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## Toward a European System of Appellate Courts

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## TOWARD A EUROPEAN SYSTEM OF APPELLATE COURTS

*Hjalte Rasmussen\**

EUROPEAN LAW AND THE INDIVIDUAL. Edited by *F.G. Jacobs*. Amsterdam: North-Holland Publishing Co. 1976. Pp. xi, 211. \$21.75.

The issue of individual rights has become one of substantial interest and concern in the European Economic Community (EEC), and it is the subject of this book. Although the book's title is ambitious and the table of contents reveals that the subject is approached in a variety of ways, it can hardly be said that this book covers all aspects of the rights of the individual under Community law. After all, if this book were really meant to explore all the title implies, would it not ultimately be necessary to describe the entire legal system of the Communities? Even if measured by more modest standards, however, the book's coverage is far from all-embracing. Actually, as the *Foreword* suggests, these ten papers, which were first presented at a workshop held in 1975 by the University of London's Institute of Advanced Legal Studies, concentrate on only two, albeit broad, facets of individual rights.<sup>1</sup>

Specifically, the essays emphasize that aspect of Community Law that could loosely be termed "social." In the interest of precision, I should certainly mention, however, that one can find in several of the essays, particularly in "The European Social Charter," discussions of many important aspects of labor law.

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1. The papers include *The Legal Protection of Private Parties in the Law of the European Communities*, by W. van Gerven (pp. 1-17); *The International Scope of the Community Provisions Concerning Free Movements of Workers (with Special Reference to the Law of the United Kingdom)*, by T.C. Hartley (pp. 19-37); *An Incipient Form of European Citizenship*, by R. Plender (pp. 39-53); *Conflicts of Law in Matters of Social Security Under the EEC Treaty*, by K. Lipstein (pp. 55-77); *Recent Decisions of the Court of Justice in the Field of Free Movement of Persons and Free Supply of Services*, by P. Leleux (pp. 79-93); *The Mutual Recognition of Qualifications in the EEC*, by R. Wagenbaur (pp. 95-112). Professors of Law Eric Stein and G. Joseph Vining, the only Americans to participate in the workshop, co-authored *Citizens' Access to Judicial Review of Administrative Action in a Transnational and Federal Context* (pp. 113-43). The remaining papers are *The Protection of Fundamental Rights in the Community*, by M. Hilf (pp. 145-60); *Remedies in the United Kingdom: Some Practical Problems of Direct Applicability*, by Solicitor Lawrence Collins (pp. 161-79); and *The European Social Charter*, by O. Kahn-Freund (pp. 181-211). The editor, Francis G. Jacobs, is Professor of Law at King's College in London.

Moreover, van Gerven's essay and Stein and Vining's contain important contributions to the study of Community procedural law. (I shall return to the latter in great detail below.)

In sum, the reader will find selective discussions of the substantive social and labor law, and of related aspects of the procedural law of the European Communities and other European sources of law.<sup>2</sup> All the essays, according to the *Foreword*, are concerned mainly with the gradual enlargement of the legal protection of the individual as a result of certain far-reaching decisions of the European Community's Court of Justice.

From what has already been said, it is obvious that I cannot review all the essays without resorting to Procrustean techniques, and the ten essays in this book certainly deserve better. For example, Trevor Hartley took up the problem of the international effects of Community law on movements of workers when that subject-matter was still an area of Community law largely unpenetrated by other scholars. Similarly, Hilf's "The Protection of Fundamental Rights in the Community" embodied considerable new information and research, for only shortly before he presented his paper had discussion begun about how and by whom the fundamental rights of the individual should be protected under Community law. Since the time of Hilf's essay, however, the issue of fundamental rights has evoked perhaps the most important developments in the Community and its law.<sup>3</sup>

The other fine essays notwithstanding, the rest of this review will look at the contribution of Stein and Vining.<sup>4</sup> Their question—why the Court of Justice has limited the access of private parties to judicial review under article 173, paragraph 2, of the

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2. "Community law" and the "Law of the Communities" are interchangeable with "European law" and are often used in its stead. The term "European law" also embraces, however, non-national European law which stems from sources other than the European Communities. Although the foreword refers to the subject of the book as "the area of Community law which can loosely be called 'social,'" several of the essays concern issues which would better be described as "European law." For instance, two of the essays largely discuss laws of the United Kingdom. Collins, *supra* note 2; Hartley, *supra* note 2. Also, Kahn-Freund's *The European Social Charter*, *supra* note 2, argues for the use of the broader term "European law."

3. See, e.g., Golsong, *Ist der Katalog der in Europäischen Menschenrechtskonvention erhaltenen Grundrechte für die EG anwendbar?*, ZEITSCHRIFT FÜR GRUNDRECHTE 346-51 (1978); Schermers, *The Communities Under the European Convention on Human Rights*, 1978/1 LEGAL ISSUES OF EUROPEAN INTEGRATION 1; *L'Individuel le droit Européen* (1975) (published papers from the Seventh International Congress for European Law held in Brussels on oct. 2-4, 1975, under the auspices of the International Association for European Law).

4. The chapter by Stein and Vining is also printed in 70 AM. J. INTL. L. 219 (1976).

EEC Treaty—is among those which have caused the most gallons of ink to flow. To my knowledge, however, they are the first to attempt a full account of the reasons the Court may have had when denying that access.

To answer the question whether the Court should change its case law on this issue, it would seem of the greatest importance to understand initially what the underlying rationale for its narrow definition of that access has been. Happily, the authors' catalogue of explanations is exceedingly thoughtful and broad in perspective. Their comparative treatment of access to judicial review of American and West German administrative actions highly enriches their study. While I acknowledge my debt to Stein and Vining for their pioneering effort, I must also admit my firm belief that their catalogue of explanations needs both expansion and modification. I even venture to suggest that the additional explanation I shall propose may be the most crucial one to a complete assessment of why the Court has denied standing to private parties.

I contend that the Court's denial of direct access under article 173, paragraph 2, is part of a grandiose plan to modify the Community's judicial system, and that the Court's ultimate goal is to act as the supreme *appellate* Court of the Community. In this design, the subordinate courts would be the courts and tribunals of the nine Member States and the special courts of first instance which the Community might from time to time establish. I shall argue this hypothesis later. First I must establish some preliminary points of law and fact. Furthermore, Stein and Vining's presentation is so authoritative and thorough that I must, in my view, meet their arguments before asserting my own.

Unlike the United States Constitution, which makes no provision for judicial review, the Treaties which established the Western European Communities expressly authorize the Court of Justice to rule on the validity of the Community's legal acts. Article 173, paragraph 1, empowers the Member States and Community Institutions to file suit for annulment of such acts. Article 173, paragraph 2, governs the citizen's access to judicial review.

Another rather significant difference between the United States Constitution and the EEC Treaties is that the former granted only a limited original jurisdiction in the United States Supreme Court while empowering Congress to vest in it appellate jurisdiction. The latter, on the contrary, provide the Court of Justice with a broad range of original powers but expressly forbid it from hearing cases other than those the Treaties designate. The

most important areas of the original jurisdiction granted by the Treaty are: (1) cases challenging the legality of acts by Community Institutions (article 173); (2) cases alleging a failure to act by one or more of the Community Institutions (article 175); (3) damage claims against the Community for injuries caused by its administrative and legislative acts (article 178); (4) claims by employees of Community institutions against their employers (article 179);<sup>5</sup> and (5) actions brought by the Commission or a Member State against another Member State for a breach of a treaty obligation (articles 169-171).

It is probably generally agreed that the Framers of the Treaty envisioned these actions as the primary remedies available to redress unconstitutional activities. However, to assure that the law of the Treaty would be uniformly applied in all the Member States, the Framers, in article 177, rested jurisdiction in the Court of Justice to issue preliminary rulings. According to this article, the courts of Member States may submit to the Court so-called preliminary questions about the interpretation of the Treaty or the validity and the interpretation of the Community's legal acts. In an unbroken line of precedents, the Court has interpreted article 177 as encouraging cooperation between Community and Member State courts, but not, at least in principle, as allowing the Court to rule on the compatibility of national legislation with Community law. When presented a preliminary question, the Court of Justice is supposed to respond with an abstract interpretation of the relevant Community law. Even granting the Court's best intention not to trespass on the national courts' exclusive jurisdiction to find facts and to apply Community law to the case at hand, the Court has never, for practical reasons, been able to disregard totally the facts of a case. The Court has, however, enjoyed the advantage in such cases (compared to cases it hears as first instance) that the facts will usually have been properly established and thoroughly discussed before the preliminary questions are submitted.

Turning our attention now to Stein and Vining's article, I should begin by considering the extremely interesting finding which led them to delve anew into the old question of the limitations on private parties' standing to sue under article 173. Highlighting judicial decisions in the Federal Republic of Germany

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5. Approximately one-third of all the cases filed in the Court's register are "staff cases" brought by Community personnel.

and the United States, Stein and Vining establish that a citizen's ability to trigger judicial review is quite broad "in these more or less mature federations where the citizens are directly subject to federal and state law." Why then is the Court of Justice so reluctant to extend the same protection to the European citizen? That citizen is undeniably the subject of a common law which daily affects him in a variety of important economic activities. Even if the EEC is not a "mature federation," the Court has said that it is "a new legal order"<sup>6</sup> and not just "a new legal order of international law," as Stein and Vining contend (p.115).

A short explanation is required with respect to the authors' use of the term "administrative actions," for it is not at all clear what the term means in Community law. Stein and Vining refrain from defining the notion, which presumably should be distinguished from legislative action. Both the Council and the Commission are empowered to legislate and administer, but remarkably, no one has attempted to determine authoritatively by reference to origin, nature, or form precisely which acts are legislative and which are administrative. These conceptual difficulties might explain why in a couple of instances the authors are less stringent than would be expected in distinguishing the two kinds of action (pp. 117 & 120).

The authors repeatedly allude to the Community's origin in international law (p. 115), emphasizing in this way that the Community was created as a compact among sovereign states. Presumably these states, more or less instinctively, would have rejected the idea of giving private citizens standing before a non-national court to claim rights vis-à-vis the states. Such a state-oriented philosophy might have inspired the Court to interpret article 173, paragraph 2's standing requirements as narrowly as possible. The "compact-among-states" argument also suggests that the Court, given its modest background, should not dare to interpret citizens' access in broader terms than those undoubtedly warranted by the textual limitations of that article. This theory finds support in the Court's repeated statements that it is bound by the "clearly restrictive wording of Article 173 para 2,"<sup>7</sup> although on another occasion the Court declared that "the provision of the Treaty relevant to the right of action of the citizens should not be narrowly interpreted."<sup>8</sup>

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6. See, e.g., *Costa v. ENEL*, [1964] E.C.R. 1141, [1964] C.M. L.R. 425.

7. See *Sgarlata v. Commission*, [1965] E.C.R. 279, [1966] C.M. L.R. 315.

8. See *Plaumann & Co. v. Commission*, [1963] E.C.R. 197, [1964] C.M. L.R. 29, 46.

The authors, however, believe that the wording of article 173, paragraph 2, contemplated in isolation, is ambiguous enough to allow the Court considerable discretion to permit private standing to sue (p. 124). In this belief, they are no doubt right. Further, considering how often the Court has tainted its interpretations of the Treaty with interests other than those of the constituent states, Stein and Vining are correctly unpersuaded by the Court's textual argument. More precisely, the Court has often asserted its will in contravention of the will of the Framers, as more or less successfully expressed in the Treaty's different articles, and the Court has accordingly often been charged with usurping legislative power and with disregarding the rights of the Member States. Under these circumstances, one would certainly not be well advised to credit the Court's display of judicial modesty. Indeed, one might note that lawyers, scholars, and even the Court's own Advocates General have argued strongly for a broader definition of the citizen's access to judicial review of administrative and legislative action. Finally, whatever some of the Member States may have felt about their time as completely sovereign states under international law, the desirability of a strong Community judiciary must have been ardently advocated during the negotiations which ultimately led to the establishment of the European Coal and Steel Community (ECSC). The Framers must have had at least two important concerns: to accord legal protection to the individual who would be subject to the powers they were creating and to create a judiciary strong enough to overcome what they expected to be formidable opposition from various powerful interests to the enforcement of Community laws. The Framers could have adopted the American solution by creating a hierarchy in which the Court of Justice was the highest appellate court and heard appeals from both federal courts and all the courts of the Member States. A second solution would have been to let the courts of the Member States enforce the common law, permitting appeal to the Court of Justice on all matters involving Community law. A third, plainly somewhat less effective, solution is the present one. If the present Court probably cannot assert itself against opposing interests to meet all the Community's need for a strong judiciary, it is nonetheless remarkably more powerful than any traditional transnational court or tribunal. This is so, not least, because the ECSC Court—and its successors—have an express power of judicial review which, compared with that of traditional non-nation courts, must be termed extraordinary. Also, the standing requirements on which the ECSC Treaty

conditions the citizen's right to trigger judicial review are not unreasonably burdensome. Finally, the credibility of the "compact-among-states" argument suffers further by the fact that article 173, paragraph 2, specifically provides that any citizen "addressed" by an act of a Community institution may challenge the validity of that act. Since that argument neither alone nor in connection with the "textual" argument plausibly explains the Court's narrow construction of the almost self-evident meaning of article 173, paragraph 2's, standing requirement, the search for a convincing rationale must continue.

Stein and Vining assume that the Court's interest in maintaining the delicate balance between the power of Member States and of the Community accounts for its narrow construction of the standing requirement of a showing of "direct concern" (p. 120). They show that the Court's first French Advocate General, M. Gand, urged the Court to demonstrate "diplomatic courtesy" by not impairing state discretion and sovereignty. They properly ask, however, whether "the Court [can] seriously assert respect for States' rights and sovereignty when a plaintiff, claiming present harm, is offering to show that the contested Community act is unlawful and thus cannot serve as the legal basis for further state action?" (p.122). The answer clearly ought to be that it cannot. Besides, it is unclear to me how the Court's annulment of a Community Institution's act could seriously impair state sovereignty.

One might recall at this point that the Court has never earned high grades for diplomacy in its relations with Member States. In fact, the Court has conceded surprisingly little to Member States in developing Community constitutional law. Moreover, occasional decisions that have appeared to defer to national interests later turned out to concentrate further the power of judicial review in the hands of the Court. With that note, I believe, we can leave the "sovereignty" arguments.

Stein and Vining suggest that the Court may be reluctant to permit private parties access because it feels bound by a comparison of the relevant provisions of the ECSC and EEC treaties. The more restrictive language of the EEC Treaty may have led the Court to conclude that the Framers intended to restrict individual access, "presumably because of the much broader power to issue general regulations granted to the EEC institutions and the much wider range of persons affected by the EEC Treaty" (p. 117). In the words of the Court, the changed wording indicates the Framers' intent not to accord the same protection under the EEC

Treaty—and they clearly did not mean to accord more—even though they were increasing both the Community's power and the number of people affected. But it seems peculiar to me, to say the least, to provide less protection in response to greater political power. Equally peculiar is how, without stating it unambiguously, the Framers could have expected that intent to be followed by an independent judicial branch expressly vested with the right to exercise judicial review. If broad democratic controls had been simultaneously institutionalized at the Community level, this hypothesis might command some greater credibility, but no such attempt was ever made. Without such democratic controls—and perhaps even with them—the Court would unacceptably cooperate with the political branches of government by maintaining a Community governed not by law but by politicians. The Court would thereby manifestly disregard its article 164 duty to ensure “that in the interpretation and application of this Treaty the law be observed.” The “more power, less control” argument therefore cannot be accepted as a valid explanation.

Perhaps the Court's unwillingness to permit direct private actions questioning the validity of Community acts is due to some fear that, by overturning a decision forged in the Council of Ministers by political compromise, the Court might paralyze the Council's ability to make decisions. This is not a risk, the argument would contend, that the Court should run. But this argument is improbable. First, there is no evidence that the Court shows any specific hesitance to strike down fragile political compromises where their validity is questioned under the preliminary-question procedure of article 177. Why then should the Court hesitate more to invalidate such an act directly? Second, to the extent the Court does take into account the instability that might result from invalidating a political compromise, it properly ought to and in fact does so when deciding the substance of the case.

Moreover, the EEC Council's practice of deciding questions unanimously, one might argue, ought to lead the Court to interpret citizens' access in broader terms, since there is little chance that any of the Member States which have been deeply involved in the horsetrading would subsequently question the validity of their compromise in an article 173 action. Nor is there any particular reason to believe that the EEC Commission would use its power to trigger judicial review. Statistics clearly prove both these points.

These considerations amply support Stein and Vining's

rejection of the "political compromise" argument. To be sure, their rejection assumes that relatively insignificant Council actions, routine regulations, and other "only" administrative acts are often of little political import. The points I have made, however, are no less valid with respect to actions against genuinely legislative acts.

In their search for a rationale, Stein and Vining then suggest "that the inherent aversion of administrators everywhere . . . to judicial control" may explain the Court's reluctance to allow individuals standing (p.123). The authors might have added that the Council is not only an administrative agency, but the Community's foremost political organ. Since its decisional process presumably would be inhibited if decisions might later undergo judicial scrutiny on private initiative, the Council would disfavor a broad right to judicial review. The authors note that attorneys for the Council and the Commission "have been uncompromising and consistent in their opposition to plaintiff standing" (p.123). They add that even the United States Supreme Court would hesitate to decide a controversial case against both Congress and the Executive (p.123).

Addressing the latter argument first, I would retort that one ought to be especially cautious in arguing by analogy from the American experience in this particular respect. The European Court's express power of judicial review has no equivalent in the United States Constitution; the Supreme Court exercises judicial review only as a matter of constitutional practice, however well-established that practice might be.

If the attorneys for Community Institutions favor a very narrow interpretation of the standing requirements, commentators have almost unanimously taken the opposite view. The Court's Advocates General have likewise supported plaintiffs' claims that the Court should at least hear the substance of their cases. In any case, since no empirical evidence supports this "administrator's aversion" argument, its bearing on the Court's rationale is probably not strong.

One potential difficulty that confronted the Community in its formative years was that most of its subjects lacked loyalty to it or a sense of solidarity with its fate. Powerful companies and interest groups presumably would not have been expected to permit the Community to curtail their freedom; they would combat the new body with all available means. One means of opposition would be to seek judicial review frequently, even in frivolous cases.

It is far from evident that these fears lacked substance. In fact, experience under the ECSC's more liberal provision for individual access to judicial review justifies the fears that foes of the Community would abuse the liberal access to judicial review. Presumably such abuse was prompted by the belief that as long as the validity of Community acts was subject to litigation, it would be difficult, if not impossible, to enforce them. Such abuse could have proved catastrophic for the young Community, which needed all the legitimacy successful enforcement could provide it. The result would have been a vicious circle operating in favor of the Community's foes.<sup>9</sup> Thus, in the early 1960s, when the first annulment cases were filed against the Community, considerations of legitimacy may have influenced the Court to deny almost totally a citizen's right to standing.

What is the situation today? I feel that the Community has been sufficiently successful to generate a not insubstantial loyalty and solidarity. If my assessment is correct, the Court has considerably less need today to interpret the standing requirements narrowly. The Court has shown no signs, however, that it is reconsidering its interpretation.

If the standing requirements were interpreted more liberally, the Court would not, in my opinion, have to wait long for cases. Presumably, the Court's interpretation of those requirements has deterred a good deal of litigation. Parenthetically, therefore, I disagree with Stein and Vining when they suggest that the Community's regulatory power is too limited in scope to produce enough pressure on the Court to redefine its standing requirements (p.125).

Precedent, unbroken for more than fifteen years, indicates that the Court is unwilling to ease the citizen's access to judicial review, no matter how many litigants knock on the Court's door. This is presumably so because the Court evidently has a long-term interest in reshaping the judiciary of the Community to allow itself to act as the high appellate court of Community law, with the courts and tribunals of Member States and any administrative and other courts which the Community might create acting as courts of first instance. This interest weighs against the citizen's interest in a direct access to the Court. Considerable

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9. The authors point out on page 116 that "in the Communities the institutions are brittle and as yet have little grass roots participation" whereas "[i]n the United States there is little question about the basic legitimacy of the governmental institutions . . . ." The authors, however, do not relate this observation to their search for a rationale for the Court's negative attitude toward standing for private individuals.

empirical evidence supports this hypothesis.

First, the Court not only restricts the citizen's access to judicial review of legislative and administrative acts; it also restricts the right of private individuals under article 175, paragraph 3, to seek an injunction against an institution which disregards an obligation to act under Community law. Several individuals have sought such injunctions, but the Court has dismissed all of the suits, primarily on the ground that the parties did not satisfy the article's standing requirement. The importance of the Court's denials of access to private parties lies in the virtual absence of litigation between the Member States and Community Institutions under articles 173 and 175: The Court has reduced to an absolute minimum the number of cases brought under these articles, thereby reducing the frequency with which, pursuant to the Treaty, it must act as a court of first instance.

Second, for many years, the Court was equally unsympathetic to damage suits brought under article 178, in most instances on the grounds that they attempted to circumvent article 173's narrow standing requirements.<sup>10</sup> In the early 1970s the Court ostensibly shifted its position, more liberally interpreting the provisions that allow private persons to sue the Community for damages.<sup>11</sup> Despite this apparent shift, the Court has, for two reasons, clearly disappointed the expectations of private plaintiffs. First, the Court defined the conditions for Community liability so narrowly that no private party has yet been awarded damages.<sup>12</sup> Second, the Court has found alternative means to inhibit private suits. For example, in suits alleging that a government agency has denied the plaintiff a benefit on the basis of an illegal Community law, the Court has held that since the allegedly injurious decision was made by a national agency, the plaintiff must first sue the national government in its own courts. Once again the Court's desire to have another court act in the first instance as judge of both law and fact is clearly discernible.

The denial of a remedy under article 173 is thus paralleled by the unavailability of remedies under articles 175 and 178. This

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10. van Gerven, *The Legal Protection of Private Parties*, in *EUROPEAN LAW AND THE INDIVIDUAL* 1, 9 (F. Jacobs ed. 1976).

11. *Id.* at 11.

12. See, e.g., *Firma Bayerische HNL Vermehrungsbetriebe GmbH v. The Council and the Commission*, No. 83, 94/76 & 4, 15, 40/77 [1978] E.C.R. 1209 (May 25, 1978), where the Court rejected a damage claim for losses suffered by the plaintiff as a result of enforcement of a regulation which the Court earlier had annulled on equal protection grounds.

parallelism strongly supports, in my opinion, the validity of the hypothesis that these denials are but elements of the Court's overall plan to establish itself as a sort of high appellate court on matters of Community law.

A memorandum prepared by the Court in 1978 also supports my hypothesis. The memorandum was intended to convince the Council of Ministers of the need for basic changes in the Court's powers, organization, and procedures. The Court stated:

At the present time the Court is one of the first and last instance in all cases. For staff cases steps are already being taken to set up an administrative tribunal of first instance against whose decisions an appeal will lie to the Court only on a point of law. . . .

The Court accepts that it should retain its present jurisdiction in cases such as against Member States for failure to fulfill Treaty obligations, actions for annulment brought by Member States or Community Institutions and—in any event—references for preliminary rulings. On the other hand it may be thought that certain other categories of cases—such as cases brought by private persons in competition matters [articles 85 and 86 of the EEC Treaty] or for damages [articles 178 and 215 of the Treaty] might in future be the subject of an arrangement similar to that at present envisaged for staff cases.

It is clear, I believe, that the Court should remain the sole judge of cases brought against Member States for Treaty infractions. What the Court seeks in its memorandum, therefore, is to be released from its remaining duties as a court of first instance. It would like to avoid its present duty to act as such a court in cases where a Community Institution specifically addresses its decision to the plaintiff (article 173); the Commission's decisions in antitrust cases under articles 85 and 86 are the only really important cases in this category. The Court would also prefer that a lower court first hear and decide claims for damages. The Court's proposal to have "staff cases" removed from its docket has already been implemented, although the administrative tribunal established for that purpose is not yet functioning.

By implication, the memorandum suggests the Court is willing to act as a court of first instance in the other areas enumerated in the Treaty but not discussed in the memorandum. It is reasonable to assume that this willingness is intimately connected with its belief that in these remaining areas it has succeeded in limiting the number of such cases to the necessary minimum.

In sum, injured private parties have no choice but to file suit

before their own national courts. In turn, the national courts should, in the opinion of the Court of Justice, seek preliminary rulings under article 177 where the Court's interpretation of relevant Community law is desirable or required by law. The national courts should also refer to the Court for decision all questions about the validity of Community acts.

In theory, then, the national courts will try most cases on their merits, and the Court of Justice will be the ultimate arbiter on questions of law. It is no secret, however, that when making preliminary rulings the Court often transgresses this abstract borderline between the two jurisdictions. Often the Court sufficiently weaves together its analysis of questions of law and its consideration of facts that the national judge has little flexibility in making his final decision.<sup>13</sup>

The Court's memorandum mirrors this view when it suggests that the proposed reforms would have the advantages

not only of bringing the Community judicial system more into line with those of the Member States but also—and above all—of making the Court to a large extent the judge of questions of law rather than of fact so concentrating its activities on *what is its true and main role* within the framework of the Community. The function of the Court would thus be limited in this field to hearing appeals on questions of law brought before it against decisions of the new court of first instance.<sup>14</sup>

One important reason for the Court's desire to limit its role to deciding questions of law is its multilingual nature. For instance, the Danish government insists on using Danish whenever it appears before the Court as a party or intervenor. Imagine the difficulties if a witness does not understand the language of the examining attorney. Even more difficult are cases requiring simultaneous translation; in some situations, the spoken language cannot be translated directly into the desired languages because, for technical reasons, it must first be interpreted into certain intermediate languages.

Even disregarding the linguistic hurdles that confront the

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13. It may be more than mere coincidence that in very recent decisions the Court refrains from discussing article 177's underlying assumption of cooperation between the Court and the courts of Member States. See, e.g., Pigs Marketing Board, No. 83/78 (Ct. of Justice for European Communities, Nov. 11, 1978). Professor Gerhard Casper has said "that the Court . . . had demonstrated the ease with which article 177 could be turned into a vehicle for appellate review." 1978 Proc. AM. Socy. INTL. L. 171.

14. (Emphasis added). The Ministers actually disapproved the Court's proposals. Declaration of Oct. 9, 1978.

Court, fact-finding, as everyone knows, can be extremely time-consuming. Statistics show that the cases which the Court hears as a court of first instance consume considerably more time than cases involving preliminary rulings. On the average, the Court takes seven months to hand down a preliminary ruling, while it normally takes from twelve to eighteen months to decide a direct action. A major reason for this difference is that in suits seeking preliminary rulings, the national judge has already established the facts of the case. In view of the Court's growing workload, the need for reforms which would release the Court from the cumbersome task of fact-finding has become increasingly compelling.<sup>15</sup>

Finally, the Court may have wanted to strengthen the power of the Community's judicial branch to enforce more efficiently the Community's laws in the Member States. The best approach, the Court might well believe, would be for the courts of the Member States to assume the initial enforcement responsibility, with the Court of Justice available for appeals. To encourage this development, the Court has joined its denials of direct access to itself with liberal grants of access for individuals to national courts—an access perhaps well beyond the anticipations of the Treaty's Framers and beyond what the courts of the Member States will always be willing to live up to.<sup>16</sup>

That the Court is consciously trying to "federalize" the courts of Member States has not been proved above, and probably cannot be proved at all. The Court probably refers to a need for a cohesive hierarchy of Community courts which incorporates those of the Member States when it talks about "bringing the Community judicial system more into line with those of the Member States."<sup>17</sup>

The Court thus apparently hopes to reserve for itself the role of a supreme court of law to which appeals in the form of preliminary rulings under article 177 may be taken from rulings of lower

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15. The Court heard 19 cases in 1957, 110 in 1974, 164 in 1977, and 156 during the first six months of 1978. The number of decisions was 78 in 1975, 88 in 1976, 100 in 1977, and 60 during the first six months of 1978.

16. From the very outset, according to Stein and Vining, the Court has defined access to national courts for the purpose of enforcing individual rights derived from Community law in a most liberal way, one far beyond what may have been the intent of the authors of the Treaty. They correctly see this as particularly appropriate to the "symbiotic Community system" (p. 124). The Court, however, occasionally has met with vehement resistance from some of the highest courts of the Member States; *see, e.g.*, the decision in the Cohn-Bendit case by the French Conseil d'Etat, Section du Contentieux, of Dec. 22, 1978 (refusal to enforce a provision of an EEC directive contrary to French law).

17. *See* text at note 15 *supra*.

Community courts and of the courts of the Member States. Thus far, the Court has answered all preliminary submissions from domestic courts. In response to its growing caseload, however, the Court might in the future be compelled to develop a practice of dismissals of some requests for preliminary rulings on the ground that no question has been raised under article 177, much as the United States Supreme Court exercises its discretionary power.

#### CONCLUSION

Paradoxically, the courts of the Member States have become the principal guardians of Community law. They have become so much so that they are no longer free to follow their traditional procedures for determining the applicability of national laws when plaintiffs claim that those laws are inconsistent with the Member State's Community obligations.<sup>18</sup> It is even fair to conclude that without the legal protection which the national courts afford the citizen who seeks judicial review of Community legislation or administrative acts and the citizen who sues for damages, Community law would be *lettre morte*. Whatever strong interests the Court may have had in promoting this development, citizens ought at least to have direct access to the Court in those meritorious cases where no national remedy is available, whether because of a lack of standing or simply because no remedy exists.<sup>19</sup>

The Court could well be shaping a European system of appellate jurisdiction. While this may be a wise judicial policy, it undeniably and substantially departs from the structure envisaged by the Framers of the European Communities.

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18. It did so in *Amministrazione Delle Finanze v. Simmenthal*, [1978] E.C.R. 629.

19. That the Court is acutely aware of this problem may be seen, in particular, in its case law under article 178. This is the main reason why the Court apparently still hesitates before it definitely settles the terms of its practice of dismissals.