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THE COURT OF JUSTICE AS A DECISIONMAKING AUTHORITY†

Ulrich Everling*

*"Justitia est constans et perpetua voluntas jus suum cuique tribuendi. Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia."*¹

In the European Community, the Court of Justice has the task of declaring the law by means of its "cognizance of things human and divine" and its "knowledge of what is just and unjust," as the quoted famous words of the *Corpus Juris Romani* declare. According to Article 164 of the EEC Treaty, the Court is to "ensure that in the interpretation and application of this Treaty the law is observed."² That task includes not only the application of the formal rules of the Community legal order but also the realization of those requirements of substantive justice which alone bestow dignity on and legitimation to an organization responsible for human activity such as the Community, which has evolved beyond a mere association of states.

The Court of Justice seeks to fulfill that task by acting in the dual capacities of a constitutional court and a court providing protection of individual rights.³ In daily practice the task presents itself in a commonplace form, concealed in questions of interpretation that are technically complicated and directed toward specific factual situations. However, behind such narrow questions always lies the fundamental question of the general orientation and the system of values which are to apply in the Community.

Eric Stein, to whom this Article is dedicated, has written a number of commentaries on the jurisprudence of the Court of Justice on the basis of his experience with both the European continental law and the common law systems.⁴ In conformity with his pragmatic approach, the following examination of the Court of Justice as a decisionmaking authority devotes

† This Article is a revised English version of the author's earlier publication, *Der Gerichtshof als Entscheidungsinstanz — Probleme der Europäischen Rechtsprechung aus richterlicher Sicht*, in *DER EUROPÄISCHE GERICHTSHOF ALS VERFASSUNGSGERICHT UND RECHTSSCHUTZINSTANZ* 137 (J. Schwarze ed. 1983). The footnotes have been supplemented, but most of the German references have been retained.

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1. *CORPUS JURIS CIVILIS, THE INSTITUTES OF JUSTINIAN I.1* (1853).

2. Treaty establishing the European Economic Community, Mar. 25, 1957, art. 164, 298 U.N.T.S. 11 (1958) [hereinafter cited as EEC Treaty].

3. On the Court of Justice generally, see works by its former Presidents, R. LECOURT, *L'EUROPE DES JUGES* (1976), Kutscher, *Über den Gerichtshof der Europäischen Gemeinschaft*, 16 *EUR* 392 (1981), and its former Registrar, van Houtte, *La Cour de Justice des Communautés Européennes*, 19 *CAH. DR.* 3 (1983); see also G. BEBR, *DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES* (1981); H. SCHERMERS, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* (3d ed. 1983); G. VANDERSANDEN & A. BARAV, *CONTENTIEUX COMMUNAUTAIRE* (1977).

4. See, e.g., Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 *AM. J. INTL. L.* 1 (1981), reprinted in *FESTSCHRIFT FÜR KONRAD ZWEIGERT* 771 (1981).

less attention to the theoretical context than to the manner in which the Court attempts to accomplish its task in practice. This essay is intended to provide a judge's point of view, that is to say, a subjective contribution on the basis of personal experience gained up to the present time. Although of course duties of office impose limitations on such an approach, it is nonetheless possible to set down a number of conclusions.

The first section discusses problems concerning the decisionmaking process, in order to clarify the conditions under which the Court of Justice must form its opinions. There will then follow some observations on the manner in which the Court finds the substantive principles on which to base its decisions. Finally, certain conclusions regarding the appraisal of the case law will be drawn.

I. PRACTICAL PROBLEMS RELATING TO THE COURT'S PROCESS

Problems arise for the Court's decisionmaking from its composition, from the number and type of questions on which it must give judgment, and from the course of the procedure.

A. *The Composition of the Court of Justice*

Only a judicial body which has developed cohesion and an integrating force can be expected to produce case law that is convincing, coherent, and based on clear objectives. In that respect, the Court is faced with particular difficulties because of its size and composition.

The full Court consists at present of eleven judges. In addition there are five Advocates General who also contribute to the Court's decisionmaking process and have a vote in administrative matters. It is obvious that discussions by sixteen, or even eleven, distinctive personalities may be difficult and protracted. That applies in particular to the deliberations over a judgment, which relate not only to its operative part but also to every detail of the grounds of the judgment. It is true that the Court is able to decide by majority, and that does happen in practice; the usual approach, however, especially in cases involving fundamental issues, is to attempt to arrive at the widest consensus possible by a thorough discussion of all the arguments.

Achieving broad consensus on both fundamentals and details is made even more difficult by the different backgrounds of the members of the Court. In that respect, the different professional experiences of the Judges in the judiciary, at the Bar, in politics, in administration and in the academic legal world would appear to be of comparatively minor significance. Indeed, such a wide spectrum, which is also to be found in the German Bundesverfassungsgericht (Federal Constitutional Court), has a positive and stimulating effect. What is more important is that the members of the Court are molded by their respective home countries. They have had different types of education, they have different historical heritages, and they think in the manner of different legal systems. They thus bring to the Court's process of decisionmaking a variety in legal thinking as well as their personal concepts of values. Such variety is indispensable for the functioning of the Court, no matter how much more difficult its work is thereby made, since only if all the legal systems existing in the Community are ade-

quately represented in the Court can its decisions have an integrative effect which encompasses all the Member States.

Herein also lies the importance of having judges of a particular nationality who are not "national judges" in the traditional sense. The Judge is not to advocate the interests of his home country. On the contrary, unwritten rules of convention impose restraint upon the Judge whose home country is particularly affected in a case. Nevertheless, each Judge has the important function of introducing the legal thinking and basic concepts of the Member State to which he belongs into the Court's consideration. Each Judge must also ensure that the decision and the reasoning on which it is based are expressed in such a way that they may be understood in his home country.

The Court has mitigated the difficulties involved in plenary deliberations by introducing, in addition to the already existing Chambers of three Judges, Chambers of five Judges. Such enlarged Chambers improve the variety of legal systems represented and will probably become increasingly important. However, assignment of a case to a Chamber must not have the effect of endangering the unity of the Court. The cohesion of the adjudicating bench is one of the central concerns of the Court as decisionmaking authority. It has so far demonstrated a remarkable integrating force, as each newly appointed Judge has been able to confirm.

B. *The Diversity of Proceedings and Their Subject Matter*

A second group of problems arises from the type and number of cases before the Court.

The Court delivered 185 judgments in 1982 and 151 in 1983, of which 83 and 51 respectively were judgments of the full Court and 102 and 100 respectively of the Chambers.⁵ Each Judge must therefore act as Judge-Rapporteur in, on the average, eighteen to twenty cases annually, the difficulty and importance of these cases being, of course, uneven. In addition, each Judge must give equally great attention to the important cases of other Judge-Rapporteurs. The burden of work is therefore a heavy one, and little time remains for reflection.

The subject matter of cases ranges from institutional and other questions of principle, such as the institutional position of the European Parliament and the significance of fundamental and human rights, to economic questions relating, for example, to the law governing competition, the regulation of the agricultural or steel market and the external trade, to social problems such as the freedom of movement for workers, social security and the law governing officials of the Community, and finally to the quite different problems of the mutual recognition and enforcement of judgments of the individual Member States. There is virtually no legal field that is not touched upon; many cases concern unusual and specific areas such as the hallmarking of precious metals, the law on foodstuffs in relation to vitamins, or the treatment of particular cuts of meat in the context of agricultural law. Thus, the Judges are required to possess a high degree of

5. For details, see Everling, *Die Mitgliedstaaten der Europäischen Gemeinschaft vor ihrem Gerichtshof*, 18 EUR 101 (1983) (English version forthcoming in the *European Law Review*).

intellectual agility and broad legal knowledge and experience. That personal challenge constitutes a particular attraction of working at the Court, even though it is not always easy to fulfill the expectations of the lawyers who are specialists in a given field.

So far the Court has rejected the suggestion that every Judge should act as Rapporteur in a special field of law, as is the case, for example, in the Bundesverfassungsgericht. The individual Judge would then achieve such dominance in his specialized field as to endanger the equal contribution of all legal systems to the case law in every area.

Certain types of cases place the Court of Justice in the particularly difficult position of determining facts. References for a preliminary ruling leave such determinations in the first place to a national court, but in direct actions the Court must determine the facts. The Court of Justice attempts to clarify the facts primarily by asking the parties questions, although recently it has heard evidence with increasing frequency.⁶ Because of its structure the Court is, of course, ill-suited to this task, even if it is carried out by one of the Chambers. The Court would therefore certainly be glad if this fact-finding burden were removed from it, especially in cases involving competition law, and assigned to a court of first instance.⁷

C. *The Course of the Procedure*

Considerable problems for the Court's decisionmaking also arise from the course of the procedure.

The Judges receive their initial introduction to a case in the preliminary report. This report is presented by the Judge-Rapporteur and serves as the basis for deciding whether to hold a preparatory inquiry and whether to assign the case to a Chamber.⁸ Neither that report nor the report for the hearing, which summarizes the facts and issues in preparation for the oral procedure, contains a provisional conclusion on the case. Thus, unlike most continental national courts, especially the Bundesverfassungsgericht, the Court of Justice proceeds to the hearing without any preliminary examination or deliberation. The Court is thus deprived of the opportunity to link the parties' oral argument from the outset to those questions which seem important to it, although of late attempts have been made to do so, particularly in the Chambers, albeit with only limited success. It is only as the result of the often very penetrating questions put by the Judges and

6. See, e.g., *Musique Diffusion Française v. Commission of the Eur. Comm.* (Nos. 100-103/80), [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8880 (Ct. J. Eur. Comm. June 7, 1983) (pioneer judgment), *digested in* 1983 PROC. CT. J. EUR. COMM., No. 14/83, at 1 (June 6-10), which contains a full assessment of the evidence.

7. Such a step has been sought for a long time by advocates, but it is not seriously discussed today because it has not even been possible to reach agreement at the political level on the creation of a court of first instance to hear staff cases, although the need for this reform is recognized by all those acquainted with the problem. See Bülow, *Überlegungen für eine Weiterentwicklung des Rechts der Gemeinschaftsgerichtsbarkeit*, 15 EUR 307, 315-16 (1980).

8. See Rules of Procedure, Art. 44(1), 25 O.J. EUR. COMM. (No. C 39) 1, 12-13 (Feb. 15, 1982). For details of the course of the procedure, see van Houtte, *supra* note 3; Lecourt, *La Cour de Justice des Communautés européennes vue de l'intérieur*, in EUROPA["]ISCHE GERICHTSBARKEIT UND NATIONALE VERFASSUNGSGERICHTSBARKEIT - FESTSCHRIFT ZUM 70. GEBURTSTAG VON HANS KUTSCHER 261 (W. Grewe, H. Rupp & H. Schneider eds. 1981).

Advocates General after the oral argument that it becomes plain where critical points lie. However, the questions do not always disclose the questioner's own inclinations in regard to the matter in point.

The Court of Justice is also reluctant to curtail the parties' oral argument, which often strays far from the issues. The Court usually restricts itself to an appeal for self-discipline since, in view of the uncertainty surrounding the common understanding of the law, every doubt concerning the proper course of the procedure and above all concerning the unrestricted right to be heard by the Court must be eliminated. As a consequence, the sittings of the Court are often unduly long. The Court will react strongly, however, when it has the impression that the representative of one of the parties is acting in a dilatory or unfair manner with regard to the other party in connection with the production of documents or with new arguments.

After the oral procedure there is normally an interval of three to six weeks or, if a Court vacation occurs in the meantime, even of some months, before the Advocate General gives his opinion. The importance of that opinion has often been considered,⁹ and no further emphasis need be placed on it. From a Judge's point of view, especially one who is not the Judge-Rapporteur, its importance lies primarily in the fact that it constitutes a further, objective presentation of the subject matter of the case. That advantage, however, is gained at the cost of a considerable postponement of the commencement of the deliberations, with the result that the impressions gained at the hearing fade. The Judges may refresh their memories by referring to the minutes of the oral proceedings, but such a process entails considerable extra work.

The Advocate General's opinion which is given in full session is followed by a preliminary deliberation of the Court to determine the general line of the judgment on the basis of a written or oral proposal made by the Judge-Rapporteur. Following up the result of this discussion, the Rapporteur submits a draft judgment in French, which is then considered sentence by sentence. In difficult cases the deliberation may involve several readings and last many weeks.

Each case therefore extends over a relatively long period of time and runs concurrently with others. The Judges must constantly think themselves anew into each case, which involves considerable cost in work and time. However, the process does allow opinions to be clarified gradually by repeated reflection and discussion and to be refined in response to each other. This method improves the chances to achieve wide-ranging agreement. Therefore, although the course of the procedure is to some extent burdensome, it does nevertheless produce an integrating effect within the Court.

9. See, e.g., Dashwood, *The Advocate General in the Court of Justice of the European Communities*, 2 LEGAL STUD. 202 (1982); Reischl, *Die Funktion der Generalanwälte in der Europäischen Rechtsprechung*, in DER EUROPÄISCHE GERICHTSHOF ALS VERFASSUNGSGERICHT UND RECHTSSCHUTZINSTANZ 121 (J. Schwarze ed. 1983).

II. THE FACTORS INVOLVED IN DECISIONMAKING

How does the Court of Justice obtain the substantive criteria for its decisions? Where does it find the standards for the "scientia justi atque injusti," for what is, in its opinion, lawful and just in the Community? The answers to such questions are normally sought in the methods of interpretation employed by the Court¹⁰ and in the theory of the general principles of law.¹¹ That is certainly the correct approach and it is therefore possible to refer to relevant legal literature on these matters. However, in addition some observations will be made on the practical process by which the Court finds its rules of interpretation and its general principles of law. This will be done from three points of view. First, consideration will be given to the Court's general line of approach to the case in point, secondly to the importance of differences between the legal systems represented in the Court, and finally to the synthesis of those views on the basis of Community objectives.

A. *Method of Approach to Individual Cases*

The Court bases its decisions, as is proper for a judicial body, on specific cases and facts. That is obviously its position in relation to direct actions, although parties looking for broad decisions of principles do not always appreciate this sufficiently. It is also the case as regards references to the Court for a preliminary ruling.

In proceedings for a preliminary ruling under Article 177 of the EEC Treaty, the Court is only to answer, in an abstract manner, the question referred to it by the national court, and the national court is to apply the answer to the specific case at hand. Nevertheless, the Court is in most cases able to give a suitable answer, one helpful to the national court, only if it is acquainted with the underlying factual circumstances, because only then is it able to assess correctly the significance of its reply. Thus in these cases, too, the Court repeatedly asks questions regarding the views of the parties, the contested national provisions, and the effects of different conceivable decisions. In response to an abstract question, such as the question referred to the Court in the *Adoui* case¹² by a Belgian court seeking a definition of the concept of public policy or the question referred to it in the *Züchner*

10. See H. Kutscher, *Methods of Interpretation as Seen by a Judge at the Court of Justice, Court of Justice of the European Communities, Judicial and Academic Conference* (Sept. 27-28, 1976); See also A. BREDIMAS, *METHODS OF INTERPRETATION AND COMMUNITY LAW* (European Studies in Law Vol. 6, 1978); Bleckmann, *Zu den Auslegungsmethoden des Europäischen Gerichtshofs*, 35 NJW 1177 (1982).

11. On the development of general principles of law and the methods used, see H. LECHERER, *DER EUROPÄISCHE GERICHTSHOF UND DIE ALLGEMEINEN RECHTSGRUNDSÄTZE* (1971); J. SCHWARZE, *DIE BEFUGNIS ZUR ABSTRAKTION IM EUROPÄISCHEN GEMEINSCHAFTSRECHT* 224 (1976); Akehurst, *The Application of General Principles of Law by the Court of Justice of the European Communities*, 52 BRIT. Y.B. INTL. L. 29 (1981); Meessen, *Zur Theorie Allgemeiner Rechtsgrundsätze des Internationalen Rechts: Der Nachweis Allgemeiner Rechtsgrundsätze des Europäischen Gemeinschaftsrechts*, 17 JAHRBUCH FÜR INTL. RECHT 283 (1974); Pescatore, *Le recours dans la jurisprudence de la Cour de Justice des Communautés européennes à des normes déduites de la comparaison des droits des Etats membres*, 35 REV. TRI. DR. COMP. 337 (1980).

12. *Adoui v. Belgian State* (Nos. 115-116/81), 1982 E. Comm. Ct. J. Rep. 1665 (Preliminary Ruling).

case¹³ seeking a ruling on concerted practices relating to bank charges, the Court is only able to give an abstract reply, which the court making the reference may often find unsatisfactory.

The need for a precise knowledge of the factual circumstances was emphasized by the Court in the *Irish Creamery* case, in which the Court was asked, among other things, whether a reference to it should be made before or after the facts had been clarified.¹⁴ Although the Court stated that this was a matter for the national court to decide and that therefore a reference could be made at an early stage in the proceedings, it also pointed out the value of having the facts in the case clarified first so that the national court could be given an answer which was really helpful in the specific case.

It follows inevitably from the nature of the judicial office that the specific circumstances which come to light in the proceedings are capable of influencing the decision of the Court to a considerable extent even if the final settlement of the case must then be left to the national court. If the Court of Justice is already able to see that a possible reply to the question referred to it will lead to a result which it feels to be unjust, it will seek ways of bringing about some other result. It is of course not possible to give specific examples, but it should be noted that the reply to the abstract question framed by the court making the reference is not infrequently influenced by the result which the Court believes to be correct in the case sub judice.

It therefore follows that in the Court of Justice, too, the judge's "judicial instinct" plays a role, since if the Court is to ensure that justice is done that instinct must produce an effect even in individual cases. Nevertheless that intuitive reaction must be controlled by rational criteria for decisionmaking, which will be considered in due course. An individual case should not be resolved by laying down principles of broad scope which range beyond the general context of the case and produce unforeseeable effects. Yet the foregoing comments admit that parties are not ill-advised if they explain the specific circumstances underlying the question put by the court making the reference.

The Court's adoption of an approach directed toward the specific facts of the case at bar is above all necessary because the Court may not overlook the effect of judgments drawn up in general terms on the multitude of conceivable factual variations. The Court was not so reticent in the sixties and at the beginning of the seventies. In that period it established the well-known general principles which set the trend for the future and from which it subsequently permitted exceptions where necessary in individual cases. Such an approach may have been appropriate in the Community's formative years and, with the benefit of hindsight, one can see that it did advance the Community to a considerable extent; one need only think of the great judgments delivered in 1963 and 1964.¹⁵ Nevertheless, there were also

13. *Züchner v. Bayerische Vereinsbank AG* (Case No. 172/80), 1981 E. Comm. Ct. J. Rep. 2021 (Preliminary Ruling).

14. *Irish Creamery Milk Suppliers Assn. v. Ireland* (Nos. 36, 71/80), 1981 E. Comm. Ct. J. Rep. 735 (Preliminary Ruling) (national charges on agricultural products of national origin).

15. *See, e.g., N.V. Algemene Transport v. Nederlandse Administratie der belastingen* (Case No. 26/62), 1963 E. Comm. Ct. J. Rep. 1 (Preliminary Ruling) (prohibition of customs

areas in which such general principles were ahead of developments and at first did not determine Community practice, for example in the field of external relations.¹⁶

However, in the course of the seventies the Court of Justice seems to have become increasingly cautious about laying down general principles and has concentrated to a greater extent on the problem to be solved in the individual case. In any event that is clearly the trend today. The reasons for this are open to various conjectures. On the one hand there is the increasing complexity of the facts of cases, which makes it ever more difficult to foresee the effects of judgments in the context of the obscure interaction of provisions of Community law and provisions of national law. On the other hand, the cause may lie in the changes in the composition of the Court, that is to say in the arrival of Judges from the common law tradition schooled in case law and inclined to a pragmatic approach and in the gradual introduction of a new generation of Judges. Finally it would seem that the general lack of political direction also plays a part. The Court is no longer able to rely on a general unconditional will to integrate. Even in the other Community institutions there have been no great advances toward integration for a long time now; instead there has been merely the persistent policy of progressing by small painful steps.

One good example of this trend is the case law relating to measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the EEC Treaty. The Court of Justice originally laid down extraordinarily broad principles in the *Dassonville* Case in 1974.¹⁷ Its judgment in the *Cassis de Dijon* case in 1979 further developed these principles.¹⁸ However, it has largely gone unnoticed that the latter decision contained considerable limitations on the principles which had originally been laid down. Consequently, the Court has subsequently developed a case-by-case jurisprudence in which it weighs against each other in a pragmatic manner the interests worthy of protection.¹⁹

Occasional departures from this general reticent trend, which, furthermore, will usually lead to conflicts, will have to be regarded as exceptions which prove the rule.²⁰

duties); *Costa v. E.N.E.L.* (Case No. 6/64), 1964 E. Comm. Ct. J. Rep. 585 (Preliminary Ruling) (nationalization); see also Stein, *supra* note 4.

16. See, e.g., *Commission of the Eur. Comm. v. Council of the Eur. Comm.* (Case No. 22/70), 1971 E. Comm. Ct. J. Rep. 263 (ERTA Agreement); Advisory Opinion 1/78, 1979 E. Comm. Ct. J. Rep. 2871 (International Agreement on Natural Rubber).

17. *Procureur du Roi v. Dassonville* (Case No. 8/74), 1974 E. Comm. Ct. J. Rep. 837 (Preliminary Ruling) (certificate of authenticity for whisky).

18. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* (Case No. 120/78), 1979 E. Comm. Ct. J. Rep. 649 (Preliminary Ruling).

19. See generally Everling, *Zur neueren EuGH-Rechtsprechung zum Wettbewerbsrecht*, 17 EUR 301 (1982); Barents, *New Developments in Measures Having Equivalent Effect*, 18 COMMON MKT. L. REV. 271 (1981); Moench, *Der Schutz des freien Warenverkehrs im Gemeinsamen Markt*, 35 NJW 2689 (1982); Oliver, *Measures of Equivalent Effect: A Reappraisal*, 19 COMMON MKT. L. REV. 217 (1982).

20. See *Gaston Schul Douane Expeditieur BV v. Inspecteur der Invoerrechten en Accijnzen* (Case No. 15/81), 1982 E. Comm. Ct. J. Rep. 1409 (Preliminary Ruling) (value added tax on importation of second-hand goods); Advisory Opinion 1/78, 1979 E. Comm. Ct. J. Rep. 2871 (International Agreement on Natural Rubber).

B. *The Influence of the Different Legal Systems*

Even a case-by-case jurisprudence must follow general guidelines. It is not sufficient for every judgment to be based on previous judgments in comparable cases and to constitute a continuance of them. Individual decisions must also follow a general line of orientation. That line of orientation is searched initially by each Judge on the basis of the legal system with which he is familiar, but he must also take account of the principles of other legal systems. That is accomplished by the comparison of laws, a process which is used in the Court to a far greater extent than its expression in the judgments would indicate. The basic information is usually provided by the excellent documentation service of the Court or by the Commission. As a general rule, however, the studies relate to limited fields only, and such specific comparisons are not free from problems.²¹ It is well known that identical rules in the Member States are in practice often applied in different ways and that, conversely, different rules often lead to comparable results.

The various individual provisions governing specific matters are, however, of less importance for the Court's case law than the different basic attitudes underlying the individual legal systems. The best examples of this are in administrative law. The attitude of a French judge proceeding from the principle of "légimité" is different from that of a German judge applying the "Rechtsstaatsprinzip," while the English position based on the "rule of law" is different yet again.²²

What is more important to the French judge and to those judges whose own law has been influenced to a considerable extent by French administrative law is to reestablish the integrity of the legal system which has been violated, while the German judge's principal inquiry is whether subjective rights have been infringed. The common law judge, however, thinks less in terms of the supremacy of the State and its organs (concepts such as "Hoheitsakt" and "öffentliche Gewalt" or "puissance publique"), and is more concerned that in the event of a dispute the administration and the citizen should be on an equal footing. Frequently these different theoretical bases do not constitute an obstacle to similar solutions in the individual case; moreover, the appropriate solution often emerges in the Court's deliberations from the specific circumstances of the case.

Nevertheless, the different concepts sometimes have an effect in practice, as the law relating to civil servants demonstrates. In contrast to the German courts, the Court of Justice has from the outset and without hesitation entertained actions brought by unsuccessful candidates for promotion without even inviting the successful candidate to become a party to the pro-

21. On the problems relating to such a specific comparative approach, see M. RHEINSTEIN, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 32 (1974). On the use of comparative law at the Court of Justice, see Daig, *Zu Rechtsvergleichung und Methodenlehre im Europäischen Gemeinschaftsrecht*, in *FESTSCHRIFT FÜR KONRAD ZWEIGERT* 395 (1981).

22. On this and the following passage, see *EUROPÄISCHES VERWALTUNGSRECHT IM WERDEN* (J. Schwarze ed. 1982); Everling, *Elemente eines europäischen Verwaltungsrechts*, 98 DVBl 649 (1983) (citing other sources). For a comparison of the systems, see Jarass, *Besonderheiten des französischen Verwaltungsrechts im Vergleich*, 34 DÖV 813 (1981). MacCormick, *Der Rechtsstaat und die rule of law*, 39 JZ 65 (1984), contrasts essential differences between the German and the British-American concepts.

ceedings although his legal position may be affected even many years after the promotion.²³ In addition, the administrative authority in such cases shows little reluctance in readopting in a correct manner and with retroactive effect the measure which has been annulled, thereby restoring the legality of the position.²⁴

The different ways in which administrative discretion is reviewed are of particular importance. Those judges whose national legal systems are strongly influenced by French law tend to leave the exercise of discretion, its compatibility with general objectives, the appraisal of the established facts and their classification under indeterminate legal concepts, the interpretation of the relevant concepts, and even the interpretation of the limits of the discretion largely to the administrative agency. They are unable to understand that, for example, the legality of a properly adopted measure restricting imports of apples from Chile is to be examined in the light of the principle of free trade under Article 110 of the EEC Treaty,²⁵ as was requested by German lawyers in the case in point, or that it is necessary to recognize a subjective right to a correct exercise of discretion. Conversely, the governmental act free from judicial control ("acte de gouvernement," "gerichtsfreier Hoheitsakt"), which is firmly excluded under German law following the experiences of dictatorship,²⁶ is still discussed in France although it would appear that it is a concept which is no longer applied to measures adopted by the administration.

On the other hand, all the judges, from whatever legal system they may come, take seriously any indication of a breach of legal principles such as the principles of equality, legitimate expectation and proportionality, or the right to a fair hearing. Thus, for example, the *ratio decidendi* of the judgment in the *Cousin* case,²⁷ which concerns the country of origin of textile products, was not the alleged incorrect assessment of the decisive criterion under the relevant provisions, namely the "last substantial process or operation" performed in respect of a product, but the inequality of treatment between dyed cloth and yarn that could not be justified on any objective ground. Even if one takes the view, in conformity with what is probably a prevailing trend at the present time, that the German courts go too far, at least in some respects, in their review of the exercise of administrative discretion, it would still seem that according to the German understanding of the law stricter standards apply.

A further example of the influence of the Member States' different legal approaches is the use in the French legal system or in systems strongly in-

23. See, e.g., *Dautzenberg v. Court of Just. of the Eur. Comm.* (Case No. 2/80), 1980 E. Comm. Ct. J. Rep. 3107 (promotion of officials). For a discussion of the German position, see J. REMMEL, *DIE KONKURRENTENKLAGE IM BEAMTENRECHT* (1981).

24. In the *Dautzenberg* case, (Case No. 2/80), 1980 E. Comm. Ct. J. Rep. 3107, the promotion that was declared void was restored in a correct manner and with retroactive effect; however the "victorious" competitor was also promoted forthwith.

25. See *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen* (Case No. 112/80), 1981 E. Comm. Ct. J. Rep. 1095 (Preliminary Ruling).

26. On that problem, see K. DOERING, *DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND* 223-27, 374-78 (2d ed. 1980).

27. *Directeur des Douanes et des Droits indirects v. Cousin* (Case No. 162/82), 1983 E. Comm. Ct. J. Rep. 1101 (Preliminary Ruling).

fluenced by French law of "moyens," or "submissions," a practice which may clearly be traced to the Roman law system of actions.²⁸ To a German lawyer's way of thinking, what are homogeneous situations are, in a sense, "sliced" into separate sections and examined one by one in a manner which seems to him both formalistic and remote from real life. Thus, the German judge normally tries to condense the "moyens" into an appropriate context, whereas, conversely, a judge schooled in a legal system strongly influenced by French law attempts to come to grips with what he would regard as the amorphous contentions of German parties to proceedings by dividing them into "moyens." Illustrations of the different approaches may be found by reading judgments such as those in the *Nungesser, GVL*, or *Klöckner* cases on the one hand²⁹ and the judgments concerning the French checks on wine imports and the seat of the European Parliament on the other hand,³⁰ in which the initial draft judgments were prepared by Judge-Rapporteurs from different legal systems.

Finally, it is necessary to point out that the Judges' understanding of the law is also influenced by the different constitutions of the Member States. A judge who comes from a Member State having a federal form is more prepared to tolerate different provisions in the individual Member States because he is used to that in his home country, while "federal" Europe is often regarded erroneously in the other Member States as unitary. Judges from Member States that have a constitutional court and whose administrative courts have a broad jurisdiction to try issues by virtue of "general clauses" will be less inhibited in subjecting the political institutions of the Community and the legislation and individual measures adopted by them to judicial review than those from other Member States.

In the last analysis such differences are frequently based on different concepts of State and nation which have evolved in the course of history.

C. *Substantive Guidelines for Decisionmaking*

From these elements, that is to say from the facts of the specific case, even though they are often presented in an abstract manner, and from the understanding of the law which has developed differently in the various Member States and which is represented by strong individual personalities, the College of Judges forms its opinion on the problem to be resolved in the case at bar. This is done by mutual discussion and influence, a process that requires a high degree of understanding of the basic tenets of other legal

28. See the wording of the first paragraph of Article 173 of the EEC Treaty, which concerns actions "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers." EEC Treaty, *supra* note 2, art. 173. For a discussion of the problem, see B. BÖRNER, *DIE ENTSCHEIDUNGEN DER HOHEN BEHÖRDE* 142-46 (1965).

29. *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH v. Commission of the Eur. Communities* (Case No. 7/82), 1983 E. Comm. Ct. J. Rep. 483 (performers' rights); *Nungesser KG v. Commission of the Eur. Comm.* (Case No. 258/78), 1982 E. Comm. Ct. J. Rep. 2015 (seeds); *Klöckner-Werke AG v. Commission of the Eur. Comm.* (Case No. 119/81), 1982 E. Comm. Ct. J. Rep. 2627 (steel production quotas).

30. *Commission of the Eur. Comm. v. French Republic* (Case No. 42/82), 1983 E. Comm. Ct. J. Rep. 1013 (wine imports); *Luxembourg v. European Parliament* (Case No. 230/81), 1983 E. Comm. Ct. J. Rep. 255 (seat and working place of the Parliament).

systems and that will lead to a successful outcome only if all sides possess a willingness to arrive at common conclusions.

The substantive basis for working out a specific decision resting on a common understanding of the law must be the texts of the Treaties and the objectives of the Community which underlie them, but serious difficulties arise in precisely this context. It is common to refer to "teleological" interpretation,³¹ and that presents relatively few problems if it is understood as meaning the purpose-oriented application of technical provisions. However, the word means more than this; the Greek term "telos" in this context signifies the ultimate objective and the deeper purpose of the entire process of European integration. But what is the "telos" of the Community today? Is it still that of the founders, if even they were agreed in that respect?³²

At a time when, although there is much talk of the European Union and the necessity for concerted action, national needs still determine practices of the Community to a large extent, the Court of Justice is given little guidance by the political institutions of the Community. On the contrary, some problems that the politicians are unable to solve may even be shifted onto the Court.³³

In such circumstances the Court of Justice can scarcely fall back on general objectives. Instead it must draw guidance from the specific tasks defined in the Treaty and the results, which must be pursued and expanded upon, hitherto achieved on the basis of those tasks. This involves primarily securing the Common Market by applying the prohibition of discrimination and restrictions, by guaranteeing the conditions of competition, by ensuring a common position toward other countries and by protecting persons affected by unlawful acts. The Common Market constitutes the starting point for the entire integration process and all attempts at more far-reaching economic and political progress stem from it. Running like a red thread through the whole of the Court's case law is the idea that this core of the Community must remain sacrosanct.

This endeavor of the Court to secure the Common Market, however, produces inevitable conflicts and contradictions with the powers of the Member States which are responsible for economic policy in general insofar as there are no Community rules in the individual instance. Particularly well known are the conflicts arising from the rules governing the manufacture and marketing of products that have still not been harmonized, a situation which the decision in the *Cassis de Dijon* case was designed to meet.³⁴ In such instances, the Court of Justice strives to balance the fundamental requirement of securing the Common Market with the legitimate need of Member States to adopt rules in the public interest. In so doing, the Court

31. See A. BREDIMAS, *supra* note 10, at 70-105.

32. Doubts whether they were agreed would seem to be justified. See the detailed examination of discussions in the Member States on the purpose, subject matter, and methods of integration at the time of the Treaty negotiations in H.J. KÜSTERS, *DIE GRÜNDUNG DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT* (1982).

33. See, e.g., *Luxembourg v. European Parliament* (Case No. 230/81), 1983 E. Comm. Ct. J. Rep. 255 (seat and working place of the Parliament).

34. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) (Case No. 120/78), 1979 E. Comm. Ct. J. Rep. 649 (Preliminary Ruling).

remains sensitive to modern developments such as the protection of the environment or the protection of consumers, as recent decisions have demonstrated.³⁵

This balancing process based on specific circumstances is generally characteristic of the Court's case law, especially insofar as the Member States are affected by it. The Court cannot ignore that in the final analysis the Member States sustain the Community as its founders and exercise decisive responsibility through the Council; it must also consider that they independently discharge functions of their own for the common good and in order to secure their national existence. On the other hand, however, the Member States are incorporated into the Community and are subject to Community law and must accept that restrictions are placed on them by the case law, including, where appropriate, decisions in Treaty-infringement cases. In that respect, too, the Court proceeds in a manner that is pragmatic, balanced and unaffected by ideology.³⁶

The case method aids such an approach. The Court builds upon earlier judgments, feels its way to the next case and thus gradually works out the guidelines to which it can refer for further orientation. Of course this can sometimes lead to an impasse or to inconsistencies, such as in the decisions on fees for veterinary health inspections on the occasion of importation.³⁷ And yet there is no other way.

The Court's pragmatic approach is demonstrated with particular clarity by the *Nungesser* judgment on seeds.³⁸ The Court's decision in that case related solely to the protection of plant variety rights and was based on the specific characteristics of those rights. The decision did not relate, as some observers have suggested, in disregard of express contrary statements in the judgment, to rights deriving from licensing agreements in general. It may be that, as is frequently claimed, the criteria developed by the Court would also apply in the same way to patent-licensing agreements.³⁹ If that were the conclusion of academic criticism of the *Nungesser* judgment and were knowledgeably discussed before the Court in a subsequent case, then the Court could take the next step in the development of general principles in full knowledge of the problems and consequences. Such a future decision would then have the prospect of finding general acceptance because its foundations would have been laid in public debate.

35. See *Public Prosecutor v. Sandoz B.V.* (Case No. 174/82), 1984 COMMON MKT. REP. (CCH) ¶ 14,006 (Ct. J. Eur. Comm. July 14, 1983) (addition of vitamins to food), *digested in* 1983 ECJR 86; notes 17, 19 *supra*.

36. See note 5 *supra*.

37. See, e.g., *Amministrazione delle Finanze v. Leonelli* (Case No. 88/82), 1983 E. Comm. Ct. J. Rep. 1061 (Preliminary Ruling). But an impasse or inconsistency may prompt the Court to search for a new orientation. See, for example, the recent judgment concerning fees for health inspections, *I.F.G. Intercontinentale Fleischhandels-gesellschaft v. Freistat Bayern* (Case No. 1/83) (Ct. J. Eur. Comm. Jan. 31, 1984, not yet published) (Preliminary Ruling), *digested in* 1984 ECJR 15.

38. *L.C. Nungesser KG v. Commission of the Eur. Comm.* (Case No. 258/78), 1982 E. Comm. Ct. J. Rep. 2015.

39. See *F. Koenigs, DER BETRIEB 1811* (1982); *Pietzke, Anmerkung zu L.C. Nungesser KG v. Kommission*, 1982 GRUR INT. 537; *Reinhardt, Anmerkung*, 28 RIW/AWD 825 (1982); *van Bael, Réflexions sur l'Arrêt "Semences de Maïs": des Semences d'Espoir?*, 19 CAH. DR. EUR. 176 (1983); *Verloop, Maize Seed Judgment*, 11 INTL. BUS. LAW. 231 (1983).

The case law method thus involves simultaneous assessment of the individual case and efforts toward the further development of Community law in general terms. The day-to-day treatment of individual cases gradually develops, on the basis of the legal systems existing in the Community, into a common understanding of the law that will sustain the legal order of the Community. This common understanding of the law is gradually formed in the course of the procedure in each individual case, as described above, by the mutual influence of the judges who represent and explain the multitude of values and legal views. And although that procedure is also frequently burdensome because it is lengthy and cumbersome, it nonetheless provides the opportunity for integrative decisionmaking on a basis which encompasses all the Member States.

III. CONCLUSIONS FOR AN APPRAISAL OF THE CASE LAW

The foregoing references to the problems and peculiarities of the Court's decisionmaking should have made it clear that this operation must be seen as a process. A proper assessment and judgment of the Court's decisions can only be made if they are viewed as the culmination of such a process in the sense of an integrative procedure. A few further comments in that respect follow by way of summary.

A. *The Decisionmaking of the Court as a Process*

The judgments of the Court of Justice are not pronouncements by a monolithic institution proclaiming, on the basis of preconceived principles and fixed opinions, its words of wisdom which are supposed to have the highest claim to ultimate validity. Instead, as has been shown, the judgments are formed in the course of an extremely complicated process which varies from case to case and in which eleven persons of very different origins and with different concepts of values and objectives must, under difficult circumstances, in the context of a concrete setting, come to a conclusion accepted by all or at least by a sufficiently large majority.

Many such difficulties are inevitably present in every collegiate court and in particular in the Bundesverfassungsgericht with its Senates of eight members coming from different camps. But the communication necessary to reach a consensus is stretched to its limits by the Court of Justice's even higher number of Judges and particularly by the Judges' different nationalities, history, legal traditions and concepts of the State. The basic consensus that unites the members of a national court, notwithstanding all differences of opinion on details, exists in the Court of Justice only in the form of a strong awareness of a common responsibility for fulfilling the task assigned to it.

Consequently, when the Court is in the process of reaching a decision it engages in a work of construction which, in a certain sense, reflects the entire process of European integration in which it is embedded. It therefore cannot work in isolation; the Members of the Court need to be supported by the public in their respective countries, by legal writers, by references from national courts and by the participation of national authorities in proceedings. Only if all legal systems represented in the Community contrib-

ute fully to the making of the Court's decisions is it able properly to fulfill its task of developing a genuine Community legal order.

B. *The Court's Judgments as the Results of the Decisionmaking Process*

The variety of opinions that must be merged in the process whereby the Court makes its decisions necessarily finds expression in the judgments. The operative part of the judgments, that is to say the actual result of the proceedings, reflects this variety to some extent. But it is usually less difficult to come to agreement on the result than on the reasoning which therefore often reflects more controversies and compromises. In the course of deliberations there is frequently particular dispute over questions that leave no trace in the reasoning of the judgment. As a general rule such questions are not overlooked, as some critics think, but reaching agreement on them is so difficult that the Court prefers not to mention them.

The Court of Justice is constantly impressed to find what wide-reaching intentions and ideas are often read into its decisions. It is tempting to draw a comparison with the work of the modern artist which is given some deep meaning, often to the artist's surprise, in the criticism of experts and feature writers. The judgments are certainly not works of art, but they are the products of a creative intellectual process. As intellectual creations they become detached from their creators on publication and acquire independent significance in the process of integration; in fact, they become independent of and often go beyond what the authors may have thought when arriving at and formulating their decisions.

Courts create their own legitimacy by the quality of their decisions. The inherent power of persuasion of their judgments entitles courts to expect acceptance by those affected by the decisions.⁴⁰ Reliance on the power of persuasion is particularly important in a system such as the Community in which the means for enforcing judgments are limited and in which compliance with them ultimately depends on the recognition by all concerned that the common interest requires respect for the Community legal order. Nevertheless, it is difficult to determine the criterion against which the quality of the case law is to be measured.

With regard to constitutional courts an American view that the correctness of the result should be the sole criterion has lately been opposed by a German view. The former president of the Bundesverfassungsgericht has recently explained that it must seek acceptance of its decisions primarily in the persuasive power of its reasoning.⁴¹

The difficulties involved in the process of arriving at its decisions limit the extent to which the Court of Justice can develop truly coherent and convincing reasoning. Although the Court has for some time endeavored to provide more detailed and persuasive reasoning than it formerly did, so that the frequently raised complaint concerning the laconic brevity of its decisions would now appear to be out of date, nevertheless its efforts in that

40. See Benda, *Zur gesellschaftlichen Akzeptanz verwaltungs- und verfassungsgerichtlicher Entscheidungen*, 36 DÖV 305 (1983).

41. Benda, *supra* note 40, at 307.

direction are confined within narrow limits by virtue of the nature of its decisionmaking process.

The Court of Justice therefore creates its own legitimacy primarily by the internal logic and consistency of the actual results expressed in its judgments and by the significance of those results for the development of the Community legal order and the continuation of the process of integration. They acquire their own pattern only in the perspective of a whole series of judgments on given problems, in which it gradually becomes clear what the Court of Justice regards as the criteria "justi atque injusti" in the Community.

C. The Role of the Court of Justice in Protecting Individual Rights and as a Constitutional Institution

A Judge of the Court of Justice must naturally leave to others the appraisal of the question whether and to what extent the Court fulfills in its judgments, arrived at in the manner described above, its role as a constitutional court and as a court providing protection of individual rights. However, by way of conclusion, reference must also be made to certain factors that are important to the Court's conception of its own role.

From the point of view of its role both as a constitutional court and as a court providing protection of individual rights, the essential factor is the Court's relationship with other Community institutions and with the Member States.

When an action is brought before the Court by a business firm or by an individual against a decision adopted by a Community institution or, indirectly, by means of a reference from a national court for a preliminary ruling against a decision by a national authority giving effect to Community law, the Court accords the protection of the law in the same way as national courts in comparable cases by reviewing the specific measure. However, there is a major difference between those courts and the Court of Justice; the latter is not able to rely on a fully developed legal order, but must, insofar as it does not refer to national law, itself first develop, in the manner described, the principles and criteria of Community law against which it will appraise the measure in question.

Insofar as the Court thereby creates judge-made law, its function of protecting individual rights takes on, at the same time, a constitutional aspect because the law concerns an area that has been assigned to the legislative institutions of the Community. *A fortiori*, the relationship to those institutions becomes material when the Court examines the legality of provisions adopted by Community institutions and thereby extends Community law by means of general principles of law. Yet the Court is not thereby putting itself in the position of the Community legislature; it does not stray from the sphere of judicial activity, which is the judgment of specific cases according to rules that it has previously found to constitute the law in force, and therefore not in the intention of furtherance of a specific policy. The power of the Community legislature to legislate remains unimpaired and it may in certain circumstances even, insofar as no Treaty provisions or general principles of law are involved, correct the consequences of the Court's jurisprudence.

Thus, the function of the Court of Justice as a constitutional court is primarily to interpret and develop the Community legal order. In doing this the Court does not usurp the position of the political institutions but it participates, as a judicial institution, in the creation of a constitution which is in a constant state of evolution in a pluralistic community. In an incompletely constituted system like the Community, to use the words of one commentator, "the constitution . . . is made by the open society of those, all those, who interpret it. In the European Community, creation of a constitution is being partly happened by means of mere interpretation."⁴² The supreme interpreter is the Court of Justice; and its importance for the programs of European integration could hardly be expressed more clearly.

42. Häberle, *Verfassungsinterpretation und Verfassungsgebung*, 9 ZfSR 1 (1978). It is not possible to consider in the present context the problems raised by Häberle's conception of the "openness of the constitution"; on that, see Kaiser, *Einige Umrissse des deutschen Staatsdenkens seit Weimar*, 108 AÖR 5 (1983). It would, however, appear to be instructive for the purpose of characterizing the development of the Community, although it must be added that precisely in the present context it is not a "State" constitution that is being discussed.