . . can be regarded as constituting true preparatory work. Nor can they be held against the new Members of the enlarged Community . . . Above all you have yourselves rejected, on several occasions, recourse to such a method of interpretation by asserting the content and objectives of the provisions of the Treaty'.

This opinion gives rise to two considerations:

1. It may be wondered why preparatory work — if recourse may be had to them — are not applicable to the new Member States. Those States have acceded to the Treaties as they exist, that is to say with their spirit, aim and objectives . . . which may be deduced from the preparatory work.

2. 'The objectives' of the Treaties are indeed an essential factor in interpreting the wording of the Treaties. But is it not in fact possible to discern these objectives from the preparatory work?

The report of the International Law Commission which drafted the Convention of 23 May 1969 considered in this connexion: 'A Member State which accedes to a treaty which it has not helped to draft is perfectly entitled to see the preparatory work before consenting to accede'. [1] It is stated above in this report (p. 56): 'The Commission (nevertheless) considered that it would be scarcely realistic or appropriate to assert in the draft of the article that recourse might not be had to external means of interpretation such as preparatory work so long as the application of the rules set out in Article 27 (Article 31 of the Convention of 1969) has not shown that it is impossible to deduce any clear or reasonable meaning from the wording'.

In its opinion on the interpretation of the Convention of 1919 on the Work of Women at Night, the Permanent Court of Justice declared: *'The preparatory work* thus confirms the conclusions indicated by a study of the wording of the Convention, that is to say that there is no valid ground whatsoever for interpreting Article 3 other than in accordance with the natural meaning of its wording'. [2]

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[1] Report of the International Law Commission, 3 to 28 January 1966 and 4 May to 19 July 1966, General Assembly of the United Nations, Official Documents, 21st Session, Supplement No 9, p. 57.

[2] Permanent-Court of International Justice 1932, Series A–B, No 50 p. 380.

(ii) The national courts

It may be stated that in the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands and Belgium [1] both 'administrative' and other courts have recourse in varying degrees, but generally with prudence and caution, to preparatory work of the laws of the legislature. Frequently they have recourse in addition to the statement of grounds, reports to heads of State, preambles . . . preceding the text of orders, rulings, decrees . . .

It is generally stated that the practice differs in the *United Kingdom.*

Lord Justice Scarman [2] has written in this connexion: 'If there be ambiguity, the courts would not look outside the context of the act to resolve it. They would not look to "travaux préparatoires" or to Ministerial declarations or to Government white papers and certainly never to parliamentary debates, to explain enacted words lest they find themselves treating as law something which was not enacted. The Courts have in the past said to Parliament: we accept your intrusion into our affairs as irresistible, but we will not allow it to go one iota further than the enacted words of your statute'.

Lord Justice Scarman emphasizes however that in practice courts take account of reports of commissions which prepared the work of the legislative bodies and of other documents which may provide information as to the facts, circumstances and problems which give rise to the legislation. Parliamentary debates themselves are not used. 'It has sometimes been suggested that we should not have regard to the reports of the Law Commission which lead to legislation. But we think we should. They are most helpful in showing the mischief which Parliament intended to remedy' (by Lord Denning, *Wachtel* v *Wachtel* (1973), 2 W.L.R. 366, 375). Cf. also the leading case of *Assam Railways and Trading Company Ltd.* v *Commissioners of Inland Revenue* (1935) A.C. 445. [3]

In the Scandinavian countries the courts may also have recourse to preparatory work especially in order to discover the circumstances which gave rise to the legislation. [4]

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[1] Cf. the judgment of 8 July 1955, above cited, and of 4 May 1972, of the Cour de Cassation (Bulletin et Pasicrisie 1972, I, 806) which adopted the preparatory works as its basis in interpreting an international treaty.

[2] The Approach of British Courts to Legislation, p. 7.

[3] Cf. also Lord Upjohn in *Beswick* v *Beswick* (1968) A.C. 58, at p. 105 *Regina* v *Hyam* (1973) 3 W.L.R. 475 at 481–482.

[4] Folke Schmidt, *'Construction of Statutes'*, SSL 1957 (1) 155–198 Stig. Ströholm, *'Legislative Material and Construction of Statutes'*, SSL 1966 (10) 193–218.
N. S. Marsh *'Interpretation in a National and International Context'* (Brussels 1973), p. 79.

C — *Preparatory work — The Court of Justice of the European Communities*

(i) Initial considerations

The consultation of preparatory work clearly depends on it being possible to have recourse to it. In this connexion it should be stated that the preparatory work to the *three basic Treaties* has remained of a secret or confidential nature. A collection of extracts of the essential points in the 'Val-Duchesse' discussions which was prepared by two lawyers has never to this day been published. The only document which has been published is the Rapport des Chefs de Délégation aux Ministres des Affaires Étrangères (the 'Spaak report') which moreover contains information which sometimes clearly indicates the intention of the negotiators (this is so for example with regard to equal rights for men and women which forms the subject-matter of Article 119 of the EEC Treaty). Furthermore, in the course of the procedures for approving the Treaties in the national parliaments, several provisions of the Treaties formed the subject-matter of public debates and it appears that the competent ministers took particular pains to confer a common interpretation on the Treaties.

Subsequent international European conventions, such as the Protocols of 3 June 1971, signed at Luxembourg [1] were accompanied by *statements of grounds* or common 'reports'.

These statements of grounds or reports were submitted to the national parliaments or to certain national parliaments in the course of the procedures for approving both the Protocols and the International Convention signed at Brussels on 29 February and 27 September 1968 to which they relate.

In the opening sections of regulations, directives and decisions there are 'preambles' and 'recitals' which explain the meaning and scope of the provisions which they contain.

It may be wondered whether the minutes relating in particular to the 'preliminaries' to decisions may be taken into consideration by the courts. [2] Be that as it may it seems to me that the Court of Justice was very wise when it decided on 18 February 1970 [3] that the scope and effect of a decision

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[1] The Protocols of 3 June 1971 conferring jurisdiction on the Court of Justice to give preliminary rulings on the interpretation of the international Conventions signed in Brussels on 29 February and 27 September 1968.

[2] Certain national 'administrative' courts have recourse to them in particular in order to appraise the 'legality' or validity of a measure or decision.

[3] Case 38/69 [1970] ECR 47.

adopted by the Council by virtue of Article 235 of the EEC Treaty must be assessed in the light of its terms and therefore could not be restricted by reservations or declarations which might have been made in the course of preparatory discussions or which might emerge from the minutes of the meeting of the Council; such a decision is adopted 'within the context of the institutions and is thus in the nature of an international agreement rather than a Community measure'.

A 'Staff regulations' body provides opinions on the arrangements to be adopted with regard to the rights and duties of officials. Sometimes the Court of Justice has regard to them. However the problem which obviously arises with such 'preparatory documents' is that of publicity: how can a court take them into account when the persons concerned do not have access to them?

(ii) Recourse by the Court of Justice and by the Advocates-General to the 'preparatory work'

I have indicated above the views of Advocates-General Lagrange and Mayras on recourse to the preparatory work to the basic European Treaties. [1]

The preparatory work relating to the procedures for the approval of those Treaties by the national parliaments were cited in particular by Mr Advocate-General Roemer. Thus, in relation to Article 33 of the ECSC Treaty which provides that, 'the Court may not examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the High Authority took its decisions or made its recommendations, save where the High Authority is alleged . . .', the distinguished Member of the Court stated in his opinion in Case 6/54: 'It is important to establish the reasons which gave rise to the restriction of the review by the Court. *The statement of grounds by the German Government* states in this connexion: "With regard to the extent of the review by the Court . . .". We can furthermore cite the report of the French delegation . . . In our view the Court will require to take account of the statements of grounds of the instruments of ratification submitted to the parliaments of other countries. In our view they do not indicate any divergence of opinion on this point'.

In its judgment of 16 December 1960 [2] the Court, in order to determine the scope of the provision in the Protocol on the Privileges and Immunities

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[1] Opinion of Mr Advocate-General Lagrange in Case 8/56 and the opinion of Mr Advocate-General Mayras in Case 2/74. Cf. also the opinion of 8 April 1976 of Mr Advocate-General Trabucchi in Case 43/75, *Defrenne*.

[2] Case 6/60, *Humblet*, Recueil 1960, p. 1130.

exonerating and exempting the emoluments or salaries of Community officials from national charges, held that: '*the statements of grounds submitted by the governments* on occasion of the parliamentary debates on the ECSC Treaty are silent on this point . . . This is also the case with regard to the vote of the parliaments on the EEC and EAEC Treaties which contain a substantially identical provision as the majority of the government statements, with the exception of the statement by the Luxembourg Government with regard to the EAEC Treaty passed over this point in silence . . . Apart from the fact that this passage (of the Luxembourg memorandum) refers to the Protocol annexed to the Treaty of Rome and not to the ECSC Protocol it cannot by itself prove that the authors of those Treaties all concurred of the interpretation thus advocated'. The Court then had recourse 'to a comparison of different national laws'. It considered that: 'whilst it is true that the finance law of the French Republic is guided by the same concepts as Belgian case-law and practice it is clear from the law of the Federal German Republic that the latter has interpreted the Protocol in the manner advocate by the applicant . . . and that the German legislature accordingly does not share the view of the Belgian administration . . .'.

(iii) Regulations, directives . . . Recourse to the 'preamble' and to the 'recitals' . . .

In its judgment of 15 October 1969 [1] the Court held that: 'according to the seventh recital of the preamble to the regulation in question . . . the eighth recital of the same preamble states . . . Taken as a whole these factors indicate anxiety to ensure for the processing industries of the Member States . . . It must therefore be assumed that the authors of the first paragraph of Article 16 intended . . . This solution is confirmed by the penultimate recital of the preamble to the said regulation according to which . . .'.

In its judgment of 4 October 1972 [2] the Court interpreted Regulation No 565/68 of 24 April 1968 which provided for the non-fixing of an additional amount for slaughtered fowls originating in and coming from the Polish People's Republic. The judgment held: 'It is clear from the *recitals of the preamble* to that regulation that this exemption was granted as a result, on the one hand, of the guarantee given by the Government of the Polish People's Republic that exports would only be made by the State foreign trade agency . . . which would not deliver the said products at free-at-frontier prices

[1] Case 14/69, *Markus* v *Hauptzollamt Hamburg-Jonas* [1969] ECR 349.
[2] Case 9/72, *Brunner* [1972] ECR 961: [1972] CMLR 931.

lower than the sluice-gate prices and, on the other, of its undertaking to enable the Commission to exercise continuous supervision of the effectiveness of the measures it has taken . . .'.

When the Court in its above-mentioned judgment of 23 January 1975 (Case 31/74, *Galli),* interpreted Regulation No 120/67 on cereals the Court stated that: 'So as to ensure the freedom of internal trade the regulation comprises a set of rules intended to eliminate both the obstacles to free movement of goods and all distortions in intra-Community trade due to market intervention by Member States other than that authorized by the regulation itself'. The Court continued: 'This objective is emphasized by the fifteenth recital of the preamble according to which . . . and by the sixteenth recital according to which . . .'. [1]

Confirming the view which he already expressed in the opinion cited above Mr Advocate-General Mayras considered in his opinion in Case 190/73 [2] that: 'Rather curiously, from this account of the successive preparatory stages of the regulation the Commission nonetheless concludes that this Community provision does not exclude the intervention of "supplementary measures" . . . I do not think I can follow them along this track. First, because this would amount to interpreting Regulation No 234/68 through its preparatory stages looking for the intentions, the motives of the Community legislator, a course which the Court has always refused to take. I believe that a more certain method in this respect would be to take the regulation as it is — an objective text, binding in its entirety and of course having direct effect — and to base my interpretation upon the specific wording of its provisions and its general tenor'.

It seems to me that to base an interpretation 'upon the general tenor' does not necessarily exclude recourse to the preparatory work. The latter makes it possible to determine what constitutes the general tenor of the regulation.

In its judgment of 26 June 1975 [3] the Court had to decide whether the Council's refusal to adjust the salaries of officials, notwithstanding the fact that the annual specific indices used for the purposes of fixing the salaries were inaccurate, constituted an infringement of the rules of law and in particular of the rule of legitimate confidence which the officials and servants might have that the decision previously adopted by the Council on 20 and 21 March 1972 would be implemented. It certainly appears that in order

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[1] Cf. also in particular Case 93/74 [1975] ECR 661, and Case 5/75 [1975] ECR 759.
[2] [1947] ECR 1141.
[3] Case 70/74 [1975] ECR 795.

to settle this point the Court took cognizance of a 'preparatory' document: the report of the Council's working party on Staff Regulations approved by the Committee of Permanent Representatives.

The Court held that the decision of March 1972 provided that 'the specific index' would be constituted by the index of the variation of public salaries drawn up by the Statistical Office of the European Communities in accordance with the method used until now but with certain improvements (N.B. the decision thus referred to a 'method used until now' and it was necessary to take it into account).

The Court continued: 'this method had previously been fixed by the Council's Working Party on Staff Regulations in a report approved by the Committee of Permanent Representatives at its meeting on ... According to this report the concept of salaries should take account of ... The improvements envisaged by the Decision of 20 and 21 March 1972 have as their object an improved harmonization of the calculating methods applied by the various national administrations and to ensure that the Commission is more completely informed, but do not call in question the *basis of the method previously laid down*'. The Court further stated that: 'No doubt this same report provided for the possibility of the Commission putting forward, where appropriate, factors for consideration other than those resulting from the method adopted, but it left the Council free with regard to taking them into account'.

3 — Comparative law

I have already explained above (Section 3, introduction, *in fine)* the meaning and scope which I ascribe here to the concept of 'comparative law'.

It plays a double role in the task of interpretation which the Court of Justice undertakes.

On the one hand, by consulting the law of the Member States, especially the case-law of the national courts, the Court of Justice can obtain information which makes it easier to solve the problems submitted to it and, in particular, to clarify the rules of the European Treaties and even those of regulations and directives and the concepts to which the latter relate. Certain of those concepts at least are common to the laws of the Member States, a situation which is to be expected.

On the other hand, the general or other principles on which the European Treaties are based, constructed or supplemented and which thus form part of European law flow from the laws of the Member States. Those laws must thus be scrutinized.

(A) *The laws of the Member States which constitute a guide, indication or model and thus facilitate or can facilitate the solution of a problem submitted to the Court of Justice.*

When, in its judgment of 12 July 1957, [1] the Court of Justice had to settle the question whether it is permissible to annul administrative measures which give rise to individual rights, in particular measures appointing officials, the Court held that 'this point constitutes a problem of administrative law which is well known in the case-law and legal writings of all the countries in the Community but the Treaty contains no rule for its solution ... The Court ... is thus obliged to solve the problem on the basis of the rules recognized by the laws, legal writing and case-law of the Member Countries'.

Perhaps written laws in certain Member States expressly provide a solution to this problem, but in other States the solution is found simply by deduction from the necessary coordination and harmonization between two or more rules. We shall return to this point in Chapter V, in which the question of the harmonization and coordination of rules is considered.

In his opinion in Case 12/74, *Commission* v *Federal Republic of Germany,* Mr Advocate-General Warner quoted three English cases and one Scottish case in order to clarify concepts or his views with regard to the protection of registered designations of origin.

In connexion with the interpretation of Article 16 of the Protocol on the Privileges and Immunities, annexed to the ECSC Treaty, the Court considered whether or not all means of redress under national law must be exhausted before proceedings are brought before it. The Court held that 'the problem must be considered in the light of the general structure of the Treaty and of the rules of law generally recognized in the Member States'. [2]

Mr Advocate-General Lagrange considered the law of the Member States before putting forward his solution to the question whether, when an application is lodged against a decision bringing a matter before the Court of Justice under Article 177 of the EEC Treaty, the Court remains seised of the application (Opinion in Case 13/61 [3]).

In his opinion in Joined Cases 48, 49 and 57/69, the dyestuffs cases, Mr Advocate-General Mayras referred not only to the laws of the Member

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[1] Cases 7/56 and 3 to 7/57, Recueil 1957, p. 85.

[2] Judgment of 16 December 1960 in Case 6/60, *Humblet,* cited above.

[3] Mr Advocate-General Lagrange stated that: 'We must ... in accordance with the practice of this Court ... take account of the general principles contained in the national law of the Member States'. ([1962] ECR 45). Cf. the opinion of Mr Advocate-General Mayras in Case 127/73 (Judgment af 30 January 1974 [1974] ECR 51).

States but also to those of Switzerland and of the United States of America in order to determine whether, within the meaning of Article 85 of the EEC Treaty, the Community authorities have jurisdiction over undertakings established outside the Common Market and whose agreements or concerted practices affect trade within the Common Market. [1]

(B) *Recourse to the laws of Member States in order to clarify a concept of Community law*

In his opinion in Case 3/54 [2] (Judgment of 11 February 1955), Mr Advocate-General Lagrange reviewed at length the meaning and scope in the six Member States of the concepts of 'misuse of powers' or of equivalent concepts which might be contained in a wider concept.

In its judgment of 21 June 1958 [3] the Court defined the meaning and scope of the concept of the equality of the persons concerned with regard to economic arrangements, referring to 'a principle generally recognized in the law of the Member States'.

(C) *Recourse to the laws of the Member States in order to discern a principle of law forming part of Community law*

As a typical example of this, I should like to cite the judgment of the Court of 5 June 1973 [4] and in particular the opinion delivered in that case by Mr Advocate-General Warner. The case involved the question whether both the principle, *'patere legem quam ipse fecisti'*, and the principle that the 'legitimate confidence', in particular of those subject to an administration, must be protected, exist in the laws of the Member States and, if so, what their meaning and scope were.

4 — Interpretation by recourse to rules of a 'lower order' than the rule to be interpreted

Further recourse to the subsequent attitudes of the 'High Contracting Parties' or of other authorities

(A) *Rules of a 'lower order'*

The view has often been put forward that, in its judgment of 6 April 1962, [5] the Court interpreted, at least in part, the scope of Article 85 of the EEC

[1] The Advocates-General very often invoke the laws of the Member States in support of their opinions in other contexts, too.
[2] Recueil 1954/1955, p. 146.
[3] Case 8/57, Recueil 1958, p. 225.
[4] Case 81/72 [1973] ECR 575: [1973] CMLR 639.
[5] Case 13/61, *de Geus* v *Bosch and van Rijn* [1962] ECR 45.

Treaty on the basis of the provisions of Regulation No 17 of the Council. Nevertheless I do not in fact consider that it can be held that the Court followed this method in this case. In reality the Court had to interpret both Article 85 and Regulation No 17.

In its judgment of 8 May 1974 [1] the Court did indeed hold that 'the Commission's Explanatory Notes' constituted an important factor in interpreting the Common Customs Tariff but it ruled that the Notes 'cannot modify its text nor the introductory Notes to the Chapters, which are an integral part of the Tariff'.

In the view of the national courts it is scarcely defensible that a provision should be interpreted in the light of a provision having inferior status: it is not for the legislature to interpret the constitution, nor for the executive authority to interpret the laws.

Certain fine shades of meaning in European law as in international law may be borne in mind. A treaty is signed by the Government with the support of a simple parliamentary majority. This majority 'approves' (in certain States at least) the treaty signed by the government or, more precisely, by the executive authority, or for the Head of State vested with ministerial authority. Under a parliamentary system a minister who is a member of the Council of Ministers of the European Communities when a regulation is adopted also requires to have the backing of a simple parliamentary majority in order validly to represent his State. The situation is, of course, quite different with regard to the regulations of the Commission: those regulations are adopted by a different authority from that which gave its consent to the making or to the approval of the treaty.

(B) *Subsequent attitude*

As we have already seen, Article 31 (3) of the International Convention of 1969 on the Law of Treaties provides as follows: 'There shall be taken into account, together with the context: (a) . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. [2]

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[1] Case 183/73 [1974] ECR 477.

[2] The previously-cited report of the International Law Commission (January 1966, Monaco, General Assembly, Official documents, 21st Session, p. 55) stated in particular: 'Subsequent practice in the application of the treaty is clearly an important element of interpretation since it constitutes objective evidence of the agreement to the Permanent Court of Arbitration, 'the implementation of undertakings, between States as between individual

The Court of Justice of the European Communities perhaps considered employing this method in its judgment of 1 December 1960. [1] In this case the Court held in particular: 'In this respect it must be recognized that it is impossible to discern a common view of the Member States which is capable of serving as a criterion in the interpretation of Article 11 (b) of the Protocol'.

Whilst subsequent practice may constitute an element of interpretation in the case of a convention between two States or of obligations between two or more States ... it appears to me that the situation is different with regard to the interpretation of the European Treaties, which are not restricted to determining rights and duties as between States.

In national law, of course, an earlier law may be interpreted in the light of a more recent law. [2,3] In its judgment of 5 February 1976 in Case 95/75 the Court of Justice interpreted Regulation No 142/69 of the Commission in terms of Regulation No 700/73, which replaced the Former and which was not applicable to the case before the Court.

A provision of a constitution may also be interpreted in the light of another, earlier constitutional provision.

The attitude of the 'High Contracting Parties' is, however, quite another matter.

(Footnote [2] of previous page continued)

persons, constitutes the most reliable footnote as to the meaning of their obligations (Recueil des Sentences Arbitrales, Vol. IX, 11, p. 433) ... Recourse to this practice as a means of interpretation is firmly established in the case-law of international courts'. The report cites the advisory opinion of the Permanent Court of Justice on the powers of the International Labour Organization and the judgment of that court in the Corfu Channel Case (International Court of Justice, Recueil 1949, p. 25).

V.T. Degan (Revue Trimestrielle de Droit Européen 1966, p. 189 et seq.) also cites the judgment of 15 June 1962 of the International Court of Justice in the *Temple de Preah Vihear* Case (Recueil 1962, p. 32–33.

[1] Case 6/60, Humblet [1960] Recueil 1154.

[2] On 11 June 1956 the Cour de Cassation of Belgium decided (Bulletin et Pasicrisie 1956, I, 1133) that a court may interpret a law on the basis of its general structure by referring to the preparatory works of another law (that is to say, of a previous law dealing with the same subject-matter).

[3] As Cardozo puts it: 'There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system' (cited by Dean Acheson in the Michigan Law Review 1938, 520).

CHAPTER V

General survey of the work of the Court of Justice in the field of interpretation

Section 1 — Consultation of texts — Texts in different languages

The wording is clearly important, indeed of fundamental importance; no-one would dream of disputing the importance of the words, terms and expressions employed by the 'legislator'.

In its advisory opinion of 15 September 1923 the Permanent Court of Justice stressed that 'the duty of the Court is clearly defined; when it is faced with a provision lacking nothing in clarity, it is bound to apply it as it stands without the necessity of wondering . . .' [1]

On 3 March 1950 the International Court reiterated: 'The Court considers it necessary to state that the first duty of a court called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them, taken in their context, in accordance with their natural and ordinary meaning. If, when the words in question are given their natural and ordinary meaning, they make sense in their context, scrutiny must then cease. [2]

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[1] Series B, No 7, p. 20.

[2] Opinion cited by de Visscher, *Op. Cit.*, p. 52.
See also the opinion of Commissaire du gouvernement Corneille in connexion with the judgment of the Conseil d'Etat of France of 18 March 1921:
'Learned writers state that resort must be had to interpretation if the drafting of the legislator is in itself rather contradictory and does not have a full and clear meaning. When resort must be had to interpretation, the first method to be employed is grammatical or literal interpretation the purpose of which is to determine the exact meaning of a word or words with the help of the usage of the language and the rules of syntax. Laws enacted by the French Parliament must, in principle, be drafted in French. If the process of literal interpretation does not suffice or requires confirmation the process of reasoned and logical interpretation must also be employed.'

Nevertheless it is clear that, on very many occasions, if not as a general rule, a decision whether a provision is clear necessitates already being embarked on a certain degree of interpretation. The maxim *'interpretatio cessat in claris'* is certainly dangerous. As the eminent judge Anzilotti has indeed stated: 'I do not understand how it can be said that an article in a convention is clear before the objective or the aim of the convention has been established, as it is only within and in relation to that convention that the article acquires its true meaning. It is only when one knows what the contracting parties intended to do and the aim which they wished to attain that one can ascertain either that in their natural meaning, the words used in a particular article accord with the real intention of the parties or that, in their natural meaning, the words employed fall short of or go beyond that intention. The first thing to be done, therefore, is to ascertain the subject-matter and the aim of the convention which contains the article to be interpreted. [1]

The clarity of a word, expression or concept must, moreover, be considered with considerable care when the instruments in question, like the treaties, regulations and directives of the European Communities are common to nine Member States and must be interpreted and applied *inter alia* by courts which are accustomed to apply national laws which none the less diverge significantly.

Often the instruments are clear and precise but nevertheless they have manifestly failed exactly to express the intention of the legislator or, as those who refuse to attach any importance whatsoever to that intention would say, they have a meaning and scope which conflict with what the law or regulation must, of necessity, be read as intending to do.

As an example I should like to refer to the question which had to be settled by the judgment of 17 May 1972. [2] According to Article 28 of Annex VIII to the Staff Regulations of Officials, the divorced wife of an official is entitled to a survivor's pension 'if the court which pronounced the decree of divorce found that the official was solely to blame'. The Staff Regulations further state that the amount to which the divorced wife is entitled shall not be more than the amount of the maintenance 'awarded to her under the decree'.

In the case in question, in accordance with national law, the amount of the maintenance had not been awarded under the decree.

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[1] Permanent Court of International Justice, Series A–B, No 50, p. 383, Interpretation of the Convention of 1919 concerning the Work of Women by Night.

[2] Case 24/71 [1972] ECR 269: [1973] CMLR 136.

The Court held that: 'to require proof of the existence and extent of the obligation to pay maintenance by a judicial decision when the law governing the consequences of the divorce does not recognize or, at all events, does not require recourse to such a decision, would in such cases frustrate the exercise of the right to a survivor's pension . . . This could not have been the intention of the authors of the Staff Regulations. Therefore, the final sentence of the first paragraph of Article 28 cannot be interpreted as excluding other means of proving the obligation to pay maintenance which are required or accepted by the law governing the consequences of the divorce'.

The courts, and the Court of Justice, generally give words their usual meaning. [1]

It is self-evident that the Court is very often obliged to confer on words the meaning which they normally bear in the field referred to by the provision to be interpreted. Thus in its judgment of 16 December 1962 [2] the Court of Justice considered that it must have regard to the meaning employed in 'international tax terminology'.

In its judgment of 18 May 1962 [3] the Court established the meaning of certain words in Article 65 (1) of the ECSC Treaty by reference to a number of provisions of the Treaty and also to the provisions of Article 85 of the EEC Treaty, because the underlying purpose of the two provisions was the same. [4]

On perusing the judgment of 11 July 1968 (Case 4/68) [5] it will be clearly perceived how dangerous, and indeed ridiculous, it is to isolate a provision from its context. An undertaking had been unable to effect the importation which it had bound itself to carry out within a prescribed period and had consequently rendered itself liable to lose the deposit which it had to lodge. The undertaking thought that it was entitled to rely on a case of *force majeure* expressly referred to in Article 6 of Regulation No 136/64/EEC: it relied upon an 'engine failure in dairy machinery'. The said regulation indeed includes

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[1] Cf. in particular the judgment of 23 February 1961 in Case 30/59, Recueil 1961, p. 3 in which the Court exercised caution in ascertaining whether the usual meaning of the words in question fitted the system and the aims of the Treaty. The concepts in question were aids and subsidies.

[2] Case 6/60.

[3] [1962] ECR 83.

[4] The International Court of Justice at times has regard for the usual meaning of words and at others it has regard for a special meaning, in accordance with the cases and the requirements of the situation. Cf. advisory opinion of 28 May 1948 (Recueil 1947/48, p. 62) and judgment of 27 August 1952 (Recueil 1952, p. 195).

[5] [1968] ECR 377.

'engine failure' amongst the cases of *force majeure* which are to be taken into consideration. The words 'engine failure' are sufficiently clear but, placed in their context, that is to say viewed in conjunction with the relevant provisions as a whole, it is clear that they cannot refer to engine failures in dairy machinery because the regulation related only to engine failure in the context of navigation.

Clearly the Court had to have regard to the meaning of the expressions and words but it was particularly careful. Even if the Court finds that a provision is perfectly clear it consults the Treaty as a whole. [1] After delivering its interpretation on the basis of the wording, the Court ascertained and held in particular: the question remains whether the conclusion reached by the Court, guided by its study of the wording and the *ratio legis,* does not conflict with other objectives of the Treaty or whether it is liable to be invalidated by other considerations. [2]

In its judgment of 13 July 1966 [3] the Court, in reply to the submission that sole distributorship contracts did not fall within Article 85 of the EEC Treaty, indeed found as follows: 'Article 85 refers in a general way to all agreements which distort competition . . . and does not lay down any distinction between those agreements . . . In principle no distinction can be made where the Treaty does not make any distinction'. But it confirmed the outcome of its examination of the wording by invoking a logic explanation as well.

In reply to the question whether the *other person* to whom there was addressed a decision of direct and individual concern to an applicant can also be a Member State, the Court, on 15 July 1963 [4] decided that 'the words and the natural meaning of this provision (the second paragraph of Article 173 of the EEC Treaty) justify the broadest interpretation', but it also had regard to the nature and aim of the provision in general and held that 'provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively . . . Therefore, the Treaty being silent on this point, a limitation in this respect may not be presumed'.

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[1] Judgment of 11 February 1955 in Case 3/54 (Recueil 1954–55, p. 127). The Court held: 'Under the second paragraph of Article 33 of the ECSC Treaty, the wording of which is perfectly clear, the requirements as to admissibility are sufficiently met if the applicant formally alleges there has been a misuse of powers affecting him . . . The Treaty neither provides nor requires any additional condition for the admissibility of the application . . .'.

[2] Judgment of 21 December 1954 in Case 2/54 (Recueil 1954–55, p. 77).

[3] Joined Cases 56 and 58/64 [1966] ECR 299.

[4] Case 25/62 [1963] ECR 95.

The fact that most instruments are authentic in a number of languages does not ease the task of interpretation. Errors in translation and shades of meaning introduced into a particular version may give rise to differences of interpretation and application. Thus, for example, the Italian and German versions of Article 18 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters differ from the French version, on which the preparatory discussions were based.

Inconsistencies may be found both in the wording of the Treaty and in the wording of secondary law.

The Court of Justice has encountered this problem on a number of occasions. In its above-cited judgment of 12 November 1969 [1] the Court selected the version which allowed the most liberal interpretation for the beneficiaries of welfare measures adopted by the Community. In its judgment of 13 March 1973 [2] the Court declared: 'No argument can be drawn either from any linguistic divergeces between the various language versions, or from the multiplicity of the words used in one or other of those versions, as the meaning of the provisions in question must be determined with respect to their objective'. [3]

In its judgment of 21 November 1974 [3] the Court held: 'By reason of the divergences that exist between the versions of this text in different languages it [Article 1 (4)] does not lend itself to a clear and uniform interpretation on the point in question. Accordingly, it must be interpreted by reference to the purpose and the general scheme of the implementing provisions on the treatment of another person as if he were a dependent child'.

In other words, it is necessary to have regard to the context and, in particular, to carry out a systematic analysis of the regulation and of its purpose. [4]

Section 2 — The meaning and scope of wide concepts ideas or definitions

I have had occasion to mention those ideas, definitions or concepts in the course of considering the 'evolutive' interpretation.

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[1] Case 29/69, Stauder [1969] ECR 419.

[2] Case 61/72, Mij PPW International NV [1973] ECR 310.

[3] In this case the Court did not, in fact, choose between the language versions.

[4] Cf. judgment of the Court of Justice of 1 December 1965, Case 16/65 [1965] ECR 877; and judgment of 8 May 1974, Case 183/73 [1974] ECR 484.

All the national legal systems contain such wide ideas, concepts or definitions, such as *boni mores*, 'acts which affront public decency', 'public policy' . . . As Judge Sørensen emphasized, the Convention for the Protection of Human Rights also contains 'vague general concepts' such as 'inhuman treatment', 'measures which are necessary in a democratic society . . .'.

It is clear that such ideas, concepts and definitions also exist in Community law.

Here are some examples:

The provisions of the European Treaties require all decisions to be *reasoned*. What is the scope of 'reasoned'? Its scope has been defined in countless judgments in accordance with the nature of the Community 'measure' and with the considerations which gave rise to the duty to provide a statement of reasons.

The ECSC Treaty draws a distinction between *general decisions* and *individual decisions* and the Treaties of Rome distinguish between *regulations* and *decisions*.

What do these concepts mean? The reply to that question is clearly of fundamental importance, in particular with regard to undertakings' rights of application (ECSC Treaty) and those of persons concerned other than the Member States, the Commission and the Council (Treaties of Rome).

Numerous judgments have defined the meaning and scope of those concepts.

What is the meaning and scope of the concept '*concerted practice*' referred to both by Article 65 of the ECSC Treaty and by Article 85 of the EEC Treaty? The judgments supply the answers.

I should also mention the judgment of 18 May 1962 in Case 13/60 which defines the concept of 'a substantial part of the products in question within the common market . . .' referred to by Article 65 of the ECSC Treaty.

I must also point to the numerous, important and interesting judgments of the Court on the question of non-contractual liability: must there be fault? (under the second paragraph of Article 215 of the EEC Treaty) a wrongful act or omission, liability arising from decisions in economic matters. [1]

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[1] Cf. the relevant judgment of 4 February 1975 in Case 169/73 in which it is emphasized that non-contractual liability cannot arise from the provisions of a treaty, in particular from the Accession Treaty.
Cf. also W. Van Gerven, '*De niet Contractuele Aansprakelykheid van de Gemeenschap wegens normatieve Handelingen*', Sociaal Economische Wetgewing, 1976, 2–28.

In the judgment of 19 March 1964 in Case 75/63 [1] it was necessary to define the meaning and scope of the concept 'wage-earners or assimilated workers' within the meaning of Article 19 of Regulation No 3. In its judgment of 5 July 1967 in Case 6/67 the Court had to decide the meaning in Article 45 of Regulation No 3 of the concept of the 'authorities' of a Member State which may not reject claims or other documents submitted to them on the grounds that they are written in the official language of another Member State.

Another wide concept is that of 'discrimination'. In a recent judgment, on 18 March 1975, in Joined Cases 44, 46 and 49/74, the Court did not define it (that is always extremely difficult, and even dangerous) and instead delivered a judgment which tends to define what it is not.

The concept of '*force majeure*' is a familiar one in all national legal systems. It relates to all branches of those systems. The national courts have had to define it. The Court of Justice was clearly faced with the same problem. In its judgment of 11 July in Case 4/68 the Court held: 'as the concept of *force majeure* is not identical in the different branches of law and the various fields of applications, the significance of this concept must be determined on the basis of the legal framework within which it is intended to take effect ... Thus, the interpretation of the concept of *force majeure* used in the regulation in question must take into account the particular nature of the relationships in public law between the importers and the national administration as well as the objectives of that regulation ...

The public interest which requires the most accurate forecast possible of the future development of imports in each Member State and warrants the lodging of a deposit on the issue of an import licence must be reconciled with the need, which is also a matter of public interest, for trade between States to remain unhampered by obligations, which are too rigid ...' [2]

Article 36 of the EEC Treaty allows Member States to establish or maintain prohibitions and restrictions on imports, exports or goods in transit 'justified on grounds of ... the protection of life ...'. Such prohibitions or restrictions 'shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States ...' In its judgment of 20 May 1976 in Case 104/75 the Court had to define the concepts of 'measures for the protection of health', 'justified on grounds of ...' and

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[1] [1964] ECR 177.

[2] Cf. also the judgment of 20 February 1975 in Case 64/74 ([1975] ECR 261).

'arbitrary discrimination . . .' and 'disguised restriction'. In order to define them, a court must take account of the facts and circumstances which can develop in particular because of the possibilities opened up by technical developments and changes in social relations. Without laying oneself open to criticism it is extremely difficult to appraise the requirements for and the means of protecting public health.

Section 3 — Reasoning, deduction, common sense — The spirit and objectives of the rules to be interpreted

1. In general

(a) *Introduction*

Amongst the numerous methods 'of interpretation' legal writers cite the 'logical' method and the means which are appropriate to this method or which characterize it: [1] reasoning *'a contrario'*, by analogy [2][3] *'de eo quod plerumque fit'* . . .

It is self-evident that this method does not enjoy a monopoly of logic. The courts, as general interpreters, must employ reason, logic, circumspection and intelligence when they use other 'methods': they investigate the meaning and scope of an instrument, of a rule on the basis of the wording and the context and scope of the latter, the problems or questions facing the 'legislator' . . . the aim and objectives of the rule, of the legislation, of the regulations . . .

Indeed in order to make use of the sources of law, and to interpret, appraise and judge the facts, this must be done with intelligence, logic, zeal, care, industry and perseverance, without which it is impossible to solve the many delicate and difficult problems involved in all the facts and facets of human activity.

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[1] The Court of Justice, like many courts, clearly has recourse to it: nevertheless it does so with the necessary circumspection. (Cf. in particular the judgments of 29 November 1956 in Case 8/55 and of 13 June 1958 in Case 9/56 and of 13 June 1958 in Case 10/56 and of 13 June 1958 in Case 15/57).

[2] Wide or strict interpretations also exist and I shall consider them later.

[3] In British law care is exercised not to fill legislative lacunae by the expedient of an interpretation by analogy, which leads, in theory, to the exclusion of all recourse to this method; it appears nevertheless that a more flexible attitude is adopted in practice: cf. *Wachtel & Wachtel* (1973) 2 W.L.R. 366, 372.
With regard to interpretations by analogy cf. in particular: J. M. Polak, *Op. cit.*, p. 33, Marsh, *Op. cit.* p. 68 and Obermayer, Neue Juristische Zeitschrift 1966/2, 1889.

I do not propose to spend much time in examining the various 'processes' and the so-called 'logical' method. I shall merely emphasize first, that these processes do not really exhaust the possibilities of the 'method' and, second, that they must, and generally are, treated with caution, because 'analogy' and 'arguments *'a contrario'* ... are only applied on relatively rare occasions.

I shall thereafter consider the reasoning, deductions and common sense of the courts, in particular, of the judges of the Court of Justice of the European Communities, and then submit my findings and reflections on the concept of 'wide or strict interpretation'.

(b) *Common sense — Nature of the concept or rule to be interpreted — Essential or fundamental principles of the Treaty*

'Methods' of interpretation cannot and should not be applied universally. In very many cases the Court of Justice does what any court would also have to do. A court is composed of people who think and is not a machine. It thinks out its decisions. It does so with wisdom and intelligence. Thus the Court of Appeal, The Hague, asked the Court of Justice whether it must be considered that the 'national taxes on salaries, wages and emoluments paid by the Community' (second paragraph of Article 12 of the Protocol on Privileges and Immunities) also refers to the school levy payable under the Netherlands Law on school levy'. In its judgment of 8 February 1968 in Case 32/67 the Court replied as follows: 'A charge or due representing the consideration for a given service rendered by the public authorities is not a tax within the meaning of the second paragraph of Article 12 of the Protocol ... even if that charge or due is calculated on the basis of the salary paid by the Community to the person liable'.

That conclusion was unavoidable.

The Court of Justice recalled the reasons for the immunity as to salaries, wages and emoluments paid by the Community. Such salaries, wages and emoluments must be subject to a common charge by the Communities and cannot be subjected to different taxes depending on the States in question in such a way that the situation of officials would vary according to their nationality. The judgment points out that Article 3 of the Protocol itself clearly states that no exemption shall be granted in respect of taxes and dues which amount merely to charges for public utility services. The Court declared: 'Neither the spirit nor the wording ... of the Protocol contains any factor capable of being relied upon against the charges and dues

required as a consideration for a given service supplied by public authorities'. [1]

The judgment of 4 April 1968 in Case 31/67 declared: 'The provisions of Article 95 of the Treaty establishing the European Economic Community do not prohibit Member States from imposing internal taxation on imported products from other Member States when there is no similar domestic product or other domestic product capable of being protected'. The Court arrived at this decision after having held: 'Although ... Article 95, both by the precision of the first paragraph and by the general nature of the terms of the second paragraph, contributes to the creation of a common market ensuring the free movement of goods, nevertheless its ambit would be extended beyond its proper objective if one were to deduce from it a prohibition on the imposition of internal taxation on imported goods *which do not compete with a domestic product*'.

As I have already indicated (see Section 2 of this Chapter) many judgments have been delivered concerning the extent of the duty to provide a statement of reasons. As we know Article 190 of the EEC Treaty and Article 15 of the ECSC Treaty require that a statement of reasons shall be given for all regulations, directives and decisions of the Council and of the Commission.

What is the extent of this duty to provide a statement of reasons? It is clear that this was not defined by the Treaties, and indeed it could not have been. The Court of Justice has rightly emphasized that the extent of this duty depends on the nature of the measure and of the facts and circumstances to which it relates. In order to determine this extent, the Court clearly pays regard to the *raison d'être* for the statement of reasons: to avoid arbitrariness, to ensure that the measure has been thought out, to enable the persons concerned to know the relevant facts and, in particular, to enable the measure to be reviewed, especially by the courts.

In the judgments of 1 February 1972 in Cases 49 and 50/71 the Court had to interpret an agricultural regulation, which required the national intervention agencies to purchase cereals which 'were offered to them', and in particular to establish the meaning and scope of the concept of 'offer'. The Court noted that, save in exceptional circumstances, events with such cogent consequences can become binding on the addressee ... only when they come to his knowledge. Is not this just plain common sense?

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[1] Similar considerations were involved in the judgment of 3 April 1968, in Case 28/67, relating to the second paragraph of Article 97 of the EEC Treaty.

In its judgment of 17 December 1959, in Case 14/59, the Court defined the concept of 'production in the coal or steel industry' within the meaning of Article 80.

The Court held: 'It is important above all to take into consideration the fact that the authors of Annex A have included in the list of products coming under the ECSC the category of foundry-iron and other pig-iron . . . without excluding from the jurisdiction of the Treaty foundries effecting initial smelting whilst other industries were explicitly excluded. *Accordingly it appears certain* that the draftsmen intended to bring foundries effecting initial smelting within the system of the Treaty in so far as they produce molten pigiron for foundries. The latter . . . The Court went on: 'Whilst such an outcome implies that an intermediate product, which is indeed to a certain extent transitory, is brought under the Community legal system, this does not appear in any way to conflict with *common sense and the basic principles of the Treaty*'.

(c) *Deductions — reasoning*

In its judgment of 14 March 1973 in Case 57/72 the Court scrutinized the provisions of a regulation of the Council and determined on that basis, as it was bound to, the powers of the Commission which had been disputed in proceedings before a national court. It decided in particular that the Commission was enabled under Article 9 (8) of Regulation No 1009/67, to exercise the powers necessary to ensure the functioning of the system of denaturing premiums in so far as the Council had not itself provided for it in another regulation. *It followed* (the Court declared) that, subject to the general rules laid down by the Council, the Commission had the right to decide on both the grant and the amount of denaturing premiums and that, therefore, it had the power to decide whether they should be suspended.

In its judgment of 23 January 1975 in Case 51/74 the Court held: 'The prohibition on the levying of charges having equivalent effect to customs duties on export in trade within the Community covers any charge levied at the time of or by reason of export of the product in question which produces the same restrictive effect as a customs duty on the free movement of goods'. From this, the Court reasoned as follows: 'To the extent that it may be established that the application of an internal levy falls more heavily on export sales than on sales within the country concerned the levy has an effect equivalent to a customs duty on export. Moreover, if an internal levy is the same on domestic sales and on exports, it may be necessary to take into account the use to which the revenue from these charges is put. If, in fact, a levy is designated to finance activities which serve to make marketing

within the country more profitable than exportation or in any other way to give preferential treatment to the product intended for the internal market, to the detriment of that intended for export, it is liable to impede exports and thus to have an effect equivalent to a customs duty . . .'.

(d) *Logical interpretation which confers a meaning on the provisions or rules to be interpreted*

I have already stated that the Court of Justice obviously refrains from drawing unreasonable conclusions.

The Court rightly states, in its judgment of 29 November 1956: [1] 'The Court considers that it is proper, without resorting to a wide interpretation, to apply a rule of interpretation generally acknowledged in national and international law in accordance with which the rules laid down by an international treaty or by a law imply those provisions without which those rules would be meaningless or could not be reasonably and correctly applied'. I should like to recall that, in its judgment of 9 February 1925, [2] the Cour de Cassation of Belgium held that: '. . . it is sometimes necessary to establish what the legislator meant rather than what he literally said; it is preferable as a general rule to assume that the legislator employed wording which imperfectly communicated his thoughts rather than arbitrarily to attribute thoughts to him'.

The Staff Regulations of Officials provides for an appeal to the made through official channels to the administration before an appeal is made to the Court of Justice. In its judgment of 8 July 1965, [3] the Court declared: 'It appears from Articles 90 and 91 of the Staff Regulations, read together, that appeals though official channels to the administration are subject to the same time-limit as applies to appeals to the Court of Justice, provided that they were themselves instituted within the time-limit laid down for appeals to the Court. In fact the intention of the authors of these regulations cannot have been to compel officials to commence simultaneously an administrative appeal through official channels and an appeal to the Court of Justice in order to avoid being out of time'.

The courts apply reason and make deductions . . . without which they could not give a ruling.

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[1] Case 8/55, Recueil 1955–1956, p. 290.
[2] Bulletin et Pasicrisie 1925, I, 129 especially p. 142.
[3] Joined Cases 27 and 30/64 [1965] ECR 481.

In this connexion i must quote from the opinion of Mr Advocate-General Warner in Case 9/75 *(Meyer — Burckhardt):* 'In his Opinion in Case 48/65 Mr Advocate-General Gand convincingly demonstrated why it was impossible for a private person to have any right to challenge the validity of a decision of the Commission declining to take action against a Member State under Article 169. *Much of Mr Advocate-General Gand's reasoning* seems to me to *lead also to the conclusion* that such a person cannot sue the Commission for damages in respect of such a decision. In particular, for the Court to entertain such an action would involve that it should, in the absence of that Member State as a party, and without affording it any of the safeguards afforded to a Member State under Article 169, decide whether or not it was in breach of the Treaty'.

It is clearly impossible to recount all the other examples which might be cited. I have placed some emphasis on this point because in certain quarters which ought to be involved in rather more scholarly activity, and in certain publications which arrogate to themselves the right to keep the public informed about the administration of justice, the role played therein of logical thought is not only forgotten, but is regarded as futile, feeble, even harmful.

2. Strict interpretation — Wide interpretation

(a) *In general*

This 'method' is applied by very many national courts and also by the Court of Justice. To refrain from conferring on certain rules or concepts an interpretation which is sometimes wide and at others strict would distort their meaning, scope, subject-matter and aim . . .

The method is also used by international courts. As Ch. de Visscher [1] wisely wrote on the subject of wide or strict interpretation: 'A strict interpretation is necessary if the provision in dispute derogates from the general law which is acknowledged to apply, or to principles established by the treaty to which that provision pertains; if the provision by its nature must be strictly interpreted because it derogates from the 'normal rule' in a certain field; if, when the court is faced with two provisions of equal authority, one of which appears to have a wider scope than the other, a strict interpretation reconciles the wording of the two provisions and to that extent accords with what was in all likelihood, the common intention of the parties; or if the

[1] *Problèmes d'interprétation judiciaire en droit international public,* Op. cit., p. 91.

clause to be applied deviates either from the underlying concept or from the general structure of the treaty'. [1]

This method of interpretation sometimes gives rise to comments, findings or conclusions with which it is not always easy to agree. Thus V. D. Degan writes: [2] 'Whilst the Court of Justice of the European Communities frequently employs such 'processes' of interpretation, the International Court of Justice never does so'. The explanation which he provides for this difference is a little difficult to follow: 'This marked difference in the practice of the two courts is perfectly understandable when one bears in mind that they are different in nature. The jurisdiction of the International Court of Justice is based on a special agreement between the parties to the dispute, unless they have agreed in advance to submit to the jurisdiction under Article 36 of the Statute of that Court. In either case, the States which are parties to the dispute have brought the matter before the court of their own free will; the Court must always take formal note of this. On the other hand, the jurisdiction of the European Court of Justice forms an integral part of the Community legal system which binds the Member States and their nationals. This jurisdiction is thus peremptory and it derives from a system superior to State sovereignty, although it was also established by treaties. The consideration of sovereignty cannot, in that case, serve as a pretext for a strict interpretation. On the other hand, since this Court is supra-national, it prefers to give Community provisions a wide rather than a restrictive interpretation, and this cannot be done by ordinary international courts. This is in practical terms, the explanation of this phenomenon. From a theoretical point of view there appears to be no justification whatsoever for any interpretation which is either wide or strict... In my view, artificial theories whether based on a strict or a wide interpretation are a departure from the essential task of interpretation, as described above, and for that reason can never be justified on any grounds'.

The principle of sovereignty is not the only factor which can justify a strict or wide interpretation. There are many other cases brought before the national courts and the Court of Justice in which a wide or strict interpretation is adopted, and is unavoidable. It is usual that if the Treaty

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[1] The International Court of Justice stated in its advisory opinion (International Court of Justice, Recueil 1956, p. 97): 'The considerations which could have been cited in favour of the strict interpretation of provisions governing the jurisdiction of a court called upon to deliver judgments between States and which was based upon the sovereignty of these States, does not apply to a court called upon to rule on the application of an official against an international organization'. *Les Sources du Droit des Juridictions Administratives Internationales,* Juris Classeur — 'L'Organization Judiciaire Internationale' — fasc. 230, No 81 et seq.

[2] Revue Trimestrielle de Droit Européen 1966, p. 189 et seq., especially pages 209 to 212.

has established a general principle . . . the courts will apply only restrictive derogations from this general principle. A study of the decisions of the Court reveals countless cases in which a sometimes strict, sometimes wide, interpretation is wholly justified.

Alain Fresia [1] refers in an interesting study to 'the enlargement' by the Court of Justice of the concept of discrimination and of its scope, 'the liberal interpretation by the Court', the fact that the Court of Justice has laid down that derogations from principle must be strictly interpreted, and, finally, to the fact that 'the Court has extended the case-law on direct effect to the free movement of persons'. The principle of non-discrimination is, indeed, wide but that was, essentially, the intention of the authors of the Treaty, the spirit of the Treaty, the effect of its provisions and even of a 'principle' which is of the essence of the Treaty. It is the Treaty which is liberal in the sense in which I understand it here. That constitutes its spirit and its *raison d'être.* It is the spirit which the Court must reflect when required to ensure the application of the principle of non-discrimination, in particular when it provides an interpretation requested by the national courts. Since non-discrimination is the principle, exceptions must be strictly interpreted . . . as otherwise this principle would be violated or ignored.

Indeed it is difficult to understand the relevance of the comment that 'the Court has extended its case-law on the direct effect of the provisions of the Treaty to the field of non-discrimination'.

The Treaty contains a large number of provisions which are directly applicable and which relate to all the fields which it covers. This is inherent in the very nature of the EEC Treaty, in particular.

(b) *The case-law of the Court of Justice*

In this case-law no arbitrary decision is made that a wide interpretation is necessary on some occasions and a strict interpretation on others. This body of case-law rests upon a foundation drawn from the provisions of Community law, their subject-matter, aim and nature . . .: it goes without saying that these justifications are also based on a process of reasoning and deduction.

Let us now consider some of those judgments.

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[1] *La libre circulation des personnes et le principe de non discrimination dans la jurisprudence de la Cour de Justice des Communautés européennes,* Revue du Marché Commun, December 1975, p. 550 et seq.

(i) Strict interpretation

Article 25 of the EEC Treaty enables the Council of Ministers to grant a Member State, in respect of imports of certain products from third countries, tariff quotas at a reduced rate of duty or duty-free.

In its judgment of 4 July 1963 [1] the Court of Justice held that this article must be interpreted restrictively . . . because it contains derogations from the common external tariff, which constitutes one of the 'foundations' of the Community.

The judgment of 21 June 1974: [2] this case had to settle whether the practice of the profession of *'avocat'* by a national of a Member State but who was not a national of the State in which he was to practise, is covered by the provisions of the first paragraph of Article 55 of the EEC Treaty. As we know, this article provides as follows: 'The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, *even occasionally*, with the exercise of official authority . . .'.

The Court held: 'Having regard to the *fundamental character* of freedom of establishment and the rule of equal treatment with nationals in the system of the Treaty, the exceptions allowed by the first paragraph of Article 55 cannot be given a scope which would exceed the objective for which this exemption clause was inserted. The first paragraph of Article 55 must enable Member States to exclude non-nationals from taking up functions involving the exercise of official authority which are connected with one of the activities of self-employed persons provided for in Article 52. This need is fully satisfied when the exclusion of nationals is limited to those activities which, taken on their own, constitute a direct and specific connexion with the exercise of official authority'.

The judgment states that the most typical activities of the profession of *avocat* such as consultation and legal assistance and also representation and the defence of parties in court, even when the intervention or assistance of the *avocat* is compulsory or is a legal monopoly, cannot be considered as connected with the exercise of official authority.

In its judgment of 26 February 1975 [3] the Court of Justice had to interpret Directive No 64/221 of the Council of 25 February 1964 on the coordination

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[1] Case 24/62 [1963] ECR 63.
[2] Case 2/74 [1974] ECR 631.
[3] Case 67/74 [1975] ECR 297.

of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. The question was raised whether the directive, particularly Article 3 thereof, allows the deportation of a national of a Member State for the purpose of deterring other foreign nationals from committing such criminal offences as those with which the person deported was charged or similar offences or other infringements of public security or public policy, that is, for reasons of a *general preventive nature.* The Court of Justice replied in the negative: those provisions must be interpreted in the light of the objectives of the directive which "seeks in particular to coordinate the measures justified on grounds of public policy and for the maintenance of public security envisaged by Articles 48 and 56 of the Treaty, in order to reconcile the application of those measures with the basic principle of the free movement of persons within the Community and the elimination of all discrimination . . .'.

The Court continued: 'Article 3 of the directive provides that measures adopted on grounds of public policy and for the maintenance of public security against the nationals of Member States of the Community cannot be justified on grounds extraneous to the individual case, as is shown in particular by the requirements set out in paragraph (1) that "only" the "personal conduct" of those affected by the measures is to be regarded as determinative'.

The Court deduced from the foregoing that, as *departures from the rules concerning the free movement of persons* constitute *exceptions which must be strictly construed,* the concept of 'personal conduct' expresses the requirement that a deportation order may only be made for threatened breaches of the peace and public security which might be committed by the individual affected. A deportation order may not, therefore, be based on considerations of a general preventive nature. [1]

Article 90 (2) of the EEC Treaty provides that: 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, *in so far as the application of such rules* does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

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[1] Cf. also the judgment of 21 June 1974 in Case 2/74, *Reyners* [1974] ECR 631.

The Court of Justice was asked under Article 177 of the EEC Treaty whether the expression 'undertaking entrusted with the operation of services of general economic interest' covered an undertaking (SABAM) entrusted by its members with the management of their copywrights. In its judgment of 21 March 1974 [1] the Court stated: 'As Article 90 (2) is a provision which permits, in certain circumstances, *derogation* from the rules of the Treaty, there must be a *strict definition* of those undertakings which can take advantage of it. Private undertakings may come under that provision, but they must be entrusted with the operation of services of general economic interest by an act of the public authority. ... That is not the position in the case of an undertaking to which the State has not assigned any task and which manages private interests, including intellectual property rights protected by law'.

The Staff Regulations grants allowances for persons, usually children, dependent on officials. The Staff Regulations treat certain persons, such as a divorced wife, as a dependent child.

In its judgment of 21 November 1974 [2] the Court held that it is necessary to bear in mind that treatment as a dependent child has an exceptional character which is emphasized by the very text of Article 2 (4) of Annex VII to the Staff Regulations which provides that this can only be done exceptionally and by special reasoned decision.

A decision of the Commission of 12 February 1969 allowed certain categories of consumers to buy butter at a reduced price and authorized the Member States to make butter available at a reduced price to certain categories of consumers who are beneficiaries under a social welfare scheme and whose income does not enable them to buy butter at normal prices. Article 4 of this decision, which was addressed to the Member States, was drafted differently in the various languages of the European Communities. The Verwaltungsgericht Stuttgart asked whether Article 4 of the decision of the Commission, making the sale of butter at a reduced price to beneficiaries under certain welfare schemes *subject to the condition that the name of the beneficiaries shall be divulged to retailers,* can be considered compatible with the general principles of Community law in force.

After emphasizing that the wording of the decision must be interpreted in the light of the versions in all four languages, the Court, in its judgment of 12 November 1969 [3] held that: 'In a case like the present one, the most

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[1] Case 127/73 [1974] ECR 313.
[2] Case 6/74 [1974] ECR 1287.
[3] Case 29/69 [1969] ECR 419.

liberal interpretation must prevail, provided that it is sufficient to achieve the objectives pursued by the decision in question'.

No doubt this does not really constitute a restrictive interpretation but it is a similar process; lawyers of our background confer a strict interpretation on any provision which is capable of adversely affecting human liberty or dignity, more precisely they only confer upon it the scope which is indispensable for attaining its objective.

The Court held, in its judgment of 15 July 1960 in Case 20/59, commenting on Article 88 of the ECSC Treaty — which relates to the recording of the failure of a State to fulfil an obligation, that this constitutes a procedure far exceeding the rules previously acknowledged in classical international law in order to ensure that States fulfil their obligations and that 'Article 88 must therefore be *interpreted strictly*'.

It is impossible seriously to dispute that this line of reasoning and the decision of the Court are well founded. The Member States have indeed alienated their sovereignty but only to a limited extent. If the Court of Justice were to interpret widely the provisions of the Treaty establishing those alienations of sovereignty it would exceed its task and moreover clearly infringe the law.

Let me further cite the opinion of Mr Advocate-General Reischl in Case 63/75: 'My basic view on this is that Article 4 (2) of Regulation No 17 must not have too wide an interpretation since it is a provision constituting an exception' (it should be recalled that he is referring to Article 4 (2) of Regulation No 17 on competition. Article 4 (1) provides that agreements, decisions and concerted practices etc. which come into existence after the entry into force of the said regulation and in respect of which the persons concerned seek the application of Article 85 (3) must be notified to the Commission . . . Paragraph 2 provides that paragraph 1 shall not apply to agreements, decisions or concerted practices where . . .). [1]

I wish to conclude these citations with the finding that strict interpretation does not exclude the need to accord to the provision, even one which requires to be restrictively interpreted, the entire scope which constitutes the justification and aim of its existence. This also holds good in criminal law which requires strict interpretation and excludes analogy.

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[1] With regard to derogations from the free movement of goods and the establishment of the common commercial policy see also the judgment of the Court of 8 April 1976 in Case 29/75, *Kaufhof*.

(ii) Wide interpretation

The view which has just been expressed is not at variance with what was decided by the Court in its judgment of 15 July 1963.[1] The Court was required to settle whether a decision addressed to a Member State must be considered under the second paragraph of Article 173 of the EEC Treaty, as a decision addressed 'to another person' which is of direct and individual concern to one of the natural or legal persons referred to by the said second paragraph.

The Court considered on the one hand that the words and natural meaning of the said provision justify the broadest interpretation, and on the other hand that the 'provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively. Therefore, the Treaty being silent on the point, a limitation in this respect may not be presumed'.

It certainly cannot be disputed that the authors of Article 173 of the EEC Treaty intended *to limit* the opportunities of the persons referred to by the second paragraph of that provision to submit to the Court of Justice applications disputing the legality of measures of the Council or of the Commission, and that they have thus established a *restricted right of application*. Nevertheless it is necessary to confer on the provisions of the second paragraph of Article 173 the *entire scope* which follows from the provision itself.

The Court was asked whether reduction cards issued by a national railway agency to large families constitutes for the workers of the Member States a social advantage and whether an advantage which is conferred after the death of the worker constitutes such an advantage.

In its judgment of 30 September 1975 in Case 32/75 the Court of Justice replied to those questions in the affirmative.

It had been claimed before the Court of Justice that the advantages provided for by that Community provision were only accorded by reason of the beneficiary's status as a worker and *that they were connected with the contract of employment itself*.

The Court held: 'Although it is true that certain provisions in this regulation refer to relationships deriving from the contract of employment, there are others ... which have nothing to do with such relationships ... It

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[1] Case 25/62 [1963] ECR 95.

therefore follows that, in view of the equality of treatment which the provision seeks to achieve, the substantive area of application must be delineated so as to include all social and tax advantages, whether or not attached to the contract of employment, such as reductions in fares for large families'.

This undoubtedly constitutes a *wide interpretation* but one which follows from the regulation to be interpreted viewed as a whole.

(c) Conclusions

It is necessary on some occasions to effect a wide interpretation and on others a strict interpretation. The provisions of the Treaty are to be given the meaning and scope inherent in them. To refrain from such an interpretation often does violence to the nature of the provisions and the effect which is clearly required.

The *external common tariff* constitutes one of the foundations of the Community. Consequently provisions which permit, as an exception, exportations to be effected on other conditions than those laid down by that tariff cannot be accorded a wide interpretation, that is to say they must be strictly interpreted if this 'foundation of the Community' is not to be set at naught.

Freedom of establishment and *freedom of movement* also constitute fundamental 'principles' of the Treaty. Those principles would be frustrated if a wide instead of a strict interpretation were placed upon the exception with regard to freedom of establishment concerning public offices as well as to the exception with regard to freedom of movement concerning the powers retained by the Member States in order to maintain public security, public order and public health.

Similar considerations might be advanced with regard to the strict interpretations (which I have already quoted) by the Court of the provisions on competition or proceedings instituted by officials.

3 — Interpretation taking account of the generality, nature, subject-matter, aim, objective and of the spirit . . .

(a) The generality, the nature of the 'scheme of regulations', the organized system and the context

The judgment of 25 June 1975 [1] underlines the need to consider a scheme of regulations in its entirety and to discover how 'it fits together'. This

[1] Case 17/75 [1975] ECR 781.

judgment concerned the interpretation of Regulation No 3 on migrant workers.

When required to determine the extent of the Commission's powers and duties in implementing a Council regulation and, thus, to decide whether or not a commission regulation was 'valid' the Court of Justice held in its judgment of 18 March 1975 [1] that: 'When considered in the context of the system in which it took effect, the discontinuance of the increase in the premium' ordered by the regulation of the Commission '*obviously* has the purpose ... of avoiding the disturbances which the Council Regulation has in mind'.

In order to obtain an export refund — under regulations governing the pigmeat sector — *an application must be submitted by the person concerned.* In its judgment of 22 January 1975 [2] the Court said that 'Although, having regard to the necessities of the *proper functioning of the complex system* of export refunds, Article 15' (of the regulation) 'must be interpreted as implying a written application, formalism which would go beyond *the necessities of efficient control* must be avoided' ... Consequently ... the control copy is sufficient if it .... The Court was called upon to determine the meaning and scope, as regards Article 56 (2) of Regulation No 4, of the words 'direct notification' — that is, notification of a decision of a social security body to a claimant who is resident in another State. The judgment given on 18 February 1975 [3] provides an interpretation which does not necessarily flow directly from the terms used, but rather, first, from the aim and the purpose of the provision in question when considered in the light of the Community rules on social security as a whole ... and, secondly, from the European 'harmonization' in social security matters which requires that the words 'direct notification' be given a meaning which coincides with a practice corresponding to such 'harmonization' and necessarily preferable to the other traditional means of notifying administrative decisions which must be sent abroad. [4]

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[1] Case 78/74, [1975] ECR 421.

[2] Case 55/74, [1975] ECR 9.

[3] Case 66/74, [1975] ECR 157.

[4] The International Court of Justice at The Hague, like the Court of Justice of the European Communities, and all national courts, necessarily considers the context and the rules as a whole. As regards the International Court of Justice at The Hague cf. in particular the Etude by V. D. Degan, in the Revue Trimestrielle de Droit Européen for 1966, pages 188 et seq.

(b) Interpretation in the light of the provision of the Treaty which the regulation to be interpreted must implement

In judgment of 9 June 1964 [1] an interpretation was provided of Article 12 of Regulation No 3 concerning social security for migrant workers, which provides that: 'Save as otherwise provided under this Head, wage-earners or assimilated workers employed in the territory of one Member State shall be subject to the legislation of that State . . .'. The Court was asked whether this article must be construed to mean that the persons to whom it refers are subject *only to the legislation of the Member State* in whose territory they are employed.

The Court of Justice considered that: (1) Regulation No 3 was made pursuant to Article 51 of the EEC Treaty, according to which . . . The Court concludes from this that the Treaty has thus placed upon the Council the duty to lay down rules preventing those concerned, in the absence of legislation applying to them, from remaining without protection in the matter of social security. (2) With a view to achieving this object it was necessary to make provision for the mandatory application of specific legislation. (3) Article 12 includes no provision prohibiting the simultaneous application of several systems of legislation. In the circumstances the intention of the authors of the regulation to impose such a restriction on the freedom of the national legislature should be presumed only to the extent that such simultaneous application is clearly contrary to the spirit of the Treaty and particularly of Articles 48 to 51. (4) These provisions do not preclude legislation by the Member States designed to bring about additional protection by way of social security for the benefit of migrant workers.

The Court therefore ruled:

(a) Article 12 does not prohibit Member States other than those in the territory of which wage-earners or assimilated workers are employed from applying their social security legislation to such persons,

(b) it is otherwise only if a Member State, other than that in the territory of which the worker is employed, requires him to contribute to the financing of an institution which would not accord him supplementary protection by way of social security in respect of the same risk of the same period.

When called upon again in Case 90/75 to interpret Article 12 of Regulation No 3, the Court of Justice repeated in its judgment of 25 November 1975 that, in order to define its meaning and scope, this regulation must be

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[1] Case 92/63, [1964] ECR 281.

interpreted in the light of Articles 48 to 51 of the Treaty which form or determine the framework, the basis and the bounds of the social security regulations. [1]

In its judgment delivered on 30 October 1974 [2] in reply to the question of: 'Whether a regulation such as the Hyacinth Cultivation Regulation, 1971, in a Member State is consistent with Article 10 of Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage' (Netherlands Decree). [3]

The Court considered that: 'In the absence of express provisions as to the compatibility of a national regulation restricting production with the organization of the market set up by Regulation No 234/68, it is necessary to seek the solution to the question referred in the light of the objects and the purposes of the Regulation within the framework of the principles laid down by the Treaty itself'. The Court concluded: 'Article 10 of the regulation ... excludes any national system having the purpose of quantitatively restricting the cultivation of one of the products falling within the common organization of the market'.

(c) Object, aim and purpose of the regulation – Meaning and spirit

Object and aim' — Ch. de Visscher [4] writes that the two terms are often regarded as synonymous. However, he writes that one must beware of the conclusions which may be drawn from their use. Properly speaking the object of a treaty is the obligations it prescribes, that is, its legal effect. On

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[1] When required to interpret Articles 27 and 28 of Regulation No 3, in its judgment in Case 1/67 ([1967] ECR 181) the Court defined the meaning and scope of Articles 27 and 28 of Regulation No 3 in the following terms: 'In view of the difficulties of interpretation of these provisions it is necessary to consider them in the light of Articles 48 to 51 of the Treaty which the regulations in the field of social security have as their basis, their framework and their bounds ... These provisions establish' (Article 51) 'at the outset that the regulations, regarded as a whole are intended, in certain circumstances, to benefit the migrant worker as compared with the situation which would result for him from the exclusive application of national law. In case of doubt these regulations must therefore be interpreted in the light of this objective'.

[2] Case 190/73 [1974] ECR 1123.

[3] The terms of this Royal Netherlands Decree prohibit the cultivation of hyacinth bulbs by any person who is not the holder of a cultivation licence issued annually for a specific area of cultivation by the competent 'Produktschap'. Article 10 of Community Regulation No 234/68 prohibits, *inter alia* in the internal trade of the Community 'any quantitative restriction or measure having equivalent effect'.

[4] *Problèmes d'Interprétation Judiciaire en Droit International Public,* pages 62 et seq.

the other hand, the aim is a teleological factor; it refers to the ends which the contracting parties wish to attain. He further emphasizes the danger of giving premature priority either to the object or aim of a convention which runs the risk of falling into the exaggerations of the so-called teleological method. In spite of this necessary prudence, the case-law of the two courts (of two international courts) demonstrates the importance given by its interpretative decisions to the determination of the object or even of a basic idea which merely underlies the convention. [1]

As we know, Article 48 of the EEC Treaty lays down the principle of freedom of movement for workers, which entails the abolition of any discrimination as regards remuneration and other conditions of work and employment. However, paragraph 4 of this article specifies that: 'The provisions of this article shall not apply to employment in the public service'.

In its judgment of 12 February 1974, [2] in reply to the question of whether paragraph (4) [of Article 48] permits discrimination to be practised in the public service between the nationals of a State who are employed in the public service of that State and the nationals of other States, where both types of nationals are employed in that public service, the Court rightly replied in the negative. It considered that:

(a) the exceptions made by Article 48 (4) cannot have a scope going beyond the aim in view of which this derogation was included;

(b) the interests which this derogation allows Member States to protect are satisfied by the opportunity of restricting admission of foreign nationals to certain activities in the public service;

(c) on the other hand, this provision cannot justify discriminatory measures with regard to remuneration or other conditions of employment against workers *once they have been admitted to the public service;*

(d) the very fact that they have been admitted shows indeed that those interests which justify the exceptions to the principle of non-discrimination committed by Article 48 (4) are not at issue.

In order to decide what action a Member State may or may not take under Community regulations the Court takes account of the objective of such

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[1] However, the Institute of International Law at its meeting in Granada in 1956 showed a certain reticence as regards this method of interpretation. For this reason the meeting placed it in the lowest category of proper methods of interpretation.

[2] Case 152/73, [1974] ECR 153.

regulations. In its judgment of 22 January 1976 in Case 60/75 [1] it considered that 'since one of the principal objectives' of the common organization of the market in cereals 'is to guarantee to producers a price based on the target price this objective is jeopardized where the actions of the State agency are of such a nature as to influence conditions on the market and to induce a tendency to force prices below that level. It must therefore be concluded that the action of a Member State in purchasing durum wheat on the world market and subsequently reselling it on the Community market at a price lower than the target price is incompatible with the common organization of the market in cereals ... Regulation No 120/67 is in fact intended to shield the development of Community agricultural production from fluctuations in market prices and thereby to ensure a fair standard of living for the agricultural Community and to stabilize markets by means of Community levies and refunds, protecting the operation of the common agricultural market against the risks of the world market ... Consequently, an individual farmer may not claim that he has suffered damage under Community law if the price which he has actually obtained on the market exceeds the target price ... If such damage has been caused through an infringement of Community law the State is liable to the injured party for the consequences in the context of the provisions of national law on the liability of the State'.

As regards Regulation No 3 concerning migrant workers, the judgment of the Court of Justice of 30 June 1966 [2] stated that its interpretation of the question submitted to the Court 'conforms *with the spirit* of Articles 48 to 51 of the Treaty as well as with that of Regulation No 3, which is, in addition to protecting the migrant worker *stricto sensu,* to prevent territorial provisions from being applied against workers or their survivors in matters of social security'.

Furthermore the judgment of 13 July 1966 [3] stated that: 'The question whether there is an improvement in the production or distribution of the goods in question, which is required for the grant of exemption, is to be answered in accordance with *the spirit of Article 85*'.

The Court has further considered the question of the legal position of an insured person who has continued to work and to pay contributions with a view to acquiring rights to a higher pension and against whom the national institution responsible for payment of the said pension had invoked on the basis of Articles 27 and 28 of Regulation No 3 the right on its own initiative to make a payment of the pension on the same date when the insured person obtained the payment of another pension in another Member State.

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[1] [1976] ECR 45.

[2] Case 61/65, [1966] ECR 261.

[3] Joined Cases 56 and 58/64, [1966] ECR 299.

In its judgment given on 5 July 1967 [1] the Court decided that 'the solution to this question ... can only emerge from the interpretation of those regulations in the light of the objectives of the provisions of the Treaty (Articles 48 to 51) ... Since ... this system' of social security 'aims at conferring on migrant workers the advantages corresponding to their various periods of work, it may not, in the absence of an express exception in conformity with the objectives of the Treaty, be applied so as to deprive them of the benefit of part of the legislation of a Member State'. The judgment continues by stating that there is no general obligation in Community law requiring an insured person to seek the simultaneous payment of various pensions.

The judgment given on 17 December 1970 [2] determines the nature and scope of the Commissions's powers to adopt implementing regulations, taking into account the *'scheme and objectives'* of the Council Regulation which form the basis of the action taken by the Commission.

The Court was asked whether, after the entry into force of the Common Customs Tariff, Member States were free to introduce or maintain charges having an effect equivalent to customs duties in their relations with third countries. In its judgment of 13 December 1973 [3] settling this matter the Court pointed out that although, unlike Section 1 of the Chapter [of the Treaty] relating to the customs union, Section 2 of the same Chapter makes no mention of 'charges having an effect equivalent to custom duties', this omission does not mean that such charges may be maintained, still less introduced. It stated that in answering the question as to the application of such charges in trade with third countries, account must be taken both of the requirements resulting from the establishment of the Common Customs Tariff, and of those resulting from a common commercial policy. It further specified that, according to Article 113 (1) of the Treaty, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade. The definition of these uniform principles involves, as does the common tariff itself, the elimination of national disparities, whether in the field of taxation or of commerce, affecting trade with third countries. The Court concluded: 'it follows ... that, subsequent to the introduction of the Common Customs Tariff, all Member States are prohibited from introducing, on a unilateral basis, any new charges or from raising the level of those

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[1] Case 9/67, [1967] ECR 229.
[2] Case 25/70, [1970] ECR 1161.
[3] Joined Cases 37 and 38/73, [1973] ECR 1609.

already in force ... The reduction or elimination of existing charges on goods imported directly from third countries is a matter for the institutions of the Community'.

In a case concerning a decision of the Commission adopted under Article 85 of the EEC Treaty, which the Court was asked to declare invalid, the applicant had maintained that the agreement in question had been concluded not between undertakings, but between associations of undertakings, and that therefore it was not covered by Article 85. In its judgment given on 15 May 1975 [1] the Court of Justice considered that: 'Article 85 (1) applies to associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results to which it refers. To place any other interpretation on Article 85 (1) would be to remove its substance. [2]

The Court has thus interpreted the rules on the basis of the object of the regulations or their purpose as generally expressed in precise terms in a treaty, or even as deduced from such treaty. It has done this *inter alia* by comparing the rule with the title of a chapter in Treaty, [3] with the aims expressly assigned to the Communities by the Treaties [4] or with the aims of the Treaties considered as a whole. [5]

4. Overall view — Determination of the nature, essence and necessary consequences of the European structure — 'Construction by the courts'

The Court must, of course, take an overall view of the European structure as it is shown by the Treaties. This view enables it to define in detail the meaning and scope of the fundamental 'concepts' on which the Communities

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[1] Case 71/74, [1975] ECR 563.

[2] In interpreting Article 3 (2) of the Treaty of Lausanne (frontiers between Turkey and Iraq) the Permanent Court of International Justice considered in its advisory opinion given on 21 November 1925 that: 'Thus, it is in the wording that the Court must first seek to discover *the intention of the contracting parties*, although it may, if necessary, consider later the extent to which factors other than the wording of the Treaty should be taken into account in pursuing this objective' (Series B, No 12, p. 19).

[3] Judgment of 19 March 1964 in Case 75/63, *Hoekstra (née Unger)* [1964] ECR 177; Judgment of 5 July 1967, Case 1/67, *Ciechelski* [1967] ECR 181; Judgment of 9 June 1964, Case 92/63, *Mrs Nonnenmacher, Widow of H. E. Moebs* [1964] ECR 281; Judgment of 27 October 1971, Case 23/71, *Janssen* [1971] ECR 859.

[4] Judgment of 21 February 1973, Case 6/72, [1973] ECR 215 (this judgment shows the binding force of the preliminary provisions of the Treaty); Judgment of 31 March 1971, Case 22/70, [1971] ECR 263.

[5] Judgment of 9 July 1969, Case 5/69, *Völk* [1969] ECR 295: Judgment of 13 February 1969, Case 14/68, *Walt Wilhelm and Others* [1969] ECR 1.

are built. As I have already said, Judge Pescatore has brilliantly explained the nature and meaning of these concepts. [1] The Court has referred to them, in particular to give a proper interpretation to numerous Community provisions [2].

Such an overall view, which pays particular attention to the essential characteristics, is clearly also necessary in order to classify the Communities from a legal point of view: federal, prefederal, quasi-federal, confederal (?) institutions, union of States, special types of 'Communities' (?)

It was only possible for the noteworthy judgments of the Court of Justice defining in detail the nature of the relationships between Community law and the national laws and the practical consequences which flow therefrom to be given in the light of both this overall view and, in particular, the nature, essence and necessary consequences of the European structure. I am referring here to the judgments of the Court of Justice concerning the supremacy of European law which have formed the basis of judgments of national courts which are generally in conformity with this concept. [3]

When trying to define the concept 'interpretation' in the first chapter of my examination, [4] I refered to 'construction by the court' while emphasizing the dangers of confusion to which such a description may give rise.

This overall view also results in the essential harmonization and coordination of the rules with which I shall deal in the following section.

Section 4: Harmonization and co-ordination of rules — Decision as to which must be applied

1. General considerations

In all developed societies, and particularly at the present day, rules of positive law are very numerous. They are not intended to thwart or to weaken the application of each other. Their harmony and co-existence are dependent upon the vigilance of the courts which must also take account of the

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[1] Les Objectifs de la Communauté Européenne, comme Principes d'Interprétation dans la Jurisprudence de la Cour de Justice — in Miscellanea, W. J. Ganshof van der Meersch, pp. 325 et seq.

[2] See above, Section 3, Point 2, Strict interpretation — Wide interpretation.

[3] Cf., in particular, the recent Judgment No 232 of the Italian Corte Costituzionale of 22 October 1975.

[4] Chapter I, Interpretation — Concept — Section 1.

amendment or 'refinement' of the old rules by the new. Academic legal writing is quite wrong in referring, as it often does, to 'discrepancies' between rules of law: genuine discrepancies only exist in rare cases. Of course, an apparent discrepancy may exist where a rule of law is in conflict or is irreconcilable either with another rule of higher status, or with a provision of international law, which clearly and especially includes European law. However, in such cases the discrepancy is only apparent, since one of the rules must take precedence over the other which is, therefore, without legal effect.

The co-ordination and harmonization of rules is often a difficult and delicate task, but one which is necessary and inevitable. Very often the courts must bring rules of law into line and at the same time take into consideration several of these rules — such as laws, general principles . . . — a task whose object and effect is not to establish new or different rules of law but rather to define their scope or exact meaning and to discover, by means of decisions and judgments, which rule is applicable to specific situations.

Where several rules must be considered the courts have often to decide whether one is to take precedence over another and whether or not it is necessary to 'borrow' elements from the other.

These difficult tasks have been the work of the Court of Justice in particular, as well as of the other courts.

Some examples will be given later.

2. The case-law of the Court

(a) *Harmonization and co-ordination*

1. The members of the European Parliament enjoy immunity from legal proceedings 'during the sessions of the Assembly' (Article 9 of each of the Protocols to the three Treaties on Privileges and Immunities, before the Merger Treaty).

But when is the European Parliament in session? Article 22 of the ECSC Treaty provides that it shall meet, without requiring to be convened, on the second Tuesday in May; that the session may not extend beyond the end of the current financial year (namely 30 June); and that it may be convened in extraordinary session. Article 139 of the EEC Treaty provides that the Assembly shall meet, without requiring to be convened, on the third Tuesday in October and that it may meet in extraordinary session.

As the ordinary session begins on the third Tuesday in October, it must, in the absence of any provision for its closure on a given date, be deemed to be always in session after that date.

In consequence, in its judgment of 12 May 1964, [1] the Court held that, as the said Articles 9 apply to an institution which is common to the three Communities, they must be interpreted together with Article 22 of the ECSC Treaty and Article 139 of the EEC Treaty and that the words 'during the sessions of the Assembly in Article 9 must be interpreted as follows: subject to the dates of opening and closure of the annual session determined by Article 22 of the ECSC Treaty, the European Assembly must be considered in session, even if it is not actually sitting, up to the time of the closure of the annual or extraordinary sessions'.

2. In its judgment of 20 February 1975, [2] the Court had to 'co-ordinate' a provision in the Staff Regulations of Officials relating to expatriation allowances and a provision prohibiting discrimination, in particular between male and female officials.

The Staff Regulations provide that officials are entitled to an expatriation allowance which, if the officials concerned are or have been nationals of the State in whose European territory the place where they are employed is situated, is only payable if certain special conditions are fulfilled.

A female official of Belgian nationality had married an Italian. The judgment found that, under Italian law, she had automatically acquired Italian nationality on her marriage.

The Court held that it was necessary to 'define the concept of . . . nationality under Article 4 . . . as excluding nationality imposed by law on a female official upon her marriage with a national of another State, when she had no possibility of renouncing it'.

The Court based this interpretation on the need to take account of the principle that there must be no discrimination between male and female officials, 'since under no national legislation does the male official acquire the nationality of his wife'.

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[1] Case 101/63 [1964] ECR 195.

[2] Case 21/74 [1975] ECR 221: same decision in the judgment of the same date in Case 34/74 [1975] ECR 235.

3. In its judgment of 12 July 1957 [1] the Court ruled on the question whether administrative measures which create individual rights, in particuler the instrument appointing an official, can be revoked.

It accepted the view that illegal measures may be revoked, at least within a reasonable time. It did not accept the view that legal and, therefore, valid measures were revocable.

The issue was much more a question of harmonization and of co-ordination than of a lacuna. The written law enables an authority to appoint officials. But the public service is subject not only to the principle of continuity but also to that of 'change' imposed by its actual requirements and by political considerations.

Written rules also provide that the official appointed has rights and duties.

Are the official's rights such as to defeat any right the authority may have to go back, within its discretion, on its previous decision? The problem was therefore to harmonize the rights, powers or jurisdiction of the authority, on the one hand, and the rights of officials, on the other.

4. It has been necessary, in a large number of judgments, to define the difference between an action for annulment and an action for a declaration of liability, to stress that each of these actions is a separate remedy. Other judgments have determined whether the Community can be liable for a wrongful administrative measure even if it had not been annulled. Other judgments have taken into consideration the distinction between a measure which is illegal and a measure, the illegality of which gives rise to non-contractual liability on the part of the Community. I cannot mention here all those interesting judgments which have often been most helpfully summarized as a contribution to jurisprudence by the Advocates-General. [2]

5. In its judgment of 23 April 1956 [3] the Court held that the provisions of Article 4 of the ECSC Treaty constitute the provisions establishing the Common Market of the Community; in consequence, they are directly applicable if they are not repeated elsewhere in the Treaty. If, however, the provisions of Article 4 are referred to, repeated or supplemented in other parts of the Treaty, the wording of all the passages relating to one particular provision must *be read together and simultaneously applied'*.

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[1] Joined Cases 7/56 and 3 to 7/57 (Recueil 1957, page 85).

[2] Opinion of Mr Advocate-General Roemer in Case 5/71, Recueil 1971, page 975; opinion of Mr Advocate-General Trabucchi in Cases 4 and 30/74 and opinion of Mr Advocate-General Warner in Case 9/75.

[3] Cases 7/54 and 9/54 (Recueil 1955/56, page 55).

On 21 June 1958 [1] the Court held that Articles 2 to 5 of the ECSC Treaty must at all times be complied with, because they lay down the fundamental objectives of the Community. Nevertheless, the Court added, it is necessary to *reconcile* to a certain degree the *various objectives* in Article 3, since it is obviously impossible to attain all of them simultaneously and each to the fullest possible extent, since these objectives are general principles and the aim must be to put them into effect and harmonize them as far as this is humanly possible.

(b) *Determination of the scope of rules which have to be considered simultaneously, and, where appropriate, their order of priority.*

The principle 'patere legem quam ipse fecisti' and the protection of legitimate expectations or legal certainty

In its judgment of 5 June 1973 [2] the Court was asked to determine whether the Council of Ministers can be bound by a 'decision' which it has previously adopted.

Under the law of several Member States, the principle *'patere legem quam ipse fecisti'* [3] does not allow an authority which has adopted a set of rules to derogate from them in individual cases but this in no way prevents the authority from amending this set of rules.

This was the first rule which had to be considered in the case before the Court.

Another rule was that an administration must not disappoint the legitimate expectation of the persons subject to its administration.

The two principles or rules were set against each other.

The Court resolved the problem by giving the principle of the need to protect legitimate expectation a scope which it would not normally have had in the case-law of the Member States or of some of them.

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[1] Case 8/57 (Recueil 1958, p. 223).

[2] Case 81/72 [1973] ECR 575.

[3] This principle seems to me to be based, in the first place, on common sense; if an authority which has enacted a regulation, that is to say a general provision, cannot derogate from it in individual cases, it runs the risk of depriving the regulation of its force and effect, of its *raison d'être*. (In certain countries, the principle of the supremacy of Parliament may justify particular derogations from the general provisions of a law). The principle is based, in the second place, on the needs of a State holding to the rule of law and on legal certainy.

The Court held that, under the terms of Article 65 of the Staff Regulations of Officials 'the Council shall each year review the remunerations [paid by the Communities] . . . Both the historical background and the terms of the decision [of the Council of 21 March 1972] make it clear that the Council intended to bind itself to observe fixed criteria in the working out of subsequent measures relative to the periodic determination of remunerations'. The Court went on to say that 'by its Decision of 21 March 1972, the Council . . . assumed obligations which it has bound itself to observe for the period it has defined'.

The Court concluded: 'Taking account of the particular employer-staff relationship which forms the background to the implementation of Article 65 of the Staff Regulations, and the factors taken into account in consultations and involved in its application, the rule protecting the staff's legitimate expectation that the authorities would stand by undertakings of this nature, implies that the Decision of 21 March 1972 binds the Council in its future action'. The Court was careful to state that although the rule for protecting legitimate expectations 'is primarily applicable to individual decisions, the possibility cannot by any means be ruled out that it may apply, where appropriate, to the exercise of more general powers . . . Furthermore, the adjustment each year of remunerations provided for in Article 65 only constitutes an implementing measure of an administrative rather than a legislative nature, which is within the framework of the Council's application of that provision'. [1]

Section 5 The 'lacunae' in the 'law' or in Community law — Concept — Necessary restatement of this question.

1. Concept

It must be said that the concept of a lacuna would justify a comprehensive and detailed jurisprudential study and obviously learned writers have already applied their minds to its meaning (very frequently), to the problems it creates and their impact on the court's task.

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[1] Another example is provided by the judgment of 9 December 1975 in Case 57/75 relating to the interpretation of Regulation No 3 and, in particular, to the determination under this regulation of the rights of migrant workers to an invalidity pension, which held that the answer to the question must be based both on Article 27 (1) and on Article 28 (1) (b) and (c) of the said regulation.

First of all so far as the *meaning of the word* is concerned; a lacuna is 'une interruption dans le texte ou une série' [1] ('a break in the wording or a list') or 'un espace vide à l'intérieur d'un corps, ce qui manque pour compléter une chose quelconque' [2] ('an empty space in a whole, what is needed in order to complete anything') or 'se dit spécialement d'une interruption, d'un vide dans le texte d'un auteur, dans le corps d'un ouvrage' [3] ('used particularly to mean a break, a blank in the text of an author, or in the body of a work') or 'espace vide, solution de continuité dans un corps' [4] ('empty space, break in the continuity in a whole') or again 'interruption involontaire et fâcheuse dans un texte, un enchaînement de faits ou d'idées; absence d'un ou de plusieurs termes dans une série ... lacune dans un raisonnement ... lacune de mémoire ...' [5] ('unintended and vexatious gap in a passage, a series of facts or train of thoughts; absence of one or several terms in a series ... lacuna in a line of reasoning ... memory gap ...').

So far as the meaning of the concept of a *'lacuna' used in relation to law is concerned,* books on general law, introduction to the study of the law or jurisprudence refer to this concept.

But has their examination of the concept being sufficiently thorough? Have they drawn the necessary distinctions?

Consequently, is it not repeatedly and, therefore, fruitlessly discussed on the basis of concepts which have a different scope and meaning?

A useful distinction has been drawn between: [6]

(a) the *deontological* lacuna: inadequacy of the legislative system; the duty to be, Sollen, what should be τό δέον (failure to do what it ought to do),

(b) the *ideological* lacuna: inadequacy in relation to an idea, an ideology of the legal system and therefore inadequacy in relation to a 'Rechtsidee',

(c) the *teleological* lacuna: inadequacy of the 'legal' order itself. In a legislative system which lays down that the right to strike shall be exercised within the framework of the laws which govern it, there is a teleological lacuna if there is no provision governing that right'.

(d) the ontological lacuna: inadequacy of the legislative system to be, Sein, what is τό ὄν, in short the 'infinite variety of human actions' (failure to cover a situation).

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[1] Littré et Dictionnaire de l'Académie Française.
[2] Larousse du XXe Siècle.
[3] Dictionnaire de l'Académie Française.
[4] P. Robert, Dictionnaire de la Langue Française.
[5] P. Robert, *Op. cit.*
[6] Amedeo G. Conte — Décision, Complétude, Clôture ... in Le Problème des Lacunes en Droit — Travaux du Centre National de Logique — 1968, page 66 et seq.

It seems to me that a vital distinction must therefore be drawn between, on the one hand, a lacuna *in the law* and, on the other hand a lacuna in a law or in the principles of law or custom. A lacuna in the law could be a deontological, ideological or ontological lacuna. In particular a lacuna which is in 'a law' would be a teleological lacuna as described by Conte.

To determine whether there is a lacuna in the law or not is to make a value judgment. The relevant evaluations may differ: some may take the view that there is no lacuna, others, on the other hand that there is, the latter not always suggesting the same way of filling it in.

To point out that a law does not contemplate such a solution but that an unwritten principle or custom, or again a rule which be be inferred from one or more laws, govern the said situation, is merely a finding, if you like, that there is a 'lacuna' in *a law*.

To record the finding that neither the EEC Treaty nor any other provision of Community law permits the control of mergers, is to find that there is a lacuna in this law, if *the view is held* that such a control must be permitted. To point out that Community law provides no procedure for the revision of the Treaties which would enable a qualified majority to legislate to this end and that such a procedure should be adopted and, again, that the European Parliament does not possess the legislative power which it should nevertheless be able to exercise, is also to call attention to lacunae in *Community law*.

It is not normally the function of a court to fill in gaps in *the law;* this is the task of the 'legislature' and of the Nation which naturally develops customs and, in part at least, legal principles of its own accord.

On the other hand it is for a court to fill in the lacunae (if importance is attached to this word 'lacuna') in the provisions of laws by considering the rules which emerge from one or several other provisions, from their spirit and purpose or rules found in legal principles or custom. If it is borne in mind that rules of law are only found in provisions, and in them alone, there are unquestionably lacunae, and indeed a large number of them, but these are in any case only lacunae in 'a law'.

Reference is, often wrongly, made to Article 4 of the Civil Code which deals with a refusal on the part of a judge to give a decision. [1] It is not the purpose

[1] 'Le juge qui refusera de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice' ('Legal proceedings may be taken against a judge, who refuses to give a decision on the ground that the law is silent, obscure or inadequate, for refusal to give a decision').

of this provision, however, to entrust the judge with a legislative task which, moreover, would conflict with the constitutional institutions. In any case it refers to the inadequacy of a law and not of the law. It is clear that this provision, which is held in great respect, cannot mean that the judge must always find a rule, and it doesn't much matter where he discovers it, in equity or in law, upon which he would bestow the force and effect of a rule of substantive law by applying it during the performance of his judicial functions. The judge who comes to the conclusion that no rule of substantive law applies to the case complies with the requirement of Article 4. It is in fact clear that substantive law does not have to cover every kind of human relationship: a system of substantive law which did so would produce an intolerable system which Kant has already denounced.

As Mr Foriers has written so well 'the provision in Article 4 of the Code Civile . . . by no means makes it obligatory to fill in gaps in the law but it imposes upon the Judge the duty to determine the issues before him. These are two very different things: the legislature intended that the judge, appointed to perform judicial functions, should determine the issues before him but certainly does not oblige him to create a rule where none exists'. [1]

Article 1 of the Swiss Civil Code also provides that: 'In the absence of a statutory provision which can be applied, the court must decide the case according to customary law and, if there is no such custom, according to the rules which it would adopt if it had to act in a legislative capacity'. In this connexion it is frequently emphasized [2] that, in filling in a gap, a court does not enjoy the freedom of the legislature to begin afresh by derogating from previous laws; the court must always abide by all the laws in force and the standards of behaviour and principles which flow from them. [3]

It is the nature of the 'law' (here I also, when referring to this concept, have in mind its general meaning) to be of general application. Consequently, it cannot enumerate or set out all the facts, circumstances and events which

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[1] P. Foriers, Les Lacunes du Droit — in Le Problème des lacunes en droit — Travaux du centre national de recherches de logique, p. 11 and 12.

[2] See especially on this point Professor Wolf — Les Lacunes du droit et leurs solutions en droit suisse in Le problème des lacunes en droit — Travaux du centre international de recherches de logique, page 118.

[3] It is true, as Professor Perelman stresses (Essai de synthèse in Le problème des lacunes en droit, *Op. cit.*, p. 543), that Israeli law provides that in a case which is not covered by 'Legal sources', 'the civil courts . . . shall with certain exceptions decide in conformity with the substance of the Common Law and the doctrine of equity in force in England'. But, on the one hand, Common Law constitutes a substantial part of substantive law and, on the other hand, equity in England certainly does not have the same meaning as in Belgium, France or the Netherlands but, on the contrary, is a body of precise and well-ordered rules which came into being for well-known historical reasons.

vary enormously. Portalis has emphasized that 'the skill of the legislature lies in finding for each law the best principles for furthering the common weal; the skill of the judge is to put these principles into effect, subdivide and extend them by applying them in a judicious and reasonable way to particular cases ... The function of the law is to determine, on the basis of a wide-ranging outlook on life, general legal maxims, to lay down principles which have far reaching consequences and not to go into the details ... It is for the judge, imbued with the general spirit of the laws, to supervise their application'. [1]

It is therefore a mistake to believe that there is a 'lacuna' (in other words an empty space, omission or deficiency) whenever written law has not expressly provided for and covered every situation and question which can arise and that the court, which in spite of this fact gives a decision in such cases, performs the function of the 'Praetor' which, is indeed legislative. [2]

In this connexion if account is not taken of what a 'law' and the Court's task consist of, one is bound to find that there are innumerable, more lacunae even than written rules.

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[1] (a) Exposé Préliminaire du Code Civil — Locré Edition Belge, p. 159, No 17;
(b) Locré, t. I, Paris 1827, p. 258. No 9.

[2] Mr Lazar Focsaneanu, commenting on the case-law of the Court of Justice relating to Articles 85 and 86 of the EEC Treaty recently wrote that the Court had 'formulated' and created 'praetorian' rules and that, in so doing, it had not adhered to the classic rules of interpretation. In view of this he believes that he has to refer not to 'the interpretation' of those rules by the Court but rather to their 're-reading' in accordance with the Court's own 'herméneutics' (la jurisprudence de la Cour de Justice de Communautés européennes en matière de concurrence — Revue du Marché Commun No 192, January 1976, p. 33 et seq.). But what is the meaning of 'herméneutics'? According to 'le Larousse Encyclopédique' a hermeneut is a person who interprets sacred and ancient texts, ancient laws ... explains the rules to be followed when searching for the exact meaning of writings'. According to the same dictionary hermeneuts were ministers of the Christian Church in the first centuries (A.D.) who were responsible for translating and explaining the writings to the people. The 'Dictionnaire de l'Académie' has 'hermeneutic — adjective — having as its object the interpretation of texts. Hermeneutic science and, as a feminine noun, the hermeneutics of laws. In its general use, hermeneutics mean the interpretation of sacred writings'.
'Hermeneutical', in English, has acquired a wider meaning and is mainly applied to Scripture (in the opposite sense to 'exegetical'), and can equally well be applied in other fields (Oxford Dictionary, cf. 'hermeneutical': belonging to or concerned with interpretation).
In a noteworthy article Professor Capurso also gives it a very wide meaning: M. Capurso, Criteri in ordine all'applicazione di norme comunitarie, convenzionali e derivate, confliggenti con norme primarie di diritto interno. Riv. dir. pub. 1975, 1057–1095.

When the Court ruled that Article 65 of the ECSC Treaty covers agreements between *associations* of undertakings, [1] that Article 85 of the EEC Treaty also applies to agreements with undertakings outside the Common Market, [2] that purely national concerted practices are or are not caught by the same article [3] or again, in particular, that the abuse of a dominant economic power within the meaning of Article 86 of the EEC Treaty may arise not only from the practices or conduct of an undertaking but also from its merger with other undertakings, the Court did not fill in 'lacunae' but defined the meaning and scope of rules of law in accordance with the task which the 'law' entrusts it.

It is true that the Treaty does not define the concept of 'subsidies' or 'aids' within the meaning of Article 4 (c) of the ECSC Treaty but this is no reason for concluding that on 23 February 1961 [4] the Court filled in 'a lacuna' by defining what subsidies or aids are, unless the view is taken that 'a law' must always expressly provide for every single situation or question and define the exact meaning of words and concepts.

Article 93 of the EEC Treaty does not specify the time-limit within which the Commission must make its attitude known on national proposals for fresh aid or the modification of an existing aid but, as the Court stressed in its judgment of 11 December 1973, [5] although the Member State cannot put its proposed measures into effect until this procedure has resulted in a final decision and while this period [of the procedure] must allow the Commission sufficient time, the latter must, however, act diligently and take account of the interest of Member States in being informed of the position quickly in fields where the need to intervene can be of an urgent nature.

The Court accordingly ruled that the Commission must take a decision within a reasonable time. [6]

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[1] Judgment of 19 March 1964 in Case 67/63 [1964] ECR 151

[2] Judgment of 14 July 1972 in Joined Cases 48, 49, 51 to 57/69 [1972] ECR 619 — not yet published — [1972] C.M.L.R. 557.

[3] Judgment of 17 October 1972 in Case 8/72 [1972] ECR 977 — not yet published — [1973] C.M.L.R. 7

[4] Judgment of 23 February 1961 in Case 30/59 Recueil 1961

[5] Case 120/73 [1973] ECR 1480 and 1481

[6] The Court has used this concept of a reasonable time-limit in relation *inter alia* in relation to a limitation period which was claimed and also, more particularly, in relation to the Staff Regulations of Officials (see the judgments of 4 February 1970 in Case 13/69 and of 12 July 1973 in Joined Cases 10 and 47/72 [1973] ECR 763. National courts are also familiar with this concept of a reasonable time-limit. Where the provisions of written law do not include a specific time-limit, the courts sometimes, and more particularly in administrative cases, rule that a reasonable time-limit be complied with: see the opinion of Commissaire du Gouvernment Mr Galmot before the judgment of the

Can this be filling in a gap? It may amount to completing the written provision but by applying other rules of Community law: the principle of legal certainty, or of the protection of legitimate expectations or again the principle that a wrongful act must be prevented. It also amounts simply to applying reasonably and carefully the written provision according to the meaning which the 'legislature' had of necessity to give it.

2. Judgments in which the Court expressly or by implication relies upon the concept of a 'lacuna'

In describing the task of 'harmonization and co-ordination' (in Chapter V, Section 4), I quoted the judgment of 12 July 1957 [1] on the question whether administrative acts which create subjective rights for officials may be revoked.

The Court held that: 'This is a problem arising under administrative law with which the case-law and learned writers of all the countries of the Community are familiar but the Treaty *contains no rules* for its solution. To avoid committing the offence of *refusal of the judge to give a decision ("un déni de justice")*, the Court is accordingly obliged to solve it in the light of the rules recognized by the legislation, the learned writers and the case-law of the member countries'.

There would, in fact, have been a refusal on the part of the Court to give a decision if it had decided that, since the relevant instruments provided no guidance at all, it could not settle the dispute which had been brought before it: it clearly never occurred to the members of the superior European court to adopt such an attitude.

With regard to the concept of a lacuna envisaged by the words 'the Treaty contains no rules (for the solution of the problem)', it is true that no text expressly provides the solution, but, as I have endeavoured to show in the chapter on 'harmonization and co-ordination', it results from the meaning and scope of legal rules which, as in so many other cases, must be read together.

Conseil d'Etat de France of 27 November 1964, Recueil des arrêts du Conseil d'Etat 1964, p. 598, the judgment of the Cour de Cassation of Belgium of 23 April 1971 and the opinion of the Advocate-General, Bulletin et Pasicrisie 1971.I.751, the judgment of the Conseil d'Etat de Belgique of 19 June 1968, No 13.030, R.J.D.A. and C.E. 1969, p. 142.

[1] Case 7/56 and Joined Cases 3 to 7/57, Recueil 1957, page 85, CMLR.

On 15 December 1970 [1] the Court, after stating that 'neither Regulation No 19 nor the implementing regulations issued thereunder contain provisions whereby the rate of the levy applicable to a specified category of cereals can be reduced because of damage and loss of value suffered by these cereals before being imported', ruled that: *'In view of the absence of such provisions,* this problem must be solved by reference to the system of the regulation, having regard to the principles governing the common organization of agricultural markets and the aims attributed to it by the Treaty'.

No specific solution is to be found in the provisions; there may therefore be a 'lacuna' in these provisions. But a solution can be found in the regulations taken as a whole and their objectives; in fact, therefore, there is no lacuna.

The same obvervations apply to the judgment of 30 January 1974 in Case 159/73, in which the Court stated that: 'the rules of the common organization of the market in sugar form a *complete system* in the sense that it does not leave the *Member States* the power to fill a lacuna by resorting to their national law'. The Court went on to hold that: 'It is thus proper to seek a solution in the light of the aims and objectives of the common organization of the market, taking account of considerations of a practical and administrative nature'. [2]

On 30 October 1972, [3] with reference to the question whether a national regulation concerning the cultivation of hyacinth bulbs was compatible with Article 10 of Regulation No 234/68 of the Council of 27 February 1968 on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, the Court stated: 'in the absence of *express provisions* as to the compatibility of a national regulation restricting production with the organization of the market set up by Regulation No 234/68, it is necessary to seek the solution to the question referred in the light of the objects and the purposes of the regulation within the framework of the principles laid down by the Treaty itself . . . It thus follows from the general tenor of the regulation that . . .' etc.

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[1] Case 31/70 [1970] ECR 1062

[2] The case was concerned with the interpretation of Regulation No 1009/67/EEC of the Council of 18 December 1967 on the common organization of the market in sugar and Regulation (EEC) No 142/69 of the Commission of 27 January 1969 laying down certain detailed rules for the application of the quota system for sugar.

[3] Case 190/73 [1974] ECR 1123

Here again no solution is expressly provided by the provision (a lacuna in the provision) but for all that there is no lacuna in the particular 'rule of law', and, still less, a gap in the law. [1]

As I have already mentioned in Chapter I, the Court sometimes emphasizes, and rightly, that it cannot fill in gaps in the law by creating new regulations because by doing so it would exceed its powers.

In its judgment of 14 July 1972, [2] it pointed out that the Community legislature alone is empowered to lay down a limitation period for competition. The Court, relying on the principle of legal certainty, which it is entitled to do, nevertheless ruled that proceedings must be initiated within a reasonable time.

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[1] In its judgment of 18 February 1975, in Case 66/74, the Court recognized that a problem arises concerning the language to be used when a decision of a social security authority has to be notified to a legal person abroad who does not understand the national language used by the authority concerned. It stated that certain provisions of European Community rules on social security contain special provisions governing the use of languages. The Court concluded after examining these provisions that the national authorities of a Member State must ensure that legal certainty is not adversely affected when a decision of such an authoritiy is communicated to the national of another Member State who was unable to know the language of the decision.
Community and national regulations cannot anticipate every situation; it is for the court to deduce from the whole of the legislation or regulations concerned the rules which must be applied in those cases for which no express provisions could have been made. At this point it is appropriate to mention the judgment delivered by the Cour de Cassation of Belgium on 24 October 1975 (in the case of Stadt Jugendamt Kassel v De Storcke) which held that the Cour d'Appel in its judgment which was appealed against had correctly applied Article 2(2) of the International Convention of 15 April 1958 on the recognition and enforcement of decisions of the courts concerning the duty to maintain and support children and that a foreign decision by default could neither be recognized nor enforced, because the pleadings sent to the defendant were in German without any accompanying translation and the person concerned did not appear to have a sufficient knowledge of the German language.

[2] Case 48/69, I.C.I., Recueil 1972, page 656

CHAPTER VI.

Criticisms directed at certain judgments of the Court of Justice

Section 1 Introduction

I emphasized towards the end of Section 3 of Chapter II that, when carrying out their judicial task meticulously and efficiently, judges sometimes adopt solutions which would not have satisfied other judges who have the same standing and conception of their duties. I have tried to give the main reasons for this while at the same time drawing particular attention to the fact that differences in the training of lawyers and differences in the national institutions to which they are accustomed cause or may cause them to take different views of a court's decision.

It is, in consequence, to be expected that while some approve, others criticize the judgments of the Court even if it has kept to its judicial rôle, and not assumed powers which it does not possess and has made use of methods of interpretation to which no-one would think of objecting.

Moreover, some judgments are frequently criticized on the basis of a misconception of the court's task.

In the second section of this chapter I will consider certain judgments which have given or could give rise to such approval or criticism. Many other judgments could, of course, be quoted.

In the third section I will review certain other judgments which could give rise to criticisms which are not necessarily unjustified.

Section 2 Certain judgments which have been or could have been the subject of criticisms which, however, do not call in question the correctness of the methods used or the nature and extent of the powers of the court

1. In its judgment of 15 July 1963 [1] [2] the Court stated: 'The words and the natural meaning of this provision [the second paragraph of Article 173 of the EEC Treaty] justify the broadest interpretation. Moreover provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively. Therefore, the Treaty being silent on this point, a limitation in this respect may not be presumed'.

A criticism suggests itself. It is clear from the second paragraph of Article 173, especially if it is compared with the provisions of Article 33 of the ECSC Treaty, as interpreted by the Court of Justice, that the authors of Article 173 wished to restrict the right to bring an action of the persons referred to in the second paragraph of Article 173. The Court's assertion that the provisions of the Treaty on 'the right of interested parties to bring an action must not be interpreted restrictively' could therefore be criticized.

But this criticism can be answered with the argument that the Court does not conceal the fact that the second paragraph of Article 173 restricted the right to institute proceedings of those concerned, particularly if a comparison is made between this right and that which is secured under Article 33 of the ECSC Treaty but that, within the limits laid down by this provision, full effect must be given to the right which the parties concerned are recognized as having to bring an action.

Thus, the line of reasoning followed by the Court can certainly give rise to criticisms which however, in my view, appear to be unjustified.

2. The Court could conceivably be criticized for having, in its judgment of 21 February 1973, [3] given Article 86 of the EEC Treaty a meaning and scope which this provision does not have and for having allowed the Commission, contrary to the intention of the Treaty, to exercise control over mergers.

According to Article 1 of the Commission's decision which the Court of Justice was asked to annul, the abuse consisted in Continental Can having

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[1] Case 25/62 [1963] ECR 106.

[2] In this judgment, the Court had to decide whether a decision addressed to a Member State can be treated as a decision addressed to another person within the meaning of the second paragraph of Article 173 of the EEC Treaty.

[3] Case 6/72, *Europemballage et Continental Can* [1973] ECR 215.

purchased through its subsidiary approximately 80% of the shares and convertible debentures of another financial and commercial entity and in this purchase having in practice lead to the elimination of competition in packaging products in a substantial part of the Common Market.

The Court dismissed the complaint that the contested decision gave Article 86 of the EEC Treaty a meaning and effect for which there was no authority in the Treaty and which thus enabled the Commission to exercise a control over mergers, which is illegal.

One may or may not consider the conclusion which the Court of Justice reached in that judgment to be the one which is wanted. But it cannot be denied that the decision is based on a consideration of all the rules of the Treaty and on the system which is inferred both from the fundamental principles of the Treaty and the provisions of Articles 85 and 86 read together. From those principles and articles the Court drew a conclusion which can undoubtedly be justified. It in no way creates a new rule of law permitting the control of mergers, and, in consequence, does not go beyond the limits of the task with which, as an institution, it is entrusted.

The *ratio decidendi* may give rise to criticism, it may be unconvincing but it [1] has been arrived at by proper judicial methods.

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[1] In essence the Court reasoned as follows:

(a) The question is whether the word 'abuse' in Article 86 refers only to the course of conduct of an undertaking or whether this word refers also to changes in the structure of an undertaking which lead to competition being seriously distorted in a substantial part of the Common Market.

(b) The distinction between measures affecting the structure of the undertaking and practices affecting the market is not decisive, since any structural measure may influence market conditions, if it increases the size and the economic power of the undertaking.

(c) In order to answer this question, it is necessary to consider the spirit, general scheme and wording of Article 86, as well as the system and objectives of the Treaty.

(d) If Article (3) (f) provides for the introduction of a system ensuring that competition in the Common Market is not distorted, then it requires *a fortiori* that competition must not be eliminated.

(e) The distortion of competition which is prohibited if it is the result of behaviour falling under Article 85 cannot become lawful because such behaviour, under the influence of a dominant undertaking, turns out to be successful and results in the merger of the undertakings concerned.

(f) In the absence of any express provision it cannot be assumed that the Treaty, which prohibits by Article 85 certain decisions of ordinary associations of undertakings ... permits in Article 86 that undertakings, after merging into an organic unity, may achieve such a dominant position that any serious opportunity for competition is almost impossible. Such disparate legal treatment would make a breach in the entire competition law which could jeopardize the proper functioning of the Common Market.

(g) In any case Articles 85 and 86 cannot be interpreted in such a way that they contradict each other, because they serve to achieve the same aim.

3. The regulation relating to imports of cereals provides that the importer may request the advance fixing of the levy which will be applicable to him on the date of submission of the application for a licence. This regulation, however, lays down that the rate of this levy will only apply to importations effected during the period of validity of the said licence.

The regulation relating to the importation of cereals *from third countries* expressly provides that, in case of *force majeure,* the rate of the levy applicable on the date of submission of the application for the licence will continue to apply even if the importation has not been effected during the period of validity of the licence.

In its judgment of 20 February 1975 the Court ruled that the exception of *force majeure* must be applied 'by way of analogy' to trade between Member States.

Some will criticize the court for having recourse to reasoning 'by analogy', others will also be able to claim that it was unnecessary to have recourse to it, since *force majeure* can usually be pleaded in any legal matter, even if there is no text which can be quoted in support.

4. Article 36 of the EEC Treaty permits the Member States to introduce or maintain in force prohibitions and restrictions on imports, exports or goods in transit 'justified on grounds of the protection of health' but it provides that such measures 'shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

In its judgment of 20 May 1976 in Case 104/75, which was concerned with national regulations relating to imports of medicinal preparations, the Court had to define these wide concepts of 'measures for the protection of health' which 'are justified' and in no way constitute 'arbitrary discrimination' or 'a disguised restriction on trade between Member States'.

For this purpose, it also had to evaluate facts and circumstances which, of course, are liable to develop and change.

Was the Court's evaluation of the 'requirements' and the 'options' for protecting health good or bad? Obviously opinions can vary on this point.

5. On 30 September 1975, in Case 32/75, the Court held that 'in view of the equality of treatment which the provision (Article 7 (2) of Regulation (EEC) No 1612/68) seeks to achieve, the substantive area of application must

be delineated so as to include all social and tax advantages, *whether or not attached to the contract of employment,* such as reductions in fares for large families'.

There are those, of course, who will be able to take the view that the area of application delineated for the concept 'social advantages' is too large... but no-one can deny that the Court proceeds on the basis of the considerations which it could and had to take into account.

6. On 28 October 1975, in Case 36/75, the Court, interpreting the provisions of Article 48 of the EEC Treaty and several regulations adopted to implement it, ruled that a Member State cannot (specifically on grounds of public policy) prohibit a national of another Member State from residing on part only of its territory except in those cases where 'such (partial) prohibitions may be applied to nationals of the State concerned'.

The view could be taken that this conclusion does not necessarily follow from the Community provisions which called for interpretation. The opinion could even be held that the interpretation by the Court of Justice may in the end render ineffective the 'supervision of aliens' which Community law, in any case, allows Member States to continue.

In Chapter II of my review I referred to a number of judgments on economic matters. Inevitably there are those who will consider that the review of these matters by the Court has gone too far while there are others on the contrary who will say that it has not gone far enough.

I devoted a part of Chapter V of my review, on the one hand, to consideration of the need to adopt a particular line of reasoning and of the interpretation, at times wide and at others strict, of a concept or a rule and, on the other hand, to the question of 'lacunae'.

It has seemed to me that the arguments and good sense of the Court in general carry conviction. Nevertheless the possibility cannot be ruled out that others may take a different view.

As for the so-called 'lacunae', if a text does not expressly provide the answer, the Court must look for help to all the factors which I have described. Obviously the possibility cannot be ruled out that some may think that the factors taken into consideration were irrelevant or that others should have been taken into account.

Section 3 Certain judgments which have been the subject of criticism which may not be unjustified

1. On 18 March 1970 [1] the Court ruled that all national courts are 'authorities of the Member States' within the meaning of Article 9 (3) of Regulation No 17. This ruling was given on the ground that 'Article 88 refers to national rules on jurisdiction and procedure, with the result that the concept of 'authorities in Member States' includes national courts'.

It may be asked whether Article 88 contains any justification whatsoever for this ruling of the Court and, in particular, whether other provisions of the Treaty *do not call for* a different ruling from that given by the Court.

It is helpful to recall the wording of Article 88: 'Until the entry into force of the provisions adopted in pursuance of Article 87, the *authorities in Member States* shall rule on the admissibility of agreements, decisions and concerted practices and on the abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 85, *in particular* paragraph 3 and of Article 86'.

No ordinary court has (at least under the system of administration of justice adopted in some of the Member States) the power to rule that a provision of Article 85 (1) is inapplicable for any of the reasons set out in paragraph (3) of that article. Consequently, when Article 88 states that the 'authorities in Member States' shall apply paragraph 3 of Article 85, that expression cannot have been intended to include every court (for example the ordinary Belgian courts).

Moreover Article 89 of the EEC Treaty also refers to the concept of 'competent authorities in the Member States' and there seems to be no doubt that it cannot embrace *all* the courts of the Member States since this provision states that the Commission shall investigate cases of alleged infringement 'in cooperation with the competent authorities'. There is no doubt that the set up of the Community means that 'cooperation' between the court and the administrative authorities is impossible. [2]

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[1] Case 43/69 [1970] ECR 127.

[2] I have already pointed out that the judgment of 18 March 1970 was confirmed on this point by that of 6 February 1973 in Case 48/72. However this point was decided differently in the judgment of 30 January 1974 in Case 127/73.

2. The judgment of 9 July 1970 [1] has apparently given rise to a number of comments and even criticisms which have often been regarded as justified. [2]

It has even been claimed that, in holding that France had not failed to fulfil its Community obligations, the Court was motivated by considerations of expediency or 'policy'.

I do not believe that these criticisms can be accepted as valid.

The Court held that the application brought by the Commission against France under Article 169 of the EEC Treaty 'must ... be rejected as not sufficiently well founded'.

France had excluded imports of goods originating and coming from Tunisia from the application of the levy provided for by Regulation No 136/66/EEC on the establishment of a common organization of the market in oils and fats. This was the failure for which France was blamed.

France relied on a Protocol (known as Protocol 1.7) annexed to the EEC Treaty to justify the continuance of a system of duty-free entry of the said imports until the entry into force of the provisions made by a subsequent association agreement between the Community and Tunisia.

The Court found that, as from the entry into force of Regulation No 136/66, the objective of Protocol 1.7, which France believed it could proceed to attain, had henceforth to be achieved by means of provisions compatible with principles forming the basis of the common organization of the market concerned, and that the rights reserved to the French Republic by Protocol 1.7 had to be adapted to the new organizational techniques introduced by the regulation. In addition, the Court found, first, that the Community authorities ought to have adopted provisions for the purpose of adapting the system applicable to the said imports in the light of the new legal situation created by the regulation and, second, that 'the fact that Regulation No 136/66 is silent on the point may have given rise to the question whether the unchanged exercise of the rights deriving from Protocol 1.7 was, at any rate provisionally, compatible with the provisions of that regulation' and that 'bearing in mind the *equivocal* nature of the situation thus brought about' there had been no 'failure' on the part of France.

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[1] Case 26/69 [1970] ECR 565.

[2] See, in particular, Audretsch, Communautaire Contrôle, Het Toezicht in de Europese Gemeenschappen op de Naleving van de Verdragsverplichtingen door de Lid-Staten.

It is true that the French State had not complied with the letter of a regulation but its *conduct* was held *not to be wrongful* (and one can understand this decision without being forced to assume that it was based on considerations of expediency or policy) in view of the equivocal nature of the regulation and the omissions of the Community authorities. A court which, after taking the circumstances and *normal* conduct into account, determines whether an act or an omission is or is not wrongful, is still performing its judicial task. It seems to me necessary to bear in mind the nature of the task assigned to the Court of Justice by Articles 169 to 171 of the EEC Treaty.

3. The Bundesfinanzhof (Federal Finance Court) had annulled the judgment of the Finanzgericht (Finance Court) on the ground that a provision of Community law had been infringed. This superior court had sent the case back to a Finanzgericht which, under the provisions of German law 'was bound by the judgment of the court of last instance'.

However, as this Finanzgericht considered that the Bundesfinanzhof's reasoning was not consistent with Community law, after staying the proceedings and before deciding the case, it referred a question of interpretation to the Court of Justice. An appeal against this decision was lodged with the Bundesfinanzhof which, in turn, stayed the proceedings and referred the following question to the Court of Justice: 'Does the second paragraph of Article 177 give to a court or tribunal against whose decisions there is a judicial remedy under national law a completely unfettered right to refer questions to the Court of Justice, or does it leave unaffected rules of domestic law to the contrary whereby a court is bound on points of law by the judgments of the court superior to it?'

In its judgment of 16 January 1974,[1] the Court held that 'a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings'.

There can be no doubt that any court or tribunal has the right at all times to refer a question of interpretation to the Court of Justice under Article 177 of the EEC Treaty. But it is much more difficult to decide whether a national court which, by virtue of its national law, is no longer able to give a ruling on a question, is given back the right to do so by Article 177 of the EEC Treaty.

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[1] Case 166/73 [1974] ECR 33.

This last question must, I think, necessarily be answered in the negative. Article 177 does not alter the powers and rules of procedure of national courts.

Let us take the case of a decision given by a court of first instance based on an interpretation of Community law which has been appealed against. If the appeal had been lodged out of time, it goes without saying that the appeal court would be unable to give a fresh ruling on that interpretation, however mistaken it might consider it to be. In the circumstances it cannot, after making a reference to the Court under Article 177, alter the decision of the court of first instance, because it is now a final judgment.

There seems to me to be a similar situation in the case which culminated in the judgment of 16 January 1974. The decision of the Bundesfinanzhof was in law final and the Finanzgericht had no power to set it aside. Article 177 was not intended to modify the powers of the courts.

Consideration might have been given to criticizing the Bundesfinanzhof for not having, pursuant to the last paragraph of Article 177, made a reference to the Court of Justice and to setting in motion on the strength of this paragraph the procedure for obtaining a declaration that the Federal Republic [1] had 'failed' to fulfil its obligations under the Treaty (Article 169 of the EEC Treaty),

4. In its judgment of 8 April 1976 in Case 43/75, the Court gave a clear and strict ruling that Article 119 of the EEC Treaty has direct effect and that the persons concerned can therefore avail themseleves of it before the national courts. It stated that the principle of equality, laid down by the said article, was to have been fully secured by the original Member States as from 1 January 1962 and by the new Member States as from 1 January 1973.

The Court rightly emphasized that neither the resolution of the Member States of 30 December 1961 nor Directive No 75/117 could alter the legal or temporal effect of Article 119.

The Court, after having surpassed itself when it laid down the principles in this way, recoiled however from the consequences, in particular from the fact that the parties concerned might assert rights taken from Article 119 either as from 1 January 1962 or as from 1 January 1973 and, on the ground, *inter*

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[1] On the responsibility of a Member State for the failure of its organs, including its legislative and judicial organs, to comply with provisions of Community law, see the opinion of Mr Advocate-General Warner in Case 9/75 [1975] ECR 1184, in particular 1187.

alia, that the attitudes of Member States and the Community authorities, which can only be described as ambivalent, could have created confusion in the minds of those concerned ruled that 'except as regards those workers who have already brought legal proceedings or made an equivalent claim, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods *prior to the date of this judgment*'.

I find it difficult to accept that the Court, after having correctly stated that neither a resolution of the Member States nor of their representatives nor even a resolution of the Members of the Council of Ministers nor even a directive can weaken the direct effect, which stems from the Treaty itself, of a Community provision, can repudiate its own doctrine by assuming the power, which it does not have, to restrict, in a general and unlimited manner, as a law does, the temporal effect of a directly applicable provision of the Treaty. It may well be asked whether several of the considerations which engaged the attention of the Court would not have justified a decision that Article 119 does not have direct effect. It is of course easy to criticize!

Corrigendum

1. P. 14 lines 3 and 4 for 'thus the law common to the Member States' substitute 'is thus called upon to act as judge of the ordinary law of the Community'.

2. P. 32 line 4 after 'might' insert 'not'.

3. P. 40 for the sentence in lines 6 and 7 substitute 'Nevertheless fine distinctions are possible when a court reviews the facts on the basis of which the administration has acted'.

4. P. 41 line 18 for '(a)' substitute '(i)'.

5. P. 43 at the beginning of line 5 insert '(ii)'.

6. P. 44 line 33 for 'EEC' substitute 'ECSC'.

7. P. 48 line 6 delete 'been'.

8. P. 52 line 5 of footnote 1 after 'be made on the' insert 'basis of a single translation'. In matters of discipline let me mention in particular the'.

9. P. 82 line 9 for 'corollary' substitute '*a contrario*'.

10. P. 88 line 2 of footnote 2 for 'the actual effect' substitute 'effectiveness'.

11. P. 89 lines 26 and 27 for 'legislature wished to say rather than what it actually said' substitute 'legislator meant rather than what he literally said'.

12. P. 148, penultimate line of footnote 2 after 'Criteri' insert 'ermeunitici'.

13. P. 161 last paragraph for 'having surpassed itself when it laid down the principles in this way' substitute 'thus laying down the principles in a perfectly satisfactory manner'.

Court of Justice
of the
European Communities

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The evolution of the work of the European Court of Justice

by

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I have been asked to address you briefly on the evolution of the work of the Court since its inception to the present day. This means concentrating into little more than 24 minutes a story that it has taken, so far, nearly 24 years to enact.

For it was in December 1952, pursuant to the Treaty of Paris, creating the European Coal and Steel Community (the 'ECSC'), that the Court was first set up. It was then of course only the Court of the ECSC.

And so it remained until October 1958, when, following the ratification of the Treaties of Rome, creating the European Economic Community (the 'EEC') and the European Atomic Energy Community ('Euratom') it was reconstituted as the Court of all three Communities.

The next great event in its life, or so I like to think, was the accession to the Communities on 1 January 1973 of three new Member States, including my own country. As a result of this the Court was, like the Communities themselves, enlarged.

Old hands here will describe to you with humour the very early days of the Court, when seven Judges and two Advocates-General, and their staff, awaited with avidity their first case. They spent the time concocting the first set of the Court's Rules of Procedure, basig themselves, in so doing, on the Rules of Procedure of the International Court of Justice at The Hague. Since then there have been successive revisions of the Court's Rules of Procedure. The set now in force was adopted in December 1974, following the enlargement of the Communities and of the Court.

The first case ever before the Court was brought in April 1953. It was an action by a German undertaking against the High Authority of the ECSC. It seems to have been settled. At all events it was withdrawn and never came to Judgment. In fact, altogether four actions were brought in 1953, none of which ever came to Judgment.

It was on 21 December 1954 that the Court delivered its first Judgment. That was in an action brought by the French Government against the High Authority. On the same day the Court delivered Judgment in a parallel action brought by the Italian Government against the High Authority. Those were the only Judgments delivered in 1954.

In 1955 five Judgments were delivered. Of these three were in actions brought by associations of Italian steel undertakings against the High Authority, one was in an action by the Dutch Government against the High Authority, and one was in a staff case. This, in a way, set the pattern for the future: the litigants before us are far more often private individuals or undertakings than Governments, and always our work includes a fair proportion of staff cases — those are disputes between officials of Community Institutions and their employing Institutions.

In 1956 there were six Judgments, in 1957 four and in 1958 ten. After that there was, not a steady increase in the number of Judgments delivered annually — there have always been fluctuations from year to year — but a general tendency for the numbers gradually to increase. Thus in 1974 the Court delivered 64 Judgments, in 1975 it delivered 80, and this year it had, up to 15 July, delivered 54.

I think for my part that the statistics of Judgments delivered are, generally, a more accurate measure of the volume of work done by the Court than the statistics of cases brought. This is partly because cases are now and again withdrawn, and partly because cases between which there is a nexus are often joined. To take an extreme example, there were initiated in 1973 a group of 81 staff cases all raising the same point; they were joined, so that the Advocate-General had to deliver only one Opinion and the Court only one Judgment. But of course they swelled the 1973 statistics of cases brought, and particularly those of staff cases brought, to a considerable extent. One can however think of converse examples. One that springs to mind is that of the *Sugar* cases, also brought in 1973. These were 16 actions brought by various Belgian, Dutch, French, German and Italian sugar concerns to challenge a Decision of the Commission holding them guilty of breaches of the competition law of the EEC (Articles 85 and 86 of the Treaty). There was a sufficient nexus between the actions for them to be joined, but the issues in them were not identical. They gave rise to only one Opinion and one Judgment, but the Judgment alone runs to over 350 pages ([1975] ECR pp. 1671 to 2027). So the statistics of cases brought are also useful. They, of course, are the only measure of the work falling on the Court's Registry. The joinder of cases does not reduce the number of files that the Registry has to handle.

With that in mind, here are the figures of cases brought in 1974, 1975 and up to 15 July this year. They are respectively 102, 130 and 67. In what follows I shall sometimes refer to numbers of Judgments delivered and sometimes to numbers of cases brought.

Leaving aside staff cases, all the Judgments delivered by the Court down to 1960 (inclusive) were in ECSC cases; and such cases continued to form a substantial part of the work of the Court until 1966. Since then there have been few ECSC cases. The maximum number brought in any year has been four. In some years there have been none.

It is interesting perhaps that, of the ECSC cases brought since 1 January 1973, all but one have been brought by English companies. In two instances, English steel companies invoked the 'concentration' provisions of the Treaty of Paris (Article 66) in an endeavour to resist take-over bids. In another — this case is still pending — an English coking company is seeking redress from the Commission for the alleged failure of that Institution to prevent the company being driven out of business by the pricing policies of the British Government and of the National Coal Board. The one case to which I have alluded that was not brought by an English company was brought by a German wholesale coal merchant. The Judgment in it contains an important ruling by the Court on the protection of fundamental human rights in Community law (*Nold* v *Commission* [1974] ECR 491).

I doubt if I should take up time analysing the subject-matter of the earlier ECSC cases. It was of course in those cases that the Court laid some of the foundations of Community law, but the actual topics with which they dealt are not on the whole of major interest today. An astonishing proportion of the cases brought (about half) concerned a levy on purchases of scrap which had been instituted by the High Authority in order to even out differences in the prices at which it could be obtained by steelworks situate in different parts of the Community.

Before I turn to the EEC cases, a word about Euratom. This has been, in terms of litigation, the least prolific of the three Communities.

Again leaving aside staff cases, Euratom has yielded only one direct action. This was an action brought by the Commission against the French Republic in 1971. The action was about contracts entered into by the French Republic with various countries, including Canada and South Africa, for the supply of enriched uranium and of plutonium. The Court held that France had in some respects failed to comply with its obligations under the Euratom Treaty in connexion with those contracts.

Euratom has also yielded three references to the Court for preliminary rulings. All three, though not strictly staff cases, were concerned with staff matters. The first two (in 1968 and 1969 respectively) were references from the Cour de Cassation of Belgium about the consequences of a road accident

caused by an Euratom official while driving in Belgium on official business. The third was a reference from the Guidice del Lavoro at the Tribunale of Varese. Essentially it was about the limits of the jurisdiction of respectively this Court and that Tribunal over disputes concerning the terms of service of locally recruited staff of the Joint Nuclear Research Centre at Ispra.

I turn to the EEC cases, which have constituted the bulk of the Court's work in the last fifteen years or so.

Once more leaving aside staff cases, the first Judgment of the Court in an EEC case was delivered on 19 December 1961, almost seven years to the day after its first Judgment in an ECSC case. It was in an action brought by the Commission against the Italian Republic under Article 169 of the Treaty. The Court found that the Italian Republic had failed to comply with its obligations under Article 31 of the Treaty in suspending imports of certain products from other Member States.

Article 169 has always provided a small but important part of the Court's business, the average being about two or three actions a year, though there were two years (1966 and 1967) in which there were none, and there was one exceptional year (1969) in which there were eleven. Actions under Article 169 are often settled. Down to 15 July 1976, 40 such actions altogether had been brought, of which 11 had been settled. In 28 of them the Court had delivered Judgment and one Judgment was awaited. Of those 28 Judgments, 24 were in favour of the Commission and four in favour of the Defendant Member State. It would perhaps be invidious, before an audience such as this, to go into the statistics as to how many times each of the Member States has been found to be in breach of the Treaty. I will say only that it has happened to all six of the old Member States, though in the case of one of them (the Federal Republic of Germany) only once and that not until 1975; and that it has not yet happened to any of the new Member States. What is more important is that, with some delay in some cases, every Judgment of the Court against a Member State has been complied with.

The cases that come to the Court under Article 169 have been described as the tip of an iceberg. Although no figures are published about this, I believe that fewer than one in ten of the cases in which the Commission embarks on the procedure under Article 169 eventually come to the Court.

In contrast to Article 169, Article 170, which enables a Member State to bring an action against another Member State for failure to comply with the Treaty has never been invoked. So far, the Member States have chosen to leave it to the Commission, acting under Article 169, to secure compliance with the

Treaty by their fellow Member States. It would, however, be a mistake to think that Article 169 is the only means of ensuring compliance with the Treaty by Member States. Often such compliance is secured by private persons bringing actions against national authorities in national Courts, relying on the direct effect of many provisions of the Treaty and of EEC secondary legislation. Such actions of course frequently lead national Courts to refer to this Court under Article 177 of the Treaty questions as to the compatibility with Community law of particular provisions of national law. I shall come to references under Article 177, generally, in a moment.

Before I do so, I must mention actions by Member States against Community Institutions: the Commission and the Council. These also have provided a small but important part of the Court's work.

Down to 15 July 1976, 21 such actions had been brought against the Commission. The first of them ever was an action brought in 1962 by the Federal Republic of Germany. It was successful. The Court delivered Judgment in it, in favour of the Federal Republic, on 4 July 1963. Such actions were comparatively frequent in the early years of the EEC. Of the 21 actions I have mentioned, 10 were brought in the period 1962—1965. Since then there have been five years (1966, 1967, 1968, 1970 and 1974) when none was brought, and four years (1971, 1972, 1973 and 1975) in each of which only one was brought. There has however been a small revival of such actions this year. There are at present pending four actions in which Member States (namely France, Germany and the Netherlands) are challenging aspects of the Commission's accounting in connexion with the European Agricultural Guidance and Guarantee Fund (more generally known as 'the Farm Fund').

One action was brought against the Council as well as the Commission. This was an action brought by Italy in 1965 for declarations that certain Regulations adopted by those Institutions in implementation of Article 85 of the Treaty were void. The action failed.

There has been one action by a Member State against the Council alone. It also has the distinction of having been the first and only case ever to have come to the Court from Ireland. It was an action by Ireland against the Council for a declaration that a Regulation adopted by the Council fixing, pursuant to the transitional provisions of the Act of Accession, certain 'compensatory amounts' applicable to trade in tomatoes was void in so far as it affected Ireland. The Court delivered Judgment in favour of Ireland on 21 March 1974. I have it on the authority of the President of Ireland that the Court's health was drunk in the pubs of Dublin that night. I suspect he had in mind some near the Four Courts.

The Court has also had to entertain three actions brought by the Commission against the Council, each of which has aroused a great deal of controversy.

The first, the famous *E.R.T.A.* case, brought in 1970 and decided in 1971, provided the first occasion on which the Court had to consider the limits of the competence of the Community and of the Member States respectively to negotiate agreements with non-member States. This subject came to the fore again in 1975 when the Court was called upon by the Commission to deliver its first Opinion ever under Article 228 of the Treaty. It is too soon yet to comment on the value of the latter procedure. I will say only that that too is controversial.

The other two actions brought by the Commission against the Council were about the method of determining increases in the remuneration of members of the staffs of the Community Institutions. In the first, brought in 1972 and decided in 1973, the Commission was successful. In the second, brought in 1974 and decided in 1975, the reverse was the case.

As I have already mentioned, the bulk of the litigation before this Court comes here at the instance of private persons. Procedurally, it can be classified under two broad headings, namely direct actions and references for preliminary rulings.

Direct actions brought by private persons are invariably against Community Institutions. The majority of them have been brought against the Commission. But there have been such actions against the Council too.

Indeed the first group of direct actions (always leaving aside staff cases) ever brought under the EEC Treaty by private persons were brought against the Council. They were a group of six actions brought in 1962 by various French, Dutch and German trade associations for declarations that certain Regulations adopted by the Council when it was initiating the common agricultural policy were void. The actions, which were purportedly brought under Article 173 of the Treaty, were held to be inadmissible. This indeed has been the fate of many actions brought by private persons under that Article, which is notoriously restrictive of them. It allows of course a private person to bring an action challenging the validity of a Decision addressed to that person. The typical Article 173 action brought by a private person as to the admissibility of which there is no question is an action brought by an undertaking or group of undertakings which have been held by the Commission to be in breach of the competition rules of the Community and who wish to challenge the Commission's Decision to that effect. There have been

many such actions. But actions brought by private persons to challenge Regulations or Decisions addressed to others, e.g. Member States, are usually inadmissible. So far, only five such actions have been held admissible, one in 1965, two in 1971, one in 1975, and one in 1976.

Problems as to admissibility have also bedevilled actions brought by private persons under Article 175 of the Treaty, for alleged failure of a Community Institution to act when it should have done, and under Article 178 for compensation (under the second paragraph of Article 215) for damage caused by an Institution otherwise than by a breach of contract. There has been recently a spate of cases raising the question when a person complaining of such damage should sue the Institution concerned in this Court and when he should sue in the competent national Court the national authority responsible for administering the relevant branch of Community law. That question is far from being, as yet, completely and satisfactorily solved. There is, so far as I am aware, no case in which an action brought by a private person under Article 175 or Article 178, even where it has been held admissible, can be said to have succeeded. The nearest to it is a group of actions brought by certain German concerns against the Commission in 1966, where it was established by a Judgment of the Court in 1967 that the Commission was at fault, but where it has not yet been established whether the applicants suffered any damage for which the Community is liable.

In the 1960s and early 1970s the flow of direct actions brought by private persons fluctuated to an astonishing extent. For instance, in 1965 there was only one, in 1966 there were twenty, and in 1967 there was again only one. But in recent years the flow has been consistently substantial. Thus in 1974 20 such actions were brought, in 1975 29 and in 1976, up to 15 July, 13. Those bringing such actions have been predominantly German, Italian and French trading concerns. Actions originating from Belgium and the Netherlands have been relatively few and Luxembourg, whilst it generated several direct actions under the ECSC Treaty, has generated none under the EEC Treaty. Since the enlargement of the Community there has been one action brought by an English company, but it was settled. It is to be observed, however, that applicants in direct actions are not confined to persons established in the Community. The competition law of the Community can affect concerns outside the Community, just as, for instance, American anti-trust law can affect concerns outside the U.S.A. Thus the applicants in the famous *Dyestuffs* cases, which were brought in 1969, included an English company and two Swiss companies. American companies too have several times been involved in competition cases; and, in one such case at least, the applicant was a world-wide association of manufacturers of a particular product (*Transocean Marine Paint Association* v *Commission* [1974] ECR 1063).

I turn to references for preliminary rulings, which have, since 1967, constituted the major part of the Court's work in terms of Judgments delivered.

The first Judgment ever delivered by the Court on such a reference was delivered on 6 April 1962. It was a reference from the Gerechtshof of The Hague raising a number of questions of interpretation of Article 85 of the Treaty *(De Geus* v. *Bosch* [1962] ECR 45. Its admissibility was challenged, so that the Court was called upon to rule on the interpretation of Article 177 itself. It laid down in this respect a number of principles which have been applied many times since, such as the principle that a reference need not be in any particular form and that, if it raises questions going beyond the jurisdiction of the Court, the Court will not reject it but will distil from it the questions of Community law that call for an answer.

With some fluctuations from year to year, the number of Judgments delivered by the Court on references for preliminary rulings has increased fairly steadily. Out of the 64 Judgments delivered in 1974, 41 were on such references. In 1975 the figures were 45 out of 80. This year there have been 33 out of the 59 Judgments so far delivered. For the first time this year the Court exercised the power newly conferred on it to assign to the Chambers references 'which are of an essentially technical nature or concern matters for which there is already an established body of case law' (Rules of Procedure, Article 95).

A noteworthy fact is the imbalance that exists as between the Member States as regards the number of references that their Courts and Tribunals send to this Court. Down to the end of 1975 there had been 167 references from Germany, 58 from the Netherlands, 41 from France, 40 from Belgium, 38 from Italy, 6 from Luxembourg, 2 from the United Kingdom, 1 from Denmark and none from Ireland. The French and Italian Courts were noticeably slow to make references until fairly recently. Thus, of those 41 references from France, 15 were made in 1975. Similarly, of the 38 references from Italy, 14 were in 1975.

In the context of references for preliminary rulings I cannot forbear to mention the case of *EMI* v *CBS.* This is a dispute about trade-marks between an English and an American company, which has led to parallel proceedings in the Chancery Division of the High Court in London, in the Sø-og Handelsretten in Copenhagen and in the Landgericht of Cologne. Defences based on Community law having been raised in each set of proceedings, each of those Courts, in 1975, referred to this Court for a ruling the same, or very similar, questions. The three cases were heard together and the Court delivered Judgment on them together last June. This, I think, vividly underlines

the value of the preliminary ruling procedure. As a result of its use by those three Courts, the interpretation and application of Community law in that case will be uniform in the three Member States concerned.

The subject-matter both of direct actions and of references for preliminary rulings has been very diverse, but in both types of proceeding the Regulation giving effect to the common agricultural policy have been by far the greatest single source of work. In this field it is not so much members of the farming community as members of the trading community (importers, exporters, millers and the like) who litigate before us — though there was one celebrated case about the grants that an Italian lady was to receive on the slaughter of her cows.

Competition cases have been the second most numerous category, closely followed by social security cases — the latter being as a rule references for preliminary rulings, not direct actions. Next come cases about customs duties between Member States and charges having equivalent effect to them (though there have been fewer of these lately than there were in the 1960s and early 1970s); cases on the removal of restrictions on the free movement of goods between Member States, including cases about the exercise of industrial and commercial property rights and about State commercial monopolies; cases about the interpretation of the Common Customs Tariff (usually references for preliminary rulings); and cases about State aids and internal taxation. Although there were comparatively few in earlier days, there has recently been a spate of cases about the free movement of workers, freedom of establishment and freedom to provide services within the Common Market. In contrast, the subject of transport, about which there was a certain amount of litigation in earlier days, has not been a lively one recently.

I am conscious that my recurring theme has been 'leaving aside staff cases'. Staff cases, to my mind, are like mosquitoes, persistent and distracting. Nor are they negligible in number. In 1974 there were 13 Judgments in staff cases; in 1975 22, nearly half as many as in references for preliminary rulings. The amount of work involved in a staff case, for the Advocate-General at least, is on average greater than that in a reference for a preliminary ruling, because staff cases so often give rise to issues ~~of fact~~. I propose to say no more about staff cases except — and in this I think I speak for the whole Court — that the Court very much welcomes the proposal, which has been approved in principle by the Council of Ministers of Justice, to set up a Court of first instance to hear staff cases, from which there would be only a right of appeal on law to this Court.

My survey would be incomplete if I did not mention the new jurisdiction that has been conferred on the Court as a result of the entry into force on

1 September 1975 of the Protocol concerning the interpretation by the Court of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Civil and Commercial Judgments. This Protocol confers power on certain Courts, Tribunals and other authorities in the Contracting States to refer questions of interpretation of the Convention to this Court for preliminary ruling.

Down to 15 July last, 7 references had already been made under it. The first two were heard on 30 June and a third on 14 July. So this looks like becoming a fertile fresh source of work for the Court.

Statistical Information on the Proceedings of the Court

1. Cases brought

	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1. 1. — 15. 7. 1976	1953 — 1976
Preliminary Rulings	—	—	—	—	—	—	—	—	1	5	6	6	7	1	23	9	17	32	37	40	61	39	69	38	391
Direct actions	4	10	7	9	14	43	38	18	22	28	63	19	20	24	4	6	35	12	13	19	31	22	35	18	514
Staff cases	—	—	2	2	5	—	9	4	3	2	36	30	35	6	9	17	25	35	46	23	100	41	26	11	467
Interim measures	—	—	2	2	2	17	9	—	—	3	8	4	4	2	—	1	2	—	1	2	7	8	5	3	82
Total:	4	10	11	13	21	60	56	22	26	38	113	59	66	33	36	33	79	79	97	84	199	110	135	70	1 454

2. Direct actions brought by

	1953 — 15. 7. 1976
Belgium	2
Denmark	—
Germany	11
France	8
Ireland	1
Italy	11
Luxembourg	1
Netherlands	8
United Kingdom	—
Total Member States	42
Commission	43
Natural or legal persons	429
Total:	514

3. Direct actions brought against

	1953 — 15. 7. 1976
Belgium	3
Denmark	—
Germany	3
France	8
Ireland	—
Italy	23
Luxembourg	2
Netherlands	1
United Kingdom	—
Total Member States	40
Commission	428
Council	16
Commission and Council	30
Total:	514

4. Judgments and interim orders

	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1. 1. — 15. 7. 1976	1953 — 1976
Cases completed	—	2	5	8	10	10	18	58	27	39	31	44	62	39	34	26	32	70	77	90	89	146	114	79	1 110
Judgments given in cases completed	—	2	5	5	4	10	13	19	11	20	17	31	50	24	22	26	29	64	59	61	79	60	76	52	739
Interlocutory judgments	—	—	—	1	—	—	—	—	—	—	—	—	2	1	2	—	1	—	1	—	1	2	2	2	15
Total judgments	—	2	5	6	4	10	13	19	11	20	17	31	52	25	24	26	30	64	60	61	80	62	78	54	754
Interim orders	—	—	1	2	2	17	10	—	—	3	8	4	4	2	—	1	1	—	1	2	7	7	5	2	79

5. Subject matter of direct actions

	1953 — 15. 7. 1976
a. EEC	
Customs duties (Tr. Arts. 12—17)	17
Common customs tariff (Tr. Arts. 18—29)	1
Quantitative restrictions (Tr. Arts. 30—35)	4
Industrial property (Tr. Art. 36)	3
Agriculture (Tr. Arts. 38—47)	96
Agricultural guidance fund (Tr. Art. 40)	6
Freedom of movement for workers (Tr. Art. 48)	1
Right of establishment (Tr. Arts. 52—58)	2
Freedom to provide services (Tr. Arts. 59—60)	1
Transport (Tr. Arts. 74—84)	3
Cartel agreements, dominant positions (Tr. Arts. 85—90)	56
Aids granted by States (Tr. Arts. 92—94)	6
Internal taxation (Tr. Arts. 95—99)	15
Approximation of laws (Tr. Arts. 100—102)	3
Conjunctural Policy (Tr. Art. 103)	4
European Social Fund (Tr. Arts. 123—128)	2

5. Subject matter of direct actions

	1953 — 15. 7. 1976
Non-contractual liability (Tr. Art. 215)	78
Protective measures (Tr. Art. 226)	22
b. EAEC	
Supply (Tr. Arts. 52—76)	1
c. ECSC	
Coal market	15
Control by the High Authority	2
Aids granted by States (Tr. Art. 4c)	4
Consultative Committee (Tr. Art. 18)	1
Non-contractual liability (Tr. Art. 40)	65
Levies (Tr. Arts. 49—50)	8
Equalization of scrap metal (Tr. Art. 53)	167
Investments (Tr. Art. 54)	2
Prices (Tr. Arts. 60—64)	19
Cartels and concentrations (Tr. Arts. 65—66)	24
Transport (Tr. Art. 70)	35
d. Privileges and Immunities	2
e. Staff Cases	468
f. Functioning of the Communities	1

6. Subject matter of preliminary rulings

	1953 — 15. 7. 1976
EEC	
Common customs tariff (Tr. Art. 3)	32
Free movement of goods (Tr. Arts. 9—11)	9
Customs duties (Tr. Arts. 12—17)	41
Quantitative restrictions (Tr. Arts. 30—35)	16
Industrial property (Tr. Art. 36)	12
National monopolies (Tr. Art. 37)	9
Agriculture (Tr. Arts. 38—47)	177
Agricultural Guidance (and Guarantee) Fund (Tr. Art. 40)	4
Free movement of workers (Tr. Art. 48)	17
Social Security for migrant workers (Tr. Art. 51)	76
Right of establishment (Tr. Arts. 52—58)	3
Services (Tr. Arts. 59—60)	3
Transport (Tr. Arts. 74—84)	8
Cartel agreements, dominant positions (Tr. Arts. 85—90)	30
Aids granted by States (Tr. Arts. 92—94)	8
Internal taxation (Tr. Arts. 95—99)	27
Approximation of laws (Tr. Arts. 100—102)	2
Conjunctural policy (Tr. Art. 103)	3
Balance of payments (Tr. Arts. 104—109)	1
Social policy (Tr. Arts. 119—122)	2
Procedural questions (Tr. Art. 177)	10
Non-contractual liability (Tr. Art. 215)	1
Protective measures (Tr. Art. 226)	3
Functioning of the Communities	3
Associations between EEC and third countries	4
Privileges and Immunities	7
Convention on jurisdiction (27. 9. 1968)	7

7. Courts which have requested a preliminary ruling

	1953 — 15. 7. 1976
BELGIUM	
Cour de Cassation	5
Conseil d'État	6
Others	35
Total:	46
DENMARK	
Højesteret	—
Others	1
Total:	1
GERMANY	
Bundesverfassungsgericht	—
Bundesgerichtshof	5
Bundesarbeitsgericht	3
Bundesverwaltungsgericht	5
Bundesfinanzhof	25
Bundessozialgericht	10
Others	129
Total:	177
FRANCE	
Cour de Cassation	7
Conseil d'État	3
Others	36
Total:	45
IRELAND	
An Chúirt Uachtarach	—
An Ard-Chúirt	—
An Chúirt Chúarda	—
An Chúirt Dúiche	—
Others	—
Total:	—

7. Courts which have requested a preliminary ruling

	1953 — 15. 7. 1976
ITALY	
Corte Costituzionale	—
Corte Suprema di Cassazione	3
Consiglio di Stato	—
Others	42
Total:	45
LUXEMBOURG	
Cour Supérieure de Justice	3
Conseil d'État	—
Others	3
Total:	6
NETHERLANDS	
Raad van State	1
Hoge Raad	4
Centrale Raad van Beroep	11
College van Beroep voor het Bedrijfsleven	25
Tariefcommissie	5
Others	22
Total:	68
UNITED KINGDOM	
House of Lords	—
Privy Council	—
Court of Appeal	—
Inner House of Court of Session	—
Court of Appeal of N. Ireland	—
Others	3
Total:	3

8. Failure by a Member State to fulfil its obligations under the Treaties

	1953 — 15. 7. 1976
Belgium	3
Denmark	—
Germany	3
France	8
Ireland	—
Italy	23
Luxembourg	2
Netherlands	1
United Kingdom	—
Total:	40

Court of Justice
of the
European Communities

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Address on the application of Community law in each of the Member States

by

Pierre PESCATORE

Judge at the Court of Justice of the European Communities

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The application of Community law, more specifically its application through the courts and tribunals in the Member States, is a particularly difficult subject on which to speak. It is difficult by reason of the extent of the problem, since its salient features have to be sought in nine States and the situation has to be evaluated in relation to legal contexts which differ quite profoundly one from another. It is not only a difficult subject but also a delicate one, since as the investigation progresses, if one is really trying to get to the root of the matter, it reveals, alongside an obvious manifestation by the courts and tribunals of the Member States of an open-minded attitude and of an unfaltering will to ensure the application of Community law, certain residual difficulties, certain perplexities in the face of undeniably real and serious problems. Consequently, a realistic presentation of the subject demands that in taking note of the positive achievements, we do not overlook the problems which are still with us, all the more so as their solution will depend upon an ultimate consolidation of Community law.

With this in mind, I shall first of all set out in Part 1 of this address the background to the problem and its salient features, and then go on to show in Part 2 in what circumstances and to what extent it has been possible to ensure application of Community law within the Member States.

Part 1. Background and salient features of the problem

1. In the majority of cases application proceeds with no problem

The instances of the application of Community law in its different forms — the Treaty provisions themselves, Community regulations, national provisions adopted to give effect to directives and decisions of the Community institutions — have by now become too numerous to count. Whole sectors of public administration, such as those dealing with customs, with external trade, with social security and with control of foreigners, are already 'taking their cue from European law'.

The diversification of Community law is so great and its penetration within the Member States so deep, that the impact of provisions of Community law, sometimes in the most unexpected contexts, is manifested to the judge in the Member State in the most diverse legal actions — commercial and civil cases, fiscal cases and administrative actions, social cases and even criminal cases. His most usual reaction, quite properly, is to bring these elements of law into his legal reasoning, and thus to ensure their application on an equal footing with the rules prescribed by his own national law. Community law is already so well established in our Member States, so well incorporated into judicial principles that it is applied without question and raises no particular problem. Thus it is that the most positive and the most substantial part of the implementation of Community law passes unnoticed, precisely because it does not present any difficulty.

However, in certain cases, less numerous than the foregoing, the application of Community law does raise doubts, and can indeed give rise to difficulties. In this connexion two sorts of problems of differing degrees of difficulty must be distinguished according as one looks at Community law in itself or in its relationship to national law.

(a) First of all, uncertainties may arise concerning the *interpretation of Community law;* the problem is not intrinsically different from that posed by the interpretation of national law. Furthermore, a dispute may be brought before the national court as to *the validity* of a measure of secondary Community law; the Community is indeed founded on the principle of

compliance with the law, and consequently any individual subject to it is entitled to dispute before the courts the validity of a measure of secondary law which purports to apply to him, if he considers that it does not comply with the rules of the basic Treaty or with the general legal principles which form an integral part of the Community legal system. These are doubts and disputes which concern *Community law in itself;* with a view to solving this problem logically, the EEC Treaty adopted the procedure of the preliminary ruling under Article 177. Thus one category of cases in which the application of Community law causes problems within the Member States can be discerned through this procedure. These problems do not give us cause for concern, since, precisely because of the intercommunication between the courts and tribunals of the Member States and the Community Court, they can be satisfactorily resolved. This is subject always to one condition: that the courts and tribunals of the Member States do in fact avail themselves of this procedure every time they are faced with a hitherto unresolved problem of interpretation or with a dispute on validity where Community law is concerned.

(b) The cases where the application of Community law gives rise to *a conflict between Community law and national law* are more difficult, for in such cases the national court is — or considers itself to be — faced with conflicting demands deriving, on the one hand, from Community law and, on the other, from the national law which it has a duty to apply. The difficulty is particularly acute when this conflict, be it apparent or real, involves a rule of high standing in the hierarchy of the provisions of the national law, as is the case with a provision of statute law or even of constitutional law. From the Community's point of view, the situation involves an element of profound uncertainty since, in this case, the duty to find the solution rests solely on the court or tribunal of the Member State. Of course, it will be able to ask the Court of Justice — and numerous courts have not hesitated to do so — to enlighten it about the scope and requirements of Community law, which is one of the adversaries in the conflict; but in the last analysis the national court will still have to settle the conflict on its own authority. Consequently there is no guarantee that the conflict will be resolved in a way which is wholly satisfactory to the Community.

Thus at the very time when a deep and massive penetration of Community law into the domains of national law is proceeding quietly and uneventfully, our attention is focused on a small number of problems of jurisdiction which give rise to rather difficult questions on the scope of Community law and on its effectiveness in the national framework. It is understandable that our concern should centre on the disputes which may thus attend the application of Community law, despite their being the exception. For we well know that it is the decisions in the exceptional cases which determine — for good or for ill — the evolution of the law.

2. Unity of Community law and diversity of national contexts

Community law presents itself, by its nature, as a body of common rules. They are common in their source, in their formal expression (which is far from coinciding with the customary forms of national law), and in their objectives. The aim is that these rules shall be implemented in each of the Member States in an identical manner as regards their subject-matter and with equal effectiveness.

This law, in essence unique, has to take effect in national legal contexts which, while akin in many respects, are none the less far from being identical. Each Member State possesses its particular social structures and legal traditions, based on age-old historical developments. Even within one and the same country the 'receiving end' may be more or less open or closed, welcoming or hesitant according to the different kinds of legal subject-matter: the reactions are not always the same according as, for example, a civil, administrative, social or constitutional court or tribunal is involved.

Furthermore, one must take into account a noticeable difference in the positions from which the Member States started out, in that the situation regarding the problems of applying Community law was very different according as old Member States or newly acceding States were involved. Paradoxically, the difficulties of application seem to be greater for certain of the 'old members' than for the 'new members'.

For the old Member States, the formation of the European Communities was indeed a 'leap in the dark'. The first of the Communities, the European Coal and Steel Community (the ECSC) arose out of a sort of political upheaval which abruptly presented the Member States with the difficulty of solving the strange new legal problems set by entering into a scheme of integration. When the Economic Community was formed five years later, it had already been possible to derive some benefit from that short experience but the fact remains that in most of the Member States the problems set by the internal application of Community law had to be resolved in a state of more or less obvious unpreparedness.

In this respect, the position of the three States which adhered to the Community in 1973 was more favourable. At that time extensive experience had already been acquired of the problems raised by the application of Community law within the Member States; it was possible to draw upon a considerable stock of judicial decisions and of thinking by the text-book writers. In these circumstances, the new Member States were able to make in advance the arrangements necessary to ensure the smooth application of Community law within their internal legal systems; these arrangements took

a concrete form in legislative measures introducing Community law into the internal legal systems. These measures have the advantage of providing the jurists and the judges of those countries with a clear and sure legislative foundation. On the other hand, in the old Member States, it was necessary to derive what assistance one could from the few factors available which helped towards a solution: constitutional provisions, generally not too clear; some few judicial precedents. The main effort had to come from judge-made law and contributions by the text-book writers; undertaken as it was at this basic level, this effort at creating new law involved considerable uncertainties.

These differences in the legal environment of this problem explain why, even now, decisions of courts in the different Member States sometimes fall considerably out of step, both quantitatively and qualitatively. Although many lessons can be learned from the comparative study of the situation in the different Member States, it should not in any circumstances lead us into making value-judgments, for the circumstances in which Community law is to be brought into effect differ too fundamentally from one country to another.

3. Identification of the obstacles to proper application of Community law

The full effectiveness of Community law in the different Member States has not been easily achieved; far from it. We have witnessed a gradual growth of awareness and a gradual process of adjustment which has developed very unevenly. This is hardly surprising, seeing that Community law has opened up entirely new perspectives before the judiciaries of the Member States, presented the courts with unusual tasks and required them to do some rethinking on many points. This quiet revolution took time and will take yet more time. It is essential to identify the obstacles in order to see better the points on which effort should be brought to bear in the aim of ensuring for Community law the effectiveness within the national framework to which, by its very nature, it aspires. Three problems at least must be raised in this connexion.

(a) The first obstacle is commonplace: *lack of information.* If Community law is not everywhere applied as fully as could be desired, the reason is simply that its existence is still largely unknown. Litigants and their advisers, the lawyers, are not yet well enough acquainted with the resources which Community law has to offer for the defence of their interests, for example, in the sphere of business dealings, in that of work and of social security or in their relations with the public administration. Judges in their turn are often still unaware of the requirements of Community law in regard to cases which come before them; certain cases of patent failure to give effect to Community

law which have been detected among the decisions of courts in the Member States are attributable quite simply to ignorance.

It does not seem too hard to deal with this difficulty. A sustained effort is made by the institutions of the Community — and in particular by the Commission and the Court of Justice — in the 'dissemination of information' as regards Community law. By means of the study days which it has regularly organized, the Court has been able to welcome some thousands of judicial officers from all the Member States and thus make them more aware of the problems of Community law. Certain universities, prompted particularly by specialist institutes, have included European law in their syllabuses; at present this effort, still all too sporadic, deserves to be put on a more systematic footing. In this context, mention should be made of a recent initiative by the French Garde des Sceaux (Minister of Justice) who sent circulars to the courts and tribunals drawing their attention to the growing importance of Community law and to the desirability, in this perspective, of making more systematic use of the procedure for preliminary ruling under Article 177.

Finally attention should be drawn to the desirability, for the dissemination of Community law, of providing lawyers and judges with the more important texts, that is to say the Treaties, the principal regulations and directives, the further conventions, including reference to the relevant cases, in a manageable form, as is done in the case of national legislation in all the Member States. In a word, we have a need for a 'handy compendium' on Community law, for our Official Journal is a publication which is both too bulky and too expensive to effect a real dissemination of Community law in all the circles concerned.

(b) A second problem — which pertains to the fundamentals of legal life — results from *the national legal structures and national legal thought not being adapted* to the solution of the problems set by the application of Community law. Indeed everything which constitutes our legal world has been developed within an essentially national framework: the structure of the institutions, the legislative procedures, the judicial organization, the methods of interpretation and even the depth and generality of our legal thinking. In our time, a time favourable to international and cultural exchanges, the world of jurists is still an astonishingly closed and introspective universe. Such an environment obviously does not lend itself to the acceptance of something so novel as Community law, the basic aspiration of which is precisely to transcend the confines of national frontiers which, for the majority of jurists, are also mental frontiers. Thus, when confronted with this new phenomenon, the jurist's first step, taken albeit with genuine goodwill, has been to seek the resolution of the problems raised by the application of Community law within the range of, and with the help of the methods peculiar to *national* law.

Such methods cannot produce adequate results. For Community law is in essence a common system of law. The problems which it raises, both in legislation and in litigation, cannot be properly resolved in the light of concepts which have evolved to meet the needs of an internal legal system. They cannot be approached in a 'unilateralist' perspective. If Community law is to be saved from disintegration at the point where it is applied, recourse must very clearly be had to *solutions worked out and arranged in common.* This is particularly true of anything concerning the interpretation of Community law and the solution of the highly delicate problems of its relations with internal law. Such problems cannot be decided unilaterally with no consideration paid to the coherence of the whole. Regrettable errors of judgment could have been avoided by the realization of the fact that the problems raised by Community law fit into a multilateral context, and by accepting that there is a contradiction in applying to them solutions inspired solely by the needs of national law.

(c) Finally, reference must be made to a more specific circumstance, which in its way has made the proper application of Community law more difficult. It is that in getting to know the realities of international life, we must not forget that *international law, public and private,* historically came before Community law. The first contacts between the closed world of national law and the outside world were in practice established at the level, on the one hand, of public international law and, on the other, of the resolution of conflicts of laws. Thus it is that the constitutional provisions which are devoted to external relations are above all centred on the conclusion and on the effect of international treaties; the courts and tribunals, for their part, are acquainted with law external to their State in the dual form of problems raised by the application of those treaties and by the resolution of conflicts of laws. Treaties and foreign laws are the two phenomena which thus far have symbolized, from the point of view of the national court, the intrusion of influences from the outside world. However, the ideas implanted by encounters with international law, public and private, are ill-suited to the needs of Community law. The treaties on which the constitution of the Community rests are an entirely different matter from treaties designed to regulate relations between independent States; it is with integration treaties that we are concerned. Secondary law, especially in the form of Community regulations, has no equivalent in the system of international law. In short, it would be a disastrous mistake to assimilate Community law to foreign law and to approach it with the spirit of relativism which characterizes the methods applicable to conflicts of laws. It is to counteract such tendencies that the Community Court has repeatedly stressed *the specificity and the autonomy* of Community law.

Part 2. Introduction and deployment of Community law within the framework of the individual Member States

Looking back on the experience we have acquired over the years — nearly a quarter-century of it — one is struck by the extraordinary dynamism with which Community law has penetrated into the internal legal systems, particularly if one takes the trouble to make a comparison with other sectors of international legal life. The penetrating force of Community law is a phenomenon *sui generis*. It can be explained by a whole number of factors: the cultural affinity of the European peoples in their amazing diversity; the will to restore to Europe a place in the world by dint of concerted effort, and the awareness of the essential contribution of the law in carrying out this process. There is also a more cogent explanation, which is of greater interest in the context which concerns us. To a large extent, the dynamism of Community law can be explained by the successful interaction between the jusrisprudential activity of the Community Court, at the centre, and the corresponding activity of the courts and tribunals of the Member States, each within its own national or regional domain. So it was that the authors of the European Treaties had the foresight not only to endow the Community with an autonomous judicial power, but also to set up an organic link between the Community Court and the courts and tribunals of the Member States with a view to harmonious application and coherent development of this our common system of law. That is one major reason explaining the deep and swift penetration of Community law within our States.

Broadly speaking, the action of these two factors — that is to say the Community Court and the national courts — has been concomitant and reciprocal; they have led to mutual stimulation and improvement. Indeed, while the evolution of case-law in our different Member States would be unimaginable without the stimulus emanating from the judgments of the Community Court, this Court has been subjected, in its turn, to the influence of the national courts; nor should the reciprocal influences exercised by the courts of the different Member States on one another be overlooked. This process of interaction, which generally proceeds discreetly and almost imperceptibly, from time to time produces something quite outstanding

which has profound, widespread repercussions: the decisive impulses have emanated from a small number of 'pilot' decisions, some of which were made by the Community Court while others, among them perhaps the boldest and most interesting ones, were made by national courts.

An attempt will be made hereafter to describe this process rather more precisely. For convenience, first of all a survey will be given of the case-law of the Court in so far as it relates to the characteristics of Community law and to its relations with national law; this will be followed by an exposition on the stage reached in dealing with the problem of the application of Community law in the different Member States. However one must not lose sight, at any point in this account, of the close interaction subsisting between these two classes of factors which have had to be separated — artifically — for clarity of presentation.

I — The case-law of the Community Court as a 'catalyst'

1. Procedures which provide an opportunity for defining the requirements of Community law in regard to national law

Among the forms of action, there are two which have given the Court occasion to pronounce upon the characteristics of Community law, on its effectiveness and on its requirements in regard to national law: the action for the failure of a State to fulfil its obligations and the reference for a preliminary ruling. The use made of each of these procedures has made a powerful contribution to the definition of the relationships between Community law and national law.

(a) *Proceedings for the failure of a State to fulfil its obligations* are relatively few in Community practice. But they are highly significant in dealing with our problem, given that the purpose of these actions is precisely to impose a sanction on Member States which have failed to meet requirements of Community law. Occasionally they raise the issue of the omissions and defaults of Member States; more often they concern positive violations of Community commitments; the usual form which these violations take is the introduction or the maintenance of legal provisions incompatible with the requirements of Community law. In such situations the Court has had to affirm, sometimes forcefully, the overriding power of Community law in relation to national law.

(b) However, *references for preliminary rulings* make a more important contribution to the solution of the problem under consideration. Indeed it is through them that the national courts are given the opportunity to apply to the Community Court with a view to removing the obstacles which inhibit proper application of Community law within the national framework: uncertainty about the meaning of the requirements of the Treaties or of secondary Community law; disputes against the effectiveness of regulations or other Community measures. The national courts often seek interpretations in the context of a conflict between Community law and national law: the national court asks the European Court to specify, by way of interpretation, what are the requirements of the Treaty or of measures of secondary law, in order to decide on the compatibility of its own national law with Community law. In such a situation, it is not for the European Court to decide on the compatibility of the national law with the provisions of Community law; the European Court only supplies the premise for an appraisal which it is for the national court to make. But one must not be under any illusion about this matter: once the premise is clearly laid down, the decision on compatibility inevitably follows from it.

2. The case-law of the Community Court as a 'common model'

Thus, as one case has followed another, the Court has been led step by step to define the main characteristics of Community law (see the judgments listed in Appendix I). These characteristics may be summed up in one phrase: the effectiveness of Community law. The judgments of the Court relating to this problem all proceed from the simple truth that a legal system exists and is a reality only in so far as it is operative in practice. And to say that it is operative in practice within the Member States is, perforce, to postulate the principle of its precedence in cases of a conflict with national law.

More precisely, the case-law of the Court has brought out the following characteristics and requirements.

(a) In numerous judgments, the Court has stressed the *fullness of the effect* of Community law. Concepts such as the 'practical effect' or the 'full effect' of Community law run like a live wire through its decisions. In the face of attempts by one or other of the Member States to evade certain parts of Community law, the Court has vigorously stressed the wholeness of the Community legal system, which is all of one piece, organized and coherent; consequently it does not tolerate any selective attitudes by States seeking to enjoy the benefits of it without assuming the corresponding burdens. Several times over, and on occasion emphatically, the Court has affirmed the irreversibility of Community commitments in order to counteract any inclination on the part of Member States to withdraw from them.

(b) Another dominant theme of this body of case-law is *the idea of the unity of Community law*. This must be the same throughout the Community and inside every Member State. The Court has asserted this unity not only in relation to the substantive meaning of the provisions of Community law (this is the well-known problem of uniform interpretation), but also from the point of view of the effectiveness of that law: Community law must be applied throughout the whole Community not only with the same substantive meaning, but also with an equal degree of effectiveness. To this end, a constructive effort is required of the national court so that, in the midst of the complications of a national legal situation, the overriding power of Community law is recognized and its objectives fully attained.

(c) Community law is *mandatory law;* in certain judgments reference is made to the concept of 'maintenance of Community law and order', a very meaningful and evocative concept. This mandatory nature is moreover asserted in two distinct perspectives: on the one hand, the Court has repeatedly asserted the binding nature of the commitments assumed by the Member States; on the other, it has had occasion to assert the mandatory nature of Community rules in regard to private individuals and organizations formed on private initiative, in such areas as the business world, relationships at work and even sporting life.

(d) Community law is *directly applicable* within the Member States; as such it can be relied upon in law by private individuals and it confers rights upon them which the courts are called upon to protect. I refer here to one of the largest and best consolidated bodies of law within the case-law of the Court. Starting with the well-known *Van Gend & Loos* judgment, the Court has asserted repeatedly and in the most diverse circumstances that Community law is not merely a matter between States, but that at the same time it directly concerns private individuals. This body of case-law, which time does not permit me to go over here, is truly the cornerstone of the whole jurisprudential edifice for the effectiveness of Community law.

(e) Finally the Court has resolutely maintained *the unconditional* precedence of Community law in relation to internal law. This precedence has been asserted in the most diverse contexts: in the face of contrary practices by Member States, even when it was a question of a prolonged and concerted failure by Member States to meet their obligations; in the face of the, in a sense, conventional conflict between Community law and national law; in the face of contradictions arising from the judicial organization or any other constitutional structure in a Member State. In such circumstances, the Court has consistently asserted that a Member State may not unilaterally attenuate the effect of Community law, that it may not unilaterally withdraw from its commitments; it cannot, for this purpose, rely on the provisions of its statutes, on its political or judicial organization, or even on its constitutional rules.

These positions which the Court has taken up in one case after another in legal disputes of the most diverse kinds, in terms varying in their mode of expression but with only one meaning as to their essential content, have defined 'model' attitudes which have since been the inspiration for numerous decisions by national courts. Some of the terms originally coined by the Community Court have been adopted by the most diverse courts and tribunals in the Member States, sometimes word for word, sometimes in a form adapted to the national context. Legal problems, concerning for instance international law, which the national courts previously had to approach in total isolation are now resolved in the light of a common inspiration, emanating from the judicial centre of the Community.

II — Response of the national courts and tribunals to the requirements of Community law

1. Preliminary observations on the uneven distribution of decisions of national courts

If we look at the decisions on questions of Community law taken by the national courts we see a clear disparity in that, in some Member States, legal decisions on the problems involved in the application of Community law are rare, even non-existent, whilst in other Member States such decisions are not wanting and some of them lay down principles of the highest importance. How does this disparity come about?

It follows from the fact, to which I have already referred, that the various Member States came into the Community system in very differing states of preparation. In some States the problems posed by the application of Community law and, in particular, those raised by the transfers of sovereignty which are the essence of any system of integration were resolved on a constitutional, legislative or judicial level before accession. This applied, as regards the original Member States, to Luxembourg and the Netherlands. It also applies to the new Member States, where the problems raised by the application of Community law in the internal legal system have been expressly and positively resolved by legislative measures. As a result there are no legal decisions which rule in principle on the problem of the application of Community law to be found in the case-law of these States.

On the other hand, decisions of principle in connexion with this problem are to be found in the case-law of four Member States: Germany, Belgium, France and Italy. In these four States historical and constitutional reasons peculiar to each have caused disputes of more fundamental importance to be

brought before the courts and settled by them. After initial periods of uncertainty of varying duration the highest courts in each of these States have finally ruled on the question with the result that we may regard the problems concerning the application of Community law as in the main satisfactorily resolved.

These preliminary observations explain the somewhat peculiar order in which I shall now consider the position in each of the Member States. Rather than going through the States in alphabetical order, which would be too artificial, I shall begin with those cases in which the position is simple and go on to the more complicated ones, describing in turn the position in:

Luxembourg and the Netherlands;

the new Member States;

Germany, Belgium, France and Italy.

2. Luxembourg and the Netherlands: no problems as regards case-law

Apart from the many cases in which it has simply been applied, there is scarcely any case-law in these two Member States on the effects of Community law. This situation is explained by the fact that in these Member States the problems concerning the application of Community law were — in different contexts — resolved entirely satisfactorily before accession to the European Communities.

Luxembourg

In Luxembourg, the application of international treaties by the courts (what is now called 'direct effect') and the precedence of the treaties over national law have always been regarded as incontrovertible axioms. Thus, in a judgment of 13 June 1890, in the case of *Actien-Brauerei Cöln Niedermendig* v *Schwartz,* the Cour Supérieure de Justice confirmed the precedence of the treaties governing the customs union over a subsequent national law by stating that 'that law could not affect international treaties and had not sought to do so'. It went on to say that 'it is an established principle that the enforcement of conventions is one of the principal rules of interpretation'. In the judgment of 14 July 1954 *Chambre des Métiers* v *Pagani,* the same court reaffirmed in even stronger terms the precedence of an international treaty — once again a convention governing economic union — over internal law, even adopted subsequently, by stating that 'a treaty is a law of a higher nature, of a nobler origin than the will of a national body'. On the

constitutional level Article 49 bis, which was introduced on a revision of the Constitution in 1956, enables the exercise of powers reserved by the constitution to the legislature, executive and judiciary to devolve upon international institutions. The EEC and Euratom Treaties were ratified on the basis of this provision, with the result that the fundamental problem of the transfer of sovereign powers to the European Communities has been resolved positively in Luxembourg. It must be noted that, with the exception however of the Conseil d'État, the Luxembourg courts have repeatedly made use of the procedure under Article 177 for referring a question for a preliminary ruling. This attitude of detachment has meant that in its recent judgment of 23 April 1975 in the *Mohammad Alimuddin Subhani* case (a British national), the Conseil d'État was surprised to find itself in conflict with the case-law of the Court of Justice on the interpretation of the limitations on grounds of public policy in the EEC Treaty.

The Netherlands

For the Netherlands the solution of the problem of the relationships between Community law and national law was predetermined by the revisions of the Constitution in 1953 and 1956 which led to the assertion in the new Article 66 of the Constitution that international treaties take precedence over national legal provisions, in so far as the provisions of such treaties are 'binding upon everyone'. Two key concepts of Community case-law thus appear in the constitutional law of the Netherlands: what has come to be the principle of the 'direct effect' of Community law and the principle of the precedence of the treaties. It is therefore not by chance that the first cases on the direct effect of Community law referred to the Court of Justice for preliminary rulings came from the Netherlands, since in that country recognition of the precedence of international rules is, under the Constitution, dependent upon their direct applicability. One of these requests for a preliminary ruling forms the basis of the well-known judgment in the *Van Gend and Loos* case which has profoundly influenced the whole evolution of Community law. Since that time, communication between the Court and the Netherlands courts by means of the procedure for obtaining a preliminary ruling under Article 177 has remained particularly active at all levels including the highest courts, that is, the hoge Raad and the Raad van State.

3. Denmark, Ireland, United Kingdom: solutions provided in advance by legislation

In Denmark, Ireland and the United Kingdom the application of Community law by the courts appears to raise no major problems. The reason for this,

which is common to all three States, has already been stated: the problems relating to the application of Community law within the national legal system have been positively resolved by legislative measures which have incorporated Community law into those systems. The legislative measures involved are, in Denmark, the Law of 11 October 1972, in Ireland, the European Communities Act 1972 and, in the United Kingdom, the European Communities Act 1972. The noteworthy feature of all three measures is that they provide, in substantially identical terms, that Community law must take 'effect in the national legal system in accordance with the provisions of *Community law itself*. As a result of that incorporation by reference European law is applied in accordance with terms which it itself lays down, so that all sources of conflict between Community law concepts and possibly differing concepts of national law over this vital problem of validity and efficacy are eliminated in advance.

Denmark and Ireland

This fact appears to explain why there is scarcely any case-law on Community law in either Denmark or Ireland. The truth of this finding appears to be reinforced by the fact that these two States have been careful to adopt their national constitutions to the requirements of integration; Denmark amended Article 20 of its Constitution as early as 1953 and Ireland amended Article 29 of its Constitution on a revision of the Constitution in 1972, for the express purpose of enabling accession to the European Communities. Furthermore, it must be remembered that in both States accession to the Communities formed the subject of a referendum whose positive outcome contributed to the creation of psychological and political conditions which were particularly favourable to the acceptance of Community law.

United Kingdom

There is rather more case-law in the United Kingdom but, owing to the existence of the European Communities Act, it has had no need to deal with the fundamental problems which have preoccupied the courts in other Member States. The principles of direct effect and the precedence of Community law are accepted as incontrovertible axioms. Problems relating to the application of Community law and concerning such areas as the free movement of goods (in particular in the context of the protection of industrial and commercial property rights), competition, free movement of persons and social security have on several occasions been brought before courts of first instance and appeal courts. In this context discussions have taken place as to how proceedings under Article 177 fit in with the special features of internal legal procedure. So far, references to the Court of Justice for preliminary rulings, which are becoming more and more frequent, have revealed no

practical difficulty of this kind. On the whole the decisions given show in the style of the Common Law courts — a style which is their own — a perfect understanding of the legal implications of European integration and the desire to ensure that, within the territory of the United Kingdom, Community law is as effective as by its nature it should be. This has already been brought out very strikingly in Lord Denning's judgment in *Blackburn* v *Attorney-General* on 10 May 1971 — some years before accession — and has since been confirmed on many occasions.

4. Germany, Belgium, France, Italy: legal debate concerning the fundamental problems of application

In Germany, Belgium, France and Italy the case-law reflects the uncertainty surrounding the problems concerning the application and effectiveness of Community law. At present however, it can be said that, happily, since this period of uncertainty decisions given by the highest courts in those States have come down firmly in favour of the full effectiveness of Community law. In particular, many important decisions of principle have been given in recent years. This is not to say, however, that in every case the problems have been settled unequivocally. It is therefore necessary to outline the situation in each of the four Member States individually, in the light of the particular constitutional features and case-law of each.

Germany

The problem was clarified relatively quickly in the Federal Republic. In this Member State the first paragraph of Article 24 of the Constitution provides for the possibility of 'transferring sovereign rights to international institutions by legal means'. Despite this favourable beginning certain lower courts had questioned the compatibility of Community law with the provisions of the national constitution. Thus, the effectiveness of this law has occasionally been called into question in certain of the courts. Precisely because of these disputes, the Constitutional Court quickly made clear its views on the effect of Community law within the national framework. Reference should be made to two decisions on this question: that of 18 October 1967, which contains some remarkable developments as regards the structure of the Community, the autonomy of Community law and its effect within the Member States, and that of 9 June 1971, which specifically states that Community law has precedence over conflicting national law. The pronouncements by the Constitutional Court in these two cases have finally put an end to all debate in the Federal Republic of Germany as to the effectiveness of Community law and its position in relation to national law — subject to one reservation to which

I shall return later (under 5). It must be added that these two legal decisions — in themselves of major importance — in no way manifest the scale of the legal debate which has taken place as regards Community law and its effects in the Federal Republic of Germany. In fact, an extremely important body of case-law exists on this subject to which both civil and commercial courts and financial, administrative and social courts have contributed. A further indication of the repercussions of Community law on legal life in the Federal Republic is shown by the fact that approximately one half of all the references to the Court of Justice for preliminary rulings has come from German courts of all kinds at every level. In this way an extraordinarily intense legal dialogue has developed between these courts and the Court of Justice which has greatly contributed to the development of Community law.

Belgium

In order to explain the position in Belgium it is first necessary to mention that the Belgian Constitution is completely silent as regards the application of both Community law and international law. A new provision, Article 25 bis, was inserted into the Constitution only as recently as 1970 for granting to international institutions powers which fall within the sphere of national sovereignty. The problems connected with the application of Community law have thus been settled exclusively by means of case-law. In fact, in this connexion the Belgian courts were very severely handicapped by the old judgment of 26 November 1925 of the Cour de Cassation in the *Schieble* case concerning the Treaty of Versailles, which was dualist in tone and opposed to the effectiveness of international law. Over the years a flow of legal writing and case-law had arisen in reaction against this precedent and this movement culminated in the judgment of the Cour de Cassation of 27 May 1971 *(État belge* v *SA Fromagerie Franco-Suisse (Le Ski))*, which stated that 'where a conflict exists between a rule of national law and a rule of international law which has direct effect in the internal legal system, the rule laid down by the Treaty must prevail. The predominance of that rule arises out of the very nature of international law on conventions'. This reasoning is transported *a fortiori* to the relationship between national law and Community law. This judgment is in accordance with the detailed opinion of the Procureur-Général, W. J. Ganshof van der Meersch, which is a document of vital importance in the development of concepts relating to the application of Community law. Apart from this outstanding action at Supreme Court level it may be observed that the Belgian courts take an active interest in Community law as is shown mainly by the steady flow of questions referred to the Court of Justice for preliminary rulings from courts of all kinds. It must be mentioned that the questions put by Belgian labour and social security courts and tribunals form the basis of particularly noteworthy developments in the case-law of the Community on matters of social security.

With regard to the French Republic it may be said that where the Constitution is concerned, Community law was incorporated into the national legal system in favourable circumstances. In fact, Article 26 of the Constitution of 1946, which was in force when France acceded to the Communities, provided that 'diplomatic treaties which have been properly ratified and published shall have the force of law even where they conflict with French laws without any necessity to adopt legislative provisions for the purposes of their implementation other than those necessary to ratify them' — direct effect and precedence thus dealt with in a single sentence of the Constitution. Article 55 of the present Constitution also lays down that treaties are 'of higher authority than laws'. Despite this favourable beginning French case-law has long presented an uncertain picture with, in addition, a visible rift between the receptive attitudes of the ordinary courts to this new phenomenon of Community law and the more reserved reactions of the administrative courts. Recent developments have, however, taken the form of an increasingly clear recognition of the inherent requirements for the effectiveness of Community law. At the same time, communications between the French courts and the Court of Justice has increased as a result of the procedure for obtaining a preliminary ruling provided for under Article 177 and this Court regularly receives questions referred to it by French courts of all kinds and at every level, including the highest courts, the Cour de Cassation and the Conseil d'État. Decisive pronouncements have been made recently by the Cour de Cassation. In its judgment of 24 May 1975 in the *Jacques Vabre* case, ruling on the noteworthy opinion delivered by the Procureur-Général, Mr Touffait, the 'Chambre Mixte' of that Court held that the EEC Treaty 'is of greater authority than laws' and 'establishes its own legal system which is incorporated into that of the Member States. As a result of that characteristic the legal system which it has created is directly applicable to the nationals of those States and is binding upon their courts'. In a more recent judgment given on 15 December 1975 in the *Von Kempis* case, which was of a particularly delicate nature because it concerned the recovery of rural property by a national of another Member State, the Cour de Cassation reaffirmed the precedence of Community law by stating that Article 52 of the EEC Treaty, which deals with freedom of establishment, 'is directly applicable to the nationals of the Member States of the Community' and 'is binding on their courts and tribunals, prohibits any restriction on the freedom of establishment of such nationals in France' and that, therefore, 'provisions of French internal law which required persons wishing to run an agricultural undertaking in France to obtain an authorization from the administration are no longer applicable'. These judgments of the Cour de Cassation may be seen as defining the basic principles of application of Community law in the French Republic satisfactorily and incontrovertibly.

In Italy also the relevant case-law reflects intense efforts and slow progress. Here, too, the first step was taken through the Constitution, that is, by Article 11, whereby the Italian State agrees 'to the limitations of sovereignty necessary for the establishment of a system ensuring peace and justice among nations'. However, between the adoption of this general formula and the statement that Community law is fully effective in the national legal system — a principle which is on the whole accepted today except for certain side-issues — progress was slow, since it was first necessary to break with a whole tradition of dualist thinking which was expressed as late as the judgment of the *Constitutional Court* of *24 February/7 March 1964, No 14,* which was opposed to the principle of the effectiveness of Community law within the national territory. The existence of this decision clearly explains the vigorous terms used by the Community Court in a judgment given soon afterwards on 15 July 1964 in a parallel case, *Costa* v *ENEL.* Since then, the amount of case-law has risen steadily. It has come from the lower courts, in particular those of first instance and is closely linked to the procedure for requesting preliminary rulings since, in several cases referred to the Court of Justice under Article 177, Italian courts have asked it to define the scope of certain provisions of Community law to enable them to give a ruling as to the compatibility of their own national legislation with the provisions of that law. It must also be pointed out in this context that as early as 7 November 1962 the *Consiglio di Stato* gave judgment in favour of the effectiveness of the EEC Treaty. The *supreme Corte di Cassazione* gave clear rulings in favour of the direct application and precedence of Community law in 1972 in judgments *Nos 1171 and 1173 of 8 June 1972* and *No 2896 of 6 October 1972.* The last-mentioned judgment referred expressly to the case-law of the European Court and to the judgment of the Belgian Cour de Cassation in the *SA Fromagerie Franco-Suisse* case. This case-law was consolidated — at least as regards the question of the direct applicability of Community law — in the judgment of the *Constitutional Court of 18/27 December 1973, No 183,* which contains a remarkable and in a way classic analysis of the basic characteristics of Community law and its effect within the territory of the Member States. However, a more recent judgment, *No 232 of 22/30 October 1975,* shows that that case was not the last word from the Constitutional Court, as I shall explain more fully below.

5. Assessment of the developments which have taken place in case-law regarding the application of Community law; the dark side of the picture

After this short analysis, which is somewhat inadequate in the light of the enormous number of constitutional and legislative factors, case-law and legal

writings which might be discussed, let me try to take stock of the developments which have taken place.

The first observation to be made is that despite some wavering and the occasional setback the general tendency of these developments has been in the same direction: this tendency is marked by either an immediate or a gradual awareness of the requirements of Community law and by a constant effort to ensure the maximum effectiveness of that law within the particular political and legal framework of each State. The second observation is that in the main the basic requirements of Community law are fulfilled. This law is in fact applied in all the Member States with the same degree of effectiveness. It cannot be denied that conflicts have arisen between Community law and national law on the way but these collisions have only amounted to what we generally call 'minor mishaps'. No major confrontation has ever arisen because nobody has wanted one and because both legislatures and courts are aware that, in order to act in the common interest, Community law must be implemented on the same terms throughout the Community. Having made this observation, which is on the whole reassuring, I must conclude by raising a few queries.

(a) The first concerns the *protection of fundamental rights* in the Community system. This issue has been raised only in those of the Member States which have a Constitutional Court, that is, in Germany and Italy. Let us consider the facts.

At the end of the noteworthy order of 18 October 1967, which strongly emphasizes the autonomy of Community law, the *German Constitutional Court* made the reservation that it might re-assert its rights of review if any question of a conflict between Community law and the fundamental rights guaranteed by the national Constitution again came before it. The *Italian Constitutional Court* made a similar reservation in its *jugdment No 183 of 18/27 December 1973,* although in a rather hypothetical way. Finally, in its *order of 29 May 1974,* the Second Senate of the *German Constitutional Court* acted on the reservation made in 1967. In an appeal brought before it against a Community regulation, the validity of which had been considered and accepted by the European Court of Justice as regards, *inter alia,* the protection of human rights (judgment of 17 December 1970 in the *Internationale Handelsgesellschaft* case), the Constitutional Court asserted its own jurisdiction to assess the regulation in question in the light of the measures necessary to protect the fundamental rights laid down by the national Constitution. In substance the German Constitutional Court upheld the findings of the European Court of Justice. However, the problem does not lie there but in the fact that a national court has asserted its own power to make a unilateral examination of the validity of a Community regulation.

This case has drawn attention to the fact that the builders of the European Communities thought too little about the legal foundations of their edifice and paid too little attention to the protection of the basic rights of the individual within the new European structure. Here, therefore, is a question which remains open. One must not, however, exaggerate the scope of what has been said and done by the German and Italian Constitutional Courts: the question is limited to the possibility — which in practice occurs very infrequently — of a conflict between Community law and basic human rights. In other matters, the precedence of Community law is not in question and the two Constitutional Courts have made this quite clear.

(b) A further dark area is that of the application of Community law where there is *a real or imagined conflict with the national law.*

This was seen, for example, in certain old decisions of the French Conseil d'État which omitted to refer relevant questions to the Court of Justice when the compatibility of internal legislative provisions with certain rules of Community law was contested before it. Two judgments are involved, both of which have been widely commented upon in legal circles in the Community; the judgment of 19 June 1964 in the *Shell Berre* case, which the doctrine known as the 'acte clair' was called in aid and the judgment of 1 March 1968 in the case of the *Syndicat Général des Fabricants de Semoule,* in which the application of Community law was set aside in favour of a provision of national law. According to the submissions of the Commissaire du Gouvernement in this latter case these decisions were inspired by a number of different considerations: a consciousness of the limits imposed on the powers of the court by the division of the prerogatives provided for under the Constitution, the unconditional observance required by the law and perhaps also a lack of confidence in the ability of the Court of Justice of the European Communities to appreciate the finer points involved in certain national issues. As these judgments were given in very special circumstances, it would certainly be wrong to interpret them as the expression of a view on a matter of principle.

As regards the consequences of the conflict between Community law and the provisions of a national law, a restrictive view recently appeared in a judgment of the *Italian Constitutional Court, No 232 of 22/30 October 1975,* the reasons for which were stated at length and which was given following a reference from the Corte di Cassazione on a question of legality under the Constitution. The problem was whether, where a conflict exists between a national law and the provisions of Community law, any court may hold that the internal rule is inapplicable or whether this finding may only be made by the Constitutional Court as the Court which decides on the validity of laws. Without in any way calling into question the direct applicability and

precedence of Community law the Constitutional Court stated that it alone has jurisdiction to rule on the inapplicability of a national law where it conflicts with the requirements of Community law. It appears that in the end the effect of this decision must be that all disputes arising out of at conflict between Community law and national law must be settled by the Constitutional Court alone. It is open to question whether that decision does not severely limit the possibilities open to an individual of obtaining a ruling that the legislature is in breach of Community law, particularly in the light of the fact that the decisions of the Constitutional Court, which rule that a legislative measure is invalid, only take effect *in futuro*. Thus, a serious procedural obstacle has been set up in Italy to the practical acceptance of the principle of the precedence of Community law and to its immediate effect.

One observation must be made which concerns all the decisions of the national courts to which I have just referred: every one has been taken unilaterally, without the courts in question availing themselves of the opportunity provided by Article 177 of getting into touch with the Court of Justice. In fact, as each case under consideration raised a question concerning the rules and requirements of Community law several opportunities of implementing legal cooperation have been missed which would have enabled problems of prime importance for the effectiveness of Community law to be resolved to the satisfaction of all parties.

Conclusions

At the end of this short analysis it is appropriate to draw certain conclusions. They derive from three successive propositions: first, that Community law subjects our States and their courts to certain mandatory requirements; secondly, that the Treaties contain all the necessary means for us to make an appropriate response to new requirements; thirdly, the reaction of the national authorities and, in particular, of the courts to these requirements has on the whole been positive and, what is more, constructive.

1. Requirements of Community law in relation to the national legal system

Let me say a word first of all about the requirements which emerge from this consideration of the manner in which Community law is applied in the Member States. Its application must enable the overriding power which is, in constitutional terms, inherent in the existence of Community law to be implemented.

First of all, a definition of the relationship between Community law and national law must take into account the fact that we are here dealing with a *common legal order* established in the collective interest of all our States and our peoples. Community law is not foreign law nor is it external law. It belongs to each of our States just as much as the national law. However, it is peculiar in that at the same time it provides a common standard for us all. So we are all directly affected by it. At the same time, there can be no unilateral solutions to the problems raised by its application. The right solutions can only be found in a spirit of cooperation and mutual trust.

Furthermore, and this is the second idea which must be fully accepted, Community law can only exist in real terms as a legal order in so far as it is *actually* capable of being applied within the Member States. The case-law to which I have referred shows that this principle of effectiveness has two complementary requirements: first, the 'direct effect' of Community law, which means that this law must be applied as positively within the Member States as national law itself, without the need for any national order to be

made for its implementation. This also means that in critical cases of conflict Community law must be able to take precedence over any contrary provision of national law. If, in a conflict with national law, Community law did not succeed in asserting its supremacy, the very existence of the Community would be instantly threatened. This supremacy has been repeatedly asserted by the Court.

2. Means of finding common solutions

A second conclusion which may be drawn from the foregoing investigation and reflexions is that the treaties which form the basis of the Community have put at our disposal all the necessary means of pursuing the common search for that unity and necessary effectiveness of Community law.

The Communities are made up of a number of institutions, each of which contributes in its own way to the development of Community law: first, there are the three institutions which share — although admittedly still very unequally — legislative power, that is, the European Parliament, the Council and the Commission. Secondly, there is the Court of Justice, the legal institution, which, in addition to settling disputes arising out of the functioning of the Community, is involved in the increasing case-law relating to this common law. All these institutions are constituted in such a way as to represent the Community as a whole and, what is of importance to us, the legal systems which it combines within it. The legal argument before the Court of Justice is wider in scope and more representative than argument before national courts because, in addition to the parties to the case, the governments of the Member States and the Community institutions take part in it. On the whole, although these combinations vary from case to case, the legal discussions bring in a highly representative range of legal interests and opinions. The Court is at grips with practical problems and is able to take account of all the relevant factors and it is here that a European law is being created which is acceptable to all the Member States as law which is genuinely common to them all.

Among these representative influences there is a procedure which is specially adapted to the requirements of legal cooperation: the procedure for giving preliminary rulings under Article 177 of the EEC Treaty to which I have repeatedly referred in this context. It is this procedure which enables the national courts, when faced with a question of Community law which gives rise to difficulties, to consult with this our common Court in order to find appropriate solutions. The few national decisions with which we can find fault are those in which the opportunity to use this consultative procedure has been missed.

3. Constructive contributions to the solution of the problems raised by the application of Community law

What has been the response of the national courts to this sort of legal 'challenge'? An analysis of national case-law shows that there has been no lack of problems and difficulties, at least in certain Member States. On the whole, however, reactions have been more than positive. Patterns of thought which have come into being over long periods and represent respected national traditions have had to be modified and sometimes all but cast aside. Legal problems, which henceforth will be common ones, have had to be thought out again in new settings. This effort to make a fresh start has been made with goodwill and often even with enthusiasm.

This common effort has brought concepts into being which will not only enable us to consolidate permanently this 'Community experience' but also to remove any final misunderstanding of Community law and break down all resistance to its full effectiveness. The purpose of this review has been to make a modest contribution to that effort by pointing out certain guiding legal principles which may encourage the coherent and effective application of Community law. These guiding principles appear not only in the work of the Community Court but also in the remarkable contributions made by national courts of every kind. It is clear that we are all engaged in one great movement to bring about the convergence of the legal systems into a new community of interests.

The most important judgments of the Court of Justice concerning the application of Community law in the Member States

Over the years the cases before the Court of Justice have thrown light on various aspects of the effect of Community law on the Member States and its effectiveness within their internal legal systems. Such themes as the binding nature of the undertakings entered into by the States, the direct effect of Community law, its mandatory and unconditional nature and its precedence over national law have been brought out. The following is a summary of the most interesting judgments of this type, showing the principal theme in each case. The references except for the first case are to the *European Court Reports,* in English; the reports for the years 1954 to 1961 and 1971 and 1972 have not yet been published.

23 February 1961, *Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority,* Rec. 1961, p. 1 (within a system of partial integration it is necessary to interpret the provisions of the Treaty in such a way as to ensure their effectiveness).

14 December 1962, *Commission of the European Economic Community* v *Grand Duchy of Luxembourg and Kingdom of Belgium* [1962] ECR 425, known as the 'gingerbread' case (the provisions of the Treaty are complete and mandatory in nature and are opposed to national practices which are capable of jeopardizing the achievement of the objectives of the Common Market).

5 February 1963, *NV Algemene Transport- en expeditie Onderneming van Gend and Loos* v *Netherlands Inland Revenue Administration* [1963] EC 1 (judgment of fundamental importance for the question of direct effect: Community law confers on individuals rights which the national courts must protect).

15 July 1964, *Costa* v *ENEL* [1964] ECR 585 (judgment of fundamental importance for the question of the precedence of Community law: mandatory and unconditional nature of Community law; the internal legal provisions of a State cannot prevail unilaterally over Community law).

13 November 1964, *Commission of the European Economic Community* v *Grand Duchy of Luxembourg and Kingdom of Belgium* [1964] ECR 625, known as the 'milk powder' case (unconditional nature of the undertakings entered into by the Member States within the Community and the impossibility for those States to take the law into their own hands).

22 June 1965, *Acciaierie San Michele SpA* v *High Authority of European Coal and Steel Community* (Order) [1967] ECR 27 (final and unconditional nature of the undertaking entered into by the Member States; effects of the Treaty identical in all the Member States; ineffectiveness, in relation to the Treaty, of exceptions provided for by national legislation or a national legal system, in particular by a Constitutional Court).

4 April 1968, *Firma Fink-Frucht GmbH* v *Hauptzollamt München, Landsbergerstraße, Firma Gebrüder Lück* v *Hauptzollamt Köln-Rheinau, SpA Salgoil* v *Italian Ministry for Foreign Trade* [1968] ECR 223, 245 and 453 respectively (obligation on the national court to make a constructive effort in order to ensure that full effect be given to Community law; the complexity of certain situations in a State cannot alter the nature and effectiveness of a Community provision).

13 February 1969, *Walt Wilhelm and Others* v *Bundeskartellamt* [1969] ECR 1 (precedence of the competition rules of the Community over national laws pursuing the same object).

10 December 1969, *Commission of the European Communities* v *French Republic* [1969] ECR 523, the 'rediscount rate' case (obligation on the Member States to act together in monetary matters and inability of any State to derogate unilaterally from the rules laid down by the Treaty).

17 December 1970, *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 (independence of Community law; effectiveness of that law cannot be avoided by reference to the constitution of a Member State or the principles of a national constitutional structure; protection of fundamental rights within the Community legal system).

14 December 1971, *Commission of the European Communities* v *French Republic* [1971] EC 1003, the 'Euratom Supply Agency' case (irreversible nature of undertakings entered into within the context of the Community).

14 December 1971, *Politi SAS* v *Ministry for finance of the Italian Republic* [1971] ECR 1039 (precedence of a Community regulation over any national legislative measure, even if it is enacted subsequently, which is incompatible with its provisions).

13 July 1972, *Commission of the European Communities* v *Italian Republic* [1972] ECR 529, case concerning the enforcement of the judgment in Case 7/68 (prohibition on the competent national authorities against applying a national rule recognized as incompatible with the Treaty and obligation to take all appropriate measures to enable Community law to be fully applied; application of Community law at the same time and with identical effect over the whole of the territory of the Community).

7 February 1973, *Commission of the European Communities* v *Italian Republic* [1973] ECR 101, case concerning 'premiums for slaughtering cows and for withholding milk from the market' (responsibility towards individuals in the case of a failure by a State to discharge its obligation within the Community; incomplete or selective application of Community regulations unacceptable; equality of States before Community law and respect by them for their duties of solidarity).

16 January 1974, *Rheinmühlen-Düsseldorf* v *Einfuhr- und Vorratsstelle* für Getreide und Futtermittel [1974] ECR 33 (full effect of Community law within the framework of the judicial systems of the Member States; national rules which prevent a national court referring questions to the Court of Justice under Article 177 are incompatible with the Treaty).

8 April 1976, *Defrenne* v *Sabena* [1976] ECR 455 (failure by a Member State over a long period to implement a provision of a Treaty does not affect the effectiveness of such provision; intervention by the national legal authority in order to ensure the performance of undertakings entered into by the Member States).

APPENDIX II

Books, articles and leading decisions of national courts concerning the application of Community law in the Member States

This Appendix contains, first, a summary of the principal publications, general and comparative, and, secondly, a list of the publications and legal decisions, if any, relating to each Member State.

Badiali, Giorgio, Il diritto degli Stati negli ordinamenti delle Comunità Europee, Milano 1971

Baermann, J., Catégories et autonomie du droit communautaire, Revue internationale de droit comparé, 1974, 33

Bebr, Gerhard, How supreme is Community law in the national courts? 1974 Common Market Law Review, 3

»La Communauté et ses États membres«, Sixième colloque de l'Institut d'Études Juridiques Européennes, Liège-La Haye 1973, avec les contributions de Zuleeg, Pescatore, Dehousse, Kovar

Constantinesco, Léontin, L'applicabilité directe dans le droit de la C.E.E., Paris, 1970

Constantinides-Megret, Colette, Le droit de la Communauté économique européenne et l'ordre juridique des États membres, Paris 1967

Daig, Hans-Wolfram, Die Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaften zur unmittelbaren Wirkung von EWG-Bestimmungen, Europarecht, 1970, 1

Dehousse, Fernand, Rapport sur l'application du droit communautaire par les États membres, Parlement européen, Documents de séance, 1967-1968, 3 mai 1967, n^0 38

Deuxième Colloque de droit européen à La Haye, 1963, Zwolle, 1966 (Thème I: Le problème des dispositions directement applicables des traités internationaux et son application aux traités instituant les Communautés, Rapport général, par Erades, L. et rapports nationaux)

»Diritto delle Comunità europee e diritto degli Stati membri«, Milano, 1969, avec des contributions de Van Dijk, Rodiere, Ganshof van der Meersch, Treves, Pescatore, Zweigert

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